

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

Dated 10th March, 2010

Petition No. 31(C) of 2008

Hathway Bhawani Cabletel & Datacom Ltd. ... Petitioner

Versus

M/s B.R.Cable ...Respondent

BEFORE:

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

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

For Respondent : Mr. Tejveer Singh Bhatia, Advocate

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ORDER

S.B. Sinha

The Petitioner has filed this petition for recovery of a sum of Rs. 13, 80,498 from the respondent herein inter alia on the premise that it had not paid the amount of subscription fee for obtaining signals from the petitioner.

The admitted fact of the matter is that the parties hereto entered into an agreement on or about 1.4.2000, pursuant where to and in furtherance where of the petitioner was to supply and the respondent to obtain signals inter alia for Bharat Nagar Area. Another agreement was entered into by the parties hereto on or about 1.2.2005 supply of signal in MHADA Colonies.

Indisputably so far as agreement dated 1.4.2000 is concerned, it was valid for a period of 5 years. Therein the subscriber base was shown to be 37 and the monthly subscription charges were fixed at Rs.50/- per subscriber.

Clauses 2 as also clause 9 of the said agreement are as under:-

“Consideration

In consideration of receiving input signal/feed by the Franchisee and of the terms and conditions, covenants and stipulations contained herein, Franchisee shall continue to pay to the Franchisor as per the number of Subscriber Points held by the Franchisee in the Area which presently are 50 numbers and more particularly as laid down the Schedule before the 10th of the following month at the rate of Rs. 37 per point per month. Provided always that the consideration as contained herein shall be subject to revision in case of increase in the number of pay channels or subscription rates thereof or in number of Subscriber Points”.

"TERM

The Term of this Agreement shall unless determined earlier under the provision of this Agreement, be initially for a period of 5 (five) years commencing from the Effective Date. At the end of the period of 5 years, the Parties shall renegotiate the consideration payable to the Franchisor. Provided however that all other provisions of this Agreement shall continue to be in full force and effect for the next period of 5 (five) years and so on."

Similarly the agreement dated 1.2.2005 was initially for the subscriber base of 200 and the subscription charges payable was @ Rs. 100/- per subscriber per month. Other terms and conditions of the said agreement were almost the same to that of the agreement dated 1.2.2000.

According to Petitioner, invoices were being raised for each month and served on the respondent. The Petitioner has filed the invoices for the months of April, 2007 to June 2008. Invoices for the two agreements used to be raised separately, with a distinction namely invoices in terms of the agreement dated 1.2.2000 were being raised in the name of B. R. Cable, whereas invoices in terms of the agreement dated 1.2.2005 used to be raised in the name of BR Cable 2.

The Petitioner raised invoices in respect of B R Cable for 300 points at the rate of Rs. 30 per point for the period April, 2007 and June 2008. They said invoices have been proved by PW-1.

The Petitioner has also filed ledger account concerning B. R. Cable which was being maintained in ordinary course of its business wherefrom it appears that as on June 2008, the balance amount due from the respondent was

shown to be Rs. 8,12,317/-. Similarly as in June 2008, the balance amount for B. R. Cable-2 appears to be Rs.5,68,181.

It has furthermore been contended by the petitioner that two notices were also issued to the respondent seeking payment of the outstanding amounts on 9.4.2007 and 16.6.2007. The said notices are said to have been delivered to the respondent but the receipt thereof has been denied by the respondent. Thereafter a legal notice was served in respect of dishonor of two cheques by the Petitioner on the respondent on or about 21.2.2007, in response where to the respondent by a letter issued through its advocate contended that it had migrated to another MSO.

The respondent in its reply inter alia contended:-

- (a) It has stopped taking supply of signals from 31.12.2006 which although the petitioner was all along aware of but deliberately suppressed the same in this petition.
- (b) It has entered with a franchise agreement with the Wire and Wireless Limited on 5.1.2007.
- (c) The respondent has paid the entire amount due towards the dishonored cheques i.e. the amount of Rs.33,111 towards full and final settlement by cash.

The issues, which arise for our consideration in this petition, are:

1. Whether the respondent could have migrated to the new MSO without complying with the requirements of the Regulations namely payment of the dues of the petitioner; and
2. Whether the respondent had taken supply of signal up to 31.12.2006 or June, 2008.

The fact that the parties had entered into the aforementioned two agreements are neither in doubt nor in dispute. The dispute, however, is in relation to the enhancement of subscriber base as also the rate at which the

signals were to be supplied.

An invoice was raised on 1st April, 2007 from a perusal whereof it appears that input charges were shown therein to be Rs.39,000 for the said month. On or about 1st February, 2008 another invoice was raised showing the same input charges but the previous outstanding balance was shown as Rs.5,93,217/-.

