

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

Dated 5th May, 2010

Petition No.159(C) of 2009

Indian Cablenet Company Ltd

...Petitioner

Vs.

Grabss Dot Com & Ors

...Respondent

BEFORE:

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

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

For Petitioner : Mr. Yoginder Handoo, Advocate,

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

JUDGMENT

S.B. Sinha

The petitioner herein is a multi system operator (MSO).

Inter alia on the premise that the respondent no. 1 with whom it had entered into a contract for transmission of signals, defaulted in making payment of a sum of Rs.2,59,125/- upto 31.7.08 whereafter it in collusion

with the respondent no. 2 herein migrated to its network, this petition has been filed praying, inter alia, for the following reliefs:-

- a) Order/decreed in favour of the petitioner and against the respondent No.1 for an amount of 2,59,125.00 being the outstanding amount due from the respondent no. 1 as on 31.7.08 for the cable services received by the respondent no. 1 from the petitioner.
- b) Order awarding an interest in favour of the petitioner for an amount of Rs.14,227.00 on the aforesaid payment of Rs.2,59,125.00 till 31.7.08.
- c) An order awarding pendent lite interest @ 12% on the abovementioned amount due of Rs.2,73,352.00 with effect from 31.7.2008 till date.
- d) An order/decreed in favour of the petitioner and against the respondent no.2 declaring that the respondent no. 2 has induced the respondent no. 1 into breaching the contract/agreement with the petitioner and further declaring that the respondent no. 1 and 2 have violated the TRAI regulations.
- e) An order awarding damages as deemed fit by this Hon'ble Tribunal for the illegal and impermissible acts of commission and

omission on the part of respondent no. 2 in inducing the respondent no. 1 into breaching the agreement with the petitioner.

It is not in dispute that the agreement by and between the petitioner and the first respondent herein was entered into on or about 01.07.2007. It is furthermore not in dispute that the said agreement was valid for a period of three years. The petitioner and the first respondent, however, entered into a memorandum of settlement with regard to the outstanding amount on or about 30.7.07; the relevant portions whereof read as under:

“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 part thereof by it to or by the Affiliate’s operation/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.”

The said amount was inclusive of service tax. It is stated that up to July, 2007, the first respondent No.1 fell into arrears of a sum of Rs.7,36,000/-. On 1.7.08, the first respondent allegedly served a notice upon the petitioner herein, inter alia, contending that they would not be using its signal from the said date. The petitioner by a letter dated 2.7.08 addressed to the first respondent stated as under:-

“With reference to our earlier letter dated 19.6.08 on the above subject we confirm your outstanding dues for the period April, 08 to June, 08 stands as Rs.2,59,125/- (Rupees two lac fifty nine thousand one hundred twenty five only). We confirm that there is no dues outstanding in our books as on 31.3.08.

You are requested to kindly ensure that the dues are settled at the earliest.”

Yet again, by a letter dated 21.8.05, the petitioner asked the first respondent to pay a sum of Rs.1,72,750/-. As no response thereto was received, a legal notice was issued to Respondent No.2 on 7.11.08 which reads as under:-

“We have come to understand that Grabbs Dot Comm is running your signal.

As per clause 3.2 of TRAI Interconnect Regulation party can shift to some other MSO only after clearing the outstanding subscription dues with us. In addition, clause 4.2 of the said regulation also reads that party has to provide notice as stipulated by the law.

Please note that as on 1.11.08 party has outstanding of Rs.6,04,625/- (Rupees six lac four thousand six hundred and twenty five only)(copy of last invoice is attached for your reference).

We would like to bring to your notice that, as per TDSAT judgment between KCBP & Star Den Media Services, Petition No. 194(C) of 2008, it was directed to you not to supply signal to any such LCO who has not produced proof of above compliances.

It is under the circumstances we would request you to immediately disconnect the party and not provide signal to them till such time the Interconnect Regulations are observed and complied.”

The respondent No. 2, to which, admittedly, the first respondent migrated with effect from 01.07.2008 by a notice dated 05.12.2008 addressed to the petitioner stated in the following terms:-

“We are pleased to acknowledge the receipt of your above referred letter and noted down the contents therein.

