

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

**DATED 25th MAY, 2010**

**PETITION No.212(C) OF 2007**

M/s North Bombay Cable Network Pvt. Ltd.

... Petitioner

Versus

M/s Haith Cable

...Respondent

**PETITION No.213(C) OF 2007**

M/s North Bombay Cable Network Pvt. Ltd.

... Petitioner

Versus

M/s Bhavani Cable

...Respondents

**PETITION No.214(C) OF 2007**

M/s North Bombay Cable Network Pvt. Ltd.

... Petitioner

Versus

M/s Cross World

...Respondent

**PETITION No.216(C) OF 2007**

M/s North Bombay Cable Network Pvt. Ltd.

... Petitioner

Versus

M/s Magic Vision

...Respondent

**PETITION No.287(C) OF 2007**

M/s North Bombay Cable Network Pvt. Ltd.

... Petitioner

Versus

M/s Ideal World Vision, Thane

...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. Somiran Sharma, Advocate

For Respondent : Mr. Jayant K. Mehta, Advocate

### **JUDGMENT**

#### **S. B. Sinha**

These five petitions filed by the same petitioner against the respondents herein involving common questions of law and facts, were taken up for hearing together and are being disposed of by this common judgment.

The fact of the matter, however, shall be noticed by us from Petition No. 212(C) of 2007, although the amounts claimed from the concerned respondents are different, which would be noticed by us hereinafter.

The petitioner is a Multi System Operator (MSO). within the meaning of the provisions of Telecom Regulatory Authority of India Act, 1997 (The Act).

The respondents herein are the Local Cable Operators (LCOs). Admittedly, they have been taking supply of signals from the petitioner. Inter alia, on the premise that the respondent is a defaulter, these petitions have been filed.

We may, however, notice the reliefs claimed for by the petitioner which are as under:-

- (a) Respondent No. 1 be restrained in providing network to the Respondent No. 2;
- (b) Respondent No. 2 be directed to pay the amount due from Respondent on account of supply of cable feed with interest at the rate of 18% p.a. till realization;
- (c) Also to initiate action for providing false information against the Respondent No. 1;
- (d) Any other equitable relief which this Hon'ble Tribunal deems fit;
- (e) Cost of the proceedings may also be granted.

Before, however, we advert to the respective cases of the parties, it may be noticed that originally the respondent herein was impleaded as respondent no. 2 in the petition. M/s Hathway Cable Limited was impleaded as the respondent no. 1 in each of these petitions. However, the said respondent by an order dated 5.8.2009 passed by this Tribunal was directed to be deleted from the array of the parties. According to the petitioner, each of the respondents in these cases had migrated to the original respondent no. 1. Although the factum of migration is not in dispute, there is some dispute in regard to the month in which such migration had taken place. Whereas according to the petitioner, the migration had taken place in September, 2008, the respondents contend that such migration had taken place in the month of July, 2008.

The respondents do not deny or dispute that the fact that they had been receiving signals from the petitioner. Except in the case of M/s Haith Cable, the amount of subscription fee is also denied or disputed. The case of each of the

respondents herein appears to be that they had all along been making payments to the petitioner and such payments having been made up to July, 2008, no amount is due from them.

The petitioner, on the other hand, contends that the respondents had been taking supply of signal from the year 2002. It is of some significance to notice that the petitioner in sub para (iii) of Para 4 of the Petition stated as under:-

“The Respondent No. 2 i.e. Haith Cable Network have had mutually agreed with Petitioner in the year 2002 and since then the said contract is in existence till Respondent committed the breach of contract as Respondent have taken the services and failed in paying the Basic Package & Other Services. It is also to be noted that Respondent No. 2 regularly paying their subscription through cheques and therefore said contract was in force for providing services is in existence upto 20.8.07. It is completely breach of contract in between the parties and also it is breach of rules under TRAI Act. Despite of issuance of notices to Respondent No. 2 has failed in depositing outstanding dues for the subscription of local area operation system mentioned in the invoice and schedule. The Respondent No. 2 is well aware that the Petitioners are in the service contract with the Respondent No. 3 to Respondent No. 6 for these pay channels. A service contract with the Respondent No. 3 to 6 is annexed herewith as Exhibit “A”, “B” and “C”.”

