

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

DATED 28th MAY, 2010

PETITION No.248(C) OF 2008

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Channel Plus (A.P.) Chennai

... Petitioner

Vs.

Palanati Satyanarayana Chanti Network, A.P.

... Respondent

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BEFORE:

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

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

For
Petitioner : Ms. Narayani K. Sibal, Advocate

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

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ORDER

S.B. Sinha

The petitioner is a distributor of Sun TV Network Ltd, a broadcaster of a number of channels (mainly operating in Southern Part of India). The respondent is a multi system operator (MSO) operating in the town of Bodhan in the State of Andhra Pradesh.

Indisputably, the respondent herein filed a petition before this Tribunal which was marked as Petition No. 43(C) of 2006 inter alia praying for supply of signals of different bouquets of its channels either directly or on such terms and conditions as were stipulated in the agreement. By a letter dated 18.5.06, this Tribunal asked the parties hereto to make an attempt to arrive at a settlement to finalise the terms of subscription agreement. The parties, pursuant thereto or in furtherance thereof, are said to have reached at a memorandum of understanding. The said memorandum of understanding is in the form of a letter addressed to the petitioner being dated 25.5.06. It reads as under:-

“As per our discussions and negotiations on 22.5.06 at Hyderabad office in response to TDSAT Orders the following settlement is worked out for supplying Gemini, Teja TV Signals to my network:-

1. That Bodhan Communication Network is presently paying subscription for 10,500/-, Gemini, Teja Signals and out said 10,500 Signals you have accepted to give me 5250 Signals to my network plus additional Aditya and Teja News Channels.
2. That further has for your conditions I undertake to take over the remaining 5250 connections of Bodhan Network in future if the Bodhan Communication Network discontinues complete and stop receiving the signals from you totally.”

It is stated that the respondent also filled up an affiliation form in regard to the allotment of decoders and made an undertaking to pay therefor. The said undertaking contained many blanks. The date was blank, the agreement was blank, the date from which the bill for the connection would start from was also blank. It, however, appears that the petitioner thereby had declared a total connectivity of 5250 and sought to increase their connectivity to 10500 connections. The petitioner also filed an affiliate registration form wherein both total number of subscribers and declared connections were shown at 5250.

The petitioner contends that the respondent herein had made the aforementioned undertakings and filled up the requisite forms willingly, by reason whereof, it became liable to pay the subscription amount from May, 2006. According to the petitioner, it paid three Post Dated Cheques (PDCs) at the time of entering into the aforementioned memorandum of settlement, the details whereof are as under:

Cheque No. 670752 dated 5.7.06 for Rs. 76,603/-.

Cheque No. 670753 dated 5.8.06 for Rs. 76,603/-.

Cheque No. 6707524 dated 5.9.06 for Rs. 76,603/-.

It appears that in September, 2006 one of the said cheques was presented in bank for encashment, but the same bounced in October, 2006. The petitioner in his statement of account had shown the deposit of the said cheque on 26.9.06 and after the same bounced, a crossing fee and debit in respect of the same was made on 6.11.06.

It furthermore appears that one Bodhan Communication Network was the distributor of the petitioner in respect of the aforementioned town. It was having 10500 connections. As noticed hereinbefore, according to the petitioner, the respondent

was to get 5250 subscribers for its both the channels. Before proceeding, however, we may also notice that whereas re-transmission of bouquet-I of the petitioner's channel started from July, 2006, that of the bouquet-II started from August, 2006.

The respondent, however, states that another oral agreement was entered into by and between the parties indicating that the arrangement in terms of the aforementioned undertaking was an adhoc one and in fact the amount paid by the respondent to the petitioner would be adjusted upon arriving at a subscriber base in a joint survey.

The respondent contends that at the time of entering into the aforementioned memorandum of undertaking, it had merely 400 subscribers which in the course of time, increased to 880 subscribers.

It, furthermore, stands admitted that this Tribunal in the aforementioned Petition No. 47(C) of 2006 directed a joint survey to be undertaken. The said joint survey was to be held on 30.4.2007. It did not take place. Whereas, according to the petitioner, the respondent did not turn up therefor, tThe respondent says that as his son was suffering from 'Malaria', he asked for some time and assured that would join the joint survey at a little later but the officials of the petitioner left the village stating that they would come back on some other day.

The petitioner, however has produced before this Tribunal a tape-recorded version of the conversation which took place by and between its representative and the respondent, the transcribed form whereof is contained in a CD as well as in Annexure-P-8.