It may be noted that M/s Grabbs Dot Com joined us on 1.7.08 with your knowledge and consent and you have asked for the deletion of 425 points from M/s Star Den Media Services Pvt Ltd, vide your letter dated 8.7.08 addressed to M/s Star Den Media Services Ltd (Photocopy enclosed).

Further, you have attached a copy of November, 2008 invoice along with your letter which we feel is fabricated and fictitious as is evident from your above referred letter wherein you have asked for deletion of sub-base from broadcaster in the month of July, 2008.

Moreover, vide your letter dated 11.8.08 addressed to M/s Star Den Media Services Ltd, you have not shown any outstanding against M/s Grabbs Dot Com.

In view of the above fact it is stated, since the Interconnect Regulations are observed and complied, disconnection of signal is not at all feasible.”

The petitioner contends that as the first respondent did not pay the lawful dues payable to it, by a letter dated 22.12.2008 it asked the first respondent to pay a sum of Rs.6,91,000/-. The said sum included the amount mentioned in the invoice for the month of December, 2008, i.e., for a sum of Rs.86,375/-. Along with the said invoice, the petitioner enclosed copies of the other invoices. It also enclosed therewith a statement of account showing the amount due from the petitioner.

The petitioner contends that the action on the part of the first respondent to migrate to the network of the second respondent herein is violative of the Regulations framed by TRAI and in that view of the matter, as also having regard to the fact that the said migration took place by reason of an inducement made by the respondent no. 2, both the respondents are jointly and severally liable for payment of damages.

The first respondent, on the other hand, contended that although no payment was made for the months of May, June and July, the first petitioner would not be entitled to the amount claimed in view of the fact that—

- (i) 5% discount had not been given as was agreed to in the memorandum of understanding dated 30.7.07;
- (ii) The petitioner had not accounted for the price of 100 Set Top Boxes (STBs);
- (iii) Some credit notes had not been taken into account.

The respondent no. 2 in its reply apart from contending that it had unnecessarily been impleaded as a party therein, denied and disputed the allegations that there had been a collusion by and between it and the first respondent.

The relationship between the petitioner and the first respondent is not in dispute. We are, as noticed hereinbefore, not concerned with the transactions which took place between them up to 29.7.07. On 30.7.07, admittedly, a settlement between the parties took place pursuant where to a

memorandum of understanding was entered into, the relevant terms whereof read as under:-

- “1. All accounts with Grabss Dot Com is settled upto June 2007 in full and final with payment of Rs.40,993/- including service tax.
2. Grabss Dot Com will cooperate towards collection of Rs.1,38,000/- from Manas Patra.
3. ICNCL will provide support to Grabss Dot Com towards collection of Rs.36,000/- from Aniruddha Dhar’s present Network is with Pradip Bose from Jan 2007.
4. From July 2007 Grabss Dot Com will pay Rs. 73600/- (Rs.92000 less 20%) plus taxes as applicable.
5. After completion of 6 months ICNCL will provide credit note towards discount of 5% after all payment is settled.”

The first respondent, we may notice, has also admitted that a sum of Rs.34,686/- is due and owing to the petitioner. It was proved by the petitioner that the invoice as noticed hereinbefore were served. It has also proved the statement of accounts. The correctness of the said statement of

accounts is not in dispute; from a perusal whereof it appears that in the entry dated 3.3.08, a 5% discount for a sum of Rs.32,391/- had been given.

From the said statement of accounts, it furthermore appears that a credit note had been taken into account duly for a sum of Rs. 4,82,334/-.

Mr. Yoginder Handoo, the learned counsel appearing on behalf of the petitioner contended that having regard to the evidence brought on record, it would not be correct to say that only a sum of Rs.34,000/- and odd is due from the first respondent. According to the learned counsel as the first respondent in collusion and conspiracy with the second respondent herein and without service of a valid notice as also issuance of a public notice, had migrated to another MSO, namely, the respondent no. 2, it is liable to pay damages.

