

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : October 23, 2012

Petition No.309(C) of 2011

M/s Ortel Communications Ltd. ...Petitioner

Vs.

Zee Turner Ltd. ...Respondent

And

Petition No.190(C) of 2012

M/s Ortel Communications Ltd. ...Petitioner

Vs.

Media Pro Enterprise India Pvt. Ltd. ...Respondent

BEFORE:

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

: Mr. Sameer Sagar Vasishta & Mr.
Devender Thakur, Advocates

For Petitioner

For Respondent : Mr. Upender Thakur, Advocate for Mrs.
Pratibha M. Singh, Advocate

JUDGMENT

1. These two petitions involving common questions of law and fact were heard together and are being disposed of by this common judgment.

The Petitioner is a Multi Service Operator in the town of Vishakapatnam.

It caters to the need of residents of the Eastern Command Naval Colony.

2. It entered into two agreements one for retransmission of signals in respect of Zee Bouquet of channels and the other for Star Bouquet of channels.

3. The agreement in respect of Zee Bouquet of channel was for the period 13.4.2010 to 31.3.2011; whereas for the Star Bouquet of channels it was for the calendar year 2011.

4. The monthly subscription amount payable for the Zee Bouquet of channels was Rs.1,09,953/- and Rs.1,40,023/- for Star Bouquet of Channels.

5. The Respondent herein, a broadcaster within the meaning of provisions of Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 (The Regulations), served a notice purported to be under Clause 4.1 thereof on or about 6.6.2011, inter alia, on the premise that the Petitioner has failed and/or neglected to pay a sum of Rs.6,98,535/- so far as the Star Bouquet of channel is concerned and thus, it fell in arrears of a sum of Rs.1,40,023.76.

6. Public notices were also issued in respect of both the channels on or about 8.6.2011.

7. There exists a dispute as to whether the Petitioner has paid the entire dues in respect of both the channels.

8. The Petitioner made a request for renewal of the agreement on or about 15.1.2011, where to allegedly no response was made by the Respondent herein. On or about 7.3.2011 the Petitioner again made a request stating that it has about 3,500 subscribers. By reason of the said notice the Petitioner asked for downgradation and/or continuing the agreement on the same terms and conditions. Yet again no response thereto is said to have been made by the Respondent.

9. The Petitioner made a further request for down gradation by a notice dated 20.5.2011. The Respondent does not appear to have made any counter offer. So far as the Star Bouquet of Channel is concerned the Petitioner made a request on or about 21.11.2011 claiming 25% of down gradation. It is, however, not in doubt or dispute that the parties hereto had undertaken a joint survey wherein the Member of subscribers of the Petitioner is found to be 5039. The Petitioner, however, contends that out of the said subscribers about 200 of them have been obtaining the services of only for internet connection from the Petitioner.

10. The Respondent in its Reply, inter alia, would contend that the Petitioner was a defaulter and in that view of the matter the

Respondent had the right to issue the notices under Clause 4.1 and 4.3 of the Regulations.

11. The Respondent furthermore denied or disputed that the subscriber base of the Petitioner had decreased.

12. In its rejoinder, the Petitioner, however, taken the following stand:

"1. It is submitted to this Hon'ble Tribunal that the Petitioner verily believes that the Respondent has entered into agreements with MediaVision (Venkata Sai Media) and Sridevi Master Media who are two other competing MSOs operating in the neighbourhood and in larger part of Vizag City and each of them cater to a subscriber base of approximately one lakh. Furthermore, the Respondent is charging Rs. 11,03,081/- from MediaVision for both Star and Zee bouquets and Rs.4,54,374 from Sridevi for Star bouquet, which both these operators are catering more than 1 lakh subscribers. Copies of invoices raised by the Respondent which, the Petitioner has got from the market and statistical data showing the total number of cable homes in Vishakhapatnam as available on ETV Telegu website are annexed and appended as Annexure P-1 and Annexure P- 2, respectively. It is pertinent to mention herein that as per the latest census data the total number of households in Vishakhapatnam district is 887,003 out of which Vishakhapatnam (urban) is 224,042 and Vishakhapatnam (rural) has 16,089 households, respectively. It is believed that both the above mentioned competing MSO's are operating in entire Vizag city. A copy of the latest census data is annexed as **Annexure P-3**. On the other hand, the Petitioner who **is** operating in very small area of Eastern Naval Command having a subscriber base of only 4800 is being asked to pay at the rate of Rs.1,90,000/- to Zee and Rs.1,40,000/- to Star which is wholly discriminatory, biased and clear

violation of TRAI Regulation.”

