

Zee Turner Ltd Vs. Asia Net Satellite Communication Limited

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Court : Telecom Disputes Settlement and Appellate Tribunal TDSAT

Decided On : Jul-22-2011

Judge : S.B. SINHA, CHAIRPERSON, THE HONOURABLE MR. G. D. GAIHA, MEMBER & THE HONOURABLE MR. P.K. RASTOGI, MEMBER

Appeal No. : Petition No.166 (C) of 2010, (With M.A. No.11 of 2011)

Appellant : Zee Turner Ltd

Respondent : Asia Net Satellite Communication Limited

Advocate for Pet/Ap. : For the Petitioner: Mr. Maninder Singh, Senior Advocate, Mr. Vadivelu Deenadayalan, Mr. Paras Anand, Mrs. P M Singh, Advocates. For the Respondent: Mr. Arun Kathpalia, Ms. Shirin Khajuria, Advocates.

Judgement :

S.B. Sinha, J.

The petitioner is a content aggregator of several channels of the Zee Group of Broadcasters.

The respondent herein is a big Multi Service Operator operating in the State of Kerala.

2. By reason of an agreement entered into by and between the parties hereto, the petitioner agreed to supply signals of its channels to the network of the respondent on payment of subscription fee as specified therein. It fell into arrears in consequence where to the petitioner issued a public notice on or about 6.1.2009. The signals were disconnected on 11.2.2009.

3. The parties in view of their respective stands taken, entered into negotiations, both on the contents of the notice of disconnection as well as those contained in the said public notice i.e. quantum of the amount due as also the fact that it had been distributing the signals of the petitioner in an unauthorised mode.

4. A suit for injunction was filed by respondent against petitioner in the Civil Court. An interim ex-parte order of injunction was passed in the said suit on 13.02.2009 in favour of respondent. An order of injunction was passed upon hearing the parties on 25.3.2009. An appeal was preferred thereagainst before the learned District Judge by petitioner.

5. During the pendency of the said appeal, the parties hereto met for the purpose of restoration of signals and it was agreed and that in the event of respondent's making payment of the amount due, which was negotiated at Rs.8,025,200 in instalments, the services shall be restored within 24 hours:-

	Bouquet	Total
	rate/per	Subscription
Subscriber		

Particulars	Base	subscriber/mont h (in Rs.)	Fee per month (in Rs.)*
Bouquet-I	107,000	36.70	3,927,000
Bouquet-II	107,000	22.28	2,384,000
Ten Sports (ala carte)	107,000	15.00	1,605,000
Bouquet-IV	10,500	10.40	109,200
		TOTAL	8,025,200

• Service Tax was to be paid in addition to the total

subscription fee payable per month.

6. A subscription agreement was to be entered into within one week from the date of the said MOU, in terms whereof for different bouquets of channels of the petitioner, a sum of Rs.60,12,210/- was to be paid on a monthly basis plus taxes. Separate Agreements were to be entered into for six different regions and the agreed subscription amount was to be specified

therein. The outstanding amount was settled as Rs. 4,08,15,345/- which was to be paid by respondent in instalments viz :- PAYMENT SCHEDULE:

S.No.	Details of Instalment	Date of Payment	Amount (in Rs.)
1.	First instalment of Rs. 1,36,05,115/-	30.07.2009	1,36,05,115
2.	Second instalment of Rs. 1,36,05,115/-	30.08.2009	1,36,05,115
3.	Third instalment of Rs. 1,36,05,115/-	30.09.2009	1,36,05,115
		TOTAL	4,08,15,345

7. We may also notice the following stipulations contained in the said MOU:-

“ASIANET agrees and undertakes to clear its outstanding dues of Rs. 4,08,15,345 (Rupees Four Crores Eight Lacs Fifteen Thousand Three Hundred and Forty Five only) towards the subscription fee for availing ZTL signals as per schedule of payment mentioned herein below. Asianet shall

clear the outstanding amount of Rs.4,08,15,345/- accumulated arrears upto 26.01.2009 by 30.09.2009 as per schedule of payment mentioned herein below: 3 monthly instalments on 30th of each month starting from 30th July 2009.

It has been agreed between the parties hereto that the above mentioned figures have been arrived at based on tentative workings which are subject to correction in case of Arithmetical or any other error. Any change in the above amounts will come into effect only upon mutual discussions

between the parties.

Further, it has been agreed by ASIANET that it shall pay the monthly subscription fees from 15th July 2009 to 31st March 2010 on its due dates i.e. last day of every month, in addition to the abovementioned outstanding arrears payable by ASIANET to ZTL on the dates of instalments payable as mentioned in Para 4 herein above in terms of the arrangement mutually arrived at between the parties.

It is agreed by ASIANET that in case they fail to clear the total outstanding amount of Rs.4,08,15,345/- by 30.09.2009 as specified in Para 4 herein above on the due dates, then in such circumstances ZTL's signals to ASIANET shall be deactivated after giving public notice of 21 days as prescribed by TRAI regulations.

It is further agreed between the parties that introduction of any new or additional channel in the existing Bouquet shall be available to the ASIANET at the prevailing market price/the price as filed by ZTL with TRAI. Accordingly a proportionate reduction will be applicable in case of deletion of any channel in the list mentioned in Annexure-I. To sum it up ASIANET shall be solely responsible for making the payment of all such subscription fees to ZTL, namely:

(i) Outstanding amount of Rs. 4,08,15,345/- accumulated to be paid by 30.09.2009 in terms of schedule of payment as detailed in Para 4 herein above.

(ii) Monthly subscription fee of Rs.60,12,210/- to ZTL w.e.f. 15th July 2009 plus service tax and other taxes as applicable on its due date.

(iii) Over and above Rs. 4,08,15,345/- ASIANET shall pay to ZTL monthly subscription fees amounting to Rs. 97,391/- attributable to the five (5) networks serviced by ASIANET as mentioned in Para no. 7, plus any new additional networks serviced by Asianet as well. Also,

ZTL will reduce from the billing proportionate amount of the billing that is being charged to any Operators who moves away from ASIANET.

