

**Polimer Cable Network Vs. Sun Distribution Services**

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**SooperKanoon Citation :** [sooperkanoon.com/941560](http://sooperkanoon.com/941560)

**Court :** Telecom Disputes Settlement and Appellate Tribunal TDSAT

**Decided On :** Feb-02-2011

**Judge :** S.B. Sinha, Chairperson, the Honourable Mr. G.D. Gaiha, Member & Amp; the Honourable Mr. P.K. Rastogi, Member

**Appeal No. :** Petition No. 251(C) of 2010

**Appellant :** Polimer Cable Network

**Respondent :** Sun Distribution Services

**Advocate for Pet/Ap. :** For Petitioner: Mr. Navin Chawla, Mr. Ajay Kumar, Advocates. For Respondent: Mr. Maninder Singh, Sr. Advocate, Mr. Arun Kathpalia, Ms. N.K. Sibal, Advocate, Ms. Gauri Setia, Advocates.

**Judgement :**

S.B. Sinha

The petitioner is a Multi System Operator. It operates in 14 areas/districts in the State of Tamil Nadu. The respondent is a 'broadcaster' within the meaning of the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (The Regulations).

2. The petitioner is aggrieved by and dissatisfied with a notice issued by the respondent herein purported to be under Regulation 4.1 of the Regulations dated 7.7.2010 as also a public notice of the same date issued in terms of Regulation 4.3

thereof.

3. The area in question is Pollachi. It now stands admitted that another MSO City Network have been operating in the said area. It stopped its operation in December, 2007. There is a controversy as to whether the petitioner has taken over the said network and began its operations from January, 2008 as admittedly the petitioner started its operation in the area of Pollachi then.

4. The petitioner contends that it started a fresh operation without in any manner being connected with the said network from 1st April, 2008.

5. Another area of controversy between the parties appears to be as to whether they have entered into any agreement in writing or not?

6. The petitioner contends that such an agreement had been entered into but the respondent did not supply a copy thereof to it; whereas the respondent contends that the supply of signal was being carried out in terms of an oral arrangement.

7. The petitioner's case is that one Lucky Cable Vision and Sky TV started their operations in the town of Pollachi, as a result whereof its subscriber base was reduced to the extent of about 60%.

As the controversy between the parties revolve around the subscriber base and consequent claim of the petitioner for down-gradation in relation thereto, we may notice a few letters which had been issued by it, the receipt whereof, however, is denied and disputed by the respondent.

8. By a letter dated 05.11.2008, the petitioner informed the respondent in the following terms :-

“As you are aware that we are running an MSO at Pollachi. Mr. Jayaseelan of Lucky Cable Vision was also one of our Cable Operator from May 2008.

At present Mr. Jayaseelan of Lucky Cable Network has started his own control room Polimer Cable Network. Due to this 60% of our operators had shifted to Lucky Cable Vision, Pollachi.

Kindly take this in your consideration and reduce our subscription amount immediately to the minimum points.”

9. At this juncture, we may also notice that according to the petitioner, the reduction in the subscriber base was substantial which is evident from para 10 of the petition and which is said to have been admitted as would appear from para 10 of the respondent’s reply. The petitioner is said to have dispatched the said letter on 6th November.

Yet again by another letter dated 4.6.2009 dispatched on 5.6.2009, the petitioner stated as under :

“Sub : Reconciliation of Subscriber base for Pollachi Network

Ref : Our Account ID No. 10000916

We are operating as an MSO at Pollachi comprising Pollachi Town, Kinathukadavu, Kotur and Devanampalayam areas. We have entered the area by taking over the below mentioned networks.

1. Popular Cable Network - Pollachi
2. R.K.S. Cable Network - Kinathukadu
3. Popular Cable Network - Kottur
4. City Network - Pollachi

We have been paying as per your billing on mutually agreed subscriber base of 18,936 which was billed as follows :

Sl. No. Bouquet Subscriber Base Rate Amount Excluding Service Tax

1. KTV 15149 15.60 23624.40
2. Sun TV 25787 12.40 319758.80
3. Gemini TV 5225 10.40 54340.00

Total 610423.20

However there were two other MSO's namely Lucky Cable Vision and SKY TV having their headends at Pollachi and Devanampalayam respectively operating with your IRD's.

