

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

Dated 1st September, 2017

Broadcasting Petition No.317 of 2011
(M.A.No.163 of 2013)

Sri Sivakami Amman Cable T.V. System ...Petitioner

Versus

Sun 18 Media Services South Pvt. Ltd. ...Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. B.B. SRIVASTAVA, MEMBER
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioner : Ms. Suveni Bhagat, Advocate

For Respondent : Mr. Abhishek Malhotra, Advocate

ORDER

By S.K. Singh, Chairperson – We have heard learned counsel for the petitioner and also learned counsel for the respondent on several dates at quite some length. The petitioner is a proprietorship concern engaged in the business of a Multi-system Operator (MSO) having its cable network operations in Chinnamanur, Tamil Nadu. The respondent as a distributor of SUN TV group of channels falls in the category of a broadcaster.

This petition was filed on 12.07.2011 disclosing/alleging that the petitioner in addition to being a MSO, is also a distributor of the respondent since the year 2003. It claims that it is entitled to receive distributorship commission from the respondent for a certain period beginning from 15.07.2008 on the lines it had earlier received such commission. Allegedly, the respondent, arbitrarily and dishonestly stopped payment of distributorship commission from the year 2007 and even prior to 2007 the payment on this head was irregular and as a result the accounts have remained un-reconciled.

Petitioner claims to have made a deposit of Rs.16 lakhs since the year 2002 for the aforesaid rights of distributorship and that amount is still lying with the respondent.

From the averments it is also clear that petitioner had earlier filed Petition No.7(C) of 2009 against illegal disconnection of signals by the respondent. Ultimately the said petition was finally disposed of by this Tribunal vide order dated 26.02.2010 on the basis of settlement between the parties. That order is on record. It shows that petitioner agreed to pay subscription dues amounting to Rs.11,90,115/- as outstanding on 24.02.2010. The dues were to be paid in instalment of Rs.1 lakh every month in addition to the monthly subscription dues which also the petitioner undertook to pay regularly. Petitioner also agreed to restrict its areas of operation as per the terms of the existing

agreement. On joint prayer of both the parties, the matter was disposed of as withdrawn by the petitioner on the basis of settlement between the parties.

It is clear from the order dated 26.02.2010 that till that month the petitioner did not claim any outstanding dues against the respondent on any account such as commission for the distributorship business.

Petitioner has disclosed that there also existed a subscription agreement since long, between the parties. The last agreement was from July 2010 to July 2011.

Petitioner claimed that he is entitled to 5% of the subscription amount collected by the respondent from petitioner's distribution area, the entire Theni District, as commission. He pleaded helplessness in providing the records of calculation in respect of such commission on the ground that a competitor had destroyed the records and equipments of the petitioner in September 2008. The last payment towards the distributorship commission was claimed to be in 2007. Copies of TDS certificates for the years 2003 to 2007 along with a letter dated 01.09.2010 from the respondent to the petitioner was relied upon by the petitioner. In Para 4.6, the petitioner has made an estimate of its distributorship commission from the period 01.01.2003 and on that basis has alleged that an amount of Rs.18-20 lakhs is due to the petitioner towards distributorship commission payable by the respondent for the period 15.07.2008 till filing of the petition in July 2011. Petitioner has annexed a statement of account

prepared by it as Annexure P-4 and in that it has tentatively calculated the due amount of commission as Rs.16 lakhs.

Invoices for subscription fees issued by the respondent for the month of April and May 2011 have been annexed to show that the amount due, including previous balance in the invoice of April 2011 was only Rs.1,71,386/- approximately and in the next month i.e. May 2011 the total amount was shown as Rs.2,32,741/- approximately. On that basis petitioner has alleged that a totally wrong amount of Rs.16,67,045/- was claimed as dues from the petitioner in the letter dated 16.06.2011. On that very basis petitioner challenged the impugned notices dated 21.06.2011 and 23.06.2011. Petitioner has also claimed that it is entitled to receive back its deposit of Rs.16 lakhs and also dues of distributorship commission from 15.07.2008 till date. Petitioner has also claimed interest over the distributorship commission found payable by the respondent to the petitioner, at the rate of 18% per annum.

In reply, the respondent has claimed that the petitioner did not pay the monthly instalments as per agreement recorded in the order of this Tribunal dated 26.02.2010. Learned counsel for the respondent has pointed out that as per petitioner's own account contained in Annexure P4, the outstanding against the petitioner would be more than Rs.16 lakhs because in that account petitioner has, allegedly, wrongly shown Rs.16 lakhs as an amount payable by the respondent to the petitioner as distribution commission from 08.07.2010 to

07.07.2011. Even after making such a false claim, the petitioner in his account has shown Rs.5,587/- approximately as outstanding payable to the respondent upto May 2011.