This MOU shall be read as a part of the Subscription Agreement, which the parties shall execute as per Clause 2. Jurisdiction The Hon'ble TDSAT shall have exclusive jurisdiction with regard to any disputes arising out of this MOU and no other Court shall have any jurisdiction to adjudicate upon the dispute. Supersedes prior agreements/MOU Signing of this MOU shall supersede any prior agreements/MOU/arrangements, between the parties.

8. From annexure A appended to said MOU, it would appear that Bouquet-4 consisted of only one channel namely Zee Sports and so far as Ten Sports is concerned, its rate was fixed a-la-carte.

9. Indisputably, the parties also entered into an agreement on the same day, the relevant clauses whereof read as under :-

"Clause 4

For the period from 1st July 2010 to 31st March 2011 Asianet will pay to Taj a Monthly Subscription Fee of Rs. 13.60 Lakhs (Rupees Thirteen Lakhs and Sixty Thousand Only) plus

Service Tax and other applicable from time to time for networks as per the following table.

Clause 4.9

If the Subscription Fees, or any other charges as specified in this agreement or any other agreement executed in this connection, is not paid by the subscribers on due date, the Company may take any or all of following recourse without prejudice to any other rights:

. switches off the IRD (S) boxes by giving seven days notice or the notice as specified by the provisions of applicable Statute, if any, and/or

. terminate this Agreement, by giving three days notice or the notice as specified by the provisions of applicable Statute, if any, and take back possession of the IRD(s) . charge an interest of 18 % p.a. @ or at the rate prescribed by any statute, which ever is higher, compounded monthly from the date such amounts became due until they are fully and actually paid.

Upon disconnection of the Service, whether accompanied by termination or not, all sums due and payable by the Subscriber to the Company shall forthwith become and remain due and payable.

Provided however, the Company may at its discretion, waive its right to disconnect the Service and terminate this Agreement, upon such terms and conditions as the Company may deem fit and proper, which shall, inter-alia, include the receipt by the Company (a) of the entire arrears of Subscription Fees and other charges due and payable by the Subscriber under the terms of this

Agreement, together with interest accrued thereon at the rate of one and one half percent per month from the date such amounts became due and payable until they are fully paid; and (b) the re-connection charges as may be decided by the Company.

Clause 7.2

In the event that the Subscriber is desirous of extending the term of this Agreement beyond its Initial Period, it shall give the Company a minimum of two (2) months written notice prior to the expiration of the Initial Period of its intention to extend the term in which event the parties shall negotiate in good faith the terms and conditions which shall apply in respect of any such extended term. All such extension shall be to a maximum period of one (1) year only. If parties fail to arrive at or agree on the terms of the extension within the Initial Period, this Agreement shall expire at the end of the Initial Period. Provided that if the negotiations for renewal of the interconnection agreement continue beyond the due date of expiry of the existing agreement then the terms and

conditions of the existing agreement shall continue to apply till a new agreement is reached or for the next three months from the date of expiry of the original agreement, whichever is earlier. However, once the parties reach an agreement, the new commercial terms shall become applicable from the date of expiry of the original agreement.

Provided further that if the parties are not able to arrive at a mutually acceptable new agreement, then any party may disconnect the retransmission of TV channel signals at any time after the expiry of the original agreement after giving notice in pursuance to the applicable Statute. The

commercial terms of the original agreement shall apply till the date of disconnection of signals."

10. The said agreement expired on 31.3.2010. The respondent admittedly did not discharge its contractual obligations to pay the arrears as per the said MOU. It also defaulted in payment of the

subscription fees in terms of the aforementioned agreement dated 14.7.2009. The petitioner by a letter dated 17.8.2009 called upon the respondent to pay a sum of Rs.15,100,635/- only. By another letter dated 14.9.2009, respondent was called upon to pay the outstanding amount of Rs.1,82,77,927/-. Along with the said notice an activity report was also annexed.

Yet again, by a legal notice dated 3.12.2009 respondent was asked by petitioner to pay a sum of

Rs.44,639,799/- which was also to be treated as a notice u/s 433 (e) read with Section 434 of The Companies Act, 1956.

11. The respondent, however, by a letter dated 23.12.2009 addressed to the learned Advocate of petitioner contended as under :-

"It is pertinent to note that as the contract is continued and regular payments have also been made. Of course, based on the contracts signed, there is an outstanding amount to be settled and it is the difficulty experienced in the liquidity caused by the ground issues that causes the delay in settlement. It was with the desire to continue and clear the debts, the MOU was signed and the outstanding is a temporary phenomenon. Now it is a fact that the contract is a current and valid contract with a month to month payments happening and the outstanding accumulated has to be seen as an outstanding that has happened due to ground issues which also will be paid off as the market situation stabilizes.

Out of a schedule of payment for clearing the outstanding amounts. In this background it is

essential to mention that a winding up notice in a matter of a continuing business contract with currency of transaction of payments does not match the relationship being pursued between our companies. In view of this we request you to advise your client M/s. Zee Turner Ltd. to withdraw the notice."

12. The petitioner, thereafter, in response to the said reply, by a letter dated 30.12.2009, inter alia, stated as under :-

"The seven cheques for a total amount of Rs.67,38,889/- available to us for initiating legal

action(s) against you for the outstanding amount. It is further pertinent to note that acceptance of the abovementioned cheques by us in no event shall amount to our agreeing for "final confirmation of a payment schedule" or any other confirmation whatsoever. It is once again reiterated that the payment schedule as agreed in the MOU continues to apply. In addition, the monthly subscription fee has become due on month to month basis leading to total outstanding dues of Rs 5,16,11,140/- (Rupees Five Crores Sixteen Lakhs Eleven Thousand One

Hundred Forty Only) as on 4.1.2010 as mentioned hereinabove."

Along with the said letter, a statement of account was also annexed.

13. On the premise that the respondent owes a sum of Rs.5,90,84,750/- together with interest @ 18 % per annum, this petition has been filed purported to be in the nature of a summary suit as stipulated Under Order 37 of the CPC.

14. In the petition, the petitioner has annexed statements of accounts in two parts to which we would advert to at an appropriate stage.

