

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

Dated 22nd April, 2010

Petition No.119(C) of 2009

Indusind Media & Communication Ltd

...Petitioner

Vs.

M/s INX Media Pvt. Ltd.

...Respondent

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BEFORE:

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

For Petitioner

Ms. Vandana D. Jaisingh, Advocate

For Respondent

Mr. Ankit Shah, Advocate

JUDGMENT

S.B. Sinha

In this petition, the petitioner who is a multi systems operator (MSO), seeks to recover a sum of Rs.2,37,57,370/- from the respondent herein, who is engaged in the business of distribution of TV channels, namely, 9x (Gen Ent Channel), 9xM(Hindi Music) and News X (English News) (hereinafter called and referred to as “INX Channels”), towards placement fees due to it purported to be in terms of an agreement dated 1.4.2008. Execution of the said agreement is neither denied nor disputed. The terms and conditions thereof also are admitted.

In terms of the said agreement, the petitioner was required to transmit/retransmit signals of the aforementioned three channels in the cities of Mumbai, Ahmedabad, Baroda, Nagpur and Nasik. The said agreement was valid for the period 1.4.2008 to 31.3.2009.

The placement charges payable thereunder were fixed at Rs.10,11,24,000/-, the details whereof are as under:-

“3.1.1 “IMC” shall charge Rs.9,00,00,000 (Rupees Nine Crores Only) per annum as “channel placement charges” for the aforesaid three Channels, namely, 9X (Gen Ent Channel, 9XM (Hindi Music) and News X (English News), effective from 1st April 2008 up to 31st March 2009 to be paid in advance of every quarter by INX by submitting post dated cheques in favour of “IndusInd Media & Communications Limited”. In addition, Service Tax and other Taxes and levies will be extra and to the account of “INX”. Details of payment received from INX and amount to be paid by “INX” inclusive of Service Tax to “IMCL” will be as per details given herein below:

Sr. No.	Cheque dated as	Channel Placement	Service Tax @ 12.36%	Cheque amount to be	For the period
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	under to be deposited by “INX” with “IMCL” before end of the previous quarter	Charges for 9X (Gen Ent Channel, 9XM (Hindi Music) and News X (English News) Channels	on Channel placement charges	deposited by “INX” with IMCL	
		Rs.	Rs.	Rs.	
1	1/4/08	2,25,00,000/-	27,81,000/-	2,52,81,000/-	01/04/08 to 30/06/08
2	1/7/08	2,25,00,000/-	27,81,000/-	2,52,81,000/-	01/07/08 to 30/09/08
3	1/10/08	2,25,00,000/-	27,81,000/-	2,52,81,000/-	01/10/08 to 31/12/08
4	1/1/09	2,25,00,000/-	27,81,000/-	2,52,81,000/-	01/01/09 to 31/03/09
	TOTAL	9,00,00,000/-	1,11,24,000/-	10,11,24,000/-	”

The respondent in its reply, inter alia, contended that although a sum of Rs.1.98 crores was outstanding, the parties herein had entered into a memorandum of understanding in a meeting held on 22.3.2010, pursuant where to and in furtherance where of, the respondent has paid unto it, two different sums amounting to about Rs.50 lakhs.

Indisputably, having regard to the fact that the respondent had categorically admitted that the aforementioned sum of Rs. 1.35 crores was payable to the petitioner, this Tribunal, by an order dated 23.11.2009 directed it to pay the same, stating –

“In view of the respondent’s admission that a sum of Rs.1.35 cr. is owing and due from it or is payable to the petitioner by it, we are of the opinion that having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure and/or the principles analogous thereto, the respondent should be directed to pay the said sum to the petitioner. The question of payment of interest and/or rate thereof shall be considered at the time of hearing.

It may also be placed on record that in para 8 of its reply, the respondent claims a sum of Rs.5,80,897/- from the petitioner by way of subscription agreement (Non CAS) dated 01.07.2008 purported to have been entered into by and between the petitioner and the respondent. The question as to whether the aforementioned amount should be directed to be set off from the balance claimed by the petitioner, if any, shall be considered at the time of hearing of this petition.

The respondent is, therefore, directed to pay the aforesaid amount of Rs.1.35 crores to the petitioner within a period of 30 days from date.”

It stands admitted that the respondent did not comply with the said order.

Only at the hearing of this petition, this Tribunal was informed that it had tendered a cheque for a sum of Rs. 50 lakh to the petitioner on or about 22.3.10, the receipt whereof, subject to encashment has been accepted by Ms. Vandana Jaisingh, the learned counsel appearing on behalf of the petitioner.

The short questions which arise for our consideration are:-

- (1) Whether the purported memorandum of understanding was agreed to by and between the parties hereto.
- (2) Whether the respondent is liable to pay the aforementioned amount of Rs. 2,37,57,370/- .

In view of the fact that the parties are in broad agreement with regard to the amount due, we would refer to only those materials which are relevant for our purpose. The purported memorandum of settlement in terms of a meeting held on 22.3.2010 as has been contended by the respondent, is in the form of a letter dated 29.4.2009.