The petitioners have filed proof to show that the invoices were not only being raised but also were being served upon the respondent regularly.

It is also not in dispute that the Petitioner served a notice upon the respondent on or about 9th April 2007, inter alia, stating :-

“This refers to the Franchisee agreements dt. 1st April, 2000 for Bharat Nagar and dt. 1.2.2005 for the 25 MHADA buildings. As per the said Agreement you have been receiving feed signals from us for which we have been raising invoices upon you.

It has been noticed that you have been defaulting in making payment as per the invoices billed on you in spite of all the invoices were served upon you from time to time. We regret to note that till date you have not cleared your outstanding liability. Please note, a total sum of Rs. 3,17,177 (Rupees three lakhs seventeen thousand one hundred seventy seven only) as per the invoice Nos. : 06-07/Mar/06 dated 01/03/2007 for the month of March-2007 is due and payable by you. A copy of the invoices for the month of March 2007 is enclosed herewith for your reference.

We request you to clear our dues immediately failing which we will be forced to take appropriate legal action against you for the recovery of our dues.”

The receipt of service of the said notice has also been brought on record.

It furthermore appears that a legal notice dated 21.7.2007 was served upon the respondent in regard to bouncing of a cheque, the relevant portions whereof read as under:-

“2. That you are one of the Cable Operators of our Client, who has availing Cable Feed signal of Our Client for your Cable Networks.

3. That our Client have accordingly raised invoices upon you from time to time.

6. that it is needless to state that if you fail to comply with the demand of Our Client under this notice, Our Client shall presume that you had issued the said Cheque with the dishonest intention and knowing fully well that the Cheque when presented for encashment would be dishonoured.

7. That on your failure to make the payments within 15 days of the receipt of this letter by you, you shall be guilty of having committed an offence under Negotiable Instrument Act, 1881 and you alone shall be responsible for the resultant cost and consequences of the same, of WHICH YOU MAY PLEASE NOTE.”

As noticed heretobefore, the respondent through his lawyer sent a reply thereto on or about 7.8.2007 wherein inter alia it was contended that it had migrated to another MSO.

The petitioner as noticed hereinbefore has filed the ledger account.

Mr. Tejveer Singh Bhatia, however contends that from a perusal of the ledger account as on 24th January, 2008, it would appear that no basis has been disclosed for showing the opening balance at Rs.1,70,000 and furthermore the same for the period 1st April, 2008 and November 2009 would show that no demand had been made on the basis of the amounts mentioned therein. Similarly in the ledger account dated 1st April 2007 to 24th January, 2008 due of Rs. 1,00,000 had been disclosed for which there is no basis.

It is not in dispute that no payment has been made by the respondent from January, 2007 onwards.

It is now well settled that the matter relating to supply of signal by a MSO to a local cable operator or another MSO would be governed by the provisions of the **Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004**. By reason of the 3rd amendment thereto made in 2006 (**Regulation 10 of 2006**) an explanation was added to the 2nd proviso to sub-clause 3.2 thereof, which reads as under :-

“The applicant distributors of TV Channels intending to get signal feed from any multi system operator other than the presently-affiliated multi system operator, or from any agent/any other intermediary of the broadcaster/multi system operator, or directly from broadcaster shall produce along with their request for services, a copy of the latest monthly invoice showing the dues, if any agent/any other intermediary of the broadcaster/multi system operator who collects the payment for providing TV Channel signals.”

Regulations 4 of the said regulations deal with disconnection of TV Channel signals. Clause 4.2 of the Regulations reads as under :

“4.2 Broadcaster/multi system operator shall inform the consumers about the dispute to enable them to protect their interests. Accordingly, the notice to discontinue signal shall also be given in two local newspapers in case the distributor of TV channels is operating in local area and in two national papers in case the distributor of TV channels is providing services in a wide area. Alternatively consumers can be informed through scroll on the concerned channel(s). Where a Broadcaster or a Multi System Operator decides to give this notice through a scroll the Multi System Operator or the Cable Operator, as the case may be, must carry the scroll in the concerned channel(s).”

In terms of the aforementioned Regulations, the respondent was legally obligated not only to clear the dues of the petitioner but also to serve at least 21 days' notice.

The petitioner was apprised of the fact that the respondent has migrated to another cable operator only in terms of its notice dated 18.8.2007. The petitioner, in our opinion, therefore, would be entitled to the subscription charges up to August 2007 and not up to June 2007.

The question which survives for our consideration is as to whether the petitioner has been able to prove that there has been an increase on the subscriber base.