A team of Cable Operators who were taking feed from us got migrated to the said other MSO's namely Lucky Cable Vision and SKY TV by October 2008. The same was informed to your good office by a letter dated 05th November 2008 and we had requested for a downward revision on subscriber base in view of the said migration.

We have herewith enclosed the list of operators who have migrated to the said MSO's alongwith their subscription base. It is relevant to mention here that we have been billing them for their respective subscriber base and receiving payments by cheque from them, which by itself stands as proof for their subscription base. Further the migrated operators owe us a huge outstanding which accumulates to around Forty Four Lakh rupees.

The total subscriber base of those who have shifted arrives 8600 points to M/s. Lucky Cable Vision -Pollachi and 1925 points to M/s. Sky TV - Devanampalayam totaling to 10,525 points. We hereby kindly request your good office to kindly reduce the above points from our account and add the same to the respective MSO's. Hence the balance subscriber base held with us stands to 8411 points. Applying the above points to your modality of tabulation arrives as follows.

Sl. No. Bouquet Subscriber Base Rate Amount Excluding Service Tax

1. KTV 6729 15.60 104972.40

2. Sun TV 11454 12.40 142020.60

3. Gemini TV 2243 10.40 23327.20

Total 270329.20

10. Along with the said letter, the petitioner annexed a copy of the list of subscribers, who are said to have migrated from it. It also issued another letter on 05.11.2008. Neither of the said letters were responded to on the premise that the same has not been received. The petitioner, however, issued another letter contending that it has not been receiving the invoices from August, 2009.

11. Admittedly, a meeting was held by and between the parties at Erode. The said meeting was attended by Mr. Prabhakaran of Channel Plus. Lucky Cable Vision, which is said to be a rival MSO of the petitioner and a distributor of the respondent, was represented by Mr. A. H. Jayaseelan, Mr. A. Harikrishnan, Mr. Somasundaram; whereas the petitioner was represented by Mr. A. Kankaraj and Mr. P. Senthil Kumar. No minute of meeting, however, was drawn up. According to the petitioner, the subscriber base was reduced in respect of Sun TV to 18805 points and in respect of KTV and Gemini TV bouquet to 10839 points.

12. The petitioner by a letter dated 01.02.2010 stated as under :-

“We kindly bring to your notice that, till date we had not received invoices from August 2009 for the above referred POLLACHI network. This is to bring to your kind attention that pertaining to the above referred Pollachi account kindly bill as per the agreed subscriber base fixed in the meeting held at Erode on 24.11.09.

We had been making the payments regularly as per the agreed subscriber base.”

13. The petitioner again made a grievance with regard to non-receipt of invoices in a meeting held at Erode on 24.11.2009. It expressed its desire to renew the agreement by its letter dated 11.5.2010, inter-alia, in respect of the Pollachi area.

14. The petitioner, however, received the impugned notices, which were issued inter-alia on the premise that it had been a chronic defaulter. By a letter dated 26.7.2010, the petitioner protested there-against contending that a request had been made for reduction in the subscription amount. The petitioner contended that the monthly bills should have been raised at Rs.3 lacs per month and not the amount mentioned by the respondent in its statement of accounts.

15. The petitioner has filed this petition inter-alia, praying for the following reliefs :-

“(a) pass an order restraining the Respondent from in any manner deactivating or disturbing the supply of signals of its TV channels to the Petitioner;

(b) hold the Public Notice dated 09.07.2010 and notice under Clause 4.1 of the Interconnect Regulations issued by the Respondent on 07.07.2010 as illegal, unlawful, frivolous and restrain the Respondent from initiating any action against the Petitioner on the basis thereof;”

16. The respondent in its reply denied and disputed that the down-gradation in the subscriber base of the petitioner was to be granted from August, 2008. According to it, an agreement in writing had been entered into for a period of four months from 1st December, 2009 to 31st March, 2010. The respondent contended that the invoices were being raised since 2006 to the petitioner’s predecessor, M/s. City Net and whenever any increase or decrease in the subscriber base could be effected, the same had been done.

