

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

**DATED 16<sup>TH</sup> DECEMBER, 2010**

**Petition No.200(C) of 2008**

DEN Network Limited  
Vs.  
Multi Vision Network

... Petitioner

...Respondent

**BEFORE:**

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

For Petitioners	:	Mr.Maninder Singh, Senior Advocate Mr.Vibhav Srivastava,,Advocate
For Respondent	:	Mr.Navin Chawla, Advocate Mr. Sharath Sampath, Advocate

**JUDGMENT**

**S.B. Sinha**

The petitioner herein, who is a multi system operator (MSO) has filed this petition praying inter alia for a decree for a sum of Rs.44,72,816/- against the respondent herein purported to be towards non-payment of the subscription fees for

the period October, 2007 and September, 2008.

2. We may, however, place on record that for the period prior to October, 2008, the petitioner has filed another Petition before this Tribunal which is pending judgement.

The basic fact of the matter is not in dispute.

The petitioner is a MSO within the meaning of the provisions of the Telecom Regulatory Authority of India Act, 1997 (the Act).

The respondent herein, Multi Vision Network, which is a proprietary concern of Ms. Shashi Sharma, was a cable distributor. It sold its network to the petitioner in terms of a business transfer agreement executed in the month of September' 2007.

3. According to the petitioner, a business affiliation agreement was entered into by and between the parties herein on or about 1.10.07 in terms whereof the respondent undertook to obtain signals from it. The respondent, on the other hand, contends that after the aforementioned deed of transfer was executed by the parties hereto, the petitioner having regard to its experience in the business intended to appoint it as an Associate wherefor a Business Associate Agreement was to be entered into. It now stands admitted that a format of Business Associate Agreement was e-mailed to the son of the respondent Shri Aditya Sharma.

4. On or about 1.10.07 allegedly, an officer of the petitioner company visited the residence cum office premises of the respondent when Smt Shashi Sharma was all alone. He wanted her to sign the agreement. The blanks in the said

agreement are said to have been filled up by the said officer himself. The husband of the petitioner Shri Ashok Sharma, being not present at the house, Mrs. Shashi Sharma contacted him over phone and on her being asked to go ahead with the signing of the agreement, she not only did so but also handed over three blank cheques by way of security.

5. The petitioner, however, contends that Business Associate Agreement was proposed to be entered into, not with the respondent but merely a proposal was mooted to enter into such an agreement with the son of Mrs. Shashi Sharma, namely Shri Aditya Sharma.

6. Indisputably, the agreement in question, namely, the Business Affiliate Agreement dated 1.10.07 has been signed by the parties.

7. The address of the respondent has been mentioned therein. The area of operation of the cable network had also been mentioned in the said agreement. The Affiliate Agreement was on a subscriber base of 1513 subscribers and the subscription fee per subscriber per month was fixed at of Rs.250/-. A sum of Rs.4,25,000/- per month allegedly became payable to the petitioner by the respondent. It is now not in controversy that two out of the three cheques for a sum of Rs.4,25,000/- were presented by the petitioner before the bank, which bounced. It is also not in dispute that the respondent paid a sum of Rs.1,28,708/- by a cheque in October, 2007 which has been encashed. Issuance of the said cheque, however, is in controversy.

8. The issues, which arise for consideration in this petition, are :-

- (i) Whether the parties hereto entered into a Business Affiliate Agreement or a Business Associate Agreement ?
- (ii) Whether the respondent, who is said to be an illiterate lady and can only put her signature in English, could have executed the aforementioned agreement ?
- (iii) Whether the respondent was bound to pay the subscription fee of Rs.4,25,000/- to the petitioner herein having regard to the number of subscribers as also the subscription fee realized from them, or in fact the petitioner was entitled only to a sum of Rs.1 lakh per month from the respondent ?

9. Mr. Maninder Singh, the learned senior counsel appearing on behalf of the petitioner, contends that the core question arising in this petition being as to whether the parties had entered into a Business Affiliate Agreement or a Business Associate Agreement and as the conduct of the parties would clearly show that the parties had in fact entered into a business affiliate agreement, the petition should succeed.