Except in the case of M/s Haith Cable, as noticed hereinbefore, despite the said assertions, the petitioner claimed that a part of the amount of the subscription fee namely Rs. 42,000/- for some months and Rs.58,000 and odd for the others, which were paid in cash, all other payments used to be made by the respondents, by cheques only. The petitioner furthermore contends that Hathway Cable and Datacom Pvt Ltd (original respondent no. 1) encroached into the area and

for the said purpose. The petitioner relies upon a letter dated 21.8.2007 addressed to Zee Turner, in turn, also addressed the letter to the Hathway Cable on 21.8.07, 31.8.07 and 13.9.07.

We may, however, notice that the said letters have not been brought on record by the petitioner. It is also pertinent to place on record that the details of the payments made by the respondents herein alongwith their invoices were annexed to the petition and marked as Annexure 'F'. It may further be placed on record that in sub-para (v) of para 4 of the Petition it was stated:-

“This Petitioner has forwarded invoice to Haith Cable i.e. Respondent No. 2 against the total outstanding Rs.4,32,412/-, which is not paid by them i.e. Respondent no. 2 to the Petitioner. That as per the provision of TRAI, it is mandatory on the part of the Respondent No. 2 when would like to separate himself from availing services from Petitioner, he ought to have pay for his operational unit to enable the petitioner to pay entertainment tax and service tax and therefore the Respondent No.2 has committed the breach of condition of terms for which he is liable and responsible.”

The respondents, in their respective replies, inter alia, contend that the petitions are barred under the provisions of Clauses 3.3 of the Interconnect Regulations in so far as the petitioner failed and/or neglected to establish its claim by bringing on record documentary proof of service of the invoices. It is further the case of the respondents that the invoices on which reliance has been placed by the petitioner, are fabricated ones and have never been served on them. It

had also been contended that the ledger account, which, according to the petitioner, was being maintained in the regular course of business, would show that despite the petitioner's claim that supply of signals had been effected only up to September, 2007, subscription fee for the month of October, 2007 had also been claimed. It had further been contended by the respondent that it had regularly been paying a sum of Rs. 1 lakh per month up to October, 2006. However, from November, 2006, the amount of subscription fee was increased by Rs.1750/- per month up to January, 2007. The respondents contend, which is denied and disputed by the petitioner, that transmission of signals was stopped in the month of February, 2007 when the petitioner insisted on enhancement of the subscription charges, whereupon, the same was increased to Rs.1,27,460 p.m. Thereafter, the respondent continued to make payment of the amount to the petitioner up to July, 2007. The respondents state that they had been forced to make a further deposit, e.g., a sum of Rs. 80,910/- by M/s Haith Cable. The amount, according to the respondents, is liable to be refunded and/or adjusted against the charges for August, 2007. The case of the respondent is that the hike in the subscription charges, which having been found to be unreasonable, they migrated to Hathway.

The principal issues which arise for our consideration in these petitions are as under:-

- (1) Whether the petitioner is entitled to the respective claims prayed for in these petitions?
- (2) Whether the migration took place in July, 2007 or August, 2007 or September, 2007?
- (3) Whether the migration of the respondent to the network of M/s Hathway Cable Network being in violation of the Explanation appended to the Second Proviso appended to clause 3.2 of the Interconnect Regulations is legal and valid?

The petitioner, in support of its case has examined one witness. The respondents, having not filed its affidavit within the time allowed to it, were not allowed by this Tribunal to examine witnesses on their behalf.

Before, however, we consider the oral evidence adduced on behalf of the petitioner, we may notice that the petitioner initially filed an affidavit of Mr. Dilip Arun Bhagat. He, as it now transpires, is a Director of the petitioner company. However, on the date when the said witness was to be cross-examined, he did not turn up and in his place, one Mr. Umesh Samant attended the Court.

