

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

**Dated 25<sup>th</sup> February, 2010**

**Petition No.49(C) of 2008  
(M.A. Nos. 2 & 13 of 2009)**

Wire & Wireless (India) Limited & Anr.

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-  
...Petitioners

Versus

M/s Friends Cable Netcom

...Respondent

**BEFORE:**

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

For Petitioners : Mr.Yoginder Handoo, Advocate

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

**ORDER**

**S.B. Sinha**

The petitioner No.1 is a Multi Service Operator (MSO). It has its network throughout India including the town of Kolkata.

Petitioner No.2 is the distributor of the petitioner No.1. Inter alia on the premise that despite entering into an agreement with the petitioner No.1 on 18.01.2006, the respondent had not paid the outstanding dues amounting to Rs.39,95,584/- as on 29.02.2008, this petition has been filed. It is contended that the supply of signals continued till 15.01.2009. The respondent, however, denies and disputes the said claim of the petitioner. Execution of the said agreement had also been denied and disputed. The respondent, however, contends that the signals were disconnected on 31.12.2008. The further contention of the respondent is that the amount of subscription was only Rs.3 lakhs per month.

This petition has been filed on 28.03.2008.

This Tribunal having regard to the rival contentions of the parties framed the following issues:

1. Whether the respondent is liable to pay unto the petitioner a sum of Rs.39,95,584/- as on 29.02.2008 and also other amounts for supply of signals upto 15.01.2009?
2. Whether the signals were disconnected on 31.12.2008 or on 15.01.2009?
3. Whether the subscription agreement dated 18.01.2006 is genuine and has been signed on behalf of the respondent by a person authorized to do so?
4. Whether the subscription amount has been fixed at Rupees Three lakhs as claimed by the respondent and consequent whereto invoices raised by the petitioner claiming various amounts on monthly basis is legally payable?

5. Whether in the event the petitioner is found to be entitled to any monetary relief, interest @18% per annum as prayed for is granted?
6. What relief, if any, can be granted in this petition?

The petitioner in support of its case has examined Shri V.Suresh Kumar and Shri Zafar Iqbal. The respondent, however, has examined one of its partners Shri Dinesh Karmakar.

According to the petitioner, one Shri Rana Mukherjee was the Managing Partner of the respondent firm. He had signed the agreement along with other partners. He is also signatory to various other documents. Despite the fact that signature of Rana Mukherjee appears in the agreement as also various other documents, the respondent contended that he had nothing to do with the affairs of the respondent's firm. The respondent furthermore denied and disputed that save and except on a few occasions, it had received any invoice. Contents or otherwise of the invoices as also the statement of accounts are denied and they are stated to be 'false and fabricated'.

Before, however, advertng to the materials placed on record by the parties, we may notice that during pendency of this proceeding, this Tribunal by an order dated 01.04.2008 restrained the respondent herein from taking supply of signal from any other multi service operator without producing the invoice from petitioner before the new MSO. By another order dated 12.01.2009 an order of injunction was issued directing the respondent not to shift to any other MSO.

The petitioner has filed a miscellaneous application (MA No.13 of 2009) purported to be under Section 20 of the Telecom Regulatory Authority of India Act, 1997 (the Act) praying for the following:

- “a) Punishing the respondent No.1 to 6 under section 20 of the TRAI Act and holding them guilty of willful non-compliance of the orders dated 01.04.08 and 01.01.09 of this Hon’ble Tribunal; and
- b) Restraining respondent No.3 M/s Cablecomm Services Pvt.ltd. from providing signals of TV channels to respondent – Friends cable till the pendency of the present petition;”

Mr.Yoginder Handoo, the learned counsel appearing on behalf of the petitioner would contend:

- (i) The respondent in terms of the agreement dated 18.01.2006 was bound to pay the subscription fees not only in regard to the supply of signals of free-to-air channels but also the pay channels. The demand of the petitioner would not only be evidenced by a large number of invoices which have been raised and served upon the respondent but also stand corroborated from the statement of accounts maintained by the petitioner in ordinary course of business.
- (ii) The contention of the respondent that the monthly subscription charges were Rs.3 lakhs having not been proved, the burden whereof was on it; the petitioner must be held to have proved its case.
- (iii) The petitioner having issued a large number of notices which have not been replied to by the respondent, the contents thereof must be held to have been admitted. The respondent having deliberately and willfully disobeyed the order of this Tribunal should be suitably punished.