10. Mr. Navin Chawla, the learned counsel appearing on behalf of the respondent, on the other hand, urged:-

- (i) The respondent in its reply having taken a positive stand that an officer of the petitioner having visited her residence cum office premises at a point of time when no male member was present and asked her to sign the Business Associate Agreement, a blank copy whereof has admittedly been sent to her son by e-mail to her son and furthermore having regard to the fact that the respondent had clearly stated that she had asked her husband on the issue of execution of the agreement and only plea having been raised that the nature of the agreement in question was the Business Associate Agreement and not the Business Affiliate Agreement

which having not been denied or disputed, this Tribunal must arrive at a conclusion that no amount is payable to the petitioner.

- (ii) Having regard to the fact that at a later point of time, the petitioner did not intend to give effect to the said Business Associate Agreement, the respondent herself offered it to pay a sum of Rs.1 lakh per month, which, in the facts and circumstances of this case, must be held to be reasonable and in respect whereof sufficient proof has been brought on record by the respondent that the petitioner was not entitled to the subscription fee of Rs.4,25,000/-.

11. The core question, which, arises for consideration is as to whether the transaction entered into by and between the parties hereto is hit by Section 16 of the Indian Contract Act.

The said provision reads thus:-

“16. ‘Undue Influence’ defined

(1) A Contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

(4) Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence act, 1872 (1 of 1872).”

12. The respondent signed the agreement in question in English. She is not a *pardanasheen* woman who ipso facto would require any protection of Section 16 of the Act.

While we say so, we are not unmindful of the legal position that such protection is also accorded to a woman who is similarly placed by reason of her being illiterate, old or sick or lacks understanding and appreciation of the transaction without independent advice or otherwise, helpless and thus exposed to the danger of entering into unfair details.

13. It is trite that a court of law must consider such a question having regard to the entirety of the facts and circumstances of the case and not only on the ground that the respondent is not a *Pardanasheen* woman.

14. The respondent admittedly asked her husband before signing the agreement. She admittedly handed over to the representative of the respondent three post dated cheques.

The said cheques were said to be blank ones. The petitioner's husband and her two sons are in the cable business. She has deposed before us. Although she could not state in details as regards the day to day transactions, from the tenor of her deposition before this Tribunal, it was evident that she had been aware of the defences taken in the petition. She was also found to be otherwise conversant with cable business. She could generally answer the questions relating to the defences taken on her behalf in the reply. She could also answer the questions relating rate of subscription fee and the number of subscribers.

It is one thing to say that two officers of the petitioner came to her residence cum office at a point of time when they knew that either her husband or her sons would not be there but it is another thing to say that she has no knowledge about the business transactions at all. None of the aforementioned factors has been established. Such a comment so far as her lack of mental capacity is concerned would not be correct. It is of some significance to notice that neither in the reply nor in her evidence as also the evidence of her son, the respondent raised any dispute in regard to identity of the officer of the petitioner. Only during the cross examination of PW-1, a pointed question was put in regard to the identity of the officers to which the witness knew.

Shri Rajesh Kaushal had admittedly signed the agreement on behalf of the petitioner.

15. The question, herein is not with regard to the genuineness of the agreement but only with regard to the character thereof.

Whereas according to the petitioner, it was a Business Affiliate Agreement; according to the respondent it was a Business Associate Agreement. The respondent was an MSO. Her own son, Aditya Sharma, is still an MSO. Another son is also still in the business of cable networking. Her husband is at the helm of the business affairs which is a family business.

A copy of Business Associate Agreement which was supposed to be entered into by and between the parties, was sent by E-mail.

If the respondent was so eager to enter into an 'Associate Agreement' purported to be on the representation or the promise made by the petitioner, we fail to see reason as to why the same was not collected from the office of the petitioner. The fact that terms and conditions of an 'Affiliation Agreement' and those of an 'Associate Agreement' are totally different is not in controversy.

