

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

Dated 20th May, 2010

Petition No.17(C) of 2009

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Amogh Broadband Services Ltd.

... Petitioner

Vs.

Basaveshwara Nagar Cable Network Pvt Ltd

... Respondent

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BEFORE:

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

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

For
Petitioner : Mr.Arun Kathpalia, Advocate
Mr. Vibhav Srivastava, Advocate

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

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ORDER

S.B. Sinha

The petitioner is a multi system operator (MSO). It has filed this petition inter alia for recovery of a sum of Rs. 44,35,991/- from the respondent herein on the premise that a sum of Rs.29,76,571/- is owing and due from it towards arrears of the subscription charges and a sum of Rs.14,59,420/- towards the charges of Set Top Boxes supplied by it as in December, 2008.

It is not in dispute that the respondent had migrated to the network of another on or about 20.04.2009.

The respondent is a consortium of a local cable operators, although it is a limited liability company registered and incorporated under the Indian Companies Act, 1956. According to the petitioner, they entered into a subscription agreement some time in the year 2006. The said agreement was an oral one, in terms whereof a sum of Rs. 3 lacs was payable towards monthly subscription charges.

The respondent, however, contends that some time in April, 2008, the parties herein had entered into an arrangement in terms whereof the subscription fee became payable was Rs. 1,50,000/- per month with retrospective effect from January, 2008.

The respondent, moreover, in its reply inter alia contended –

- (i) The petitioner had never issued or served any invoice on it.
- (ii) No subscription agreement in writing has been entered into by and between the parties herein and
- (iii) The petitioner has supplied merely 500 Set Top Boxes claimed to have been supplied by it and that too @ Rs. 339/- per STB as opposed to the claim of the petitioner @ Rs. 500/- to Rs.1000/-.

In view of the aforementioned rival contentions of the parties, the principal questions which arise for consideration of this Tribunal are:-

- (1) What is the quantum of subscription fee payable by the respondent on and from 01.01.2008?
- (2) Whether the invoices had been raised and served by the respondent on the petitioner; and

(3) Whether the claim of the petitioner towards the price of the STBs is correct.

Both the parties, in support of their respective contentions, have filed their respective statements of account.

From the statement of account filed by the respondent, it would appear no dispute has been raised prior to 1.1.08. For the months of December, 2007 as also November, 2007, a sum of Rs.3,47,112/- was payable towards monthly subscription fee. It is also not in controversy that whereas the amount of subscription fee payable was Rs.3 lacs per month, a sum of Rs.47,112/- was payable towards Entertainment and Service Tax. The respondent had made payment of the aforementioned amount at the aforementioned rate in the months of November, 2007 and December, 2007. It, however, appears that in January, 2008, a sum of Rs. 1,50,001/- which allegedly was agreed upon by the parties hereto towards the subscription fee for the month of January, 2008 became payable. According to the respondent itself, it paid a sum of Rs. 1 lac on or about 28.1.08. Another sum of Rs.1 lac was paid on 12.2.08 and another sum of Rs. 1,47,112/- in February, 2008. Thus, for the month of January, 2008, a total sum of Rs.3,47,112/- had been paid. So far as the subscription fee for the month of February, 2008 is concerned, it is evident that the respondent has paid a sum of Rs. 1 lac on 5.3.08, a sum of Rs.1 lac on 27.3.08 and a sum of Rs.2,47,112/- on 31.3.08. Thus, even for the month of February, 2008, a sum of Rs.4,47,112/- was paid which is Rs. 1 lac over and above the subscription fee payable for the year 2007-08. It is difficult to conceive as to why the respondent had for the months of January and February, 2008 paid a subscription fee which more or less tallies with the demand made by the petitioner.

Another aspect of the matter must also be noticed. The respondent itself by a letter dated 27.2.08 addressed to the petitioner stated as under:-

“Dear Sir,

Sub: Application for amendment of Form 52.

We Basaveshwarnagar Cable Network Pvt. Ltd. are a consortium of Cable Operators details attached in Annexure-1.

