TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 21st September, 2012

Petition No. 624(C) of 2012

New Generation Media Corporation Pvt. Ltd. …Petitioner

Vs.

Sun Direct TV Pvt. Ltd. & Anr. …Respondents

BEFORE:
HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner : Mr. Jayant Bhushan, Senior Advocate
Mr. T. Sundar Ramanathan, Advocate
Mr. V. Venkatesan, Advocate
Mr. Avinash Menon, Advocate
Mr. Kumar Mihir, Advocate

For Respondent No.1 : Mr.Meet Malhotra,Sr.Advocate
Mr. Gopal Jain, Advocate
Mr. Aman Abhinav, Advocate

No.2 : Mr. Maninder Singh, Sr. Advocate
Mr. Abhishek Malhotra, Advocate
Mr.Angad Singh Dugal,Advocate

O R D E R

The Petitioner is a broadcaster of a free to air news channel. The first Respondent is a DTH operator. The second Respondent is a Multi Service Operator (MSO) operating on cable platform.

Admittedly, the parties hereto had entered into an agreement in writing on or about 24.08.2012 for the period 24.08.2011 and 23.08.2012.

According to the Petitioner, negotiations for entering into the aforementioned agreement were being held by and between one Mr. Vittal Sampathkumar, Chairman-cum-Managing Director of the Respondent No. 2 and Mr. P.C. Vijay Kumar, General Manager of the Petitioner.

According to the Petitioner, it was agreed that the carriage charges for a sum of Rs. 5 crores shall be charged from the Petitioner for carrying its channel both on DTH Platform as also on the Cable Platform of the Respondents herein. However, the said amount was sought to be increased by the Respondents to Rs. 8 crores in July, 2011.

The Petitioner made an announcement that it's channel would be launched with effect from 24.08.2011. On 23.08.2011, the Respondents gave out that a sum of Rs. 13 crores would be charged for carrying its channel. The Petitioner having no other alternative had to agree to the said proposal and paid the said sum to the Respondents by way of two demand drafts on 23rd August 2011.

The agreement, however, was entered into with the first Respondent only, the relevant clauses whereof are as under :

> *1.1* *The term of this Agreement shall be for a period of 12 months from the date of singing this Agreement subject to NGMC paying a non-refundable channel carriage fee of Rs. 13,00,00,000/- (Rs. Thirteen crores only) plus service tax and applicable TDS in advance to Sun Direct. This agreement is made only in relation to carriage of the channel and it does not relate to placement of the channel in any manner.*
>
> *1.3* *The carriage fee has been determined after a prolonged discussion/negotiations between representatives of both parties and after considering the business potential and other key business parameters.*

The Petitioner, however, in this petition inter alia contended that:

> ***xvii*** "*In the meantime, the Tamil Nadu Government had decided to nationalize the MSO operations and therefore Tamil Nadu Arasu Cable TV Corporation Ltd. took over the operations of Sumangali Cable Vision (SCV) in all places except for Chennai. In the wake of this event and since there was no written agreement between Respondent No. 2 and the Petitioner Company, the Petitioner Company approached Respondent No. 1 seeking for a refund of the money as SCV could no longer service any region in Tamil Nadu except Chennai. It may be mentioned that Respondent No. 2 continued carriage of the News channel of the Petitioner in the City of Chennai till 13.08.2012 after which the Respondent No. 2 changed the placement of the News Channel form S-38 to UHF-66 where no clear picture is available and only grains are visible on the screen."*

Xxviii *"As the term of one year was coming to end, the Petitioner sent an email to the Respondents herein on 03.08.2012 narrating, the factual background, the understanding of the parties and the assurances given by the Respondents regarding refund of the excess amount of Rs. 5 crores and requesting thereby the Respondents to carry the news channel of the Petitioner for one more year i.e. 2012-2013 on sun Direct DTH and SCV Chennai as the Petitioner had already paid for the same and refund the balance amount of Rs. 5 crores immediately."*

It is not in dispute that pursuant to or in furtherance of the said carriage agreement, the Petitioner did not have any right to get its channel placed on a particular frequency.

According to the Petitioner, however as the cable business of *Sumangali Cable Vision (SCV)* the predecessor in interest of the Respondent no. 2 was taken over by Aarushu Cable TV, the carriage of its channel through cable platform was kept confined only to the town of Chennai.