According to the respondent, she was asked to go ahead to execute the agreement by her husband. That goes to show that she knew that an agreement was to be entered into. She had given three blank cheques. The Associate Agreement did not require furnishing of any security. She could not, thus have been advised by her husband to issue three blank cheques as at least he knew the terms and conditions of an 'Associate Agreement'.

It in fact did not require payment of any amount whatsoever to the MSO.

16. We must also notice that whereas a transaction with regard to the character of the document having been fraudulently obtained by way of a mis-representation would be void; a fraudulent mis-representation as regards the

contents of a document would make the same only voidable.

17. According to the respondent, the fraudulent misrepresentation was made with regard to the character of a document in as much as a Business Affiliate Agreement was got executed in place of Business Associate Agreement. The respondent is not an illiterate person. It was, therefore, not necessary that the contents of the deed were to be read over and explained to her so as to enable her to understand the contents thereof. The agreement was for carrying out business. She was aware thereof. Thus, where the respondent contends that she had no knowledge in regard to the contents of the agreement and she was not with any member of the family, but in her deposition before this Tribunal she did not say so. She did not say that she was not aware of the nature of the document.

18. In *Mt. Govindi vs Ganga Prasad And Ors.* reported in 147 IC 1256, the Allahabad High Court has held as under:

“This being so, the only possible ground of appeal would be that the lady was a pardanashin lady and that she had not understood the nature of her act, and that therefore the vakalatnama was not binding upon her. No case has been made out upon this point, and indeed it would be impossible to do so. The plaintiff herself appeared in Court and gave evidence and according to the Judge was an intelligent woman and well understood her business. Indeed she seemed to have the better of the contest with counsel in the Court of first instance. She obviously is not a woman that would be described as a pardanashin lady, within the meaning of the terms.

[See Also *Ismail v. Hafiz* (ILR 33 Cal 773) and *Ismail v. Amirbibi* (4 Bombay LR 146)]

Mulla and Pollock in their celebrated work "The Indian Contract ACT: With a Commentary, Critical And Explanatory" has stated the position of law as thus:-

"The expression "parda-nishin" connotes complete seclusion. It is not enough to entitle a woman to the special care with which the Courts regard the disposition of a parda-nishin woman that she lives in some degree of seclusion. Thus a woman who goes to Court and gives evidence, who fixes rents with tenants and collects rents, who communicates, when necessary, in matters of business, with men other than members of her own family, could not be regarded as a parda-nishin woman. In *Hodges v. The Delhi and London Bank, Limited*, a Privy Council case, it was said : " It is abundantly clear that Mrs. Hodges was not a parda-nishin. The term quasi-parda-nishin seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the parda-nishin class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to parda-nishins must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established, with the wisdom of which we are not now concerned; outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute."

In *Bellachi v. Pakeera* – 2009(12) SCC 95 the Supreme Court of India opined:-

“16. Section 16 of the Contract Act provides for as to what constitutes undue influence. Relationship between the parties so as to enable one of them to dominate the will of the other is a sine qua non for constitution of undue influence. Findings of fact as noticed hereinbefore have been arrived at by both the trial Judge as also the first appellate court that the respondent was not in a position to dominate the plaintiff's will.

17. In a given case it is possible to hold that when an illiterate, pardanashin woman executes a deed of sale, the burden would be on the vendee to prove that it was (*sic*) the deed of sale was a genuine document. It is, however, a registered document. It carries with it a presumption that it was executed in accordance with law. Again a concurrent finding of fact has been arrived at that the appellant was not an illiterate woman or she was incapable of understanding as to what she had done.”

19. In a situation of this nature, in our opinion, the respondent ought to have examined her husband.

If the RW1 is correct in her contention that the document in question was executed at the instance of her husband, only he could have explained as to how and on what premise such advice was rendered or she was asked to hand over three blank cheques.

