

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

Dated 26th March, 2010

Petition No.99(C) of 2005

Hathway Media Vision Pvt. Ltd.

....Petitioner

Vs.

M/s Spider Cable

...Respondent

BEFORE:

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

For Petitioner : Mr. Arun Kathpalia, Advocate
Mr. Nasir Hussain, Advocate

For Respondent : Mr.Meet Malhotra, Advocate
Mr. Ravi S.S. Chauhan, Advocate
Mr. Swagat Sharma, Advocate

JUDGMENT

S.B. Sinha

The petitioner is a Multi System Operator (MSO) being engaged in the business of receipt and supply of signals from various broadcasters, to the Local Cable Operators (LCOs). The LCOs, in turn, supply signals to their respective subscribers/customers.

The respondent herein is one of the LCOs operating in the area in question.

Indisputably, the parties had entered into two agreements – one of them in the form of an undertaking being dated 4.11.1998 by reason whereof Shri Govind Mehra, who admittedly is the proprietor of the respondent concern, had undertaken to supply signals to the customers, upon receiving the same from United Cable Network (UCN).

Some of the provisions of the said agreement are:-

“2. I take cable input presently from United Cable Network (UCN), a company registered under the Companies Act, 1956, having its registered office at Rahejas, 4th floor, Corner of Main Avenue and V.P. Road, Santacruz (W), Mumbai -400 054. UCN is engaged in the business of Cable TV/Satellite TV distribution in the area from Colaba to Mahim.

3. I shall continue to take input form UCN and solely from them for my cable network, I shall pay input charges, to UCN as required by the same.

4. For all the various services that have been and continue to be rendered by me in connection with the UCN network, (1) UCN

(2) Zubin Gandevia(Zubin), aged 32 years, s/o Jehanbeux Gandevia, residing at 36 Mahim Navratna, Mogal Lane, Mahim, Mumbai – 400 016; and

(3) Pradeep Sooderji, aged 32 years, son of Gonindji, residing at 19, New Pushpa Milan, Worli, Mumbai-400018; Madan Bhatia, aged 45 years, son of Laxmandas, residing at Pavalova Building, Little Gibbs Road,

Mumbai – 400006; Anthony Aranha, aged 32 years, son of Francis Aranha, residing at 82 Jasmine Lodge Building, 2nd Floor, Napeansea Road, Mumbai – 400006 (jointly called ‘Pradeep and Associates’).

5. I shall pay input charges as agreed upon, mutually by the parties, as aforementioned, and me, to UCN.
6. I shall perform cable operations in the network as aforementioned, to which I am responsible, smoothly and without any hindrance and also service all the customers without any hindrance and perform all other activities as are necessitated by the nature of the operations being carried on.
7. I shall not either directly or indirectly, engage in any business in the aforementioned area or do anything by act or omission, which shall compete or conflict or adversely affect the respective businesses or interest of the parties, aforementioned, either currently or in the future.”

It is also not in dispute that the predecessor in interest of the petitioner entered into a distribution agreement with the proprietor of the respondent concern and his brother, Mr. Abdullah, the relevant portions whereof read as under:-

- “3. The first party, DISTRIBUTORS are Cable Operators, taking feed from the Grant Road, Head end of Hathway Group, and have got approximately about 200 primary points in the area.
5. The Hathway group have decided to appoint the above mentioned “DISTRIBUTORS” at present for the areas in and around Worli including Haji Ali, Race Course, Lala Lajpatrai and in around Tardeo, Peder Road, for a period of 3 years from the date of his agreement on the following terms and conditions. It should be noted that it is the prerogative of Hathway group to change and re assign the area of distribution to “DISTRIBUTORS”, i.e. they may be assigned any other area other than the one defined above as “WORLI, PEDER ROAD, TARDEO, etc.”

In the said agreement, the parties furthermore agreed:-

“1. Hathway group has made payment to Distributors in the following manner:

- (i) Rs.5,00,000/- (Rupees five lacs only) on 07/06/1999 on account of Non competition clause as defined in point f.10 of this agreement.
- (ii) The Hathway Group in addition to the one time payment mentioned above will pay the Distributors, 10% of all the cable TV operator collections collected through Distributors for their area of distribution which at present is Worli, Tardeo and Peder Road.
- (iii) Both the “DISTRIBUTORS” together shall be paid all inclusive Rs.25,000/- (Rupees twenty five thousand only) per month, as collection costs for collecting the operators feed charges.
- c) It will be responsibility of the “DISTRIBUTORS” to liaise with the Cable TV operators of the area assigned to them to provide satisfactory service and ensure regular monthly collection of the Cable TV feed charges from the area assigned to them.
- d) It will be the duty of DISTRIBUTORS to periodically verify declaration by the Cable TV operators and increase declaration over a period of time.
- e) Hathway group will pay the DISTRIBUTORS the 10% commission but only after at least 80% of the collection for the month from the operators drawing feed from assigned area i.e. at present Worli, Tardeo, Peder Road, is received and credited to the Company’s account with the respective bank.
- f) RESPONSIBILITES/DUTIES OF DISTRIBUTORS:

