

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

Dated 10th March, 2010

Petition No.147(C) of 2009

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M/s The Indian Cable Net Company Ltd.

...Petitioner

Vs.

M/s Linkmen Services Pvt. Ltd. & Anr.

...Respondents

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR. P.K. RASTOGI, MEMBER

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For Petitioner : Mr.Yoginder Handoo,Advocate

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

JUDGMENT

S.B. Sinha

The petitioner is a Multi Service Operator. The respondent No.1 is a local cable operator. The respondent No.2 is also a Multi Service Operator.

The respondent No.1 herein entered into an agreement with the predecessor in interest of the petitioner M/s RPG Network with regard to supply of signals of various pay and free to air channels of various broadcasters to its viewers on or about 27.07.1998.

According to the petitioner the respondent No.1 had not been making payment of the subscription fee regularly and, thus, fell in huge arrears.

The petitioner and the respondent arrived at a settlement in relation thereto. It is recorded in a letter being dated 24.06.2008 addressed by the petitioner to the respondent No.1 in the following terms:

“After taking into account all bills/payments/debit-notes/credit-notes and all associated adjustments, balance outstanding on account of Linkmen Services Pvt. Ltd. as on 31.03.08 works out to Rs.5,86,356/- (Rupees Five lac eighty-six thousand three hundred and fifty-six only).

You are requested to please confirm this balance by signing this letter with your confirmation.

Necessary debit-notes/credit-notes if required for purpose of your audit will be provided by us as and when required by you.”

The balance amount of arrears of dues as mentioned in the said letter was accepted by Shri Partho Banerjee, a director of the respondent No.1.

The statement of account accompanying the said letter also shows a balance of Rs.5,80,356/- as on 01.03.2008. Therein a sum of Rs.2,62,394/- was shown to be the amount paid towards amusement tax.

As the first respondent failed and/or neglected to pay the said dues to the petitioner, a reminder therefor was sent on 11.08.2008. It is stated that the first respondent did not respond thereto.

Yet again on 11.08.2008, the petitioner by a letter addressed to the respondent No.1 stated inter alia as under:

“This has reference to our various follow ups with you in regard to clearance of your dues.

As already informed vide our repeated follow ups Rs.5,86,356/- lies due on your account against our cable tv subscription charges.

Apart from the above dues, kindly refer to our letter 28.07.08 in regard to pole charges in Bidhannagar Municipal Area, wherein we claimed proof/no due certificate from you to which you failed providing us with any feedback.

With no reply from your end we are at an ease to understand that you have no means proving the same and hence has no valid reasons in replying to our letter. We claimed refund of our amount from you immediately. If we find our total dues of Rs.(5,86,356 + Rs.4,92,000/-) Rs.1078356/- is not paid to us immediately, we shall be forced to initiate statutory steps against you.”

In response to the said letter dated 11.08.2008, the first respondent by its letter dated 25.08.2008 stated as under:

“With reference to the balance of Rs.5,86,356/- towards the Cable TV subscription charges which also includes a sum of Rs.3,60,332/- towards the amusement taxes, as per the statement prepared by you. It is also once again

brought to your notice that amusement tax is not payable by us, on the contrary the same is payable by your company, being an MSO, and the same has also been held by a recent judgment passed by the Hon'ble Supreme Court of India as reported in (2005) 3 SCC 711.

In this regard your attention is also drawn to the credit note of Rs.1,66,400/-. Pertaining to the period 07-08 (FY) which was issued by you in favour of us, against returning of STB's but has not been adjusted against the claim as made in the letter under reference. Our accounts reflects an outstanding due of Rs.59,624/- only, as on year ended 31st March, 2008 the details of which are given below:

Details of Deductions to be made from the Outstanding Amount of Rs.5,86,356/- are as follows:

Amusement Tax for 2007-2008	=	Rs.2,62,394/-
Amusement Tax for 2006 – 2007	=	Rs.97,938/-
Total Amusement Tax	=	Rs.3,60,332/-
Credit Note Agst. Return of STB	=	Rs.1,66,400/-
Total Deductible Amount:	=	Rs.5,26,732/-
Net Payable Amount	=	Rs.59,624/-”