While the respondent examined herself and her son, she did not choose to examine her husband. Why he was not examined has not been explained although according to her, it was only he, who used to look after the business. So are the statements of Shri Nitya Sharma.

The respondent filed affidavits of only Mrs. Shashi Sharma and her son Shri Nitya Sharma. Their evidence was recorded. An application was filed for examination of Shri Ashok Sharma, husband of Smt Shashi Sharma, after their

cross-examination was over when it was realized that they have not been able to prove the defences raised in the petition.

20. By an order dated 18.12.09, this Tribunal upon taking into consideration various aspects of the matter observed as under:-

“From the decision of the Supreme Court in Salem Advocate Bar Association (supra) thus it is evident that in the event the respondent intended to examine Shri Ashok Sharma for whom no assistance of the court was required to be taken, it was obligatory on its part to file his affidavit by way of evidence. It did not choose to do so. Both the witnesses examined on behalf of the petitioner in their respective affidavits have almost reproduced in verbatim the contents of the petition. Such an affidavit could be filed by the respondent even in the case of the said witness, who, it will be a repetition to state, was the principal witness.

As indicated hereinbefore only when in cross-examination it was given out that it is Shri Ashok Sharma had been looking after the business and had been negotiating with the petitioner, this application has been filed.

Furthermore in the petition even no sufficient explanation has been given. The only paragraph which is relevant for our purpose is paragraph-4 of the said application which reads thus:-

“That due to inadvertence and communication error with the Counsel, the Respondent failed to file the Affidavit by way of Evidence of Mr. Ashok Sharma, husband of Smt. Shanti Sharma.”

No detail of the purported communication error has been furnished. Why the name of such an important witness has been omitted, has not been disclosed. It is now a well settled law that the court cannot assist a party to fill up a lacuna in its case. We are of the opinion that this application has been filed for the purpose of filling up the lacuna and, thus, not a bona fide one. This application is dismissed.”

21. It is, therefore, at this juncture, in our opinion, not open to the respondent to contend that it had intended to examine Shri Ashok Sharma also. A bare perusal of the cross examination of Shri Nitya Sharma the son of the respondent (RW2), would show that in no uncertain terms he accepted that it was Ashok Sharma alone who had been looking after the business affairs of the respondent.

22. We have noticed heretofore that for the purpose of fulfilling the requirements of Section 16 of the Contract Act, it was obligatory on the part of the respondent to prove that a fraudulent mis-representation had been made with regard to the character of the document. The said contention could have been established, provided the respondent had examined Ashok Sharma for the purpose of proving that a fraudulent representation was made with regard to the nature of the document.

23. In Sangram Singh P. Gaikward & Ors v. Shanti Devi P. Gaikward [2005(11)SCC 314], the Apex Court held as under:-

“a transaction by a lady who is illiterate or cloistered (purdahnashin) and a transaction by a lady who looks after the family business/property would be differently viewed.”

24. The onus of proof in this regard was on the respondent herein as the contract is not in dispute. As noticed heretofore, what is the dispute is the nature of the transaction.

25. In MST. Kharbuja Kuer Vs. Jangbahadur Rai & Ors. {(1963) 1 SCR 456 : AIR 1963 SC 1203} the Supreme Court opined as under:-

“In the instant case the learned Munsif and, on appeal, the learned Subordinate Judge found concurrently that the two widows put their thumb marks without understanding the true import of the document. Imam, J., in second appeal reversed the said findings on the ground that they were vitiated by an erroneous view of the law in the matter of burden of proof. The judgment, if we may say so with respect, consists of propositions which appear to be contradictory. The learned Judge, after reviewing the case law on the subject, concludes his discussion by holding that it was the duty of the plaintiff to prove that there was fraud committed and that, as that had not been established, the question whether the document was read over and explained to the plaintiff, in his opinion, in the circumstances, did not arise. This proposition, in our view, is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India pardahnashin ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as, by the pardah system they are practically excluded from social intercourse and communion

with the outside world. In *Farid-Un-Nisa v. Mukhtar Ahmad* 1 Lord Sumner traces the origin of the custom and states the principle on which the presumption is based.