The learned counsel appearing on behalf of the respondent objected to his examination before this Tribunal. However, as an exceptional measure he was allowed to be examined in chief and cross-examined. The said witness sought to prove the documents accompanying the affidavit of the said Shri Dilip Arun Bhagat.

The petitioner, in support of its case, has brought on record the following documents :-

- (i) The invoices;
- (ii) The Ledger Accounts;
- (iii) The Bank Accounts; and
- (iv) A letter of denial dated 14.8.07.

The learned counsel appearing on behalf of the petitioner would contend:-

- (1) Keeping in view the fact that the invoices used to be hand-delivered to the respective respondents as has been proved by PW-1. Shri Umesh Samant, and corroborated by the Bank Statement being Exhibit 'C' series as well as the ledger account being Exhibit 'B' series and the amounts paid by cheques and thus having regard to the fact that the amounts mentioned in the invoices, the part payments made as also other relevant factors, the case of the petitioner stands corroborated from the particulars of the Bank Statements as also the ledger account and, thus, it must be held to have proved its case.
- (2) In view of the fact that the books of accounts were being maintained by the petitioner in regular course of business in terms of Section 34 of the Evidence Act, cash component paid by the respondents must be held to have been paid by them.

In this connection, our attention has been drawn to the statement made by the said witness which reads as under:-

“Haith Cable is combination of the five operators and each operator has to pay 30% of the subscription amount in cash to avoid payment of entertainment tax which was payable on the basis of subscriber base.”

In support of this contention in respect of Section 34 of the Indian Evidence Act, the learned counsel has relied upon the decision in C.B.I. v. V.C. Shukla, [1998(3)SCC410].

- (3) The respondent having not given any suggestion to the witness of the petitioner with regard to the correctness of the entries made in the ledger or that the same was not being maintained in regular course of business, the statement of the witness must be accepted as correct.
- (4) In view of the Explanation appended to the Second Proviso appended to clause 3.3 of the regulation, it being obligatory on the part of the respondent to clear off the outstandings of the petitioner before migrating to another MSO, the original respondent no. 1, at least, ought to have enquired about the dues as also the amount mentioned in the last invoice from the respondent. The same was necessary in view of the fact that by reason thereof, a valuable right has been conferred upon the MSO from whom the LCOs had been taking the service.
- (5) The invoices having been sent under a registered cover with acknowledgement due and the envelope having been returned with the endorsement of the postal department, the same would be deemed to have been served. In support of the said contention. Reliance had been placed on D. Vinod Shivappa v. Nanda Belliappa [2006(6)SCC456].

Mr. Jayant Mehta, the learned counsel appearing on behalf of the respondents, on the other hand, would submit:-

- (1) The petitioner must be held to have failed to prove its case and discharge the burden of proof cast on him.
- (2) The petitioner has not been able to prove that:-

- (i) an agreement was entered into for payment of a sum of Rs.1,86,420/- per month towards subscription charges;
  - (ii) invoices were served on the respondent;
  - (iii) the petitioner had been supplying signals to the respondent even after 20.8.09;
- (3) The petitioner having itself written a letter to M/s Zee Turner Ltd on 24.8.07, the question of the respondent's being liable to pay any subscription charges for the month of August, 2007 or September, 2007 does not and cannot arise;
- (4) The so called ledger account of the petitioner does not show any amount of Rs.4,32,412/- as claimed in Petition No. 212 of 2007.

The dispute between the parties, as noticed hereinbefore, lies in a very narrow compass. The agreement by and between the parties was an oral one. The terms and conditions thereof, therefore, are required to be ascertained from the materials brought on record as also the conduct of the parties. The respondents in each of these cases, as noticed hereinbefore, admit that they were paying the subscription fees to the petitioner. It is also not denied and disputed that all such payments used to be made by cheques.

We, therefore, at the outset, may consider the question as to whether the respondent Haith Cable had been paying any amount in cash or not. We have noticed hereinbefore, some statements made in the pleadings, from a perusal whereof,

it would be evident that the petitioner has accepted that all payments used to be made by cheques. The petitioner has furthermore accepted that the contract by and between the parties hereto came to an end on or about 20.8.07.

