

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

DATED 12th May, 2009

Petition Nos. 265(C) of 2006

Hathway Nashik Cable Network Petitioner
2nd Floor, Shiledar Bhawan,
Opp. Fire Brigade Office, Shingada Talao,
Gurudwara Road, Nashik- 422 002.

Vs.

Super Cable Network,
A sole proprietary concern
Represented through Mr. Noor Bhai,
Having its office at
3704, Near Bhor Galli,
Bhagwanpura,
Nashik -422 002. Respondent

BEFORE :

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON
HON'BLE DR. J.S. SARMA, MEMBER
HON'BLE MR. G.D. GAIHA, MEMBER**

For Petitioner : Mr. Jayant Mehta, Advocate
Mr. Nasir Husain, Advocate

For Respondent : Mr. Sunil Kumar Verma, Advocate for
Mr. Sanjay V. Kharde, Advocate

ORDER

1. By this petition the petitioner has claimed an amount of Rs. 7,95,667 upto Sept, 2006 alongwith interest @ 18% per annum from the respondent, who is a Cable TV Operator, operating in the area of Bhagwanpura in Nashik, Maharashtra. The petitioner claims to be a Multi System Operator (MSO) operating in the city of Nashik, Maharashtra. The petitioner also claims that the persistent default on the part of the respondent in making payment of the cable TV feed charges to the petitioner company for a considerable

period of time, has resulted in building up the alleged outstanding against the respondent. The petitioner has also prayed that the respondent may be restrained from switching over to any other cable TV service provider for availing signal feed for its network without paying its outstanding dues.

- 2.** The case of the petitioner is that it has raised monthly invoices on the respondent for the subscription charges. Four invoices from 1st June, 2006 up till 1st Sept, 2006 are placed on record. The invoices from June, 2006 up till Sept, 2006 have been raised on a connectivity of 300 points @ Rs.110/- per point, exclusive of taxes. The petitioner has claimed that the respondent was in default of an amount of Rs. 7,21,589/- as on July, 2006 and in this behalf a notice dated 24th Aug, 2006 has been sent to the respondent by courier. We note in the courier receipt annexed with the notice of 24th Aug, 2006 that the notice has been refused to be accepted by the consignee.
- 3.** The petitioner has claimed that after adding the subscription amount @ Rs. 37039.20 per month (inclusive of statutory taxes) for Aug, 2006 and Sept, 2006 the total outstanding till Sept,2006 is Rs. 7,95,667/-. The petitioner has also submitted that it is maintaining a running ledger account of the respondent on its request, however, the ledger account has not been annexed with the petition. The petitioner has also filed the affidavit by way of evidence of Mr. Vijay Mandhayan, who is authorized representative of petitioner company. It has been admitted by the petitioner that the respondent started receiving the cable TV feed signals from the head-end control room of the petitioner company sometimes in the year 2000. During cross examination the deponent has also confirmed the issuance of letter dated 24th Aug, 2006. The deponent on behalf of the petitioner has not indicated any outstanding amount against the respondent during cross examination, however, he has confirmed that a notice dated 24th Aug, 2006 was sent to the respondent by courier. The deponent was asked a question

during cross examination about the invoice dated 1st Sept, 2006. It was suggested by the learned counsel of the respondent that this particular invoice has been fabricated for the purpose of this petition. In response to this question the deponent on behalf of the petitioner has commented that the invoice is a computerized generated document and this document was sent to the respondent by way of hand delivery. There is, however, no confirmation of delivery of this invoice. The deponent also did not agree with the suggestion that signals of the respondent were disconnected by the petitioner w.e.f. 1st Dec, 2005. Deponent also revealed that the respondent has set up its own head-end, however, it continued to take signals from the petitioner. Deponent also denied that, the respondent has cleared all its dues to the petitioner upto Dec, 2005. It is a fact from the pleadings that the petitioner has neither submitted the alleged ledger account statement with the petition nor in the rejoinder Affidavit filed by it. It is surprising that, for the first time, the ledger account has been annexed by the petitioner with the evidence by way of affidavit.

- 4.** The respondent's case is that, the petitioner has failed to indicate as to what amount the respondent had undertaken to pay to the petitioner for receiving its signals and as to what amount has already been paid to arrive at such a huge outstanding amount. The respondent has contended that the petitioner does not disclose the date from which it is claiming the outstanding amount from the respondent in the petition. It is also contended by the respondent that the petitioner does not state any date on which the cause of action is said to have arisen and, therefore, it is obvious that the petitioner have no cause of action at all. The respondent has alleged that the present petition is based on false and fabricated document and the person deposing on the affidavit in support of the petition is liable to be proceeded against, for committing perjury. The respondent has also brought to our notice a letter addressed to Star India Ltd. dated 24.2.2006