“In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind.”

“Of course fraud, duress and actual undue influence are separate matters”

It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as, fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not.”

26. It was observed by this Court :-

“The legal position has been very well settled. Shortly it may be stated thus : The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial.”

It is, therefore, evident that if the executants of the document is not a perdanashin lady, subject to other propositions of law which may be found to be applicable, the burden of proof would be on the party who alleges fraud, misrepresentation etc.

27. Again in *Saunders v. Anglia Building Society* 1970 (3) All E.R. 961 it was held that a document should be held to be void only when the element of consent to it is totally lacking, i.e., when the transaction on which the document purports to take effect is essentially different in substance or in kind from the transaction intended.

This aspect of the matter is very vital for this case. The respondent with a view to show that the transaction in question in effect and substance was essentially different from other than transaction in question intended to have been entered into, should have proved the basic facts. For the said purpose not only Shri Ashok Sharma was required to be examined, the other circumstances attending thereto should have been established. It was also necessary to examine the other son Aditya Sharma.

28. It may be noticed :-

- (i) The respondent failed to show that it had all along proceeded on the basis that the transaction in question was a Business Associate Agreement wherefor the parties had agreed;
- (ii) It had not taken any step to establish the facts which would fructify its contention;
- (i) Its subsequent conduct also is not in consonance with the contentions raised by it in its reply.

29. We have noticed heretofore that no clause for furnishing of any security was necessary in term of a Business Associate Agreement. It is, thus, difficult to accept the contention of the respondent that despite the same and despite the deliberations of the respondent with her husband, no explanation has been offered as to why the same had been furnished. It is beyond anybody's comprehension as to why even the subscription fee would be paid or offered to be paid. More significantly a Business Associate Agreement would not involve any transaction of transmission of signals to the respondent's head end and retransmission thereof by it to its subscribers.

Some talks prior to execution of the agreement, must have been held by and between the respondent or her husband and some representative of the petitioner. It was, thus, for the respondent to establish as to under what circumstances, such instructions had been given.

30. The respondent, despite such taking positive stand, indisputably had herself been taking feed from the petitioner. It was not free of cost and, thus, some payment was required to pay to the petitioner. On the other hand, if the agreement was in the nature of a Business Associate Agreement, it was for the petitioner to pay to the respondent therefor.

An affiliate agreement and a Cable Network Agreement are of some difference.

The term 'Affiliate' means

"A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation."

The term 'Associate', on the other hand, would mean differently.

In the MacMillan Dictionary, definition of the term 'Associate' is given as under :-

- (a) "someone you work with, especially in business
- (b) a member of an organization who has only some of the rights or benefits that ordinary members have."

31. The respondent on her own showing had been taking feed. It had furthermore admitted that said cheques were given to the petitioner. If some blank cheques had been given, which, according to the respondent, were three in number, it is difficult to accept that the petitioner would present before the bank only two of the cheques.

Otherwise also, the respondent has been served with some letters by the petitioner.

We may in this connection notice the letter dated 29.5.08 which reads as under:-

"Since you have conveniently failed and neglected to pay the outstanding feed charges, we once again enclose your statement of accounts for the aforesaid amount and Duplicate Invoices from October 2007 to May 2008. Please note that a sum of Rs.29,22,808/- (Rupees Twenty Nine Lacs Twenty Thousand Eight Hundred Eight Only) is due and payable by you to us as of 29<sup>th</sup> May 2008."

32. It appears that admittedly the respondent had paid a sum of Rs. 7,708.00 as early as in October, 2007. Why the said payment was made, has not been explained. It furthermore appears that :-

- (1) A sum of Rs. 15,000/- plus a sum of Rs.35,000/- had been paid by cash on the same date other than the cheques, out of which, one had bounced. A cheque for a sum of Rs.3000/- was also handed over.
- (2) The details of the invoices are also required to be noticed.

