TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th 29th October, 2013

Petition No. 57 (C) of 2012

(M.A. No. 200 of 2012)

M/s. Manthan Broadband Services Pvt. Ltd. ... **Petitioner**

Vs.

Navoneel Netcom Services Pvt. Ltd. ... **Respondent**

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner : Ms. Nidhi Parashar, Advocate
for Mr.Navin Chawla, Advocate

For Respondent : Mr. Tejveer Singh Bhatia, Advocate
for Mrs. Prathiba M. Singh, Advocate

J U D G M E N T

KULDIP SINGH

The petitioner is a Multi System Operator in Kolkata and districts of West Bengal. It receives signals of various Free to Air channels and Pay channels from the broadcasters at its head-end, and thereafter, retransmits the same to the

cable operators affiliated to it for further transmission to their subscribers. The present petition has been filed under Section 14 read with Section 14-A of the Telecom Regulatory Authority of India Act, 1997.

2. The respondent represents a number of local cable operators (LCOs) in the Durgapur Township. The respondent deals directly with the MSO on behalf of the LCOs for provision of signals, and thereafter via the respondent, the LCOs retransmit the signals received from MSO to their subscribers.

3. Admittedly, an agreement dated 29.12.2008 was signed between the parties where under the petitioner was to supply signals of TV channels to the respondents.

4. On 9.1.2012, the Respondent gave 21 days' notice to the petitioner for the termination of the aforesaid contract. It was stated in the notice that due to unavoidable circumstances, the respondent is no longer able to continue with the signal of the petitioner.

5. The present petition is filed to restrain the respondent from migrating to another MSO by terminating the agreement with the petitioner, for which he has

given a 21 days' notice on 09.01.2012, as also to recover the dues allegedly owed by the respondent to the petitioner. The prayer made in the petition is as follows:-

> *"(a) declare the notice dated 09.01.2012 as null and void and restrain* the Respondent from taking signals of TV channels from any other MSO/broadcaster;
>
> *(b) direct the Respondent to forthwith pay to the petitioner a sum of Rs.78,38,142/- (Rupees Seventy Eight Lacs Thirty Eight Thousand One Hundred Forty Two Only) as on 30.01.2012 along with interest at the rate of 18% p.a. and also clear the future monthly subscription dues on time;*
>
> *(c) pass an ad-interim ex-parte order in terms of prayer (a) above;*
>
> *(d) Pass such other and further orders as may be deemed fit and proper in the facts and circumstances of the case."*

6. As per the petitioner, it had built a digital head-end in Durgapur at the behest of the respondent prior to entering the above agreement and it had invested close to Rs.2 crores in setting up this fully operational digital head-end and further it had deployed about 1500 Set Top Boxes (STBs). It is the contention of the petitioner that taking into consideration the huge investment made by it, the termination clause in the aforesaid affiliation agreement did not

give any free will right to either party to terminate the same at any point as per its own wish and it was agreed to between the parties that the Agreement could be terminated only upon due satisfaction of any of the conditions as laid down in the termination clause 16 of the Agreement.

Clause 16 of the Agreement is as under:

> *"16. TERMIANTION*
>
> *This agreement shall be terminated by:-*
>
> *(a) sending a 21 days notice by either party to the other on breach of any of the terms and conditions set out in the agreement, or*
>
> *(b) either party going into liquidation or becoming insolvent either compulsorily or voluntarily or a Receiver being appointed to administer the assets of either party, or*
>
> *(c) non-payment of dues by the Cable Operator in terms of this agreement, or*
>
> *(d) if in the opinion of the Principal the business is being carried on by the Cable Operator in a manner prejudicial to the interests of the subscriber or the Principal or endangering safety of the members of the public, or*
>
> *(e) any change in any statute, rule or regulation framed by the Central or State Government, TRAI or any other regulatory body as may be determined from time to time which makes it impossible for either party to carry its business in accordance with the provisions of this agreement, or*

(f) mutual agreement between the parties."

7. The mater came up for preliminary hearing before the Tribunal on 31.01.2012. However, no interim order was passed on that date and notices were directed to be served upon the respondent. On 09.02.2012, Mr. Tejveer Singh Bhatia, learned counsel for the respondent, submitted to this Tribunal that the respondent has already stopped taking supply of signals from the network of the petitioner after serving notice on the petitioner in terms of clause 4.2 of the Regulations as also by publication of a public notice under clause 4.3 of the Regulations. The matter was further heard with regard to the interim application and it was also brought to the notice of the Tribunal that there was a negative covenant as per para 12.6 of the agreement. However, vide it's order dated 24.02.2012, the Tribunal observed that on a plain reading, it does not contain any negative covenant prohibiting the respondent to migrate to the network of another MSO and it merely postulates that it would not supply signals of its channels to the subscribers or any other party without the respondent's prior consent. After considering the various arguments from the counsels, the Tribunal was of the opinion that the balance of convenience and irreparable injury lies against the grant of injunction in mandatory form. The Tribunal further observed that petitioner being a company must be maintaining its books of accounts and it can work out the losses which may have been

suffered by it so as to enable it to claim damages against the respondent. The prayer for injunction was refused.

