

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

DATED 28th MAY 2010

**Petition No.29(C) of 2008
(MA No.201 of 2008)**

Eureka Cable TV Network
Versus
Valric Cable & Anr.

... Petitioner

...Respondents

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BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G..D.GAIHA, MEMBER
HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner	: Mr. Vineet Bhagat Ms. Neha Jain, Advocate
For Respondent No.1	: Mr. Jai Prakash Malviya, Advocate Mr. Sumit Gupta, Advocate
For Respondent No.2	: Mr. Tejveer Singh Bhatia, Advocate

ORDER

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S.B. Sinha

Petitioner has filed this petition inter alia for recovery of a sum of Rs. 6,14,167 against the respondent No. 1 inter alia on the premise that it had failed and/or neglected to pay the subscription fee @ Rs. 48,382 per month from January, 2007.

The said amount of subscription charges was inclusive of Service and Education tax.

According to the petitioner, the monthly subscription fee was increased to Rs. 59,200 by mutual agreement which would appear from the monthly invoices and the postal receipts from August, 2007 to January, 2008. It has, furthermore been contended that a sum of Rs. 52,240 was outstanding from the respondent as on 01.01.2008.

The petitioner's further contention is that the respondent is also liable to pay an amount of Rs. 91765 towards materials/equipments supplied to it.

The petitioner contends that it had made several demands by letters dated 23.09.2007, 3.10.2007, 7.1.2008 but the respondent despite the same has failed to clear off the arrears. The petitioner has also prayed for an interim relief restraining the respondent from joining any other network without clearing the outstandings of the petitioner.

The defence of the respondent as it appears from the reply to the petition filed by it, is as under : -

"In January 2007, when Shri Victor Farnandes started taking signals from M/s. Eureka Cable TV Network, M/s. Eureka Cable TV Network raised an invoice of Rs. 48,382/- which was promptly on request and assurance from the Petitioner that the things would be settled later on the same agreed terms paid by Shri Victor Farnandes but with an objection regarding high charges, and therefore Shri Jack Gonsalves agreed to give discounts to Shri Victor Farnandes and Shri Victor Farnandes was liable to pay based on the collection from the subscriber after retaining the distribution margin and thereafter it was agreed that Shri Victor Farnandes is liable to pay only Rs. 25,000/- per month as subscription charges and therefore excess amount paid for January subscription over and above Rs. 25,000/- shall be adjusted towards the subscription for the subsequent months. Accordingly as per the understanding with the Petitioner herein the Petitioner has refused to record this understanding in writing and had also refused to enter into an Interconnection Agreement and Shri Victor Farnandes paid the following amounts from January 2007 till July 2007 to the Petitioner herein :-

Subscription for the month of	Amount (Rs.)
1. January 2007	48,382/-
2. February 2007	35,000/-
3. March 2007	13,000/-
4. April 2007	20,000/-
5. May 2007	25,000/-

6. June 2007	30,000/-
7. July 2007	N I L"

Indisputably, the petitioner has transferred its network in favour of Mr. Cosmos J. Gonzalvis, authorized representative of Masters Cable Network. On the said premise, the respondent No. 2 was impleaded as a party in this proceeding in terms of an order dated 23rd February, 2009. The respondent No. 2, however, contended that as it had been not taking supply of any signal from the petitioner, it was not liable to pay any amount to it as alleged or at all. Reference in this behalf was made to paragraph 8 of the said agreement dated 20th July, 2007, which reads as under :-

"8. The party of the second part, the purchaser shall not be liable for any liabilities incurred by the party of the first part, it being specifically agreed and understood that the party of the first part shall discharge any such liabilities."

The petitioner in support of its case has examined Shri Cosmos J. Gonzalvis; whereas the respondent has examined one Shri Gergory Fernandis. The respondent No. 2 has not examined any witness in support of its case.

We may notice that a statement of claim against the respondent herein by Channel III Entertainment has been placed before us which has been marked as Exhibits A to A/5. The statement of accounts in relation to the

period May 2003 and December 2006 have also been brought on record.

During pendency of this proceeding, a meeting was held by and between the representatives of the petitioner and the respondent No. 2 on or about 2.7.2009 which was given a retrospective effect from 1st August, 2007.