- f.1. Canvassing on behalf of the Hathway Group to get new cable TV operators to join the Hathway group's Head end as Franchisee, or operators and take feed from Hathway Goup's Head and servicing area in and around Worli, Tardeo, Pedder Road.
- f.2. Dissuade the existing operators drawing cable TV feed from the Hathway group's head end from breaking away from Hathway group and joining any other competitor's head end.
- f.5. DISTRIBUTORS will continue to take feed exclusively from the Worli Head end of the Hathway group and pay the feed charges to Hathway group company as may be applicable from time to time during the course of this agreement being in force.
- f.6. If the DISTRIBUTORS acquire any new network by himself or through partnership with any third party directly or indirectly or in the name of his distant/ close relations such as wife, son, daughter, brother, sister, father, mother, father in law, mother in law etc., then even for this new network, DISTRIBUTORS will take the Cable Television feed exclusively from the Hathway group Head end.
- f.9 DISTRIBUTORS will settle all its old outstanding dues to UCN within 30 days of signing of this agreement.
- f.10 DISTRIBUTORS will not associate with any other Head end/ cable TV control room belonging to any other cable group other than Hathway group, during the tenure of this agreement and for a period of 3 years thereafter, when the agreement is terminated with mutual consent of all the parties to this agreement.
- f.11 Either parties may, with or without cause, terminate this agreement by giving prior written notice of One Calendar month to the other Party.

h) AMENDMENTS

Any modifications to this Agreement shall not be effective unless it is in writing and shall be signed by a duly authorized representative of each Party.”

In terms of the said distribution agreement, the respondent, who, as noticed hereinbefore, was a cable operator and had been taking signals from the petitioner, was shown to be operating in the Worli area having declared 250 points therefor. The distribution agreement shows that there were such 28 cable operators having 5558 points.

According to the petitioner, the respondent not only had been making defaults in payment of the amount of subscription fees, but also failed and/or neglected to collect the amounts due from the local cable operators. It also failed and/or neglected to settle all outstandings which it had undertaken to do within 30 days from the date of entering into the distribution agreement as contained in the clause f.9 thereof.

On the said premise, the petitioner sent a notice to the respondent on or about 30.1.2005 asking it to pay a sum of Rs.1,37,000/- towards the outstanding amounts due towards the subscription fee.

The respondent herein by a letter dated 15.6.2001 admitted that it had not been able to collect 80% of the payments due from the subscribers but, however, attributed such failure on its part to the petitioner itself.

The respondent contended that the petitioner was to receive 50.88% of the collected amount, i.e., Rs.9.76 lakhs being the actual annual collection amount divided by annual collection which ought to have been collected, being Rs.19.80 lakhs for 5350 points, which is Rs.97,600/- as stated in para 8(d), i.e., 10% of the said sum. The respondent, furthermore, sought an adjustment of his personal 200 points payment with one Mr.Zubin Ganderias amounting to Rs.42,000/- totalling a sum of Rs.1,39,600/-.

According to the petitioner, it had put the respondent under a watch list for one month as it had failed to finalise the outstanding amounts payable by the LCOs and consequently by the respondent to the petitioner.

It is not disputed that the petitioner had terminated the distribution agreement dated 29.7.2001 in terms of its letter dated 1.12.2001.

However, the respondent contends that in fact the said notice dated 1.12.2001 was posted on 22.12.2001, as a result whereof it had not been given 30 days' notice, to which it was entitled to, and in that view of the matter, the said purported termination of the distribution agreement was wholly illegal.

According to the petitioner, from the month of March, 2002, an increase in the subscription amount took place from 200 to 1200 point by way of a one time increase which having not been agreed to by the respondent, the same was decreased from 1200 to 400 and then raised to 1000 purported to be on the basis of mutual discussions. The bills were, therefore, raised on the basis of subscriber base of 200-1200 and then reduced to 400 but increased to 1000 later.

It is, moreover, the case of the petitioner that in January, 2003, general increase in the monthly subscription fees took place primarily on account of the increase in the costs of pay channels from Rs. 100 to 150 per subscriber per month. According to the petitioner, the said increase was made operative not only by the petitioner but also by the other MSOs.

The respondent, however, on or about 5.6.2003, with various other cable operators, raised the issue of increase in the subscription fee by a letter dated 5.6.2003 requesting the petitioner to raise invoices at 60% of the total number of subscribers, which in effect, means 40% of under-reporting.

The petitioner has filed this petition on the aforementioned factual backdrop praying inter alia for the following reliefs:

- “a) Direct the respondent to declare and provide his true list of subscriber base since January 2004 and onward on monthly basis in order for the Petitioner to facilitate the revised upward invoicing accordingly.
- b) Direct the respondent to pay to the petitioner a sum of Rs.76,77,184/- (Rupees Seventy Six Lakhs seventy seven thousand one hundred eighty four only) including a sum of Rs.58,39,732/- (Rupees fifty eight lakhs thirty nine thousand seven hundred thirty two only) toward the cable TV feed signals charges and Rs.18,37,452/- toward the interest on the said outstanding liabilities at the rate of 18% p.a. on the aforesaid Rs.58,39,732/- computed from each date of default as computed upto and as of September 2005, save and except the amount deposited by the Respondent by way of the interim order as prayed by the petitioner.

The respondent in its reply not only denied and disputed the said contentions raised in the petition but also filed a counter claim of Rs.30 lakhs and odd.

The respondent averred that it had been paying the subscription amount on the basis of the agreed subscriber base and not on any other basis.

The relationship between the parties, as per the respondent, would be governed by the aforementioned deed of understanding dated 4.11.1998 as also the distribution agreement dated 29.7.2009. The respondent, denied and disputed that the petitioner had any authority to increase the base of subscription and/or the subscription fee unilaterally without its consent. The respondent also denied and disputed that it had been receiving any invoice purported to have been raised by the petitioner.