In the aforementioned context, it is also of some significance to notice that the petitioner itself had written a letter to M/s Zee Turner on or about 24.8.07, the relevant portion whereof reads as under:-

“We had informed you about losing our jointers Magic Vision, Nandivli Road (Dombivli East), Haith Cable, Sunil Nagar, (Dombivli East). The latest development is six more of our jointers have joined the Haithway feed which itself is illegal and we are losing revenue day by day. We would also like to inform you that as the revenue is difficult to get it will be difficult in our part to pay you on time in the forthcoming months.”

In view of the aforementioned statements made by the petitioner itself, in our opinion, it must be held that the supply of signal, if any, continued only up to 20.8.07 and not upto September, 2007. We may furthermore notice that the petitioner itself in its ledger account had stated that the invoices were also raised for the month of October, 2007 which cannot be accepted having regard to the petitioner's own case.

The respondents seriously disputed the claim of the petitioner that any part of the subscription fee was being paid in cash. It has produced the documents. It appears that according to the petitioner itself, one of the cheques of the respondent bearing number 264858 dated 23.5.07 bounced. The respondent paid the said amount on 4.6.07 and 5.6.07 being a sum of Rs. 1 lakh and a sum of Rs,27,460/-. This payment in cash has been accepted and not any other payment.

The respondent in its reply stated as under:-

“That the Answering Respondent was regularly paying a sum of Rs. 1,00,000/- per month upto the month of October, 2006 to the Petitioner plus applicable service tax. That from November 2006 onward due to increase in connectivity, it was mutually decided between the Petitioner and this Respondent that the subscription fees would be increased by Rs.1,750/- or thereabout, which arrangement continued upto January 2007. It is submitted that some time in the month of February 2007, the Petitioner stopped transmitting signals to the Answering Respondent. On enquiring with the Petitioner, the Answering Respondent was informed that he is required to shell out additional monthly subscription fees from February 2007 onward. It was after deliberation it was mutually decided that this Respondent would make payment of Rs.1,27,460/- inclusive of service tax to the Petitioner which in continued to make upto July 2007.

It is submitted that some time in March 2007, this Respondent was forced to deposit as an adhoc payment of Rs.80,910/-, which this Respondent is entitled to refund/adjustment against August 2007 payment as this Hon’ble Tribunal may determine, without prejudice to this Respondent claim for refund of subscription amount paid in July 2007 which was paid by this Respondent in good faith despite poor quality and infrequent disconnected signals.”

In its rejoinder thereto, the petitioner stated as under:-

“It is further be noticed that the previous amount of Rs.1,00,000/- was exclusive of service tax and the subsequent amount of Rs.1,27,460/- was inclusive of service tax.”

From bare perusal of the pleadings of the parties, it would appear that the petitioner for all intent and purport accepted the case of the respondent that the agreed amount of subscription fee payable by the respondent to it was a sum of Rs.1,27,460/- and not the invoiced amount of Rs.1,86,420/-.

The learned counsel appearing on behalf of the petitioner, however, would contend that with a view to clarify the aforementioned position, a supplementary affidavit has been filed. That may be so, but there cannot be any doubt or dispute that the petitioner, subject to any amendment made to the petition, would be bound by the statement made in the original petition. Any statement made in the rejoinder to the reply or in supplementary affidavit cannot be taken into consideration which is contradictory to or inconsistent with the statement made in the original application. Furthermore, as noticed heretofore, the petitioner itself has confined its claim up to 20.8.07. It is, therefore, difficult for us to accept the plea of the petitioner that it had continued to supply of signal to the respondent beyond the said date. We, having regard to the specific stand taken by the respondent that the supply had been made by the petitioner up to July, 2007 need not go into question as to whether the supply of signal was of good quality or not.

This brings us to the question as to whether the respondent should have been issued any notice or it should have asked the petitioner to supply the last invoice in terms of explanation appended to the second proviso of Regulation 3.3.