13. The issues between the parties were framed by this Tribunal by an order dated 17.2.2012, the core issue being the subscriber base of the Petitioner.

The Petitioner in support of its case has examined one Shri Chandrakant Puhan who was working as the Senior Executive, Accounts in the Petitioner company.

14. It is accepted that all the subscribers of the Petitioner are directly connected. The said witness in paragraph 12 of his deposition reiterated the contention raised in paragraph 2 of the rejoinder filed by the Petitioner.

15. The Respondent in support of its case has examined Shri Venkat Saradhi an officer of the rank of DGM.

It is not in dispute that in the earlier agreement the subscriber base was shown as 1800 and the Petitioner had an invoice of 3700 subscriber whereas the Petitioner had about 4000 subscribers.

16. Mr. Vashist, learned counsel appearing on behalf of the Petitioner would contend that keeping in view the facts and circumstances of the case and in particular the subsequent events which had been pleaded by it the Petitioner cannot be asked to enter into an agreement having a subscriber base of 4800 or 5039 as the case may be.

17. It was pointed out that the Petitioner had filed an application under Order XI Rule 14 of the Code of Civil Procedure and by an order dated 10.4.2012 the Respondent had been asked to produce the documents in question namely the agreements entered into with the other MSOs operating in the town of Vizag.

18. The Petitioner called upon the Respondent to disclose the informations sought for therein. As the said informations were not disclosed, the Petitioner filed an application on or about 4.9.2012 which was marked as MA No.532 of 2012.

19. By an order dated 6.9.2012 it was directed :

“The matter is already on the day’s board for hearing. At this stage, prima facie an application under Order XI Rule 14 of the Code of Civil Procedure should not be entertained.

However, in the event, after hearing the parties this Tribunal feels that in the interest of justice such a direction is necessary to be issued, the same shall be considered at that stage.

However, the Respondents are requested to keep the said documents ready at the time of hearing, if they are in their power and possession.”

20. Mr. Devender Thakur, the learned counsel appearing on behalf of the Respondent urged that the Petitioner has failed and/or neglected to pay even the subscription fee as was directed by this Tribunal.

Before advertng to the rival contentions of the parties it may be noticed that the Respondent had filed a Miscellaneous Application on or about 29.3.2012 which was marked as MA No.141 of 2012.

21. By an order dated 10.4.2012 the Petitioner was directed to pay a sum of Rs.17,41,263/- whereupon only the Petitioner made the requisite payments.

22. The Petitioner had filed another Miscellaneous Application on or about 3.9.2012 which was marked as MA No.522 of 2012 wherein also a prayer was made for vacating the interim order dated 29.6.2011.

23. With that application a statement of account showing an outstanding of Rs.32,67,121/- along with interest was annexed.

24. By an order dated 7.9.2012 the said Miscellaneous Application was directed to be heard along with the main matter.

25. Similar application has been filed in the case of Star Bouquet of channels also wherein a sum of Rs.32,67,121/- was said to be due.

26. Mr. Thakur would contend that in the meanwhile the monthly subscription fee for the months of September and October have also become due at the rate of Rs.1,09,953/- per month for Zee Bouquet of channel and Rs.1,40,023/- per month for the Star Bouquet of channels.

27. The learned counsel for the parties have taken me through the affidavits of evidence as well as their cross examination.

28. So far as the contention of the Petitioner that the Respondent should be asked to produce the agreement with other MSOs for retransmission of its signals in the town of Vizag is concerned, Mr.