Before, however, we advert to the aforementioned rival contentions of the parties, we may notice that the respondent raised a preliminary objection in regard to the jurisdiction on the part of this Tribunal.

The said preliminary objection was rejected by this Tribunal by an order dated 28.5.2009. By an order dated 8.3.2006 having regard to the pleadings that the parties, the following issues were framed :-

- “1. Whether the respondent is liable to pay Rs.58,39,732/- towards subscription charges till September, 2005 as per statement of accounts filed by the petitioner?
2. Whether the respondent is obligated to furnish his complete list of subscribers?
3. Whether the respondent is obligated to pay the petitioner as per the actual subscriber base?
4. Whether the respondent is liable to pay to the petitioner the subscription charges from October 2005 till the disposal of the petition as per the subscriber base and rate to be determined by this Tribunal?
5. Whether the respondent is liable to pay to the petitioner interest at the rate of 18% per annum on the outstanding cable TV feed signals charges as claimed by the petitioner?

6. Whether the respondent is entitled to maintain any counter claim under the terminated Distribution Agreement dated 29th July 1999 as it is barred by limitation?
7. Whether the claim of the respondent under the terminated Distribution Agreement falls within the scope of the jurisdiction of this Tribunal?
8. Whether the counter-claim of the respondent under the terminated Distribution Agreement is barred by limitation?
9. Whether the respondent is liable to pay to the petitioner, the cost of the present petition as filed by the petitioner?
10. Reliefs.”

We may furthermore place on record that by an order dated 12.1.2006, this Tribunal directed the respondent to file a list of subscribers which it claimed to have been serving within one week's time from the said date. By another order dated 31.1.2006, the Tribunal directed that the list of the subscribers should be filed before the Tribunal failing which suitable order would be passed.

However, the learned counsel for the respondent urged that an application for modification of the said order had been filed and this Tribunal did not insist on compliance thereof.

It, furthermore, appears that on or about 11.12.2009, an additional issue was framed, which is as under:-

“i) whether respondent is entitled to sum of Rs.33,08,994/- from the petitioner as claimed in the counter claim contained in the reply.”

Mr. Arun Kathpalia, the learned counsel appearing on behalf of the petitioner, would contend that although the agreements were entered into by and between the parties hereto on 4.11.98 & 12.7.98, the parties continued to give and take supply of signals on payment of the subscription fees which used to be fixed from time to time.

The learned counsel would urge that having regard to the fact that the petitioner had regularly been raising invoices and sending the same to the respondent, who had raised no protest thereabout, a binding agreement must be held to have come into being. It was pointed out that on 21.12.2001, settlement of accounts had taken place, as a result whereof, the respondent admitted and acknowledged that it owed a sum of Rs. 1,99,000/- and undertook to pay the same to the petitioner in the same manner. Moreover, there had been a regular increase in the subscription fees, as a result whereof, the petitioner was constrained to raise the subscription fees from Rs. 100 to 150/- per subscriber per month. It was furthermore urged that the respondent's network having grown multifold, viz., at least 4,000 subscribers if not more, the subscriber base of the respondent was also increased to 1000 subscribers.

Mr. Kathpalia submitted that the increase in subscription fee must be held to be reasonable, having regard to the fact that the respondent himself was billing all its customers @ Rs. 600 per subscriber and furthermore having regard to the fact that the respondent's subscriber base was 1000, i.e. raising of invoice on the subscriber base nearly 25% of the actual number of subscribers cannot be said to be unreasonable. So far as the subscription fee of Rs.150/- per subscriber is concerned, according to the learned counsel, Rs.150/- was the universal rate applicable to all the LCOs at Mumbai.

Our attention has also been drawn to various notices issued to the respondent being dated 9.2.2004, 7.2.2004, 26.2.2005, 25.4.2005, 7.9.2005 and 12.9.2005, to urge that as it had not replied thereto, nor denied the receipt thereof, it must be held to have accepted the amount of outstanding dues mentioned therein.

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

- (i) There being no pleading that the invoices were raised by the petitioner and were served upon the respondent, the question of respondent's denying and disputing the receipt thereof did not arise.
- (ii) The petitioner having come into existence on or about 26.12.2003 in terms of Sec. 23 of the Companies Act, 1956; the name of United Cable Network having been changed to the present petitioner, the invoices which were sent to the respondent in its name must be held to be forged and fabricated documents.
- (iii) Even the ledger accounts whereupon strong reliance has been placed by the petitioner, is a got-up document, as would appear from the fact that only on the basis of the objections taken in the reply, some adjustments for a sum of Rs. 10,27,150/- had been made.
- (iv) Even the witness examined on behalf of the petitioner having admitted at para 17 of cross-examination, that at the relevant point of time, although the number of subscribers was 400 and the rate of subscription fee was Rs.100 per subscriber, but from the ledger accounts it would appear that a sum of Rs. 1,20,000/- was being charged from the respondent, which must be held to be ex facie wrong.
- (v) The purported report of the survey having been conducted after filing of this petition wherein the respondent was not asked to participate, no reliance can be placed thereupon.

- (vi) The distribution agreement having been terminated illegally, the respondent is entitled to damages which is to be calculated in terms of the provisions of the said agreement.
- (vii) As would appear from the receipts submitted by the petitioner itself to the respondent that those were 'on account' receipts and in view of the fact that no reconciliation of the accounts took place by and between the parties, in terms of Article 1 of the Schedule appended to the Limitation Act, 1963, the parties having been maintaining running account, the counter-claim is not barred by limitation.

