

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

DATED 10th FEBRUARY, 2006

Petition No.64(C) of 2005

(M.A.No.167 of 2005)

R.R. Enterprises
Through Mr. Narinder Narula
53, R. Plaza Commercial Complex
Sector 50, NOIDA,
Gautam Budh Nagar
Uttar Pradesh

...Petitioner

Vs.

Zee Turner Limited
5th Floor, Radisson Plaza
NH-8
New Delhi-110 037

...Respondent

BEFORE:

**MR. VINOD VAISH, MEMBER
LT.GEN.D.P.SEHGAL(RETD.),MEMBER**

For Petitioners : Mr. Arun Kathpalia with
Ms. Sandhya Singh, Advocates for
Bajpai & Co.

For Respondent : Mr. Maninder Singh with
Mr.Yogender Handoo, Mr.Tejveer
Singh Bhatia, Advocates

ORDER

In this petition filed under Section 14 read with Section 14(a)(i) of TRAI Act, 1997 the petitioner, R.R. Enterprises, is a multi system operator providing cable service in the township of NOIDA (UP) and the respondent, Zee Turner Ltd., is a private limited company registered under the Companies Act, 1956 and is engaged in providing broadcasting service.

2. Learned Counsel for the petitioner Mr. Kathpalia stated that the petitioner had entered into a subscription agreement on 1st January, 2005 with the respondent whereunder the respondent is

obliged to provide its signals to be telecasted by the petitioner in the whole of NOIDA. As per the said agreement petitioner was to pay to the respondent for 2000 subscribers only which was regularly paid. He said that the petitioner was surprised to receive a notice dated 28th June, 2005 stating that it was violating the terms of the Subscription Agreement. The Notice covered two issues as under:-

(a) that the petitioner is providing service in areas of Bhangel village, Silarpur, Gajha villages and Sectors 82, 93 and 110 which, according to the respondent are beyond the area authorized to the petitioner for the provision of cable service as per the agreement existing between the petitioner and the respondent.

(b) that according to the respondent, the petitioner is retransmitting/ distributing signals of TV channels of Zee Turner bouquet to over 2200 customers/subscribers, including the subscribers/customers being served in the above extended area against the subscriber base of 2,000 as per the agreement.

3. Petitioner contended that in the said Notice the respondent has threatened to disconnect its signals within two days under the proviso to Clause 4.1 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulation dated 10th December, 2004. While arguing his case, Mr. Kathpalia mentioned that immediately on receipt of the notice, the petitioner informed the respondent vide letter dated 29th June, 2005 stating that there was no violation of the agreement and the additional areas mentioned by the respondent were part of NOIDA and it had been providing signals in whole of NOIDA for the last two years. He also produced a map of NOIDA wherein he showed that the extended areas mentioned by the respondent in the notice were part of NOIDA itself. He also produced a sale deed of an occupant of a house in Sector 93 which also showed Sector 93 as part of NOIDA. It is, therefore, the contention of the petitioner that the respondent's stand on transmitting signals to unauthorized areas is totally incorrect. He also said that the respondent never gave any public notice required as per the Regulation. On receipt of the impugned notice dated 28th June, 2005 on unauthorized/unlawful distribution of signals the petitioner filed this petition before the Tribunal with the prayer for withdrawal of the said notice by the respondent and direction to it not to disconnect its services/channels.

4. Mr. Kathpalia also said that subsequently after this petition was filed, the respondent wrote a letter dated 3rd August, 2005 to the petitioner stating that it had authorized Ajab Cable Network to distribute signals in Sectors 93, 82, 110, Village Bhangel, Silarpur and Gajha villages. He said that these areas form part of NOIDA and are therefore covered under the agreement as petitioners authorized area for distribution of TV signals. He said that the respondent cannot appoint another MSO/cable operator for the area which as per the agreement falls in petitioner's territory authorized for distribution of TV signals. Petitioner contended that

