

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

**Dated 10<sup>th</sup> March, 2010**

**Petition No.185(C) of 2006  
( M.A. No.23 of 2009)**

Hathway Cable & Datacom Pvt. Ltd. ... Petitioner

Vs.

M/s Vikrant Enterprises ... Respondent

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**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. Meet Malhotra, Advocate  
Mr. Tejveer Singh Bhatia,Advocate

## ORDER

**S.B.Sinha**

The petitioner is a Multi Service Operator (MSO).

It, in this petition has, inter alia, prayed for the following reliefs:

- “(a) Direct the respondent to declare and provide her true list of subscriber base since April, 2002 in order for the petitioner to facilitate the revised upward invoicing accordingly; and/or
- (b) Direct the respondent to pay to the petitioner a sum of Rs.48,70,230/- (Rupees Forty Eight Lakhs Seventy Thousand Two Hundred Thirty Only) and interest @ 18% p.a. from the date of default save and except the amount deposited by the respondent by way of the interim order as prayed by the petitioner; and/or
- (c) Appoint a commissioner or an appropriate audit firm or any other fit and proper person or agency to conduct a survey of the actual number of subscribers of the respondent, connected to the network of the respondent and/or;
- (d) Pending the hearing and final disposal of the petition, restrain the respondent from transferring, encumbering or alienating her rights title and interest in the said cable network and the business or any part

thereof and/or;

(e) Restrain the respondent from switching over to any other Cable TV service provider for availing signal fee for her network without first paying her dues owed to the petitioner and/or.

(f) Pass appropriate orders/directions to the respondent to pay to the petitioner such sum at the prevailing rate based on the actual number of subscriber connected to the network of respondent from such time as this Hon'ble Tribunal may deem fit;"

It is not in dispute that the respondent had been receiving signals from the petitioner.

The parties, however, are at variance as to whether the signals were being supplied from 1998 or from 2001.

According to the petitioner, monthly invoices were being raised on the respondent on the subscriber base of 166. According to the petitioners, the subscriber base by mutual consent was increased to 500 from January, 2003. It is, however, disputed by the respondent.

Furthermore it is contended that as per the "the industry practice", the invoices used to be served on the respondent personally, which is again denied by the respondent.

The petitioner sent five notices upon the respondent, the details whereof are as under:

- (i) Notice dated 14.11.2003 with postal receipt.
- (ii) Reminders dated 17.12.2003, 0.1.2004, 18.03.2004 and 5.5.2004.
- (iii) Notice dated 4.1.2005 with postal receipt.

- (iv) Notice dated 23.09.2005 with postal receipt.
- (v) Notice dated 20.5.2006 with postal receipt.

It is not disputed that no response thereto was made by the respondent. Respondent, however, denies the receipt of the said notices.

It is, furthermore, stated that no payment whatsoever has been made by the respondent towards the supply of signal by the petitioner.

The respondent, however, contends that pursuant to an oral understanding between the parties, that not only no payment was to be made for supply of signals but the petitioner was liable to pay commission to the respondent.

According to it, there were about 500 subscribers in a network known as Mahatma Society. It was said to have been acquired by the respondent. Signals to the subscribers of the said society, however, were disconnected as the members did not agree to pay the enhanced subscription fee.

The petitioner, however, gave direct connection to the subscribers of the said society as a result whereof the respondent suffered losses.

With a view to mitigate the loss of the respondent; the petitioner agreed not to receive any subscription fee from the respondent and further agreed to pay commission to it for procuring other networks.

The respondent has also lodged a counter-claim but no evidence in relation thereto has been adduced.

The Petitioner in support of its case has examined one Deepak Shivale who had been working as Asstt. General Manager in the Petitioner Company. The said witness has categorically stated that the respondent had been obtaining feed signals from the petitioner without making any payment therefor. He has also proved invoices. The said witness has also proved the ledger account.

The respondent has examined one Ms. Prachi Shah.

The business of cable operation in the name of the respondent was started by her in the year 1991. According to her she was also a Director of a company named Vikrant Cable Network Pvt. Limited. The said company allegedly had been looking after the maintenance of the head end of the respondent. It stands admitted that her husband Abhay Tara Shah has filed a suit in the Court of Civil Judge, Pune being Suit No. 831 of 2007 and therein an application for temporary injunction was also filed.

