

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated : October 19, 2012**

1. **Petition No. 447(C) of 2011**

M/s Taj Television India Pvt. Ltd. ...Petitioner

Vs.

M/s Akash Cable ...Respondent

And

2. **Petition No. 448(C) of 2011**

M/s Taj Television India Pvt. Ltd. ...Petitioner

Vs.

M/s Akash Cable ...Respondent

**BEFORE:**

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

**HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner : Mr.Tejveer Singh Bhatia, Advocate

For Respondent : Mr.Nitin Bhatia, Advocate

**J U D G M E N T**

1. These two petitions at the instance of a Content Aggregator of the channels Ten Sports, Ten Action Plus and Ten Cricket have been

filed for recovery of sums of Rs.3,61,480/- and Rs.4,14,280/- respectively.

2. These petitions although involve similar questions of law and fact, we will notice the fact of the matter from Petition No.447(C) of 2011.

3. Petitioner is a content aggregator in respect of the channels Ten Sports, Ten Action Plus and Ten Cricket.

Indisputably, prior to February, 2010 the Ten Sports Channel, Zee Sports Channel now named as Ten Action Plus, were being distributed by M/s Zee Turner Ltd.

4. This petition involves the operation of the Respondent in two towns situated in the district of Kanyakumari namely Nagercoil and Dindigul.

According to the Petitioner, a subscription agreement was entered into by and between the said Zee Turner Ltd. and the Respondent herein on or about 11.1.2010 for the period 1.4.2009 and 31<sup>st</sup> March, 2010.

5. The Petitioner contends that in terms of the said agreement, the Respondent was to obtain supply of signals of Bouquets-I and II of Zee Group of Channels and Ten Sports of channels on a subscriber base of 2490 so far as Nagercoil is concerned and on a subscriber base of 2421 so far as Dindigul is concerned.

Xeroxed copies of the said agreements have been filed with the petitions.

6. The Petitioners issued public notices in various newspapers to the effect that on and from 1.2.2010, it would be distributing the said Ten Sports channel.

The Petitioner contends that the right of distribution of the said channels has been taken over from Zee.

7. The Petitioner's predecessor in interest allegedly served invoices on the Respondent. It also served a notice with the statement of account on 17.7.2010 inter alia on the premise that the Respondent had not been making payments in terms of the said agreement. It reads as under:

Dear Mr./Ms. S. Sarvanan,

This has reference to the Subscription Agreement(s) dated 1/4/2009 executed between you and *ZEE TURNER LTD.* (the Company) in terms of which you have been authorized to subscribe and further distribute the Ten Sports Channel and Zee Sports Channel in the agreed area and to the declared number of subscribers only.

Kindly note that the distribution of Ten Sports Channel and Zee Sports Channel is being distributed by Taj Television India Limited (Taj) w.e.f 01.02.2010 as informed by ZEE TURNER LTD. vide Public Notification dated 8<sup>th</sup> January 2010. Further, it was also informed to all its Subscribers that all the payments and monthly subscription fees for Zee Sports Channel & TEN Sports accrued w.e.f 01.02.2010 shall be payable to Taj. Accordingly, Taj had also informed the Subscribers of ZEE Sports Channel and TEN Sports Channel about the said new

arrangement through a Public Notice dated 29.01.2010.

We regret to state that you have not cleared your outstanding dues in spite of repeated requests. It appears that you have been avoiding to clear your outstanding dues without any reason. As per our statement of accounts you are under an obligation to clear your outstanding dues amounting in Rs.193973.060999999999 /- as on date.

We hereby request you to contact our nearest Dealer/Regional office of the Company and pay the above said dues within 3 days from the date of this letter. Please note that in the event you fail to comply with the tenor of this notice we shall be constrained to deactivate our signals as per the applicable statute.

Your are requested to treat this communication as notice for deactivation of signals in terms of clause 4.1 of Interconnection Regulation dated 4<sup>th</sup> September, 2006 issued by Telecom Regulatory Authority of India."

8. A public notice was also issued on 21.7.2010. Another Demand notices were issued on 11.8.2011 claiming a sum of Rs. 3,61,480.27 and a sum of Rs. 4,14,280/- respectively.

The said notices were sent by Speed Post.