17. The respondent has presented an account of the ID in question being No.10000916, which reads as under :-

Sl. No. Period Increase/

decrease in subscriber points Sun TV KTV Gemini Reason

1. Jul’06 to Oct’06 Increase 315 PSK Cable, Raj Sat System, Om Muruga Cable got merged

2. Nov’06 Increase 450 383 Points acquired from Lucky Cable

3. Dec’06 Increase 1725 862 Up gradation

4. Feb’07 Increase 125 100 50 Friends Cable (10004178) got merged

5. Jun’07 Decrease 375 240 120 Points moved to Lucky Cable

6. Jan’08 Decrease 2127 1311 655 Points moved to Lucky Cable

7. Feb’08 Increase 125 100 Murugantham Cables (10005339) got merged

8. May'08 Increase 6915 3950 1975 Popular Cable N/W, Pollachi (10006170) got merged
9. Jul'08 Increase 8624 4600 Popular Cable N/W, Kottur (1000785) and RKS Cable N/W Kinathukadavu (10001183) got merged
10. Dec'09 Decrease 6982 4310 1880 Points revised as per the settlement made between Polimer and Lucky Cable on Nov'2009
18. It furthermore accepted that with effect from 01.12.2009, the subscriber base of Sun TV increased to 18805, KTV 10839, Gemini 3345, Adithya 108 and Chutti 108, wherefor the total subscription fee payable by the petitioner was Rs.4,40,466.88 besides taxes.
19. According to the respondent, despite the fact that the petitioner has been a chronic defaulter, in respect of 14 out of 18 areas, agreements have been entered into on or about 01.4.2010, but so far as Pollachi and three other areas namely Thiruvannamalai, Atur and Salem are concerned, no agreement has been entered into.
20. We may, however, notice that in paragraph 9 of the reply, the respondent stated that it continued to supply signals to the petitioner on the hope that it would honour its commitments in terms of the settlement agreement.
21. As no subscription agreement has been produced before us, we proceed on the basis that it was an oral one.
22. The respondent reiterated the aforementioned stand in para 11 of its reply, the relevant portion whereof reads as under :-
- “It is submitted that the monthly amount that the Petitioner has to pay every month is Rs.4,85,835 (18805x12.4 for SUN, 10839x15.6 for KTV, 3345x10.4 for Gemini, 108x18.19 for Adithya and 108x13.37 for Chutti Plus the prevalent Service Tax 10.3% (Rs.45,368.10) would amount to a total of Rs.4,85,835/-. In this regard it is submitted that the Respondent has already filed the original agreement dated 01.12.2009 with the Hon'ble Tribunal in compliance of the orders dated

04.08.2010, a copy of the order dated 04.08.2010 is annexed hereto as Annexure R-6.”

23. According to the respondent, it had been supplying the invoices to Mr. Henry of the petitioner.

24. In its para-wise reply, which is contained in the 2nd part thereof, the respondent, however, stated as under :

“However, it is denied that it was agreed that the reduction would be effective from October 2008. The said reduction was to be effective only from December 2009, i.e. after the reduced subscription points had been settled at the meeting dated 24.11.2009. It is further denied that there was any agreement to reduce the subscription fee to Rs.3,00,000. The subscriber base mentioned above actually translates into Rs.4,85,835 calculated Sun TV 18,805/-, KTV 10,839/-, Gemini 3345, Aditya - 108, Chutti - 108/-. It is submitted that the respondent received letter dated 24.11.2009 from Lucky Cable Vision providing the details of the subscription points agreed to in the meeting. It is further submitted that the said letter from Lucky Cable Vision does not mention anything about reduction in subscription amount or the date of coming into effect of the reduced subscription points.”

25. The said letter of the Lucky Cable Vision being dated 24.11.2009 reads as under :-

“The following point details are finalized between Polimer and LCV

SUN TV KTV

Polimer current declaration 25787 15,149

Points to LCV 6982 4410

18,805 10,739

Points to Devanampalyam 600 400

18,205 10,339

Points to be Billed 600 500

Polimer = 916 18805 10,839”

26. The respondent, along with its reply, has annexed a statement of account from January, 2006, Sl. Nos. 31, 32 and 33 whereof show that some payments were made by the petitioner for the month of January, 2008. It further shows that no payment was made by the petitioner for the months of February, March and April, 2009 and merely a sum of Rs.11,030/- has been paid in the month of May, 2009. It appears that a sum of Rs.6,85,872/- was said to be the subscription fees till February, 2009 and a sum of Rs.6,73,297/- from March 2009 till November, 2009 which came down to Rs.4,85,835/- from January, 2010 but for the month of December, 2009 the subscription fee was Rs.4,89,595/-.

