TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 18th December, 2009

PETITION No.151(C) OF 2008

M/s Indian Cablenet Company Limited
Plot No. – XI
Block – EP & GP
Salt Lake Electronics Complex
Sector-V
Kolkata 700 091 … Petitioner

Versus

M/s Dum Dum Cable TV Network
Mr.Tapas Som
44a, Rashtra Guru Avenue
Dum Dum, Kolkata
West Bengal – 700 028 …Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

For Petitioner : Mr. Tejveer Singh Bhatia, Advocate

For Respondent : Mr.Navin Chawla,Advocate
Mr.Sharath Sampath,Advocate

ORDER

The petitioner has approached this Tribunal, inter alia, for recovery of a sum of Rs.13,56,844/- from the respondent.

The petitioner herein has prayed for the following reliefs:

> "a) Order/decree in favour of the petitioners and against the respondent for an amount of Rs.13,56,844/- (Rupees Thirteen Lac Fifty Six Thousand Eight Hundred and Forty Four only) being the outstanding amount due from the respondent as on 30.06.2008 for the cable services received by the respondent from the petitioners.
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> b) An order awarding an interest in favour of the petitioner for an amount of Rs.62,846 on the aforesaid payment of Rs.13,56,844/- till 15.7.2008.
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> c) An order awarding pendent elite interest @ 18% on the above mentioned amount due of Rs.14,19,690/- with effect from 15.7.2008.
>
> d) Pass an order awarding costs to the petitioners."

2. An interim order was also prayed for for a direction upon the respondent not to discontinue the signals being provided by the petitioner without giving a mandatory notice under Clause 4.1 of the Telecommunication (Cable & Broadcasting Services) Regulation, 2004(hereinafter referred to as 'the Regulation').

3. Admittedly, the parties entered into a subscription agreement on or about 05.11.2002 in terms whereof the subscription fee payable was Rs.2,80,403/- per month. According to the petitioner the signals were transmitted to the respondent since November, 2007. It had paid a sum of Rs.56,635/- upto 31.08.2008 and as it did not respond to its notice demanding the balance sum notices under clauses 4.1 and 4.3 of the Regulation were issued/ published on or about 27.05.2008.

4. The respondent, however, in its reply, inter alia, pleaded that parties hereto as also the broadcaster, namely, ESPN, entered into a settlement in terms whereof the respondent was to

obtain signals from the petitioner upto February 2008 and from March, 2008 it had to take supply of signals from another MSO.

5. The parties hereto in support of their respective cases have examined one witness each. Whereas the petitioner has examined Mr.Atul Kumar Singh as his witness, the respondent has examined Shri Tapas Som.

6. Mr.Tejveer Singh Bhatia, learned counsel for the petitioner would urge that having regard to the fact that the respondent had entered into a subscription agreement and invoices having been issued on a regular basis upto June, 2008, there was absolutely no reason as to why the respondent would not be directed to pay the subscription fee till the said period. It was contended that the respondent having not complied with the requirements of clause 4.2 of the Regulation, even if this defence is accepted, it would be liable to pay the amount claimed in this petition.

7. Mr.Navin Chawla, learned counsel appearing on behalf of the respondent on the other hand, urged that in view of the Memorandum of Settlement arrived at by and between the parties in terms whereof subscription fee had been offered to the ESPN, the claim of the petitioner is fit to be rejected.

8. Certain facts in this case are not disputed.

The petitioner is an MSO. It inter alia, had been transmitting signals of the channels of Star Den Media Services Pvt. Ltd. and others. From a letter dated 29.04.2008 which was faxed to M/s Star Den Media Services Pvt. Ltd, it appears that a prayer for downgradation of the subscription amount was made, inter alia, contending “we give full details of operators who have migrated from our network”. Serial No.8 of the said communication refers to the respondent herein as well as some other details, namely, the contact person, the address, the city,

the pin code, number of subscribers(1978) and month of migration(March 2008), which clearly indicates that the respondent had already migrated.

9. The petitioner's witness, however, raised a contention in his evidence in respect whereof no plea was raised in the pleadings that the list of the MSOs had been furnished to the broadcaster who were likely to migrate. Further contention of the petitioner appears to be that as the broadcaster despite the same had not downgraded the subscription fee of the petitioner, respective cable operators are bound to reimburse it.