The Respondent in its reply contended:

1. The agreements in question are forged and fabricated documents.
2. The Petitioner has not served any invoice on it.
3. It had been operating 14 networks including Nagercoil and Dindigul which are the subject matter of this petition and in

respect of all its Networks, a consolidated sum of Rs.75,000/- was payable.

9. It is not in dispute that the petitioner disconnected supply of its signals after issuance of notices under Clauses 4.1 and 4.3 of the Telecommunication (Broadcasting & Cable Services) Inter Connection Regulations, 2004 (The Regulations).

10. The parties in support of their respective cases examined witnesses. Whereas the Petitioner examined one Sandeep Panwar (PW1), the Respondent examined its proprietor S. Saravanan (RW1) and an employee Shri S. Perumal (RW2) who was said to be a witness to the said agreement.

11. The core question which arises for consideration is as to whether the Petitioner is entitled to recover the aforementioned amounts from the Respondent.

12. At the outset, it may be noted that the original agreement has not been filed. It was also not called for from the Respondent by the Petitioner.

The authorized signatory of the said Zee Turner Ltd. was also not summoned.

13. The respective cases of the parties, therefore, must be judged on the basis of the pleadings of the parties and the evidences adduced by them.

14. At the outset, it must also be placed on record that on a query made by us, Mr. Ajay Kumar, learned counsel appearing on behalf of the Respondent would contend that the Petitioner had its headend only at Nagercoil.

15. It has 14 networks but without separate headends through which the signals of channels are retransmitted.

The Respondent does not deny or dispute that an agreement was entered into with M/s Zee Turner Ltd. It has been pleaded that an oral agreement was entered into by and between the parties.

16. According to it, whatever sums were payable in terms thereof have been paid i.e. in respect of all the 14 networks on a consolidated basis.

Execution of the agreement has not been proved.

17. We may, therefore, at this stage have a look at the oral evidence adduced by the parties.

PW-1 in paragraph 5 of his affidavit stated as under:

"5. I state that the respondent has also made payment in the name of the petitioner and therefore admittedly the respondent is fully aware of change of the channel from M/s. Zee Turner Ltd. to the petitioner. I state that since the petitioner was not receiving payments from the respondent the petitioner issued 4.1 and 4.3 notices against the respondent, copy of the 4.1 as also public notices issued in newspapers viz. Dinamani and The New Indian Express dated 21.07.2010 are exhibited as EXHIBIT PW1/4 (Colly) (Pages 32 - 35 of the paper book).

6. I state that as per the statement of account of the respondent a sum of Rs. 3,61,480/- is due and payable by the respondent towards enjoying the signals of the petitioner till 25.11.2010 when the signals of the respondent were disconnected. I state that the petitioner for recovery of the aforesaid amount had also issued a demand notice in August 2011 and had provided the respondent with its statement of account. However, till date, the respondent has neither paid nor responded to the said demand notice. I state that the petitioner being aggrieved by non-payment due of the respondent has filed the present petition. Copy of the demand notice dated 11.8.2011 along with proof of sending is exhibited as EXHIBIT PW1/5 (pages 36-40 of the paper book)."

18. We may notice a few questions put to him by learned counsel appearing on behalf of the Respondent in cross examination on the question of execution of the agreement:

"Q.5: Can you produce proof of service of statement of account upon respondent?

A : The proof of dispatch has been enclosed on page 40 of the paper Book.

Vol. : The statement of account forms the part of the demand notice dated 11.8.2011 sent to the respondent company.

It is incorrect to suggest that the petitioner never provided and served upon the respondent any statement of account before filling the petition.

.....

Q.8: Do you have any proof of services of the agreement upon the respondent?

A : I do not have any proof of service of the agreement upon the respondent.

Vol: but as per TRAI Regulations it is mandatory on the part of the broadcaster to supply copy of the agreement to the MSOs.

It is incorrect to suggest that the since the petitioner has not served the agreement upon the respondent, that is why petitioner has no proof of service of the same.

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

.....

Q.10: Do you have any proof of service of monthly invoice upon the respondent, annexed at page 18 to 24 of the paper Book?

A : No.

It is incorrect to suggest that the petitioner does not have any proof of services of any these invoices, that is why the same is not produced.

Vol: In fact invoice are raised in bulk to all the MSOs on monthly basis, so it difficult to have the copy of the proof of any particular MSO.

.....

Q.13: I put it to you that the statement of account enclosed as Annexure P-6 on Page 59 of the Paper book is raised for the Nagercoil Network of the respondent?

