TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 21ST MAY, 2010

Petition No.146(C) of 2009

M/s. Indian Cable Net Company Ltd. …Petitioner

Vs.

M/s. Economic Entertainment & 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

For Petitioner : Mr. Yoginder Handoo, Advocate

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

JUDGEMENT

S. B. SINHA

The petitioner is a multiservice operator having its head-ends all over India. The first respondent is a local cable operator. They entered into a subscription agreement in or about March, 2006 for a period of 3 years. Sub-clause (e) of Clause 8 of the said agreement reads as under :-

> "(e) It shall not, while it is affiliate with ICNCL, hold dual/multiple signal of any other service provider/MSO/cable operator, without ICNCL's prior written permission. It is clearly understood by the Affiliate that any unauthorized tapping/copy/reproduction/exhibition of the ICNCL Service or any port thereof by it to or by the Affiliate's operators/link-operators/sub-operators shall, (without in any way limiting the scope of the offence,) amount inter alia to dishonest and unauthorized removal of the property of ICNCL and shall constitute an offence of theft, as defined under the provisions of the Indian Penal Code, 1860."

We may at the outset notice that the first respondent denies and disputes execution of the said agreement. It was urged that the petitioner willfully did not produce the original document despite having been called upon to do so. It is however, not in dispute that in terms of the said agreement, the first respondent was to pay the stipulated feed charges for obtaining supply of signal from the petitioner.

The parties however agree that in regard to the purported arrears, a settlement was arrived at in terms whereof the first respondent was to pay and in fact pursuant thereto a sum of Rs. 1,26,127 was paid by a cheque dated 31.07/2007.

The petitioner thereafter had been raising invoices. We are concerned with the invoices raised from the month of April, 2007 till the date of termination of the agreement.

The bone of contention of the respondent is that it had ceased to take supply of signals from the petitioner on and from 1st May, 2008, whereas the petitioner contends that for the said purpose neither any notice as contemplated under regulation 4.1 nor a public notice envisaged under Regulation 4.3 of the interconnect Regulation had been issued. It, however, is not in dispute that although the petitioner claims arrears from the respondent No. 1, a sum of Rs. 7,20,512 said to be

outstanding as on 31.07.2008, it now stands admitted in view of a letter dated 25.10.2008 issued by the Executive Officer (Technical) of the petitioner company addressed to the respondent No. 1 that the supply of signal continued only upto 1.7.2008. We, however, must place on record that according to the respondent, the said date was changed by Shri Mithun Barik, Technician of the petitioner as 1.5.2008 and he had put his initials in support thereof.

It is also not in dispute that the petitioner had been raising invoices and allegedly had been sending the same to the first respondent till October, 2008.

Shri Mithun Barik has not been examined in this case, although an application for summoning him was filed and in fact his was evidence by way of affidavit was also filed. We may furthermore place on record that although the petitioner did not raise any plea in respect of the aforementioned letter dated 25 October, 2008 in its petition, the said contentions have been raised by the respondent in its reply. It was inter alia averred in the rejoinder thereto that Shri Mithun Barik was forced to make the changes in the date by the first respondent. We may furthermore place on record that the first respondent has inter alia contended that although it had not paid the bill for the month of April, 2008, it was entitled to some commission being 10 percent of the collection which had not been paid for the months of March and April, 2008.

Furthermore, contention of the respondent is that in view of the decision of Supreme Court of India in State of West Bengal & Ors. Vs. Purvi Communication (P) Ltd. & Ors. reported in 2005 (3) SCC 711, it was entitled to the amount of entertainment tax adjusted from the amount due from it namely; the subscription fee for the month of April, 2008.

Mr. Handoo, the learned counsel appearing on behalf of petitioner, inter alia, would contend :-

(a) The first respondent was bound to pay the subscription charges upto June, 2008 as it had not denied or disputed receipt of signal upto the said period.

(b) The first respondent could not have migrated to the network to the second respondent nor could the latter supply signals to it without the compliance of the requirements under the regulations; and in that view of the matter namely clearance of the last invoices, both respondents are liable to pay damages.

(c) The first respondent having not denied the receipt of invoices upto May and June and having regard to the fact that the petitioner had to pay the subscription fee to its broadcasters, it must be held to have suffered loss as the subscription agreement was valid for a period of three years.

(d) The letter of the technician of the petitioner dated 25th October must be held to have been manipulated as Shri Barik was forced to change the date of supply of signal by the petitioner.

(e) The purported letter dated 2nd April, 2008 on the basis whereof the first respondent is said to have dis-continued receipt of signal from the network of the petitioner having not been proved to have been delivered, the same must be held to be a manufactured document.