We are sourcing our cable operating signal through your company and also making payment to you the entertainment taxes as per your instruction on behalf of all our cable operators.

Hence, we request you to kindly incorporate the names of our Cable Operators in Form 52 as per the Annexure-1 attached herewith and oblige for the year 2006-07 & 2007-08.”

It enclosed with the said letter a statement which inter alia contains the following columns:-

“Operators’ Name **PC and Entertainment Tax.”**

In a tabulated chart, the names of about 22 LCOs had been enclosed as also the total number of subscribers of all of them. The aggregate of the total amount payable by the LCO comes to Rs. 2,99,988/-, i.e., almost Rs. 3 lacs per month. So far as the Entertainment Tax is concerned, the amount, which, required to be paid by the LCOs separately, had also been mentioned. The amount deposited or payable towards the same by each of the LCOs is 6% of the amount paid by each of them.

It is also not in dispute that the petitioner herein had been depositing the amount of Entertainment Tax on a consolidated basis but by reason of the aforementioned letter dated 27.2.08, the respondent asked the petitioner herein to segregate the amount of Entertainment Tax payable by each of the 22 LCOs separately.

It is also of some significance to notice that the said letter dated 27.2.08 talks of payment of Entertainment Tax in respect of the Financial Years 2006-07 and 2007-08, i.e., up to 31.3.08. If the parties had already entered into a financial arrangement at the end of the Financial Year, in our opinion, it is difficult to believe that the respondent would have asked the petitioner to segregate the amount of Entertainment Tax payable by each of the cable operators for both the years as it is not in dispute that in terms of Section 4(g) of the Karnataka Entertainment Tax Act, the same was payable on the amount of tax calculated.

This fact has also been admitted by the witness examined on behalf of the respondent, namely, Shri Shashindra Hegde. It is, therefore, difficult to believe that any arrangement was entered into by and between the parties herein in terms whereof, the subscription fee was brought down from Rs. 3 lacs per month exclusive of taxes to Rs. 1 lac per month exclusive of taxes. Some reasons must exist for down-gradation of the subscriber base. It is in that context the significance of the respondent being a consortium of LCOs assumes importance. If a consortium of LCOs had been taking signals from the petitioner, there could have been actually no reason why they would have migrated to any other network. Even if they migrate from each other, the total of the subscriber base of consortium shall remain the same from the point of view of the petitioner. **(Indisputably, the Entertainment Tax was payable @ 6% per annum in terms of Section 4(g) of the Karnataka Entertainment Tax Act.)**

Mr. Navin Chawla, the learned counsel appearing on behalf of the respondent, would, however, contend that the very fact that the petitioner has failed to prove service of the invoice would clearly go to show that it has failed to prove that subscription fee payable to the petitioner by the respondent was Rs. 3 lacs per month. Mr. Chawla urged that the petitioner in support of its case has examined only an Accountant namely Shri Sanganna B Biradar who on his own showing had no knowledge about the transactions on the personal basis and deposed only on the basis of the document on record. The learned counsel would further

urge that there is absolutely no reason as to why the statement of account filed by the petitioner along with the Petition starts from 1.4.08 which proves that the respondent was not admittedly in arrears till March, 2008. According to the learned counsel, having regard to the fact that a sum of Rs.6,74,119/- had been shown as opening balance in the same statement of account although PW-1 has categorically admitted that there was no arrears payable by the respondent up to March, 2008 itself would go to show that the claim of the petitioner is not correct.

In this case, the relationship between the parties is not in dispute. As noticed hereinbefore, the respondent has not denied or disputed that the monthly subscription fee payable by it to the petitioner was Rs.3 lacs per month. The law presumes that the terms of contract particularly when it is an oral one, would have continued unless contrary is shown. For the purpose of showing that a new arrangement has been entered into by and between the parties from April, 2008 and that too, with retrospective effect, no material has been brought on record far less any correspondence or minutes of any meeting or any evidence of migration of any operator from the network of the respondent. If there was any novation of the contract, it was for the respondent to prove the same. If a new arrangement was entered into by and between the parties herein or any occasion arose for reduction of any subscription amount for down-gradation of the subscriber base or otherwise, it was a matter which was within the special knowledge of the LCOs. Furthermore, the respondent being a consortium of the LCOs, in our considered opinion, it was obligatory on its part to show as to what extent each of them had lost the subscriber base to an LCO outside the consortium.