Although a large number of issues have been framed, the principal questions which arise for consideration of this Tribunal are:-

- (i) Whether in the facts and circumstances of the case, the purported increase in the rate and subscriber base by the petitioner was legal and valid; and
- (ii) Whether the respondent is entitled to the amounts claimed in its counter-claim.

The agreement entered into by and between the parties would clearly show that the number of subscribers as also the rate therefor was fixed.

It is not in dispute that even after 1998, when the agreement was not in force, the rate and the subscription fee was increased and the respondent paid the same. A question arises as to whether the invoices could be raised by the petitioner when legally it was not in existence.

There cannot be any doubt or dispute in view of Section 23 of the Companies Act, 1956 that the date on which the name is changed by the Registrar of Companies, the new company would come into existence.

The fact that UCN was a group company of the petitioner, however, is not in dispute. It is expected that the company in its usual course of business would raise invoices. The petitioner in its petition categorically stated that the invoices were being raised on a regular basis and the respondent had not denied or disputed the same.

Mr.Kathpalia in the aforementioned factual backdrop appears to be correct in his submission that as the name of the company had been changed, the invoices being computer-generated, any change in the programme in the software, in case new print-outs are taken, would bear the name of the petitioner company and not the old company. Moreover, the said contention has been raised during oral argument but the attention of the witness examined on behalf of the petitioner was not drawn thereto.

Some documents have been brought on record by the petitioner to prove that the invoices were being raised and the same were being received by the respondent.

Before, however, we advert to the genuineness of said documents, we may notice that the respondent, for reasons best known to it, did not raise any contention whatsoever in its reply that the invoices were forged and fabricated. Curiously enough, even no suggestion had been given to the witness in this behalf.

We have noticed heretofore, that the petitioner has raised a specific plea in the Petition that invoices were being raised and issued on a regular basis. The respondent, however, in its reply, stated as under:-

“The respondent emphatically denies that there was any representation from the respondent about the number of points being 1000. In fact, it is the petitioner which unilaterally and baseless without **any proof or record or** prior consultation increased the number of points from 200 to 1000 **and feed charges Rs.100/- to Rs.180/-** the raise so made in the bill in respect of subscriber points and the charges has always been protested by the respondents. Similarly, without even a proof or prior notice to the respondent, they raised the charges (tariff/franchisee charges) illegally and in violation of the statutory orders. Further the averment of having 3700 subscribers is again totally false and incorrect. If the number is 3700 why at all, the petitioner chose to bill for a lesser number (even the figure of 1000 is an illegal raise). All such allegations are emphatically denied and the petitioner be put to strict proof thereof. In fact, the raise from 200 points to 1000 points has been made **only** in the case of answering respondent and no other cable operator taking feed from the petitioner, has been billed for any increase in the number of points. In such facts and circumstances, where the petitioners have committed various acts of omission and commission including the offence of violating statutory orders, the petitioners are not entitled to any relief as claimed. On the other hand they are liable to be proceeded with for various offences including perjury and violation of statutory orders besides the breach of agreements, undertakings and mutual understandings.”

5.f That the contents of the para 5-f of the petition in the form laid out are wrong and denied. In answer it is submitted and stated that this is not correct to say that the respondent has started receiving the cable TV feed signals from the head end of control room of Hathway Space from Nov 2004. The fact is, as also incorporated in paragraph 3 of the distribution agreement that the respondent has been taking the feed from Hathway Space at Grant Road right from the beginning and continues to do so.

5.k & l. That the contents of the para 5(k to l) of the petition in the form laid out are wrong and denied. It is stated and submitted that there has been no occasion or question of any default by the respondent. The entire dispute arose when the petitioners terminated the distributor agreement illegally and unilaterally and did not pay the huge sum payable by them to the respondent under the said agreement. Every time the respondent demanded the payment, the petitioners have assured to clear the same at an early date, but nothing has been done so far. They have not even adjusted any amount against the monthly bills raised by them in respect of cable feed. Instead, the petitioners increased the number of points unilaterally and illegally and also raised the charges incomplete violation of the statutory orders.....”

The statements made in its reply by the petitioner, on its face, do not show that any contention had been raised that the invoices had not been received by it. In fact, they having not been traversed, would be deemed to be admitted.

The very fact that the respondent questions the action of the petitioner in increasing the number of points from 200 to 1000 and even the subscription fee charges of Rs.100 to 180 in its bills itself is a pointer to the fact that the bills were being received. The respondent did not stop there. It furthermore stated that the averment of the petitioner that the respondent had 3700 subscribers was false, as the petitioner had chosen to issue a bill for lesser number which again goes to show that the bills were being received by it. To the similar effect, is the contention of the respondent in other paragraphs of its reply in this behalf.

It is of some significance to notice that a purported complaint was made not by the respondent alone in respect of increase in the rates of subscription fee but by other too. It reads as under:-

“It has been observed that you have been unilaterally creating a false record of billing @ Rs.150/- point since January 2003 to all the operators listed below INSPITE of the rate being MUTUALLY AGREED at Rs.100/- per point.

It is further observed that although your survey was conducted and it was mutually agreed that due to free points and inactive points of approximate 40%, the balance 60% was payable.

Here again you persist in creating false outstandings by overbilling by 40% and deliberately and unilaterally creating outstanding balances for 40% more points than due.

Such duplicity has been continued in all subsequent receipts, building up FALSE and mischievous OUTSTANDING with OBVIOUSLY MALAFIDE INTENT.