It reads as under:-

“Dear Mr.Chabaria,

This refers to your meeting with Mr.Arun Mohan and Mr.Rajnish Mathur at your office yesterday. As per the discussions our proposal is as follows:

- (A) As agreed the Liability of Rs.1.5 Cr will be paid to you as per discussed plan as Full & Final Settlement.
- (B) An amount of Rs.14.45 Lac vide Ch:No.000002, Dated 28th April 2009, drawn on Kotak Mahindra Bank has been handed over to you during the course of meeting.
- (C) The balance of Rs.1.35 Cr. will be paid to you over 9 months as per the below mentioned plan.

the	Mark-et	25 th Dec.08's Net Liability as Agreed	Jun- 09	Jul-09	Aug- 09	Sep- 09	Oct- 09	Nov- 09	Dec- 09	Jan- 10	Feb-10	Mar- 10	Total Payout

		on 28 th Apr'09											
edia	Mumbai	135.55	13.50	13.50	14.50	14.50	15.00	15.00	15.50	15.50	18.55	18.55	135.55
ons													

We thank you for your support thus far and look forward to your support in the future. May we request you to kindly switch on our channels on your networks across the Country.”

Mr. Ankit Shah, the learned counsel appearing on behalf of the respondent would contend that in view of the agreement entered into by and between the parties hereto, the petitioner could not have claimed an amount in excess of Rs.1.35 crores.

The learned counsel urged that the respondent could not pay the said amount because of financial stringencies and if some time is granted, the arrears would be wiped off.

One of the principal questions which arises for our consideration is as to whether by reason of the said document, this Tribunal may be able to infer that the parties in fact had agreed that Rs. 1.5 crore would be paid to the petitioner as a full and final settlement of the entire dues? The said purported letter dated 29.04.2009 has not even been acknowledged by the petitioner. Two inferences could have been drawn in view of the contentions raised by Mr. Shah, viz:

- (1) the petitioner having accepted a sum of Rs. 14.5 lakh without any demur whatsoever, must be held to have accepted the said purported agreement and;
- (2) the petitioner, in view of its conduct is estopped and precluded from raising any plea contrary thereto or inconsistent therewith.

Certain facts may be noticed which would be relevant for the purpose of determination of the issues before us.

The respondent herein by a notice dated 04.12.2008 terminated the agreement. It is not in dispute that 30 days' notice was required to be given for terminating the agreement which would have otherwise expired on 25.12.2008. The petitioner, however, contended that the said notice has in fact been received by the petitioner on 10.12.2008, and, thus, the said agreement came to an end on 29.12.2008.

We may, however, place on record that Ms. Vandana Jaisingh, the learned counsel appearing for the petitioner categorically stated before us that the petitioner would not press for the subscription amount for a period of 5 days or so.

The learned counsel for the respondent, when questioned, would, however, stated that pursuant to the request made by the respondent, the petitioner had not switched on the channels on its networks across the country. We may also notice that the petitioner had protested against the aforementioned action on the part of the respondent in so far as the agreement was sought to be terminated in terms of its letter dated 19.12.2008, stating —

“Dear Sir,

Sub: Notice of termination of Placement Agreement – your letter dated 4th Dec.2008.

This has reference to our on going Placement Agreement dated 1st April, 2008, valid till 31st March, 2009. In terms of this Agreement, INX has granted to IMCL a non-exclusive right to distribute its Channels to the Subscribers in the area through the Distribution System during the terms of the agreement.

In order to achieve maximum reach and viewers for its three channels, INX had approached IMCL for availing the services of IMCL to receive and re-distribute signals of its three channels through the cable service on mutually agreed Band/ frequency. Details of the Bands in analog and digital mode are available in Clause 1 of the Agreement.

INX agreed to pay IMC a sum of Rs.9,00,00,000/- (Rupees Nine Crores Only) per annum as Channel Placement Charges as per clause 3.1.1 of the agreement. Invoices to this effect have been raised from time to time.

We are, therefore, surprised to receive your communication dated 4th December, 2008, actually received by us on 10th December, 2008, terminating the said placement agreement effective from 25th December, 2008, being three weeks notice as required under the said Placement Agreement.

We note in the second paragraph of your notice, you refer to **“difficult economic scenario being faced by many companies presently not just in the media and entertainment industry but in general, we request you to enter into a fresh Agreement for the transmission of our channels on your network”**.

But at the same time, we regret to note, immediately in the following paragraph, you have terminated the agreement with effect from 25th December, 2008. Interestingly enough, you have stated that you will continue to provide signals for transmission.

In view of the above, we are taking steps to inform the Public about your suo moto termination of both the Placement and Subscription Agreements with effect from 31st December, 2008, as your notice of 4th December,

2008 has been actually received by us on 10th December, 2008.

It may also be noted, at present we do not have any other analog frequency available to transmit your signals as offered by you in paragraph 2 of your letter dated 4.12.2008.