The Petitioner allegedly asked for a refund of a sum of Rs. 9 crores to which allegedly the Respondent no. 2 promised to carry its channel in Sun Direct DTH and SCV (within Chennai Only) for one more year as an adjustment for the pending payment i.e. for the year 2012-2013 to carry the channel in SCV in Chennai and refund a sum of Rs. 5 crores.

The Respondent by an E-mail dated 7.08.2012 responded to the said E-mail to the Petitioner dated 03.08.2012 in the following terms:

> "*We at SCV, do not have any contractual or financial obligations to carry your singals. Be it so, your claim of approaching us in September 2011 and our purported promise of carrying your signals for one more year are not true and make no sense. If you have any issues with SUN Direct, you may kindly take up with them.*

We hereby reiterate that we are neither under obligation to carry your signals nor at any point of time accepted to pay your illusionary claim of Rs. 5 crores. Kindly refrain yourself from making such joint mails to SUN Direct and us, in order to create a paper trail for your absurd demand which are otherwise two different companies. "

The Petitioner's General Manager Mr. Vijaya Kumar by an E-mail dated 27th August 2012 referring to the earlier E-mail dated 3rd August, 2012 stated as under:

"*We were shocked to know from our viewers that Sun Direct has removed our Channel running in slot no. 133 and moved to 583 without any prior intimation or notice to us either orally or through mail. This is against the TRAI regulations under which you are licensed to operate in India.*

By shifting our channel to 583 position you have made our channel a pay channel while we remain as Free to Air Channel. Thus in essence you are trying to make money by making a Free to Air Channel in to paid Channel without the consent of the Broadcaster and misleading the public.

This is against our MoU dated 24th August 2011 and also ethical business practices as per TRAI regulations. Kindly take notice of the issue immediately and revert back the channel to its original position of 133. "

The Respondent No. 1 in response to the Petitioner's E-mail dated 27th & 3rd August 2012, however, stated as under:

"*Please note that your channel continue to remain as Free to Air channel in our platform till 18th September 2012 we are also been running a Scroll in our channel informing the same to our subscribers.*

We wish to reiterate that carriage agreement is purely a commercial contract between two entities and parties are guided by the same only during the "Contractual period".

If you wish to renew the contract you may please contact us during business hours between Monday to Friday."

Mr. Jayant Bhushan, learned senior counsel appearing on behalf of the Petitioner would contend:-

1. From the conduct of the Respondents, it is evident, that the nature of the terms and conditions contained in the agreement dated 24.08.2011 are not reflective of the actual state of affairs namely the Respondent No. 1 alone had agreed to carry the channel of the Petitioner and it must be held that both the Respondents agreed to carry the same from their respective platforms.

2. The Respondent No. 1 could not have legally terminated the contract by issuing a public notice in terms of clause 4.3 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 without publishing the same in two national newspapers and as admittedly the same has been published in a Tamil daily newspaper ‘Dinakaran’ and an English daily newspaper ‘The Financial Express’, the same must be held to be bad in law and in that view of the matter it should be restrained from giving effect thereto.

3. The Respondent No. 2 although had been carrying the channel, which it was bound to do having not published any public notice in terms of the clause 4.3 of the Regulation, the quality of signals retransmitted by it being very bad, the same would amount to not carrying the channels in terms of the agreement.

Mr. Meet Malhotra, learned senior counsel appearing on behalf of the Respondent No. 1, on the other hand, submitted that:-

1. The agreement having not provided for placement of any channel and the Petitioner having prayed for restoration of supply of its channel in a given frequency viz. Slot No. 133 no order of interim injunction can be passed in favour of the Petitioner as has been prayed for or otherwise.
2. As the newspaper Dinakaran is published from 12 different locations including Bombay and Delhi, the same must be held to be a national newspaper.

Mr. Maninder Singh, learned senior counsel appearing on behalf of the Respondent No. 2 urged :-

1. The Petitioner does not have any legal right in terms whereof this Tribunal may issue a direction that the Respondent No. 2 must carry its channel.
2. If the Petitioner was really aggrieved by the terms of the agreement, it should have approached this Tribunal soon after execution thereof and not at a point of time when the same has expired.

