

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

**Dated 12 October, 2012**

**PETITION No. 676(c) of 2012  
(With M.A. No. 576 of 2012)**

M/s Indusind Media and Communication Ltd. ... Petitioner

Vs

M/s Media Pro Enterprise India Pvt. Ltd. ... Respondent

**BEFORE:**

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

For Petitioner : Ms. Vandana Jai Singh, Advocate

For Respondent : Mr. Tejveer Singh Bhatia, Advocate  
Mr. Upender Thakur, Advocate for  
Ms. Prathiba M. Singh, Advocate

**ORDER**

The Petitioner is a multi service operator.

The Respondent is a content aggregator and thus is a 'broadcaster' within the meaning of the provisions of the Telecommunication (Broadcasting and Cable Service) Interconnection Regulations 2004 as amended from time to time (the Regulations).

2. The admitted fact of the matter is that the parties had entered into a subscription agreement so as to enable the Petitioner herein to retransmit signals of the channels of the Respondent to its subscribers in the CAS areas.

'CAS' areas have been notified by the Central Government in exercise of its powers under Section 4 A of the Cable T.V. Networks (Regulation) Act 1995 which reads as under:

- (1) Where the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, make it obligatory for every cable operator to transmit or retransmit programme of any pay channel through an addressable system with effect from such date as may be specified in the notification and different dates may be specified for different States, cities, towns or areas, as the case may be.
- (2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, specify one or more free-to-air channels to be included in the package of channels forming basic service tier and any or more such channels may be specified, in the notification, *genre-wise* for providing a programme mix of entertainment, information, education and such other programmes.
- (3) The Central Government may specify in the notification referred to in sub-section (2) , the number of free-to-air channels to be included in the package of channels forming basic service tier for the purposes of that sub-section and different numbers may be specified for different States, cities, towns or areas, as the case may be.
- (4) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, specify the maximum amount which a cable operator may demand from the subscriber for receiving the programmes transmitted in the basic service tier provided by such cable operator.

- (5) Notwithstanding anything-contained in sub-section (4), the Central Government may, for the purposes of that sub-section, specify in the notification referred to in that sub-section different maximum amounts for different States, cities, towns or areas, as the case may be.
- (6) Notwithstanding anything contained in this section, programmes of basic service tier shall be receivable by any subscriber on the receiver set of a type existing immediately before the commencement of the Cable Television Networks (Regulation) Amendment Act, 2002 without any addressable system attached with such receiver set in any manner.
- (7) Every cable operator shall publicize, in the prescribed manner, to the subscribers the subscription rates and the periodic intervals at which such subscriptions are payable for receiving each pay channel provided by such cable operator.
- (8) The cable operator shall not require any subscriber to have a receiver set of a particular type to receive signals of cable television network; Provided that the subscriber shall use an addressable system to be attached to his receiver set for receiving programmes transmitted on pay channel.”

3. In terms of the said agreement, the Respondent was to supply signals of the channels specified therein, wherefor it now stands admitted that only one decoder boxes for each of the channels had been supplied to the Petitioner.

A controversy exists between the parties as to whether the Petitioner in the garb of non compliance of the confidentiality clause contained in the main agreement has put an obstruction in carrying out audit by the Auditor of the Respondent Price Waterhouse Cooper Pvt. Ltd. (PWC).

The non disclosure agreement in regard to the confidentiality of the data is contained in the said agreement to which I shall refer to a little later.

Another question which arises is to whether the Petitioner has transgressed its area of operation by retransmitting its signals to the LCOS operating in the non CAS areas.

This Petition has been filed, interalia, for the following reliefs :

- “a). That Respondent be restrained from de-activating the signals in respect of their channels distributed by them in respect of their channels to the Petitioner in the city of Delhi;
- b). That notices dated 7.9.2012 under Clause 4.1 of the Telecommunications (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulations, 2004 and a public notice dated 11.9.2012 under Clause 4.3 of the Telecommunications (Broadcasting and Cable Services) Interconnection (Third Amendment) be stayed/cancelled/quashed. “

The said notices dated 07.9.2012 and 11.9.2012 were issued in terms of Clauses 4.1 and 4.3 of the Regulations on three grounds: (i) the Petitioner has failed and/or neglected to pay a sum of Rs.8,79,691/- towards the monthly subscription charges; (ii) the Petitioner having not allowed the auditor appointed by the Respondent viz. PWC to complete the audit has committed breach of the said agreement; and (iii) the Petitioner has transgressed its area of operation.

Ms. Vandana Jai Singh learned counsel appearing on behalf of the Petitioner would contend that (i) the Petitioner has paid the outstanding

amount of Rs.8,79,691/- by a cheque dated 18<sup>th</sup> September, 2012 and thus no amount is due and payable to the Respondent by the Petitioner and (ii) PWC having not executed a NDA with the Petitioner as is required in terms of Clause 10.1 and 10.2 of the agreement, the Petitioner could not have supplied the data to it which were confidential in nature.

4. The relevant clauses with regard to the confidentiality issue, having regard to the pleadings of the parties may be noticed.