In this view of the matter, we are of the opinion that the question as to whether any invoice was being raised on regular basis or the same had been served or not, loses all significance.

However, as the learned counsel for the parties had referred to certain documents in this behalf, we may notice the same. Our attention has been drawn to certain documents (at pages 27, 28 and 29) being dated 15.11.2008, 26.11.2008 and 08.01.2009.

The petitioner by reason of the aforementioned letter dated 15.11.08, demanded a sum of Rs. 44,35,991/-, no break-up figure for the said amount, however, was furnished. The respondent, by its letter dated 26.11.08, did not say that the said amount was not owing and due to the petitioner. It merely asked for the break-up of the amount towards pay channel and STBs. Further, the respondent being not aware of the amount having been claimed by the petitioner towards the pay channels, it could have said so, keeping in view the fact that an excess amount had been cleared by it relying on or on the basis of the subscription fee of Rs.150001/- per month which included the tax element also. It is proved that the petitioner in its letter dated 8.1.09 also did not clearly state as to whether the invoices had been sent by it earlier. The said letter states, thus –

“We regret to inform you that inspite of sending you the statement of accounts and requesting and reminding you several times you have till date not made your payments. Since you have conveniently failed and neglected to pay the outstanding feed charges, we once again enclose your statement of accounts and the invoices as requested by you in your letter dated 26.11.2008 for the aforesaid amount. You may please note that we have supplied 2029 STBs to you as on 31.12.2008, for which you have not made the payments.”

We will assume that the copies of the invoices had been sent for the first time but a bare perusal of the said letter would clearly go to show that the statement of account must have been furnished earlier as the same had been sent once again. It is on the aforementioned premise it is also difficult to accept the submission of Mr. Chawla that as in the petition, the rate of subscription fee had not been mentioned, nor the statement of account mentions the same, we should ignore all the documents

filed by the petitioner. The respondent, it will bear repetition to state, had set up a case which was within its special knowledge. Indisputably, the burden of proof thereof was on it. In its reply, the respondent also did not state as to with whom the meeting was held. Who had agreed for reduction of the amount and why the same was not reduced in writing, particularly when the same was being given a retrospective effect and retrospective operation remain disclosed.

How the parties were to settle their accounts and particularly, the amount of taxes payable by the petitioner for the amount which had been collected by the LCOs was required to be stated specifically.

We, therefore, are of the opinion that the defence of the respondent is wholly unacceptable. We must, however, notice that during the pendency of this petition, pursuant to the order passed by this Tribunal, the respondent has made payments of Rs.6,62,524/-.

It shows that till December, 2008, a sum of Rs. 15,68,216/- was payable by the respondent to the petitioner.

So far as the claims of the petitioner towards STBs are concerned, there is no evidence in support of the contention that 2029 STBs had been supplied to the respondent. The petitioner has furthermore failed to prove the rate in respect of the said STBs. The onus of proof in respect thereof was on the petitioner. It has failed to discharge the same. We, therefore, have no other option but to hold that the petitioner, in view of the admission of the respondent, has supplied only 515 STBs @ Rs. 399/- per STB.

Before us, Mr.Chawla has specifically stated that the respondent is ready and willing to return the same to the petitioner on payment of Rs. 399/- per STB. The petitioner is given an option to do so within a period of four weeks from date, failing which, it will be open to the respondent either to appropriate the same or dispose the same, if it so wishes.

The petition, therefore, is allowed in part and to the extent mentioned hereinbefore. The petitioner is entitled to no costs. However, it would be entitled to interest @ 12% p.a. on the decretal amount throughout.

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

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(G. D. Gaiha)
Member