

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

Dated 5th May, 2010

Petition No.133 (C) of 2009

Shree Ganesh Infotenment

... Petitioner

Vs.

Information TV Pvt. Ltd.

...Respondent

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.Vibhav Srivastava, Advocate

For Respondent

: Mr. Inder Singh, Advocate

ORDER**S. B. Sinha**

The petitioner herein is a Multi-System-Operator. The respondent is a broadcaster. They are, thus, for the purpose of Telecom Regulatory Authority of India Act, 1997 (The Act) are service operators within the meaning of the provisions thereof.

Admittedly the parties hereto entered into an agreement for placement of Channel on or about 18 March, 2008; two of the clauses whereof read as under:-

“1. MSO is hereby authorized by ITV to downlink their TV channel India News signals from satellite INSAT 4A and ensure timely distribution to all their subscribers, imputers and cable operators clear signals, which shall effective from 1st day of April 2008 respectively.

5. The placement of the TV channel India News will be subject to complete payment of carriage fees, 10 days prior to the start of the distribution service starting on 1st April 2008.”

Indisputably, the respondent herein made part payment of a sum of Rs.25,000/- by a demand draft dated 21st March, 2008 i.e. within a period of 21

days prior to the coming into force the said agreement. It is also neither in doubt nor in dispute that the respondent did not pay the balance amount of Rs.1,75,000/- prior to the 1st April, 2008.

The petitioner however contends that it had complied with the terms of the agreement and placed the channel of the respondent for the whole year. The petitioner had further more averred that as the balance amount of Rs. 1,75,000/- was not paid to it, it served notices dated 8th August, 2008 and 4th September, 2008 on the respondent. The petitioner with the petition as also with the affidavit affirmed by his witness had filed proof of service of the said notices. The petitioner furthermore contends that the respondent despite receipt of the said notices did not respond thereto.

The respondent in its reply however contended that:-

- a) The agreement in question was not acted upon;
- b) As the petitioner had not placed its channel in S Band frequency, it did not pay the balance amount within 10 days prior to coming into force of the said agreement.
- c) As services were not availed by it, no payment was made to the respondent having regard to the aforementioned fact;

- d) Raising of any invoices or writing of any letters claiming the amount is of no consequences as signal of the petitioner was very weak.

The petitioner in support of its case has examined one Prashant Prakashrao Mane, who in paragraph 7 of the affidavit stated as under :-

“7.the Petitioner has started placing the channel – India News on the S – Band frequency as per the Agreement.....”

The said witness in his cross examination denied that the signal was low or that it had not placed the channels of the respondent.

The respondent also in support of its case examined one Rakesh Kumar Khanna, who did not have any personal knowledge and his statements admittedly were based on the records of the case. He admitted that neither he had interacted with the petitioner nor was he a signatory to the agreement.

He, in the cross examination stated as under:-

“Initially we have made a sum of Rs.25000/- to the petitioner. But later on our Pune and Bombay office informed as the quality of service of S band is not up to mark, no contract for placement of channel need be continued. Vol – We have asked for refund of

Rs.25000/- from the petitioner on phone and informed them that the contract need not be performed.

I deny that the respondent has made part payment of Rs.25000/- after receipt of the invoice.

I deny the suggestion that the transmission of frequency of S band of the petitioner was good.

Vol – TRP was very low.

It is not correct to suggest that anyone from my office has contacted the petitioner regarding discontinuation of the service.

The telephone talk took place one or two days after sending the said sum of Rs.25000/-. Mr.Vikram Madhok talked to the petitioner on behalf of the company. It is true that a cheque of Rs.25000/- was not sent but the same has been handed over to petitioner when he visited for signing of the agreement but it is not correct to say that invoice was delivered to us.”

Although, he denied receipt of the notice dated 1.6.2008 or the other notice dated 08.08.2008, there cannot be any dispute whatsoever that in terms of Section 114(f) of the Indian Evidence Act a presumption may be raised with regard to

service thereof, and such a presumption so raised, notices must be held to have been served upon the respondent.

Mr.Vibhav Srivastava the learned counsel appearing on behalf of the petitioner would contend that having regard to the fact that agreement was entered into by and between the parties hereto, the petitioner is entitled to a decree for a sum of Rs. 1,75,000 besides interests.

The agreement in question is not in dispute. The payment of Rs. 25,000 is also not in dispute. It is true that in terms of clause 5 of the agreement dated 18.03.2008, the payment of entire sum of Rs. 2,00,000 had to be made before 1st April, 2008, but the same in our considered opinion would not by itself mean that the agreement for placement of channels had not been acted upon. One of the contentions, as noticed heretofore, raised on behalf of the respondent is that the frequency in S-band of the petitioner was on the lower side. The agreement does not contain any stipulation as to on what frequency the channels of the respondent were required to be retransmitted except that it should be in S-band.

Once the retransmission of its channel took place, and continued for one year, it was for the respondent to establish that in fact the quality of service rendered by the petitioner did not fulfill the terms of the contract. Not only the fact that the respondent has failed to examine any witness who could testify to the

aforementioned effect, no documentary evidence has also been placed to record to establish the said fact.

The services of three notices, in our considered opinion, stands proved. Inter alia in view of the fact that the respondent did not respond thereto, the same is also a pointer to the fact that it did not raise any such contention at the relevant point of time. The witness of the petitioner, apart from being given the two suggestions was not cross examined, so as to establish that the petitioner has failed to prove its case before this Tribunal.

Service of the aforementioned notice in law must be presumed to have been effected. The Privy Council in *Harihar Banerji & Ors. Vs. Ramsashi Roy & Ors.* reported in Law report 1918 (LR)IA 222, stated the law as under:

“The jury found it had been received. On a motion for a new trial on the ground of misdirection, the Court, consisting of Cockburn C.J., Blackburn, Mellor, and Hannen JJ., held that if a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to who it was addressed. The presumption would appear to their Lordships to apply with still greater

force to letters which the sender has taken the precaution to register, and is not rebutted, but strengthened, by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.”

The respondent even did not cross-examine the witness of the petitioner on the question as to why it is not an MSO. If the petitioner is a MSO, this petition will be maintainable.

As noticed hereinbefore, as no question has also been put in regard to placement of channel in the cross-examination, the said fact must be held to have been established.

The respondent has raised before us inconsistent stands; on the one hand it has been contended that agreement has not been given effect to and on the other hand would raise contentions with regard to quality of service.

No plea has been raised, nor any evidence has been brought on record that any such survey was done prior to 1st April, 2008. The respondent being a broadcaster, it is expected that such survey would be conducted even before the agreement was entered into.

Moreover, the respondent even did not raise any protest even after receipt of the invoices or notices. It was expected to do so.

Having regard to the materials brought on record, we are satisfied that the petitioner has proved its case. However, in absence of any agreement, the petitioner, in our opinion, is not entitled to any interest at the rate claimed for in the petition on the aforementioned sum due. We, however, direct that the petitioner would be entitled to interest at the rate of 12% per annum as a reasonable amount of compensation throughout i.e. from the date on which it fell due till the date of realization.

The petition is allowed to the aforementioned extent with costs. Counsel's fee assessed at Rs. 25,000/-.

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

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

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(P.K. Rastogi)
Member