Mr.Sharath Sampath, the learned counsel appearing on behalf of the respondent, on the other hand, would contend that the petitioner in fact is not entitled to any amount from the respondent as due credit had not been given to the Set Top Boxes and furthermore the amount of amusement tax received from the first respondent must be accounted for.

The contention of the petitioner is that the monthly subscription fee payable @ Rs.86,000/- and odd has been accepted by the respondent. It is also accepted that in the month of July, 2008, the first respondent has paid the subscription fee for the month of April. From the records, it furthermore appears that the respondent has not paid the subscription fee for the months of May, June and July, 2008.

The fact that the first respondent has migrated to the network of the respondent no. 2, is also not denied or disputed.

The petitioner in its rejoinder, to the reply of the respondent with regard to the Set Top Boxes, stated as under:-

“The act of returning the set top boxes has got nothing to do with the outstanding amount due from the respondent no. 1 to the petitioner for the sum of Rs.1,72,750/- on account of subscription charges.”

It, however, appears that Mr. V. Suresh, the witness examined on behalf of the petitioner herein stated that the petitioner had supplied some

Set Top Boxes to the respondent and the respondent has been charged for the STBs on refundable basis. If that be so, there cannot be any doubt or dispute whatsoever that the first respondent was entitled to the price of STBs, being 100 in number. So far as the amusement tax is concerned, again there cannot be any doubt or dispute that the petitioner, as an MSO, cannot escape its liability to pay the amount of amusement tax in terms of the provisions of the West Bengal Amusement Tax Act. This has been so held by the Supreme Court of India in State of West Bengal & Ors. Vs. Purvi Communication(P) Ltd. & Ors. – 2005 (3) SCC 711.

We may, in this connection, notice that Mr. Suresh in his evidence has categorically admitted that he was not aware as to whether the component of amusement tax would be Rs.44,152. He did not say as to what was the exact component of entertainment tax. In absence of any evidence, thus, having been brought on record, we must proceed on the basis that component of the amusement tax was included in the said amount.

Mr. Handoo would, however, contend that the said plea had been raised only in the evidence and not in the pleadings. The learned counsel would, furthermore, contend that having regard to the fact that the

component of amusement tax can be the subject matter of a contracted liability of the MSO or the LCO. In a given case, it might have been so, but there cannot be any doubt or dispute that the statutory liability of a person to pay amusement tax, unless there exists a contract, cannot be ignored. If there was no contract contrary to the decision of the Supreme Court of India vis-à-vis the provisions of the West Bengal Amusement Tax Act, we see no reason as to why the first respondent shall be deprived from the said benefit.

So far as the question of non-compliance of the provisions of Regulations 4.2 and 4.3 is concerned, indisputably, the first respondent has not issued any public notice, as is required in terms of clause 4.3 of the regulations. It is also difficult to agree with the contentions of the first respondent that it had given oral notice and the notice in writing dated 01.07.2008 was sent by Fax. DW-1, Shri Dibakar Baniya has not produced before this Tribunal any document to show that the notice in question had been served upon the petitioner either by Fax or by any other mode on 01.07.2008. We may, moreover, notice that the petitioner has confined its prayer so far as the subscription fee is concerned, only up to 31.7.08. We have also noticed heretofore that despite the same, the petitioner had served invoices upon the first respondent up to November, 2008. Keeping

in view the fact that the petitioner itself has limited its claim up to 31.7.08, we see no reason as to why the same should not be accepted. We, in the aforementioned circumstances, direct that the petitioner would be entitled to the subscription charges only up to 31.7.08, subject to deduction for the price of the STBs and/or the component of amusement tax.

Mr. Handoo would, vehemently contend that the respondent no. 1 has left the network of the petitioner at the instance of and/or on the inducement of the second respondent. The evidence brought on record does not say so. As a matter of fact, the evidence brought on record clearly suggests that not only the petitioner has accepted the fact that the first respondent has left his network; from the statement made by it to the Star Den, it is evident that it had gone to the extent of claiming the benefit thereunder. It is in the aforementioned context we have noticed the letter dated 27.11.08 of the petitioner addressed to the respondent No. 2. The petitioner, thus, from some quarters acquired knowledge of such migration and acted thereupon. That being the factual position, the principle of 'waiver' would be attracted.