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

- (i) The agreement dated 18.01.2006 having contained no clause showing the exact amount of subscription fee to which the respondent was liable to pay and the petitioner having not been able to prove amount of the subscription charges mentioned in the invoices, the petition is liable to be dismissed.
- (ii) The invoices and the statement of accounts being false and fabricated, no reliance could be placed thereupon.
- (iii) The petitioner having not supplied a copy of the SLR, the witnesses examined on behalf of the petitioner must be held to be untrustworthy.
- (iv) The two witnesses examined on behalf of the petitioner, namely, Shri V.Suresh Kumar and Shri Zafar Iqbal being untrustworthy, no reliance can be placed upon their evidence.
- (v) In terms of Section 34 of the Indian Evidence Act, 1972 also, the books of accounts of the petitioner having not been kept and maintained in the regular course of business, the same by itself cannot be held to be sufficient evidence to charge the respondent with any liability and thus, in the facts and circumstances of this case the contention of the respondent that the subscription amount as agreed to by and between the parties was only a sum of Rs.3 lakhs must be held to be correct.
- (vi) The petitioner having not been able to show that the signal of the respondent was disconnected on 15.01.2009, the contention of the respondent that the same was done on 31.12.2008 must be held to be correct.
- (vii) The petitioner having not proved as to how and in what manner the respondent has violated the order of this Tribunal, MA No.13 of 2009 purported to be in terms of Section 20 of the Act is liable to be dismissed.

Although in his evidence Shri Dinesh Karmakar examined on behalf of the respondent denied that Shri Rana Mukherjee had anything to do with the firm, having regard to the fact that his signature appears in the agreement as also on the letter of the respondent which is at page 18 at the paper book, it must, at the outset, be held that the said plea is wholly incorrect.

We may also place on record that Mr.Chawla did not press before us the contention of the respondent that the agreement had not been executed.

The agreement shows that there were 1101 subscribers.

The price clause is contained in Para 2 in the following terms:

**“2. PRICE**

The Price payable by the FRANCHISEE for access to the signals provided by the network shall be as follows:

Rs.19/- per subscriber per month to be paid before 7<sup>th</sup> Day of the every month (this charge of Rs.19/- is valid only for the free to air channels. Charges for the encrypted (pay) channels shall be charged extra as demanded by the transmitting pay channels)

The Network reserves its right to increase the subscription charges as mentioned above upon market conditions and cost of supply of signals.”

Clause 3 of the said agreement provides for the terms and conditions, sub-clause(m) whereof reads as under:

“(m) The Franchisee shall be liable to pay all applicable taxes, charges etc. levied or imposed by Government or which may be imposed in future by the Government or any other statutory or regulatory body of the region (i.e. Rs.19/- or any other amount being charged towards providing signals shall be net of taxes).”

The petitioner in terms of the said agreement had been supplying signals of free-to-air and pay channels to the respondent. It, however, appears from the record that although extra charges for transmission of pay channels were to be determined at a subsequent stage, both the witnesses examined on behalf of the petitioner have not mentioned any rate/charge in respect thereof. For reasons best known to them they have also not stated what was the amount of the subscription fee payable by the respondent to the petitioner for supply of signals to it.

It is of some significance to notice that the petitioners themselves in Paragraph 10 of the petition stated:

“10. It is most respectfully submitted that the respondent had vide letter dated 1.3.2007 (sent through fax) to the petitioners had admitted its liability to pay an amount of Rs.9.00 Lakhs as on 27.02.2007. Copy of the letter dated 1.3.2007 sent by the respondent along with its English translation is annexed here as Annexure P-2 (Colly)”

The petitioner did not in its petition, or its witnesses in their evidences denied or disputed the receipt of the said letter and even the contents thereof.

As on 27.02.2007, according to the petitioners themselves, a sum of Rs.26,63,582/- was due from the respondent.

We may for the said purpose also notice the invoice for the period ending 27.02.2007 which shows the total outstanding to be Rs.26,63,582/-.

In the ordinary nature of the business transactions, it was expected, in the event the contents of the said letter were not correct, that a reply thereto would be sent. The least the petitioner could do was to contend that no such settlement had been arrived at nor did the respondent make any payment. We, therefore, do not find any reason not to accept the said statements made on behalf of the respondents. Mr.Dinesh Karmakar in his evidence stated as under:

“16. ....I state that, the settlement amount of Rs.9,00,000/- was arrived at mutually and indicated to the Respondent and admittedly received by the Petitioner after asking the Respondent to fax the same to the Petitioner on their letterhead, which was done on 01.03.2007.”

