

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 17th October, 2012

PETITION No. 387(c) of 2011

M/s Co-op Cable Network ...Petitioner

Vs

M/s Sun 19 Media Services South Pvt. Ltd. ...Respondent

BEFORE:

Hon'ble MR. Justice P.K. RASTOGI, MEMBER

For Petitioner : Mr. Jayant K. Mehta, Advocate

: Mr. Nitin Bhatia, Advocate

For Respondent

JUDGEMENT

The Petitioner had been issued a notice under Clause 4.1 of the Telecommunication (Broadcasting and Cable Services) Inter Connection Regulations, 2006 for disconnection of its signals on the ground of having an outstanding amount of Rs. 4,17,411/- as on

February, 2010. Later, the Respondent disconnected the network of the Petitioner on 11.6.2011. Aggrieved by the action of the Respondent, this petition has been filed.

2. The Petitioner is an association of 14 cable operators and the Respondent is a distributor of Sun Group of channels.

3. The Petitioner has submitted that it has subscribed to the Sun T.V., KTV, Sun News, Sun Music, Gemini channels of the Respondent. The monthly subscription charges which are being charged by the Respondent from the Petitioner are Rs. 2,04,996/- exclusive of taxes. The Petitioner has been making payment of this amount to the Respondent regularly and without any default.

According to the Petitioner, until date, the Respondent has not provided a copy of any counter signed subscription agreement to the Petitioner and the signatures of the Petitioner have been obtained on blank and unfilled agreements from time to time. Lastly, the Respondent got the signatures of the Petitioner on a blank agreement sometime in the month of April, 2010 but no copy of the counter

signed agreement was provided to the petitioner till date. The Respondent was invoicing the Petitioner for the period from May to December, 2010 at Rs. 2,04,996.00 and the amount was 2,26,110.59 inclusive of taxes. All these invoices were fully paid. The Petitioner received an invoice of Rs. 2,09,378.40 for the month of January, 2011. There was no basis or justification for this increase as the Petitioner had not given consent for such an increase. Again an invoice for the month of February, 2011 was raised by the Respondent for an amount of Rs. 2,25,220.20 exclusive of taxes. This increase was also unilateral without any consent of the Petitioner. Again for the month of April, 2011, an invoice for an amount of Rs. 2,34,420/- exclusive of taxes was received by the Petitioner.

By a letter dated 5.4.2011, the Respondent had demanded an amount of Rs. 4,17,411/- from the Petitioner as the same was due and the amount should be paid within one week's time from the date of receipt of that letter. However, on 11.4.2011 the Respondent issued a notice under Regulation 4.1. The Petitioner approached the Respondent and explained its accounts and protested about the claim of the Respondent regarding any amount outstanding from the Petitioner. The Petitioner demanded the statement of accounts from

the Respondent and also counter signed copies of the subscription agreement for proper verification. But the Respondent did not provide any of these to the Petitioner. Finally the Respondent disconnected the signals of the Petitioner on 11.6.2011.

4. The Petitioner sent a letter to the Respondent on 18.6.2011 stating the detailed facts. In the said letter the Petitioner also notified to the Respondent that it was not interested in carrying the signals of about 9 channels, which were forced upon the Petitioner by the Respondent. The Petitioner also wrote that it was returning the decoder boxes of the said channels. Later, it returned 9 decoder of the aforesaid channels of the Responder after following due process of law including by issuing a public notice under Regulation 4.3

5. Finally, the Petitioner has submitted that there is inconsistency in the accounts of the Respondent and the Petitioner is not liable to pay any outstanding accept a nominal amount of Rs. 17,000/-.

6. In view of the above circumstances, the Petitioner prayed for the following reliefs :

- (i) Direct the Respondent to ensure uninterrupted supply of good quality signals of Sun T.V. and KTV, Sun News and Sun Music channels to the network of the Petitioner;
- (ii) On production of the subscription agreements and in the event that they are found to contain arbitrary, improper and discriminatory subscriber base of the Petitioner, declare and hold that all such subscription agreements are invalid, inoperative, null and void;
- (iii) Direct the Respondent to enter into a subscription agreement with the Petitioner for the period from 1.4.2011 to 31.3.2012 and for subsequent periods on a fair, non-discriminatory and negotiated subscriber base for the Sun T.V. , K.T.V., Sun News and Sun Music channels and further direct that all such agreements be executed only after prior filling up of all particulars and further direct the Respondent to provide their counter signed copies of the Petitioner;
- (iv) Direct the Respondent to rectify the subscriber base of the Petitioner in its records and to reflect the fair, non-discriminatory and negotiated subscriber base;
- (v) Direct the Respondent to produce the accounts relating to the Petitioner and on such production, declare and hold that the accounts maintained by the Respondent are improper, unfair and invalid;
- (vi) Direct the respondent to maintain its accounts in a fair and non-discriminatory manner so as to reflect the fair and non-discriminatory subscriber base of the Petitioner;
- (vii) Declare that the invoices for the months of January, February, March, April and May 2011 are invalid, null and void;

- (viii) Direct the Respondent to disclose in its monthly invoices the channel wise subscriber base and channel wise subscription charges based on which it raises its invoices; and
- (ix) Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the interest of justice.