An invoice for the month of May, 2008 which had been issued on 1.5.08, admittedly, was received. With regard thereto in the cross examination of the witness examined by the petitioner, the proof of delivery had not been put in question. It is, thus, difficult to accept that the respondent would not protest thereagainst. Such protest as a natural human conduct was expected to be made.

It also was served with the invoices for the months of June, July and August 2008. The service of the said invoices is evidenced by the following endorsement of the courier service provider which has been proved by the petitioner :-

**“The shipment was picked up on 8.8.2008 vide Waybill No. 12159608296 and delivered to Mr. Nitya on 9.8.08 at 12.20 hrs from New Delhi to New Delhi.”**

- (3) Yet again, an invoice was issued for the months of September, 2008 and was delivered on 2.9.2008. Invoices were issued by the petitioner till March, 2009.

33. Mr. Chawla, however, contended that the very fact that a copy of the Business Associate Agreement was sent to Shri Aditya Sharma which now stands admitted as PW-1 clearly stated that the petitioner might have sent the same and there is no dispute in respect thereof would go to show that a Business Associate Agreement was to be entered into. The

counsel has, in this behalf, drawn our attention to the particulars of the pleading of the alleged fraud as is required in terms of Order VI Rule 4 of the Code of Civil Procedure, which reads as under:-

**"4. Particulars to be given where necessary**

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading".

34. According to the learned counsel, denial having been made in the rejoinder in respect thereof and furthermore in view of the fact that a sum of Rs.6,000/- was paid to the respondent by the petitioner towards rental charges for occupying the premises of the respondent, the plea of 'fraud' must be held to have been proved.

It is for us to consider the totality of circumstances for the purpose of arriving at a decision as to whether a fraud has been committed or not.

35. We have noticed heretofore that the respondent had been receiving the feed from the petitioner. It is difficult for us to accept that the agreement had not been signed in good faith by the parties. The supply of feed continued for a long time namely for the period October, 2007 to September, 2008 in terms thereof and in fact even beyond the said period.

The respondent has failed and/or neglected to bring on record any material to show that the petitioner has committed any fraud which would further its contention that the parties herein had in fact entered into the Business Associate Agreement and not Business Affiliation Agreement.

36. The assertions of the respondent that a fraud was committed on her, cannot be accepted for more than one reason.

The respondent had not replied to any of the notices/invoices; one of them had at least was served on him on 29.5.08. Why no protest thereto was made is difficult to conceive.

Furthermore, if the admission of RW-1 that three cheques which were handed over to the representative of the petitioner were undated, the respondent should have summoned the original cheques from the bank to show as to who had filled them up; if they were undated or they were blank, presumably the same would bear the handwritings of some officers of the respondent thereon and not of the respondent or her husband.

If the cheques were undated they must have been filled up by somebody. It is a matter of ordinary human prudence that the respondent in its letter to the petitioner dated 5.2.2010 would have contended that when RW1 had visited the office of the petitioner, she had been assured of service of correct invoices.

The first thing which should have been questioned by the respondent as to why any invoice had been sent at all by the petitioner as in terms of a Business Associate Agreement, the respondent was to receive some payments from the petitioner and not to pay any amount to it.

The letter was issued inter alia on the premise that the petitioner was to receive a sum of Rs. 1 lakh plus taxes towards the subscription amount. If some assurances had been given, it was necessary for it to plead and prove as to who on behalf of the petitioner, had given such assurances. Neither RW-1 nor RW-2 had visited the office of the petitioner. There, thus, cannot be any doubt whatsoever that it was Shri Ashok Sharma who must have visited the office of the Petitioner.

37. There are two aspects of the matter which must be noticed. First is RW-1 herself has given out the number of subscribers as also the rate. If she had not been carrying on the day to day business, it was difficult for her to know the number of subscribers or the rates.

RW-2 in his evidence had stated that he merely exercises control over the staff. In that view of the matter, even according to witness, examined on behalf of the respondent, it was Ashok Sharma alone who had been looking after the entire business affairs.