Thakur would contend that the said operators vis a vis the Petitioner stand completely on different footings in view of the fact that whereas the Petitioner caters to the needs of the direct subscribers in a colony of Eastern Naval Command; the other MSOs have been supplying signals to the LCOs, and thus, whereas the number of subscribers of the Petitioner are known and keeping in view their rank and status it is not difficult for it to realize the amount of subscription fee, the other MSOs have to deal with LCOs and thus have to enter into agreement on an agreed subscriber base.

29. PW-1 in his cross examination in Petition No.309 of 2011 stated as under:

"Cross-Examination of Mr. Chandrakant Puhan by Mr. Teiveer Singh Bhatia, Advocate For Respondent

Q.1: Is it correct that you are working as Senior Executive, Accounts in the petitioner company?

A: Yes.

Q.2: Is it also correct that your office in Delhi is at B-7/122A, Safdarjung Enclave, New Delhi-29?

A: Yes.

Q.3: Is it correct that you are posted at Delhi office?

A: Yes.

(Attention of the witness is drawn to para 4 of his affidavit.)

Q.4: What do you mean by "projected subscriber base"?

A: At the time of signing the agreement with the party, the projected subscriber base to be achieved.

Q.5: Will I be correct in saying that the projected subscriber base does not have anything to do with the actual subscriber base because the projected subscriber base is only based on your projections?

A: Yes.

(Attention of the witness is drawn at Ex. Pw-1/2 at page 13 of the affidavit.) Q.6: Is the word "parity" mentioned in this letter dated 15.1.2011?

(The witness requested to explain the meaning of word "parity".

Ld. Counsel for the respondent draws attention of the witness to para 5 of his affidavit where the word "parity" has been mentioned by the witness himself.)

A: It is not mentioned.

Q.7: Who has made this affidavit for you?

A: The affidavit has been drafted by my advocate with my consultation.

(Attention of the witness is drawn to letters dated 7.3.2011, 1.4.2011, 20.5.2011 at pages 14, 15 and 16 respectively of the Evidence Folder.)

Q.8: Does any of the letters talk about "parity"?

A: Yes. Witness asks Ld. Counsel for the respondent as to whether parity means down gradation. Again says No.

(Attention of the witness is drawn to letter dated 20.5.2011 at page 16 of the Evidence Folder.)

Q.9: Is it correct that for execution of the fresh agreement, petitioner has asked Zee Turner to conduct a survey for verification of the subscriber base?

A: Yes

Q.10: I put it to you that the subscriber base of the Ortel in the joint survey has come out to 5,039 subscribers?

A; Out of 5,039 subscribers, 200 subscribers are only broadband connections and remaining 4,839 connections are cable connections.

Q.11: When did Ortel start its business in Vizag?

A: I do not remember the actual date and year.

Q.12: Is it correct to say that from May 2011 till December 2011, your subscriber base has grown from 3,500 to 5,039?

A: Yes.

Q.13: Have you filed any document on the record to show your so called projected subscriber base in the area of Vizag?

A: No.

Q.14: Is it correct that there is an agreement between Eastern Naval ' Command and Ortel whereby Ortel exclusively provides Cable TV services in Eastern Naval Command Township?

A: I am not aware. Only Vizag office can tell about the same.

Q.16: Have you placed any document on record showing any survey conducted by you for Vishakhapatnam City?

A: No.

Q.17: On what basis have you made the statement in para 12 of your affidavit regarding subscriber base of Media Vision and Sri Devi Master Media?

A: From our office record provided by Vizag office.

Q.18: Have you placed your office record before the Hon'ble Tribunal?

A: No.

Q.19: I put it to you that Eastern Naval Command Township is not part of Vishakhapatnam City. Is it correct?

A: I deny.

Q.20: I put it to you that Ex. PW-1/10 and Ex. Pw-1/11 are forged and fabricated documents?

A: I deny.

