

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 2ND NOVEMBER 2012

Petition No.585 (C) of 2012

(M.A. No. 598 of 2012)

M/s. Digi Cable Network Pvt. Ltd. ... Petitioner

Vs.

ESPN Software India Pvt. Ltd. ... Applicant/ Respondent

Petition No.621 (C) of 2012

(M.A. No. 599 of 2012)

M/s. Digi Cable Network Pvt. Ltd. ... Petitioner

Vs.

ESPN Software India Pvt. Ltd. ... Applicant/Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

For Petitioners : Mr. Krishndu Datta, Advocate
Mr. Diggaj Pathak, Advocate

For Respondent : Mr. N. Ganpathy, Advocate
Mr. Kartik Yadav, Advocate

ORDER

These two applications have been filed by the Respondent herein praying for initiation of a proceeding against the Petitioner in terms of Section 19 of the TRAI Act.

We may notice the prayer made by the Applicant/Respondent from one of these applications :-

- “(a) that the Petitioner should be directed to pay the subscription fees for the months of July and August 2012 amounting to Rs.36,44,243/- alongwith interest rate @ 9% per annum amounting to Rs.88,102/- as per calculations set out in Annexure R-3 without any delay;*

- (b) Permit the Applicant/Respondent to forthwith deactivate its signals to the Petitioner without recourse to requirement under TRAI’s regulations bearing No. 4.2 and 4.3 if the Petitioner fails to comply with the orders of this Hon’ble Tribunal dated 27 August 2012 and September 18, 2012 and make payment of the subscription fee for three months of July 2012 and August 2012 with interest at 9% per annum immediately and without prejudice to its entitlement to such payments.”*

- (c) Pass such other or further order or orders as this Hon’ble Tribunal may deem fit and appropriate in the circumstances of the case.”*

2. The basic fact of the matter is not in dispute.

The Petitioner has filed Petition No. 585 (C) of 2012 in respect of an interconnection agreement entered into by and between the parties hereto for the New Delhi region; wherein an interim order was passed on 22.08.2012, which is to the following effect :-

“However, without prejudice to the rights and contentions of the parties the Respondent may restore the supply of signals to the Delhi Networks of the Petitioner subject to its payment of Rs.16 crores plus taxes. Such restoration of supply of signal must be made within 48 hours from the time of payment.

It is made clear that so far as the networks of the Petitioner at Delhi is concerned, it shall go on making payments of subscription fees for the month of July 2012 onwards.”

Admittedly, the Petitioner complied with the said direction, although belatedly.

3. After the said interim order was passed, the Petitioner filed Petition No. 621 (C) of 2012 in respect of the circles other than Delhi.

By an order dated 18.9.2012 passed in Petition No. 585 (C) of 2012, it was directed as under :-

“23. We have noticed heretofore the contentions of the Respondent with regard to the estimated number of viewers i.e. 5.5 lakhs in Delhi. Stricto sensu the Petitioner is a defaulter.

26. The agreement between the parties expired only in June, 2012.

In terms of Clause 8.1 of the Regulations, the terms of the agreement continues for a period of three months subject of course to the fact that the negotiations between the parties had started two months prior to the expiry of the agreement.

The commercial terms in that view of the matter shall continue upto September, 2012.

29. However, it must be noticed that the same may represent the state of law in other fields, but in the matter of the broadcasting and cable industry, an additional fact is required to be taken into consideration that if an order of injunction and some times in mandatory form is not granted, subject of course upon protecting the interest of the broadcaster, the Multi Service Operator would lose it entire business as no viewer would continue to subscribe to the MSO who might not be telecasting an important channel.

32. It was more or less concerned with realization of its own dues which was the subject matter of the aforementioned Petition No.225 of 2012.

33. Furthermore, a broadcaster would always be ready and agreeable to enter into a subscription agreement with a Multi Service Operator which has a large viewership.

In that sense not only the conduct of the Petitioner, but also that of the Respondent assumes significance.”

4. Immediately after the said order was passed on 12.09.2012, the learned counsel mentioned that the parties have entered into a settlement in the meantime; whereupon the following order was passed on the said date later :-

“After orders were pronounced in these matters by one of us, learned counsel for the parties stated that the parties have entered into a settlement.

In that view of the matter, the interim order passed by one of us shall be governed by the terms of settlement.

It is stated that the terms of settlement shall be filed within a week.

In view of the aforementioned order passed, let Petition No.225(C) of 2012 be also listed along with these Petitions on the next date.”

5. In the connected matter namely, Petition No. 621 (C) of 2012 by an order of the same date it was directed :-

“26. After having taken into consideration all aspects of the matter, I am of the opinion that on compliance of the directions as aforementioned by the Petitioner viz deposit of the balance amount of Rs.2.79 crores as also deposit of the subscription fee for the month of July, 2012, the supply of signals should be restored within 48 hours.”

6. Inter-alia on the premise that the Petitioner despite the said order did not pay the subscription fee in respect of the town of Delhi and also did not pay the aforementioned amount of Rs.2.79 crores as well as the subscription fee for the

month of July 2012 as was directed by this Tribunal in these applications have been filed.