In the said application, it was inter alia stated :

“The Plaintiff No.1 has entered into Agreement with one Company by name Chik Display Services Pvt. Ltd. and the Plaintiff gets signal through the said Company. The Plaintiff is required to pay monthly charges to the said company which are around Rs. 4 lakhs. The Plaintiffs submit that the plaintiff is required to pay Entertainment Tax of Rs. 75,000/- approximately per month. The Plaintiff says that the Plaintiff has 2377 subscribers from whom the Plaintiff is getting monthly charges for providing cable facilities. The Plaintiff in turn gets signal from Chik Display Services Pvt. Ltd., and provides the same to his Subscribers.”

Filing of the said suit and the application for injunction is admitted.

It is also not denied or disputed that initially the number of subscriber was 166. The petitioner's witness stated that by mutual agreement the number of subscribers increased. The basis for such an assertion evidently is issuance of the invoices raised by the petitioner upon the respondent.

From the invoices filed for the period 1.4.2002 to 1.1.2006 (Exhibit PWI/1) it appears that for supply of signals to 166 subscriber the monthly subscription fee was shown to be Rs. 26,560.

The invoices filed by the petitioner have been proved. However, from the invoice dated 2.9.2003 it appears that the subscriber base has been raised on the basis of 500 points which continued till the filing of the petition.

It, furthermore, appears that the amount of subscription fee was also raised to Rs. 130 per month per subscriber from 1.1.2003. The petitioner in the petition inter alia contended that the said invoices were being sent on a regular basis, stating:-

“It is submitted by the Petitioner that the Petitioner has been sending the invoices regularly to the Respondent by hand delivery as per industry practice. It is submitted by the Petitioner that the last invoice sent by the Petitioner to the Respondent was for the month of June 2006, which shows the monthly invoice toward the cable TV feed charges for the month of June 2005 was Rs. 1,12,240/- (Rupees One lakh Twelve thousand Two hundred Forty Only), which includes Service Tax and Education Cess levied by the Central Government under the Central Legislation. It is submitted that the accumulated outstanding amount on the face of the said May 2006 invoice was shown as Rs. 48,70,230/- (Rupees Forty Eight Lakhs Seventy thousand Two hundred Thirty only), which was covered with the final notice dated 20<sup>th</sup> May, 2006. Hereto annexed and marked as ANNEXURE P-10 (Colly) are

some of the copies of the invoices raised by the Petitioner on the Respondent towards the cable TV feed charges and including the last invoice raised by the Petitioner for the month of June 2006.”

Similar statement has also been made in paragraph 7 of its rejoinder. According to the petitioner it was the standard practice of the industry to serve the invoices only by way of hand delivery.

It was however stated that the relationship between the parties being close, no acknowledgement of the receipt of the invoices was taken.

From the record of the case, it appears that a large number of notices and reminders have been served upon the respondent. Each of them was served but despite the same no reply thereto was given. We have noticed heretofore that along with the notice dated 20.05.2006, even the copies of the ledger account were served on the respondent. A copy of the said ledger account has been annexed also with the affidavit of the witness of the petitioner Shri Deepak Shivale.

We have noticed heretofore that at no point of time, any payment was made by the respondent prior to filing of the petition. From the order sheet dated 26<sup>th</sup> November, 2006, it appears that attention of this Tribunal was drawn to the fact that no amount had been paid to the petitioner, although supply of signal had continued. However, it appears that some payments have been made after filing of this petition.

The witness of the respondent in her evidence accepted filing of the aforementioned suit. She had also raised a plea that the petitioner had agreed to pay the Mahatma Society upon mitigating the loss incurred by it, by not charging any subscription

fee from it, stating:

“9. I state that the respondent acquired another existing and operational network providing signals to Mahatma Society located in Kothrud, Pune at a substantial amount. The total connections in the said network were approximately 500 points and it was agreed by the petitioner that they would invoice the said network only for 150 points. Copy of letter dated 18.10.2006 issued by Ajit Bhide, owner of cable network at Mahatma Society stating that the said network was sold to the respondent is exhibited herewith as **Exhibit R/3**.

10. I state that respondent after taking over the said Mahatma Society increased the rates for its subscribers in order to recover its investment costs. However, the residents of the society did not agree to pay the revised subscription amount and as a result I was constrained to disconnect the entire society.