In course of hearing of this application, this Tribunal passed an interim order not to effect discontinuance of supply of signals to the petitioner's network but without prejudice to the rights and contentions of the parties. It also noted a categorical statement from the petitioner that it is not interested in continuing with the Distributorship Agreement.

An application was filed on behalf of the petitioner on or about 22.09.2011 seeking amendment of the petition; mainly to delete prayer No.3 which was for signing of the Distributorship Agreement and to add in its place a prayer for refund of deposit of Rs.16 lakhs in view of surrender of distributorship business.

The Proprietor of the petitioner examined himself as PW-1 in support of the petition, whereas the respondent has examined one Mr. S. Rajan, Manager(Operations) as its witness.

The order sheet of this case discloses that on 22.03.2012 a detailed order was passed by this Tribunal after hearing counsel for both the parties. In paragraph 5 of that order, the entire order dated 26.02.2010 passed in earlier Petition No.7(C) of 2009 has been extracted. In Paragraph 22, the statement of

account prepared by the petitioner has also been extracted with a written observation that the dispute is in respect of an amount of Rs.16 lakhs claimed by the petitioner towards commission.

That order in Paragraph 4 records that “indisputably since September 2008, the petitioner was asked not to collect the subscription fees directly from the local cable operator operating in the said district. Disputes and differences arose between the parties”. It is also noted thereafter that petitioner filed Petition No.7(C) 2009 after such disputes and differences had arisen.

After discussing the materials on record with a purpose to arrive at a finding whether the distributorship agreement continued for the period claimed by the petitioner or not, on the basis of a letter of the respondent dated 26.08.2009, a tentative conclusion was reached that even during part of 2009 the distributorship agreement appeared to have been operative. But after such tentative finding in Paragraph 27, no final conclusions could be reached on any of the issues except a conclusion in Paragraph 39 that the Tribunal did not see any reason as to why in a situation of this nature, a preliminary decree for accounts should not be passed. On the basis of such conclusion in Paragraph 39 and 49 of the said order, Tribunal requested learned District Judge, Theni, Tamil Nadu to appoint an Advocate Commissioner to scrutinize the books of

accounts and other documents of both the parties in order to ascertain the following four issues:

- “1. What was the amount of commission, if any, payable to the Petitioner by the Respondent towards distributorship agreement.
2. Whether the amount payable by way of commission had been adjusted.
3. Whether any amount has been adjusted from the amount of security deposit of Rs.16,00,000/- refundable by the Respondent to the Petitioner.
4. What is the amount payable by the Petitioner hereto against the respondent or vice-versa on setting off the dues of the one from the amount payable to the other.”

Further relevant observations and directions in that order are as follows:

- “51. The parties must produce their books of accounts for the relevant years as also the audited statements of accounts before the learned Commissioner within two weeks from the date of his appointment.
52. The learned District Judge may also fix the remuneration payable to the learned Commissioner. Such remuneration and other expenses which may be incurred by the learned Commissioner shall be borne by the parties in equal proportions.
53. In the event the Petitioner is unable to file its books of accounts, it shall file other documents which are in its power and possession to show as to what amount, if any, is due to it from the Respondent towards distributorship agreement.
54. Learned Commissioner may submit a report to this Tribunal as expeditiously as possible and preferably within a period of three months from the date of his appointment.”

The learned District Judge, Theni appointed Mr. Guru Radhakrishnan as Advocate Commissioner in compliance of directions of this Tribunal. The learned Advocate Commissioner through his letter dated 26.07.2012 has

submitted his Report along with documents produced before him by the rival parties. Para 5 of the Report discloses that the petitioner took the same stand before the Advocate Commissioner that because of ransacking of control room and his office room by hooligans on 02.09.2008, all his accounts were completely destroyed and hence could not be produced. The respondent produced statements of account which were not audited statements. On Issue No.1, the Advocate Commissioner calculated the dues of commission of the petitioner for the period 01.01.2003 to 31.12.2004 as Rs.9,90,144/-. The commission, due for the period 01.01.2005 to 30.11.2006 was calculated to be Rs.12,20,150/-. Similar dues of commission for 01.12.2006 to 13.07.2011 (till filing of the petition) were calculated to be Rs.56,69,661/-. Adding the dues for all the three periods, the total dues of commissioner from 01.01.2003 were computed to be Rs.78,79,955/-.

