TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 21st August, 2020

Broadcasting Petition No.256 of 2020
(with M.As. Nos.124 and 154 of 2020)

Zee Entertainment Enterprise Ltd. ....Petitioner

Versus

E-infrastructure & Entertainment(India) Pvt. Ltd.& Ors. ....Respondents

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

For Petitioner	:	Mr. Kunal Tandon, Advocate Mr. Shashank Shekhar, Advocate Mr. Amandeep Singh, Advocate
For Respondent No.1	:	Mr. Jayant K. Mehta, Advocate Mr. Jayant Pawar, Advocate
For Respondent No.2	:	Mr. Rajsekhar Rao, Advocate Mr. Manikya Khanna, Advocate

ORDER

By S.K. Singh, Chairperson – The main relief sought in this petition, *inter alia*, is for a decree of Rs.14.95 crores(approx.) in favour of the petitioner and against the respondents Nos.1 and 2, jointly and severally. One of the interim prayers in respect of which the parties have been heard and which is the subject matter of this order is to pass an interim order directing the respondents, jointly and severally, to pay the admitted amount of Rs.10,77,04,807/- and/or in the alternative to deposit the said amount before this Tribunal.

2. The petitioner is a broadcaster of its various channels whereas respondent No.1 is an MSO who has entered into a subscription agreement dated 12.02.2019 on the basis of RIO of the petitioner under the new Interconnection Regulations 2017. The agreement was for a term ending on 31.01.2020. According to petitioner the said agreement has been extended from time to time upto 30.06.2020 vide extension letters dated 03.03.2020, 31.03.2020, 20.04.2020 and 30.05.2020. The agreement and the letters are **Annexure P-1**. The supply of signals was disconnected on 08.06.2020. It is petitioner's case that invoices were raised regularly but respondent No.1 is a chronic defaulter who was earlier given a disconnection notice dated 14.10.2019 on the ground of non-payment of

outstanding licence fee dues of Rs.6.92 crores(approx.) for the billing till 30.09.2019. The notice is **Annexure P-2**.

3. It is petitioner's case that respondent No.1 through a letter dated 30.11.2019 (**Annexure P-3**) acknowledged the outstanding amount and gave a payment plan to clear the up-to-date outstanding of Rs.7.05 crores(approx.) and also made a payment of Rs.1 crore in discharge of its part liability. For the balance amount, respondent No.1 issued three cheques, each for an amount of Rs.1.50 crores. The cheques were dated 30.11.2019, 31.12.2019 and 31.01.2020. Upon presentation the first cheque dated 30.11.2019 itself was dishonoured for lack of funds. Petitioner again issued a disconnection notice dated 12.12.2019 (**Annexure P-4**) for the outstanding amount of Rs.7.48 crores(approx.). This was for billing done till 30.11.2019. Petitioner also issued a demand notice dated 22.01.2020 under the Insolvency and Bankruptcy Code 2016 for an amount of Rs.8.26 crores for the billing till 06.01.2020. Thereafter, respondent No.1 made a part-payment of Rs.6.29 crores and assured to pay the balance but failed to make the payment in spite of requests. This lead to another disconnection notice dated 09.03.2020(**Annexure P-6**). It is petitioner's case that respondent No.1 assured to renew the agreement as per applicable RIO and therefore, signals were not disconnected. In the notice of 09.03.2020, the grounds were: (i) non-payment of

outstanding licence fee which was split into two, Rs.6.95 crores(approx.) for regular billing from May 2019 till 31.01.2020 and Rs.5.72 crores (approx.) towards additional revenue on account of non-submission of monthly subscriber reports for the period February 2019 to April 2019; (ii) non-confirmation of request for audit; (iii) non-submission of the monthly subscriber reports for February 2019 to April 2019; and (iv) non-signing of new RIO agreement w.e.f. 01.02.2020.

4. According to petitioner, respondent No.1 never disputed the invoices, continued to avail the signals on the basis of extension granted through letters without any demur or protest and hence it is liable to pay the total amount of Rs.14.95 crores (approx.) as claimed through this petition. Copy of invoices and statement of accounts have been annexed as **Annexures P-7** and **P-8.**

5. One of the reasons for not disconnecting supply of signals in spite of notice dated 09.03.2020 is said to be the global pandemic due to the COVID-19 virus. The Ministry of Information & Broadcasting had issued an advisory on 11.04.2020 to all the stakeholders to continue to provide uninterrupted services to their subscribers and cooperate with other players in the interest of the viewers and larger public safety. It has been stated that disconnection was effected on 08.06.2020 because the respondent No.1 began to receive signals from respondent

No.2 without informing the petitioner in contravention of terms of the subscription agreement and the provisions of Interconnection Regulations 2017.