11. I state that while I was in the stage of negotiating with the members of that society, the petitioner without any information or without taking the consent of the respondent, connected Mahatma Society directly some time in October 2001. That as a result of the same, the negotiation talks between the residents of the Society and the respondent broke down and the respondent lost the entire society having 500 points. The loss to the respondent was not only limited to the monthly 500 points but also involved a huge financial loss as the network was purchased by the respondent for a substantial amount on the expectation of recovering the investment through the monthly subscription from the society itself.

12. I state and submit that the respondent took up the issue of Mahatma Society with the petitioner and requested the petitioner to disconnect the network and to further return the network to the respondent.

13. I state that petitioner assured the respondent that the network would be returned to the respondent as soon as they obtain approval from their concerned officers. I state and submit that I was further assured by petitioner would mitigate the loss incurred by the respondent by not charging any amount from the Erandwane unit of the respondent. In other words, the petitioner agreed to set off the amount payable by the respondent against Mahatma Society. I state and submit that it was for this reason that the petitioner never invoiced the Eranwane unit. Copy of letter dated 21.11.2001 of the respondent duly received by the petitioner is exhibited herewith as **Exhibit R/4.**”

From the aforementioned deposition of the witness of the respondent it is evident that although she has made denial of the receipt of the invoices but she agreed that the invoices were being raised in respect of the Mahatma Society. The receipt of signal being not disputed and evidently the respondent having been receiving the said invoices, the defence of the respondent that although there were 500 subscribers in respect of the said Mahatma Society and the petitioner agreed not to charge the respondent for more than 150 points was required to be proved by it. The respondent raised a specific defence. The onus of proof was on the respondent to prove the same. It failed to discharge its onus.

The question is whether the said story can be believed. It may be placed on record that in support of its claim, the respondent has not filed any documentary proof. It did not have any as has categorically been accepted by Ms. Shah in her evidence.

In her deposition, although she denied receipt of the invoices and notices, she however, admitted that the addresses mentioned in one of the letters dated 13.01.2001 was correct. The presumption of service of the said notice may, therefore, be raised. In paragraph 5 of her affidavit she stated as under:-

“5. I state that the petitioner has never raised any invoice on me as alleged, which is apparent as the petitioner has not even annexed one such invoice which bears any signatures, receipt or acknowledgement from me. I state that the petitioner has mischievously stated that the invoices were hand delivered, if it is delivered ought to have borne the signatures of me.”

In view of her aforementioned statement, the following question was asked to her

“Have you any documentary proof to substantiate your statement that you did not receive any invoice?”

She however accepted that there is no document to prove the same. She accepted that books of accounts were being maintained. In terms of the order of this Tribunal of petition she had been making payments to the petitioner. She neither produced any books of account nor explained before this Tribunal as to why she had been making payments to the Petitioner from February 2007; although according to her not only no amount was payable for supply of signal but infact she was to receive a huge amount from the petitioner.

The defence of the respondent, thus, cannot be accepted for more than one reason. Firstly, because no evidence worth the name has been brought on the record to show as to what type of arrangement the parties had entered into. Secondly, because the respondent does not say as to what are the terms of arrangement entered into by the parties including the amount which was allegedly payable by the Petitioner to it.

The respondent has taken a positive defence. It was for it to prove the same. Keeping in view the fact that the parties have accepted that the respondent had been taking signals from the Petitioner, wherefor an agreement had been entered into and thus a concluded contract had been arrived at, be it on the basis of an oral agreement or otherwise, the same in absence of any acceptable defence must be held to have been acted upon.

It may be true that no payment has ever been demanded since the inception of the agreement, i.e. in the year 2001. The conduct of the Petitioner although has not been explained as ordinarily a person carrying on business in transmission of signal would raise demands, but the same in a situation of this nature, in our considered opinion, can not by itself a ground for rejecting the petition in toto in view of the fact that a substantive part of the petitioner's claim has been admitted.

This Tribunal, has to proceed on the basis that the respondent has accepted not only the receipt of signal but also the transmission thereof to the ultimate consumers.

Our attention has been drawn to the evidence of the witness examined on behalf of the Petitioner by Mr.Malhotra to contend that the witness of the petitioner could not prove the agreement. Keeping in view the fact that such an agreement must

be held to have been entered into by necessary implication in view of the conduct of the parties, it matters little whether the aforementioned Deepak Shavale was the person in whose presence the respondent had entered into the agreement or not. It also matters little as to whether the receipt of the invoices had been insisted upon or not. Before us, not only the invoices have been produced, the statement of accounts have also been produced. No discrepancy has at all been shown in regard to the maintenance thereof. It is also not a case whether the petitioner had filed a petition for recovery of a huge amount only on the basis of the ledger account. Mr. Mehta would contend that from the evidence of the witness examined on behalf of the respondent, as it would appear that no invoice was received, no credence to such a statement can be given as the witness examined on behalf of the Petitioner categorically stated that all the invoices were hand delivered.