The said provision reads as under:-

“Any broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster /multi system operator, who collects the payment for providing TV channel signals to any distributor of TV channels, shall issue monthly invoices to the distributor of TV channels. The monthly invoice shall clearly specify the arrears and current dues along with the due date for payment of the same.

Explanation:

Any claim for arrears should be accompanied by proof of service of invoices for the period to which the arrears pertain.”

There cannot be any doubt or dispute that the Regulator has inserted the said explanation in terms of an amendment carried out in the year 2006 for certain purposes, namely, that LCO or an MSO may not migrate to another MSO or broadcaster without clearing the dues of the former. This, however, pre-supposes that the concerned MSO or the broadcaster must have raised an invoice and served the same to the MSOs or other LCOs, as the case may be.

The witness of the petitioner examined on behalf of the petitioner, as noticed hereinbefore, has come to the witness box without filing any affidavit. We fail to see any reason as to why Shri Dilip Arun Bhagat who filed its affidavit did not turn up for his cross examination. A suggestion which has been given to the said witness and which has been accepted by him, would clearly go to show that he is alive and could have been examined by the petitioner. Ordinarily, the case of the

juridic person should be proved by a person having knowledge of the fact of the matter. The aforementioned witness, namely, Shri Dilip Arun Bhagat, was aware of the fact of the matter. The reason for his non-examination has not been explained by the petitioner. It is a well settled concept of law that ordinarily the evidence of the witness who has not been cross examined, cannot be taken into consideration. It is also evident in view of the provisions of Order 18 Rule 4 of the Code of Civil Procedure as also the rules framed by this Tribunal that ordinarily and subject to just exceptions, the provisions of the Code may not be required to be applied by this Tribunal having regard to the provisions of Section 16(ii) (f) of the TRAI Act, 1997. The affidavit by way of evidence of the witness should be filed at the first instance.

The witness examined on behalf of the petitioner states that except the invoices, he had no personal knowledge in regard to the continuation of the supply of signal. He also accepts that no notice was given to Bodhani Cable that any amount of Rs. 51,443/- was outstanding as on 31.7.07 nor any notice was given showing outstanding of Rs.1,32,432/- as on 31.8.07. It is also curious to notice that even according to him, the petitioner which is a company registered and incorporated under the Indian Companies Act, 1956, had not finalized its accounts of 2007-08, which, in terms of the provisions of the Companies Act, 1956, should have been completed within a period of six months, namely, September, 2008.

It is furthermore accepted by the said witness that the cashiers, who accept the cash payments and issue receipts are Mr. Anil Panwar and Ms. Mangia Dhighe. Mr. Anil Pawar, according to the said witness, also collects the amount by way of subscription charges. In view of the fact that one of the disputed question which arises in this Petition is as to whether

the respondent had made any payment in cash or not, in our opinion, it was obligatory on the part of the petitioner not only to examine one of the aforementioned cashiers who had been accepting payments in cash from the respondent but also was required to file the cash receipts, office copies whereof, admittedly, are being maintained by it.

The said witness had also not been authorized by the Board of Directors to depose in favour of the petitioner. It is, therefore, difficult to comprehend as to why PW-1 was examined and for what purpose. Having regard to the materials brought on records, we are of the opinion that the petitioner's witness is not reliable. In that view of the matter, we are also not in a position to accept the contention that the invoices in question had been delivered.

It is true that the petitioner had sent invoices to the respondents through registered post which had been returned as 'unclaimed'. But then, the invoices were sent only in September, 2007, i.e., after the contract admittedly came to an end. Whereas on the one hand, the petitioner relies upon Interconnect Regulations, it itself has not complied with the provisions thereof. In terms of the provisions of the said Interconnect Regulations, the petitioner was legally obligated not only to raise invoices but also serve the same on the LCO. Such service of invoices was required to be established by documentary evidence. Furthermore, the ledger account of the petitioner which is said to have been maintained in ordinary course of business shows that the petitioner had been receiving an amount of Rs.1,27,460/- per month from the respondent. There is also no documentary evidence to show that any signal was supplied in the month of September, 2000.