You are requested to hereby CEASE and DESIST from CONTINUING this frivolous practice and advice you're A/Cs Dept. accordingly.

Kindly sign one copy of this letter and return the same in token of receipt/acknowledgment.”

Even in that complaint, they have accepted that in January, 2003, the petitioner had been raising bills @ Rs. 150 per subscriber.

The petitioner has examined its Director, Mr.Rohington Soli Dadyburjor as its witness.

We have been taken through the entire cross-examination of the said witness but could not find that even any suggestion was given to him to the effect that the said invoices were forged and fabricated. If the respondent had been receiving invoices raised by the petitioner from time to time and having regard to the fact that all the relevant invoices had been filed with the petition, it was expected that the respondent would produce those invoices raised by the predecessor in interest of the petitioner company, had any discrepancies thereunder appeared. Moreover, it is one thing to say that the contents of the said invoices are not correct, but it is quite different to say that they were not received or forged or fabricated.

There cannot moreover be any doubt or dispute that after the 1998 agreement came to an end, the supply of signals by the petitioner and receipt thereof were not governed by any written agreement. Except the aforementioned complaint made by some of the cable operators in June, 2003, it does not appear that the respondent had replied to any of the letters and notices served upon it. The respondent is a business concern. It had not only been acting as a local cable operator; according to it, it had also been a distributor of the petitioner company. If that be so, by reason of business practice alone, the respondent is expected to raise objections to the correctness or otherwise of the amounts said to have been wrongly calculated on the basis of an increased rate and subscriber base.

The petitioner had undertaken a survey in 2003. According to the petitioner, the number of subscribers of the respondent was 3700. It is also the petitioner's case that the respondent had been collecting more than Rs.600 from its customers. The petitioner has brought on record the said evidence for the purpose of raising a contention that keeping in view the ground realities and furthermore in view of the fact that several pay-channels had come into being, and the broadcasters had been raising their charges, it had no other option but to raise the amount of subscription fees as also the number of the subscribers.

The fact as to whether the respondent had so many subscribers and/or had been collecting more than Rs.600 from each of them was within its special knowledge.

The proprietor of the respondent had filed an affidavit as a part of its evidence. For reasons best known to him, however, he did not produce himself for cross-examination. No explanation has been offered therefor. It is now well-known that if a witness does not produce himself for cross-examination, his evidence by way of examination-in-chief would be inadmissible. It is also a well settled principle of law that ordinarily, a party to a lis must examine himself. It was so held as early as in 1927 by the Privy Council in *Sardar Gurbakhsh Singh Vs. Gurdial Singh & Anr.* - AIR 1927 PC 230:

“29. Their lordships think it unnecessary to repeat the numerous details of the story, but, as it involves a general and important question of procedure and practice, they think it expedient to make the following reference to what occurred at the trial of this civil suit. At the Bar of the Board it was admitted by the respondents that she, Bhagwan, had been present in Court when the evidence was: being taken, and that she did not go into the witness box, and was not examined as a witness on her own or her alleged son's behalf.

30. Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a maneuver under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness.

31. This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranji Lal* [1910] 32 All. 104, calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."

The Supreme Court of India in *Iswar Bhai C. Patel v. Harihar Behera* - (1999) 3 SCC 457, has held as under:-

“17. Admittedly Respondent 1 had an account in Central Bank of India Limited, Sambalpur Branch which his father, namely, Respondent 2 was authorised to operate. It is also an admitted fact that it was from this account that the amount was advanced to the appellant by Respondent 2. It has been given out in the statement of Respondent 2 that when the appellant had approached him for a loan of Rs.7000, he had explicitly told him that he had no money to lend whereupon the appellant had himself suggested to advance the loan from the account of Respondent 1 and it was on his suggestion that Respondent 2 issued the cheque to the appellant which the appellant, admittedly, encashed. This fact has not been controverted by the appellant who did not enter the witness-box to make a statement on oath denying the statement of Defendant (Respondent) 2 that it was at his instance that Respondent 2 had advanced the amount of Rs 7000 to the appellant by issuing a cheque on the account of Defendant (Respondent) 1. Having not entered into the witness-box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of the principles contained in Illustration (g) of Section 114 of the Evidence Act, 1872.”

To the same effect, is the decision of the Apex Court in *Vidhyadhar v. Manikrao* - (1999) 3 SCC 573, wherein again the law has been laid down in the following terms :

“17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbakhsh Singh v. Gurdial Singh*. This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh* and the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh*. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat* also followed the Privy Council decision in *Sardar Gurbakhsh Singh* case. The Allahabad High Court in

Arjun Singh v. Virendra Nath held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box.”

[See also Binapani Paul Vs. Pratima Ghosh and others, 2007(6)SCC 100 (Para 36)].

It is also of some significance to notice that the respondent had produced one witness said to be its part-time Accountant, named Mr. Bipul Shah. We have been taken through his cross-examination; from a perusal whereof, it appears that apart from the fact that he himself is a MSO, he accepted that not only he had no knowledge prior to his joining as part-time Accountant, i.e., December, 2001; he was not even aware of the area of operation of the respondent.

Furthermore, he accepted that the respondent had been charging subscription fee @ Rs.250 to 275 per month on an average basis from its own subscribers. He even was not aware of the number of channels which were being received by the respondent.

His evidence, therefore, is of no value.

It has been brought on record by the petitioner that –

- (i) Pay-channels had been introduced in the year 1995.
- (ii) The number of pay channels had been increased.
- (iii) From 2002 onwards, the broadcasters had been increasing their rates.