38. We are of the opinion that the respondent did not enter into a business affiliate agreement and was fully aware that the agreement in question was an 'affiliate agreement'; the effect whereof was known to it.

39. It is in the aforementioned context that alternative submission made by Mr. Chawla should receive our consideration. The learned counsel would submit that the respondent did not intend to deprive the petitioner from receiving reasonable feed charges and it had in fact produced a lot of documents to show that the amount of subscription fee payable by the respondent in respect of each of the subscriber was much more than what it had been earning from them.

The aforementioned offer on the part of the respondent, in our opinion, itself would show that its contention that the agreement which had been entered into was a business associate agreement and not a business affiliate agreement is not correct.

We have, thus, no hesitation in holding that the said plea on the part of the respondents was a dishonest one.

There are a large number of materials brought on record by the parties to show that the respondent had sold its network. For the time being, some interim arrangements might have been entered into for the purpose of keeping the business going. It is only for the aforementioned purpose, the petitioner had been paying rent at the rate of Rs. 6,000/- per month from September 2007 till April 2008 to the respondent. The very fact that the parties had entered into such an arrangement is itself a pointer to show that when some amount had been paid by way of rent as would appear from the letter dated 3.10.2008, the said arrangement could not have been a part of a business associate agreement.

We may furthermore notice that although the respondent had raised a contention that on and from September, 2008, the services had been dis-continued, it is important to note that it in its letter dated 13.10.2008, it did not even make any whisper that the signals had been discontinued.

It is on the aforementioned premise, we may notice the respondent's own letter dated 14.12.2007 addressed to the petitioner :-

"In view of the above, you are requested to kindly take immediate remedial measures and also ensure that the invoices as per actual strength of subscribers and the post dated/advance cheques received by you at the time of agreement be sent to us immediately so as to enable us to settle the same."

Yet again by a letter dated 5.2.2008, the respondent contended :

"I am to bring to your notice again that no development of the network has taken place till date and the status remains as such and we are losing our clientele on a daily basis. To add to our woes you have willfully entered into agreements with our rival operators also thus rendering the entire area to your mercy. To top all this you have also forced us to withdraw signals from our previous franchisee, as you had entered into agreement with certain other operators of the area where he was operating. Thereby, you have will fully caused loss to our network to provide pecuniary gains to the other party which is again against the true spirit of the Agreement entered upon with you after detailed mutual discussions. May I also bring to your notice that during my visit to your company you had verbally assured us of sending the invoices after rectifying the same as per the objections raised by me during the discussion regarding over charging in invoices which were shown to me in your office. I hope that you stick to your commitments as you had assured me that such inflated bills are usually generated to garner monetary benefits from the broadcasters and that the actual payment to be tendered will remain as agreed upon verbally i.e. @ Rs. 1,00,000 plus taxes as applicable. But to my dismay we have not received any invoice whatsoever till date.

In view of the above, you are requested to kindly take immediate remedial measures and also ensure that the invoices as per facts, ground reality and requested to execute fresh agreement with me instead of Ms. Shashi Sharma, be sent to us immediately so as to enable us to settle the same."

From what has been noticed heretobefore it is evident that admittedly invoices were raised for supply of signal in terms of the Affiliate Agreement to which no protest was raised.

If the entirety of the facts and circumstances of this case including the conduct of the respondent in the whole matter is taken into consideration and in particular issuance of the so called blank cheques which were not required in the case of Business Associate Agreement, we have no other alternative but to hold that the plea raised by the respondent is wholly incorrect.

There is another aspect of the matter namely that the cheques were issued on 4<sup>th</sup> October, 2007, 26<sup>th</sup> December, 2007 and 31<sup>st</sup> December, 2007, out of which one of the cheques being dated 4.10.2007 bounced.

So far as the bouncing of the cheques issued by the respondent is concerned, the burden of proof was on it to show, having regard to the presumption contained in Section 118(a) of the Negotiable Instrument Act that the cheques were not for the amount mentioned in the body thereof.