8. Vide order dated 23rd April 2012, the Tribunal, on the statement of the Ld. Counsel for the petitioner that application for amendment of the petition shall be filed within a week, asked the Respondent to file its reply to the said application within 10 days thereafter. The petitioner filed miscellaneous application bearing M.A. No. 200 of 2012 on 14.5.2012 praying for allowing the petitioner to amend the petition in view of the order dated 24.02.2012 of this tribunal. The petitioner also sought to add following clause (cc) after clause c of the prayer clause:

> *"(c1) Direct the respondent to pay a sum of Rs.20 lakhs towards infrastructure provided by the petitioner.*
>
> *(c2) Direct the respondent to pay damages quantified at Rs.60 lakhs for breach of the obligations under the agreement between the parties and for non-compliance with the Regulations.*
>
> *(c3) Direct the respondent to return the equipment of the petitioner."*

Thereafter, taking into consideration the pleas of the parties, the Tribunal framed the issues vide its order dated 9th July, 2012 .

9. The counsel for the petitioner and the respondent were heard at quite some length by this Tribunal.

We first examine the issue of whether the agreement was in subsistence on 09.01.2012 the date on which the respondent gave 21 days' notice to the petitioner.

As per the respondent, the agreement period was only for one year as per the industry practice. No doubt the agreements are generally renewed on a year-to-year basis, however, in the instant case we find that the term of the validity of the agreement was not specified. We further note that the signals were being supplied to the respondent, invoices were being raised and paid from time to time, the parties were in discussion with each other with regard to the further discounts, et cetera. We, therefore believe that the agreement was very much in subsistence on 09.01.2012.

10. We next examine the issue of whether the respondent has breached the conditions of the agreement, whether it has followed the regulations in

terminating the same and whether the claim of the petitioner for damages is justified. The claim for damages is based on the premise that there was no term specified for the termination of the contract between the parties. The clause regarding term of the contract contained blank with regard to the same. The blanks in the clause specifying term of the contract have not been filled as can be seen from the clause reproduced below:-

> *"6. APPOINTMENT & GRANT : The Principal doth hereby appoint the Cable Operator as its agent and doth hereby grant a right of franchise to receive signals through a feeder line for further instant transmission or communication to its subscribers within the territory allotted to the Operator for a term of .....years, commencing from .....to.....on the terms conditions and stipulations herein contained."*

It was argued by the counsel for the petitioner that it was intentionally left blank as there was no date of termination envisaged in the contract. In support of its argument, the petitioner drew our attention to clause 10.1.3 where a service charge of Rs. Nil was filled. It is the contention of the petitioner that the fact that some clauses were filled implies that clauses not filled were intentionally left blank. It was also argued that there was a negative covenant in clause 12.6, which is reproduced below:-

"12.6 Not transmit either to the subscribers or to any other party, any signal, commercial and/or other information not received through the Principal's network to the satisfaction of the Principal."

Counsel for the petitioner argued that since there was no defined term for the contract, the same could be terminated only as per termination clause 16[clause 16 of the agreement is as reproduced at para 6 of this judgment]. It was further argued that since the respondent did not give any of the conditions mentioned in the clause 16, he could not have terminated the agreement and migrated to any MSO especially in view of the negative covenant. It was also contended by the counsel that before migrating to the other MSO, the respondent did not take No Dues Certificate from it terms of the clause 3.2 of the regulations.

First schedule to the agreement gives area of operation of the cable operator as Durgapur Steel Township and adjacent areas. Counsel for the petitioner argued that since there was no other cable operator in the township of Durgapur, the head-end was specifically set up for the respondent at the cost of Rs.2 crores. The damages claimed in the petition are accordingly claimed due to losses suffered on this investment on the alleged breach of contract by the respondent.

With regard to the term of the agreement, it is the contention of the respondent that the agreement dated 29.12.2008 had expired by flux of time on 28.12.2009. As per the respondent, there was no requirement to give any 4.2 notice under the Regulations. It is further submitted by the respondent that after issuance of 4.2 notice the respondent further issued notices under clause 4.3 of the Interconnect Regulations and after waiting for 21 days notice period, discontinued the supply of the petitioner's TV channels.