6. It is also petitioner's case that respondent No.2 is another MSO having agreement with the petitioner for re-broadcast of its channels and that without informing and taking care of the liability, a clandestine merger/take-over has been effected. According to petitioner, the supply of its signals to subscribers of respondent No.1 by respondent No.2 is illegal, unauthorized and has been effected by concealment of relevant facts and developments. Respondent No.2 is, therefore, said to be closely in hand-in-glove with respondent No.1 and hence should be held liable for the payment of outstanding dues of the petitioner, jointly and severally.

7. At the initial stage when the matter was first heard on 10.06.2020, respondent No.2 took the stand that it has decided to acquire and has in fact acquired the assets of respondent No.1 but requires certain time to remove and change the logo of respondent No.1 appearing in about 1.5 lakhs STBs of respondent No.1. Some accommodation was granted to respondent No.2 to complete the transaction and ensure compliance with the Regulations within a fixed time. Respondent No.1 was granted four weeks' time to either settle the issue of outstanding dues or to file its reply. Both the respondents have filed their

reply. Respondent No.1 has filed the reply to dispute the amount claimed by the petitioner. Petitioner has filed a rejoinder to the same. The parties were heard on the interim relief noted earlier, i.e. on 31.07.2020.

8. The reply of respondent No.1 begins with preliminary objections/submissions which are general in nature and not relevant for settlement of accounts and deciding the claim based upon invoices as set-up by the petitioner. Preliminary Objection No.F contains a submission that the amount of Rs.14.95 crores has been claimed by the petitioner malafidely; the amount is incorrect and has been highly inflated to show the respondent No.1 in bad light. Respondent No.1 has relied upon clause 10 of the Interconnection Regulations which is extracted hereinbelow to submit that in view of bar upon supplying signals in case the parties fail to enter into a new interconnection agreement, the respondent No.1, in spite of availing the signals under extensions granted through various letters is not liable to pay for the period after 31.01.2020. In support of this proposition reliance has been placed upon a judgment dated 10.05.2016 in **B.P. No.611/2015(UCN Cable Network Pvt. Ltd. Vs. Raj Cable Network & Anr.)** which has been annexed as **Annexure R-3**. On this account, respondent No.1 has denied the liability to pay the amount of Rs.4.18 crores for the period February 2020 to April 2020.

9. Respondent No.1 has also seriously disputed the additional billing for the period February 2019 to April 2019 because of not providing monthly subscribers' reports. Respondents stand is that this claim is not in accordance with clause 14.2 of the Interconnection Regulation 2017, no invoice was raised for such amount and such claim should be deemed to have been waived. In Para R of reply, respondent No.1 has subtracted the aforesaid two amounts of Rs.5.77 crores(approx.) and Rs.4.18 crores(approx.) and shown the balance to be Rs.5,04,24,388/-. Thereafter, it has deducted Rs.2.41 crores as incentives from May 2019 to January 2020, Rs.8,71,847/- as TDS for the period till 31.03.2019 and Rs.24,38,099/- as TDS for the period till 31.01.2020. It has also subtracted from the claim an amount of Rs.1.2 crores as a loss which respondent No.1 claims to have suffered in its subscriber base due to shut-down of particular brand of STBs during November 2018 to April 2019. After deducting the aforesaid four amounts, respondent No.1 has shown the balance payable as Rs.1,09,80,807/-.

10. Along with its reply, respondent No.1 has filed four documents as annexures. **Annexure R-1** is a formal Board Resolution authorizing a particular person to represent respondent No.1 in court proceedings etc. **Annexure R-2** is also not relevant for the purposes of deciding the issues relating to accounts and to ascertain the dues of the petitioner. It relates to resignation of one Mr.Somasekhar

– a Director. As noted earlier, **Annexure R-3** is a judgment of this Tribunal dated 10.05.2016 in **UCN Cable Network(supra.)**. This will be discussed while considering the legal issue raised by respondent No.1. **Annexure R-4(Colly.)** shows that a letter dated 14.03.2020 was sent to the petitioner along with nine incentive invoices covering the period from May 2019 to September 2019 as one group and from October 2019 till January 2020 as another group. The incentive for the second group covering the period of four months till January 2020 contains a note that it has been computed on the basis of invoices raised at the rate of 20% on the basis of subscription invoices raised by the petitioner for the said periods. The total amount claimed as incentive on 14.03.2020 through all the vouchers sent by respondent No.1 is for Rs.2.41 crores(approx.). There is no other material with the reply for supporting the stand of respondent No.1 already noted earlier.

