

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

Dated 1st March, 2016

Broadcasting Petition No.473 of 2014

(M.A. No.329 of 2014 and M.As. Nos.68, 79, 188, 431,481 & 482 of 2015)

Malwa Cable Operator Sangarsh Committee ...Petitioner

Vs.

Fastway Transmission Pvt. Ltd. & Anr. ...Respondents

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE DR. KULDIP SINGH, MEMBER
HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER**

For Petitioner : Mr. Vineet Bhagat, Advocate
Mr. Shubham Jain, Advocate

For Respondents : Mr. Navin Chawla, Advocate
Mr. G.S. Oberoi, Advocate

Amicus Curiae : Mr. Abhishek Malhotra, Advocate

ORDER

By Aftab Alam, Chairperson – Whether it is open to a large Multisystem Operator (MSO), commanding regional dominance to refuse to give signals to the Local Cable Operators (LCOs) for re-transmission in analogue mode in areas that are yet to come under mandatory digital addressable system (DAS) regime? Or to put the same issue slightly differently, can the MSO insist that it would give signals for re-transmission only in encrypted digital addressable mode regardless of whether the area of operation of the LCO falls under the DAS regime or it is yet to come under the DAS regime? These two questions sum up the dispute between the two sides that needs consideration by the Tribunal.

The petitioner, *Malwa Cable Operators Sangarsh Committee*, as the name suggests is a loose association of LCOs who have been getting signals of TV channels for re-transmission from the respondent which is a MSO. The LCOs, represented by the petitioner *Sangarsh Committee* operate in *Talwandi Sabo, Cot Shamir, Cot Fatah* and other rural areas of Punjab. It is significant to note that all these LCOs operate in analogue mode. They have been receiving their signals from the respondent, which for all intent and purposes is the only MSO operating in Punjab, for the past several years. According to the petitioner, earlier the LCOs were getting 92 channels from the respondent for re-transmission in analogue

mode on payment of a lump sum amount (fixed fee) as the monthly subscription fee. Around June, July, August 2014 the respondent started giving them set-top boxes for seeding at the subscribers' places. At that time it only charged Rs.35/- per month as the **rental** of the set-top box in addition to the fixed fee payable each month. By and by, however, the respondent demanded higher amounts for each set-top box. The petitioner states that its member LCOs operate in villages and their subscribers are poor rural people who simply cannot pay the charges as demanded by the respondent. Hence, the LCOs resisted the respondent's demand for higher rates and the unilateral change in the arrangement between the two sides but they were subjected to all kinds of harassment such that they had no option but to seek the Tribunal's protection in order to survive in the business.

According to the respondent, the real dispute between the parties is in regard to the mode of transmission. The respondent has taken the decision that it would transmit signals only in encrypted digital addressable mode and supply signals down in the distribution chain only for re-transmission in encrypted digital addressable mode. The LCOs whom the petitioner claims to represent, on the other hand, insist on continuing with transmission in analogue mode that gives them unlimited scope to under-report the subscribers and thus derive grossly undue profits at the expense of the respondent.

Here it needs to be clarified that the respective cases of the parties, as indicated above, crystallised only at a later stage, after the matter had proceeded before the Tribunal for some time. Initially the petitioner sought to agitate before the Tribunal a multitude of grievances without much coherence or even clarity. It was stated on its behalf that the respondent was causing unjustified and unauthorized disruptions in the supply of signals to the LCOs being represented by the petitioner; that it cut the cables laid out by the LCOs; that it set up dummy cable operators who poached upon the subscribers of these LCOs by offering channels at very low rates or even free; that, in collusion with the police and the local administration, the respondent got some of these LCOs implicated in false criminal cases; that, in short, the LCOs were being subjected to harassment by the respondent in many ways so as to either get driven out of business or to yield to the respondent's demands and accept the rates and terms on which the respondent chose to give signals to them. Dealing with the grievances agitated before it, the Tribunal passed some interim orders that were intended to douse the immediate fire. The interim directions made by the Tribunal apparently hurt and upset the respondent. Mr. Chawla, representing the respondent repeatedly expressed the grievance that taking advantage of the status quo order passed by the Tribunal, the LCOs were not making any payment or were making payment @ Rs.35/- per month which made it totally unviable for the respondent to continue to supply

signals to them. Learned counsel further stated that the petitioner was not disclosing the number and identities of the LCOs represented by it and taking advantage of the vagueness, a number of LCOs who had earlier executed agreements with the respondent had gone back on their agreements and had stopped making any payments to the respondent on the pretext that the matter was pending before the Tribunal. The petitioner in turn alleged that despite the interim directions passed by the Tribunal the LCOs continued to suffer at the hands of the respondent and that the respondent not only tried to by-pass the Tribunal's directions but also deliberately flouted them. At one stage the Tribunal also appointed a team of pleader commissioners to visit the area of operation of the LCOs and give its report regarding the situation prevailing there.

