
(2021) 02 TDSAT CK 0063

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Broadcasting Petition No.448 Of 2016

BhimaRiddhi Digital Services

APPELLANT

Vs

ZEE Entertainment Enterprises Lid. & Ors

RESPONDENT

Date of Decision : 25-02-2021

Acts Referred:

Cable Television Networks (Regulation) Act, 1995 — Section 4A

Citation : (2021) 02 TDSAT CK 0063

Hon'ble Judges : Shiva Kirti Singh, CP

Bench : Single Bench

Advocate : Vandana Jal Singh, Kanupriya Gupta, Himanshu Dhawnn, Upender Thakur, Kunal Vats

Final Decision : Dismissed

Judgement

S. K Singh, Chairperson

1. Both the parties have been heard in detail. They have also filed written submissions for the purpose of disposal of the petition filed long back on

25.07.2016.

2. The petitioner is a Multi-System Operator (MSO), engaged in the business of transmission of broadcast through cable network since last several

years. The respondent No.1, i.e. ZEE Entertainment Enterprises Pvt. Ltd. (ZEL) is a broadcaster and a media and entertainment company. It is

distributing ZEE group of channels and also Sports channels of respondents nos.2 and 3, namely, Iai Television India Pvt. Ltd. and Turner

International India Pvt. Ltd. Admittedly, ZEE has been appointed as a distributor of channels of respondents Nos.2 and 3 from 01.09.2016. Both the

parties are service providers and are amenable to the jurisdiction of this Tribunal.

3. In order to appreciate the case of the petitioner it is useful to extract Para J of the petition which discloses the nature of relief sought by the

petitioner against a notice for disconnection dated 18.06.2016 and also Partts 5 and 6 containing relevant averments in respect of Memorandum of

Understanding (Agreement) between the parties. Paras 4, 5 and 6 are as follows:

4. The petitioner by way of the present Petition seeks to stay the illegal and arbitrary deactivation notice issued by the Respondents under clause 6.1 of the

Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (DAS Regulations) for

non-payment of the Outstanding license fee amounting to Rs. 89,58,500/- & Area Transgression issued by Respondents on 8.06.2016 against all addressable

Distribution Platform which was dispatched by post: Respondent No.1 on 18.06.2016 and was received by the Petitioner on 21.06.2016 (clearly reflected from the

envelope of the notice received by the Petitioner). In the said notice the Respondents are claiming outstanding amounts as per Agreements executed by the

Petitioner with the Respondent Nos.2 & 3. However no date of the Agreements have been specified. The Petitioner has not executed any Agreements with the

Respondent but has executed memorandum of Understandings with the Respondents. The copy of the said notice along with the envelope are collectively annexed

herewith as Annexure-P1 copy.

5. The petitioner has executed a Memorandum of Understanding dated 16.11.2015 with Respondent No.2 Similarly the Petitioner has also executed a

Memorandum of Understanding dated 16th November, 2015, with Respondent No.3. That the term in both the MOUs was for a period of 12 months commencing

from 01.01.2016 to 31.12.2016. 1 set of copies of both the aforesaid Memorandum of Understandings dated 16.11.2015 are annexed herewith and marked as

Annexure- P2 & P3 respectively.

6. The Petitioner had executed these Memorandum of Understandings dated 16.11.2015 apprehending that the implementation of DAS Phase III would be front

01.01.2016 as declared by the government in its notification. The term of the Memorandum of Understanding was for a period of 12 months commencing from 01.01.2016 to 31.12.2016. However during the implementation of DAS Phase I & II there were postponements hence the Petitioner had to clause to that effect in its MOU in

event of non implementation of DAS, as it was only executed for DAS Phase III.

4. The Petitioner has assailed and disputed the correctness of invoices and demands made by the respondents for the period from 01.01.2016 to

31.12.2016 on the ground that this period was under analog regime and therefore, the MoU signed for this period dated 16.11.2015 for DAS regime

chargeable at higher rates would not apply, particularly in view of clause 2 in the Memorandum signed with respondents Nos.2 and 3 respectively. The

term of the agreement as per clause 2 has been prescribed as follows:

2. Term:

The term of the license granted hereunder shall for a period of twelve (12) months commencing on January 1, 2016 and valid until 31 December, 2016, unless

terminated earlier in accordance with this MOU. In the event the date of implementation of DAS Phase III is extended beyond 31 January 2016, the Term of this

MOU shall commence from the date of implementation of DAS Phase III and shall be valid only until 31 December, 2016, unless terminated earlier in accordance

with this MOU.