We observe that the clause related to the term of the agreement is left blank in the agreement. The Ld. counsel for the petitioner argued that the same is intentionally left blank. Be that it may, we are not convinced with the argument of the petitioner that the respondent could not have terminated the same by giving notice under the clause 4.2 and 4.3 of the regulations. If the arguments of the Counsel were to be accepted, the same would imply an agreement in perpetuity that cannot be terminated even as per the Interconnection regulations. It does not appear logical to us. As per clause 4.2 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, a distributor of TV channels is required to give three weeks' notice to the MSO for disconnection of its channels. As per clause 4.3 of the

Interconnect Regulations, the notice is also required to be given in two local newspapers. Clauses 4.2 and 4.3 are as under:-

> *"4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster, multi system operator or HITS operator, as the case may be, clearly giving the reasons for the proposed action.*
>
> *4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language. In case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of the regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later."*

It is not in dispute that notices above were given. We are of the view that the contention of the petitioner that the agreement cannot be terminated even after due notices are given as per regulations, is not correct. We also do not agree with the contention of the petitioner that it was mandatory for the respondent in terms of clause 3.2 of the regulations to take a no dues certificate from it before migrating to another MSO.

As regards negative covenant in the agreement, the Tribunal has already held in its earlier order dated 24.02.2012 that on plain reading of this clause it does not contain any negative covenant prohibiting the respondent to migrate to the network of another MSO. The relevant para is as follows:-

> *"19. This leaves us only with a question as to whether there exists a negative covenant. We, heretobefore, have taken a note of paragraph 12.6 of the agreement. On a plain reading, it does not contain any negative covenant prohibiting the Respondent to migrate to the network of another MSO. It merely postulates that it would not supply signal of its channels to the subscribers or to any other party without the Respondent's prior consent. If the agreement is not to be specifically enforced, the said provision also cannot be given effect to."*

In view of the foregoing we find that the respondent has terminated the agreement after following the regulations in this regard. We further find that the respondent cannot be held in breach of the agreement when the same is terminated in accordance with the regulations. Therefore, we find that no case for damages has been made out by the petitioner. The Ld. Counsel for the petitioner also argued that since its agreements with the broadcasters were based on the financial year, the respondent must pay the subscription charges

for February and March, 2012 also. However, we do not agree with this in view of the termination of the agreement as above.

11. We now come to the issue of the amount payable by the Respondent to the petitioner in terms of the agreement between the parties. In this regard, we observe that there are two claims, one related to the amount of the subscription fees and the other related to the amount payable due to the Set Top Boxes (STBs) supplied by the petitioner to the respondent.

As per the counsel for the petitioner, the respondent has to pay the following dues to the petitioner:-

(a) Rs.49,43,102/- as subscription fees up to 31.01.2012;

(b) Rs.28,95,040/- towards the Set Top Boxes.

In this regard our attention was drawn to the statement of accounts annexed with the petition (Annexure P-9 at page 44 and 45 of the paper book).

12. We first deliberate the issue of subscription amount. As per the second schedule to the agreement, the rates of various channels to be paid are specified. The discount to be paid is also specified therein. The learned counsel for the respondent drew our attention to his letter dated 29.12.2008 wherein it

has proposed a discount of Rs.15,926/-. Learned counsel for the petitioner, however, argued that the discount provided for in the second schedule to the agreement was arrived at after taking into consideration this letter. It is noted that the date of agreement is the same, i.e., 29.12.2008 as the date of the aforesaid letter. We, therefore, find that the discount as specified in the agreement is only applicable.

It is seen that as per the statements of account given by the Petitioner (page 44-45 of the paper book) the respondent has to pay an amount of Rs.49,43,102/- as on 31.1.2012 whereas as per the statement of accounts submitted by the respondent (page 80 of the paper book) it owes only 16,13,653/-.

The scrutiny of the two statement of accounts reveals that there are four credit notes, each of Rs.7,66,161/- which are claimed by the respondent as due from the petitioner. If these 4 credit notes are accounted for, the amount which remains as per petitioner's SOA is Rs.18,78,458/- as against Rs.16,13,653/- as per respondent's SOA. Both the counsels admitted that this difference is only due to taxes, etc. and therefore the figure of Rs.49,43,102/- is agreed as correct. As regards the credit notes to be given by the petitioner, we turn to annexure-1 of the agreement which is at page 31 of the paper book. As per this, the

respondent will be allowed the 12th month free, i.e., no payment will be made to the petitioner for the 12th month. The relevant clause is reproduced below:-

