

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

Dated 18th December, 2009

Petition No.153(C) of 2009

M/s Asianet Satellite Communications Ltd.Petitioner

Versus

ESPN Software Pvt. Ltd.Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER**

For Petitioners : Mr.Ramji Srinivasan, Sr. Advocate

For Respondent : Mr.N.Ganpathy, Advocate

-
-
-
-
-

JUDGEMENT

S.B. Sinha

The petitioner is an MSO/Cable Operator. It started its operation in Kerela in the year 1993. It's scale of operation is very large as would appear from its company profile which reads as under:

“Asianet is one of the leading CATV Company in India in terms of Revenues, EBITDS and infrastructure. In Kerala, Asianet is the #1 Cable TV operator with about 600K + Primary (including 90K + Digital Subs) and 176K secondary connections. It is also a dominant broadband player with over 60K broadband Internet connections through data over cable. Overall it provides a host of services including Analogue/Digital Cable TV, broadband internet and exclusive cable channels.

Company Advantages:

Asianet has a very strong subscriber base in the affluent state of Kerala that can be cross-sold/ up sold VAS/Digital offerings, which is backed by a State of the art network spanning 700 kms UG fiber network, 40,000 kms of HFC, 20,000 amplifiers and benchmarked on international quality standards. It is already offering CATV & Broadband bundle to subscribers and progressively moving towards “Triple Play” strategy. Unlike most of the major players in India, it has a unique Primary Point business model, which gives greater share of subscription revenue for Asianet and control over critical last mile. It is one of the most powerful brands in the State of Kerala. It has access to over 600,000 KSEB poles due to its ROW arrangement with the KSEB, can reach any location with its cables and equipments in the minimum possible time. Its 700 kms of UG OFC ensures that it can effortlessly take its signals across the entire length and breadth of Kerala at minimal cost.

Growth over the last decade:

Asianet has seen a steady growth in its revenues and EBITA over the last decade due to its various growth strategies both organic and in organic. The graphs here depict this strategies’ growth.”

It, on its own showing, has about 8.50 lakhs of cable subscribers spread over a large part of the State of Kerela. It, for obtaining signals of the channels run by the respondent, entered into agreements with the respondent, the details whereof are as under:

“MOU dated 18th December 2003 up to Rs.85 Lakhs @ ESS pricing of Rs.39.70/- for (ESPN and Star Sports Services).

MOU dated 08th March 2005 up to Rs.67 Lakhs @ ESS pricing of Rs.42.48/- for (ESPN and Star Sports Services).

MOU dated 17th June 2006 up to Rs.67 Lakhs @ ESS pricing of Rs.42.48/- for (ESPN and Star Sports Services).

MOU dated 04th July 2007 from Rs.80 Lakhs to Rs.1.10 Crores @ ESS pricing of Rs.42.48/- for ESPN and Star Sports Service and @ Rs.28/- for Star Cricket Services.

MOU dated 04th July 2007 from Rs.80 Lakhs to Rs.1.10 Crores @ ESS pricing of Rs.44.17/- for ESPN and Star Sports Service and @ Rs.28/- for Star Cricket Services.”

It's audited balance sheet and its pay out to the channels read as under:

FYI	Total income from Cable Operation (Subscription Fee Only) as per Balance Sheet	Total payment made to pay channels as per Balance Sheet	% of Pay channel amount over collections
2002-03	81.40	26.24	32%
2003-04	84.60	29.50	35%
2004-05	87.21	27.30	31%
2005-06	103.90	26.98	26%
2006-07	109.36	28.49	26%
2007-08	113.67	33.12	29%
2008-09	119.35	35.44	30%
**Estimated figures of 2008-09.			
***INR and in Crores			

It has, however, been accepted that in the year 2008-09, its total income from cable operation was Rs.129.19 crores and the total payment made to the channels as per its balance sheet was Rs.35.79 crores showing an annual growth of 40%. It is accepted that its list of subscribers runs into 5000 pages.