15. In its reply, the respondent admitted that as on the date of filing thereof i.e. on or about 21.8.2010, a sum of Rs.4,41,69,147/- was due which, as would be noticed hereinafter, was in fact the dues as on 31.3.2010.

It, however, contended that having regard to the fact that two of the very popular 'Sports Channels' of which the petitioner was the distributor namely 'Ten Sports' and 'Zee Sports', having migrated and the remaining bouquets of channels contained different value equations, the existing agreement was required to be revised consequent to the changed business equations.

16. It was furthermore stated :-

"Due to commercial constraints and to eliminate the chances of increasing the outstanding amount, the

Respondent hereby proposes to limit its contract with the Petitioner to Bouquet 2 alone for the current year's contract starting from April 2010, which should be determined applying the principle of nondiscrimination and reasonableness as enunciated in Inter Connection Regulations. The Petitioner can accordingly initiate steps to discontinue the other

bouquets and accept a settlement plan for payment in instalments of the accumulated outstanding since April 2006, after reconciliation to the satisfaction of the parties."

17. It was furthermore averred that the amount of Rs.48,15,345/- stated to be outstanding as on 26.1.2009 was based upon tentative working and not upon any conclusive figure and subject to

reconciliation being tentative in nature.

18. The respondent also relied upon a letter dated 18.5.2010 which was issued after filing of this petition wherein it raised a contention that there was a variance of approx. Rs. 40 Lacs in the

books of accounts of the parties.

19. It also issued a proposal for clearing off the dues as on 23.6.2010, stating :-

"Both the parties has submitted before the Hon'ble TDSAT at the time of the hearing on 28th May 2010 that the parties are meeting to resolve this issue. Based on that, we had meeting with your representatives (M/s. Ajit Krishnamoorthy, Ajitt Raj and Viresh Dhalbar) yesterday at our office in Trivandrum. Based on the various discussions at the meeting we are submitting herewith the following proposal, which we request you to consider so that the relationship can continue smoothly in the future to the mutual benefit of both the parties:

1. Based on our books the total amount due to you as on 31stMarch 2010 was Rs.4,41,69,147/- (Four Crores Forty One Lacs Sixty Nine Thousand One Hundred and Forty Seven Only), inclusive of Service tax. 2. As informed, per your books, the amount due is higher on account of the following: Particulars Amount Difference between the books for the period upto 31st March 2006 2,99,219 Excess Billing Accounted by Zee for the Year 2007/08

12,39,216 TDS for the Years 2007/08 and 2008/09 not accounted by Zee 17,96,151

Excess billing for the month of July 2009 (Delayed activation but billing done earlier)

11,05,245 Total Amount 44,39,831 * • The first 3 figures are the difference that was there at the time of signing of the MOU in July 2009. Further as our Statement of Account in books of Zee Turner Limited was not handed over to us we are not in a position to determine whether any other difference exists as on 31stMarch 2010."

20. The petitioner filed a rejoinder to the said reply, wherein it reproduced its letter dated 8.9.2010 in response to the respondent's letter dated 3.9.2010 received by it on 6.9.2010 along with post dated cheques totalling a sum of Rs. 3.20 Crores. Some of the contentions raised therein are as under :-

" In this regard, the petitioner has sent a response on 08.09.10, inter alia, stating as under:-

"WITHOUT PREJUDICE"

1. As on 31.05.10, for receiving the signals of channels of our company for re-transmission by your company in 6 specified districts of Kerala viz. Trivendrum, Kollam, Kottayam, Ernakulam, Trichur and Calicut, your company had become obliged to pay to Zee Turner an amount of Rs. 5,90,84,740/-. Your company had also become liable to pay an amount of the total of Rs.6,49,13,794/- to Zee Turner as on 31.05.10. Needless to state that all the payments made by your company to Zee Turner are very much a part of your own accounts.

Your company was all along fully conscious and aware of the outstanding amount required to be paid by it to Zee Turner.

2. Without prejudice to this position, it is stated that the statement of account for the period of 30.07.09 to 25.05.10 clearly incorporating therein each of the payment made by your company to Zee Turner is upon reconciliation and was furnished to your company alongwith Zee Turner letter dt. 08.01.10 and again on 14.04.10. This reconciled account statement was again furnished to you by Zee Turner on 07.05.10 and again on 20.05.10. Thereafter, this reconciled account statement was also duly annexed with Petition No.166/2010 filed before the Hon'ble TDSAT.

3. It is also a matter of record that your company has never disputed any such payment which it had made to Zee Turner and had not been duly credited in your account and the reconciled account statement whereof has been repeatedly furnished to your company by Zee Turner.

4. That the only issue of TDS which had been raised by your company was duly addressed vide Zee Turner's letter dated 20.07.10 alongwith the details with regard to TDS certificate for an amount of Rs.16,82,177/- having been issued by Zee Turner to your company for the Financial Year 2008-09 was once again confirmed. The copy of this letter of Zee Turner dt. 20.07.10 along with its Annexure-1 containing the above mentioned details and confirmation for the TDS for the year 2008-09 is once again annexed herewith."

21. Indisputably, the respondent had been sending its SLRs. By a letter dated 20.7.2010, petitioner inter alia called upon respondent to enter into an agreement on the subscriber base of 8,0566 inter alia, contending :-

(ii) 'For reasons best known your company had not declared Subscriber base for seven (7) Districts which apparently were actually serviced by you during the previous years also.

Even when our market sources and field team have been giving the information about you having the advantage of Zee signals in the above referred additional 7 districts, we had exercised patience hoping that your company would come up on its own for having the conviction of receiving Zee signals, in a lawful manner, for these additional 7 districts areas. Now as per your own admission in your SLR's for the month of April, May and June 2010 your company has declared a subscriber base in 13 districts of Kerala as can be seen from the above Tables (SLR for the month of April, May and June 2010). We are constrained to state that your action in not coming forward voluntarily about your operations in additional 7 Districts and consistently avoiding to give your

SLR during previous years, are not bonafide at all. We eagerly look forward for receiving a request for lawfully enjoying the signals of Zee Channels in all the 13 districts at a connectivity base of at least 8,01,244 subscribers base declared by you in your SLR for the month of May 2010."