The earlier part of the proceedings is mentioned here only for the sake of the record but there is no need to go into those details in view of the issue that has finally emerged for consideration. It needs, however, to be noted that asked to clearly identify the LCOs whom the petitioner, *Sangarsh Committee* claimed to represent, it initially filed a list of 200 LCOs. Later on, however, it was able to submit the individual statements of account of only 133 LCOs. It must, therefore, be held to represent those 133 LCOs and any orders passed in this case would

apply to the 133 LCOs, the list of which is given in the affidavit filed on behalf of the petitioner on 09.10.2015.

The other feature of the proceedings that needs mentioning is that at one stage the Tribunal felt that the case of the petitioner was not being presented before it with sufficient coherence and clarity. At the initial stages in the proceedings, the lack of clarity in presentation of the petitioner's case before the Tribunal was further compounded because different lawyers appeared on its behalf on different dates. In those circumstances the Tribunal requested Mr. Abhishek Malhotra to appear on behalf of the petitioner. Mr. Malhotra rendered valuable assistance to the Tribunal and was able to introduce a good deal of coherence to the petitioner's case. Mr. Malhotra was later joined by Mr. Vineet Bhagat who was privately engaged by the petitioner to represent it before the Tribunal.

As the respective cases of the two sides were clearly spelt out, the Tribunal on 30.11.2015 passed the order setting forth the legal issue that arose for its consideration. The order dated 30.11.2015 is reproduced hereunder:

“Mr. Vineet Bhagat, counsel for the petitioner files an affidavit which, according to him, explains the anomalies pointed out in the respondent's application in regard to payments made by the different LCOs being represented by the petitioner.

In this petition, the parties are in dispute on a number of issues of facts, some of which may be stated as under:

- (i) The rate at which the LCOs are liable to make payment for the

- signals received from the petitioner;
- (ii) Whether even at the rate admitted by the petitioner (i.e. Rs. 35/- per STB) full payments have been made by each of the LCOs to the respondent MSO; and
 - (iii) Whether as a result of the respondent's /MSO's action, some of the LCOs have suffered substantial losses in their subscriber base.

However, these issues of facts are subsidiary to the principal question of law that arises in the case and which both sides agree can be decided without leading any evidence. The principal question that arises for consideration in the case is whether it is open to the MSO to insist on supplying signals in digital mode alone in areas that are yet to come under digital regime in terms of the notification issued by the Central Government under the Cable Television Networks (Regulation) Act, 1995. The LCOs represented by the petitioner are operating in the Malwa region of Punjab, part of which is likely to come under the DAS regime from 1.1.2016 but the larger rural part of which would come under DAS regime only in 2017. Admittedly, the respondent has started giving its signals in digital mode from July, 2014 and has been insisting that the LCOs should take STBs from the petitioner (sic. respondent) and should start retransmitting the petitioner's signals in digital mode from that date and this is at the core of controversy between the two sides. A connected question that would arise is, in case the MSO has the right to commence digital transmission even before the area comes under the DAS regime, how would DAS transmission impact the subsisting agreements that the LCOs might have with the MSO.

We, accordingly, propose to first post the main issues arising in the case for hearing both sides and the rest may follow the order on this issue.

Fix for orders as the last case on the aforesaid issue on 22.12.2015.”

As directed in the order, both sides were heard on 18.01.2016, 20.01.2016, 21.01.2016 and finally on 28.01.2016. The case of the petitioner was presented both by Mr. Bhagat and Mr. Malhotra. Mr. Chawla appeared for the respondent.

Having thus stated the brief background of the case, we now come to the issue that arises for consideration. But before taking note of the rival submissions, it may be noted that the issue as indicated above is actually not *res integra* in so far

as the Tribunal is concerned and there is already a decision by the Tribunal on the issue, albeit arising in a different context. However, having regard to the fact the respondent's action is causing much grievance to a large body of LCOs and who plead that they were being driven out of business we decided to revisit the issue and heard both sides as if on a clean slate.