7. Mr. Ganpathy, learned counsel appearing on behalf of the Applicant/ Respondent would contend that the Respondent is not claiming any relief in terms of the Memorandum of Understanding dated 12.9.2012 and confine it's prayer only to payer (a) of each of these applications.

8. It is necessary to notice some of the terms of the aforementioned Memorandum of Understanding dated 12.9.2012 :-

“Both the parties have agreed to enter into an arrangement by way of this MoU for distribution of the Services on Digicable’s analog cable and digital addressable cable television platforms solely in the territories as per Annexure-1 to this MoU.

NOW THIS MoU WITNESSETH AS FOLLOWS :-

- 1. This MoU is for the period of 1 (one) year commencing from September 12, 2012 till August 31, 2013 (“Term”) and solely for distribution of the Services on a non-exclusive basis and on the analog cable and digital addressable cable television platforms owned and operated by Digicable in the centres listed in the Annexure-1 and solely in the territories detailed therein.*

2. *The total consolidated subscription fees (including all taxes which shall be to Digicable's account) agreed for distribution of the Services on the analog cable and digital addressable cable television platforms of all the Digicable centres listed in the Annexure-1 to this MoU for the term specified above will be Rs.250,000,000/- (Rupees Twenty Five Crores only). Withholding tax shall be deducted by Digicable at source at applicable rate and Digicable shall provide the necessary certificates to ESI. Service tax, at applicable rates, shall be paid by Digicable.*
3. *Digicable will be under obligation for payment of subscription fees on monthly basis in arrears, payable on or before the 30th day of the relevant month for which the fee is payable. For example, subscription fee for month of September 2012 shall be payable before 30 September 2012. Late payments shall be subject to interest at the rate of 18% per annum without prejudice to any other rights of ESI.*
4. *It is agreed between the parties that the scope of this MoU is restricted to distribution of services on analog cable and digital addressable cable television platforms only and for any other platform like HITS, DTH, IPTV, OTT, etc., a separate agreement for subscription fee etc.*
5. *It is agreed that ESI shall not make further claims for pending dues payable by Digicable to ESI under the memorandum of understanding dated 29 April 2010. Calculation of subscription fees for Delhi for the period from 1 July 2012 until 1 September 2012 will be payable upon execution of this MoU as per Annexure-1. However, end date for the Services in Delhi will be same as of the end date of this MoU, i.e. 31 August 2013.*

7. Notwithstanding anything contained hereinafter, any new centre (s) will be in addition to the current deal and subscription fees payable for such centres will be decided on mutually agreed terms.”

9. Whereas the contention of Mr. Ganpathy is that by reason of the said Memorandum of Understanding, the Respondent has not given up its right to claim the arrears directed to be paid by this Tribunal in the aforementioned orders dated 27.8.2012 and 18.9.2012; the Petitioner contends that on a plain reading of clause 5 of the said Memorandum of Understanding it is evident that the subsequent events have also been taken into consideration and in terms of Clause 5 of the said MoU, the Petitioner is not required to pay the subscription fee for the month of July 2012 nor it is required to pay the aforementioned sum of Rs.2.93 crores.

10. Although at the hearing, as noticed heretobefore, the Respondent confined its claim to prayer (a) of the M.A. only, there cannot be any doubt or dispute that it took into consideration the subsequent events also, which would be evident from the prayers made in the said applications.

11. It is doubtful as to whether in a case of this nature where interim orders have been passed followed by a Memorandum of Understanding arrived at by and between the parties hereto, any application under Section 19 of the TRAI Act would be maintainable.

12. The learned counsel for the parties have addressed this Tribunal at great length with regard to the interpretation of the aforementioned clauses of the said MoU dated 12.9.2012.

13. In a case of this nature, this Tribunal is of the opinion that for enforcement of the interim orders which have been followed by Memorandum of Understanding between the parties, the Execution Application cannot be entertained at this stage.

The contention of Mr. Ganpathy is that the said Memorandum of Understanding is prospective in nature for the period September 2012 till August 31, 2013.

Clauses 5 of the said Memorandum of Understanding is required to be interpreted, but prima facie appears to have covered the arrears payable under the earlier MoU.

14. If the contention of Mr. Datta is accepted with regard to interpretation of the said clause namely, ESI was prohibited from making any further claim for pending dues under the Memorandum of Understanding dated 29.4.2010, relying on or on the basis whereof the Petitioner has been directed to pay an amount of Rs.16 crores plus taxes, the Respondent must be held to have given up its claim for the said period; particularly in view of the fact that on 18.9.2012 the counsel for the parties contended that in the meanwhile the said MoU has been executed, whereupon this Tribunal issued a direction that the said order dated 18.9.2012 shall be subject to MoU dated 12.9.2012.

15. In the facts and circumstances of this case, I am of the opinion that prayers of the applications cannot be granted as prayed for in the Miscellaneous Application filed by it at this stage.

These Miscellaneous Applications are, therefore, dismissed with no order as to costs.

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(S. B. Sinha)
Chairperson

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