22. Before, however, we proceed to advert to the rival contentions of the parties, it may be noticed that having regard to the admission made by the respondent, an application was filed by the petitioner herein for passing a decree on admission in terms of Order XII Rule 6 of the Code and by an order dated 25.10.2010, the same was allowed and a decree for a sum of Rs.4,41,69,147/- as on 30.03.2009 was passed.

23. Indisputably, the said order has been complied with.

24. It is also admitted that despite observations made by this Tribunal in the aforementioned order dated 25.10.2010, Bouquet-I was disconnected by the respondent but channels of Bouquet-II

continued to be supplied to the respondent's network.

25. Mr. Maninder Singh, the learned Senior Counsel appearing on behalf of petitioner would urge :-

(i) The stipulations contained in the MOU as also the agreement being clear, explicit and unambiguous and having regard to the admitted fact that respondent made itself liable to pay a total sum of Rs.5,49,73,086/- up

to April 2011, as per the statement of account for the period

15.07.2009 to 20.04.2011 to the petitioner, this petition should be allowed.

(ii) The purported discrepancy in the accounts to the extent of Rs.44,39,839/- which came down to Rs. 40 Lacs as claimed by respondent, essentially related to non-consideration of the deduction from the payments made by respondent, amounting to Rs.16,82,177/- which would appear from the cross examination of Mr. M V Sasikanthan.

(iii) As the only issue raised by respondent centres round tax deduction at source (TDS) only which has been reconciled, no other or further question of reconciliation of the accounts would arise for consideration of this Tribunal.

(iv) The letter dated 23.6.2010 was issued by respondent by way of an afterthought as neither any delayed activity has been pleaded nor proved.

(v) The petitioner's letter dated 08.09.10 to the effect that reconciliation had already taken place having not been controverted, the contents thereof must be held to have been admitted.

The said stand of the petitioner would find corroboration from the letter of the respondent itself being dated 17.08.2010 whereby it had asked for reconciliation of accounts only from July 2009 and not for any period prior thereto, but despite the same, now it intends to have the

accounts reconciled upto March 2006, which is impermissible in law.

(vi) The contention of the respondent that it had been discriminated against vis a vis the other MSOs has no legs to stand in view of judgment of this Tribunal passed in Petition No. 153 (C) of 2009 titled as "Asianet Satellite Communication Ltd. Vs. ESPN Software India Pvt. Ltd."

In view of the admitted fact that the respondent discontinued Bouquet-I and continued to avail the

channels of Bouquet-II during pendency of this proceeding in terms of the observation of this Tribunal, it was bound to pay for the said amount.

(vii) From the pattern of payments made by the respondent, it would appear that the same were adhoc in nature and not on the basis of the agreement, wherefor the arrears have been computed for the two periods i.e. up to May 2010 for a sum of Rs.1,30,65,115/- with cumulative balance of

Rs.5,35,42,169/-.

(viii) If the signals were continued to be availed, the MSOs must pay therefor, in support whereof reliance has been placed upon the judgment of this Tribunal in Petition no. 185 (C) of 2010 disposed off on 10.3.2010.

26. Ms. Shireen Khajuria, learned Counsel appearing for respondent, on the other hand, urged:-

(i) The people of Kerala being mostly Malayalam speaking and/or sports loving, only the local channels or sports channels are popular and keeping in view the fact that two of petitioner's

best sports channels namely 'Ten Sports' and 'Zee Sports' went out of its bouquet wherefor the

respondent had to enter into a separate agreement with the Taj Television India Pvt. Ltd., on or about 20.7.2010 for a monthly subscription of Rs.13.60 lacs Plus tax i.e. on a 30 % increase in the amount of subscription fees which was being paid to petitioner and in that view of the matter, it was essential that the quantum of subscription fee should be re-worked out.

- (ii) So far as the purported admitted dues up to 31st March 2010 is concerned, the same being the subject matter of the order dated 25.10.2010 and as the petitioner at best can claim the monthly subscription fees for the months of April and May 2010, it is not entitled to a decree in its favour for alleged supply of signals of Bouquet-I upto 18.11.2010 and for Bouquet-II, which continued to be supplied in view of the fact that no amount has been claimed on the basis thereof.
- (iii) If the petitioner intended to ask for a decree in respect of its claim for the supply of signals to the respondent during pendency of the petition, it should have either filed an application for amendment of the petition and/or a separate application in relation thereto.
- (iv) The petitioner having filed a suit purported to be in terms of Order XXXVII of CPC was bound to confine its claim which was required to be paid under a contract namely upto 31.3.2010 and in view of the fact that the MOU as well as the agreements have come to an end by efflux of time and no other written contract having been executed by the parties, this Tribunal does not have any jurisdiction to direct any such payment.
- (v) From the respondent's letters including the one dated 19.7.2006, it would be evident that no agreement can be entered into on the basis of the declared subscriber base but only on the basis of the negotiated subscriber base.
- (vi) The petitioner having been collecting a sum of Rs.25 Lacs from other operators and Rs.69 Lacs from the respondent for supply of signals covering only 25% or less of Kerala market, it must be held to have been discriminated against, particularly in view of the fact that a large number of MSOs and DTH Operators have entered the market, as a result whereof the market share of the respondent has fallen to about 20%.
- (vii) The amount of Rs.4.08 Crores approximately mentioned in the MOU dated 14.7.2009 was tentative in nature and pursuant thereto only six subscription agreements have been entered into for different regions, from a perusal whereof it would appear that the petitioner agreed that the respondent has lost a sizeable market in terms whereof only the amount of subscription fee was decreased from 80 Lacs to 60 Lacs for the year 2009-2010.
- (viii) The respondent is entitled to parity in the matter of calculation of subscription fee vis--vis the other MSOs.
- (ix) From a perusal of the letter of the respondent dated 23.12.2010, issued in response to the petitioner's legal notice dated 3.12.2009, it would appear that a request had been made therein to depute a representative of the petitioner to discuss the issues relating to clearing of the outstanding but the said request had not been complied with.
- (x) From the letter dated 13.10.2009, it would also appear that according to the respondent only the sum specified therein is payable wherefor discussions were held with Shri Kulanti Raja, a representative of Zee Turner.