this is in violation of the Regulations and breach of contract and that as per clause 3.1 of the Regulation, since its agreement with the respondent is operative for whole of NOIDA and not part of NOIDA the respondent cannot appoint another MSO/cable operator for this area. He also stated that the respondent has alleged in the said letter that the petitioner has a subscriber base of 15,162 which was far beyond the figure of 2200 as claimed by it in the impugned notice against which the petition has been filed. He said that the sectorwise break-up of 15,167 subscribers given by the respondent in the said letter shows a number of anomalies and clear fabrication. To support this claim, the learned counsel for the petitioner produced some photographs wherein it is seen that there is no dwelling unit in Sector 43 whereas 1300 connections are shown by the respondent in Sectors 43, 44 and Rampur village. Even Rampur has been shown twice at serial 4 & 11 of the chart giving the breakdown of customers in various Sectors/areas. He also said that the petitioner does not have any franchisee by the name Yashbir as stated by the respondent in the letter dated 3rd August, 2005. The petitioner contends that it is providing the service exactly as per the agreement and all the areas shown as additional areas by the respondent were part of the territory of NOIDA right from day one and it has been paying entertainment tax accordingly for this subscriber base as per the agreement.

5. The petitioner contended that this letter dated 3rd August, 2005 was written after filing of this petition and therefore infructuous and bad in law as the respondent cannot improve his stand during the course of consideration of the petition by the Tribunal. He cited the case of Mohinder Singh Gill vs. Union of India [AIR (1978) SC 851 (para 8)] to support his stand. He relied on Para 8 of the said judgment which is reproduced as under:-

“The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18)

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Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

6. Mr. Kathpalia said that the agreement between the parties was for 2000 subscribers, which was based on negotiated figure. He said that in the cable industry it is more of a norm that the

subscriber base is arrived at after negotiation between the parties and the final figures are related to the popularity of a particular bouquet/channel. It is for this reason that for different channels/bouquets, agreements signed even on the same day, will be on for different figures. As regards this practice of signing agreement on negotiated figure, we were made to go through the Explanatory Memorandum of Telecom Tariff Order dated 15.1.2004 wherein it is mentioned that different methods are adopted for arriving at the subscriber base by the cable operators and MSOs. He quoted this Tribunal's judgment dated 24th August, 2005 (E.A. 2 of 2006 decided on 17th January, 2006) in Sea TV Network Ltd vs. Star India Pvt Ltd. & Anr [Petition No. 41(C) of 2005] to support his argument that negotiated figure is an accepted norm. He quoted the relevant paras of this judgment which are extracted as under:-

“.....The applicant submits that in the cable sector subscription payable are agreed on different basis like through negotiated payment of lump sum or on the basis of actual subscriber base of the signals seeker and never on the basis of an agreed amount offered by a competitive service provider.”

“.....In the absence of any methodology to be followed in arriving at a reasonable subscription base which ought to have been formulated by the regulator, this Tribunal is compelled to do an exercise to arrive at figure on the basis and material available on record. The difficulty in arriving at a reasonable subscriber base in our opinion cannot and should not make this Tribunal powerless and thus encourage monopoly by default. Therefore, with a view to see that a reasonable subscriber base is arrived at on the basis and material on record and to see that the directions of this Tribunal are given effect to in law and spirit and spirit of the earlier order, we have decided to embark upon the following exercise following the principle of best available material on record.”

7. While summing up his arguments, he said that the figure of 15,162 is a later-thought as a bogey and asked the Tribunal to quash the notice dated 28th June, 2005.

8. While replying to the above arguments, the learned counsel for the respondent, Mr. Maninder Singh at the outset contested the legal issues. He said that the Sea TV judgment is NOT applicable in this case. According to him Sea TV Case pertains to an MSO with much less number of cable operators who is asked to match payments being made by an MSO with large number of cable operators and there is no similarity of the case with this petition under consideration. He also said that the case of Mohinder Singh Gill vs. Union of India [AIR (1978) SC 851] is also not applicable here. The case cited pertains to subsequent improvement of orders of statutory functionary by fresh reasons/affidavit whereas the present case is by a private company.

9. On the merits of the case, Mr. Maninder Singh said that the petitioner in its rejoinder is silent on the subscriber base. He said that it is not coming out with its correct figure of the

actual subscriber base. He said that it is harping on the negotiated figure of 2,000 again and again and not disclosing the actual number of subscribers it is providing the service. The learned counsel for the respondent referred to the rejoinder affidavit on behalf of the petitioner wherein it has shown subscriber base of 6200 for Star bouquet-1 and 3720 for bouquet-2. He said that when it has accepted the subscriber base of 6200 to one broadcaster how can the petitioner pay to the respondent for subscriber base of 2000? He said that the negotiated figure at the time of agreement between the petitioner and the respondent was 2000 and it was accepted by the respondent in good faith but since it has now come to knowledge that the petitioner has declared subscriber base of 6200 to another broadcaster, the respondent is entitled to payment for at least 6200 subscribers. He maintained the claim that the petitioner was catering to 15,162 subscribers as against 2,000 mentioned in the agreement. He also said that the respondent had appointed another service provider, i.e., Ajab Cable Network for Sectors 82, 93, 110, Bhangel Village, Silarpur and Gajha villages and the petitioner is providing service in these areas not authorized to him.

