

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

Dated 5th May, 2010

Petition No.222(C) of 2008

M/s Indian Cablenet Company Ltd. ... Petitioner

Versus

M/s AB Cable Communication ... 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.Tejveer Singh Bhatia, Advocate

F
or Respondent : Mr.Sharath Sampath, Advocate

ORDER

S.B. Sinha

The petitioner is a Multi Service Operator(MSO).

The respondent is a local cable operator. For recovery of a sum of Rs.21,38,170/- with interest @ 18% thereon, the petitioner has filed this petition. The parties are said to have entered into an agreement on or about 11.06.1997. The said agreement inter alia, contains the mode and manner in

which the payments were to be made. It is not in dispute that the parties hereto entered into a settlement on or about 31.07.2006, the relevant portions whereof read as under:

“2. For last 2 years there is encroachment in A.B. Cable’s Network by Samar Mondol and Basiruddin. The issue has been discussed at regular intervals in various forum but could not be resolved. It is now decided that the decisions taken in the meeting dated 23rd April, 2005 which is duly minuted needs to be implemented with immediate effect.

3. A.B. Cable’s dues to ICNCL & Calcom will be crystallized in course of next two weeks. Meanwhile the same is estimated at Rs.25.0 lacs i.e. Rs.8.0 lacs payable to Calcom & Rs.17.0 lacs to ICNCL.

4. Mr.Sanjoy Bose of A.B. Cable has agreed to pay this outstanding both to Calcom & ICNCL on installment basis. Details of which will be determined within next two weeks. It is agreed that payment will begin only after encroachments are

redressed.

5. Mr.Sanjoy Bose has since resigned from Silverline Broadband. Copy of his resignation letter is enclosed as ready reference.

6. Sanjoy Bose has also assured us that he will not associate with any activity of Silverline Broadband for now onward.”

It is the case of the petitioner that it had been sending invoices which were received by the respondent.

We may, however, at this stage notice that the proprietors of the respondent concern for the first time in her evidence denied and disputed the receipt of the said invoices.

The petitioner in support of its case has examined one Mr.Atul Kumar Singh. It has also brought on record letters dated 11.4.2006, 15.02.2006 and 16.05.2006. The petitioner has also sent a notice dated 01.092008 asking the respondent to pay a sum of Rs.21,09,815.20p. The respondent is said to have refused to accept the said notice. The petitioner in support of its case has also annexed therewith statement of accounts being Exhibit P-10.

The respondent contends that in terms of the said agreement it was not liable to pay subscription fee @ Rs.1,61,968/- but at the rate of Rs.1,40,000/- per month upto January, 2007 and thereafter @ a sum of Rs.1,47,183/- per month. The further case of the respondent is that a sum of Rs.16 lakhs as shown in the statement of account was not payable to the petitioner.

In this behalf, our attention has been drawn by Mr.Bhatia, the learned counsel appearing for the petitioner to the statement of account to contend that the opening balance shown in the Statement of Account of Rs.16,24,596/- has have been written off on or about 31st March, 2007 which would correspond to the opening balance as would appear for the entries dated 31.03.2007 being a sum of Rs.14,08,523/- and Rs.2,16,073/-.

Mr.Bhatia, in that view of the matter would contend that the petitioner is at least entitled to a decree for a sum or Rs.14,25,965/- being the admitted amount. The admission of the respondents in this behalf as noticed heretobefore is that the subscription fee payable was Rs.1,40,000/- per month which was payable till January, 2007 and thereafter @ Rs.1,47,183/-. It furthermore appears that whenever any payment used to be made by the

respondent, due receipts therefor used to be granted. The petitioner has brought on record the latest receipt in this behalf.

Mr.Bhatia submitted that the respondent claiming the benefit of payment of the amount service tax also applied for and received the benefit of CENVAT credit relying on or on the basis of the receipts of the payments obtained by it from the petitioner; but despite the same, however, the same having not been produced, an adverse inference should be drawn against the respondent.

Reliance in this behalf has been placed on a recent decision of this Tribunal in Petition No.48(C) of 2007 (Hathway Mysore Cable Network (P) Ltd. Vs. Vaibhavi Cable Network, Mysore) disposed of on 12.02.2010, where it has been opined as under:

“The defence of the respondents as noticed hereinbefore inter alia is that it had made all payments. If that be so, it was for it to prove the said fact as onus in this behalf was on it.”