The petitioner contends that although the agreement entered into by and between the parties would disclose that the amount of subscription fee payable by it to the respondent is Rs.1.10 crores, but having regard to discount granted to the extent of a sum of Rs.20 lakhs, the net amount payable by it was only Rs.90 lakhs. According to the petitioner it had been paying

the respondent on the aforementioned basis which was being accepted by it without any demur whatsoever.

The respondent, however, inter alia, on the premise that a sum of Rs.8,77,63,450/- was owing and due from the petition served a notice on it in terms of its letter dated 18.06.2009, relevant portions whereof read as under:

“Accordingly, please note that we are not in a position to extend any more credit period & that you have been provided with enough time to pay the same. Hence, please treat this letter as 21 days’ notice as required under clause 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004, as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection(Third Amendment) Regulation, 2006 and make the payment of Rs.8,77,63,450/- within 21 days of this letter, failing which we would be left with no alternative but to discontinue our services provided to you w.e.f. 09/09/2009.

Further, please be informed that your contract has been expired and you are yet to renew the contract. In such circumstances when the contract has expired and you have not shown any interest in discussing the terms of its renewal, we will not be able to continue providing you with ESPN/STAR SPORTS & STAR CRICKET services.

Lastly, please note that we are in the process of issuing public notice to keep your customers informed of the above as required under clause 8.1 & clause 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004, as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection(Third Amendment) Regulation, 2006.”

To the same effect a public notice was also issued on the same date. It, however, appears that a Memorandum of Understanding was entered into by and between the parties on or about

9th June, 2008, the relevant clauses whereof are as under:

- “a. Monthly payout for the period of 12 months from 01st March 2008 to 29th Feb.2009 shall be Rs.1.10 Crores per month, which shall be exclusive of applicable service tax. These amounts are based on the declared connectivity of Asianet as on 01st March 2008.
- b. The amounts shall be payable by the 28th day of each month. The new contract shall be valid till February 28th 2009 where after fresh terms shall be negotiated.
- d. As per ESPN the outstanding for billing up to 31st May 2008 after considering all the payments received up to 31st May 2008 is Rs.2,56,14,609/- will be reconciled between parties (Rupees Two Crores Fifty Six Lakhs Fourteen Thousand Six Hundred & Nine Only) and the reconciled figure shall be cleared before 30th June 2008. The parties will reconcile the accounts and Asianet will given a schedule for payment of the same to be cleared before 30th June 2008.
- e. Hotels & Commercial establishments are excluded and are outside the scope of this agreement.
- f. ESPN agrees to provide a prompt service discount ‘PPD’ of Rs.4.00 Lakhs (Four Lakhs Only) on the billing of Rs.1.10 Crores every month provided the payments are received by ESS on or before the 28th of every month and the minimum payment should be equivalent or more than one months billing including applicable service tax withdraw all such discounts without notice, this PPD is applicable only for the billing period upto 28th Feb.2009.”

The petitioner, however, would contend:

- (i) The respondent themselves have revised the figure of Rs.8.77 crores to 7.21 crores without reconciliation of account which shows malafide on its part.
- (ii) The admitted outstanding payable to the respondent is Rs.5,97,02,258/-
- (iii) A conventional two months credit was given by the respondent and if the same is taken into consideration then the amount due and payable would come to Rs.3,98,48,258/- as on 27.06.2009.
- (iv) The petitioner has paid a sum of Rs.1.25 crores on 30.06.2009 and, thus, only a sum of Rs.2.73 crores was due to the respondent which amount was payable in the following instalments:

<u>Month</u>	<u>Amount (in crs)</u>
July 2009	0.75
Aug 2009	0.75
Sep 2009	1.23

	Rs. 2.73

This petition was filed on 02.07.2009, inter alia, praying for the following reliefs:

- “A. pass appropriate orders or directions setting aside the Notice of Disconnection dated 18.06.2009 sent by the Respondent to the Petitioner and/or;
- B. pass appropriate Orders/direction to the respondent to grant reasonable time to the petitioner to pay the admitted payable amount of Rs.2,73,48,258 (Net of credit conventionally permitted) as on 30th June 2009, in installments, and or;
- C. pass appropriate Orders/direction to the Respondent to determine the monthly subscription fee payable by the Petitioner to the Respondent for the year 2009-10 on the basis of non discrimination parity with the other Cable operators operating in the

rest of Kerala, as per the Interconnect Regulation of 2004 as modified vide Interconnect Regulation dated 4.9.2006 and/or;

- D. pass appropriate orders/directions to the Respondent to determine the monthly subscription fee payable by the Petitioner to the Respondent in the digital mode and accordingly, enter into a contract for the year 2009-10 and/or;
- E. pass appropriate orders/directions directing the Respondent to enter into an agreement with the Petitioner as per the monthly subscription fee as determined pursuant to the prayer clause (C & D) above and/or;
- F. pass orders to allow the Petitioners to contract with the Respondent to avail the Respondent's bouquet of channels only in the digital transmission."

By an order dated 03.07.2009 out of the said purported outstanding sum of Rs.2.73 due from the petitioner, this Tribunal directed it to deposit a sum of Rs.2.53 crores within 25 days in two instalments; the first instalment of Rs.1 crore was to be paid within 10 days and the balance sum of Rs.1.53 crores within 15 days thereafter.

The parties also proposed a meeting at Trivandrum.

The respondent filed its reply on or about 28.08.2009.

The matter relating to grant of interim relief came up for consideration before this Tribunal on 16.09.2009.

By an order of the said date the petitioner was directed "to make payment at the rate of Rs.40 lakhs on account in future till the case is finally decided by the Tribunal".

A joint survey was also to be undertaken wherefor the petitioner suggested that supervision thereof may be carried out by an independent person like a retired High Court Judge, to which the respondent objected to.

Mr.Srinivasan, amongst others contended:

- (a) Keeping in view the National Revenue Survey and Indian Revenue Survey the petitioner has about 40 lakhs subscribers in the State of Kerela out of which 8.50 lakhs are the subscribers of the petitioner. In the State of Kerela the petitioner is covering 75% of the market.
- (b) According to the petitioner, the respondent assessed that out of the total subscribers of about 60 lakhs, the petitioner is serving 26 lakhs subscribers which ex facie is absurd as it is impossible that only 14 lakhs subscribers would be served through other cable operators in the State.
- (c) The number of subscribers having gone down, for the purpose of renewal of the agreement in terms of clause 4.2 of the Regulations, the petitioner was in a position to offer only a sum of Rs.20 lakhs per month to the respondent by way of subscription fee which sum was fair and reasonable in the facts and circumstances of the case.
- (d) In view of the fact that under the Regulations supply was to be made on a non-discriminatory terms and having regard to the public interest, the petitioner had rightly been directed to pay a sum of Rs.40 lakhs per month by this Tribunal.
- (e) The survey undertaken at the instance of the petitioner, namely, Geo Transtech would clearly show that the figures disclosed by the respondent are wholly absurd which would, inter alia, appear from the following:

In the Poonthura area, there are only 83 dwelling units out of which 75 having cable services and only 41 of them are served by the petitioner whereas 34 subscribers are served by others. Similarly in Valiyathura area, the number of dwelling units are 2218 out of which 2068 are served by the petitioner and 1118 are served by the others.

The numbers of subscribers as stated by the respondent are as under:

“208 United Cable Visino, Thycaud(AA01) 5080
209 Orion Cable Network, Thycaud(AA01) 10160”

A statement of subscription fee payable to the respondent based upon parity has been placed before us which needs as under:

Statement of subscription fee paid and payable to ESS, based upon parity

	Connections	Payments made to ESS	Subscription fee payable based upon parity (in Rs)
Entire Kerala	39.84 lacs	Rs.62 lacs + Rs.1.10	-----
Operators other than Asianet	31.50 lacs	Rs.62 lacs	-----
Asianet – Direct connections	6.60 lacs	110 lacs	6.6 x 62/31.5=12.99 lacs
Asianet-Link connections	1.74 lacs		2x 62/31.50=3.93 lacs
			TOTAL: 17 lacs (approx)