5. It is petitioner's case that the implementation of DAS Phase-III was at the relevant time stayed indefinitely by judicial orders. Petitioner has

referred to an order by the Hon'ble High Court of Karnataka dated 27.02.2016 which has been brought on record at the time of hearing as

Annexure -E TO an affidavit filed on 05.02.2021.

6. It is not in dispute that petitioner's same writ petition bearing No. 10184 of 2016 was transferred from Karnataka High Court to Delhi High

Court by an order dated 02.06.2016 because so many other similar petitions from Karnataka and other places had also been similarly transferred to

Delhi High Court by an order of the Supreme Court 01.04.2016.

7. The stand of the respondent is that the petitioner is bound by the terms of the Memorandum of Understanding Agreement) and pay accordingly. It

is further stand of the respondent ZEE that petitioner had made a false claim that the date of implementation of DAS Phase-III has been extended to

any date beyond 01.01 _2016. The Terms of the MoU even on the basis of date of implementation of DAS Phase-III had commenced on 01.01 2016

and lasted till 31.12.2015

8. In its short reply the respondent ZEE has affirmed that parties have executed MoU dated 16.11.2015: it came into effect from 01.01.2016; Invoices

on the basis of said Agreement were raised in time and since January 2016 the petitioner never raised any objections to the invoices and only as on

afterthought; for supporting its case it raised the issue of non-implementation of DAS Phase-III for the first time through a letter of 11.07.2016 which

was received by the respondent only on 29.07.2016.

9. In the reply respondent has referred to three different writ petitions to show that in similar matters the Karnataka High Court granted a limited

interim protection that the authorities of the State, who were made respondent, will not effect disconnection of signals. From three orders of

Karnataka High Court annexed as Annexures R-I, R-2 and R-3 it was shown that by such interim orders the date of implementation of DAS

Phase-III which was notified by the competent authority as 01.01.2016 was never extended. In supersession of the earlier date for implementation of

DAS Phase-III by 30.09.2014 as notified in 2011, the competent authority vide Gazette Notification of 11.09.2014 extended that date in respect of

DAS Phase-III from 30.09.2014 to 31.12.2015.

10. According to ZEE then: is no justification for the petitioner not to pay the invoices raised as per agreement because date for implementation of

DAS Phase- III was never extended beyond 31.12.2015 and petitioner's contention that it was so extended to 01.02.2017 by virtue of notification

dated 23.12.2016 is absolutely incorrect and baseless. That notification is available as Annexure C(colly.) at pg-155 of the affidavit of 05.02.2021

and shows that only the date specified in the notification of 11.09.2014 in respect of DAS Phase-III areas was extended from 31.12.2015 to

31.03.2017. It further shows that in respect of DAS Phase-III areas the notification mentions that the extended date is only upto 31.12.2015 as

indicated in the notification of 11.09.2014.

11. Of the three notifications, of 11.11.2011 I, II, 09.2014 and 23.12.2016, have been issued in exercise of statutory power available to the

Government of India under sub-section (1) of the Section 4 A of the Cable Television Networks (Regulation) Act, 1995 (the CTN Act). There is no

other notification to show that the date for implementation of DAS Phase-III was extended beyond 31.12.2015.

12. Learned counsel for the petitioner has placed strong reliance upon two documents available on the initial two pages of Annexure C (colly.) to

support the submission that the Government of India had in fact extended the date specified for implementation of DAS Phase-III from 31.12.2015 to

31.01.2017. The first document is a Notice by the Ministry of Information & Broadcasting, Government of India dated 22.12.2016. The other

document is a Press Release of the same contents as in the Notice, issued on 23.12.2016 by Press Information Bureau, Government of India,

Ministry of Information & Broadcasting. These documents refer to the notifications under Section 4A of the CTN Act and reiterate that it is

obligatory for every cable operator to transmit or retransmit programmes of any channel in an encrypted form through a Digital Addressable

System (DAS) with effect from the dates mentioned in those notifications. Thereafter, there is a reference to stay orders passed by various high courts

leading to order by the Hon'ble Supreme Court and transfer of all such cases to Delhi High Court for hearing and disposal. It is further mentioned

that most of the cases have been disposed of by Hon'ble Delhi High Court. Hence, "in order to provide adequate time for transition of those

subscribers who had not switched to digital mode of transmission in the DAS Phase-III areas on account of the ongoing court proceedings, it was

decided that broadcaster, MSOs and I CO:- will be allowed further time upto 31.01.2017 after which no analog signals shall be carried in Phase-III

areas". It was also stated that no further extension shall be given in future.