A: Yes, it is raised for Nagercoil Network having SMS ID4488 by ZEE turner limited.

It is incorrect to suggest that the statement of account mentioned above does not pertain to Nagercoil Network.

It is incorrect to suggest that the above statement of account is forged and fabricated.”

19. Shri S. Saravanan in his affidavit by way of evidence, apart from denying and disputing the genuineness of the agreement, stated as under:

“In any case, I hereby it is denied specifically that the respondent ever entered into any agreement with ZEE turner Ltd. for any alleged subscriber base

of 2490 or monthly subscription charges of Rs.44,080.84 as claimed in the petition.”

20. RW1 has denied that any agreement in writing with M/s Zee Turner had been entered into and/or any payment had been made to the Petitioner herein on the basis thereof or otherwise.

21. However, in his cross-examination, he made out three different cases, viz. (i) no agreement had been entered into; (ii) it had been receiving signals from Zee Turner but supply of the said signals were not continued by the Petitioner; and (iii) Respondent used to receive signals in Nagercoil after Ten Sports was taken over by the Petitioner.

22. It is admitted that the Respondent has paid certain amounts to Taj Television also.

We may notice the relevant statements made by the said witness in this behalf:

“I was the distributor for the distributor for the past 2-3 years.

I would have been the distributor of Zee turner in the year 2010.

(Attention of the witness id drawn to Para 3 of his affidavit.)

Q: It is correct that in the affidavit you have stated that you had received signals of Ten Sports and zee sports?

A: Not in these areas.

.....  
Q: I put it to you that you were receiving singles of zee sports and ten sports in the area of Nagercoil?

A; it is incorrect.

Vol: I was receiving signal of ten sports and zee sports in the area of Nagercoil till these channels were with zee turner. After the transfer of these channels from Zee turner to Taj Television India Pvt. Ltd. I have not received signals of these channels.

.....  
Q: Did you make any payment to Taj Television India Pvt. Ltd. For ten sports and zee sports channel for Nagercoil areas.

A: I had paid for the entire network consolidated. The payment were not only for Nagercoil and Dindigul areas.

.....  
Q: Did you have any agreement with Zee Turner for its channels?

A: For the last two years, I have no agreement. Prior to that, I have an agreement.

Q: For what year do you have an agreement with Zee Turner?

A: I think I have an agreement upto year 2010 however, I am not sure.

(Ld. counsel for the petitioner calls upon the witness to produce the subscription agreement with M/s Zee Turner 2009 and 2010.)"

As regards payment of the subscription fee, it was stated:

"Q: What was the consolidated amount that you used to pay for all zee bouquets every month?

A: Around Rs.8,20,000/-. For the last two years, I did not have any agreement but I continued to pay the before said amount.

It is incorrect to suggest that I had received any invoice from the Petitioner."

23. He, however, did not give the address of the headend in the town of Nagercoil. He furthermore did not give the addresses

mentioned in the postal registration certificate for Nagercoil and Dindigul areas. He furthermore stated:

“Q: Do you operate from different bank accounts for all your 18 networks or from a single bank account?  
A: From a single bank account number.

Q: I put it to you that your above statement that you had issued only one cheque in the name of Taj Television India Pvt. Ltd. is false and incorrect?  
A: I have paid 3-4 cheques to Taj Television India Pvt. Ltd.”

24. On analysis of his aforementioned statement vis a vis the other materials brought on record, it would be evident that the RW1 has made out contradictory and/or inconsistent cases.

25. When confronted with the question that in his affidavit, RW1 had admitted that it had received signals of Ten Sports and Zee Sports. He, however, contended that he did not do so in those areas.

26. In answer to a suggestion that it had been receiving signals of Zee Sports and Ten Sports in Nagercoil area, he made a voluntary statement. As indicated heretobefore it is of some significance. According to it had been receiving signals so long the same were with Zee Turner. He, however, as noticed heretobefore, had paid the subscription fee to Taj Television, but according to him the same was made not only for Nagercoil and Dindigul areas, but all the networks on a consolidated basis.

27. He furthermore admitted that he had an agreement with Zee Turner upto 2010.

As indicated heretobefore, despite having been called upon to produce the agreement, RW-1 for reasons best known to him did not produce the same.