On Issue No.2, the Advocate Commissioner gave the following finding:

“Issue No.2

According to the documents produced by the respondent I did not see any particulars regarding this issue. On the contract, the petitioner in his statement has stated in point 12(a) that Rs.16,00,000/- out of his commission amount had been adjusted under the subscription agreement entered by it with the respondent on 08.07.2010. And this fact had been discussed and confirmed by the Hon'ble TDSAT at pages 11,27, 28 and 29 of its order dated 22.03.2012. So I come to the conclusion that a sum of Rs.16,00,000/- of subscription amount due from the petitioner had been

adjusted in the commission amount according to the agreement dated 08.07.2010 entered between the parties.”

On Issue No.3 relating to security deposit of Rs.16 lakhs, the report concludes that this amount has not been adjusted and is, therefore, refundable to the petitioner.

On Issue No.4, the report has added total dues of Rs.78.79 lakhs calculated under Issue No.1 to the amount of security deposit i.e. Rs.16 lakhs to hold the total amount due from the respondent to the petitioner by way of commission and security deposit as Rs.94.79 lakhs approximately. It has held that petitioner has admitted to have received Rs.37.69 lakhs only and hence the amount payable to the petitioner after deducting the amounts already received by the petitioner came to Rs.57,10,554/-.

On behalf of respondent, detailed objections have been filed to the Report of the learned Advocate Commissioner. The first objection is that petitioner has pleaded before this Tribunal that the distribution commission is due from 15.07.2008 whereas ignoring such limited claim of the petitioner, the Advocate Commissioner has calculated dues on this head from 01.01.2003 and accordingly allowed a claim for Rs.78.79 lakhs when the petitioner had itself estimated its claim to be only Rs.16 lakhs. In reply, learned counsel for the petitioner has fairly submitted that the dues calculated for the unclaimed period may be ignored; this Tribunal may recalculate the lawful dues on this head on

the basis of chart prepared by the learned Advocate Commissioner. On a rough computation, if the calculations are presumed to be correct, the amount of dues from 15.07.2008 to 13.07.2011 would then come to about Rs.36 lakhs.

In the objections, the respondent has alleged that while the Advocate Commissioner believed respondent's documents as true and correct billing for 01.04.2005 to 30.06.2006, he chose to disbelieve the contents of the same document for the later periods. It is also averred that if such whimsical approach was avoided the Advocate Commissioner would have calculated the dues between 01.11.2007 and 31.03.2010 to be Rs.15,03,917/- but he chose to draw another set of calculations and whimsically raised it to Rs.37,10,128/-. It was also pointed out by way of objections that the Advocate Commissioner misconstrued the security deposit advance of Rs.10 lakhs to be a statement of dues payable by the petitioner for distributorship commission.

In the objections, it was pointed out that petitioner's own statement of accounts shows that till May 2011, he owed Rs.16,15,587.45p to the respondent.

It has also been pointed out by way of objections that the order of this Tribunal dated 22.03.2012 has recorded that as per petitioner's statement, the monthly collection from its area was approximately Rs.6-7 lakhs per month, therefore, the total collection from 15.07.2008 till 13.07.2011 cannot lead to a commission amount of more than Rs.12 lakhs even if it is calculated at the rate

of 5% of the total amount. It was also pointed out that in the evidence it has been admitted by the petitioner that from September 2008, his primary duty as a distributor i.e., to collect the subscription dues from the MSOs/Operators, was discontinued.

The respondent has also averred in its objections that since no disconnection was allowed to be effected against the petitioner and the petitioner did not pay any money after February 2011, a further amount of Rs.9.17 lakhs approximately had become due for the period June 2011 to September 2012. The total dues in respect of subscription fee payable by the petitioner till filing of the objection in September 2011, was claimed as Rs.25.68 lakhs approximately.

On a careful perusal of the Advocate Commissioner's report, it is found that the main objection of the respondent carries sufficient weight. The dues of commission for the period prior to 15.07.2008 has to be totally ignored as it is beyond the pleadings and reliefs claimed by the petitioner itself.