So far as the agreement dated 1.4.2000 is concerned the number of subscriber was only 37. It may be true that clause 9 of the agreement provides for change in the subscriber base. But in the facts and circumstances of the case, we are of the opinion that no basis therefor has been brought on record to show as to how and in what manner the number of subscriber was raised to 300. The party should be *ad idem* in regard to the change in the agreement. It is also significant to notice that there has been no change in the subscriber base so far as the agreement dated 1.2.2005 is concerned. It is also of some significance to notice that in the petition the claim for

subscription charges was made up to January, 2008 for a sum of Rs.10,15,328/-. For the additional claim no amendment in the Petition has been sought for.

The respondent in paragraphs 4 & 5 of its reply stated that it had made payment of Rs.33,111/- in cash in respect of the cheques, which were dishonored. The petitioners in its rejoinder responded thereto in the following terms:-

"With reference to para 4 and 5 of the said Affidavit in Reply, I hereby deny that the Petitioners have withheld any fact from this Hon'ble Tribunal. It is submitted that the Petitioner through its Advocate had sent notice demanding outstanding payment to the Respondent which itself shows that the Respondent is a persistent defaulter. I further deny that the Respondent had made cash payment against the aforesaid cheque. I say that cash payment made by the Respondent.

There is no denial on the part of the respondent in regard to the receipt of the said letter. There is also no denial its part that the said payment had been made towards the cheques which had bounced. We may furthermore notice that the respondent in paragraph 7 of its notice through its Advocate dated 7.8.2007 made a specific denial as regards the contention of the petitioner that increase in the subscriber base was made with its consent.

It is true that petitioner has not proved the basis of its claim in term of its ledger account but it cannot be said as it had been contended by Mr.Bhatia that the basis of the entire claim of the petitioner was the invoices and the ledger account.

The basis for such claim is the agreement. Existence of the agreement and the terms and conditions thereof are not denied. The fact that the agreement had all along been acted upon also stands admitted. The petitioner

has proved that invoices were being raised and served upon the respondent. There can not be any doubt that in a case of this nature unilateral increase in the subscriber base without any basis cannot be considered to be valid for raising any claim.

It is true that some notices have been served asking for the outstandings shown therein but the same by itself in our opinion, cannot be the basis for the purpose of laying claim.

The petitioner furthermore has not filed the continuous ledger account, one of the ledger account was up to 24.1.2008, whereas the next one starts with the ledger account on and from 01.04.2008. Why the continuous ledger account has not been filed has not been explained?

So far as the contention of the respondent in regard to payment of sum of Rs. 33,111 is concerned, we may notice that no such plea has been raised in its reply.

The witness of the respondent Mr. Balu Revanna Rathod has raised such a plea only in the cross examination, the relevant portions whereof are as under :

“It is correct to say that I had not written any letter to the petitioner about getting signals from WWIL.

Witness volunteers : I have not issued any Notice before migrating to WWIL. The witness volunteers that the petitioner’s Director Mr. Kuldeep puri, however had allowed me to do so but he insisted me for paying a sum of Rs. 33,111/- for which I had issued two cheques for the petitioners and deposited the cheques in the bank after much delay and they bounced.

I have no other document including any invoice to prove my aforementioned statement.”

It is also of some significance to notice that the said witness denied the receipt of the notice dated 9.2.2007, although to that effect no plea has been raised in its reply. It is however, accepted that notice dated 16.6.2000 was received by it.

We for the reasons aforementioned are not in a position to rely fully on the ledger account as also action on its part of the petitioner to increase the subscriber base. We are of the opinion that the petitioner would be entitled to subscription charges in view of the breach of the provisions of the Regulations upto August 2007.

The petitioner would be entitled to the subscription charges in respect of the agreement dated 1.2.2005 up to the said period for 200 points at rate of Rs. 130 per point. So far as the agreement dated 1.4.2000 is concerned it would be entitled to recover the dues on the basis of the subscriber base of 37 only. In short we hold:-

1. The Petitioner has not been able to prove any basis for its claim in the first agreement save and except the amount as noticed heretobefore.
2. It will be entitled to the subscription charges till August 2007 and not up to January 2008 as the notice dated 7th August 2007 should be treated a notice in term of Clause 4.2 of the regulations.
3. The migration of the respondent to WWIL having been started on and from 5.1.2008, the same in our opinion is irrelevant, in view of the fact that the petitioner would be entitled to its dues upto August 2007.
4. The petitioner shall be entitled to interest @ 15% per annum throughout.

The suit for the reason aforementioned is decreed in part and to the extent directed heretobefore. In the facts and circumstances of the case there shall be no order as to costs.

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

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(G.D. Gaiha)
Member