The petitioner, however, had been paying at the rate of Rs.3 lacs per month from January, 2009. It, however, appears that the balance of payment as in November, 2008 was only Rs.4,405/-. The petitioner, however, did not make any payment in June, 2010 but made payment of a sum of Rs.5 lacs in July, 2010.

27. Before us, a statement of account has been submitted by Mr. Maninder Singh, learned Senior Counsel appearing on behalf of the respondent, to show that a sum of Rs.48,64,983/- up to December, 2010 is owing and due to the respondent from the petitioner.

28. We, however, would like to place on record a disturbing feature. In some matters, this Tribunal was informed that some broadcasters, the respondent herein being one of them, had not been supplying the copies of the agreements to the MSOs. This Tribunal has issued direction from time to time that such agreement should be furnished within 15 days from the date of execution thereof. Even a statutory direction has been issued by the TRAI in that behalf. But, it appears that when a complaint was made before us by the learned counsel for the petitioner at the time of hearing on grant of interim relief, the respondent even by then had not forwarded a copy of the said agreement to TRAI. We must deprecate such an

action. We are, furthermore, of the opinion that a time has come when probably this Tribunal has to go out of its way to request the TRAI to take into its consideration seriously the matter and issue a statutory direction, as Regulations made by it are being flouted by some of the broadcasters with impunity. We thought it fit that before issuing such a direction in an appropriate case, all concerned should be sufficiently warned thereabout.

29. We may place on record another disturbing feature. While we were hearing the matter on interim relief, the learned counsel appearing on behalf of the respondent placed a copy of the agreement and served a copy thereof on the counsel for the petitioner. On instructions, however, the learned counsel for the petitioner stated before us that the agreement did not contain the signature of the proprietor of the petitioner, in support whereof three circumstances were highlighted :-

(i) The agreement is shown to have been executed at Chennai, although the same is supposed to have been executed at Erode on 24.9.2009;

(ii) The petitioner had consistently been paying a sum of Rs.3 lacs towards subscription fee per month as against the alleged stipulated sum of Rs.4,38,357/-;

(iii) From the letters dated 01.02.2010 and 19.4.2010 it would appear that no invoice had been served upon the petitioner.

30. In the aforementioned situation, we directed as under :-

“Prima facie, we are of the opinion that keeping in view the admitted fact that invoice was served upon the petitioner in July, 2009 wherein an amount of Rs.34,97,758.53 paise was shown to be the dues, being a sum of Rs.28,24,461.74 paise towards the outstanding and a sum of Rs.6,78,296.79 paise towards the current bill, we are of the opinion that it is difficult for us to accept the contention of Mr. Chawla, learned counsel for petitioner at this juncture that the parties had met at a subsequent date and resolved to wipe off the arrears to the extent of ‘Nil’ by giving aforementioned credit note of Rs.8,88,128/-. We, however, accept the submissions of Mr. Chawla that keeping in view the specific stand taken by the petitioner that its proprietor had not executed the said agreement, we are of the

opinion that following directions should be issued:-

i) The Telecom Regulatory Authority of India (TRAI) is requested to send to this Tribunal an intimation as to whether respondent has sent to it the details of the agreement bearing No. 3788673216 executed by and between the parties hereto.

ii) The respondent shall file the original agreement before this Tribunal within one week from date.

iii) An opportunity should be granted to the proprietor of the petitioner to inspect the said document and affirm an affidavit as to whether the said agreement has been executed by him or not?

It is made clear that in the event such a statement on affidavit is made, this Tribunal shall consider the desirability of sending the said agreement for comparison to a handwriting expert subject, of course, to giving him an opportunity of hearing in that behalf to the respondent. We must also record a statement made by Mr. Chawla that the statement of account filed by the respondent cannot be relied upon as the entries therein commence from Jan, 2006 although according to the petitioner, the jural relationship between the parties started in respect of the aforementioned network, only in April, 2008.

We, therefore, are of the opinion that the respondent should be directed to continue to supply signals to the petitioner subject to the condition that it shall deposit a sum of Rs.30 lakhs before this Tribunal within two weeks from date.”

31. Indisputably, the order has been complied with and furthermore the petitioner on two other occasions, as would appear from the statement of accounts filed by the respondent, had paid further sums of Rs.2 lacs.

32. Another disturbing feature, which we may place on record, is that taking advantage of the technicality of the order and some delay having been caused in deposit of the said amount of Rs.30 lacs, the signals of the petitioner were disconnected on the early morning of 19.8.2010 and in that view of the matter, the respondent was directed to restore the same by an order dated 20.8.2010.