11. In the short reply filed on behalf of respondent No.2 there is nothing relevant and material on the issues relating to accounts between the petitioner and respondent No.1. The stand of respondent No.2 is that the present dispute is between the petitioner and respondent No.1 and in Para 12, without enclosing the Asset Transfer Agreement between respondent No.1 and respondent No.2 it has been pleaded that the liabilities of respondent No.1 towards the broadcasters like the petitioner continue to remain the exclusive responsibility of respondent No.1

although in Para 11 of the short reply it is admitted that all material/physical assets including set-top boxes, CAS and SMS have been acquired by respondent No.2 but without disclosing the consideration.

12. Learned counsel for the petitioner has relied upon a recent order of this Tribunal dated 20.07.2020 in B.P. No.221/2020 (**SUN Distribution Services Pvt. Ltd. Vs. E-Infrastructure & Entertainment India Pvt. Ltd. & Anr.**). A perusal of that order discloses that the petitioner, a broadcaster – SUN Distribution Services Pvt. Ltd. had initially prayed for money decree against respondent No.1 and sought orders to restrain respondent No.2 from taking over the assets of respondent No.1 but ultimately it made a prayer to hold both the respondents jointly and severally liable to make payment of the entire dues claimed by SUN Distribution. After considering the defence of respondent No.2 on exactly similar lines and after considering the Asset Transfer Agreement furnished by respondents in sealed cover, this Tribunal found that the Asset Transfer Agreement shows that it came into effect from 01.04.2020 and without passing of any consideration, practically all the assets of respondent No.1, without any exception, have changed hands, allegedly taken over by respondent No.2 for no consideration and with very limited liabilities such as payment to vendors and to banks against loans etc. In Para 8 of that order it was found that respondent No.1 and respondent

No.2 are being managed by the same interests represented by Mr.Kailasam. They have devised means to defraud the creditors of respondent No.1 EEIPL which had a large business. The take-over of all the business and assets was with a view to defraud the unsecured creditors like SUN Distribution so that they may not be able to realize even the admitted dues. Such machinations and designs were held to be products of fraud lacking any legal sanctity. In Para 9 of that order it was found necessary in the interest of justice to hold respondents Nos.1 and 2 jointly and severally liable to pay the entire lawful dues of the petitioner in that case. They were also held jointly and severally liable to pay the admitted amount in that case.

13. So far as this case is concerned, there is no material difference in the situation and therefore, in the light of findings recorded in respect of Asset Transfer Agreement between respondent Nos.1 and 2 in the order dated 20.07.2020, a similar view is required to be taken in this case also. Accordingly, it is held that both the respondents are jointly and severally liable to pay the entire lawful dues of petitioner Zee Entertainment including the admitted dues, if any.

14. The defence of respondent No.1 against the demand of Rs.4.95 crores(approx.) has been noted earlier and it is available in Para R of its short reply. The invoices and calculations are not in issue but specific challenge has been made to the billing for the period February 2019 to April 2019 on the ground

of lack of any agreement. The judgment relied for this purpose is dated 10.05.2016 in B.P. No.611/2015 (**UCN Cable Network**). In that case reliance was placed by this Tribunal heavily upon Clause 4A of Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (Interconnection Regulations 2004) which is as under:

> "**4A Interconnection Agreements to be in writing. –**
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> **4A.1** It shall be mandatory for the broadcasters of pay channels and distributors of TV channels to reduce the terms and conditions of all their interconnection agreements to writing.
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> 4A.**2** No broadcaster of pay channels or distributor of TV channels, such as multi system operator or head/end in the sky operator, shall make available signals of TV channels to any distributor of TV channels without entering into a written interconnection agreement.
>
> 4A.**3** Nothing contained in Regulation 4A.1 or 4A.2 shall apply to any supply of signals or continuance of supply of signals of TV channels by a broadcaster or distributor of TV channels, such as multi system operator or head/end in the sky operator, in pursuance of or in compliance with any order or direction or judgment of any court or tribunal, including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or tribunal.
>
> 4A.**4** It shall be the responsibility of every broadcaster of pay channels who enters into an interconnection agreement with a distributor of TV channels to hand over a copy a signed interconnection agreement to such distributor of TV channels and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement and, similarly, it shall be the responsibility of every multi system operator or

> head/end in the sky operator, as the case may be, who enters into an interconnection agreement with a cable operator to hand over a copy of signed interconnection agreement to such cable operator and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement."