The petitioner, however, by a letter dated 04.09.2008 stated as under:

“Further regarding our demand of Rs.5,86,356/- would request you to go through our letter dated 24.06.08 wherein we have stated that Rs.5,86,356/- will be outstanding dues payable by you as on 31.03.08 after adjustments of all

types till that date. As on 31.03.08 outstanding as per our books was much more and after adjustments on all accounts, and considering full and final settlement, this amount was arrived as due from you as on 31.03.08 and the same was accepted by you in writing. Upon reading your above referred letter, rather we are bemused for how a person after receiving so generous discount disown a settlement agreed by himself in writing. Mr.Partha, I would remind you that this record has signature of none other than yours. Now by reopening this closed issue you are making your malafide intention very clear.”

The first respondent, however, did not pay the amount demanded for by the petitioner from it.

It is on the aforementioned premise, this petition has been filed by the petitioner claiming inter alia for the following reliefs:

- “a) an order/decreed directing the respondent to pay a sum of Rs.7,54,406/- to the petitioner.
- b) an order awarding interest on the said amount of Rs.7,54,406/- from 01.04.2008 till the filing of this petition.
- c) an order directing payment of interest @ 18% from the date of the order passed by this Hon’ble Tribunal.”

The respondent in its reply reiterated its stand as contained in its letter dated 11.08.2008.

Both the parties in support of their respective cases have examined one witness each.

RW1, Shri Anamitra Sen in his deposition accepted that the price in regard to the decoder boxes has duly been accounted for.

He furthermore stated:

“I admit the liability to the extent of Rs.3,94,074/- towards the First Respondent.

I have gone through the petition. By seeing these invoices alone it is not possible for me to remember how many of them had not been received and how many of them had been received.

It is true that the petitioner and the Respondent-1 had undergone the process of reconciliation. We have also received the statement annexed with the letter dated 24.06.2008.

The amount of amusement tax of Rs.2,62,394/- was to be deducted from the total amount of Rs.5,86,356/-. Besides that we have paid a sum of Rs.97,938/- towards amusement tax towards 2006-2007 for which we were entitled to get the deduction.”

The core question, which, therefore, arises for our consideration is as to whether the amount of amusement taxes had been taken into consideration in calculating the outstanding dues of Rs.5,86,356/-?

At the outset we may notice that the petitioner itself in paragraph 11 of the petition stated as under:

“11. The petitioner respectfully submits that by the said letter the respondent No.1 sought to unilaterally deduct an amount of Rs.97,938/- towards Amusement Tax for the period 2006-07 as also a sum of Rs.2,62,394/- towards Amusement Tax for the period 2007-08. The petitioner states that both the said sums of Rs.97,938/- and Rs.2,62,394/- have been duly considered and had been deducted from the balance outstanding of the respondent

No.1 at the time of arriving at the settlement as on 31.03.08, as will appear from the statement of accounts for the relevant period.”

To the same effect is the statement made by the witness examined on behalf of the petitioner Shri V.Suresh Kumar.

Mr.Handoo, the learned counsel appearing on behalf of the petitioner, would, however, urge that as per the statement of account as on 30.06.2008 (Annexure P-10), it would appear that the net outstanding amount shown therein being Rs.7,54,406/- credit included the towards given the return of the set top boxes and furthermore it would be evident that it has erroneously been stated in paragraph 11 of the petition that the amount of the amusement tax had been deducted from the balance outstanding of the respondent No.1 in place of ‘having been added’.

According to the learned counsel, having regard to the provision of Sections 91, 92 and 93 of the Indian Evidence Act, no party to a document can raise a plea contrary to and/or inconsistent with the terms of a contract reduced to writing.

Mr.Navin Chawla, the learned counsel appearing on behalf of the respondent, on the other hand, would contend that having regard to the plea raised by the petitioner itself and the evidence adduced, the petitioner cannot be permitted to raise the said contention.

Amusement tax was payable under the provision of West Bengal Entertainment-cum-Amusement Tax Act, 1982.