The petitioner denied and disputed the same only in its rejoinder. It must be held to be an afterthought. Mr.Karmakar in his cross-examination furthermore stated:

“According to me only Rs.12 lakhs becomes due and payable to the petitioner.”

We may now consider as to whether any reliance can be placed on the invoices or the statement of accounts.

We have noticed hereinbefore that according to the petitioner, invoices had been raised depending upon the increase or decrease in the number of subscribers. It was so stated by Mr.V.Suresh Kumar in the following terms:

“7. I say that the respondent declared addition of 316 subscribers to the petitioners. The respondent was accordingly billed for 1417 subscribers from 01.05.2006. Subsequently the respondent declared the connectivity of 316 to the petitioners. Accordingly, from 01.08.06, the monthly subscription invoices has been raised on the basis of declared connectivity of 316 and have been regularly forwarded to the respondent.”

Mr.Zafar Iqbal, on the other hand, in his examination-in-chief stated that the amount of subscription was fixed only once. Furthermore the aforementioned contentions of Mr.V.Suresh Kumar are not reflected from the statement of accounts/ledger filed by the petitioner. He, otherwise also, on his own statement, had no personal knowledge with regard to the day to day business dealings between the parties.

Mr.Handoo submitted that in the town of Kolkata the amount payable towards subscription fee depends upon the number of subscribers. It may be so but in that event in terms of clause 12.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 (the Regulation), it is obligatory on the part of MSO to file the number of subscribers each month. It is expected that the respondent must have done so and in any event the petitioner should have asked therefor. Whether such list of subscriber had in fact been supplied by the respondent is not borne out from the record. The petitioner for one reason or the other has not produced before us the SLR nor has filed any documentary evidence to substantiate the rate per subscriber so far as the pay channels are concerned.

In terms of clause 3.3 the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation 2006, a MSO is bound to serve invoices on a regular basis. Except for a few, service of the invoices has not been proved. The petitioner, however, has produced before us a large number of invoices. We may furthermore notice that only three invoices bear the invoice number. Out of the three invoices, two invoices, wherein invoice number had been mentioned do not tally with the corresponding entries in the ledger account. One although bears the No.001214 but in the ledger account the corresponding entry has been mentioned as 001137. Similarly, the invoice number mentioned in the invoice dated 01.02.2006 being 001015; the corresponding entry in the ledger account shows to be 001099. The explanation of the petitioner to the effect

that the software generated a unique voucher number, in absence of any evidence brought on record in that behalf cannot be accepted.

Mr.Handoo would contend that the invoice numbers have been mentioned wrongly in the ledger account. This submission does not fit in with the explanation as noticed hereto before.

It, therefore, cannot be accepted. The printouts taken anywhere at any point of time must be having the same contents; if the inputs were correct.

We may furthermore notice that although the invoice for the month of May, 2006 shows a balance of Rs.2,24,894/-, the ledger entry does not mention any such amount. As against the entry dated 01.05.2006 towards subscription income, in the month of May, 2006 a sum of Rs.9,16,182/- has been shown.

Mr.Handoo before us has not explained as to why no invoice showing the said amount has been produced before us. The following chart, however has been filed, which reads as under:

<b>Invoice date</b>	<b>Amount</b>	<b>Page</b>
01.05.2006	Rs.5,77,939/-	130
02.05.2006	Rs.49,629/-	138
02.05.2006	Rs.63,720/-	134
02.05.2006	Rs.224,894/-	146
Total	Rs.9,16,182/-	Same amount as in the statement of account for the bill dated 2/5/06

Had the statements made in the ledger account been correct the same would have been reflected in the invoices drawn on 01.05.2006. The invoices referred to by Mr.Handoo not only show the subscription fee for the month of May, 2006 but also

some charges due for different months, namely, supplementary bills for the month of April being at page 138 and 134 but also for the months of March being at page 146. It may be that the total of the aforementioned bills tally but this also goes to show that the books of accounts were not maintained in regular course of business.

The invoice dated 01.05.2006 for a sum of Rs.5,77,939/- is not reflected in the ledger account. Furthermore it appears that there existed a discrepancy in the invoice dated 01.12.2007 wherein an amount of Rs.34,84,540/- was shown to be due as on 31.11.2007 and the demand dated 10.12.2007 wherein an amount of Rs.32,39,540/- was demanded. Mr.Handoo would, however, contend that although the witness examined on behalf of the petitioner, Mr.Zafar Iqbal in his cross-examination stated that some payment must have been made in between and despite the fact no such payment or credit has been shown in the ledger account, the discrepancy can be explained keeping in view of the fact that a cheque for Rs.2,45,600/- bounced. However, on later dates cash payment for sums of Rs.65,000/-, Rs.1,17,000/- and Rs.1,00,000/- totaling to Rs.2,80,000/- has been shown.