> *"That NNSPL (Cable Operator) will make the agreed payments duly on or before the due date and will be allowed the 12th month free, that is no payment will be made to MBSPL (Principal) for the 12th month."*

The learned counsel for the petitioner argued that this one month free was subject to the agreed payments being made by the respondent on the due date whereas he has been delaying in making the payments. The respondent, on the other hand, claims that this free period was later increased to two months in a year and in support of his arguments, he drew our attention to the meeting held on 7th May, 2010 between the parties. The fact of the meeting is not disputed by the parties. The minutes of the meeting are reproduced below:-

Minutes of the Meeting

1. *"Technical problems were raised and would be looked into was confirmed by Manthan.*

2. STBs to be sold at Rs.600/- per STB was proposed and accepted by Manthan.

3. Monthly feed charges discount was proposed at 10 % more on the existing invoice. To this Manthan proposed an additional discount of one month charges. It was finalized that on the existing billing Novoneel will get a total of two month fee period.

4. New agreement will be executed in continuation of the present term and same will be for five years."

Though the para 3 of the minutes of the meeting states that the respondent will get two months free period, but the counsel for the petitioner states that the agreement arrived at in the meeting was subject to a new agreement to be executed in continuation of the present term for 5 years as per paragraph 4 of the same meeting.

The learned counsel for the respondent also drew our attention to a letter dated 30.12.2011 (page 40 of the paper book) wherein the petitioner had stated that the discount of two months in the previous year will be revised to 4 months

and adjustments will be made accordingly. As per the respondent, this is an admission that 2 months discount was to be given in the previous year.

Learned counsel for the respondent also drew our attention to Exhibit PW1/RC-7 and Exhibit PW1/RC-8 which are 2 credit notes dated 31.3.2011 and 30.9.2010 each for an amount of Rs.7,66,161/-

It is an admitted fact that two credit notes, each of Rs.7,66,161/- were issued by the petitioner to the respondent and they have not been accounted for in the amount claimed as due by the petitioner. Though the learned counsel for the petitioner argued that this was subject to the due payments being made in time, we cannot agree with the petitioner because having accepted the payments from the petitioner from time to time and also after having given those two credit notes, now the respondent cannot be denied the benefit of the same. It is relevant that these credit notes are as per annexure 1 of the agreement as per which the twelfth month is to be given free. However, we also cannot agree with the contention of the respondent that two more credit notes were due to him on account of the discussions and agreement reached in the meeting dated 7th may, 2010 due to the very fact that a new agreement for a term of 5 years was to be executed in terms of this meeting and admittedly it was not executed. We are of the opinion that if the agreement arrived at in the meeting was to be

implemented that should have been done in *toto* including the execution of a new agreement for 5 years. The respondent having failed to do so, we, therefore, find that the respondent is entitled to only two credit notes which were already issued by the petitioner to it in terms of the agreement between the parties. After accounting for these two credit notes of Rs.7,66,161/- each, the dues to the petitioner on account of subscription are Rs.34,10,780/- (based on the admitted balance sum of Rs.49,43,102/-).

Learned counsel for the respondent also claimed that the respondent was entitled to reduction of Rs.6,47,500/- (17500 X 37) on account of migration of a local cable operator, Mr. Manor Singh. However, the same was denied by the petitioner. The respondent also claims Rs.8.00 lakhs on account of some head-end equipment which is also denied by the petitioner. We find that the agreement between the parties is based on a defined SLR (Subscriber Line Ratio) which may not be varied unilaterally . As regards the equipment supplied by the respondent for Rs. 8 Lakhs, our attention was drawn to page 37-40 of the evidence folder which are receipts by the petitioner for some equipment. However, these are just receipts for some equipment that do not mention any amounts. We do not find any evidence that the petitioner agreed at any time to pay for the same.

13. We now come to the issue of the amount to be paid on account of the Set Top Boxes (STBs). As per the petitioner, it has supplied 1,488 STBs to the respondent. This fact is not denied by the respondent. The dispute is with regard to the amount payable by the respondent to the petitioner for STBs. As per the petitioner, the cost of the STBs is Rs.2,080/- per STB and the total amount payable by the respondent on this account for 1488 STBs is Rs.30,95,040/-. Out of it, Rs.2.00 lakhs have been paid and therefore balance amount claimed is Rs.28,95,040/-. The respondent, on the other hand, states that in terms of the meeting dated 7th may, 2010 it has to pay Rs.600/- per STB and it has already paid an amount of Rs.4.00 lakhs.

The petitioner in support of the cost of the STB drew our attention to a copy of invoice submitted by it as annexure P-16 (page 121 of the paper book).