10. There is no agreement in writing. According to the respondent, the parties had entered into an oral understanding. Apart from the aforementioned communication whereupon strong reliance has been pressed by Mr.Chawla, learned counsel for the respondent, the respondent has also placed strong reliance upon a letter dated 05.03.2008 addressed to the Chief Executive Officer of the petitioner company which reads as under:-

> "With reference to the discussion held in your office on 25th of Feb.08, so kindly organized by you and therein participated by Mr.Bapi Som, Mr.Koushik Saha and ESPN represented by Mr.Swarup & Mr.Binani; the following aspect in regard to our forthcoming bill payment for the month Feb'08 was agreed upon with common consensus and is herewith put on record for your kind perusal.
>
> The duplicate/double payment of Rs.2,35,280/- made to you and as well as the same amount of Rs.2,35,280/- paid to ESPN in the month of Dec'07 is to be adjusted against our payment for the month of Feb'08 to your office.
>
> Adjusting the same amount, please acknowledge the balance payment of the said bill for Feb'08 clearing all dues is herewith extended along with.
>
> In event of M/s ESPN Software India Pvt.Ltd. delays the abovementioned, post confirmation from M/s ESPN Software India Pvt.Ltd., we will ensure the balance amount/outstanding if any."

11. At this stage, we may notice the statement of account for the months of November 2007 to June, 2008 which is as under:

Statement of Accounts from Nov'07 to May'08

Inv.No.	Month	Date	Particulars	Cheque No	Dr.	Cr.

IM07110392	Nov-07	01/11/2007	Invoice		280403	
		30/11/2007	Payment	005880		100000
IM07120269	Dec-07	01/12/2007	Invoice		280402	
		04/12/2007	Payment	005879		180404
IM08010240	Jan-08	01/01/2008	Invoice		280403	
		11/01/2008	Payment	005881		100000
		21/01/2008	Payment	005882		180403
IM08020247	Feb-08	01/02/2008	Invoice		280403	
		02/02/2008	Payment	005888		280450
IM08030237	Mar-08	01/03/2008	Invoice		280403	
		07/03/2008	Payment	005889		45123
I008040116	Apr-08	01/04/2008	Invoice		280403	
I008040116	May-08	01/05/2008	Invoice		280403	
I008040116	Jun-08	01/06/2008	Invoice		280403	
Total					**2243224**	**886380**
Closing Balance					**1356844**	

From the admitted document it would, thus, appear that the respondent had paid the prescribed monthly subscription fee for the month of November, 2007 by paying the same in two instalments.

12. No payment, however, admittedly has been made towards subscription fee for the month of March, 2008 onwards. It is to be noticed that the balance amount payable for the month of February 2008 was Rs.2,25,180/-. The letter of the respondent dated 5th March, 2008 clearly proves that the said amount had been transmitted to ESPN.

13. My attention has been drawn to the invoices raised by the petitioner. None of the invoice shows any arrears. Even the invoice drawn for the month of March, 2008 does not show the same. It is now well known that in terms of the regulations, the MSOs are not only required to issue invoices but also serve the some on a monthly basis. In the said invoices the amount of arrears is also required to be shown. The petitioner had admittedly not done the same. We, however, hasten to add that the said omission on the part of the petitioner may not be held to be conclusive.

14. Mr.Bhatia urged that from the letter dated 18.04.2008 it would appear that respondent was reminded of the dues of Rs.5,15,635/- upto 31st March 2008 and although he admitted receipt of thereof, in cross-examination he disputed the same.

15. The petitioner having filed this petition is legally bound to prove the same in terms of the provisions contained in Section 101 of the Evidence Act. The burden of proof, thus is on it.

It is now well settled that when the onus of proof is on the plaintiff a suit cannot be decreed only on the basis of weakness of the defence of the defendant.

In Anil Rishi Vs. Gurbaksh Singh – 2006(5) SCC 558 para 19-20, the Supreme Court of India held as under:-

> "19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and it he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.
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> 20. In R.V.E. Venkatachala Gounder v. Arulmigu Viswesarawami & V.P. Temple the law is stated in the following terms:
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> 29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in Addagada Raghavamma v. Addagada Chenchamma there is essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability as to shift the onus on the defendant it is for the defendant to discharge his onus and in the

absence thereof the burden of proof lying in the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

The petitioner is bound by its conduct. It itself in its letter to M/s Star Den Media Services Pvt. Ltd. categorically admitted that the respondent had migrated to another MSO. The respondent is not concerned with the petitioner's plea that despite the said letter the broadcaster's had not downgraded it. It is accepted that in the city of Kolkata subscription fee is determined on the basis of number of subscribers. Each MSO/cable operator follows the regulations in sending SLRs every month. It is only in that context the aforementioned letter of the petitioner dated 29.04.2008 is required to be considered.

From the letter dated 06.03.2008 issued by the respondent, it would appear, that a meeting took place not only by and between the parties hereto; even the representative of ESPN had participated therein.

It is only pursuant to the agreement arrived at therein that the respondent had remitted a sum of Rs.45,123/- towards the amount due to the petitioner. The balance amount, namely, Rs.2,35,280/- admittedly had been paid to the ESPN which was to reimburse the petitioner to the said extent.

The petitioner accepted the said payment which accordingly to the respondent was in full and final satisfaction of its claim, without any demur whatsoever. As noticed heretobefore, even the petitioner did not show any arrears in its subsequent invoices. The statements made by Mr.Tapas Som in his evidence in this behalf had not been put to him in cross-examination. We may notice that Mr.Tapas Som in his evidence categorically stated that "the entire exercise was so mutual and with consent of all concerned."