We may notice that Shri Zafar Iqbal has signed all the invoices. He has also signed the notice dated 10.12.2007. He looks after the Kolkata office and thus it is difficult to accept that he would not know about the said entries and/or the discrepancies.

In any event the discrepancies pointed out by the respondent had not at all been explained.

Section 34 of the Indian Evidence Act reads thus:

**“Section 34: [Entries in books of account including those main tained in an electronic form] when relevant.-**

Entries in the books of account [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.”

A bare perusal of the aforementioned provision would clearly show that no claim can be based on the basis of the statement of account. We have held heretobefore that the books of accounts maintained by the petitioner cannot be relied upon

having not been done in regular course of its business. We have also noticed hereinbefore discrepancies in the evidence of the witnesses examined on behalf of the petitioner.

### **Whether the subscription amount was Rs.3 lakhs ?**

To begin with this issue we may reiterate that as on 27.02.2008 the dues of the petitioner had been settled for a sum of Rs.9 lakhs. Both the parties, however, have not stated before us any basis thereof. We have also noticed heretobefore that the exact amount of the subscription fee or the rate per subscriber for the pay channels has not been indicated.

Mr.Dinesh Karmakar in his affidavit stated that there had been a settlement even after filing of this petition. In the cross-examination the only question which was asked put to him in relation to the complaint made to the police authorities, to which he answered as under:

“I do not remember as to whether in the police complaint made by me I have made reference of compromise between the parties in terms of which it was agreed that the petitioner could receive a sum of Rs.3.00 lakh per month from the respondent.”

According to Mr.Chawla it was not necessary to mention thereabout in the police complaint as merely an intimation about the disconnection of the signal as on 31.12.2006, had been given to them.

Although the said statement may not itself be enough but no question has been put to the said witness in the cross-examination to show that the said statements were not correct. In a situation of this nature, where on the one hand the ledger

account mentioned by the petitioner cannot be believed, it is also difficult to believe that the respondent being a partnership firm had not been maintaining any books of accounts or paying any income tax as has been stated by Mr.Dinesh Karmakar. The witness however, accepted that individual partners have been paying income tax; if that be so, their share of profit were to be calculated on the basis of statement of accounts which must have been maintained by the firm.

We, however, in a case of this nature is to choose between the two statements. The burden of proof was on the petitioner. If no evidence has been adduced the petition would have failed having regard to the provisions contained in Section 101 of the Indian Evidence Act. We, therefore, have no other option but to hold on that basis that the monthly subscription fee was Rs.3 lakhs per month. In this view of the matter we furthermore direct that while calculating the amount due to the petitioner an admission made to the effect that the respondent has made any payment of Rs.9 lakhs and furthermore it having admitted its dues of Rs.16 lakhs, a decree for the said amount, whichever is higher, must be passed. While calculating the amount due the amount paid by the respondent shall be adjusted.

The respondent would also be bound to pay interest at the rate of 18% per annum on the amount which fell due, till the date of actual payment.

So far as the petition filed by the petitioner under Section 20 of the Act is concerned, action could have been taken against the respondent only in the event if it could be found that he is guilty of willful disobedience of the orders of the court.

We have noticed hereinbefore the nature of the order of injunction. In terms thereof, it was obligatory on the part of the petitioner to show that the respondent had migrated to another MSO after the orders of injunction were passed. The only contention raised was that the disconnection took place on 15.01.2009 and not on 31.12.2008 as contended by the respondent.

The petitioner has not adduced any evidence to show that the respondent had migrated to any other MSO. We, therefore, are of the opinion that no action under Section 20 of the Act can be taken. We, furthermore in the absence of any positive evidence and in particular the fact that in the service card for the month when the alleged disconnection has been caused the signature of the respondent has not been obtained, can arrive at a decision that disconnection had taken place on 15.01.09.

We, therefore, hold that disconnection must have been made on 31.12.2008. However, in view of the conduct of the respondent we are of the opinion that the petitioner should be entitled to costs under section 35A of the CPC. It is directed accordingly. Counsel's fee assessed at Rs.2 lakhs.

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

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