

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

Dated 10th March, 2010

Petition No.133(C) of 2008

ESPN Software India Pvt. Ltd.

...Petitioner

Vs.

M/s Preethi Communications

...Respondent

BEFORE:

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

For Petitioner

: Mr. N. Ganpathy, Advocate

For Respondent

: Mr. Tejveer Singh Bhatia, Advocate

ORDER

S.B. Sinha

The petitioner has filed this petition for recovery of a sum of Rs.43,80,417/- from the respondent herein towards the subscription charges which are said to be due.

The petitioner is a broadcaster. The respondent is a local cable operator. It distributes its service to cable homes and other cable operators at Vishakhapatnam.

The parties hereto entered into a service agreement on or about 30.06.2006. According to the petitioner, although in terms thereof, the respondent was to pay a subscription fee of Rs.27,12,600/- per annum at the rate of Rs.2,26,050/- per month as per the schedule annexed thereto, it had failed and/or neglected to pay the same on a regular basis.

The petitioner served a notice upon the respondent on or about 20.06.2007 asking it to pay a sum of Rs.21,67,751/- failing which the services would be deactivated. The petitioner had been raising invoices which were also being served upon the respondent. It is the case of the petitioner that the respondent despite receipt of the invoices and/or said notice did not make any payment but approached its representative Mr.S.R. Bhandary to execute an agreement with an assurance that the arrears would be cleared; pursuant whereunto another service agreement was entered into on or about 28.07.2007 in terms whereof the respondent had agreed to pay the subscription fee of Rs.50,83,018/- per annum. It was, however, granted a discount of Rs.7,55,818/- and thus, the net annual subscription fee payable came to Rs.43,27,200/- excluding the service tax. The respondent, thus, was liable to pay a sum of Rs.3,60,000/- per month towards the subscription charges.

On or about 16.11.2007 the petitioner informed the respondent that 4% increase in the rates would be effected permitted by Telecom Regulatory Authority of India (TRAI) on and from 04.10.2007 as a result of whereof the monthly subscription fee payable came to Rs.73,2074/-.

As respondent did not pay the amount of subscription fee on a regular basis, it fell into arrears of Rs.39,59,040/- only. However, on or about 01.01.2008 the respondent without issuing any public notice as mandated by the regulations framed by

TRAI discontinued taking services from the petitioner on its network. The petitioner by a letter dated 03.01.2008 asked the respondent to pay the outstanding amount of Rs.46,43,417/-. A public notice was issued on 03.01.2008.

On the aforementioned premise this petition has been filed.

The respondent, however, in its reply inter alia contended that on or about 02.06.2007, the parties hereto entered into a Memorandum of Understanding whereby and whereunder, it was agreed that a sum of Rs.10 lakhs was to be paid by the respondents towards the arrears. According to the respondent it was also agreed that the decoders issued to it should be transferred in the name of M/s Waltair Communications Pvt. Ltd. (hereinafter referred to as 'the said Company'). The respondent contends that in terms of the said MoU the decoders were transferred in the name of the said company. The said Memorandum of Understanding was signed by Mr.D.Ravi Shankar, an officer of the petitioner company.

By a letter dated 30.06.2007 the aforementioned Memorandum of Understanding recorded between the parties was communicated. The said letter was received by Shri R.K. Singh who admittedly was the Sales Area Manager of the petitioner company.

A sum of Rs.3 lakh was paid by the said company which was accepted by the respondent without any demur whatsoever. A further payment of Rs.2 lakhs as also a sum of Rs.1.5 lakhs had also been paid by the said company which have also been accepted.

The respondent has furthermore pointed out certain discrepancies in the ledger accounts submitted by the petitioner.

The petitioner in support of its claim has examined one Shri S.R. Bhandary who was the Sr. Manager in the Finance & Accounts Department of the petitioner company. The respondent, on the other hand, examined Mr.K.Shandilya, its proprietor in support of its case.

Mr.Ganpathy, the learned counsel appearing on behalf of the petitioner would submit that the proprietor of the respondent in his evidence having accepted the fact that the agreement had been signed by him and it having stopped taking services from the petitioner on and from 01.07.2007 in violation of the Regulations framed by TRAI, this petition should be allowed.