3. The term of the agreement in any event having expired, the Petitioner cannot be heard to say that the same should continue to govern the commercial relationship between the parties.
4. In terms of Sections 91 & 92 of the Indian Evidence Act, any oral evidence to prove the terms of the contract contrary to the written agreement being barred, the Petitioner has not made out any case for grant of an order of injunction.

The agreement in question is a commercial document.

The parties are supposed to know the effect thereof as also its binding nature.

Prima facie having regard to the provisions contained in the Sections 91 & 92 of the Indian Evidence Act, the Petitioner may not be permitted to adduce any oral evidence to establish that in fact some terms and conditions other than the ones mentioned in the said agreement were meant to be acted upon by and between the parties hereto.

Mr. Jayant Bhusan, in support of the proposition that sections 91 & 92 of the Indian Evidence Act are not applicable in the instant case , has relied upon a decision of the Supreme Court of India in Roop Kumar V. Mohan Thedani, reported in 2003 (VI) SCC page 395, wherein it was held :

> **22**. "*This Court in Smt. Gangabai v. Smt. Chhabubai (AIR 1982 SC 20) and Ishwar Dass Jain (dead) thr.Lrs. v. Sohan Lal (dead) by Lrs.(AIR 2000 SC 426) with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.*"

The effect of the said provisions, however, had been noticed by the Apex Court in paragraphs 19,20 & 21 thereof which are as under:

> *"**19** : Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document which limitation improved by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.*

20. *The two sections are, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only to bilateral documents. (See: Bai Hira Devi and Ors. vs. Official Assignee of Bombay AIR 1958 SC 448). Both these provisions are based on "best evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law". It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the*

parties to be proved by the uncertain testimony of slippery memory.

21. *The grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."*

In that case recovery of a consolidated and expected commission, rendition of accounts and possession of same immoveable property was in question.

Therein the plaintiff was a tenant of the Defendant. The second plaintiff, the father of the first Plaintiff, entered into an Agency-cum-Deed of license with the appellant-defendant. Earlier the defendant was having a business of tailors and drapers. He allegedly approached the Plaintiff No. 1 for use of his premises in question as his tenant as a show room on a license-cum-agency basis.

The defendant contended that he was in lawful occupation/possession as a tenant under the plaintiff, but, some documents had been obtained from him on false representations, giving an impression to him that they were required to be produced before same court for fixation of standard rent in a case of eviction and they were not meant to be acted upon otherwise.

It is on that premise that the observations were made in paragraph 22 of the said judgment.

Prima facie, therefore, it is difficult to accept the submission of Mr. Jayant Bhushan that the parties had negotiated for entering into some other types of agreement, which would include contractual obligations not only on the part of the Respondent No. 1 but also on the part of the Respondent No. 2 to carry its channel both on DTH and cable platforms.

In this case, the Petitioner relies upon the agreement. It does not say that the agreement was not meant to be acted upon.

Even before us, no prayer has been made that the agreement be declared to be a sham one or otherwise not binding on the parties.

The Petitioner has, in fact, prayed for the following interim orders:

> "*Pass an ad-interim ex-parte order directing the Respondents herein to restore the news channel at its original slot no. 133 as a free to air channel and at the DTH network of the Respondent No. 1 and at S-38 on the cable network of the Respondent No.2.*"

Perusal of the said prayer would clearly go to show that restoration of the news channel of the Petitioner has been sought for at its original slot no. 133 as a free to air channel.

Keeping the view the fact that agreement in question was merely a carriage agreement and not a placement agreement; interim order to the said effect as prayed for by the Petitioner cannot be allowed.

Mr. Bhushan, however, would contend that the interim prayer of the Petitioner is in two parts and even if the second part of the prayer cannot be granted, an interim order for restoration of the channels may be passed.

The plain language used in the prayer portion, however, does not show that the interim prayer made by the Petitioner is in two parts.

Be that as it may, the Petitioner in our opinion has also no legal right to obtain such a direction from this Tribunal.

It is now well settled by reason of various decisions of this Tribunal that whereas there exists a ‘must provide’ clause in the Regulations there does not exist any ‘must carry’ clause.