7. The Respondent on the other hand submitted that averment made by the Petitioner about having signed blank subscription agreements and about not being provided a copy of the subscription agreements by the Respondent was baseless. The Petitioner executed the subscription agreement dated 5.5.2010 and was provided a copy of the said agreement on 14.5.2010. Again the Petitioner entered into new subscription agreement dated 26.10.2010 with the Respondent for certain additional channels. In terms of that agreement the Petitioner was liable to pay Rs. 2,34,420/- to the Respondent as monthly subscription charges.

The Respondent denied that it has been charging the Petitioner and competing operator in a differential manner.

Regarding the increase in the subscription charges during the financial year the Respondent submitted that this was on account of increase in channels supplied to the Petitioner and also due to a 7%

increase in the subscription charges in compliance with the directions issued by the TRAI.

8. In its further submission the Petitioner submitted that the Respondent has not chosen to annex any statement of accounts maintained by it along with its reply to demonstrate in what manner an amount of Rs. 4,17,411/- was outstanding from the Petitioner. The agreement dated 5.5.2010 as enclosed by the Respondent along with its reply provides for 6870 subscription points for Sun TV and 6120 subscription points for KTV. It is well known in the state of T.N. that the subscription points for KTV are usually fixed at 50% of the subscription points for Sun TV.

9. In its prayer, the Petitioner has sought relief for the direction to the Respondent to ensure uninterrupted supply of good quality signals of the channels of the Respondent and to enter into subscription agreement for a period from 1.4.2011 to 31.3.2012 and for subsequent period. However, during the hearing Shri Jayant K. Mehta the learned counsel for the Petitioner stated that the Petitioner was not getting signals from the Respondent now and was not interested

to get the signals further as prayed earlier. The Petitioner was no more interested in pursuing its prayer No. 1 and 3.

10. As the main prayer for restoration of signals and signing of further agreement have been dropped the dispute will be whether an amount of Rs. 4,17,411.00 will be outstanding against the Petitioner or not.

11. Before the hearing started the counsel for the Petitioner objected to the filing of certain document along with its additional affidavit filed by Mr. Samuel Rajan on 27.4.2012 on behalf of the Respondent. Along with the affidavit Mr. Rajan filed copies of the invoices from May, 2010 to March, 2011, debit notes and statement of accounts of the Respondent.

12. It is seen from the cross examination of Shri Samuel Rajan of the Respondent that the learned counsel for the Petitioner during cross examination had asked the witness to produce documents relating to total number of cable operators in Nagapatnam District, proportion of subscriber base of Sun T.V. and KTV with operators in District of Nagapatnam and audited accounts of the Respondent company for the period ending 31.3.2011 showing an outstanding

amount against the Petitioner. We may produce the relevant portion of cross examination of Mr. Samuel Rajan

“Q.29: In addition to the petitioner, to how many operators does the respondent provide signals in District Nagapatnam?

A: I will have to check with my records.

Q.30: Would you also remember as to what is the general percentage of subscriber base of K TV vis-à-vis the subscriber base of Sun TV as agreed by the respondent with the operators in district Nagapatnam?

A: I am not sure. I can check with my records.

(Ld. Counsel for the petitioner calls upon the witness to check up and provide information with respect to Q. 29 and 30)

It is incorrect to suggest that no negotiations were held between the petitioner and the respondent prior to execution of the agreement dated 5.5.2010.

It is incorrect to suggest that copies of countersigned agreements dated 5.5.2010 and 26.10.2010 were never handed over by the respondent to the petitioner.

I do not remember as to who on behalf of the respondent had negotiated with the petitioner before the execution of the agreement dated 5.5.2010.

It is correct that a meeting was held between the petitioner and Mr. Kamalakkannan of the respondent on 13.6.2011.

Q.36: Can you show from the record any request made by the petitioner for the signals of Colors, Disney XD,

Gemini bouquet, Hungama, Disney, CNBC TV 18, CNBC Awaaz and CNN IBN?

A: No.

Vol.: It is only verbal request.

It is incorrect to suggest that no such request was made by the petitioner.

Q.37: Is it correct that the figure of Rs. 4,17,411/- is shown to be outstanding for the period prior to 1.4.2011?

A: Yes.