(xi) The respondent never refused to pay the just dues of the petitioner and in fact it had asked its

representative to verify its books of accounts which are being maintained in regular course of business and in support whereof even the auditor's certificate had been issued.

(xii) The respondent is the only MSO in the entire State of Kerala which had been supplying the SLRs on a regular basis which was also accepted by petitioner in its notice dated 20.7.2010. The said letter was issued mala fide which would be evident from the fact that petitioner had indicated therein that it would enter with an agreement with respondent only on the basis of the declared

subscriber base in its SLRs for the months of April to June 2010.

(xiii) So far as the MOU is concerned, no interest having being stipulated thereunder and furthermore in view of the fact that the only option which could be exercised by petitioner being disconnection of respondent's network in the event of its failure to pay the arrears for the period 15.7.2009 to 31.3.2010, no interest was payable on the principal sum.

(xiv) The arrears had mounted, only because of the unreasonable attitude on the part of petitioner and refusal to treat respondent at par with other MSOs.

27. We may at the very outset notice that the question as to whether the respondent can be treated to be at par with the other MSOs vis--vis its share of viewership to the State of Kerala, this Tribunal in its judgment in Petition No. 153 (C) of 2009, held as under :-

"The entire case of the petitioner is based on a comparison with the other multisystem operators and service providers in the State of Kerala. The main theme of the petitioner's case is based on the premise that the petitioner has been discriminated in determination of the subscriber base vis-avis the other Multi System Operators in the state of Kerala.

28. Upon taking into consideration the factual matrix involved therein, the materials brought on record as also the submissions made by the learned counsel, it was opined :-

"(ix) 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.

(x) ACV bouquet largest TV channel bouquet with 5 channels namely ACU, Jukebox, Jukebox plus and Rose Bowl. This is a comprehensive bouquet of channels which serves the needs of masses in Kerala and there the most distinguished feature of the petitioner is that it is broadcaster

as well. It is virtually a broadcaster, MSO, LCO, Internet Service Provider and is heading for triple play all over the state and thereby virtually taking over majority of the entertainment and IT requirements of the State."

29. Opining that more or less parity has been maintained, it was held :-

"Keeping in view the aforementioned backdrop and furthermore not being oblivious of the principles of level playing field as has been advocated by the Supreme Court in Reliance Energy Ltd. and Ors. vs. Maharashtra State Electricity Distribution Company Ltd. (2007)8SCC 381, we

must also keep in mind what would be meant by a nondiscriminatory term. Is it in absolute lines? Should it not form the class on the basis of the same homogeneous group? If that be so, even a sub-classification between two such groups namely big MSOs and small MSOs and who, thus are operating in big towns and semi-urban or rural areas must be kept in mind. One may have good

customers like hotels, nursing homes, clubs, malls, which are plenty in the State of Kerala and thus can be

treated to be the creamy layers amongst the customers and the rest in another class. The class of customers, the petitioner offers to pay services may found the same to be

inevitable, for others it may not be so. One sector of MSOs may be wholly unorganised, they may not be able to realise the subscription fee from a good number of their customers, whereas the subscription fee of big MSOs like the petitioner except in some exceptional cases would be

almost secure. It is beyond any doubt or dispute that rates of subscription fee not only varies from metropolitan towns to the hilly areas, they do vary from area to area in the same town. We, therefore, must have the requisite facts and figures for invoking the equality clause vis--vis

the level playing field."

30. It was held that the respondent was a class by itself.

31. Noticing the decision of the Apex Court in R. K. Dalmia Vs. Justice S.R. Tendolkar 1959 SCR 279, it was held :-

"The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish –

(a) That a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; (underlining is ours)

(b) That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) That it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) That the legislature is free to recognise degrees to harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) That while good faith and knowledge of the existing conditions on the part of legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the

presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

32. The petitioner is a class in itself and, therefore, the negotiated terms and conditions as per MoU valid up to 28.2.2009 and extended for 90 days as per Regulation 8.1 during the period of negotiations for future is held to be valid.

33. Although the learned counsel for the parties addressed us at great length over the areas of controversy, to our mind, the ambit of the dispute between them is very narrow. The principal questions are :-

1. Whether the respondent was entitled to deductions of a sum of Rs.44,39,831/- which amount must be reconciled?

2. Whether the petitioner is entitled to a decree beyond the period 31.3.2010?

3. Whether the respondent is entitled to claim any interest on the principal amount?

34. Before, however, we advert to the above mentioned questions, we may notice the claim of petitioner as it stands now for different reliefs as has been prayed for :-

"1. For the payment of arrears as specified in the MOU dated 14.7.2009 and the subscription fees payable in terms of the agreement of the said date i.e. upto 31.3.2010.

2. Subscription amount payable for the months of April and May 2010 being outside the purview of the said agreement; and

3. For the period June 2009 till date."

35. The statement of account submitted before us by petitioner is as under:-

"[ZEE TURNER LTD.

Statement of account for the period 15.07.2009 to 20.04.2011 Area Covered: Calicut, Ernakulum, Kolam, Kottayam, Trichur, Trivandrum And 5 networks services by Asianet Asianet Satellite Communication Pvt. Ltd. Month Billing including the Subscription Fee attributable to 5 networks

serviced by Asianet Collection Cum Balance Opening balance 15.07.2009 40,815,345 15.07.2009 to 31.07.2009 3,690,019 2,200,000 42,305,364 Aug-09 6,728,859 11,500,000 37,534,223 Sep-09 6,728,859 6,682,177 37,580,905 Oct-09 6,728,859 2,586,272 41,723,492 Nov-09 6,728,859 4,152,617 44,299,734 Dec-09 6,728,859 6,738,889 44,289,704 Jan-10 6,728,859 - 51,018,563 Feb-10 5,542,572 4,813,614 51,747,521 Mar-10 5,542,572 9,290,497 47,999,596 Apr-10 5,542,572 - 53,542,168 May-10 5,542,572 - 59,084,740 Jun-10 5,542,572 5,000,000 59,627,312

Jul-10 5,542,572 - 65,169,884 Aug-10 5,542,572 - 70,712,456 Sep-10 5,542,572 - 76,255,028

Oct-10 5,542,572 - 81,797,600 Nov-10 3,152,903 39,169,147 45,781,356 Dec-10 1,838,346 47,619,702 Jan-11 1,838,346 49,458,048 Feb-11 1,838,346 51,296,394 Mar-11 1,838,346 53,134,740 Apr-11 1,838,346 54,973,086 106,290,954 92,133,213 54,973,086 1. Collection in the month of Sept' 2009 include TDS certificate of Rs. 16,82,177]

36. We may also notice the contention of respondent on the statement of account filed by petitioner. "It has been agreed between the parties hereto that the above mentioned figures have been arrived at based on tentative workings which are to subject to correction in case of Arithmetical or any other error. Any change in the above amounts will come into effect only upon mutual discussion between the parties."