The Supreme Court of India in *State of West Bengal & Ors. Vs. Purvi Communication (P) Ltd.* – 2005(3) SCC 711 held that such Entertainment Tax is payable by a cable operator, stating:

“36. Therefore, the respondents as a cable operator have direct and proximate nexus with the entertainments provided by them through their cable television network and, as such, they are the taxable person in respect of their gross receipts in relation to any month for providing entertainments to the individual viewers. Therefore, the respondents have a direct and proximate nexus with the entertainments presented to the viewers inasmuch as in terms of the respondent’s agreement vide clause 4(d): “Recording and then retransmission of the signals by the franchisee is not allowed.” That apart, the name of every subscriber having connection with the respondent’s network must be on their records and the franchisee must furnish information of business honestly and completely to the respondents pursuant to clause 4(c) of the said agreement. In the event, any charge received from a subscriber is not paid to the respondent, the franchisee shall pay a sum equivalent to three times of the amount that the franchisee has saved by not paying the requisite amount to the respondents in respect of such subscriber.

37. In our view, the respondents as a cable operator, for the purpose of levy and collection of tax under sub-section (4-a) of Section 4-A of the Act have direct and close nexus with the entertainments made available to the viewer through their cable television network. The performance, film or programmes shown to the viewers through the cable television network come within the meaning of entertainments and therefore within the legislative competence of

the State Legislature under Entry 62 of List II of the Seventh Schedule to the Constitution to make law for the levy and collection of tax on such entertainments.”

Whether the amount of entertainment tax ultimately was to be paid by the petitioner or the respondent No.1 is not a question which arises for our consideration, although we may place on record that it is beyond any controversy that having regard to the decision of the Supreme Court of India, the legal liability to pay the amount of amusement tax would be on the MSO.

If the respondent No.1 has paid, the said amount of amusement tax, whether it was entitled to obtain due credit therefor, or not and whether the same has been deducted from or added to the amount due from the respondent No.1, in our opinion is not a matter which would attract the provisions of Section 91 and 93 of the Indian Evidence Act.

Parties had indisputably arrived at a settlement.

The letter dated 24.06.2008 in which the amount of outstanding dues was recorded does not show that the parties had taken into consideration the amount of payability of one party or the other under the said statute.

The settlement does embody any term of contract. The amount was arrived at upon undergoing the process of reconciliation. The fact as to whether the said amount was payable or not is not in question. What is in question is as to whether in arriving at the said figure the element of amusement tax which is concededly payable by the petitioner had duly been accounted for or not.

In view of its own pleadings, the petitioner must be held to have taken the stand that the amount of amusement tax had been deducted and not added. It is binding on it proprio vigore.

If commission of a mistake is admitted, we fail to understand as to how the provision of Sections 91, 92 and 93 of the Evidence Act would be attracted.

The said provisions could have been taken aid of, provided the parties were at issue on the said question. They are not.

The petitioner has raised an issue, in regard whereto we are of the view that no such contention can be permitted to be raised now.

The said submission of Mr.Handoo, therefore, must be rejected.

However, as the first respondent admitted its liability to the extent of Rs.3,94,074/-, a decree for the said sum must be passed.

Mr.Chawla said that as the respondent even in its correspondences admitted the payability of the said amount, no interest should be directed to be paid. We do not agree. The respondent did not tender the admitted amount to the petitioner. It is not its case that despite tender, the petitioner had refused to accept the same.

Interest is ordinarily granted to a creditor so as to recompense him the amount which he could have earned by investing the same, had it been paid to him in terms of the contract. The respondent admittedly did not do so. It cannot, therefore, escape its liability to pay interest. Moreover, it had even unjustly raised the plea of non-settlement of its dues towards the set top boxes.

The petitioner shall also be entitled to interest @ 18% per annum in terms of the agreement dated 27.07.1998 on and from 01.04.2008 till the date of filing of the petition i.e. 04.06.2009.

It would also be entitled to interest pendete lite and further at the rate of 12% per annum.

The respondent No.1 must also pay and bear the proportionate costs.

Advocate's fee assessed at Rs.50,000/-.

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

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

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(P.K. Rastogi)
Member