The Petitioner stated that on or about 08.12.2011 and 09.12.2011 “PWC” carried out the audit which allegedly was completed. Evidently it was not.

On or about 29.12.2011 “PWC” sent an email requesting the Petitioner to provide the data which finds place in the MOM recorded in respect of the meeting held by the parties hereto.

The Petitioner asked for some time, whereafter the Respondent by an email dated 29.12.2011 detailed its requirements to PWC.

5. We may notice that the Petitioner pursuant to or in furtherance of the requirements to supply data as contained in the Respondent’s email dated 29.12.2011 while asking for some time, stated that it would be able to supply the same by 10.01.2012.

It is not in dispute that both the Respondent as also PWC specified the data required by it. PWC again requested the Petitioner therefor by its email dated 6.1.2012 in response where to, a week's time was sought for.

In its emails dated 29.12.2011 and 09.01.2012, the Petitioner did not raise any objection with regard to the alleged non-compliance of NDA clause by PWC.

It did so for the first time on 12.01.2012.

I may at the outset notice the relevant clauses of the agreement

“4.10.2 The SMS and all Subscriber Records that are relevant to the Subscribed Channels for the operation of the Agreement shall be available for inspection and audit by Star DEN/Star Den's representative(s) (where such representatives are members of an internationally recognized accounting firm and agree in writing to be bound by confidentiality obligations) during the Term at any time during normal business hours and for three months after the expiry or premature termination of the Agreement, as the case may be, to ensure compliance with the Anti-Piracy Obligations, and (ii) on three days prior written notice during normal business hours to ensure compliance with all other terms of the Agreement upto four times within any 12 months period and for three months after the expiry or premature termination of the Agreement, as the case may be. The Affiliate shall give Star Den/Star Den's representatives any assistance they may reasonably require in connection with their audit investigations. In the event a breach of the Agreement has been discovered during the course of such audit or inspection, Star Den/Star Den's representatives shall have the right to take printouts, photocopies and computer copies of the

Subscriber Records, or any portion thereof, reasonably required to provide evidence of such breach and the Affiliate agrees to extend reasonable cooperation in this regard.”

- 10.1 The parties agree to keep all information including without limitation, data pertaining to the business of the other party, details of the other party’s Affiliates, subscriber details. Subscription Amounts, pricing, etc. regarding, the strategy and volume of business of the other Party strictly confidential at all times unless required by applicable law to disclose such information.
- 10.2 Any information provided by one Party to the other Party under the Agreement is to be held strictly-in-confidence by the other Party and shall not be used by the other party for a purpose other than the purpose for which it is intended under this Agreement without written consent of the other. Disclosure of any such information is to be made only to such employees of the parties who need to use the Confidential Information and it is the responsibility of the Parties to bind and ensure that any such employee shall hold in confidence all such confidential information including but not limited to the terms and conditions of the Agreement and that such an employee does not disclose, publish or make copies of the Agreement or the Confidential Information (unless it is required by law to do so) without the prior written consent of the other party”.

6. Ms. Vandana Jai Singh would contend that Clause 10.2 requires disclosure of informations only to the employees of the Respondent and not to the auditors; whereas Mr. Bhatia submitted that Clause 10.2 must be read into two parts, the first part dealing with the confidential aspect of the documents

and the second part with regard to the disclosure thereto by the employees of the Respondent.

7. Construction of the said document vis-a-vis the aforementioned communications between the parties hereto as also PWC would require consideration at an appropriate stage of the proceedings.

The fact, however, remains that PWC sent a draft agreement to the Petitioner herein on or about 31.01.2012. The Petitioner contends that from a perusal thereof, it would appear that some of the clauses contained therein being not relevant, it returned the same to PWC, stating :-

“This NDA will not in line with our requirement. Please note that IMCL is no way connected for considering to hire PWC for any services.

What we need a non disclosure of any/all data which is there with PWC and cannot be given to anyone, without IMCL’s permission. If required, we will send a copy of the same, else you may send us a revised copy.

Meanwhile, you may let us know which all areas the subscription numbers are to be further verified.

You may plan at site audit further to see data on screen on a mutually convenient time and date.”

It may be true that the Respondent on or about 17.8.2012 sent an email with regard to supply of the data but the impugned notice under Clause 4.1 was issued on 11.9.2012.

8. The petitioner prima facie should have allowed the PWC to continue its audit, keeping in view the fact that the reason for supply of data had been disclosed, as allegedly there were serious discrepancies in the data already supplied. It could only insist on obtaining a document in writing that PWC would be bound by the confidentiality clause.

For the said purpose, prima facie, no agreement was required to be entered into.

9. Had the Petitioner been interested only with a document in writing issued by the said PWC, it could have stated so. It could have also sent back the draft agreement issued by PWC containing only those clauses in its opinion which were applicable. They could have deleted the un-necessary clauses from the said agreement.

10. I do not see any justification on the part of the Petitioner not to raise any question of NDA from the very beginning as according to it, it had a right with regard thereto.