10. Having heard the arguments from both the sides and having gone through the documents produced by the petitioner and the respondent in their Affidavits, there is no doubt that the cause of action in the petition has arisen from the notice dated 28th June, 2005 given by the respondent to the petitioner for disconnection of the signals because of its alleged provision of cable service in areas of Sectors 82, 93, 110, Bhangel Village, Silarpur and Gajha village, which as per the respondent, are beyond the areas authorized to the petitioner as per the agreement. The second contention of the respondent in the impugned notice is that the petitioner is supplying signals to approximately 2200 subscribers against 2,000 subscribers as per the agreement.

11. On the first issue, we were quite convinced after going through the map of NOIDA that additional areas mentioned in the notice form part of NOIDA itself. During the arguments, the respondent could not convince us that these areas are not part of NOIDA, the territory entered into agreement between the parties. Since the agreement between the petitioner and the respondent is for NOIDA and not "Part of NOIDA", we feel the petitioner is well within its rights to continue providing signals to those areas. The respondent's contention that it had assigned these additional areas to another cable operator, i.e., Ajab Cable Network and hence petitioner could not enter this territory is not sound. According to us that does not in any way stop the petitioner from providing signal to subscribers in these areas, the same being part of NOIDA. We have seen in some other cases that more than one operator can provide service in same area as long as there is agreement for the same. We also observed during the arguments that the counsel for the respondent did not contest the stand taken by the petitioner that these additional areas form part of NOIDA. The stand of the respondent is only that it has another operator to provide service in these areas and that the petitioner is doing unauthorized cable casting in this area.

12. On the second issue of subscriber base, the notice given to the petitioner stated that it was providing service to 2200 subscribers against 2,000 as per the agreement. Subsequently, vide letter dated 3rd August, 2005, this figure was enhanced to 15,162 subscribers. Since the petition was already under consideration by the Tribunal, we need not take any cognizance of this subsequent letter, but since both the parties during their arguments mentioned about this letter, we think it prudent to consider this letter for the purpose of our judgment. The respondent had given a sectorwise breakdown of 15,162 subscribers, which was contested by the petitioner. We are quite convinced by the petitioner’s arguments about some of the sectors where there is no habitation. Besides, respondent in his letter dated 3rd August, 2005 has reflected Rampur twice.

We therefore have no hesitation in concluding that this letter was issued by the respondent as an after-thought consequent to the filing of the petition. Since the respondent came to know of higher subscriber base declared by the petitioner to other broadcasters, it perhaps took a chance to claim this inflated figure of 15,162 subscribers which it, itself could not justify. The respondent seemed to be quite content to get the payment for subscriber base declared as 6200 subscribers which was the petitioner’s declared subscriber base for STAR bouquet-1. However, this does not clinch the argument in favour of the respondent since the petitioner has negotiated different figures of subscriber base with different broadcasters. Since the Agreement is in place for 2,000 subscribers and the respondent has through his notice indicated the higher subscriber base of 2200, at the most, we will give concession to the respondent that the subscriber base of 2200 will be accepted from the date of the notice till the signing of the new agreement and this figure has not been too vehemently contested by the petitioner.

13. We do not consider it appropriate to take into consideration the judgments cited by the petitioner since both are not very relevant in the instant petition. It is enough for us to take note that there is a subsisting agreement between the parties for the year 2005 and the respondent has given a notice during the period of the agreement which could not be justified fully by the respondent.

14. In view of the above, the notice given by the respondent is hereby quashed and agreement for the year 2005 will remain operative for the said period with the modification that the petitioner will pay for a subscriber base of 2200 with effect from the date of the notice.

15. Petition disposed off. M.A.No.167 of 2005 also stands disposed off.

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(Vinod Vaish)
Member