Q. 21: I put it to you that the statements made by you in para 13 regarding NRS survey, electricity connections and number of households in Vishakhapatnam City are misconceived and incorrect?

A; I deny.

Q.22: Are you aware of the subscription fee that is collected by Ortel in the area of Vizag from its subscribers?

A: I am aware on the basis of office record.

30. He had no personal knowledge with regard to the activities of the Petitioner in the said town.

I may notice the relevant part of cross-examination of PW-1 in Petition No.190(C) of 2012 which is to the following effect:

"Cross-Examination of Mr. Chandrakanta Puhan by Mr. Tejveer Singh Bhatia. Advocate For Respondent

Q.1: Is it correct that the petitioner has only primary points (direct points) and is not supplying signals of TV channels to any LCO?

A: It is correct.

(Witness is confronted with Page 27 of the Paper Book.)

Q.2: Is this the letter that has been written by the petitioner for renewal of the subscription agreement?

A: Yes.

Q.3: Is it correct that you have merely sought for 25% degrowth of subscription agreement for Vizag without giving any reason for the said degrowth in your letter dated 21.11.2011?

A: It is incorrect.

Q.4: Can you please specify what are the reasons in your letter dated 21.11.2011 for 25% degrowth of subscriber base?

A: Current subscriber base is low.

.....

Q.8: I put it to you that till filing of the present petition, you had never raised issue of parity with the respondent?

A: It is incorrect.

Q.9: What do you understand by the word "parity"?

A: Parity means similar facilities given to other MSOs.

.....

Q.19: What do you understand by the term "SLR"?

A: Subscriber Line Report.

Q.20: What would be according to you are the contents of a SLR?

A: It would contain particulars of area and number of subscribers in those areas.

Q.21: I put it to you that in terms of the Regulations, the petitioner has to supply list of its subscribers along with name and addresses of the subscribers as SLR since the petitioner only has direct points?

A: It is correct.

.....

Q.25: I put it to you that as on date, you have defaulted in making monthly subscription fees to the respondent and the outstanding due is to the tune of Rs.32 Lacs approx.?

A: I will have to confirm after verifying the records."

RW-1 in his cross examination in Petition No.309(C) of 2011 stated as under:

"Q. Which other MSO operate in Vizag?

A. There are two major MSOs other than the Petitioner.

Q.Are these two MSO s also taking signals from Media Pro?

A. Yes.

Q. What price you are giving the Zee Bouquet and Star bouquet of channels to these two MSOs?

A. I cannot disclose it.

Q. How many subscriber base these two MSOs have in respect of Zee and Star bouquet of channels?

A. It is not relevant in as much as petitioner is concerned.

Attention of the witness is drawn to page no.39 (para 2 of his evidence affidavit) of evidence folder.

31. As indicated heretobefore the oral evidence with regard to the subscriber base which is the core issue between the parties is not much in dispute.

32. It is admitted that the Petitioner's subscriber base is about 4800. It is a big Multi Service Operator. As indicated heretobefore in the earlier agreement the subscriber base was negotiated to 1800 out of an universe of 3700.

33. For the purpose of renewal of the agreement the provisions of Clause 8.1 of the Regulations vis a vis Regulations 11 and 12 must be complied with. I may notice the provisions of Regulations 11 and 12:

"11. Finalising Subscriber Base at the time of Renewal of agreement

Between Multi System Operator and Cable Operator

11.1 In non-addressable systems, negotiations on revision of subscriber base at the time of renewal of interconnection agreement between a multi system operator and a cable operator shall take into account the changes in subscriber base of the cable operator over the past three years, as well as the changes in subscriber base of other cable operators operating in the area in which the cable operator is operating and its adjoining areas for the current period.

Between Multi System Operator and Broadcaster

11.2 In non-addressable systems, negotiations on revision of subscriber base at the time of renewal of interconnection agreement between a multi system operator and a broadcaster shall take into account the changes in subscriber base of the multi system operator over the past three years, as well as the changes in subscriber base of other multi system operators operating in the area in which the multi system operator is operating and its adjoining areas for the current period.