It is indubitable that the change in transmission of TV signals from analogue mode to encrypted digital addressable mode is a major step forward. It is highly beneficial not only for the subscriber but also for all the players in the broadcasting sector. It gives a much better viewing experience, besides giving the viewer the choice of content for viewing. Further, in place of the opacity of analogue transmission that made it impossible to determine the number of viewers watching a TV channel, transmission in digital addressable mode provides complete transparency and openness that makes it easier for the broadcaster and the distributors of channels at different tiers to enter into inter-connect arrangements. It also cannot be doubted that both the law and the Regulator are guiding the broadcasting sector towards complete digitisation and, as a matter of fact, a large part of the country has already come under DAS regime where transmission of signal in analogue mode is unlawful.

The Cable TV systems are governed by the Cable Television Network (Regulation) Act, 1995 and section 4A of the Act, in so far as relevant for the present, provides as under:

“4A. Transmission of programmes through digital addressable systems, etc. – (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 re-transmit programmes of any channel in an encrypted form through a digital addressable system with effect from such date as may be specified in the notification and different dates may be specified in the notification and different dates may be specified for different States, cities, towns or areas, as the case may be:

Provided that the date specified in the notification shall not be earlier than six months from the date of issue of such notification to enable the cable operators in different States, cities, towns or areas to install the equipment required for the purposes of this sub-section.”

The Central Government, in exercise of powers under Section 4A of the CTN(R) Act issued the notification on 11.09.2011. The notification reads as under:

“In exercise of the powers conferred by sub-section (1) of the section 4A of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995), as amended by the Cable Television Networks (Regulation) Amendment Ordinance, 2011 (3 of 2011), the Central Government, having been satisfied that it is necessary in the public interest so to do, hereby, notifies that **it shall be obligatory for every cable operator to transmit or re-transmit programmes of any channel in any encrypted form through a digital addressable system** in such city, town or area, as specified in column (2) of the following Table, in respect of corresponding State or Union territory, as specified in column (3) thereof, with effect from such date, as specified in column (4) of the said Table”

(emphasis added)

The notification, having regard to the technological preparedness in the broadcasting industry and other relevant considerations, mandated for the switch

over from analogue to encrypted digital addressable mode to take place in four phases. The first phase came into effect on 30.06.2012. It covered the four metropolitan cities. The second phase came into effect on 31.03.2013. It covered 38 cities as enumerated in the table given in the notification. Phase III covering all other urban areas (municipal corporations/municipalities), excepting the areas already covered by phases I and II and phase IV covering the rest of the country were was due to come into effect from 30.09.2014 and 31.12.2014 respectively. The Central Government, however, issued another notification on 11.09.2014 by which the date in regard to phase III was extended to 31.12.2015 and in regard to phase IV to 31.12.2016.

Mr. Bhagat stated that only 4-5 petitioner LCOs operate in areas that partly fall under phase III of digitisation; the rest of the LCOs and apart from a very small part, the entire area of operation of the LCOs being represented by the petitioner falls in phase IV of the digitisation. The statement made by Mr. Bhagat is accepted and we proceed on that basis.

On a plain language of the notification, it is quite lawful for the cable operators to operate in analogue mode until 31.12.2016 in their area of operation. At the same time, it is equally lawful for the respondent to transmit its signals for distribution in encrypted digital addressable mode, for the notification issued by

the Central Government does not prohibit transmission in digital mode prior to the dates of its enforcement in any area. No provision of the CTN(R) Act or any regulations framed by TRAI was brought to our notice that forbids the transmission of TV signals in encrypted form through digital addressable system in any area that is yet to come under the DAS regime in terms of the notification issued under section 4A of the CTN(R) Act. On the contrary there are provisions in the regulations that suggest that transmission in encrypted digital addressable mode is the preferred mode of transmission of TV signals¹ and in any case by 01.01.2017 the whole country will come under the DAS regime.

A question, therefore, arises whether the LCOs, who indeed have the right to make transmission of TV signals in their area of operation in analogue mode, can insist that the respondent must provide them TV signals for further transmission at their end in analogue mode.

Mr. Chawla, counsel for the respondent submitted that in 2012, TRAI announced the need for digitisation. The respondent could then see that future of the broadcasting industry lay in digitisation and it took the business decision to voluntarily move in the direction of digitisation. Since then, it has fully developed both its technological capabilities and commercial model on the digital addressable

¹ The relevant provisions of the regulations are fully referred to in the earlier judgment of the Tribunal dated 22 April 2014 in Petition no. 84 (C) of 2014.

system of transmission. In April 2014, the respondent formed packages of channels as per TRAI regulations and announced the package rates and called all the LCOs receiving signals from it to enter into agreements on based on packages and pay the monthly subscription fee as per the rates fixed for the packages. Mr. Chawla referred to Annexure-I to the respondent's application (filed under section 151 of CRPC for vacating the interim order passed by the Tribunal: page 232 of the brief). It is a copy of the rate card of the different packages of channels formed by the respondent, which is reproduced below:

		Customer		Fastway Share – subscription (Without ST)	LCO Share – Subscription (Without ST)
		MRP incl STB Rent and ST	MRP (without ST)		
1st TV	BST	112.86	99.00	37.60	61.40
	Silver	210.00	184.21	92.10	92.11
	Gold	265.00	232.46	111.84	120.62
	Platinum	305.00	267.54	129.83	137.72
	HD	399.00	350.00	192.98	157.02
2nd TV	BST-2	112.86	99.00	70.18	61.40
	Silver-2	160.00	140.35	92.10	48.25
	Gold-2	200.00	175.44	111.84	63.60
	Platinum-2	205.00	179.82	129.83	50.00
	HD-2	320.00	280.70	192.98	87.72

Mr. Chawla submitted that the respondent was offering its channels on the aforesaid rates uniformly and without discrimination to every LCO, including those represented by the petitioner, provided that further re-transmission of the

signals received from it was made in the DAS mode. With reference to the rate card, Mr. Chawla further submitted that the respondent was offering a better share of revenue than the ratio of 65:35 statutorily prescribed under the TRAI tariff order.

As to the petitioner's claim that the respondent must continue to supply signals to the LCOs in analogue mode on a fixed fee basis, Mr. Chawla submitted that the respondent's right is protected under Article 19(1)(g) of the Constitution. Learned counsel submitted that the right to carry on any trade or business also envisaged the right to not carry on any business or trade². Further, in the absence of any restriction by any law, any person had the right to carry on business or trade of a particular kind or in a particular commodity or article and at a particular place or region and not to carry on business of any other kind or in any commodity or article or at a place not of his choice. In case, therefore, the respondent, as an MSO did not wish to engage in transmission of TV signals in analogue mode, in the absence of any law to the contrary it could not be forced to do so; in case the respondent wished to confine its business only to cities and urban centres, it could not be forced to carry on its business in rural areas by incurring huge costs for laying out cables and other ancillary equipment.

We find much substance in the submission made by Mr. Chawla.

² (1978) 4 SCC 224 – Excel Wear Vs. Union of India

Mr. Vineet Bhagat submitted that the scheme of digitisation was a phased scheme and it would be unreasonable and unjust to thrust upon the poor LCOs the digital addressable system of transmission even before the date of its enforcement under the Government notification. He referred to the Recommendations of Telecom Regulatory Authority of India (TRAI) dated 05.08.2010 on Implementation of Digital Addressable Cable TV Systems in India and placed reliance on paragraphs 3.2 and 3.4 in Chapter III under the caption “Roadmap for Digitization with Addressability”. The two paragraphs relied upon by Mr. Bhagat are as under:

3.2 Stakeholders have different views on the issue of an appropriate date for analogue switch-off. However, all the stakeholders feel that analogue switch-off should be implemented in a phased manner. Generally stakeholders have indicated a time frame of 4- 5 years for complete switch-off for the analogue system. An MSO association has indicated a time frame of 7-10 years for complete digitization. One of the DTH players has stated that several developed as well as developing countries have provided a time table and a framework for the switch-over to digitization, considering it as a critical component of the national communication and economic policy.

3.4 One of the national level MSOs has cautioned that in India, where more than 30% population lives below the poverty line, complete analogue switch-off may not be possible. In their view, analogue switch-off of pay channels is important and that can be done in a phased manner (yearly targets for select cities based on population) in a span of 1-6 years – in the first step. Year 7 onwards, in the second step, all the cities in a phased manner should be covered for all the channels, including the FTA channels.

We fail to see how the above passages can be of any help to the case of the petitioner. It was on a consideration of the recommendations made by the TRAI

that the Central Government issued the notification dated 11.11.2011 (later amended on 11.09.2014) introducing digitisation of cable TV systems in four phases over a period of four and a half years. As noted above, the language of the notification is such that it would be unlawful to make transmission in analogue mode in any part of the country that has come under the DAS regime as per the schedule given in the notification. But it is not unlawful to make transmission through digital addressable system in any part of the country that is yet to come under the DAS regime.

This is how the position stands in law.

Mr. Bhagat submitted that such a view would cause much hardship not only to LCOs operating in rural areas but also to the rural population who may not be able to pay the higher subscription fee demanded by the MSOs for making transmission of TV signals in packages of channels and in DAS mode.