The petitioner relying on or on the basis of the said minutes of the meeting filed a claim against the respondent No. 2 also @ Rs. 40,000 per month from the said date.

The said minutes of meetings read is as under:-

“The meeting was held on 2nd of July 2009 at 9.00 am in the office of Univision at comunadade Ghor Mapusa.

The following matter was discussed.

The input charges to be paid on behalf of Valric Cable Network Siolim.

Master Cable Network had purchased (Valric cable network) a sub imputers of Eureka cable T.V. Network, operating at Siolim, Bardez, and Goa. The input charges were not decided between Master Cable network and Eureka cable T.V. Network. Master Cable network was paying a sum of Rs. 30,000/- as input charges on account; to the head end that is UNIVISION from Mapusa with effect from 01.08.2007.

Mr. Michael once again informed Jack from Eureka cable T.V. Network that on purchasing of Valric cable of Siolim, Mr. Victor Fernandes proprietor of Valric cable told Master Cable to continue paying Rs. 30,000/- as monthly input charges.

Mr. Jack clarified that he was invoicing Valric cable for approximately Rs. 49,000/- per month, and wanted the same amount from Master Cable network. To that, Michael replied that on actual collection of subscription, the monthly collection, collected was Rs. 27,000/- approximately.

After discussing and negotiating both the parties came to a mutual compromising figure of Rs. 40,000/- per month. So Master Cable net work has to account for 40,000/- per month payable to UNIVISION and in turn Eureka cable T.V. network has to pay Rs. 40,000/- less to Univision.

It is however, not in dispute that although the petitioner has deposited court fees, on the said claim but did not amend the petition and, thus, no prayer has been made in the prayer portion of the petition for recovery of the said amount. In that view of the matter, the petitioner can not be granted any relief on that basis.

It furthermore appears from the said minutes of the meeting that the same does not bear the signature of the petitioner. In terms of the said minutes of the meeting, the petitioner was also obligated to perform its part of contract. Indisputably, it did not do so. We, therefore, are of the opinion that no relief can be granted to the petitioner in respect of the aforementioned claim against the respondent No. 2.

In *Shibcharan Das Vs. Gulabchand Chhotey Lal* reported in AIR 1936 AIR at 157, it has been held as under :-

“Negotiations were being conducted with a view to settlement, and that being so, we are bound to hold that these negotiations were being conducted without prejudice. In such circumstances it is not open for one of the parties to give evidence of an admission made by another. If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to take something less than what he later claims he is legally entitled, such must not be used against him; otherwise persons could not make offers during negotiations with a view to a settlement.”

We may furthermore notice that in *Sri Bauribandhu Mohanty & Anr. Vs. Sri Suresh Chandra Mohanty & Ors.* – AIR 1992 Orissa 136, a learned single judge of the Orissa High Court held as under:

“ From this it follows that where the compromise is not binding on the parties, any recital is of no much value as evidence. The parties are often willing to make admissions for the purpose of affecting a compromise to which it would be unfair to hold them if the compromise falls through.”

The said decisions are authorities, authentic for the proposition that a settlement which has not fructified cannot be enforced in a court of law.

One of the contentions raised by the first respondent herein is that it having ceased to be a cable operator, this petition is not maintainable.

This plea has been raised by the respondent no. 1 in its reply as a preliminary objection. We, however, are not in a position to accept the said submission.

It had admittedly availed the services of the petitioner up to July, 2007. It is also not in dispute that the liability of the respondent no. 2, if any, in terms of agreement for sale dated 20.7.07 is on the respondent no. 2.

Sections 14 and 14(A) of the TRAI Act, 1997 read thus:-

“14. Establishment of Appellate Tribunal.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to –

- (a) adjudicate any dispute—
 - (i) between a licensor and a licensee;
 - (ii) between two or more service providers;
 - (iii) between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to—

- (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);
 - (B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);
 - (C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act 1885 (13 of 1885);
- (b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

14A. Application for settlement of disputes and appeals to Appellate Tribunal.—(1) The Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of section 14.

(2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central

Government or the State Government or the local authority or the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an application under sub-section (1) or an appeal under sub-section (2), the Appellate Tribunal may, after giving the parties to the dispute or the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the dispute or the appeal and to the Authority, as the case may be.