As the respondent has principally raised two contentions in its defence, viz. that (i) it is entitled to adjustment for a sum of Rs.44,39,839/-, we may also notice the deposition of Shri M V Sasikanthan in this relief.

"Q: Please look at the letter dated 20.7.2010 at page 336 of Vol. II of the paper book. As per the

Annexure-I and II (Pages 345-346) to this letter the TDS amount of Rs.16,82,177/- has been duly taken care of. Am I right?

A: Yes."; and

(ii) it is entitled to level playing field by way of parity.

37. We may also place on record that respondent has filed a separate petition before this Tribunal inter alia paying for a direction upon petitioner to supply signals on a digital addressable platform

wherein a specific prayer has been made to determine the period of default.

38. We have noticed the filing of the said petition by respondent herein as it was the emphatic contention of Ms. Khajuria that in absence of any prayer having been made by amending the petition and/or by filing a separate application therefor, the petitioner is not entitled to obtain a decree for the period towards subscription charges in terms of the agreement or otherwise.

What would be the effect of a petition filed subsequently by respondent before this Tribunal being Petition No. 207 (C) of 2011 whereafter only the three cheques were issued to petitioner by the

respondent with its covering letter dated 20.4.2011 for a sum of Rs.35,27,940/- for Bouquet-I and Rs.34,87,068/- for Bouquet-II and Rs.1,13,755/- towards WB? The said cheques are said to have been returned by the petitioner.

39. Before, however, we advert to the said question, we may notice that respondent in its letter dated 23.6.2010 inter alia contended that reconciliation was necessary on the following :-

“Both the parties have submitted before the Hon’ble TDSAT at the time of the hearing on 28th May 2010 that the parties are meeting to resolve this issue. Based on that we had meeting with your representatives (M/s. Ajit Krishnamoorthy, Ajitt Raj and Viresh Dhalbar) yesterday at our office in Trivandrum

Based on the various discussions at the meeting we are submitting herewith the following proposal, which we request you to consider so that the relationship can continue smoothly in the future to the mutual benefit of both the parties: 1. Based on our books the total amount due to you as on 31st March 2010 was Rs. 4,41,69,147/- (Four Crores Forty One Lacs Sixty Nine Thousand One Hundred and Forty Seven Only), inclusive of Service tax.

2. As informed, per your books, the amount due is higher on account of the following

Particulars Amount Difference between the books for the period upto 31st March 2006.

2,99,219 Excess Billing Accounted by Zee for the Year 2007/08

12,39,216 TDS for the Years 2007/08 and 2008/09 not accounted by Zee 17,96,151 Excess billing for the month of July 2009 (Delayed activation but billing done earlier) 11,05,245 Total Amount 44,39,831* • The first 3 figures

40. So far as the first item is concerned Ms. Khajuria would contend that although a sum of Rs. 2,99,219/- was to be reconciled upto 31.3.2006, while entering into the MOU, the quantum of

arrears that having been determined on a provisional basis did not attain finality. The second item was again a subject matter of discussions between the parties but the amount had not been

reconciled. We may refer to clause 4 of the MOU, from a perusal whereof it would appear that the outstanding amount payable by the petitioner to the respondent was determined at Rs.4,08,15,345/- upto 26.1.2009. The said amount of Rs.4,08,15,345/- was to be paid in three instalments i.e. upto 30th December 2009. Emphasis however, was laid by Ms. Khajuria on the terms that the figures had been arrived at on tentative workings which are subject to correction in case of any arithmetical and other error.

41. What would be the meaning of the terms ‘tentative workings’ is the question.

The said words are followed by the words ‘subject to correction in case of arithmetical or other error.’ Could

any other error come within the purview of the meaning of the terms reconciliation of accounts?

42. Ex-facie it is not. We have noticed heretofore that subsequently respondent in its letter dated 23.6.2010 categorically stated that the reconciliation of accounts would be necessitated from

14.7.2009.

We have also noticed heretofore that tentatively the reconciliation of accounts was sought only for a sum of Rs.40 lacs.

Before us, Ms. Khajuria has placed reliance upon the ledger account maintained by respondent for the purpose of showing that on regular basis service tax and TDS had been deducted from the bills of the petitioner. It has, however, not been shown that on the basis of which entries of the said ledger account, respondent has been able to show the differences in receipt and payment for a sum of Rs.2,99,219/- upto 31.3.2006.

43. In this connection, we may also notice that the witness of respondent Shri M V Sasikanthan stated as under :-

"As shown in letter dated 23.6.10 of the Respondent, the difference is on 4 issues and has been wrongly shown by the Petitioner.

(a) Rs.2,99,219/- is the difference in the books of the period in fact prior to 31.3.2006. It is due to non-payment of Service tax towards the carriage fee recoverable by the Respondent from the Petitioner for the year 2006.

(b) Rs.12,39,216/- is due to excess billing by Zee for the year 2007-08, when it unilaterally increased the fees for first three months of 2008, while the respondent has paid the subscription amount as per the Agreement which was till 31.3.2008.

(c) Rs.17,96,151/- being TDS paid by Respondent for year 2009-10 but not apparently accounted for in the books of the Petitioner as shown by the Petitioner to the Respondent. In fact, it is apparent from letter dated 5.7.10 of Petitioner that they have considered TDS for year 2008-09 instead of 2009- 10, the relevant year.