33. We may place on record another disturbing feature namely when the original agreement was produced in Court, the petitioner despite the position taken earlier, as noticed heretofore, filed an affidavit that in fact the aforementioned agreement dated 01.12.2009 was executed by its proprietor. There cannot be any doubt or dispute that the statement, as made before us by the learned counsel for the petitioner that the copy of the agreement produced by the respondent did not bear his signature, might have influenced our mind in passing the interim order in its favour.

34. We may also place on record that according to the petitioner, Lucky Cable Vision and Sky TV entered the market when it was the only MSO serving in the area but a statement was made by the respondent's witness, Shri Nirmal Rathan that the said Lucky Cable Vision has been operating since 1996, which has not been seriously disputed.

35. The petitioner, therefore, must be held to be not correct in contending that it had suffered any loss in the subscriber base because of the entry of the aforementioned operators as alleged by it.

36. We have been taken through the rejoinder filed by the petitioner to reply of the respondent. Most of the statements made in the reply have been vaguely denied or disputed. No denial has been made to the tabulated statement filed by the respondent in its reply with regard to the increase and decrease in the subscriber base having regard to migration of some LCOs or merger of networks.

37. We may also observe, although vehemently contended otherwise at one stage, that the aforementioned Lucky Cable Vision, although is the distributor of the respondent but there is nothing on record to show that it is its subsidiary or sister concern. We, furthermore, are of the opinion that although the respondent has filed a ledger account, the statement of accounts filed by it along with its reply as also the affidavit of Mr. Nathan has not been seriously disputed.

38. A contention was raised by Mr. Ajay Kumar, learned counsel appearing for the petitioner that for all intent and purport, the respondent must be held to have admitted the number of subscribers/LCOs who migrated to M/s. Lucky Cable

Vision and M/s. Sky TV having regard to the statement made in paragraph 10 of its reply to the statement made in paragraph 10 of the petition.

39. We accept the contention of Mr. Maninder Singh, learned Senior Counsel appearing on behalf of the respondent that some confusion has arisen because of the incorrect statement made by the petitioner in paragraph 10 of the petition. We have noticed heretofore the different statements appearing in different paragraphs of the reply so far as reduction in subscriber base of the petitioner vis--vis the statement made by it in the petition is concerned and are satisfied upon reading the reply in its entirety that the statements made in paragraphs 4 and 11 of the reply are correct. We, furthermore, are of the opinion that there may not be any controversy between the parties in that regard even in the agreement dated 1st December, 2009.

It is stated :-

“The Affiliate has requested for permission to pay the above Subscription Fee in advance in the following mode and the Licensor has agreed for the same.

Mode (Advance) Connectivity Subscription Fee (Rs.)

Monthly

Bi-Monthly

Quarterly

Half Yearly

Annual Sun TV

KTV

Gemini

Auditya

Chutti  $18805 \times 12.40 = 233182$

$$10839 \times 15.60 = 169088.4$$

$$3345 \times 10.40 = 34788$$

$$108 \times 18.19 = 1964.52$$

$$108 \times 13.37 = 1443.96$$

40. So far as the connectivity of Sun TV is concerned, there is no dispute. The connectivity of Sun TV earlier was 10,839 which is said to be the reduced subscriber base vis--vis its earlier subscriber base declared i.e. 15,149. The same also for all intent and purport tallies with the statements made by the petitioner in its letter dated 4.6.2009.

41. The respondent having regard to the percentage of reduction in the subscriber base appears to have shown a similar reduction in Gemini as compared to the earlier subscriber base of 5,225. The petitioner, therefore, is not correct in contending that the connectivity of both for KTV and Gemini would be 10,839.

42. There cannot, furthermore, be any doubt or dispute that on a plain calculation keeping in view the rate for the Sun TV and KTV, even if the supply of bouquet of Gemini is not taken into consideration; by no stretch of imagination the amount of subscription fee would come to Rs.3 lacs per month as contended by the petitioner.