(6) The application made under sub-section (1) or the appeal preferred under sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application or appeal finally within ninety days from the date of receipt of application or appeal, as the case may be:

Provided that where any such application or appeal could not be disposed of within the said period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the application or appeal within that period.

(7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness, of any dispute made in any application under sub-section (1), or of any direction or order or decision of the

Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to deposing of such application or appeal and make such orders as it thinks fit.”

It is now a well settled principle of law that subject to consideration of subsequent events, the issues raised in a petition would have to be determined as on the date of filing thereof. The petitioner has filed this application on or about 21.2.08. It had, as noticed hereinbefore, has prayed for a decree for a sum of Rs.6,14,167 up to the period January, 2008. A bare perusal of the provision of Section 14 of the Act would clearly go to show that the period for which the outstanding has been claimed is for the period during which the respondent no. 1 admittedly was a MSO. If that be so, only because he has allegedly ceased to be so at a later date, the same would not mean that this petition would not be maintainable.

Our attention has been drawn to a decision of this Tribunal dated 31.8.05 in P.B. Enterprises Vs. World View wherein it was held as under:-

“8.In Prayer (iii), the petitioner has sought for a direction to Respondent No.1 to pay him an amount of 1,67,768/- (Rupees One Lakh Sixty Seven Thousand Seven Hundred Sixty Eight Only) which according to the petitioner is due to it from the 1 respondent towards the arrears of subscription. Petitioner has annexed a statement as Annexure- I with the petition giving the particulars of dues and has sought for pendente lite as well as future interest at 18% per annum till the date of hearing.

10. A perusal of the averments relating to this prayer in the petition shows that this claim is made based on an assumption that there is a subsisting relationship between the petitioner and the 1st respondent as service providers. However, from the averment found in the petition itself, it is seen that there is an admission that even before this petition was filed the 1st respondent has ceased to take signals from the petitioner and the business relationship between the parties has severed.”

A bare perusal of the aforementioned paragraph would clearly go to show that in that case an admission had been made that even before filing of the petition, the respondent has ceased to take signals from the petitioner.

We have indicated hereinbefore that according to the petitioner, the relationship continued as the first respondent or for that matter, the second respondent had not served notice in terms of the extant regulations. Unfortunately, this aspect of the matter was not brought to the notice of the Tribunal.

Furthermore, having regard to the provisions contained in Section 15 of the Act, the jurisdiction of the Civil Court is barred. A cause of action as is well-known, constitutes a bundle of facts. A suit in a Civil Court and/or a petition before this Tribunal would be entertained having regard to the cause of action disclosed in the plaint/petition. If a major part of cause of action arises for determination of the Tribunal; this Civil Court's jurisdictions being barred, there cannot, in our opinion, be any doubt whatsoever that such a petition would be maintainable.

Moreover, the Supreme Court of India in UoI Vs.Tata Teleservices Ltd, 2007 Vol.IV or VI SCC 656, has gone to the extent of opining that the jurisdiction of this Tribunal is so wide that a counter-claim would be maintainable, even if the parties had not entered into an agreement in writing.

The decision of the Supreme Court of India in Tata Teleservices (Supra) is binding on us.

So far as the submissions of Mr. Malviya, the learned counsel appearing on behalf of the first respondent, that the petitioner has not proved service of notice is concerned, we may place on record that the petitioner has placed before us sufficient evidence to show that invoices as also the notice were despatched at the correct address of the respondent.

It is, therefore, not in dispute that a presumption can be raised in favour of service of the said invoices and/or correspondences sent at a correct address of the respondent. The respondent no. 1 filed evidence of its witness, Shri Victor Fernandes, wherein originally it was stated that the notice and the invoice had not been served. However, it appears that on or about 9th February, the respondent no.1 has filed another affidavit, the verification portion whereof reads as under:-

“I Victor Fernandes, S/o Shri Damasceno Xavier Fernandes, R/o H. No. 1236, Bamon Vaddo Siolim, Bardez, Goa – 403517 presently at New Delhi, aged about 42 years occupation – business do hereby verify that the contents of the paras 1 to 6 are true to my personal knowledge (derived from official

record) and paras 7 to 15 believed to be true on legal advice and that I have not suppressed any material facts.”