Q.38: Have you seen the audited accounts of the respondent for the period ended on 31.3.2011?

A: No.

It is incorrect to suggest that the audited accounts of the respondent do not show any outstanding from the petitioner.

Ld. Counsel for the petitioner calls upon the witness to produce the audited accounts of the respondent for the period ended on 31.3.2011)"

13. Regarding the request of the learned counsel for providing a copy of the audited accounts for the period ending 31.3.2011 the Respondent took a stand that the audited accounts are not to the details of the Petitioner alone and contains financial details of the entire business of the Respondent, which is confidential in nature. Therefore the Respondent was under the obligation not to divulge the confidential information relating to the third party transaction.

However, the Respondent filed copies of the invoices sent to the Petitioner for the period May, 2010 to March, 2011 along with debit notes and statement of accounts of the Respondent maintained for the Petitioner's account. Filing of these invoices and statement of accounts which were not filed earlier along with its reply by the Respondent are being objected by the Petitioner.

14. The contention of the learned counsel for the Petitioner is that the main grievance of the Petitioner was raising of illegal demand by the Respondent. The Petitioner enclosed its statement of accounts along with the petition itself. The Respondent should have filed its own statement of accounts at the time of reply. Once the evidence is over and the case is at the stage of hearing, the Respondent cannot fill up the lacunae and file these statement of accounts and invoices which were pointed out by the Petitioner in its cross examination.

15. Although this Tribunal is not strictly bound by the procedure of Civil Procedure Code, yet the basic principle of natural justice has to be followed. The entire Petition is based on the aspect that the Respondent has raised the demand without any basis and the Petitioner has requested to direct the Respondent to produce the accounts relating to the Petitioner and on such

production, declare and hold that the accounts maintained by the Respondent are improper, unfair and invalid. However, the Respondent failed to produce its accounts and filed its reply without it. The same was not filed even along with the affidavit of its witness when the evidence was recorded. In the case of *Vadiraj Naggappa Vernekar Vs. Sharadchandra Prabhakar Gogate*, (2009) 4 SCC 410, it had been held that the power under Order XVIII Rule 17 of CPC was not intended to be used to fill up omissions in the evidence of a witness, who has already been examined.

It was opined in *Vadiraj (Supra)*:-

“28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.”

16. I am of the view that filing of the invoices for the period May, 2010 to March 2011 and statement of accounts is an after thought and cannot fill up the lacunae in the evidence of the Respondent. Therefore these documents filed by the Respondent cannot be taken on record.

17. The Petitioner has submitted a copy of the invoice for May, 2010 raised by the Respondent. The amount for the invoice for the period May 2010 is 2,04,996.00 without taxes. The same amount was shown in the invoice till December, 2011. However, for the period of January, 2011, subscription amount without taxes was revised to 2,09,378.00. For the month of February, 2011 the amount became 2,25,200.20 and 2,34,420.20 for the month of April, 2011. It is seen that there has been a difference of amount of subscription from December, 2010 to January, 2011 again February, 2011 as well as April, 2011 that means the subscription amount has changed thrice in a period of 4 months.

18. The Respondent has enclosed a copy of the agreement dated 5.5.2010 along with its reply. This agreement was valid from 1.4.2010 to 31.3.2011 and the amount of subscription without taxes mentioned in this document is Rs. 2,25,220.00. It is not understood as to how the invoices are being raised by the Respondent for the month of May, 2010 to December, 2010 for an amount of Rs. 2,04,996. The amount mentioned in the agreement and the invoices raised do not tally.

19. The Respondent has contended that the Petitioner and the Respondent signed another agreement on 26.10.2010 wherein the Petitioner got

additional channels namely Colors, IBN 7, CNBC Awaaz, IBN Lokmat, MTV, Nick, VH1, CNBC TV 18, CNN IBN and had paid an amount of Rs. 9,200/- per month for these additional channels w.e.f October, 2010. The subscription amount was further increased as there was an increase of 7% as per TRAI Regulations. The Respondent has not indicated anywhere in its reply from which date the 7% increase came into force. In my view, the Respondent has no right to increase 7% in the subscription charges without the consent of the Petitioner. If there was a provision for increase of 7% in the rates of channels it should have been done with the consent of both the contracting parties. It was not possible for the Respondent unilaterally to increase the rates of the channel.

20. From the record it is seen that the Respondent did not produce any invoices for the period April, 2010 to December, 2010 for an amount of Rs. 2,25,220.20. The Respondent failed to show any record which was showing an outstanding amount of Rs. 4,17,411.00. In his cross examination the witness simply stated 4,17,411.00 was on the basis of invoice at page 38. We may produce the cross examination of the witness of the Respondent Mr. Samuel Raja.