Learned counsel for the petitioner also drew our attention to the evidence by way of affidavit of Mr. Gautam Nath on behalf of the Respondent. As per the counsel, the respondent's witness has admitted the outstanding but claims that it is inflated.

Our attention was also drawn to para 11 of the affidavit of the respondent's witness which is reproduced below:-

"11. I state that from time to time the petitioner had issued credit notes to the respondent. However, I state that the petitioner while filing the present petition has neither mentioned about those credit notes nor has accounted for these credit notes in the alleged statement of account filed by it in the present petition. I state that in fact the petitioner has approached this Hon'ble Tribunal with unclean hands and by suppressing material documents before this Hon'ble Tribunal which are relevant for adjudication of the present petition. I further state that the petitioner has shown the cost of set top box to be Rs.2000/- per set top box. However, the petitioner had only billed the respondent @ Rs.1,000/- per set top box and had agreed in the minutes of meeting that the said set top box will be charged @ only Rs.600 per set top box. I further state that the petitioner had made payment of Rs.4.00 lakhs towards these set top boxes and is ready and willing to return all the set top boxes provided the payment of Rs.4.00 lakhs is refunded to the respondent along with interest @ 12 per cent per annum." (Emphasis supplied)

We notice from the above that witness of the respondent admits that the petitioner has billed the respondent @ 1,000 per STB. The witness, however, states that a payment of Rs.4.00 lakhs has been made towards the same.

The learned counsel for the petitioner argued that this figure of Rs.4.00 lakhs came for the first time during evidence and was not part of the reply of the respondent and therefore the petitioner could not rebut it in rejoinder.

The cross examination of Mr. Ashutosh Nigam, PW-1 in response to questions regarding STBs is as follows:-

> *"Q77: I put it to you that the set top box supplied by the petitioner to the respondent was to be provided to the respondent at Rs.600/- per STB.*
>
> *A: No. The purchase price of the STB from the petitioner was Rs.2020/- and as discussed in the meeting held on 7.5.2010 the respondent had requested that their selling price to be reduced from Rs.1,000/- to Rs.600/- considering the huge investment that the petitioner had made in Durgapur and also the price of STB in other markets apart from Durgapur was*

higher, the petitioner considered the respondent's selling price to be Rs.600/- under the pretext that the respondent would sign a fresh agreement for five years, in such time the subsidy that was extended to the respondent could have been recovered. ***(emphasis supplied)***

Q78: Did the petitioner raise any invoices regarding STB on the respondent?

A: No.

Vol: Invoices were not raised on the request of the respondent wherein they were unable to make the payment towards STB through cheque because of internal accounting issues. They had told us to raise the invoice once the accounting issue is resolved. ***(emphasis supplied)***

Q79: I put it to you that your above mentioned voluntary statement is incorrect and there was no such request made by the respondent as stated by you.

A: It is incorrect.

Vol: It was a verbal request. I cannot prove it."

From the above, it can be deduced that there was agreement between the parties for selling price of STBs as Rs. 1,000/- per STB which was considered to be reduced to Rs.600/- when the agreement was being considered for renewal for another 5 years. Further from the cross-examination of PW-1 above, it is evident that invoices were not raised for STBs and moreover, payments were not being made by cheque for these. Our attention was also drawn to two receipts for Rs, 2 lakhs each dated 29.09.11 and 28.03.2011 [Ex PW-2/R1 and Mark "Y"]. The petitioner's witness PW-2 is not able to convincingly deny the same. In view of this and the statement made by the respondent's witness on affidavit, we accept the payment of Rs. 4.00 lakhs by the respondent to the petitioner in this regard.

Considering that these STBs are further supplied to the subscribers, we hold that it is only fair that the respondent be asked to pay the price agreed between the parties for selling these STBs, which is clearly Rs.1,000 per STB . Accordingly, we hold that the respondent has to pay Rs. 14,88,000 for 1488 STBs @ Rs. 1000 per STB out of which Rs. 4 lakhs have already been paid and, therefore, the balance due on this account is Rs. 10,88,000/-

13. Based on the foregoing, we allow the petition partially and direct that the respondent shall pay the following amounts to the petitioner:

(a) Rs. 34,10,780/- on account of subscription fee dues.

(b) Rs. 10,88,000/- on account of 1488 Set Top Boxes.

(c) Pendente Lite and future interest @ ~~of~~ 10 % till the payment is made.

There is no order as to costs. M.A. No. 200 of 2012 is also disposed of with the above directions.

(Aftab Alam)
Chairperson

.....

(Kuldip Singh)
Member

hkc/rkc/23.9.13