Mr.Bhatia, the learned counsel appearing on behalf of the respondent, on the other hand, would contend:

- (a) The respondent firm is different from the said company of which Mr.Shandilya is the Director.
- (b) Although, the respondent had been receiving signals, it had not been receiving any invoice from the petitioner.
- (c) Mr.D.Ravi Shankar having signed the Memorandum of Understanding and Mr.R.K. Singh having accepted the letter dated 30.06.2007, the respondent must be held to be not liable to pay any amount to the petitioner as alleged or at all.
- (d) So far as the agreement purported to have been signed on 28.07.2007, is concerned the same had in fact been signed prior to execution of the Memorandum of Understanding.
- (e) There is nothing on record to show as to when the said purported agreement was signed or where the same was signed, as Mr.Bhandary in his evidence is absolutely silent with regard to the details thereof and furthermore no witness thereto having been examined, no reliance can be placed thereupon.

The fact that an agreement had been executed by and between the parties is not in dispute. It is furthermore not in dispute that the respondent had been receiving signals from the petitioner. However, it appears that a Memorandum of Understanding was entered into by and between the parties. The Memorandum of Understanding is in the form of a letter addressed to the petitioner. Attention in respect thereof was drawn to Mr.D.Ravi Shankar and Mr.Nageswar Rao, the ‘Distributor’ of the company. The said letter, apart from the respondent, was signed on behalf of the petitioner by the aforementioned Mr.D. Ravi Shankar; the relevant paragraphs whereof read as under:

“Ref to the discussion we held with your good selves, we have informed you that M/s Preethi Communications has been closed and requested you to transfer the decoders in the name of M/s Waltair Communications Pvt. Ltd. Also, we have agreed to pay Rs.10,00,000/- (Rupees Ten Lakhs Only) towards the entire outstanding under the account of M/s Preethi Communications till 30.06.2007, which has been agreed by you, we thank you for the consideration of the waiver off after understanding the current ground dynamics.

We also agree to pay the above said amount w.e.f. 01.07.07 onwards for which we shall issue 3 PDCs for the above said amount as requested by you.

We therefore request you to enter into a fresh agreement in the name of M/s Waltair Communications Pvt. Ltd., as per the new terms of subscription payment including the addition of the new channel STAR SPORTS into the existing bouquet of ESPN & STAR SPORTS.

Pls acknowledge the same as memorandum of Understanding.”

Furthermore, the respondent by a letter dated 30.06.2007 stated as under:

“With reference to the discussions held with your Area Sales Manager, Mr.Ravi Sankar earlier and the understandings as per the letter date 02.06.07, we have asked to change the decoders into the name of Waltair Communications Pvt. Ltd. and billing also w.e.f. 01.07.07.

As per the discussions we herewith attaching the payment of Rs.3,00,000/- (Rupees Three Lakhs) vide cheque # 43R310, drawn on Karnataka Bank as per the commitment against the outstanding of Preethi Communications.

Also, now the billing from a 1.07.07 will be Rs.1,25,000/- (Rupees One Lakh Twenty Five Thousand Only) for all the 3 Channels and shall not increase the same as the ground connectivity has been divided to 4 MSOs against 3 MSOs earlier as per our share of the ground connectivity which is 18% of the total City Connectivity.

Also, to inform you, we shall review the prices as per the billing to the other MSOs which should be proportionate i.e. 18% to the total Vizag city billing.

We shall issue the POCs as committed in the month of July 07.

We are herewith signing the freemen agreement PC# 1297 which shall be effective from 01.07.07 to 30.06.08.

Pls acknowledge the payment receipt and the understandings as stated above.”

The said letter was issued by M/s Waltair Communications Pvt. Ltd. In pursuance in the said arrangement a sum of Rs.1.25 lakhs was paid by the respondent. It indisputably contained the signature of Shri R.K. Singh who according to PW-1 was its Sales Area Manager, who was dealing with the respondent and not the aforementioned PW-1.

The signature of Shri D.Ravi Shankar and Mr.R.K. Singh is also not disputed. The petitioner merely contends that they were disgruntled employees and have left the services of the company in October, 2007. But it has not been shown that they had, to the knowledge of the petitioner, had no authority to enter into the aforementioned arrangement with the petitioner.

It furthermore appears that the said company had made payments to the petitioner. By a letter dated 25.07.2007, the said company stated as under:

“Sub: Demand draft for Rs.3,00,000/-

Ref: Out commitment as per the letter dtd. 02.06.07

We are herewith attaching demand draft for a payment of Rs.3,00,000/- vide demand draft # 925809 & 011293 drawn on State Bank of Travancore & Karnataka Bank dtd: 25.07.07.