The carriage regime although is regulated, what can primarily be enforced, is the right of the public and not the right of the parties to such agreement. Whereas in the case of transmission of signals of the channels of the broadcaster, notice must be issued in terms of clause 4.1 as also a public notice under clause 4.3 in the case of a proposed termination of a carriage agreement only a public notice under clause 4.3 may be necessary to issued.

In M/s Usodhaya Enterprises Pvt. Ltd. V. M/s Digicable Network (India) Pvt. Ltd. Petition No. 334(C) of 2011, this Tribunal:

> "*The Petitioner has prayed for passing of an order of injunction in mandatory form. It was, therefore, required to establish a strong prima facie case.*
>
> *We will assume that the agreement does not contain any termination clause. We may furthermore assume that in any event the conditions laid down in the Respondent's letter dated 24.12.2009 are not attracted.*
>
> *There cannot further be any doubt or dispute*

that the Respondent has not brought on record any letter terminating the said agreement.

Mr. Bhatia, however, would contend that the termination of the agreement in the facts and circumstance of this case may be held to have done in terms of the letter dated 21.07.2011.

The Petitioner in this Petition accepted that its channel had been transmitted only at S-32 band from 26.07.2011 wherefor it intends to place reliance upon a compact disc recorded in that behalf. The Respondent, therefore, has committed a breach of contract at least on and from that date.

Even if the Respondent has committed gross breach of contract, in the facts and circumstances of this case, the Petitioner would only be entitled to damages, having not approached this Tribunal immediately thereafter.

Section 14(1) (a) read with Section 41(1)(e) of the Specific Relief Act, 1963 clearly prohibit grant of an order of injunction in a case of this nature. This

Tribunal's jurisdiction, therefore, clearly circumscribed by the aforementioned provisions."

On a query made by us as to why the Respondent No. 2 had been carrying the channel of the Petitioner, Mr. Maninder Singh submitted that any MSO can carry a 'free to air' channel for which no permission is necessary nor any carriage agreement is required to be entered into.

According to Mr. Singh as the Respondent no 2 had not been charging any amount from the Petitioner it can stop retransmission of its signals any time upon complying with the provisions of clause 4.3 of the regulations.

It is, however, accepted at the Bar that as the Respondent No. 2 has not issued any public notice, it has been carrying the channel of the Petitioner.

Mr. Jayant Bhushan urged that on its own showing the Respondent no. 2 has shifted the frequencies. In this behalf our attention has been drawn to the following statement made in the short reply of the Respondent No. 2:

> "*It is, however, denied that the transmission of Petitioner's channel from the current frequency is unclear and further stated that the Head End output of the current frequency is absolutely clear without any grinds. The Petitioner may be put to strict proof thereof. It is also stated that prior to shifting the frequency of the Petitioner's channel, the answering Respondent gave adequate notice by way of on screen display scrolls on its network indicating that the frequency of the channel is likely to be changed.*"

We have been assured that the Respondent No. 2 's headend can be inspected by the technical team of the Petitioner to ensure that the output of the current frequencies is without any grains and if there is any problem at the end of the LCOs the same as far as possible also may be sorted out.

Having regard to the prayer made by the Petitioner vis a vis the admitted fact that a agreement dated 24.08.2011 has come to an

ends and the Respondent No. 1 has issued a public notice on 29.08.2012, the Petitioner cannot be said to have any legal right to obtain an order for injunction as has been prayed for or otherwise.

So far as the Respondent No. 2 is concerned there being no agreement with the Petitioner, prima facie we are of the opinion that this Tribunal cannot direct it to carry the channels of the Petitioner although it's desired ; the only statutory requirement being that a public notice under clause 4.3 of the Regulation is required to be issued.

Mr. Jayant Bhushan would urge that the Petitioner is ready and willing to abide by any terms which may be imposed by this Tribunal for issuance of the direction upon the Respondents to carry its channel as has been prayed for.

As terms and conditions for renewal of a carriage agreement depends on the agreement between the two parties, this Tribunal cannot make a contract for them.

It is also not a case where carriage of a channel is otherwise governed by a regulatory regime.

For the reasons aforementioned, the Petitioner having not been able to make out a prima facie case, no order of injunction as has been prayed for can be granted.

The said prayer is therefore rejected.

……..
(S.B. Sinha)
Chairperson

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(P.K.Rastogi)
Member

MM