On the basis of materials available before the Tribunal at the time of passing of the order dated 22.03.2012 for reconciliation of accounts, this Tribunal could not/did not give any categorical and clear findings in respect of any other issue apparently under the hope that parties shall produce their original books of account before the Advocate Commissioner and that would provide sufficient material for deciding the issue of dues against the petitioner

or the respondent. However, that has not happened. It is strange that petitioner has claimed distribution commission from 15.07.2008 till filing of the petition i.e. from 15.07.2008 to 13.07.2011 but no books of accounts have been produced for any period even subsequent to 02.09.2008 when the ransacking of petitioner's office etc. allegedly took place. There is no good reason for not producing the books of accounts and other documents before this Tribunal or before the learned Advocate Commissioner for the period after 02.09.2008.

There is another significant feature which constitutes a glaring lacuna in the case of the petitioner. Admittedly, its earlier Petition bearing No.7(C) of 2009 was finally disposed of by this Tribunal on 26.02.2010 on the basis of settlement between the parties. That order and the terms of settlement show that the petitioner agreed to pay subscription dues amounting to Rs.11,90,115/- as outstanding on 24.02.2010. It even agreed to pay that amount in instalment of Rs.1 lakh every month in addition to the monthly subscription dues. Subsequently, it defaulted in paying instalments which is reflected in the impugned demand notice by way of arrears. It is wholly beyond comprehension as to why the petitioner would not claim for adjustment of its dues, if at all there existed any such dues, on account of alleged distributorship commission of 5% at the time of comprehensive settlement between the parties reached on 24.02.2010. It is a heavy burden upon the petitioner to explain why such dues, if at all they existed, were not claimed then and were later on claimed in the

present petition filed in July 2011. If the dues were accumulating since 15.07.2008, it does not stand to reason that petitioner would forego to claim it in February 2010 and raise the same by way of counter claim against outstanding shown in the impugned bill issued by the respondent.

Admittedly, there is no written agreement in respect of distributorship commission and in the evidence petitioner has admitted that the major work under such an agreement was not being performed by the petitioner since September 2008. Thereafter, the parties settled their differences in February 2010 with a written agreement under which only subscription fees payable by the petitioner remained due against the petitioner. The present petition was then filed to challenge the notices of disconnection showing dues of more than Rs.16 lakhs. Petitioner has filed this petition in July 2011 for rendition of accounts of the distributorship commission, claiming dues since 15.07.2008.

Upon a deep deliberation over all the relevant materials, facts, circumstances, the earlier detailed order dated 22.03.2012, the report of the Advocate Commissioner and the objections thereto, it is found that petitioner did not perform the primary role of making collections as a distributor of the respondent at least since September 2008. Whatever correspondences and dispute that lingered in this regard were clearly buried as settled on account of the fact that though petitioner had referred to and claimed distributorship commission in its notice that led to the earlier petition bearing No.7(C) of 2009,

the final settlement of February 2010 was a comprehensive settlement and did not leave any scope for the petitioner to make any further claim that it had money to recover on account of distributorship commission and that also from 15.07.2008. It is also found that petitioner was required to produce its books of accounts in original at least after the alleged ransacking in September 2008 but the same was not produced either before this Tribunal or before the Advocate Commissioner.

On the basis of aforesaid findings, the Advocate Commissioner's Report in respect of Issue No.1 and Issue No.4 are set aside. So far as Issue No.3 is concerned, this Tribunal has already held in the earlier order that admittedly respondent has yet not refunded the security deposit of Rs.16 lakhs to the petitioner. That finding is reiterated. Petitioner is held entitled to claim adjustment of Rs.16 lakhs against the impugned demand. It is also liable to pay subsequent dues on account of getting continued signals from the respondent due to pendency of this matter. The petition is allowed to the aforesaid extent i.e. declaring petitioner's entitlement to an adjustment of Rs.16 lakhs on account of deposit made by the petitioner towards the distributorship agreement which has remained with the respondent so far. Petitioner has become entitled to such adjustments on account of its subsequent stand taken during the pendency of this petition that it is no longer interested in distributorship agreement. Other claims of the petitioner shall stand rejected.

The impugned notice must be held to have lost its force by subsequent developments over such a long period. It is deemed just and proper to direct for ignoring the said notice in view of our findings that petitioner is entitled to adjustment of Rs.16 lakhs. The respondent will be at liberty to demand the outstanding dues from the petitioner after making adjustment of Rs.16 lakhs. In case of non-payment of dues or failure of the parties to settle that account in the light of payments that might have been made by the petitioner during the pendency of this petition, the respondent would be entitled to take fresh steps against the petitioner in accordance with law.

All pending M.As. shall stand disposed of along with the main petition.
There shall be no order as to costs.

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(S.K. Singh, J)
Chairperson

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member