indicating that the respondent owned by Mr. Noor Bhai was getting signals from the petitioner and it was in the list of heavy debtors (outstanding up till Jan, 2006 amounting to Rs.5,07,312/-). It is also mentioned in the letter that the respondent is a habitual cheque bouncer and after receiving the notice of disconnection from the petitioner, it had started a new control room in the Bhagwanpura of Nashik City. It is also mentioned in the said letter that the respondent is having 35 free to air channels besides Star package which has been given by Star India Ltd. The petitioner has also alleged that the Star Package is available to the respondent through the decoders which are pirated from somewhere else. The petitioner has requested the Star India Ltd. to stop the alleged malpractice on the part of the respondent by setting up of the control room by using the pirated decoders. The witness of the petitioner has, however, not been able to confirm the setting up of its own head-end by the respondent during cross examination. His statement is ambiguous and while answering the question of the learned counsel of the respondent, he has also confirmed that inspite of setting up the head-end by respondent, it was still taking signals from the petitioner. The statement made by the witness of petitioner has created a considerable doubt, about the case of the petitioner, in regard to the outstanding amount.

The only document produced by the petitioner at the stage of affidavit by way of evidence is the alleged running ledger account and the outstanding figures are being derived from this statement only. The respondent has denied the outstanding amount as projected in the running ledger account of Rs. 7,95,667.20 as on 1st Sept, 2006. The respondent has paid all dues by cheque except few cash payments which have also been acknowledged by the petitioner in its alleged running ledger account since 1st June,2000 till 1st Sept, 2006.

During the arguments, the respondent has contested that the running ledger account has neither been filed in the petition nor in rejoinder affidavit and has been filed by the petitioner for the first time in the affidavit by way of evidence which should not be considered. It is contested that at the stage of affidavit by way of evidence, introduction of the statement of the ledger account, denies opportunity to the respondent to specifically comment upon the correctness of the same. The contention of the respondent is that the petitioner has not placed on record anything to show as to what prevented the petitioner from claiming outstanding dues alongwith the bill of subsequent months. Further there is no demand letter for alleged outstanding from the petitioner from June, 2000 till July,2006 except the letter dated 24.8.2006 raising demand for the first time, after the respondent has shifted to another MSO. It is beyond the stretch of any imagination that the petitioner would not claim the outstanding dues for five years and will simply go on maintaining the accounts without sending any notice to the respondent.

The witness petitioner is also vague and does not help in improving the case of petitioner. Neither he is employee of the petitioner company nor he has personal knowledge of anything pertaining to this case.

5. The respondent claims that the petitioner unilaterally disconnected the respondent on 1.12.2005. The respondent claims that after disconnection by the petitioner, it started operating independently and only catered to his viewers free to air channels till Feb, 2006. In March, 2006 the respondent shifted to another MSO for getting the signals of various pay channels of different broadcasters. The respondent also claims to have cleared all the dues pending to the petitioner till Nov, 2005. The respondent has also mentioned in his counter affidavit that it had filed a complaint of disconnection to TRAI. A letter addressed to TRAI has been enclosed in the counter affidavit by respondent, which indicates that the respondent has

made complaint against the petitioner for disconnection on 1.12.2005 at 12.26 PM. A photocopy of the receipt from the Department of Post for sending the letter to TRAI on 27.12.2005 is also enclosed alongwith the counter affidavit. The respondent has mentioned in the counter affidavit that it did not pursue the case of disconnection with TRAI because TRAI did not have powers of adjudication of the same. The witness of the petitioner during cross examination has mentioned that he is not aware of the fact whether petitioner knew about this complaint to TRAI by respondent or not. The witness of petitioner has not agreed to the suggestion of the learned counsel of the respondent, during cross examination, that the signals were disconnected on 1.12.2005. The witness of the respondent has, however, confirmed that the signals were disconnected since 1st Dec, 2005 and the respondent was running only free to air channels. He has further confirmed that from 1st Jan, 2006 the respondent took the package from Star TV and started relaying the same on its network. The witness of the respondent, when confronted with the question that there is no document on record to show that respondent has taken the package from Star India Pvt. Ltd., volunteered that he can produce the documents including copy of the agreement which he was carrying with him on the day of cross examination. The witness also confirmed that the respondent entered into an agreement with WWIL in June, 2006 and started acting as its distributor. It can be inferred from the above that the petitioner has not been able to produce any evidence of supplying the signals to the respondent beyond 1.12.2005, while the respondent has produced a letter addressed to TRAI about the unilateral disconnection of the signals of the petitioner to the respondent. The receipt of the Postal Department of sending a letter to TRAI also gives credence to the statement of the respondent, in regard to disconnection of signals of the petitioner to the respondent w.e.f. 1.12.2005.

6.