Be that as it may, we have noticed heretofore that at least in respect of Mahtma Society, which the respondent is said to have taken over, invoices were being raised. If that be so, it is difficult to accept that the respondent was not aware of raising of the invoices by the Petitioner. Furthermore had the arrangement by and between the parties hereto been not correct, there was absolutely no reason as to why the respondent despite service of a large number of notices and reminders would not respond thereto. The evidence on record and in particular the admission made by Ms. Shah in her cross-examination would show the number of subscribers. In the application of injunction filed by the respondent before the civil court, it was averred:

“The Plaintiff No.1 has entered into Agreement with one Company by name Chik Display Services Pvt. Ltd. and the Plaintiff gets signal through the said Company. The Plaintiff is required to pay monthly charges to the said company which are around Rs. 4 lakhs. The Plaintiffs submit that the plaintiff is required to pay Entertainment Tax of Rs. 75,000/- approximately per month. The Plaintiff says that the Plaintiff has 2377 subscribers from whom the

Plaintiff is getting monthly charges for providing cable facilities. The Plaintiff in turn gets signal from Chik Display Services Pvt. Ltd., and provides the same to his Subscribers.”

From a perusal of page 164 of the paper-book it would appear that the persons named therein were the subscribers of the respondent. The statements made in Exhibit R-2 is the document on which respondent relied upon. It's a pleading in a suit. If the respondent had as far back as in 2001 had 2377 subscribers, we fail to see any reason as to why the bills raised by the petitioner for 500 subscribers would be held to be unreasonable and/or unrealistic. Furthermore a complete ledger account had been sent to the respondent alongwith the legal notices dated 20<sup>th</sup> May 2006. Even at that point of time the respondent could have objected thereto.

The conduct of the respondent in this behalf is of some significance.

It had preferred a counter-claim. No evidence in support thereof has been adduced.

The basis of the defence raised in the petition and the claim made in the counter-claim, there was absolutely no reason as to why no material was brought on record in support thereof.

The petition and the counter-claim were to be heard together, thus, it is difficult to accept a plea raised by the learned counsel that the respondent be permitted to lead separate evidence in support thereof. Even such a contention was not raised during oral arguments, only in the written submissions, such a plea was raised.

We have noticed heretobefore that the defence raised in the petition by the respondent is not raised in the counter-claim.

We, therefore, have no hesitation to reject the pleas raised by the respondent herein.

We are therefore, of the opinion that the petitioner must be held to have proved its case.

The claim of the petitioner in regard to demand of the arrears of the subscription fees, however, is from the year 2001.

This petition has been filed on 10<sup>th</sup> July, 2006. Mr. Mehta would contend that having regard to the fact that the account was a continuous one, the suit is not bared by limitation. We don't agree.

Article 1 of the Schedule appended to the Limitation Act 1963 reads as under:-

	<b>Description of suit</b>	<b>Period of limitation</b>	<b>Time from which period begins to run.</b>
1	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last admitted or proved is entered in the account; such year to be computed as in the account.

In order to attract Article 1 of the Limitation Act 1963 two conditions are required to be fulfilled, namely (1) there must be mutual, open and current account between the parties; and (2) there also must be reciprocity of demands. If the two conditions are not satisfied Article 1 does not apply.

From a bare perusal of the aforementioned provision, it is evident that for the purpose of attracting the same, the accounts must not only be a continuous one but also a mutual and open one. In that view of the matter Article 1 of the Limitation Act cannot be said to have any application to the facts of the present case.

The Petitioner would, thus, be entitled to a decree only for a period of 3 years i.e. from 11<sup>th</sup> July, 2003 to 10<sup>th</sup> July 2006. As during pendency of this petition also the petitioner has supplied the signals to the respondent, in our opinion, petitioner shall also be entitled to the charges for the period during which signal was supplied at the same rate subject to of course to adjustment of any amount which has been paid.

The petitioner is also entitled to interest on the amount due @ 12% from the aforementioned date till the date of actual payment. The respondent shall also pay and bear the costs of this petition. Advocate's fee assessed at Rs.50,000/-.

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

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