Mr.Bhatia would submit that in view of the invoices which are at pages 161 to 163 of the petition as also the demand letters, the claim made by the

petitioner must be held to have been proved. In any event, it was urged that the petitioner is entitled to a sum of Rs.1,49,965/- as per the admission of the respondent.

Mr.Sampath, learned counsel appearing on behalf of the respondent, on the other hand, would urge that no subscription amount having been mentioned in the agreement, the petitioner cannot be said to have proved its case for claiming a sum of Rs.1,61,968/- per month as contained in its invoices dated 01.03.2008 and 01.04.2008 particularly when neither any proof of delivery of invoices has been filed nor any explanation has been offered as to why the outstandings have been shown only in two invoices despite the fact that the regulation framed by TRAI mandating disclosure of such outstandings in the invoices came into force in 2006.

Strong reliance in this behalf has been placed on a judgment of this Tribunal in Petition No.330(C) of 2007 (P. Net Communication Vs. M/s Indusind Media Communications Ltd.) disposed of on 28.05.2008, which is in the following terms:

“Learned counsel for respondent submits that the respondent may have other claims against the petitioner which might not have been reflected in the invoices or else he submits that there may be

claims for period prior to which the invoices have been referred to by the petitioner and the respondent should not be deprived of opportunity to claim such amounts. In reply to this, the learned counsel for the petitioner has drawn my attention to regulation 3.3 of the 4.9.06. Regulation, which provides that monthly invoices should clearly specify the arrears and current dues along with due date for payment of the same. He has also drawn my attention to para-9 of the Explanatory note appended to the said Regulations which also makes it clear that the arrears have to be clearly reflected in the invoices. In view of these regulations and in view of the invoices to which my attention has been drawn, in none of which any arrears have been shown, I find no merit in the submission made by the counsel for the respondent. Counsel for the respondent submits that regulation 3.3 relates only to right to receive signals and is not relevant in the present case. I am unable to accept this.

The result is that the petition is allowed to the extent indicated above.

The petition stands disposed of.”

The learned counsel would further contend that the delivery of notice

dated 11.04.2000 has not been proved. In any event a settlement having been arrived at by and between the parties hereto, the petitioner was required to confine its claim only thereto.

The petitioner in support of its claim have examined one Mr.Atul Kumar Singh. He in its evidence inter alia stated in regard to the original subscription fee payable by the respondent and which had been increased in September, 2005 for different bouquet as also the increases in the subscriber base of the respondent.

He furthermore stated :

“13. I state that on 31.7.2006, a meeting was held between the petitioner and the respondent wherein the respondent agreed that Rs.17 lakhs were due and payable to the petitioner and the same would be paid to the petitioner in monthly installments. Copy of minutes of meeting dated 31.7.2006 is exhibited herewith as Exhibit P-6.

14. I state that in the minutes of meeting dated 31.7.2006 clearly mentioned that the outstanding payable by the respondent to the petitioner will be calculated within 2 weeks from the

meeting dated 31.7.2006. However, for the sake of convenience, the outstanding payable to the petitioner was estimated to be Rs.17 lakhs. I state that as per the accounts of books of the petitioner, the outstanding as on 31.7.2006 was Rs.26,10,086/-.”

Mr.Sampath, however, would point out that the amount shown in the books of account as on 31.02.2006 is evidently wrong.

Be that as it may, the principal questions which, in our considered opinion, is as to what would be the effect of the aforementioned settlement dated 31.07.2006.

We have noticed heretobefore the salient features of the said settlement. Reference has been made to one, Calcom which is a separate entity. A proposal was mooted with regard to the payment of Rs.25 lakhs, namely, Rs.8 lakhs to Calcom and Rs.17 lakhs to the petitioner. It was however, an estimate in relation whereto, details were to be furnished within the two weeks for the said date. It is, however, interesting to notice that Shri Sanjay Basu, husband of the proprietor of the respondent in his cross-examination stated as under:

“The amount of Rs.17 lakhs appearing in minutes of the meeting 31.7.2006 is not pertaining to any subscription fees but was adhoc amount demanded towards removal of encroachment in the area of the respondent by the MSO.

The amount of Rs.17 lakhs has no co-relationship with the subscription fees.”