Annexed herewith as Exhibit DW1/15 is letter of Petitioner dated 5.7.10.

(d) It is stated that the difference of Rs.11,05,245/- is attributable to the excess billing by Petitioner for the month of July 2009, when the signals were re-connected. The Petitioner has apparently shown amounts to be due from 15th July 2009, the day the signals were to be reconnected though they were actually reconnected in phases and at a much later date, in fact upto 28th of July 2009. This is evident from letter dated 29.7.09 of the Respondent. The Respondent had also informed the Petitioner vide letter dated 16.7.09 that it was not fully connected and would be liable to pay only when it is completely connected. However, since some places were connected earlier, it was decided between the parties that payment would be made for 10 days in the months of July 09. Hence, though the Petitioner has booked the subscription fee for July 2009 at Rs. 33 lakhs, the Respondent has booked it for a maximum of only Rs.22 lakhs, including service tax.

44. If the matter related to non payment of service tax towards the carriage fee recoverable by respondent, the same could have been brought to the notice of petitioner. The respondent did not do so. However, the invoices raised by petitioner not only contained the amount of outstanding but also amount of the service tax leviable on the subscription fee. If any subscription fee has been deducted and deposited before the authorities, petitioner would have claimed the said amount by way of adjustment from the authorities concerned. It was, therefore, for petitioner to show that in fact it had deposited any service tax for the aforementioned amount prior to 31.3.2006 and if so, on what accounts and on what dates.

45. So far as, the purported excess billings made by petitioner is concerned, Mr. Sasikanthan stated that the

same were for three months beginning from April to June of 2008. The same comments may be made in respect of the said amount which is said to have not been reconciled.

As far as the amount of TDS is concerned, it now stands admitted that petitioner in its account for the period 15.7.2009 and 31.8.2010 had shown the amount payable towards the subscription

fee, the amount received from respondent (See page 345 and 346). We have also noticed heretofore that petitioner in its letter dated 6.9.2010 categorically stated that it along with its letter dated 20.7.2010 had found the details with regard to TDS certificate for an amount of Rs. 16,82,477/- for the financial year 2008 and 2009 as also for the balance amount for the financial year 2007-2008 and 2008-2009.

Ms. Khajuria accepts the same but would contend that petitioner has in fact adjusted the TDS for the year 2008-2009 in September 2009 which may be repeated for the financial year 2009-

2010. Mr. Sasikanthan in his cross examination stated as under:-

["Q: Please look at the letter dated 20.7.2010 at page 336 of Vol. II of the paper book. As per the Annexure-I and II (Pages 345-346) to this letter the TDS amount of Rs.16,82,177/- has been duly taken care of. Am I right?

A: Yes."]

46. Mr. Maninder Singh, however, has filed some documents to show that the Income Tax Department has granted exemption to the petitioner from the purview of the deduction of TDS in terms of its letter dated 13.5.2009 which was addressed to all the concerned officers and for the year 2009-2010 to the respondent herein by its letter dated 31.5.2010, 9.6.2010 and 11.6.2010.

In that view of the matter, although, respondent was not to deduct any amount by way of TDS from the said dates, Mr. Maninder Singh would assure us that in the event it has deposited any amount with the Income Tax Authorities on account of petitioner, on furnishing of certificates to that effect, due credit thereto shall also be given. In that view of the matter, no further direction is required to be issued.

So far as excess billing for the month of July 2009 is concerned, submission of Ms. Khajuria is that all its networks which were spread in six different regions, were not reconnected within 24

hours despite the assurance given in that behalf in the MOU dated 14.7.2009.

Mr. Maninder Singh would contend that in view of the stand taken by petitioner, that for the aforementioned purpose allegedly an agreement was arrived at between the parties that the bill for the month of July 2009 would be payable only for ten days, no decree for the aforementioned sum need be passed.

47. So far as, the admitted dues of petitioner upto 31.3.2010 is concerned, a decree on admission has already been passed in terms of this Tribunal's Order dated 12.6.2010.

48. The second and third items of claim namely for the months of April and May evidently, would come within the purview of the petition. We, therefore, without entering into any controversy pass a decree for the remainder sum of Rs.1,49,15,653/- calculated as under :-

Rs. 5,90,84,740 – Rs.4,41,69,147/-.

49. Ms. Khajuria urged that this Tribunal has no jurisdiction to pass any decree from June 2010 till date as no evidence would be admissible beyond the pleadings which would include the prayers made in the petition. Reliance on the said preposition has been placed upon "Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Ors." 2010 (1) SCC Page 466.

50. Reliance has also been placed on Ramneek Ballabhdas Madhavani and Ors. Vs. Taraben Pravinlal

Madhavani 2004 (1) SCC Page 497 wherein a Three Judge Bench of the Apex Court was concerned with a question as to whether an amount of interest @ 13% p.a. could be charged when it was originally claimed at 6% p.a..

In that case, an amendment application was filed which was allowed. In the decree prepared in terms of the judgment however, the court allowed the interest to be charged at prevalent bank rate of the national banks from time to time on commercial transactions during the relevant period in respect whereof neither any application for amendment was filed nor the parties were given a chance to contest the questions in controversy.

51. It is not necessary for us to discuss a large number of decisions cited at the Bar.

52. Ms. Khajuria urged before us that there had been a change in the ground realities.

She mentioned about two factors; (i) the entry of other MSOs/DTH operators as a result whereof there was a substantial dent in the subscriber base of the respondent; and (ii) going out of the two of the sports channel from the Bouquet of the respondent.

Neither of the aforementioned pleas is available to respondent. When an agreement has been entered into, the question of enforcement of any parity does not arise. After entering into an

agreement a party thereto cannot claim parity or level playing field, keeping in view the fact that the contract is commercial in nature. If it was of the opinion that the terms of the agreement dated 14.7.2009 were unreasonable the only option left to it was to approach this Tribunal immediately after entering into the said agreement and question the reasonableness of the terms thereof or the subscriber base or the quantum of subscription amount calculated on that basis.