Mr. Navin Chawla, the learned counsel appearing on behalf of the respondent, on the other hand, urged :-

a) The notice dated 2nd April, 2008 having been sent to the petitioner under certificate of posting, the same must be presumed to have delivered in terms of Section 114 (8) of the Indian Evidence Act.

b) The petitioner having not produced the monthly SLR submitted to it by the broadcaster, It must be held to have failed to prove that the signals continued to have been supplied to the respondent No. 1.

c) The conduct of the petitioner goes against its contention that signals have been supplied to the respondent No. 1, as invoices have been raised upto October, 2008, despite the fact that admittedly they were disconnected in June 2008 and no outstanding has been shown in the invoices and thus, it is evident that the petition has been filed malafide.

d) The petitioner was bound to give credit by way of adjustment of 10% of the bill for the months of March and April, 2008 amounting to Rs. 36,000.

e) The petitioner having admitted that there had been no interpolation in the letter dated 5.10.2008 and having regard to the fact that no protest was made immediately after the issuance of the said letter and Mr. Barik having not been examined, the impugned demand can not be sustained, although no prior demand had been made in relation to the amusement tax.

f) The witness of the petitioner PW2 Mr. Suresh Kumar having accepted that the amount claimed includes the amusement tax, this Tribunal would allow the said plea of the respondent.

In view of the aforementioned rival contentions of the parties, the principal questions which would arise for our consideration inter-alia are :-

a) Till what date, if any, the respondent would be liable to pay the subscription fee namely upto 30th April, 2008 or 30th June, 2008 ?

b) Whether the first respondent is entitled to the benefit of the amusement tax ?

c) Whether in view of the prevailing practice, the petitioner was bound to issue reverse credit note for a sum of Rs. 36,000 for the months of March and April 2008 ?

d) Whether the respondent No. 2 is liable to pay any damages to the petitioner for inducing the respondent No. 1 to join its network

The issue (a) (b) and (c) being inter related were taken up for hearing together.

Although execution of the agreement dated 1st March 2006 is in dispute, the 1st respondent did not deny or dispute that it had been taking signals from the petitioner. There is also no controversy although the same had not been pleaded that a settlement was arrived at by and between the parties in relation to the dues of the respondent up to July. The petitioner by reason of a notice dated 16.6.2008 claimed that a sum of Rs. 5,40,384 is due from the 1st respondent but in response thereto the letter dated 21st June, 2008 was issued the relevant parties of which reads as under :-

"It has been communicated to your goodself that we are not enjoying you service since last May 01,2008. A letter, under the said line, is also forwarded to you for registering such act. Inspite of that we are surprised to receive your invoice for the period we did not use your service i.e. for the month of May 2008 and June 2008.

We request you to register and record our declaration and stop raising invoice as we are already associated with other service provider, utilizing their service and have accordingly making payment to them."

The petitioner in its turn by a letter dated 2008 again demanded the aforementioned amount, stating :-

"Under the circumstances with no disconnection notice we have supplied you our signal and made payments to broadcasters. Thus, we are unable to waive off your bills as per your request. We regret that you are liable to make your payment for the period April – June 2008. Your total dues outstanding for period April-June'08 amounts to Rs. 5,40,384-. You are requested to clear your above dues immediately."

A legal notice threatening legal action was issued by the petitioner on the first respondent by a letter dated 11.08.2008. In the aforementioned situation, the first respondent replied to the said letter stating as under :-

"1. The agreement with you as MSO was effective till April, 2008.

2. On and with effect from May, 2008 we have not been enjoying any services or cable service facilities from you and the relationship of Service Provider and Service Receiver no longer exist since then.

3. We make it clear that a sum of Rs. 90,000/-tendered to you by Cheque No. 904990 dated 31st March, 2008 has been duly encashed in protanto liquidation of our outstanding dues to you till March, 2008. We are only liable to pay you on account of April, 2008 for which an invoice has been raised on your part for a sum of Rs. 1,80,128.00. We state that the said invoice is payable by us subject to adjustment of the Credit Notes for the period of March and April, 2008 which are yet to be issued on your behalf.

4. It is pertinent to record here that you have been in utter disregard of discontinuation of the agreement with you and knowing fully well that you are no longer providing us any service as MSO, continuing to raise fictitious invoices for the months of May and June,

2008. The invoices for the said two months are without jurisdiction, bad and abinitio void and we have been advised to avoid the same."

The conduct of the parties in the aforementioned fact situation, in our opinion, assumes importance. The petitioner is said to have issued a notice dated 26th April 2008. It reads as under :

"Please note that all your payment, if fallen dues, will be cleared as agreed upon among ourselves. However, we also request you to kindly send us a statement of account along with necessary deduction or the credit notes of the discount offered by you."