11. So far as the third aspect of the matter viz. retransmission of signals in the digital form in the non CAS areas is concerned, the affidavit filed by the Petitioner itself may be noticed.

It reads as under:

- “(i) That Shahdara and Jagatpuri are reflected in the said SLR. Therefore, the Petitioner is authorized to operate in the said area. In fact, the said SLR bears the names of affiliates in Shahdara at serial numbers 100,101,146,159,160 namely Puppy Cable Network, Sai Cable Network, DNT Cable, Dheer Cable, Vinod Cable T.V. Network.
- (ii) That the Respondent has been raising invoices upon the Petitioner in line with the said SLR and the Petitioner has been making payments in terms of such invoices. Therefore, there is no question of any unauthorized operation.
- (iii) That the Petitioner only has one set of decoder boxes for digital headend.
- (iv) That digital signals are supplied for CAS and Non-CAS areas from the same headend through 2 different feeds.
- (v) The CAS feeds for pay channels are encrypted whereas as regards Non-CAS areas it is un-encrypted.
- (vi) That CAS signals are not being distributed in Non-CAS areas.”

In an affidavit affirmed by Shri Sunil Singh Mohan, the deponent annexed therewith a copy of the First Information Report lodged by the Respondent upon getting an investigation made by one ‘Investigating Agency’ namely M/s Pinkerton.

Perusal of the said FIR would go to show that allegations have been made therein that two of its LCOs namely Dhir Cable Network and Vinod Cable Network have been retransmitting digital signals of the Respondent in Shahdara and/or Jagatpuri Area.

12. Ms. Vandana Jai Singh would contend that the Petitioner itself in its SLR sent to the Respondent categorically stated that the said two Local Cable

Operators were LCOs operating the said areas having their headend at Shahdara.

The Respondent however, did not send any invoice on the basis of the said SLR as the same was not a part of the agreement.

13. We have noticed heretofore that the Petitioner accepts that the aforementioned two LCOs had been obtaining signals from its digital network. It however, states that it was entitled thereto.

14. The notification dated 10.7.2003 issued by the Central Government clearly goes to show that the notified CAS area are in South Delhi.

Shahdara, therefore, being not a part of the South Delhi, the said CAS notification will have no application.

To the said effect an affidavit has been affirmed on behalf of the Respondent by one Raghavender Singh on 8.10.2012 wherein it was contended that separate IRD boxes had been issued to the Petitioner one for the CAS areas and the other for the non CAS areas.

So far as the Viewing Card numbers issued to the Petitioner is concerned the same find place in the FIR .

In his affidavit, Shri Raghavender Singh has given the number of the IRD boxes issued to IMCL.

15. Ms. Vandana Jai Singh however submitted that keeping in view the fact that Delhi is one of the Metro areas where Digital Access System (DAS) would come into being with effect from 1<sup>st</sup> November, 2012, the Petitioner has no other option but to distribute the Set Top Boxes to its customers and retransmit digital signals thereto.

It therefore, stands accepted for the purpose of consideration of the interim prayer made by the Petitioner that it had been supply of digital signals to non CAS areas which is yet to come within the purview of the DAS notification to be effected from 1<sup>st</sup> November, 2012.

So far as the notification issued by the Central Government to introduce DAS, it is not in dispute that the parties hereto are required to enter into a separate agreement if not already covered by the existing agreement.

It is difficult to accept the contention of Ms. Jaisingh that from the headend meant for the CAS areas and through one decoder, the Petitioner is entitled to retransmit signals of the channels of the Respondent both to the CAS and non-CAS areas.

However, in the event the Petitioner disconnects the digital signals supplied to the non-CAS areas forthwith and subject to an undertaking it shall reimburse the Respondent to the said extent and allow the PWC to commence its audit only on issuance of a letter that it is bound by the NDA Clause in the agreement, the Respondent may not give effect to its 4.3 notice in regard to the CAS area.

PWC would be entitled to conduct an audit with regard to this aspect of the matter also.

16. An affidavit has been filed by the Petitioner together with an application. The said application has been allowed. It has been stated that the Petitioner has already stopped supply of signals in the non-CAS area from its CAS headend and upgraded its non-CAS headend.

To the aforementioned effect, an affidavit has been filed.

The Petitioner furthermore stated that it is ready and willing to enter into a new agreement in respect of DAS area.

In this view of the matter, it is furthermore directed that the parties hereto may enter into negotiations with such growth for which they think that is reasonable and proper. The parties may also give effect to such growth from such date as they may think fit and proper.

17. A high ranking officer of the Petitioner for the aforementioned purpose must meet a high ranking officer of the Respondent at its Mumbai Office on 15.10.2012.

In the event, however, the parties fail to arrive at a settlement, it would be open to them to take recourse to such remedy which is available to it in law.

18. This order is furthermore would be subject to the application(s) for vacating the order of stay passed in different cases by the Respondent. In the event, the interim order passed herein and/or connected matter is varied or modified, it would be open to the parties to bring the same to the notice of this Tribunal.

19. With the aforementioned directions, the prayer of the Petitioner for passing an interim order of injunction is disposed of.

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

/KD/rkc