

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

DATED 12th May, 2009

Petition Nos. 266(C) of 2006

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

Vs.

Swastik Cable Network,
A sole proprietary concern
Represented through Mr. Viju Phad,
Having its office at
Plot No. 5, Vijay Niwas,
Near Swami Narayan Mandir,
New Adagaon Naka, Panchvati
Nashik -422 003. 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

By this petition the petitioner has claimed an amount of Rs. 2,13,904/- upto Sept, 2006 alongwith interest @ 18% per annum from the respondent, who is a Cable TV Operator, operating 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 Aug, 2005 up till 1st Sept, 2006 are placed on record. The invoices from 1st Aug, 2005 to 1st Jan, 2006 have been raised on a connectivity of 140 points @ Rs.110/- per point, exclusive of taxes. One invoice raised on 1st Feb, 2006 has been raised for 160 points @ Rs. 110 per point, exclusive of taxes and then subsequently all invoices from 1st March, 2006 till 1st Sept, 2006 are for 140 points again @ Rs. 110/- per point. The petitioner has claimed that the respondent was in default of an amount of Rs. 1,79,334/- 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 delivered to the consignee.
- 3.** The petitioner has claimed that after adding the subscription amount @ Rs. 17284.96 per month (inclusive of statutory taxes) for Aug, 2006 and Sept, 2006 the total outstanding till Sept,2006 is Rs. 2,13,904/-. 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. 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. 1.8.2006. Deponent of the petitioner also denied that, the respondent has cleared all its dues to the petitioner upto Aug, 2006. 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 documents and the person deposing on the affidavit in support of the petition is liable to be proceeded against, for committing perjury. The respondent has claimed

that it has cleared dues as and when these dues were raised. The respondent has also denied that the petitioner, however, sent the invoice for Sept, 2006. The respondent also claims that it has stopped taking signals from the petitioner with effect from 1.8.2006. The contention of the petitioner that it has been regularly sending invoices has been vehemently denied by the respondent; however, the witness of the respondent has admitted that the signature on the invoice dated 1.8.05 are his signatures.

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 alleged running ledger account of Rs. 2,13,903.56 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 alleged running ledger account which 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. The respondent contends that the alleged running ledger account should not be considered, since the established law does not permit the evidence to go beyond the pleadings. It is contested that at the stage of affidavit by way of evidence, introduction of the statement of the alleged running 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 more than five years and will simply go on maintaining the accounts without sending any notice to the respondent.

The witness of the 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 unlawfully disconnected the respondent on 1.08.2006. The respondent claims that after disconnection by the petitioner, it started taking signals from another MSO. The respondent also claims to have cleared all the dues pending to the petitioner till Aug, 2006. 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 1.8.2006. The witness of the respondent has, however, confirmed that the signals were disconnected since 1.8.2006. He has further confirmed that from 1st Jan, 2007 the respondent took the signals from WWIL.
6. We also find that in the rejoinder affidavit filed by the petitioner, it has narrated at Sl. No. 6(l) the facts of the other petition no. 265(C) of 2006 which is also a recovery petition filed by the petitioner against M/s. Super Cable Network. This reflects the casual way in which the present recovery petition has been filed by the petitioner.
7. The total payment made since inception by the respondent and admitted by the petitioner has resulted in an alleged outstanding of Rs. 2,13,903.56 and the petitioner has shown payments received from the respondent yearwise. However, bills raised by the petitioner are not admitted by the respondent since respondent did not get any opportunity throughout the pleadings of this case to look into the alleged running ledger account. We, therefore, give

credence to the admitted received amount by the petitioner from the respondent, as per the alleged running ledger account, however, we cannot give credence to the bills raised, as reflected in the alleged running ledger account.

8. 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 1.8.2006 ?
- 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 July, 2006 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?

9. (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. 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. Even when the bank statement account by the respondent has not been submitted in its counter affidavit, we are able to confirm these payments from the admitted alleged running ledger account statement of the petitioner.

- 10.** 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

.....
(J.S. Sarma)

Member

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