15. The Tribunal emphasized that parties are required to have an interconnection agreement in writing; it was made mandatory with a prohibition that no broadcaster of pay channels or distributor of TV channels, such as MSO etc. shall make available signals of TV channels to any distributor of TV channels without entering into a written interconnection agreement. It was because of such provision expressed in mandatory terms in the Regulations of 2004 that this Tribunal held that in the absence of written interconnection agreement the petitioner MSOs could not recover subscription charges because this Tribunal set-up under the TRAI Act would not entertain a claim which was in teeth of mandatory Clause 4A of the 2004 Regulations. However, it was also noted that Clause 5.16 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television System) Regulations 2012 (DAS Interconnect Regulations 2012) allowed, after expiry of an agreement, three months' time to the parties to negotiate the terms of a fresh agreement which would relate back to the date of expiry of the previous agreement. Hence, this Tribunal even in subsequent judgments such as one dated 19.04.2017 in B.P.

No.145/2014 (**SUN Distribution Services Pvt. Ltd. Vs. Lifestyle Communications, Hyderabad**) allowed claims for subscription charges for further period of three months beyond the expiry of the agreement. This judgment has been relied upon by learned counsel for respondent No.1.

16. Respondent No.1 has rightly not referred to earlier Interconnect Regulations because they have been replaced by the Regulations of 2017. In Para G of its short reply it has extracted and relied upon Clause 10 of the Interconnection Regulations 2017. Clause 10(14) requires a broadcaster to enter into a new written interconnection agreement with distributor of television channels before the expiry of the existing agreement. For this purpose, the broadcaster has to give a notice at least 60 days before the expiry of the existing agreement. There are two provisos which control sub-clause(14) of Clause 10. The first proviso is that in case the parties fail to enter into new interconnection agreement before the expiry of the existing agreement, the broadcaster shall not make the signals of TV channels available to the distributor on expiry of the agreement. The second proviso provides that the distributor of channels shall, 15 days prior to the date of expiry of the existing agreement, inform the subscribers through scrolls on the channels included in the said agreement – (a) the date of expiry of the existing interconnection agreement; and (b) the date of disconnection of signals of

television channels in the event of its failure to enter into a new interconnection agreement. The purpose of requirement of written agreement in the 2004 Regulations was to take care of the mischief arising from lack of written agreements because in that case the terms and conditions including the financial terms could always be disputed leading to uncertainty in the broadcasting sector. Once the parties enter into a written agreement, the rates and financial aspects get settled for the duration of the agreement. There is no embargo on parties agreeing to extend the term of a written agreement by mutual consent apparent through exchange of Emails and other written communications including letters. Such extension has been the norm since long because the negotiations sometimes used to take considerable time. On the basis of such extensions service providers have been realising licence fees and subscription charges.

17. With the arrival of new regime in 2017 the financial terms and conditions became more transparent, particularly on the basis of RIO which is to be kept in the public domain. If there is no written agreement ever signed between the parties under the 2017 Regulations, the supply itself would be contrary to the Regulations but where a written agreement has been in place and is due to expire there is no embargo or prohibition on extending the term of such agreement. Broadcaster must supply signals to the MSO who is in business relationship unless there are

good reasons to deny and both have a duty to provide channels to the ultimate viewers; planned discontinuance requires advance notice. If there can be no further agreement even by extension and if the failure is recognized by both the parties that no agreement is possible, the broadcaster has a duty to stop the supply of signals but before that the MSO/distributor has a corresponding duty to inform the subscribers by running scrolls, 15 days prior to the expiry of the agreement to inform on all the channels covered by the agreement that the agreement is coming to an end on a given date and hence, on the given date there shall be disconnection of signals of the concerned television channels.

18. In view of aforesaid provisions in the 2017 Regulations, unless the MSO/distributor runs the required scrolls in time, it will not be easy to infer that the parties have failed to enter into a new interconnection agreement even through an extension of the earlier written agreement. The extension can be done lawfully on the basis of agreement between the parties apparent from their conduct. Such extensions are common place in the sector and these cannot be held to be in violation of Clause 10 of the Interconnection Regulations. In the present case the letters and the conduct of the respondent No.1 supports the claim of the petitioner that extension was offered and accepted by the respondent who did not disconnect viewers not run any scroll which could show lack of new agreement due to failure

of talks. Therefore, the defence of lack of written agreement is found to be of no substance in the present case. As a result the stand of the respondent that Rs.4,18,85,224/ must be deducted from the amount claimed by the petitioner is rejected.