53. This Tribunal in "Star India Pvt. Ltd. Vs. Indusind Media Pvt. Ltd." Petition no. 44 (C) of 2004 disposed off on 14.1.2006 speaking through a Bench presided over by Santosh Hegde J. stated as under:-

"We also notice the fact that IMCL is now basing its right on an agreement which was entered into between the parties by virtue of the interim direction of the High Court. Terms of this agreement have been accepted by Star only because of the interim direction of the High Court

and not voluntarily. A party to the contract cannot unilaterally discard some terms of the proposed contract and still demand the fruits of the contract. Though supply of signals is mandated under the Regulation, on reasonable terms, the Regulation does not stipulate what that reasonable term should be. Therefore, if a dispute arises between two contracting parties in regard to reasonableness of a term it has to be decided by an authorised forum like this Tribunal and not by any single party to the contract. Even the question of the right of a party to receive signals during the pendency of the dispute is a matter to be decided by an independent authority and not by any one of the contracting parties. Therefore, it is not open to IMCL to decide for itself that it will keep on receiving the signals on its own terms without challenging the terms not acceptable to it. Therefore, in cases where the parties are unable to agree on terms of a contract, either of the party cannot take the law on its own hands instead the aggrieved party should approach this Tribunal which is authorized under law to adjudicate such disputes between the parties and during that adjudication proceedings is also authorised to make such interim arrangements depending upon fact of each case, bearing in mind the law applicable and the public interest involved. This raises another question as to who has to approach this forum for the redressal of its grievance. Shri Salve contends that it is the signal seeker who should approach this forum while Shri Kathpalia contends that it is the broadcaster who should approach the Tribunal if the receiver of signals disagrees with the terms of the agreement.

We do not find much difficulty in deciding this issue. The broadcaster is the owner of the signals. If any of the other service providers seeks his signals, normally it should be on agreed terms. The right to propose the terms is with the seller but this right is regulated by the Interconnect Regulations which mandates the owner

of the signals to supply signals on a "must provide" basis and on reasonable terms. At the same time, the Regulations governing the subscription agreement require a written agreement being signed before the supply of signals.

On a perusal of these regulations we are of the opinion that seeker of the signal must negotiate with the supplier of signals and if such negotiations fail he should approach this Tribunal for redressal of his grievances. In such cases if the seeker of signals wants immediate signals or his

current signals not to be disrupted, it can always pray for an interim arrangement being made by this Tribunal and the Tribunal may in a given case protect the interest of both the parties by making suitable interim orders.

In the above view, we hold in the instant case, IMCL being the seeker of the signals, if the terms proposed are not acceptable on grounds of unreasonableness it may challenge the same and in a petition so challenging it, may seek such interim order as it may think necessary."

54. The onus to prove the reasonableness of the terms being on the seeker, it was bound to approach this Tribunal within a reasonable time. It did not do so and therefore it should not be permitted to raise the said question in a collateral proceeding and that too in the proceedings for recovery of an amount.

55. Ms. Khajuria states that the matter is pending in appeal before the Hon'ble Supreme Court of India. It may be so but in our opinion respondent having entered into the aforementioned agreement dated 14.7.2009 is estopped and precluded from questioning the subscriber base in terms of Clause 8.1 of the Regulation which contemplates a situation beyond the period envisaged thereunder.

56. On the admitted facts we are of the opinion, at least up to the period of May 2010, petitioner would be entitled to the reliefs sought for.

The question which arises for consideration also is whether we should grant any relief beyond the said period.

57. One of the questions, which arises for consideration, is as to whether we should pass a decree for the period June, 2010 onwards in exercise of our jurisdiction under Section 151 of Code of Civil Procedure.

Ordinarily, the Court shall grant such relief to the petitioner as has been prayed for in the petition as would be evident from Order VII Rule 7 of the Code of Civil Procedure.

Has the petitioner made out an exceptional case? We do not think any exceptional case has been made out by petitioner.

It is also not a case where any order of injunction was passed by this Tribunal and respondent despite direction did not pay the requisite amount towards supply of signals.

58. In our opinion, it, having not filed any application for amendment of the petition and having made no prayer in regard thereto although had an opportunity to do so, should not be allowed

to pray for decree for the said period.

Contentions have been raised in this behalf by the learned senior counsel only at the time of oral hearing apart from some alleged admissions on the part of the respondent.

59. We, therefore, are of the opinion that in absence of any accounts and/or other evidence having been brought on record and the respondent having no opportunity to deal with the same, it may

not be proper for us to pass a decree as has been prayed for by the petitioner for the period June 2010 onwards. The plea of the petitioner is, therefore, rejected.

60. The only question which survives for our consideration is as to whether petitioner is entitled to any interest on the arrears. Ms. Khajuria urged that no contractual interest having been fixed in terms of the MOU and option of the petitioner being only to switch off the signals, no interest is payable for default on the part of respondent.

We do not agree. We have noticed here to before, Clause 9 of the MOU, which by reference incorporates the terms of the agreement.

We have also noticed here to before that the terms of the agreement refer to interest. In terms of the said provision, the petitioner would be entitled to interest @ 18 % per annum.

61. Even otherwise, a creditor is entitled to pay its dues within the stipulated period failing which it would be entitled to a reasonable amount of interest.

Having regard to the commercial terms and/or nature of the transaction, no creditor can allow a huge amount to remain outstanding by giving up the claim of the interest.

We, therefore, reject the contention of Ms. Khajuria that petitioner was not entitled to interest on the arrears of amount.

62. In this case, respondent, having undertaken to pay the arrears in three instalments, should have done so. The entire amount claimed by petitioner was the principal amount. Even the MOU did not envisage interest. No interest was also directed to be paid by this Tribunal while passing the order under Order XII Rule 6 of Code of Civil Procedure.

63. We, therefore, are of the opinion that petitioner is also entitled to a reasonable amount of interest.

64. Having regard to the facts and circumstances of this case, and keeping in view the conduct of parties, we are of the opinion that interest of justice would be sub served if respondent is directed to pay the principal amount due to petitioner with interest at the rate of 12% per annum from the dates it fell due till realization.

65. This petition is allowed to aforementioned extent. The respondent is also liable to pay and bear the costs of petitioner Advocate's fee assessed at Rs.50,000/-.

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