Q.10: Can you show from the record any subscription invoice for the period from April 2010 to January 2011 that has been raised for an amount of Rs. 2,25,220.20/- exclusive of taxes?

A: No.

Vol.: The difference has been made by separate debit notes as per the agreement dated October 2010.

Q.11: Can you show me any such debit notes from the record?

A: No.

Q.12: Do you maintain a statement of accounts of your dealings with the petitioner?

A: Yes.

Q.13: Have you filed the same on the record?

A: No.

(Attention of the witness is drawn to pages 21 to 23 of the paper book.)

Q.14: Are you familiar with this document?

A: Yes.

Q.15: Is it correct that you had seen this before filing your reply to the petition in these proceedings?

A: Yes.

Q.16: Is it correct that this document is the true and correct record of all the payments made by the petitioner to the respondent ?

A: I need to verify this with my Finance Department.

Q.17: Can you show from the record any basis on which the amount of Rs. 4,17,411/- has been calculated by the respondent?

A: In this regard, I have to show the invoice at page 38 of the Paper Book. The figure must have been taken from there because in the invoice, an amount of Rs. 4,18,305/- is shown as outstanding whereas in the

notice dated 9.4.2011, an amount of Rs. 4,17,411/- is shown, which are both approximate amounts.

Q.18: Can you show from the record any basis on which the amount of Rs. 4,18,305/- has been calculated by the respondent?

A: No.

Vol.: It is as per our billing system.

21. Regarding the proportions of the subscriber base of Sun TV and KTV the witness of the Respondent has replied on following lines:

Q.22: Is it correct that the subscriber base of K TV is approximately 50% of the subscriber base of Sun TV?

A: This is not true. It depends on the negotiated subscriber base of the area concerned.

Q.23: Did you attend any negotiations with the petitioner about the subscriber base?

A: Not for these two agreements.

Q.24: Is it correct that the subscriber base of Sun TV is fixed on the basis of TAM reports?

A: It is not on TAM reports but generally on the area/negotiated figures.

Q.25: Is it correct that K TV is less popular than Sun TV?

A: I am not sure.

Vol.: It depends upon area to area.

Q.26: Is it correct that when Sun TV became a pay channel, its price and subscriber base was negotiated

on the basis of TAM reports from 26.11.2006 to 2.12.2006?

A: I am not sure.

(Witness is shown the reply filed on behalf of M/s. Channel Plus in the Petition no. 267 (C) of 2009.)

Q.27: Is this a true copy of the reply filed by M/s. Channel Plus in Petition No. 267 (C) of 2009 and is it also signed by you?

A: Yes.

The document is marked as Ex. R-1.

(Attention of the witness is drawn to portion mark A to A in para 5 at Printed Page 150 of Ex. R-1.)

Q.28: Is it correct that you have stated in Ex. R-1 that sun TV is a more popular channel than K TV and had a higher market share, on the basis of which its subscriber base was negotiated?

A: Yes.

In Petition 267(c) of 2009 the same witness has submitted that :

“It is stated that the Sun T.V. has a market share of nearly 41% as against the market share of KTV, which was about 17%. It is stated that the figures of viewership share are based on the Television Audience Meter (hereafter referred to as TAM) reports for the period It is stated that the information is a public document has been takne from the official website of TAM company. It is stated that the TAM is accepted in the whole industry as the indicator of the market share of various channels. It is stated that the TAM reports from 26.11.2006 to 2.12.2006 taken from www.tamindia.com, clearly show that SUN TV has 46.81% market share and KTV has 15.9% and the TAM reports from 24.12.2006 to 30.12.2006 taken from www.tamindia.com clearly show that SUN TV has 40.87% market share and KTV has 17.19%”

It is seen that the market share of KTV is less than 50% of that of SUN T.V.

22. The Petitioner has denied that it signed any agreement dated 26.10.2010. The Respondent could not produce the acknowledgement of receipt of such agreement by the Petitioner. The stand of the Petitioner has been that it signed the blank agreement and the same was filled up by the Respondent. The Contents of the agreements dated 5.5.2010 and 26.10.2010 cannot be relied upon due to the reasons that had there been an agreement, the invoices raised by the Respondent would have been exactly the same as the agreement?

23. The Respondent has failed to show the basis on which the amount of Rs. 4,17,411.00 is outstanding against the Petitioner. Neither, the statement of accounts of Respondent nor the audited accounts showing this amount against the Petitioner as debtor for the year ending 31.3.2011 is produced.

24. In view of aforementioned reasons, the petition is allowed. The Petitioner will pay the amount of Rs. 17,000/- as admitted by it along with 9% rate of interest to the Respondent. There shall be no order as to the cost.

(P.K. Rastogi)

Member

/KD/