12. Monthly Subscriber Base Statement

12.1 In non-addressable systems, the multi system operators shall furnish the updated list of cable operators along with their subscriber base to the broadcasters on a monthly basis.”

The said Regulation must be given effect to by both the parties.

34. Mr. Vashist relied upon a decision of this Tribunal in *Star India Private Limited vs. M/s Asianet Satellite Communications Private Limited* Petition No.39(C) of 2004 disposed of 30.3.2007 and *M/s Indian Cablenet Company Ltd. vs. M/s Dum Dum Cable TV Network*, Petition No.151(C) of 2008 disposed of 18.12.2009.

35. It may be noticed that in *Asianet Satellite Communication Ltd. vs. ESPN Software India Pvt.* Petition No.153(C) of 2009 disposed of on 28.5.2010, it was held as under:

“25. The only question which survives for our consideration, therefore, is as to whether we can issue any direction in regard to the future agreement which may be entered into by the parties in future. The parties to a commercial document and even as envisaged under the Regulations should arrive at a negotiated figure of subscriber base which is also

stated to be the declared subscriber base vis-à-vis universe of the petitioner.”

36. In that case also a question arose as to whether in all circumstances the subscriber base must be determined with mathematical exactitude. The answer to the said question was rendered in the negative, upon holding that the question must be considered keeping in view the universe of other MSOs.

37. So far as the case of Star India (supra) is concerned, this Tribunal opined as under:

“8. The determination of reasonable subscriber base would have been greatly facilitated had the Petitioner, who was in a best position to do so, come forward with the requisite information. However, it has consciously chosen to be evasive. The principle of parity referred to in our order of 3/3/2006 is not any complicated piece of grand originality suddenly conceived out of the blue by this Tribunal. Ingrained in the said principle is that similarly placed cable operators / MSOs be charged on similar basis by the Broadcaster. Parity in the present case has two aspects

(i) Parity with regard to rate (urban/rural) per subscriber and

(ii) Parity as to the percentage, which the declared subscriber base of the Cable Operators bears to his Universe / Total Subscriber Base.”

38. The decision of this Tribunal in M/s Indian Cablenet Company Limited, Petition No.151(C) of 2008 disposed of on 18.12.2009, in the opinion of this Tribunal is not very relevant for this case.

39. The distinction between the two cases are apparent. In a given situation a broadcaster may also give discount upon taking into consideration the volume of traffic.

40. From the definition of `subscriber base' and `subscriber line report' as contained in Regulation 2(b) and 2(q), it is evident, that therefor an agreed figure is a must.

41. In this case there has been no agreement between the parties.

However, there is some basis for this Tribunal to arrive at a reasonable figure keeping in view the trend of the earlier agreement as also the special situation in which the Petitioner is placed.

42. In that view of the matter in the opinion of this Tribunal the interest of justice would be subserved if the parties are directed to enter into an agreement on a proportionate increase of subscriber base namely 3700 vis a vis 4800 having regard to subscriber base disclosed in the earlier agreement.

43. The parties have undertaken the joint survey, the growth in the subscriber base of the Petitioner shall also be taken into consideration with effect from the respective dates when the earlier agreement expired.

44. Keeping in view the aforementioned findings I am of the opinion that it may not be necessary to direct the Respondent to cause production of the documents.

45. So far as the Miscellaneous Applications filed by the Respondent are concerned, there cannot be any doubt or dispute that the Petitioner was bound to clear off the arrears having regard to the interim order passed by this Tribunal. The said MAs namely MA No.522 of 2012 and 523 of 2012 are allowed. The Petitioner apart from clearing off the arrears shall also pay the subscription amount for the months of September and October at the rates noticed heretobefore.

46. These Petitions are allowed in part and to the extent mentioned hereinbefore with the aforementioned directions.

47. In the facts and circumstances of this case however, the parties shall pay and bear their own costs.

(S.B. Sinha)
Chairperson

October 23, 2012
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