For the said purpose, the petitioner in its rejoinder to the reply stated that the total amount payable to different broadcasters came to Rs. 228 per subscriber per month which is in the following terms:-

| | Mar-96 | Mar-97 | Mar-98 | Mar-99 | Mar-00 | Mar-01 | May -02 | Jan -03 |
|--------------------------|--------|--------|--------|--------|--------|--------|---------|---------|
| Local Channels | | | | | | | | 25 |
| B4U Movies | | | | | | | | 09 |
| Ten Sports +FTV | | | | | | | | 15.5 |
| MEN Bouquet | | | 5 | 5 | 10 | 13.25 | 13.25 | 11.5 |
| Set Bouquet | | | | | 8.35 | 16 | 40 | 55 |
| Discovery Bouquet | | | | 5 | 5 | 6.25 | | |
| ESPN/ Star Sports | | | 2.85 | 11.55 | 14.75 | 16 | 24 | 32 |
| Turner Bouquet | | | | | 10.5 | 10.5 | - | - |
| ZEE Package | | 4 | 4 | 4 | 5 | 5 | 42 | 50 |
| Star Package | | 3 | 3.50 | 3.50 | 19.25 | 28.5 | 40.5 | 30 |
| Total | 2.5 | 7 | 15.35 | 31.95 | 72.85 | 95.5 | 119.75 | 228 |

According to the petitioner, the Telecom Regulatory Authority of India (TRAI) in January, 2003 having permitted increase of 7% in the rate, the broadcasters had increased their rate. For the said purpose, PW-1 in his evidence stated—

“It is submitted that after the compiled rate of the TRAI upto January 2003 as aforesaid, the rates have further increased in case of ZEE Package from Rs.50/- to Rs.55/- per subscriber per month from 01st April 2003 and Rs.58.85 from 01st January 2005. ZEE has introduced its IInd Bouquet of Channels from January 2005 at Rs.40/-, Sony (SET Discovery) has introduced its IInd Bouquet at Rs.44/- with effect from 01st April, 2005. Various new

channels have been introduced in pay mode in 2004 itself like Zoom, and other regional channels, etc. Hence the Respondent cannot claim the rates at Rs.100/- that were prevalent in the year 2002.”

We would, however, assume that there had been no contract between the parties with regard to the rate but even in a case where the principle of quasi contract as envisaged under Section 70 of the Indian Contract Act is to be taken into consideration, the Court, shall ensure that at least a reasonable amount is paid to the supplier by the receiver of the goods.

If the subscription amount of Rs. 150/- is not an unreasonable sum and in view of the fact that none of the invoices raised by the petitioner had been denied or disputed (in fact receipt of some invoices have been admitted) and furthermore keeping in view the fact that even the protests made by the group of LCOs show that there had been a uniform increase in the subscription fee across the board, we do not think that the rate of Rs. 150 by way of subscription fee at Bombay is unreasonable.

We may notice that the Supreme Court of India in *Piloo Dhunjishaw Sidhwa v. Municipal Corpn. of the City of Poona* - (1970) 1 SCC 213, held as under:-

“9. The plaintiff is not entitled to maintain a suit for price of the goods relying upon any contractual obligation of the Corporation. But the plaintiff may still maintain his claim for compensation under Section 70 of the Contract Act which provides:

“Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered.”

That is not disputed by the Corporation. The trial court awarded to the plaintiff the invoice value of the goods delivered by him. The learned Judge was of the view that the plaintiff as the sole selling agent of “motor spare

parts” for the manufacturers in the Bombay State, was entitled to the listed price with 12½ per cent thereon because of the increase notified by the manufacturer. In the view of the learned Judge the price for which the plaintiff made out an invoice was “reasonable and proper”. The High Court held that the plaintiff may recover compensation equal to the “fair price” of the goods.”

Coming to the subscriber base, we have noticed hereinbefore that the same has also been increased from time to time, i.e., from 200 to 1200 but having regard to the objection taken, it was brought down to 400 and then to 1000. In para 46 of the affidavit affirmed by the witness of the petitioner, it is stated as under:-

“46. That sometime in December 2005, the Petitioner Company carried out preliminary survey of the Respondent area of operation and has got to know that the Respondent is catering to more than 3,900 subscribers in the prime territories of Worli and Haji Ali areas, in Mumbai namely:-

| Name of the Buildings/ Area | Estimated connections |
|--|------------------------------|
| Madhuli Apartments – 16 Storey building with 51 flats and 4 Bungalows and each flats having at least 2 cable connections. | 110 |
| Eden Hall – 20 Story building with 76 flats and having at least 2 cable connection per flat | 152 |
| Samudra Mahal – 29 Storey Building with 112 flats and each flat has at least 2 cable connections | 224 |
| Geographical Building – 4 Story Building with 28 flats and each flat having 2 cable TV connections | 56 |
| Royal Garden, which comprise of 90 Old tenants shifted in new 6 storey building comprising of 15 flats on each floor and 48 new apartments have been occupied in two new buildings and each is having two cable TV connections | 186 |
| Lotus Court – 6 Storey Building having 52 flats and each flat having at least 2 cable TV connections | 104 |
| NSCI | 36 |
| Sirjan Plaza | 20 |

| | |
|--|-------------|
| Vitesse | 7 |
| Sainath Building – 2 Storey Building | 10 |
| Sea Ocean Co-operative Society | 10 |
| Marine Lines Co-operative Society | 20 |
| Rashid Mansion – Building I & II | 15 |
| Rabia Mansion | 10 |
| Jahaz Mahal | 10 |
| The View Apartments | 20 |
| Bombay Basserie – 6 storey premises | 56 |
| Shiv Sagar Estate – 5 Storey Building having 20 tenements and each having at least 2 cable TV connection | 40 |
| Vallabhai Patel Nagar Zopadpatti – 29/42 & 29/ 44 | 628 |
| Mariamamma Nagar – 29/43, 29/45 & 29/46 | 1056 |
| Raju Nagar (Behind Government Colony) | 28 |
| Government Officers Quarters 29/47 | 936 |
| Rajiv Nagar (Lala College, Annie Besent Road) | 214 |
| Total | 3948 |