In our view, the submission overlooks the fact that TRAI regulations mandate every distributor to provide a package of free-to-air channels to the subscriber at a very modest cost. So far as the paid channels are concerned, their rates may be fixed in accordance with the tariff orders framed by TRAI from time to time. There is nothing to show that the respondent has committed any breach of any regulations or tariff orders framed by TRAI in either making the packages of channels or in fixing the rates of those packages. Moreover, the language of the

notification issued under Section 4A of the CTN(R) Act and the relevant provisions of TRAI regulation is quite plain and to give them any other meaning on the plea of hardship caused to the LCOs would be doing violence to the plain language of the notification and the regulations.

Mr. Malhotra referred to clause 3 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004 and submitted that the scheme of interconnection envisaged by the regulations was based on the twin principles of “must provide” and “non-discrimination”. He submitted that as one of the principles of interconnection was “must provide” the respondent was obliged to supply signals to the petitioner LCOs and they would be free to retransmit the signals in their area of operation in analogue mode as that area was yet to come under the DAS regime.

In our view, the two principles of “must provide” and “non-discrimination” as the basis of interconnection cannot operate separately but are inseparable. All that those principles mean is that a distributor cannot refuse to supply signals to a LCO and it must supply signals to the LCO seeking signals from it in the same mode and on the same terms and at the same rate at which it might be giving its signals to another LCO, comparable to the one seeking the signals. As long as the distributor does not supply signals to anyone except in DAS mode, the principle of

“must provide” cannot be invoked to compel it to supply signals to anyone in analogue mode.

The respondent has made clear through Mr. Chawla and also by filing an affidavit that it is not supplying signals in analogue mode to any LCO in the State of Punjab and that it is willing to supply signals to the petitioner LCOs as per its rate card on the basis of which alone it is supplying signals to other LCOs in the state.

It may here be noted that earlier in course of the proceedings it was alleged on behalf of the petitioners that the respondent has set up a dummy operator which is supplying signals in the area of operation of the petitioner LCOs in analogue mode and on much cheaper rates. The report of the team of pleader commissioners, however, does not support the allegation. The charge of non-discrimination also thus does not stand against the respondent.

We may now refer to the earlier decision by the Tribunal on the issue. In Petition No.84(C) of 2013³ (and five other analogous cases), the petitioner, a MSO sought signals from three broadcasters. Resisting its demand, the broadcasters took the plea that it had a digital head-end and had the permission from the MoIB to operate as MSO in the DAS notified cities/towns/areas of the State of Andhra

³Wiretel Digital Networks Pvt. Ltd. Vs. ESPN Software India Pvt. Ltd. (and analogous petitions) decided on 22.04.2014.

Pradesh against phase II, phase III, and phase IV. It was contended by the broadcasters that on the basis of the MoIB permission, the MSO could make transmission in DAS mode only as and when the different areas of the State came under the DAS regime as per the schedule fixed by the notification issued under section 4A of the CTN(R) Act. Rejecting the objection raised by the broadcasters, the Tribunal, by judgment dated 22 April 2014, held as under:

“8.

From the above, it is clear that cable services with addressable systems can also be provided in the areas other than those notified under DAS regime. Rather, the broadcasters are mandated to publish Reference Interconnect Offer for the same. We are, therefore, unable to agree with the contention of the respondents that the petitioner cannot provide signals by its digital head-end (which is an addressable system) at Mangalagiri in Guntur District to areas which are not yet under DAS regime.

Undisputedly, the service based on Digital Addressable Systems (DAS) is much better and beneficial to the subscribers as well as the Broadcasters (respondents). To the subscribers (end users), it provides better quality and the option to choose the channels of their choice on a-la-carte basis; to the Broadcasters, it provides increased transparency with regard to the subscribers subscribing to their channels as well as better protection against piracy of their signals as compared to the Analogue regime. As a matter of fact, it is a challenging task for the distributors of signals, such as the petitioner in this case, to migrate to DAS regime in view of the costs involved in setting up Digital Head-End equipment and Set Top Boxes required at the subscriber end and it is, perhaps, the main reason why the same is being implemented in phases. In our view, if someone is implementing it voluntarily before the mandatory date, it is a laudable effort.”

On a careful consideration of the submissions made before us we see no reason to take a different view than the one taken in the earlier decision.

In light of the discussions made above, we come to the conclusion that no reliefs can be granted to the petitioner by the Tribunal.

Before putting down the record however, it would be proper to observe the predicament of the petitioner LCOs is not due to any lacuna in the law. It is because there is no one other than the respondent to whom these LCOs may go for supply of signals. How and why such a situation has arisen is a question for the Regulator to ponder over and to address.

In the result the petition stands dismissed with the aforesaid observation.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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(B.B. Srivastava)
Member