Mr.Ganpathy, learned counsel for respondent, on the other hand, urged:

- (i) That the figure of Rs.1.10 crores payable by the petitioner to the respondent by way of subscription fee was arrived on the basis that it had been serving about 1.66 lakhs subscribers @ Rs.66/- for three channels.
- (ii) In view of the fact that the petitioner had been taking over the management of other LCOs and MSOs as a result whereof for all intent and purport it exercises a monopoly over the urban TV viewers, whereas the others are mostly operating in the rural areas, the amount of Rs.1.10 crores was fixed as a monthly subscription fee.
- (iii) Having regard to the Memorandum of Understanding entered into by and between the parties as also the notice issued under clause 4.1 and public notice under clause 4.3 of

Regulations, it would be evident that a sum of Rs.8.77 crores was owing and due from the petitioner.

- (iv) Rebate was to be granted only in the event regular payment was made and not otherwise and the petitioner having not acted in terms thereof, the question of allowing the petitioner to continue to distribute signals to the subscribers only on payment of Rs.40 lakhs does not and cannot arise.

Before advertng to the rival contentions of the parties it would be pertinent to place on record that the legality of the order of this Tribunal dated 16.09.2009 was subject matter of a Writ Petition No.1266 of 2009 before the Delhi High Court.

By an order dated 26.10.2009, a learned judge of the Delhi High Court while setting aside the said order dated 16.09.2009 directed this Tribunal to consider the matter afresh, stating:

“This writ petition is directed against the order dated 16th September, 2009, passed by Telecom Disputes Settlement and Appellate Tribunal on an interim application filed by the respondent. I need not examine and go into the merits of the contentions raised by the parties as the matter is still pending before Telecom Disputes Settlement and Appellate Tribunal. However, it is noted that the impugned order is a non-speaking order and does not give any reason for directing the respondent to make payment of Rs. 40 lacs per month from July, 2009, till the case is finally decided. The impugned order does not specifically state that the interim application stands disposed of and decided. The matter is now fixed before the learned Tribunal on 3rd December, 2009. Learned Tribunal will re-examine the interim application filed by the respondent and pass a speaking order on the question of the amount payable by the respondent to the petitioner pending disposal of the petition. While deciding the said application, the learned Tribunal will not be influenced by the order dated 16th September, 2009, and will independently apply their own mind with respect to the respective contentions of the parties. However, it is clarified that his Court has not expressed any opinion on the merits and whether the quantum fixed earlier in the order dated 16th September, 2009, is justified or not.

Counsel for the petitioner states that they had not agreed to appointment of a retired Judge to supervise the conduct the joint survey. Appointment of a retired judge it is stated is likely to cause delay. Counsel for the respondent disputes the said statements. This aspect/contention can also be raised before the learned Tribunal. It is clarified that this Court has not stayed conduct of the joint survey.

The writ petition and all pending applications are disposed of.

**SANJIV KHANNA, J.
OCTOBER 26, 2009”**

The matter has been argued elaborately by the learned counsel of the parties pursuant to or in furtherance of the said direction of the Hon’ble High Court.

Indisputably, the parties entered into an agreement. They were on a negotiating table for renewal thereof. The agreement between the parties came to an end on 31.03.2009. Three months’ grace period allowed for the purpose of negotiation for renewal of the agreement also expired in June 2009.

It is not in controversy that the petitioner had been serving about 8.50 lakhs subscribers. The parties had however, entered into an agreement only on the subscriber case of 1.66 lakhs. The number of subscribers, therefore, was a negotiated one. The agreements entered into by and between the parties in the earlier years also go to show that the petitioner has a huge network of subscribers. They enhanced the number of subscribers. Increase in the the amount of subscription fee was accepted by the petitioner with its eyes wide open. It is, therefore, difficult to accept the submissions of Mr.Srinivasan, learned senior counsel appearing for the petitioner that the number of subscribers was so drastically reduced that the offer of the petitioner to pay a sum of Rs.20 lakhs per month to the respondent should be taken to be fair and reasonable.