The respondent no. 1 in its reply to the averments made in paragraph 3 of the petition had not disputed the said fact as it was stated:-

“3. That the contents of para 3 as stated are denied. It is denied that the monthly subscription with effect from was mutually agreed to be as Rs. 59,201/- (Rs. fifty nine thousand two hundred and one) inclusive of service and education tax. With effect from August 2007 Shri Victor Farnandes sold the Cable TV business to M/s. Masters Cable Network Carrasco Vaddo wherein Mr. Cosmos J. Gonsalves is one of the partners who also is brother of Shri Jack Gonsalves, the petitioner herein. This is also clear from the record of this petition that prior to August 2007 the invoices were hand delivered to the Respondent herein but from August 2007 the Invoices were alleged to be sent by post because petitioner knew that with effect from August 2007 the Respondent herein, Shri Victor Farnandes, is no more a cable operator and sold the said business of Cable TV to the Brother of the Petitioner, Mr. Cosmos J. Gonsalves.”

The respondent no. 1, therefore, did not deny or dispute that the invoices up to July, 2007 had been delivered.

We may also notice that so far as the letter dated 27.08.2007 is concerned, the witness examined on behalf of the petitioner was not confronted therewith. The said witness in regard to the invoices stated as under :-

“All the invoices have been personally delivered to the Respondent No. 1 every month and the Respondent No. 1 has signed on the copy of the invoices with the Petitioner after receiving the monthly invoices.”

Another question which arises for our consideration is that Shri Victor, in his evidence categorically admitted that no document in writing was sent to the petitioner with regard to the sale of its business. He has also not admittedly taken out any public notice that he would be disconnecting the signals of the petitioner, and thus the requirements of the Interconnection Regulations of 2004 having not been complied with, the relationship between the parties continued.

It is admitted that the signals of the petitioner were being received from the head end of another MSO known as Master Cables.

In this connection, we may notice the letter dated 21.10.07, from a perusal whereof, it does not appear that Exhibit RW-1/1, had not only proved receipt thereof but also proved its contents. It is also an admitted fact that he did not respond thereto.

If that be so, there cannot be any doubt that he had not only been receiving invoices which has, in fact, been admitted by him in his cross-examination, but also failed to fulfill his legal obligations.

So far as the liability of the respondent no. 2 is concerned, we may notice that both the witnesses examined on behalf of the respondents confirmed the execution of the agreement to sell. However, the petitioner suggested that the same was ante-dated.

We can not accept the said contention. We may in this behalf notice some interesting developments. The petitioner in its letter dated 27.08. 2002 addressed to Mr. Anil Patre, who, it stands admitted, was a partner of respondent no.2, stated as under:-

“As you have taken this network of M/s. Valric Cable without informing me, I have no problem but I would like to inform you that I have a internet business in siolim from 2004. All fiber cable laid in the area belongs to me, there is no fiber cable put by Mr. Victor. The node at his control room is also mine he had to pay me Rs. 8500/- for the node which is not paid to me the power to the node is also from my EDFA for which he has not paid any money, he was using it free of cost. There are three UPS and batteries installed on the network for internet purpose the comcope wire and amplifiers from

It is, therefor, accepted that the petitioner was aware of the said agreement for sale at least on that day.

It is, therefore, evident that the petitioner in view of the aforementioned document would not be entitled to claim any amount beyond the period of August, 2007. We for the said purpose took into consideration the fact that the respondent no. 1 was bound to give 21 days' notice.

No proof has also been placed on record by the petitioner with regard to its claim of Rs. 91,765/- towards the purported supply of materials.

For the reasons aforementioned, this petition is allowed in part and to the extent mentioned hereinbefore.

The petitioner, in the facts and circumstances of the case, will also be entitled to the costs from the first respondent. It will also be entitled to interest @ 18% p.a. till the date of filing of the petition and @ 12% p. a. pendentalite and further. The respondent shall bear the cost of this petition. Advocate's fee assessed at Rs. 25,000/-.

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

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

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(P.K. Rastogi)
Member