

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

DATED 18th DECEMBER, 2009

PETITION NO. 58(C) OF 2008

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ESPN Software (I) P. Ltd. Petitioner

Vs.

Bankey Bihari Communication & Ors. Respondent

BEFORE :

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER**

For Petitioner : Mr. N. Ganpathy, Advocate

For Respondent : Mr. Rashmi Sharma, Advocate

ORDER

The petitioner is a Broadcaster.

2. The respondent, a partnership firm, is a cable operator. It was carrying out its business in transmission of signal since 1995.

The respondent nos. 2 to 4, however, entered into a fresh partnership agreement in the year 2007. Admittedly the respondent no. 2 is the managing partner of the said partnership firm.

3. Inter-alia on the premise that the respondent no. 1 did not pay the stipulated subscription fees to the petitioner, this petition has been filed inter-alia for recovery of a

sum of Rs. 6,69,731/- alongwith interest @ 12% per annum from the due date till realisation of the said amount.

4. The respondents do not deny or dispute that the parties to the said agreement dated 20.07.2007 had been taking signals for transmission of the channels of the petitioner.

It is admitted that the respondent no. 1 and its subscribers attached to the network enjoyed the services till Jan, 2008. It is also not in dispute that monthly invoices used to be raised from time to time which are contained in Annexures P3A to P3G to the petition. It is furthermore not in dispute that the respondents have made part-payments against the said invoices from time to time.

The amount claimed by the petitioner and those paid by the respondents would appear from the following chart :-

Effective Date	Bill Amount	ST	Payment
23.10.2007	1,23,300	15,240	
23.10.2007	1,23,300	15,240	
23.10.2007	1,23,300	15,240	
23.10.2007	1,23,300	15,240	
25.10.2007			45,000
20.11.2007	1,23,300	15,240	
23.11.2007			15,000
28.11.2007			15,000
28.11.2007			15,000
20.12.2007	1,28,232	15,849	
31.12.2007			20,449
21.01.2008	1,28,232	15,849	
Total	20,60,231	2,50,142	16,40,642
Outstanding upto 19.02.2008			6,69,731

5. The petitioner in support of its case had also filed the statement of account. Receipt of the invoices is however disputed. The petitioner very fairly has given up its claim against the Respondents prior to the date of the agreement namely 20.7.2007.

6. The principal contention of the respondent is that the subscription fee payable to the petitioner was at Rs.82000/- per month and not Rs. 123300/- as claimed by the petitioner. It has furthermore been contended that the respondent no. 4 who was a partner of the respondent no. 1, collected the amount of subscription fee proportionately payable by the respondent nos. 2 & 3 but in collusion and conspiracy with the distributor of the petitioner has misappropriated the said amount, wherefor a First Information Report bearing no. 272/2008 under section 406/420 of IPC has been registered against him.

7. The respondent no. 2 in his evidence before us has further stated that all payments due to the petitioner have been made in cash. He, however, accepted that no receipt therefor has been obtained by him from the petitioner or its distributor.

8. On the pleadings of the parties before us, there cannot be any doubt or dispute that there existed a relationship of the broadcaster and MSO between them. The respondent no. 2, even assuming for the sake of the argument has been cheated by the respondent no. 4, the petitioner has nothing to do therewith. Mr. Ashok Sharma, the witness examined on behalf of respondent no. 2 in his evidence also admitted that despite the fact that collusion/conspiracy has been alleged by and between the respondent no. 4 and distributor of the petitioner, no First Information Report has been lodged against the later.

9. In a matter like the present one, this Tribunal is not concerned with the criminal case filed by the respondent no. 2 against the respondent no. 4 alone, which has to be decided on its own merits. Having regard to the admitted relationship between the parties as well as execution of the agreement having been admitted there cannot be any doubt or dispute whatsoever that the respondents were liable to pay a sum of Rs. 123,300/- per

month besides taxes amounting to Rs. 138,540/- from 20.7.2007 to 20.1.2008, the details whereof are as under :-

Billing period	Billing amount	Service tax	Amount billed (Incl. Service Tax)	Amount paid by respondent
20/07/07 – 19/08/07	123,300	15,240	138,540	82,000
20/08/07 – 19/09/07	123,300	15,240	138,540	138,525
20/09/07 – 19/10/07	123,300	15,240	138,540	45,000
20/10/07 – 19/11/07	123,300	15,240	138,540	15,000
20/11/07 – 19/12/07	123,300	15,240	138,540	15,000
20/12/07 – 19/01/08	123,300	15,240	138,540	15,000
20/01/08 – 22/01/08	8,220	1,016	9,236	20,449
Total			840,475	330,974
	Total Balance Due		509,501	
(Rupees Five Lakh Nine Thousand Five Hundred & One only)				

10. From the aforementioned chart it would also appear that only in the month of July, 07 a sum of Rs. 82000/- was paid by the respondents. There is thus, nothing to show that contrary to the terms of the agreement the parties novated the contract so as to modify/alter the terms and conditions thereof so far as the amount of subscription fee is concerned. We, therefore, are satisfied that the plea of the respondent no. 2 that the subscription fee payable was Rs. 82000/- per month is not correct.

11. Furthermore, a partnership firm carrying on business of such a magnitude is expected to maintain its books of account. No book of account has been filed by the respondent to prove that the amount of subscription was Rs.82,000/- per month or for that matter it had made all payments to the petitioner in cash. Curiously, the respondent no. 2 in his evidence before us stated that he had paid his share of the subscription fee to

the respondent no. 4. If that be so, it cannot be said that he had knowledge about the payment of the entire outstanding dues to the petitioner as stated by him or otherwise.

The onus of proof that such payments were made, was upon the respondents. They have failed and/or neglected to bring on record any receipt showing such payments or any books of accounts maintained by them to prove their case. We are, thus, not in a position to accept the plea of payment raised on behalf of the respondent.

12. We, for the foregoing reasons, are of the opinion that the petitioner is entitled to a decree for a sum of Rs. 509,501/- with interest @ 18% per annum from the date from which it fell due till the date of filing of this petition and @ 12% per annum pendelite and future till the date of realisation thereof with costs.

Counsel's fee assessed at Rs.25,000/-.

.....,J
(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member