It is in response only to the said letter, the second respondent by its letter dated 5.12.08 contended that the petitioner had knowledge and consented for migration of the first respondent wherefor it had asked for

deletion of 425 points from the Star Den Media Services Pvt Ltd. If by reason of the said act, the petitioner has claimed some benefit in respect of migration of the first respondent to the network of the second respondent, we are of the opinion that the same would amount waiver of a statutory right on the part of the petitioner. There cannot be any doubt or dispute that the provisions of Regulations 4.2 and 4.3 have been made by the TRAI not only to protect the interest of the service provider but also that of the consumer. The first respondent, as noticed hereinbefore, could not show that it had complied with the statutory requirements. Subject, of course, to waiver of a right by an MSO, there cannot be any doubt or dispute that benefit of the said regulations could have been claimed by the petitioner.

The petitioner has claimed damages against the respondents jointly and severally. It will bear repetition to state that such claim has been made on the basis that the respondent no. 2 had estimated not only the respondent no. 1 herein but also the other LCOs migrated to it without obtaining the last invoice and without insisting that the LCOs are required to clear the dues of the petitioner.

There was no privity of contract by and between the petitioner and the respondent no.2. The matter might have been different if the petitioner

had been able to prove any collusion and conspiracy between the first respondent and the second respondent. Mr. Handoo will contend that the principle of 'Torts' must be applied in the case of the respondent No.2. We do not agree. The petitioner in the petition cannot apply the principles of breach of contract and Tort at the same time, and in relation to the same case. Furthermore, the principle applicable to Tort Law, in our opinion, shall not apply in a case of this nature.

We, therefore, are of the opinion that the respondent No.2 is not liable to pay any damages to the petitioner.

The question which, thus, remains for consideration is as to whether the first respondent is liable to pay damages to the petitioner. In terms of the provisions of the regulations, we have no doubt in our mind that the respondent no. 1 would be so liable. But what should be the quantum of damages is the question?

Undoubtedly, the petitioner, although in para (e) of its prayer, has claimed the damages, it had not quantified the same. No evidence has also been brought on record to show that how much damages it had suffered owing to migration of the first respondent to the network of the second respondent. In absence of any quantification of any damages and/or any

evidence having been brought on record, the petitioner must be held to be entitled only to such damages to which it was otherwise entitled to. As has been noticed hereinbefore, the petitioner itself has accepted the factum of the first respondent's migration to the second respondent, having taken benefit in respect thereof from the broadcaster. In that view of the matter, in our opinion, the interest of justice would be sub-served if the amount of damages claimed by the petitioner is kept confined to the subscription amount claimed by the petitioner up to 31.7.08.

There are two reasons for our coming to the aforementioned decision. The first is that according to the petitioner itself the notice dated 1.7.08 was issued. A vague suggestion has been given to the respondent no. 1 that this notice was served much after 1st July. The petitioner did not disclose any date. The petitioner, in terms of Regulation 4.2 of the Regulations, was entitled only to 21 days' notice. If such 21 days' notice has been given, the petitioner would not be found eligible to claim any damages for non-service of notice and/or non-compliance with the provisions of the regulation 4.2 of the Regulations. Secondly, it would bear repetition to state that the petitioner itself accepted that the first respondent had migrated to the network of the second respondent.

The claim of the petitioner, thus, has to be calculated taking into account the subscription charges up to 31.07.08 which could be found out from the invoice for the said month. From that amount, the price of the STBs which are 100 in number, should be deducted. The component of amusement tax being Rs. 42,000/- and the same shall also be taken into consideration.

We, therefore, allow this petition in part and to the extent mentioned hereinbefore. However, the petitioner on the balance of claim, shall be entitled to interest at contractual rate which is 18% p.a. It shall also be entitled to proportionate cost. Advocates' fee assessed at Rs.50,000/-.

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

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