Even if that be so, the number of subscribers and/or the SLR would have relevance only for the purpose of forming basis for negotiation. The fact that for the purpose of renewal both the parties have to participate in the contract making process is beyond any dispute. If the difference between offer and counter-offer is so much, i.e. ranging from Rs.20 lakhs to 90 lakhs, this Tribunal cannot arrive at a figure which would otherwise be fair and equitable; at least at

this stage. The jurisdiction of this Tribunal at the stage of passing of an interim order is limited. Its' decision in this behalf must be founded on rationality.

Before us, reliance has been placed by the parties on exchanges of some e-mails being Annexure-13 to the petition.

The respondent in its Email dated 01.04.2009, inter alia, stated as under:

“After lots of deliberations in the last couple of months we had arrived at a solution of giving you a conditional offer of temporary discount provided the following conditions are met

- The schedule for the old outstanding would be given which would clear the old outstanding during the period March to May 09.
- The monthly payments would be made regularly along with the old outstanding schedule.
- The outstanding as on 30th June would be a one month Billing cycle.

Based on the above condition we had agreed on following terms.

- We would give a temporary discount of Rs.16 lakhs per month on the billing for the period December 08 to May 09.
- The new terms of the next year contract would be finalized in the month of June 09 where in the base amount for the monthly billing would continue to be Rs.110 Lakhs plus taxes per month.
- The outstanding after considering the conditional offer would be Rs.6.62 crores as on 31st March 09
- The Monthly Billing for the month of April & May would be Rs.94 lakhs plus taxes.
- The outstanding after considering the one month Billing cycle for June 09 as closing outstanding would be Rs.8.73 crores as on 30th June 09.
- Payment cleared in the month of March 09 is Rs.1 Crores subjected to clearing of cheques.
- Balance payment of Rs.7.73 crores would be cleared in three equal payments of Rs.2.57 crores in the month of April, May and June 09.
- Cheques for each month would be given in the previous month end to clear during the month.
- If the payments are not made as per the above terms the temporary discount would be withdrawn.”

The said offer was, therefore, a contingent one being subject to clearance of the arrears for the months upto December. Even the billing cycle was for a month and not two months as contended by the petitioner.

In another e-mail addressed to one Mr.Vinod by Mr.Sandeep Lamba it was stated as under:

“We are very surprised by your mail as we are trying to find solution for the current issue of outstanding but we are getting entangled in some other issues. I would once again make our stand clear on the 5 points raised by us.

1. We would revert back with the clarification on the old issue raised by you and only once it is clarified that it is part of the agreement we would be in a position to take this out of the outstanding in spite you have accounted in your books.
will wait for revertal from you. Details are already there in the reconciliation.

1. As per our MOU and understanding we have given you 30 days credit for payment which means clearly that an invoice raised on the 1st of the month has to be cleared on the 30th of the month which means that the entire outstanding mentioned by us would be the outstanding on the 30th March hence we would need the payment schedule for the entire 7.94 crores as this is legitimate outstanding. Hence we request you to kindly give the payment schedule for 7.94 crores.

The dues are as given in the reconciliation. Schedule is given for the same. As regards the old dues we have stated that we will give a schedule after we pay off the last 3-4 mth dues that has got accumulated.

Our due date is the month end and we were permitted 1 month dues to be retained. This is as per the understanding with you in July 2007.

1. As you have agreed to make monthly payments along with the schedule given this point is clarified. That is already clarified by us.
1. With reference to the discount we are surprised by your comments because you have been requesting us for a short time (3-4 months) discount as you are facing tight situation of Cash outflow in Asianet and not for giving you any benefit for the underdeclaration situation in the market. Further the amount of discount you are looking is simply not possible from our end.