28. An adverse inference, therefore must be drawn against him in this behalf.

If his statement is accepted to be correct that he had made payments in respect of all the 14 networks on a consolidated basis, not only to Zee Turner but also to the Petitioner herein, the Respondent should have filed its books of accounts to prove the same.

29. It may be true that the service of invoices had not been proved but keeping in view the fact that the notices had been sent with the statement of account, may be after about one year from the date of termination of the supply of signals the same, in our opinion, would have some bearing on the case at hand. It was expected that RW1 would have protested thereagainst immediately.

30. The Respondent, it is not in dispute, had been making payments by cheques. From the Customers' statement of account for the period 1.4.2009 and 28.2.2010, it would appear, that the Petitioner had been making payments in terms of the subscriber base so far as the channel

Ten Sports is concerned namely a sum of Rs.44,080.84 and/or Rs.41,000/-.

31. It had also been paying for Bouquet-I and Bouquet-II for almost the same amount.

The Respondent had paid the aforementioned amount with tax even for the month of August, 2009.

It has made three payments in the month of August, 2009.

If that be so, in our opinion, the Respondent must be held to have made itself liable to make the payments as is reflected in the statement of account filed by the Petitioner.

Supply of signals to the Petitioner's network is not disputed.

32. As noticed heretofore, the Respondent has only one headend at Nagercoil. If that be so, it is difficult to appreciate, how he can have the different networks.

33. It through cable is said to be distributing/retransmitting signals in different areas of the same district. It may be entitled to do so but then once RW-1 admitted that he had been receiving signals from Zee as well as the Petitioner, he cannot be heard to say that he had been making payments in respect of all the 14 networks together.

34. The matter might have been different had the Respondent possessed 14 different headends and had been receiving supply of

signals from those different headends from different broadcasters under different agreements.

35. The Petitioner and/or its predecessor in interest did not contend that the supply of signals had been made gratuitously.

36. It is also not the case of the Respondent that it had not supplied the said signals to its customers residing within the towns of Nagercoil and Dindigul which are big towns.

37. The sports channel ordinarily would be viewed more by the people residing in the urban areas, vis-à-vis the people residing in rural areas.

38. The principle of law involved herein is that such payments can be directed to be made by way of `restitution' as the other party had unjustly enriched itself. The said principle can be invoked in view of the admission made by the Respondent itself in terms of Section 58 of the Indian Evidence Act. An admission made by a party to the lis before a court of law must be held to be a conclusive proof.

Section 58 of the Indian Evidence Act reads thus:

“58. Facts admitted need not be proved.—No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the 'acts admitted to be proved otherwise than by such admissions."

A judicial admission made by the parties would, thus, be decisive in nature.

In a civil suit the Court while appreciating the evidence would be guided by the principles of 'preponderance of probabilities' and not by proof beyond all reasonable doubts.

It is difficult to appreciate as to how an MSO would have one headend and at the same time would have 14 networks. For different towns, it must have different headends.

39. The principles of unjust enrichment/restitution are founded in equity. It is invoked to do substantial justice in cases where it would be difficult to impute to the persons concerned relations created by contract.

40. In *State of West Bengal vs. B .K. Mandal & Sons* AIR 1962 SC 779 at page 790, law to the aforementioned extent has been laid down by the Apex Court.

41. The principle of restitution/unjust enrichment in the recent past has been applied widely. [See *Goff & Jones on the Principles of Unjust Enrichment* Paras 1.0-1.09].

42. It is true that the Petitioner has also not been able to prove the service of invoices, but as indicated heretofore this, the petition may

be disposed of on the basis of the oral evidence adduced by the parties and the admission made by RW1.

**Conclusion**

43. For the reasons aforementioned these petitions are allowed.

Let decrees be passed for a sum of Rs.3,61,480/-and Rs.4,14,280/- respectively in these petitions.

However, in the facts and circumstances of this case and keeping in view the fact that the Petitioner has not adduced any evidence to prove the agreement, it is directed that in the event the Respondent pays the aforementioned amount within four weeks from date, no interest shall be payable to the Petitioner but if he fails and/or neglects to do so, interest at the rate of 9% per annum would be payable thereafter.

In the facts and circumstances of this case there shall also be no order as to costs.

**(S.B. Sinha)**  
**Chairperson**

**(P.K. Rastogi)**  
**Member**

**October 19, 2012**  
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