The petitioner wrote to the respondent two letters being dated 14.10.2007 and 5.2.2008. We have noticed heretobefore the statements made by RW1 in respect of the aforementioned aspect of the matter.

Admittedly, a letter was written by the respondent on 13.12.2008 which reads as under :-

"Please find enclosed herewith the following documents mandatory for justified for the actual invoice/agreement your request too !

List of Subscribers as on date

Please note :- at the time of –

October - November, 2007	-	600
November - December, 2007	-	625
December – January, 2008	-	715
January – February, 2008	-	750
February – March, 2008	-	815
March – April, 2008	-	620
April – May, 2008	-	680
May – June, 2008	-	715
June – July, 2008	-	720
July – August, 2008	-	790
August – September , 2008	-	835

Along with amount received made by our staff as original. Please also note that Rs. 100/- per connection belong to us from which we have to pay Rs. 20/- as Entertainment Tax and Rs. 22/- as Service Tax and balance amount belongs to you i.e. Den Networks Ltd."

This letter has admittedly been received.

But a question which arises is as to why for the first time therein the said plea had been raised after the contract between the parties came to an end. In the aforementioned letter, the respondent has made an offer of a so called reasonable amount. She had given a subscriber list but by

reason thereof alone the fact that an agreement had been entered into should not be refused to be accepted.

We, therefore, reject the first contention of the respondent. So far as the second contention with regard to the reasonableness of the subscription fee is concerned, we may notice that the respondent has placed reliance on two circumstances, firstly on an advertisement of Sun direct for supply of 130 channels, was stated wherein the rate to be only Rs. 99/- per month.

The petitioner, however, had been charging Rs. 250/- per month per bouquet from the respondent.

The question is as to whether the said rate is arbitrary and whether the subscriber base is arbitrary.

The petitioner is a Multi Service Operator. It had been giving supply of signals of all the bouquets of channels of all the broadcasters. It is, therefore, not a case where the subscriber base would greatly vary viz the

universe vis-à-vis the negotiated subscriber base. It may be noticed that PW-1 in his cross examination stated as under :-

“I am not sure of the rate being charged by the cable operators in Paschim Vihar area from their subscribers. It could be around Rs. 150 – Rs. 250 – Rs. 300.

The rate being charged by the petitioner company to its other LCOs in Paschim Vihar area is Rs. 230/-

I am not aware of the rate being charged by other MSOs from their LCOs in the Paschim Vihar area.

Tata Sky is charging Rs. 400/- per TV Set from its subscribers. I am not certain about the rates being charged by other DTH operators. It is around Rs. 300 to 400/-.

The advertisement appearing at page 161 is that of sun direct DTH service.”

The petitioner as a multi service operator cannot make any discrimination between one local cable operator with another so far as the rate is concerned.

Why there should be a huge difference between rate of the subscription fee payable by two different local cable operators is a matter which we fail to comprehend. Whereas the petitioner had been charging the respondent at the rate

of Rs. 250/- per month per subscriber, from the others it had merely been charging at or about Rs. 150/- to Rs. 200/- per month. According to the respondents, however, the actual rate is about Rs. 160/- per month.

In the facts and circumstances of this case and keeping in view the other evidences placed on record namely the amount charged by the respondents from its other customers, as also the fact that Free to Air channels were also being aired, we are of the opinion that the reasonable rate, in a situation of this nature should not have been more than Rs. 200/- per month per subscriber.

So far as the subscriber base is concerned, having regard to the fact that the respondent is a very old local cable operator and had extensive business in Paschim Delhi as also in Dwarka (of course in this case we are concerned only with Paschim Delhi), 80% of the subscriber base should be treated to be reasonable. The petition is allowed in part and to the extent mentioned hereinbefore.

However, in the facts and circumstances of this case, the rate of interest, in our opinion, should be determined at 9% per annum.

The respondent shall however, pay and bear the costs of the petitioner. Advocate's fee assessed at Rs. 50,000/-

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

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

#mks#