The reduction was sought based on our inability to meet the high cost due to various reasons as we have been raising from time to tome. We have been very candid in our request for the discount to tide over our issues. We still feel that Rs.20 lacs is needed. This has been communicated to your and your team. You may pl.suggest what you have in mind.

1. We would need the entire schedule payment between March-May as we have already faced 4 month of non-payment from your side and we cannot give any more credit facilities to you.

As mentioned earlier, the payment schedule is made with an intention to honour the same. Any thing beyond this would be difficult to honour. In the past also we have had similar issues and in spite of all issues, we have tried our best to ensure that month on month the dues were paid. Its only in the last 3-4 mths the dues got accumulated, which we are trying to clean up. Pl. cooperate.”

There were, thus, serious disputes and differences between the parties as regards the terms of settlement. However, the fact that the petitioner owed a huge amount to the respondent is beyond any dispute.

Prima facie, the contention of the petitioner, therefore, cannot be accepted. Furthermore, admittedly even in the month of June 2009, the petitioner had paid subscription fee at the rate of

Rs.90 lakhs. It is, therefore, difficult to hold that for the purpose of the interim matter, the offer of the petitioner to pay only Rs.20 Lakhs per month should be accepted. Even otherwise the petitioner has not prayed for any interim relief directing the respondent to accept a lower subscription fee in the petition. The petitioner even otherwise cannot be granted a final relief at the interim stage. Purported inability to pay the agreed amount cannot by itself lead to the conclusion that the terms are discriminatory in nature.

Submission of the learned senior counsel that in the earlier round of the litigation, the petitioner was directed to pay only Rs.55 lakhs out of the agreed amount of Rs.83.40 lakhs cannot be accepted.

An interim order does not create any precedent in law. The situation, furthermore has undergone a change. The amount of arrears has increased.

Correctness or otherwise of the evidence of the petitioner's subscriber base can be judged only at the hearing and not at this stage.

Keeping in view the fact that there was under-declaration, it is difficult to accept that this Tribunal without any legal basis should direct, the respondent even as an interim measure to accept any amount which is even less than 50% of the agreed amount.

It is true that disconnection of signal is fraught with the loss of viewership by a large section of sports loving people in the State of Kerala, but the fact remains that the petitioner is financially sound.

A commercial contract entered into by the groups who are very much alive to their business consideration should ordinarily be given effect to.

The parties for the purpose of grant of interim relief would ordinarily be bound by the terms of the agreement. Whether petitioner would be able pay the agreed amount, ordinarily would not be a matter of concern for a court of law arising out of a commercial contract.

Between two parties of the status like petitioner and the respondent, the question of showing any equity in favour of one or the other by this Tribunal may not at this stage arise.

Furthermore the subscription agreement has also come to an end.

If in absence of an agreement, the petitioner intends to have the benefit of an interim order from this Tribunal for the purpose of enabling it to run its business, it must show its readiness and willingness at least to abide by the terms of the agreement. Inability on its part to pay the agreed sum or existence of any hardship would be beyond the domain of this Tribunal.

Sentiment and/or sympathy cannot form the basis of passing an interim order in favour of a party who is otherwise bound by the contractual terms.

Even the suggestion of the petitioner in regard to joint survey namely, subscriber base vis-à-vis those of rest of Kerala cannot be accepted at this stage.

However, this Tribunal may consider the same separately if any occasion arises therefor.

We may, however, place on record that the Respondent is agreeable to get the accounts of other parties scrutinized by Lt.Gen(Retd.) D.P. Sehgal , a former Member of this Tribunal.

We, therefore, are of the opinion that the interest of justice would be subserved if we direct the petitioner to pay a sum of Rs.90 lakhs per month in supersession of our order dated 16.09.2009. The said order appears to have been passed by the Tribunal as all the aforementioned facts had not been brought to its notice. The petitioner must file an undertaking within one week from date that it would abide by this Tribunal's order and clear of its arrears within 60 days failing which the interim order shall stand vacated. The petitioner shall also pay and bear the costs of the respondent. Counsel's fees assessed at Rs.50,000/-.

.....J
(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member