13. Learned counsel for the respondent has rightly pointed out that the statutory Gazette Notification of 23.12.2016 on the two pages of the same

Annexure C (colly.) clearly disclose that the statutory authority did not extend the date for implementation of DAS Phase-III beyond 31.12.2015 and

only the date for DAS Phase-IV was extended upto 31.03.2017. According to

learned counsel, the administrative decisions reflected by the Notice and the Press Release do not claim to extend the time for DAS Phase-III notified on 11.09.2014 in terms of the statutory provisions. He further submits that statutory Gazette Notification of 11.09.2014¹ could have been modified only by a similar notification as issued on 23.12.2016² even in respect of DAS Phase-III but since that was not done the Notice and the Press Release cannot supersede Gazette Notification of 11.09.2014. He has pointed out that CTN Act provides coercive action also. Under Sections 11 and 12 any authorized officer can seize and confiscate equipments for violation of provisions like Section 4A that may also attract punishment under Sections 16 and 17 of the CTN Act. However, no court can take cognizance of such offences except upon a complaint in writing by any authorized officer. According to learned counsel the executive or administrative decisions in the Notice and Press Release only gave a notice and warning that violation of provisions of Section 4A due to disregard of the notifications issued thereunder will no longer be overlooked after 31.01.2017.

14. On a careful perusal of the documents in Annexure C (colly.) the submissions advanced on behalf of respondent are found to have merit. All the documents in that Annexure support the stand of the respondent that the date for implementation of DAS Phase-III notified on 11.09.2014 was never subjected to any further extension because that could be done only through a gazette notification in exercise of statutory power under Section 4A of CTN Act. No such power has been exercised by the competent authority for the purpose of extension after 31.12.2015 for DAS Phase-III. The Notice and the Press Release do not claim to be ultra vires any statutory provision such as Section 4A. They only refer to the factual situation due to court cases and forbearance granted because of matters pending in the courts, particularly Delhi High Court. All concerned were given notice that the non-compliance of Section 4A should not continue beyond 31.01.2017³ because most of the cases had been disposed of by Delhi High Court. Accordingly, it is found that the competent authority under the CTN Act has not extended the date specified for implementation of DAS Phase-III beyond 31.12.2015⁴. Hence, on this ground at least the petitioner cannot succeed.

15. The other limb of petitioner's stand is based upon the interim orders passed

by the Karnataka High Court as well as other courts. ITic petitioner
 has annexed and relied upon order of High Court of Karnataka dated 27.02.2016.
 A perusal of that order shows that this interim order was against the
 Ministry of Information & Broadcasting and the Deputy Commissioner of the
 concerned district and it directed them not to disconnect the TV signals
 through the petitioner's cable network till the next date of hearing. According
 to learned counsel since the TV signals on the date of the order
 were in analog mode, the order for not effecting disconnection would amount to
 extending the date for implementation of DAS Phase-in beyond
 31.12.2015.

16. In reply to the above, learned counsel for the respondent has reiterated his
 stand that there was no judicial order interfering with the date
 specified in the statutory Notification under Section 4A of the CTN Act issued in
 2014. He has further pointed out that respondents were not made
 parties to the writ petition filed by the petitioner, the contents, scope and relief
 sought in the petitioner's writ petition were material aspects but the
 petitioner has withheld those materials by not placing the writ petition on record.
 It has also been pointed out that petitioner has not shown that the
 limited interim order was extended on any future date. On behalf of petitioner
 several orders passed by Delhi High Court in similar/connected writ
 petitions have been placed through a compilation for consideration. One order of
 Karnataka High Court passed in petitioner's writ petition dated
 02.06.2016 shows that the records were ordered to be sent to Delhi High Court.
 Orders passed by Delhi High Court in the bunch of petitions
 transferred by the Supreme Court show that in one of the judgments delivered
 on 03.11.2016, it was noticed that the last extension for implementation
 for DAS Phase-III was granted upto 31.12.2015. On a perusal of petition, the
 High Court found that the petitioner was only seeking for grant of some
 more time for installation of digital Set-Top Boxes (STBs) and for changeover to
 DAS. The court held that even after the filing of the petition
 approximately 10 months' time had elapsed and hence there was no justification
 in granting any more time for completion of installation of digital
 STBs. The writ petition was accordingly dismissed. Another judgment dated
 01.12.2016 in the case of Rohtak Cable Operators' Assn., W.P.(C)
 No.7178/2016 shows that the petitioner had challenged not the original