Our attention has furthermore been drawn to various contradictions in the case of the petitioner. The invoices annexed to the petition which are at pages 48 to 54 thereof, do not contain the seal and signature of any officer of the petitioner, which is evident from the affidavits for the identical period annexed to the affidavit of evidence of Mr. Bhagat being at pages 205, 216, 217, 227, 245 and 247 of the paper-book. The witness examined on behalf of the petitioner categorically stated that all the invoices were computer-generated. If the computer-generated invoices did not contain the signature and seal, as would be evident from the invoices annexed to the petition, we fail to understand as to why the seal and signature had been put in the subsequent invoices.

The statement of account at page 47 does not tally with the invoices as also the ledger folio which are at page 252 to 254. The petitioner's claims on the basis of the accounts cannot also be verified.

At pg 47, the Petitioner shows that it had received a total amount of Rs.1,69,460/- (Rs.1,27,460/- + Rs.42,000/-) from the Respondent in the month of April, 2007.

The invoice for the month of April, 2007 shows an outstanding of Rs.41,617/-/- as on 31.3.07. The invoiced subscription charges are Rs.1,86,420/-. Thus, the total outstanding as on April, 07, according to the Petitioner, is Rs.2,28,037/-.

From the outstanding of Rs.2,28,037/-, the Petitioner states that it had received Rs.1,69,460/- by 30.4.07. Thus, the remaining outstanding amount should be Rs.2,28,037/- minus Rs.1,69,460/- = Rs.58,577/-.

This amount of Rs.58,577/- should, therefore, be the outstanding amount for the month of May, 2007. However, this is not so. Instead, the outstanding amount shown in the invoice for the month of May, 2007 is Rs.1,00,577/-. There is an excess outstanding of Rs. 42,000/-. Incidentally, at pg. 47, the Petitioner shows that it had received a cash deposit of Rs.42,000/-.

For the month of May, 2007, the total outstanding amount is shown as Rs.2,45,132/-.

In this month, the Petitioner claims to have received an amount of Rs.1,86,420/- from the Respondent.

Thus, the total outstanding for the month of June 2007 should be Rs.2,45,132/- minus Rs.1,86,420/- = Rs.58,712/-.

However, the outstanding for the month of June 2007 is shown as Rs.1,86,172/-.

The above illustration clearly shows that the Petitioner is making a completely untenable and unfounded claim.

In fact, the above anomalies vindicate the uncontroverted stand of the Respondent that it was regularly paying the monthly subscription charges, which were Rs.1,27,460/-. The Petitioner itself acknowledges this at pg. 47.

In fact, the Petitioner has wrongly shown some cash deposits alleged to have been made by the Respondent. No receipt of any such deposit is produced. The Respondent denies to have made any cash deposit except for payment of Rs.1,27,460/- against a dishonoured cheque. The regular payments of Rs.1,27,460/- is not only evident from the uncontroverted statement of the bank account of the Respondent but also from the account of the Petitioner.

In V.C. Shukla (*supra*) the Supreme Court of India held as under:-

“Indubitably, the Act lays down the rules of evidence to be applied and followed in all judicial proceedings in or before any court including some courts-martial. Keeping in view the purpose for which the Act was brought into the statute-book and its sweep, the words appearing in Section 34 have got to be given their ordinary, natural and grammatical meaning, more so, when neither the context nor any principle of construction requires their restrictive meaning. While on this point we may refer to Section 209 of the Companies Act, 1956 which expressly lays down what “books of account” to be maintained thereunder must contain and, therefore, the general meaning of the above words under the Act may not be applicable there.”

For the reasons aforementioned, we are of the opinion that having regard to the materials brought on record by the parties, the petitioner would be entitled to the subscription charges only for the 20 days in the month of August, 2007.

To the aforementioned extent only the petitions are allowed. In the facts and circumstances of this case, however, there shall be no order as to costs. The petitioner however may be held to be entitled to the interest @ 12% per annum on the said amount pendente lite and future.

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

**Chairperson**

.....  
**(G. D. Gaiha)**

**Member**

.....  
**(P.K.Rastogi)**

**Member**