That while carrying out the preliminary survey by the Petitioner Company, the Petitioner Company come across with information that the Respondent increased his subscription fees from a Society called the Eden Hall in the year 2005 and have started charging a sum of Rs.386/- per subscriber per month.

That while carrying out the survey, the Petitioner Company had also come across that the one Housing Society by name called Royal Garden, which had about 90 old tenants, which has been shifted in new 6 storey building comprising of 15 flats on each floor. That as per the Development Regulations in Mumbai, if the old depleted buildings have been demolished and the new society is reconstructed then the builders receives certain additional Floor Space Index, which the builders sells to the new occupants. That with the additional floor space became available to the builder; the builder of the Royal Garden built two additional building, with 48 new

apartments and each flat is having at least two cable TV connections. That the Respondent is servicing to the said Royal Garden Society both for the 90 old occupants and new two building having 48 occupants.

That recently the Petitioner Company was handed over an invoice, which was issued by the Respondent to one of the housing society serviced by the Respondent and called Samudra Mahal Co-operative Housing Society in Worli, Mumbai. That the Respondent issued an invoice for the month of July 2005 for 70 connection points at the rate of Rs.315/- per subscriber. That the Respondent in the same issued for the month of July 2005 also charged to the said society for 140 cable TV connections. A copy of the invoice raised by the Respondent to the said Samudra Mahal Co-operative Housing Society may be exhibited as **EXHIBIT PW1/17.**”

A detailed account of the number of subscribers of course on the basis of estimation having regard to the number of apartments, the subscribers base came to 3948. It was furthermore stated that the respondent had been charging a sum of Rs. 386 per subscriber per month.

We have noticed heretofore that first survey was conducted in the year 2003. PW-1, also said so in his evidence in para 25 of his evidence. Surprisingly, the said witness was not cross-examined on the said point. It is now a well-settled principle of

law that subject to just exceptions, it is obligatory on the part of a party to cross-examine a witness on a particular point failing which the same shall be deemed to be admitted.

This Tribunal in Indian Cablenet Company Ltd. Vs. Dum Dum Cable TV Network Pvt. Ltd. [Petition No.151(C) of 2008] disposed of on 18.12.2009, [(2010)Company L.J., 491(TDSAT)] commented as under:

“It is now well-known that a statement made by a witness, subject to just exceptions, if not tested in cross-examination, would be deemed to be admitted.

In S.C. Sarkars’ Commentary on Law Evidence Page 577, it is stated:

“Needless to say, as it is well settled in law, that if witness has not been cross-examined on a point stated in the examination-in-chief, the same remains unchallenged and there is no reason why it should not be accepted.”

[See also Dammu Sreenu Vs.State of A.P. – AIR 2009 SC 2532, Pravin Vs.State of Madhya Pradesh – AIR 2008 SC 1846, Hindustan Steels Ltd. Rourkela Vs. A.K. Roy & Ors. – AIR 1970 SC 1401]

A Division Bench of the Madhya Pradesh High Court in Mohd.Naved Vs. Hindustan Petroleum Corporation & Ors. – 2004(1) MPHT 16, stated the law, thus:

“Needless to say, as it is well settled in law, that if witness has not been cross-examined on a point stated in the examination-in-chief, the same remains unchallenged and there is no reason why it should not be accepted.””

It is furthermore difficult to perceive as to why the respondent even did not comply with the two orders passed by this Tribunal. A party to a lis ordinarily, should disclose all the documents which is in his power or possession. Having regard to the

fact that the petitioner was expressly called upon to disclose the number of subscribers it had and particularly having regard to the fact that according to it he was liable to pay the subscription fee only on the basis of 200 subscriber base, in our opinion, it should not have withheld the best evidence in his possession.

The Supreme Court of India in *Atyam Veerraju v. Pechetti Venkanna* – AIR (1966) SC 629 deprecated such a practice holding as under:-

“The tenancy was granted by the Sanad dated November 10, 1851. Whether or not a permanent tenancy was granted is a question of construction of the Sanad. Only the Sanad could show what interest was granted by it. The most striking feature of this case and the thing which tilts the scales against the defendants is the non-production of this Sanad. The defendants have deliberately withheld this document. We should, therefore, make every presumption against them to their disadvantage consistent with the facts. We hold that the document, if produced, would have shown that the tenancy is not permanent.”

We have noticed heretofore the contentions of Mr.Malhotra that the statement of accounts is not correct. Before, however, we refer to the entries made in the statement of accounts, we may notice that the respondent itself has produced a part of the books of accounts, from a perusal whereof, it would appear that as on 21.12.2001, it has accepted the liability of Rs.1,99,000/- for the period 1.4.01 to 1.12.01. The said statement of accounts is signed by both the parties. On the basis of the said statement itself, the respondent undertook to pay a sum of Rs.41,778/- to be adjusted from the statement of account as on 21.12.01 and furthermore accepted to pay a sum of Rs.40,000/- on 27.1.02 Rs.40,000/- on 21.2.02 and Rs.42,000/- on 25.5.02. Besides, the said accounts show that he has paid a sum of Rs.35,000/- on the said date. Each of the payments made by the respondent is reflected in the statement of accounts filed by the petitioners.