Notification dated 11.11.2011 under Section 4A, but only the amendment notification dated 11.09.2014 whereby time had been extended till 31.12.2015 for implementation of DAS Phase-II. The High Court found no merit in such challenge. The writ petition was ultimately disposed of directing to complete the installation of STBs and changeover to DAS within a period of two weeks. A similar order was passed in other batch of cases on 07.12.2016. There is nothing on record to show as to what happened to petitioner's writ petition after the first order granting interim relief against disconnection.

17. A discussion of the judicial orders as made above shows that the courts have not interfered with the statutory notification under Section 4A of the CTN Act last issued in respect of DAS Phase-III on 11.09.2014. Hence, the petitioner's claim that the date for implementation of DAS Phase-III got further extended beyond 31.12.2015 on account of the judicial orders is not supported by a careful reading of the orders. In the matter as per order of the Supreme Court was finally decided by the Delhi High Court and it did not interfere with the statutory notifications. On the basis of facts, some accommodation of time was granted to complete the process if the same had been left incomplete. In other words, violation of CTN Act for a limited time was ignored. Such indulgence and forbearance by court* and the concerned department cannot be accepted as a legal extension of the date of implementation of DAS Phase-III beyond 31.12.2013 so as to adversely affect the respondents' invoices and claims on account of provisions in Clause 2 of the MOU dated 16.11.2015 which has already been extracted earlier.

18. According to learned counsel for the petitioner another agreement between the parties dated 28.12.2015 for the period 01.04.2015 to 31.03.2016 or till the date of implementation of DAS Phase-III whichever is earlier, also supports the case of the petitioner that the analog regime continued till 31.01.2017 as should also be inferred from the notice annexed in Annexure C (copy). The above agreement as contained in Annexure P-8 is between respondent No.2, M/s Taj Television and Petitioner's affiliate in Raichur District. It is admittedly for the period beginning from 01.04.2015 when the analog regime was continuing. The expiry date in this agreement is mentioned as 31.03.2016 or the date of implementation of DAS Phase-III in the area, whichever is earlier. The aforesaid facts do not support the case of

the petitioner that the date for implementation of DAS Phase-ITl was extended beyond 31.12.2015.

19.Â The pleadings and the materials show that invoices as per MOU of 16.12.2015 were issued regularly for the months from January to May 2016

and when the dues remained unpaid, the same was made the ground for impugned notice of disconnection dated 05.06.2016 (Annexure-I). The

notice mentions the unpaid dues to be Rs.89,58,500/- in total for the period till 30.05.2016 based upon billings till the month of April, 2016 for the

DAS notified areas. Further claim for late payment interest is also indicated. The notice discloses an allegation that the petitioner had been indulging in

the use of unauthorized retransmission of pay channels beyond the area agreed between the parties.

20. The issue of area transgression does not survive and has not been argued by the parties. It is relevant to note at this juncture that MA No.27/2018

was filed on behalf of ZEE on 30.01.2018 for appropriate direction. It was brought to the notice of the Tribunal that subsequent developments had

taken place during the pendency of the petition and the parties had entered into a mutually agreed Interconnect Agreement dated 02.08.2017 for the

period 01.01.2017 to 31.12.2017 or till the date of implementation of the 2017 tariff order dated (13.03.2017, whichever is earlier. The Tribunal was

informed through that MA that vide the agreements the parties had agreed that the past outstandings to the tune of Rs.1,10,49,768/- (one crore ten lakh four thousand nine hundred and seventy six rupees only) (qua ZEE

channels), Rs.98,16,832/- (nine lakh eighty one thousand six hundred and thirty two rupees only) (qua Turner channels) and Rs.22,41,335/- (two lakh twenty four thousand one hundred and thirty five rupees only) (qua Taj Sports channels) as on 23.11.2016 shall be subject to the final

determination of the present petition. The Agreements of 02.08.2017 are Annexure A2 to the said MA.