The total payment made since inception by the respondent and admitted by the petitioner yearwise, as reflected in the alleged running ledger account is as follows:

- a) From 1.6.2000 to 31.3.2001 = Rs. 40,250/- (Rs. 30,250/- by cheque and Rs.10000/- by cash).
- b) From 1.4.2001 to 31.3.2002 = Rs. 125925/- (Rs. 85375/- by cheque and Rs. 40550/- by cash)
- c) From 1.4.2002 to 31.3.2003 = Rs. 224100/- (Rs. 159000/- by cheque and Rs. 65100/- by cash)
- d) From 1.4.2003 to 31.3.2004 = Rs. 360000/- (Rs. 330000/- by cheque and Rs. 30000/- by cash)
- e) From 1.4.2004 to 31.3.2005 = Rs.295000/- (Rs.295000/- by cheque)
- f) From 1.4.2005 to 27.1.2006 = Rs. 246612/- (Rs. 110000/- by cheque and Rs. 136612/- by cash)

It is worth mentioning that in this statement of ledger account the petitioner has started the ledger account with Rs. 60,000/- debit and has indicated subscription amount till Sept, 2006 while the respondent has claimed to have disconnection of signal from the petitioner with effect from 1st Dec, 2005. It is stated by the respondent that the matter has also been reported by it to TRAI. The contention of the respondent is supported by the documents annexed with its reply. As far as respondent is concerned this ledger account has never been made available to it upto the stage of rejoinder by the petitioner and, therefore, there was no opportunity given to it for denying the same. However, as far as the payment by respondent is concerned, as mentioned above, it is admitted by the petitioner and the same can be accepted for the purpose of deciding the claim of the petitioner.

7. The following issues need to be determined to arrive at the amount, if any, which is due to the petitioner from the respondent:-

- Whether the respondent is liable to pay beyond 1st Dec, 2005 ?

- Whether the ledger A/c presented for the first time alongwith the affidavit of evidence by petitioner of about five years relationship between the petitioner and the respondent can be taken cognizance of, for arriving at the outstanding amount?
- Whether there is any credibility of the invoice of Sept, 2006 without any proof of its receipt by the respondent ?
- Whether the payment claimed to have been made by the respondent upto Nov, 2005 for clearing all the dues of the petitioner can be sustained on the basis of the admission by petitioner in its statement of running ledger account, in which the admitted cash and cheque payments made by the respondent to the petitioner are indicated?

8. (a) The contention of the respondent is supported by its letter intimating to TRAI about the disconnection of signals by the petitioner. We also find that respondent has paid Rs. 1,75,000/- from 11.11.2005 till 27.1.2006 as admitted by the petitioner and no payment has been made thereafter. This indicates that the respondent has tried to settle its account with the petitioner after disconnection of signals on 1.12.2005. The entries in the alleged ledger account by the petitioner from Jan, 2006 till Sept, 2006 showing the subscription fee due to the respondent, do not seem to have any credibility. We would like to give the benefit of doubt in favour of the respondent because the alleged ledger account has never been shown to it upto the stage of rejoinder submitted by the petitioner. Petitioner has led no evidence to show that it raised and delivered monthly invoices to the respondent. In any business relationship, in which the outstanding amount persists right from the inception, and in this particular case for more than five years, the petitioner must have brought it to the notice of the respondent several times before filing this petition. No notice of any outstanding amount has been issued by the petitioner to the respondent before filing this petition. In this petition also the alleged running ledger

account statement has been produced only with the evidence by way of affidavit by the petitioner. We, therefore, uphold the contention of the respondent that it was receiving signals from the petitioner only upto 1.12.2005.

(b) The ledger account submitted with the affidavit of evidence is not an admissible evidence as per the **Section 34 of the Evidence Act.**

“[Entries in books of account including those maintained in an electronic form] when relevant – [Entries in books of accounts including those maintained in an electronic form], regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

In this case the ledger account has been produced only at the stage of affidavit of evidence by the petitioner and the respondent has been deprived of the opportunity of specifically denying the correctness of the same. Petitioner has led no evidence in support of veracity of same. Besides this, the petitioner has accepted payment for more than five years without a demur or without issuing even a single notice to the respondent regarding the outstanding amount. In this context, **the Apex Court’s decision in Chandradhar Vs. Gauhati Bank, AIR 1967 SC 1058** is relevant.

“No person can be charged with liabilities merely on the basis of entries in the books of account, even where such books of account are kept in the regular course of business. In order, that a person may be charged with liabilities thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them.”

We, therefore, hold that the demand of outstanding raised on the basis of ledger account presented at the stage of affidavit by way of evidence is not sustainable.

(c) There is no credibility in the invoice of Sept, 2006 alleged to have been issued by the petitioner to the respondent. There is no proof of delivery of

the same to the respondent and the witness of the petitioner during cross examination has also not been able to justify the stand of the petitioner on this account.

(d) The respondent has made most of the payments by cheque and the alleged running ledger account produced by the petitioner reflects all the payments made by the respondent to the petitioner.

- 9.** We observe that there is a tendency of fabricating records, placing them on affidavit by way of evidence and also implicating local cable operators. We deprecate this tendency of fabricating records and impose a cost of Rs.5000/- to be deposited by the petitioner in the Tribunal within two weeks by way of a cheque in the name of the DDO, TDSAT.

The petition is dismissed with Rs.5000/- as costs.

.....J
(Arun Kumar)
Chairperson

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(J.S. Sarma)
Member

.....
(G.D. Gaiha)
Member