Our attention, however, has been drawn by Mr. Ajay Kumar to the following statements made in paragraph 11 of the rejoinder, which reads as under :-

“In reply to para 11, the content of the said para are wrong and denied. It is further submitted that in this para under reply, the respondent is misinterpreting the letter of the petitioner dated 24.11.2009. In the said letter, the agreed points are stated as Sun TV - 18805 points, KTV and Gemini TV bouquet - 10839 points. The respondent has misconstrued the above points related to KTV and Gemini TV as 10839 each. The content of the said data is to be construed as cumulatively 10839 points for both KTV and Gemini TV bouquets with an equal share for both. Thus, the said amount calculation would arrive as Rs.3,74,102/- (18805 x 12.4 for Sun

TV, 5420 x 15.6 and 5420 x 10.4). As the downgrading issue was pending for over a year, the respondent in the meeting in November 2009 at Erode has rounded off the said figure to Rs.3,00,000/- thereby gave a discount of Rs.74,012/-. Some of the letters are filed by the petitioner as P-7, P-12 and P-14. The respondent has accepted the monthly subscription of Rs.3,00,000/- (Rupees Three Lakhs Only) paid by petitioner without any demur and hence deemed to be accepted by it. The agreement said in the para was signed by the petitioner is blank on 24.11.2009 at Erode. In spite of various reminders the respondent failed to handover a copy.”

43. Apart from the fact that such a case was not made out in the letters of the petitioner to the respondent, the same is also not reflected from the agreement itself. Admittedly, the petitioner had entered into the agreement with the respondent on 1st December, 2009. Once execution of the agreement is accepted, it does not matter whether it was executed at Erode or at Chennai. We must, however, notice that the petitioner had entered into some other agreements at Chennai on 1st December, 2009 itself. It is, therefore, difficult for us to accept the contention of Mr. Ajay Kumar that the agreement in question was executed at Erode on 24.11.2009 immediately after the said minutes of meeting had been entered into.

44. The contention raised by the petitioner to the said effect, in our opinion, cannot be accepted inter-alia on the ground that even the petitioner in its letter dated 24.11.2009 did not say so. If that be so, we have no other option but to hold that the agreement was entered into at Chennai on 01.12.2009.

45. So far as the question as to whether the agreement arrived at between the parties in its meeting dated 24.11.2009 was given retrospective effect and retrospective operation on or from October, 2008 or the same has been given prospective operation with effect from 1st December, 2009 is concerned, the answer thereto will depend on the finding of fact as to whether the petitioner had entered into the aforementioned agreement dated 01.12.2009.

46. The submission of Mr. Maninder Singh that on a comparison of the subscriber base disclosed by the petitioner in its letter dated 4.6.2009 to the agreement dated 01.12.2009, it would appear that the subscriber base mentioned therein have been

reduced substantially appears to be correct. We have noticed heretofore that the petitioner denied and disputed the fact that he has signed the agreement. Such a statement was made and noted by this Tribunal in its order dated 04.8.2010. After the original agreement was filed, the petitioner affirmed an affidavit stating that he has entered into the said agreement. The said affidavit was affirmed by Sri P.V. Kalyanasundaram, proprietor of the petitioner concern, stating :-

“I state that I personally visited the premises of this Hon’ble Tribunal on 23.8.2010 and inspected the original agreement, wherein I found that the signatures belong to me, however, I had signed the agreement blank and that too in Erode on 24.11.2009 and not in Chennai on 01.12.2009 as is mentioned in the Agreement.”

47. The statement made in the said affidavit is that he had signed the same only at Erode and not at Chennai and/or signed the same blank. He, however, does not controvert the allegation that in fact agreements in respect of other district were entered into by the petitioner with the respondent on 03.12.2009 at Chennai. It was so stated in para 6 of the reply. The petitioner in its rejoinder to the said reply stated only as under :-

“In reply to para 6, contents of this para are denied in total. It is denied specifically that petitioner has renewed or signed agreement for 14 accounts as on or about 01.04.2010, as claimed in this para under reply. In fact, agreements in these 14 accounts were entered on different dates. In fact, they were entered only on 15th and 16th June, 2010. In reply to rest part of this para, it is again denied that in all these accounts there are outstanding owned by the petitioner to the respondent.”

48. We fail to understand as to on what basis the petitioner has also denied that he had entered into the agreement in respect of 14 other districts on the same date. Even assuming that some agreements were entered into on different dates, the petitioner does not deny or dispute that a sample copy of the agreement, which has been annexed with the reply and said to have been executed by the parties on 01.12.2009, was incorrect. It, therefore, must be held that the petitioner has failed to prove that the agreement between the parties as regards down-gradation of the subscriber base has been given a retrospective effect.