21. The above MA was considered by the Tribunal on 31.01.2018 and the new agreement of 02.08.2017 was noticed although it had also expired on

31.12.2017. This Tribunal clarified that in view of subsequent development showing that the parties had moved forward and keeping in view the earlier

order passed in B.P No.-1123/2016, the dispute in the present petition relates only to an earlier agreement and shall remain confined to same.

22.Â In the petition, the petitioner has further claimed in Para 10 that although the MOU included the area of Haveri, the said area was under a

franchisee Havcri Capital Network which took over the entire business from

01.01.2016 and therefore, payments for the said area from 01.01.2016 would be made by Haven Network and not by the petitioner Allegedly this was intimated to the respondent orally in February and March 2016 and therefore, although invoices raised for that area also, but the petitioner is not liable to pay for that area. In support of this pica petitioner has annexed a letter dated 21.06.2016 (Annexure P-7), On this issue learned counsel for the petitioner has also referred to a letter dated 26.07.2016 (Annexure K to the rejoinder) by the said letter which is subsequent to filing of the petition, a third party - Net 9 has written to Taj Television that the monthly subscription fees for the Haven Network shall be paid by that entity for the period beginning from 01.01.2016. The stand of the respondent is that till the period of the MOU/Agreement expired in December 2016 the petitioner did not seek any modification in the agreement for exclusion of Haveri Network nor any third entity approached the respondent for an agreement to take over the liability of the petitioner for the Haveri area. In such circumstances, it has been submitted on behalf of the respondents that petitioner was only using different excuses and ploys for not paying the lawful dues in time. The submission appears to have merit. In absence of an agreement for the Haveri Network with any third entity, there could be no occasion for the respondents to raise invoices against a third party and seek payments.

23. On behalf of petitioner it has been argued on the basis of updated statement of accounts in Annexure-B to the affidavit of 05.02.2021 that till December 2016, as per case of the petitioner and on the basis of rates in the previous analog agreement, it made excess payments to ZEE of Rs 1,24,94,222/- It has further claimed in the accounts on amount of Rs.63 lakhs on the plea that it is entitled to omit the monthly subscription charges for Haveri area. On that basis the total excess payment is said to be Rs. 1,87,94,222/-. According to learned counsel, the petitioner's case deserves to be accepted and therefore, the aforesaid amount should be ordered to be returned/refunded to the petitioner. This has been strongly contested by learned counsel for ZEE, both on the basis of its stand on merits that the DAS agreement was effective for the entire period from January till December 2016 and also on the technical ground that petitioner has not made any prayer for a money decree for any amount much less for the

amount now being claimed through a self-serving statement of accounts brought on record at the time of hearing through affidavit of 05.02.2021.

24. It is not necessary to go into the above controversy concerning account of petitioner's stand that it has paid an excess amount during the year 2016. The

case of excess payment could have deserved consideration had petitioner's case been found to have merit. But the findings recorded on merits

are against the case of the petitioner. The date for implementation of DAS Phase-TII was never extended beyond 31.12.2015 either by the

competent statutory authority or by any judgment or order of a competent court of law. Interim orders merge into final orders and lose their

significance thereafter. In the present matter, petitioner has not produced any final judgment or order in support of its case and the interim orders also

do not lead to a conclusion which may help the case of the petitioner. A solemn agreement or MOU between the parties referring to a date fixed by

the statutory authority cannot be ignored by one party when the statutory authority has not issued further notification which could affect the

implementation of the MOT.* from January 2016 onwards. The objection to the invoices raised by respondents on the basis of DAS Agreement was

also belated. The dispute was raised after the invoices were raised by the respondents for 4-5 months. There is no explanation why the

subsequent DAS agreement was for a term beginning from 01.01.2017 when petitioner has taken a stand that the date for implementation of DAS

Phase- III got extended to 31.01.2017.

25. In the aforesaid facts and circumstances, this tribunal finds in favour of the petitioner. The petition and the same is accordingly dismissed. The parties shall

adjust their accounts accordingly and act in accordance with law and the stipulations as agreed in the admitted DAS agreements for the period

beginning from 01.01.2017.