The said letter was allegedly sent under Certificate of Posting. The postal endorsement in the said certificate reads as under :-

"Received a letter 'under certificate of Posting' to Indian Cable Net Company Ltd. Address – Plot No. X-4, Salt Lake Electronics Complex, Block – EP & GP Sector – V, Salt Lake, Kolkata – 700091 from Economic Entertainment Address – 12/10, Goabagan Street, Kolkata – 700006."

We would, however, having regard to the fact that the first respondent did not offer any explanation as to why such an important letter was not sent under Registered cover with Acknowledgement due and/or through courier services, we do not place much reliance thereupon.

What is, however, important in our considered opinion, is the letter of the petitioner itself dated 25th October, 2008 the contents whereof have been noticed heretobefore. It is beyond any controversy that the petitioner itself admitted that the signals have been supplied upto June, 2008. It also stands admitted that Shri Mithun Barik , a technician of the petitioner altered the date of disconnection of supply of signal mentioned in the said letter from 1.7.2008 to 1.5.2008.

We have also noticed heretobefore that Shri Barik has not been examined despite filing an affidavit before us. The petitioner only in its rejoinder raised a contention that Shri Barik had to change the date as he was threatened by Shri R. K. Sahoo that he would not give back the materials which have been supplied to the respondent.

Shri Sahoo has been cross examined. In his cross examination, he stated :-

"Mr. Mithun Barik had come to our control room on 25.10.2008.

It is true that the letter which had been carried by Mithun Barik mentioned the date at 1.7.2008.

The date was changed by Mr. Mithun Barik in my presence.

It is incorrect to suggest Mithun Barik was forced to change the date of the letter

Volunteers : He did so after consulting his office. In fact I had asked him come with a fresh letter.

I deny that the aforementioned statements are incorrect.

The petitioner, however, in his rejoinder stated as under :-

"It is denied that the petitioner had deactivated the signals with effect from 1/5/2008. It is denied that the petitioner has cooked up any story. On the contrary it is the respondent No. 1 who has resorted to fabrication of documents to falsely try to escape its liability towards the petitioner. It is submitted that respondent No. 1 coerced the technician of the petitioner into carrying out the over-writing on the date mentioned in the said letter dated 25.10.2008 on the pretext that unless the said overwriting is carried out the respondent No. 1 will not handover the equipments/materials belonging to the petitioner."

The term 'force' has a definite connotation. A specific plea in that regard is necessary to be raised. The same should be specifically pleaded having regard to the provisions of the Indian Contract Act. The petitioner did not raise such a plea in the petition. Initials of Mithun Barik in the said letter is not in dispute. If he was coerced/forced to change the date, he should have reported thereabout to his immediate superiors.

It is also expected that the petitioner, keeping in view of such a serious matter would protest thereagainst immediately. We have noticed heretobefore that the petitioner had not even put its case that as coercion was exercised by the first respondent stating that he would not allow Shri Mithun Barik to take back the IRD boxes.

Such a conduct on the part of a company of the status of the petitioner can not be countenanced. PW2 in paragraph 12 of its affidavit however raised a different story. He stated as under :-

> "I say that the overwriting made by Shri Mithun Barik in the letter dated 25.10.2008 is without any authority, in as much as, Sri Barik was a technician (linesman) working in the petitioner company at the material time and by virtue of his such position in the company, he did not have any authority and/or power to cause overwriting in the letter dated

25.10.2008. In this connection the second copy of the said letter as kept in the record of the petitioner company is marked as **Exhibit PW 3/7.**"

In his cross examination the said witness categorically stated that he came to know about the lack of the authority on the part of Shri Mithun Barik only during the pendency of this proceeding. It is, therefore, clear that contrary and inconsistent stands have been taken by the petitioner itself and furthermore having regard to its conduct, we are of the opinion that the petitioner had all along the requisite knowledge that the first respondent had not been taking any supply of signal from 1.5.2008.

Infact the aforementioned letter dated 25.10.2008 having been issued prior to filing of this petition, in our considered view, it was obligatory on the part of the petitioner to raise the said issue specifically. As no such contention has been raised prior to filing of the petition, it was imperative to raise such a contention at least in the petition. Till which date the supply of signal has taken place must be within the knowledge of the petitioner. Once the necessary data was entered into in the system, further no invoice could be raised. Why therefore despite the said letter invoices were raised upto October, 2008 or why even in the petition, claim for subscription charges for the month of July, 2008 has been claimed has not been explained.

It is one thing to say that the 1st respondent was bound to issue 21 days' notice, in terms of the Regulations but it was for the petitioner to explain as to on what basis it had stopped supply of signal to the 1st respondent on or about 1st May, 2008. A consensual act on the part of the parties in that regard must be inferred. We are, therefore, of the opinion, that the petitioner has failed to prove that it had supplied signals even after 1st May, 2008.