He furthermore stated:

"9. I state that the Respondent on the receipt of the first notice datd 18.04.2008 contacted the representatives of the Petitioner expressing their grievance as to the above notice. The representatives of the Respondent however, assured the Respondent that the said notice was sent by mistake as the accounts department of the Petitioner had not been apprised of the moving of the Respondent away from the network of the Petitioner and had as a matter of habit issued notice for the alleged failure to pay subscription charges.

I state that the Respondent again received a notice dated 27.05.2008 stating dues to the tune of Rs.10,76,441/-. On receipt, the Respondent again contacted the Petitioner who apologized for the confusion and requested the Respondent to negate the aforesaid notice. I state that the Respondent never realized that this was a malafide attempt on part of the Petitioner to create evidence against the Respondent and drag it to malicious litigation before this Hon'ble Tribunal."

The effect of not questioning the correctness of any statement made by a witness in his examination in-chief in cross-examination would be that the same should be deemed to have been accepted.

In S.C. Sarkars' Commentary on Law Evidence Page 577, it is stated:

"Needless to say, as it is well settled in law, that if witness has not been cross-examined on a point stated in the examination-in-chief, the same remains unchallenged and there is no reason why it should not be accepted."

[See also Dammu Sreenu Vs.State of A.P. – AIR 2009 SC 2532, Pravin Vs.State of Madhya Pradesh – AIR 2008 SC 1846, Hindustan Steels Ltd. Rourkela Vs. A.K. Roy & Ors. – AIR 1970 SC 1401]

A Division Bench of the Madhya Pradesh High Court in Mohd.Naved Vs. Hindustan Petroleum Corporation & Ors. – 2004(1) MPHT 16, stated the law, thus:

"Needless to say, as it is well settled in law, that if witness has not been cross-examined on a point stated in the examination-in-chief, the same remains unchallenged and there is no reason why it should not be accepted."

It is true that Mr.Som although in his evidence accepted receipt of the invoices and letters and explained the reaction of the respondent thereto in his cross-examination stated that he has not received the said letters. Nothing material turns thereon.

We have held heretobefore that the petitioner has failed to prove its case and thus, that the receipt of some letters or the demanding certain amounts, neither proves nor disproves the claim of a party.

It is true that the respondent did not serve any notice in terms of clause 4.2 of the regulations. Service of such notice is necessary so as to put the other party to a contract to make alternative arrangements. However, if the parties by mutual agreement take a consensual decision the same would amount to a waiver.

In State of A.P. & Ors. Vs. Pioneer Builders, A.P. – 2006(12) SCC 119, the Supreme Court of India stated the law thus:

"19. Bearing in mind the aforesaid legal position, we advert to the facts in hand. As noted above, the Subordinate Judge, vide order dated 2.2.1993 came to the conclusion that "there was no tenable ground to refuse the relief asked for". Though there may be some substance in the submission of Mr.Chaudhari, learned Senior Counsel appearing for the State, that the order allowing the application, seeking dispensation of the requirement of notice, is cryptic but the fact remains that by allowing the application, after hearing the defendant State, the Judge has opined that the suit is for the purpose of obtaining an urgent and immediate order. Had the satisfaction been against the contractor, the court was bound to return the plaint to the contractor for re-presentation after curing the defect in terms of sub-section (1) of Section 80. Although we do not approve of the manner in which the afore-extracted order has been made and the leave has been granted by the Subordinate Judge but bearing in mind the fact that in its reply to the application, the State had not raised any specific objection about the maintainability of the application on the ground that no urgent and immediate relief had either been prayed for or could be granted, as has now been canvassed before us, we are of the opinion that having regard to the peculiar facts and the conduct of both the parties it is not a fit case where the matter

should be remanded back to the Subordinate Judge for reconsideration. We find it difficult to hold that the order passed by the Subordinate Judge on the contractor's application under Section 80(2) CPC was beyond his jurisdiction. Accordingly, we decline to interfere with the finding recorded by the High Court on this aspect of the matter. The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80 CPC the State had not raised such a plea in the written statement or additional written statement filed in the suit and, therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on the facts of each case and is liable to be tried by the court, if raised, which, as noted above, is not the case here."

Thus, in certain circumstances, even the State may waive its right to receive a notice under Section 80 of the Code of Civil Procedure. See also Bishandayal & Sons Vs. State of Orissa – 2001(1) SCC 555.

It is now the well settled that a party may waive even its statutory right.

In the facts of this case, therefore, the respondent was not obligated to serve a notice in terms of clause 4.2 of the regulations.

For the reasons aforementioned, there is no merit in this petition. It is dismissed accordingly with costs.

..……J
(S.B. Sinha)
Chairperson