19. Respondent No.1, however, appears justified that the amount of Rs.5.72 crores (approx.) which is amount of additional billing for the period February to April, 2019 needs to be scrutinized closely and should not be held payable immediately as lawful dues. It deserves to be accepted. At this stage it will not be proper to go into all the aspects, factual and legal for deciding the correctness or validity of additional billing, hence, this amount will not be payable at this stage till the claim is examined in detail at the stage of final hearing. On deducting the amount of additional billing of Rs.5.72 crores(approx.) from the claimed amount, the balance payable to the petitioner comes to Rs.9.23 crores(approx.).

20. Respondent No.1 has reduced the payable amount by amount of TDS for two different periods. That appears to be justified. If the respondent No.1 fails to deposit the TDS with the taxing authorities as per law then the petitioner would be at liberty to recover that amount at the stage of final hearing. So far as incentive claimed by respondent No.1 for Rs.2.41 crores is concerned, the rejoinder of the petitioner shows that on the basis of the subscriber reports furnished by respondent

No.1 for the period May 2019 till April, 2020 the payable incentive comes to Rs.57,18,554/-(including GST). The verification of the subscriber report for the month of May 2020 is said to be still in process. In this factual background, respondent No.1, in terms of the agreement has to pay the amount claimed by the petitioner on the basis of invoices raised in regular course. At this stage it can not be held entitled to receive incentives for any amount beyond what has been admitted by the petitioner. Only when it succeeds in establishing its claim as per law it may become entitled for more. It cannot refuse to pay the amount claimed by the petitioner simply by raising invoices for incentives as per its own notions. The incentives are payable after verification, only on receipt of invoiced subscription charges. Part of claim for incentives not accepted by the petitioner cannot become payable unless adjudicated upon and found payable. For this purpose, respondent No.1 will have to raise and maintain a claim before this Tribunal in accordance with law. For the present however, the admitted amount of incentive of Rs.57,18,554/- is permitted to be deducted. So far as loss of subscriber base due to STB shut-down during November 2018 to April 2019 is concerned, the claim itself cannot entitle respondent No.1 not to pay the lawful dues of petitioner. Neither Regulations nor the agreement permit this course of action and the nature of the claimed loss also appears to be beyond the agreement and an afterthought because admittedly such a claim was never raised in the past.

There is no whisper of such past claim in the letters of respondent No.1 including the letter dated 30.11.2019(**Annexure P-3**) wherein it acknowledged the outstanding amount on that date and gave a payment plan. Such a claim by way of defence appears to have been taken only after the disconnection notice of 09.03.2020. In such circumstances respondent No.1 is not entitled to withhold the amount of Rs.1.20 crores on the basis of its own determination. For such a claim of loss, respondent No.1 will be required to move a court of law and seek redressal by establishing the same in a manner known to law.

21. As a result of aforesaid discussion, from the dues claimed by petitioner as on 30.04.2020, respondent No.1 has been able to raise a dispute worth consideration only for an amount of Rs.5,72,80,419/-. As discussed above, from the balance claim of Rs.9,23,09,612/-, it is found entitled to withhold/deduct lawfully an amount of Rs.57,18,554/- on account of admitted incentives till April 2020 and the amounts of TDS shown in Para (R) of the reply. On further deducting such amounts, the payable claim at this juncture comes to Rs.8,32,81,112/-.

22. In the regulated broadcasting sector, a certain amount of self-discipline must be shown by all the service providers in the matters of payment of money to each other as per agreement and accounts. Fraud and indiscipline would vitiate the sector and may ultimately affect the rights of the viewers to receive supply of

channels as per their option. The monetary claims and counter-claims have also to be decided by this Tribunal only because it is an important sector which needed and has come to be regulated through statute. This Tribunal has to keep principles of natural justice in full view but is not required to follow the provisions of CPC. Expeditious relief within 90 days is the mandate. This requires considering some of issues, especially legal issues on merits even at the interim stage. This was necessary in the present case also otherwise interest of justice would have suffered.

23. In the light of discussions and findings given above, while reserving the remaining issues and claims for further hearing and adjudication, the claim of the petitioner by way of interim relief at this stage is allowed but only for Rs.8,32,81,112/-. An interim decree for this amount in favour of the petitioner is accordingly allowed. This amount must be paid by respondents Nos.1 and 2, jointly and severally within four weeks from today failing which the petitioner would be entitled to realize the aforesaid money along with interest at the rate of 9% per annum by filing an execution application. Additionally, in case of non-payment, petitioner would be entitled to treat respondents Nos.1 and 2 to be defaulters and take appropriate action as per law in terms of relevant Regulations/agreement. The prayer for interim relief is disposed of accordingly.

24. Post the matter before the court of Registrar on 23.09.2020 for passing necessary orders and directions for completion of pleadings and to make the case ready for hearing.

(S.K. Singh)
Chairperson

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