The statement of accounts clearly shows that from 31.3.02 to 1.6.02 bills have been raised @ Rs.120,000, i.e., on the basis of the subscriber base of 1200. The said amount however, has been reduced to Rs.40,000/- for the months of July, 2002, August, 2002, September, 2002, October, 2002, November, 2002, i.e., on 400 subscriber base. The number of subscribers had, thereafter, been raised to 1000 in December, 2002 onwards.

Moreover, from January, 2003, the rate of subscription fee having been increased to Rs.150/- per customer, the bills/invoices had been raised @ Rs.1,50,000/- per month.

We may also deal with the other contentions raised by Mr. Malhotra. According to the learned counsel, there exists a difference of Rs.10 lakhs and odd as the notice being dated 31.3.04 wherein the petitioner demanded a sum of Rs.48,12,582/-, but in its notice/demand as on 12.9.05, the arrears were shown as Rs. 58,39,732/-.

It, however, is not correct to contend that the ledger account was manipulated at a later date to make necessary corrections having regard to the contentions raised by the respondent in its reply. The petitioner has mentioned the said amount in its petition in the following terms:-

“cc).....It is submitted that prior to April 2003, the respondent was liable to pay to the petitioner a sum of Rs.10,27,150/- toward the cable TV feed charges. It is, therefore, submitted by the petitioner that the liabilities amount of the respondent towards the petitioner for the period from April 2003 to September 2005 was Rs.48,12,582/- as stated in the invoice and period prior to April 2003, the respondent was liable to pay to the petitioner was Rs.10,27,150/-. Hence, the respondent's total liability comes to Rs.58,39,723/-.”

We may also notice that the contentions raised in para 5(ii) in the petition have been traversed as under:-

“That the contents of the para 5(bb,cc,dd & ee) of the petition in the form laid out are wrong and denied. The claim of the petitioner is strongly denied.”

We, therefore, are of the considered opinion, particularly having regard to the fact that the respondent had not replied to any of the notices or the demands, that the ledger account cannot be said to have been manipulated by the petitioner. It is also of some significance to notice that PW-1 in para 29 of his cross-examination stated as under:

“29. There is a difference of Rs.10,27,150/- between the letter dated 12.9.2005 and the invoice dated 1.9.2005. The difference has arisen because of the fact that the petitioner has given a write off of Rs.10,27,150/- to the respondent but subsequently he has not cleared that figure and hence it was credited to the account of the respondent. In the account of other operators also such a write off was credited.”

Mr.Malhotra would contend that keeping in view the fact that the parties admittedly had entered into two contemporaneous documents – one in November, 1998 and the second in July, 1999, they were bound by the terms thereof and having regard to the provisions contained in Sections 91 & 92 of the Indian Evidence Act, no oral evidence would be admissible. We do not agree. The petitioner has filed this petition on the basis that upon expiry of the aforementioned agreements, no further agreement in writing had been entered into. If that be so, the question of any oral evidence being adduced, contrary thereto or inconsistent with any document, does not arise.

So far as the counter-claim of the respondent is concerned, a contention has been raised that the parties had been maintaining current account. It is not the case of the respondent that it had been maintaining any account which was mutually open and current. It is furthermore not the case of the respondent that there had been reciprocal demands between the parties.

The parties herein entered into an agreement for supply and receipt of signals. The distribution agreement was entered into by the petitioner not only with the respondent but also with his brother. We have noticed the manner in which the accounts were being maintained by the petitioner. The respondent has not produced any books of accounts to show that any mutual account was being maintained within the meaning of the provisions of Article 1 of the Schedule appended to the Limitation Act, 1963.

It is now well settled that to be mutual, there must be transactions on each side, creating independent obligations on the other and not mutual transactions which create obligations on one side, then when other being merely complete or operational decision of obligation.

The subscription agreement was terminated in 2001. There is nothing on record to show that thereafter, the respondent had been performing any part of its contract. Even no claim has been raised in respect of a sum of Rs.25,000/- to which he was entitled to on a monthly basis. If in December, 2001 the distribution agreement had been terminated, there cannot be any doubt or dispute that the counter claim having been filed in February, 2006 the same is barred by limitation.

The agreement might have been terminated illegally in December, 2001. Illegal termination of the said agreement would not mean that the respondent would be entitled to all the benefits thereunder as if it has all along been and still is in force. Section 14 (b) of the Specific Relief Act, 1963 clearly debars enforcement of a contract, for non-performance of which, compensation in monetary terms would be an adequate relief. The respondent had not adduced any evidence to show as to what damages, if any, it had suffered. -

Thus, taking any view of the matter, we are of the opinion, the respondent cannot said to have proved its counter claim even otherwise.

For the reasons aforementioned, this petition is allowed.

The petitioner is held to be entitled to a decree for a sum of Rs.76,77,184/- towards the principal amount. Interest @ 18% p.a. claimed thereupon, however, in absence of any contract, cannot be allowed. It can be allowed interest throughout @ 12% p.a., past, pendetelite and future.

The counter claim filed by the respondent is dismissed. The respondent shall pay and bear the cost of the petition. The counsel's fee assessed at Rs. 50,000/-.

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

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