Last, but not the least, we request you to kindly honor and immediately pay our invoice no.1300000307 dated 1st November, 2008 for Rs.2,52,81,000/-, being the channel placement charges from 1st October, 2008 to 31st December, 2008.”

It is, furthermore, not in dispute that the petitioner itself issued a public notice on or about 25.12.2008. Keeping in view the fact that there is nothing on record to show that the petitioner had accepted the terms of the aforementioned letter dated 29.4.2009, it is difficult to hold that it would be deemed to have accepted the same having received the payment of Rs.15 lakh.

Furthermore, we have also noticed heretobefore that the petitioner had not switched on the signals despite the request made in that regard by the respondents specifically. Even assuming that the petitioner has accepted the said terms and conditions, is it bound to confine its claim to Rs.1.5 crore only is the question. The answer thereto, in our opinion, must be rendered in the negative.

Evidently, the representatives of the parties, met. In view of the said letter, discussions must have taken place. The respondent, however, in the said letter itself offered a proposal. If the parties had entered into an agreement it was expected that minutes of meetings would have been drawn up. Had such agreement been arrived at, the question of the respondent's making

any proposal to the petitioner would not have arisen. In any event, the respondent admittedly did not pay the amount of Rs.1.35 crore over a period of 9 months, as had been suggested by it. The petitioner filed this petition on or about 21.5.2009. Even before that date, no payment had been made. We have noticed heretofore that the respondent has also not made payment of its admitted dues despite our order dated 23.11.2009.

So far as the next issue, viz. as to whether the respondent has made payments, as stated by it is concerned, in respect whereof the sum in question were required to be given due credit, we may notice that Mrs.Vandana Jaisingh has drawn our attention to the statement of account as contained in Annexure-5 of the petition from a perusal whereof it would appear that although the agreement came to an end in December, 2008, the respondent made two payments; one on 3.2.2009 for a sum of Rs.2,470.813 and another on 6.5.2009 for a sum of Rs.1,445,109/-.

The witness of the respondent claimed payment for a sum of Rs.14.45 lakhs was made and, thus, there cannot be any doubt whatsoever that the said payments have been give due credit.

Another sum of Rs.25 lakh must have been received by the petitioner on or about 3.2.2009 which, after deduction of TDS came to the aforementioned figure of Rs.2,470,813/-. Indisputably, as the payments have been received by the petitioner, despite termination of the agreement, it had to keep its books of account open. It is interesting to notice that Shri Arun Mohan, the Director of the respondent company not only admitted the agreement itself but also admitted the amount of placement charge payable by it to the petitioner thereunder. He, in his evidence furthermore stated as under:-

“It is true that on 29th April 2009 the amount due to the petitioner was shown as Rs.2.37 crores as out of the same we had paid 25 lakhs before the understanding was arrived at, which had not been accounted for, which was paid on

29.01.2009.

Q.Can you provide the details of the payment of Rs.25 lakhs.

A.We can file the relevant documents.

There is nothing to show that our proposal contained in 29.4.2009 RW ¼ was accepted by the petitioner.

It is correct that even in terms of the proposal you have not made the payments from June 2009 to February 2010.”

He moreover accepted that the respondent had not made any further payment, except the amounts which have been noticed by us heretobefore.

Mr. Shah submitted that this Tribunal should take into consideration the fact that the respondent having suffered financial stringencies could not make the payments.

However, Mrs. Vandana Jaisingh would draw our attention to the following statements made by Shri Arun Mohan:-

“I am not aware of the share holding pattern of INX Media and INX News Channel Pvt. Ltd.

INX News was sold in Feb 2009 to Mr.Vinay Chajlani. However, INX media is still with us.

I have no idea as to what was the consideration received by INX news for settling its network to Mr.Vinay Chajlani.”

From the aforementioned statements, it is clear that at least one of the channels had been sold out to Mr.Vinay Chajlani.

The witness, although, is the Director of the Respondent company showed his ignorance in regard to the quantum and the

amount of consideration received by it from the purchases, which can't be countenanced

In view of the admitted position, in our opinion, the petitioner must be held to have proved its case and it was not bound to accept the aforementioned sum of Rs.1.35 crore by way of full and final settlement.

The agreement contains an interest clause in terms whereof, the respondent was bound to pay interest @ 18% p.a. in case of any default.

In view of the conduct of the respondent herein, we do not see any reason as to why we would not direct payment of interest at the said rate. Furthermore, the respondent presumably utilized the said amount for its own business purpose and, thus, there is absolutely no reason whatsoever as to why the respondent should not be directed to pay the stipulated rate of interest on the sum due and payable to the petitioner.

It is also not correct to contend that the respondent was financially constrained, as admittedly, one of the channels had been sold out. The amount of consideration received with the respondent could have been paid to the petitioner towards the amount due.

Furthermore, keeping in view the fact that the respondent has also not complied with our order dated 03.02.10 and having regard to the subsequent events, we are of the opinion that it is also bound to pay costs of this petition to the petitioner herein.

The petition is allowed with the aforementioned direction. Counsel's fee assessed at Rs.2 lakhs.

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(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member