This gives rise to the question as to what amount is due to the petitioner from the first respondent. No payment has admittedly been made by the respondent from the month of April, 2008.

We although are of the opinion that the first respondent should have cleared the dues of the petitioner at least for that month, we are not in a position to direct payment for the said months having regard to the issues (b) & (e) framed by us.

It is also of some significance to notice that the petitioner herein had issued the invoice for the month of April, 2008 on or about 1.4.2008.

Before us two different invoices have been filed, one showing the outstanding amounts and the other without showing the outstanding amount.

It is not in dispute that TRAI in its Regulation directed issuance of invoices with the outstandings shown from March 2006. How two different sets of such invoices have issued has not been explained.

Mr. Handoo would submit the system of showing outstanding in the invoice was introduced in April, 2008 by the petitioner and, thus a mistake might have been committed in issuing the invoice. It may be true that the amount stated in both the invoices are same but the very fact that even upto October, 2008 invoices were raised clearely goes to show that the petitioner had not been maintaining their accounts properly.

It is true that the respondent did not raise any plea in regard to set off of his amount of Amusement Tax in its reply but there can not be any doubt or dispute that the matter relating thereto involves is a question of law.

Shri V. Suresh Kumar in his evidence admitted that the amount claimed in the petition included the amusement tax. A question of law therefore arises as to whether the petitioner can claim certain amount which is contrary to the law of the country.

It is not in dispute in view of the decision of the Supreme Court of India in the State of West Bengal (Supra), it is for the multi-service operator to realize the amusement tax from the local cable operator and to deposit the same before the appropriate authorities.

In our opinion it will be unjust enrichment on the part of the petitioner, if we deny, the first respondent's claim of adjustment thereof. We, therefore, are of the opinion that the law of the land having been declared by the highest court of India, the petitioner can not, having regard to the admitted position deny the just claim of the first respondent.

This takes to the issue as to whether the petitioner was bound to the reverse credit for the months of March and April. Credit note has been issued by the petitioner being dated 17.12.2007 for a sum of Rs. 54032/- and for a sum of Rs. 72,040 for the months of November, 2007 to February, 2008.

In the entry dated 17.12.2007, a reverse credit has been given @ 10% of the invoiced sum of Rs. 18,000. Similar reverse credit has been given in the entries for the months of November-December 2007, January 2008 and February, 2008.

It is, therefore, evident that such commission @ about 18,000 per month was being given to the 1st respondent. We, therefore, are of the opinion that the petitioner is bound to adjust the said amount for the amount of subscription fee. The respondent, therefore, would be entitled to get deductions of the sums involved in Issues (b) and (c) mentioned heretobefore. Issue (a) to (c) are decided accordingly.

Issue No. (d)

The petitioner itself with full knowledge had stopped supply of signals to the first respondent. We fail to see any reason as to on what basis the second respondent can be made liable to pay any amount by way of damages. Even otherwise the petitioner has not produced any evidence on quantification of damages. Although in cross examination of Shri Abhijit Manna the representative of the respondent No. 2, a suggestion was made that it had induced many other operators to migrate to its network without insisting on clearance of the dues of the petitioner, in our opinion, no claim for damage can be said to have been made out only by reason thereof. The petitioner could have proved the same by producing the SLRs. Mr. Handoo, as noticed heretobefore laid emphasis on the alleged admission of the first respondent in regard to receipt of signals.

We may notice the pleadings of the parties in this behalf.

> "That, the contents of Para No. 11 are wrong and are denied. It is submitted that the Respondent had stopped taking signal of the Petitioner from 1st May, 2008, so the question of making payment after this date does not arise. The invoices are all fabricated and the Petitioner be put to strict proof of delivery of same."

The statement made in the aforementioned paragraph must be read as a whole. It is not the case of the petitioner that the first respondent had been taking a dual feed. If it had stopped taking signal from petitioner, it would not mean that it had not been retransmitting the petitioners signal despite receipt thereof, in view of the stand taken by the first respondent, in our opinion, the petitioner should have established the said fact by producing sufficient evidence. Issue No. (d) is answered against the petitioner.

For the reasons aforementioned this petition is allowed in part and to the extent mentioned hereinbefore. The respondent is also liable to pay interest on the amount due @ 18% till the date of filing of this petition. The petitioner is also entitled to interest pendentelite and future @ 12% per annum.

However, in view of the conduct of the first respondent namely that it did not tender the balance amount to the first respondent and furthermore having not raised any plea in relation to the issue No. (c). We are of the opinion that it must pay and bear the costs of this petition Counsel's fee assessed at Rs. 50,000/-.

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(S.B. Sinha)
Chairperson

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(G. D. Gaiha)
Member

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(P. K. Rastogi)
Member