49. The only question, which survives for our consideration, is as to whether Clause 10.2 of the Regulations will apply in the facts and circumstances of this case. It reads as under :-

“Between Multi System Operator and Broadcaster

10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.

Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.”

50. Construction/interpretation of the said clause although appears to be difficult at the first flush, the meaning thereof appears to be absolutely clear. It postulates that the parties to the agreement ordinarily would not change the subscriber base one way and the other. An exception has been carved out in relation thereto, stating that therefor an exceptional circumstance must exist warranting increase or decrease in the subscriber base. The burden of proof in relation thereto shall be on a person, who seeks to have a change. An exception to the said rule, however, has been provided by reason of the 1st proviso clearly stating that the subscriber base cannot be altered on account of cable operator joining or leaving the Multi System Operator. The 2nd proviso appended to Clause 10.2, however, takes away the effect of the said exception to some extent. It postulates that the joining or leaving of the network of a Multi System Operator by any cable operator shall

be equal to subscriber base of the cable operator joining or leaving the network.

51. Mr. Maninder Singh urged that the 2nd proviso would only be applicable in cases where the cable operators are taking direct signals from the broadcasters and not in any other. It is difficult for us to agree with the aforementioned contention. The said provision must be given a literal meaning. It should also be read in the context in which it was made.

Increase/decrease in the subscriber base in terms of the said provision although is exceptional but the same would not mean that it is impermissible in all situations.

52. To our mind, the said provision in fact prevents the broadcaster from taking any undue benefit in the event it is found that it has financially suffered or gained by reason of joining or leaving of any cable operator from the network of another Multi System Operators, as it is obligated to give necessary adjustment to them. The 2nd proviso appended to Clause 10.2 of the Regulations seeks to give effect to an equitable principle. It's purpose is to see that no party unnecessarily suffers any loss. The petitioner in its letter dated 05.6.2009 has given a complete list of the cable operators leaving its network and migrating to Lucky Cable Vision and Sky TV. Lucky Cable Vision, the two other Multi Service Operators. The later is also the distributor of the respondent.

53. The accounts maintained by the parties, therefore, are available. They intended to give effect to migration of local cable operators from the network of the petitioner to the network of other operators. That is how the parties all understood their legal obligations.

54. In this case, the fact remains that there had been an increase and decrease in the subscriber base of the petitioner.

55. One of the main operators is the distributor of the broadcaster and another MSO. The amount received by the respondent from its distributor as also said MSO is known to it. In fact, as there has been change in the subscriber base resulting in reduction in the subscriber base of the petitioner and consequent increase in the subscriber base of the aforementioned two MSOs, we are of the

opinion, the petitioner should receive the benefit thereof. The change in the subscriber base is not in dispute. It is also not in dispute that the quantum of the subscription fee on down-gradation of the subscriber base can be found out without any difficulty whatsoever. Furthermore, down-gradations may be different at different point of time. It may not be from October, 2002.

56. We, therefore, are of the opinion that for the aforementioned purpose, the parties should undergo a reconciliation process of their respective accounts.

57. The respondent is hereby directed to allow the petitioner's authorized representative to look to the relevant entries of its books of accounts in respect of the Pollachi network so as to enable the parties to arrive at the correct figures relating to down-gradation and consequent reduction in the amount of subscription fees. Similarly, the petitioner shall offer inspection of the relevant entries of its books of accounts to the respondent herein. The reconciled accounts may be filed before us within a period of 45 days; on the basis whereof the final order can be passed.

58. The petition is allowed to the aforementioned extent. Let a preliminary decree be drawn up. A final decree, however, shall be passed upon receipt of the reconciled accounts.

59. In the meantime, the petitioner shall continue to pay the stipulated monthly subscription charges i.e. at the rate of Rs.4.53 lacs per month without prejudice to its rights and contentions and subject to further reconciliation, as noticed hereinbefore.

60. For the aforementioned purpose, it within a period of two weeks from date must pay the arrears of payment of subscription fee at the said rate from the date of passing of the interim order till the matter is finally disposed of.

61. This order we are passing in the interest of justice and in exercise of our inherent jurisdiction, so as to bring the parties to the same position as if the order of injunction was implemented by both the parties.

62. The cost of the petition shall abide by the final result of this petition.