We have paid till date Rs.6,00,000/- against the Outstanding of total Rs.10,00,000/- of Preethi Communications. The balance of Rs.4,00,000/- also will be cleared shortly.

Pls also note that the invoices and the decoders name's have not changed as yet. Pls do the needful at the earliest.”

It is true that therein it has been accepted that the decoders were not changed in the name of the said company but from a perusal thereof it would clearly appear that out of a sum of Rs.10 lakhs, a sum of Rs.6 lakhs had been paid. The said letter was also received by Shri Shiva Prasad, a representative of the petitioner, genuineness of whose signature is not in question. Yet again the said company by a letter dated 31.08.2007 stated as under:

“We are herewith attaching Cheque for a payment of Rs.2,00,000/- vide Cheque # 438414 drawn on Karnataka Bank dtd: 31.08.07.

We have paid till date Rs.8,00,000/- against the Outstanding of total Rs.10,00,000/- of Preethi Communications. The balance of Rs.2,00,000/- also will be cleared shortly.

Pls also note that the invoices and the decoders name's have not changed as yet. Pls do the needful at the earliest.”

Similarly, by a letter dated 03.12.2007 a sum of Rs.1.50 lakhs was paid.

“We are herewith attaching Cheque for a payment of Rs.1,50,000/- vide Cheque # 438324 drawn on Karnataka Bank dtd: 03.12.07.

We have paid till date Rs.9,50,000/- against the Outstanding of total Rs.10,00,000/- of Preethi Communications. The balance of Rs.50,000/- also will be cleared shortly.

Pls also note that the invoices and the decoders name's have not changed as yet. Pls do the needful at the earliest.”

Payment of the aforementioned amount also stands proved from the statement of account of Waltair Communications Pvt. Ltd. which has been brought on record. All the cheques issued by the said company have also been encashed by the petitioner which fact has been proved by the respondent. The petitioner although contends that there was no privity of contract with the said company, evidently the contract summary sheet which has been filed by the respondent and a service contract dated 01.07.2007 shows otherwise.

The parties hereto have, thus, produced two service contracts.

According to the petitioner the second service contract was entered into on 28.07.2007.

The question, however, which arises for consideration is as to whether the aforementioned service contract relied upon by the respondent being dated 1st February, 2007 is a forged document?

The service agreement relied upon by the petitioner is stated to have been signed by Mr.Bhandari as would appear from paragraph 5 of the petition. However, from a bare perusal of the said purported agreement dated 28.07.2007, it would be evident that the same was not signed by Mr.Bhandary. The petitioner has not explained as to how an agreement came to be executed on a day prior to 28.07.2007.

Mr.Bhandri has categorically stated that he is not signatory to the agreement. He has further accepted that he had not been dealing with the respondent and Mr.R.K. Singh was the person who had been dealing with the affairs of the petitioner so far as the respondent is concerned.

We agree with the submissions made by Mr.Bhatia that the said notice dated 20.06.2007 has been replied to by the said company vide its letter dated 30.06.2007.

The petitioner has also accepted that a fresh agreement was entered into only after its representative was approached by the respondent. The very fact that the letter dated 20.06.2007 finds mention in the said company's letter dated 30.06.2007, it is evident that subsequently an arrangement had been entered into by and between the parties.

We, therefore, are of the opinion that the petitioner has failed to prove the execution of the agreement dated 28.08.2007. Furthermore the petitioner indisputably having accepted the payments from the said company without any demur whatsoever, it

does not lie in its mouth now to contend that only because the decoders were not transferred in the name of the company, the same by itself would be sufficient to disown the Memorandum of Understanding entered into by and between the parties hereto.

The respondent, however, in his evidence accepted that it owed the petitioner about Rs.6 lakhs after 03.01.2008. We are, therefore, of the opinion that the petitioner is entitled to a decree for the aforementioned sum of Rs.6 lakhs.

It shall also be entitled to interest on the said sum at the rate of 12% from the date till the date of actual payment. The respondent shall also be liable to pay and bear the costs of this petition. Advocate's fee assessed at Rs.1,00,000/-. The petition is allowed to the aforementioned extent.

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

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(G. D. Gaiha)
Member