In his evidence, he also admitted that service tax returns used to be filed and in respect thereof CENVAT credit was also claimed. His evidence in this behalf is as under:

“At present we are not filing any service tax return as the turnover is below the prescribed limit. However, earlier when our turnover was more than the service tax limit we used to file the tax return.

I still have copies of the service tax return filed earlier, which can be produced.

It is correct that the respondent used to take CENVAT credit in the service tax return that were filed since the

respondent used to pay service tax to the petitioner.

We took the CENVAT credit on the basis of the money receipts that were given by the petitioner at the time of making the deposit as we did not receive any invoices from the petitioner.

It is incorrect that we took CENVAT credit on the basis of the invoices raised by the petitioner as the same were never received by us.

I will have to look into my records for a copy of CENVAT credit application filed by me.

It is incorrect to suggest that the respondent has received letter dated 11.04.2006, 15.05.2006 and 16.05.2006.”

He also admitted receipt of the notices dated 01.09.2008 and 21.01.2008, although a denial in that behalf has been made in his affidavit. It furthermore appears from his evidence that having regard to the encroachment, the amount of subscription fee was reduced to Rs.4912/- as in December, 2008. He furthermore expressed his ignorance as to whether in Kolkata, it is necessary for the LCOs to file the Service Line Reports (SLRs).

The proprietress of the respondent firm, Ms.Mamta Basu, while

accepting that the receipt for payment used to be granted by the petitioner, she in her evidence also produced the receipt dated 20.10.2009 (Exhibit- A). Although she has denied any increase in the subscription fee but accepted that due to additional amusement tax the same was increased. She also admitted that meetings were held on 31.07.2006 and 11.09.2006; although she denied that the decisions taken therein have been implemented.

Indisputably, service tax used to be paid on the subscription fees. The respondent has taken the benefit thereof. It had also obtained the CENVAT credit which is governed by CENVAT Credit Rules 2004; Rule 9 whereof reads as under:

“9. Documents and accounts.- (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

(a) an invoice issued by -

(i) a manufacturer for clearance of -

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short –levy by reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty.

Explanation.- For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or

(c)

(d)

(e) a challan evidencing payment of service tax by the person liable to pay service tax under subclauses (iii) and (iv) of clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or

(f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of, September, 2004; or”

The respondent, therefore, must have claimed the CENVAT credit on the basis of the receipts granted by the petitioner. If it was claiming the benefit in respect of payment of service tax as also the credit of CENVAT, we fail to see any reason as to why the same has not been produced.

It may be true that no proof of delivery of service of the invoices has been filed by the petitioner. The petitioner's witness, Mr. Atul Kumar Singh, in his cross-examination states as under:

“I have with me the proof of delivery of the invoices to the respondent and if necessary the same can be produced.

It is incorrect to suggest that these receipts were not filed on record because they have been fabricated later.”

The same, however, have not been produced. He furthermore accepted that the statements made in Para 10 of his affidavit regarding increase in subscription fee in September, 2006 filed was not correct. He has also not produced any books of accounts for the period prior to April, 2005. He, however, denied that they had not been produced because the opening balance in Exhibit P-10 was incorrect.

We have noticed heretofore that the opening balance had been written off.

We will also proceed on the assumption that the encroachments had been removed in terms of the minutes of meetings dated 31.07.2007 by reason whereof an estimated of Rs.17 Lakhs became payable to the petitioner is not correct as he did not remember with reference to Clause 3 of the aforementioned minutes of meetings as to whether same had ever crystalized or in terms of Clause 4 thereof, the instalments were payable by the respondent determined between the parties. We would also assume that the suggestion of the respondent that the amounts payable were never crystallized as the encroachments have not been removed is correct but in view of the clear admission made by Shri S.K. Basu that the same being not related to removal of encroachment for which a decision had been taken by three parties, we are of the opinion that the same has lost its significance.

It is now a well settled principle of law having regard to the provision contained in Section 58 of the Indian Evidence Act that the things admitted need not be proved. In view of the admissions made in the pleadings as also the evidence of the respondent, we are of the opinion that even if no other

contention of the petitioner is considered, it would be entitled to the amount claimed as per the admission of the respondent being for a sum of Rs.14,25,965/-.

We direct accordingly. This petition is allowed to the aforementioned extent. The petitioner furthermore would be entitled to interest at the rate of 18% per annum on the sum due in terms of Clause 7 of the agreement between the parties. The respondent will bear the costs of this petition. 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