We may, however, notice that the said recorded conversation on phone by and between the respondent and Mr. Suresh Babu, the representative of the petitioner, has not legally been brought on records. It was also not marked as an Exhibit.

Mrs. Sibal, the learned counsel appearing on behalf of the petitioner would contend that the fact that M/s Bodhan Communication had 10000 connections out of which half of them had been allotted to the respondent itself would be a pointer to the fact that the agreement had been entered into. Our attention in this behalf had been drawn to a letter dated 7.9.06 addressed by the aforementioned Bodhan Communication Network to the petitioner herein which reads as under:-

“As you already know M/s Bodhan Communication Network has been prompt in paying your bills from time to time. But, unfortunately you have given decoders to M/s Chanti Communication Network and we are struggling to pay the bills since few months due to tight competition on the ground.

As per the commitment given to us by your officials we request you to decrease our connectivity from 10500 to 5250 from September, 2006 onwards. In case our competitor, M/s Chanti Communication fails to pay the bills, we promise you to handover his connectivity (5250) also. We continue to obey your company rules and regulations from time to time and expect your support always.”

It was contended that from a perusal thereof it would appear that even Bodhan had asked for downgradation.

Mr. Navin Chawla, the learned counsel appearing on behalf of the respondent, on the other hand, would contend that the memorandum of understanding dated 25.5.06 would not indicate that by reason thereof, a binding contract had come into being. The learned counsel urged that the subscription agreement merely shows a figure of 5250 being the subscriber base, subject, however, to a joint survey and adjustment from the amount paid by the respondent to the petitioner. It was submitted that the petitioner had failed and/or neglected to examine its officials who had participated in the joint survey. Our attention has further been drawn to the fact that neither the said MoU nor the purported affiliation form constituted an agreement. Mr. Chawla would argue that the conduct of the parties would clearly go to show that the said memorandum of understanding was arrived at subject to a joint survey and subject to adjustment which would be evident from the fact that until August, 2006, the respondent did not make any payment but despite the same the petitioner neither approached this Tribunal nor disconnected the supply of signals of its own. The learned counsel points out that there was absolutely no reason as to why the petitioner would not file the present petition when, until June, 2006, if the respondent had failed to make any payment. The learned counsel would contend that the aforementioned stand by the respondent had not only been raised in various letters being dated 27.1.07 and 26.2.07 but also in its rejoinder to the reply filed by the petitioner herein in the aforementioned petition No. 47(C) of 2006. It was urged that the respondent is entitled to introduce independent evidence despite the said purported memorandum of understanding dated 22.5.06 in terms of Proviso 3 and 4 appended to Section 92 to the Indian Contract Act, 1872. The learned counsel has furthermore drawn our attention to that part of the pleading wherein it had been averred that the respondent, keeping in view the conduct of the petitioner had no other option but to sell its network to M/s Bodhan itself at the instance of the petitioner and parties had arrived at a full and final settlement.

The questions which, in view of the contentions of the parties, arise for our consideration in this petition are :-

- (1) Whether a valid agreement came into being in terms of the aforementioned memorandum of undertaking dated 25.5.06 and the said validation form coupled with the registration form.
- (2) Whether the contention of the petitioner that it had to sell its network to Bodhan at the instance of the petitioner and as a result whereof, a full and final settlement had been made, is correct.
- (3) The memorandum of understanding was arrived at during the pendency of a proceeding pending before this Tribunal. Although in its reply the respondent contended that it was forced to enter into the agreement in question. In his cross-examination, the witness categorically admitted that he had not made any complaint that the signature on the undertaking dated 25.5.06 was taken by force.
- (4) He furthermore accepted that he had withdrawn the earlier petition apprehending an adverse order against him and that was the reason why he had sold his network.

The background fact obtaining in this matter stands admitted. Bodhan Communication Network had a subscriber base of 10500. The respondent was to have 5250 subscribers out of the same. The respondent furthermore undertook that in the event the connections of Bodhan Network in future is obtained by it, it would take over the remaining 5250 subscribers also. The respondent does not state that the officials of the petitioner had exercised any influence over him.

It is true that the validation form contains some blanks but the same by itself would not mean that no valid agreement had come into being.

The petitioner has filed a large number of invoices to show that whereas in the month of September, 2006, the subscription amount was charged for Bouquet-I in respect of 5250 subscribers only, whereas thereafter only on the same basis, the said Bodhan Communication Network was being billed. The petitioner has also brought on several documents to show that the respondent was also being billed on that basis. For bouquet-I, the respondent was to pay a sum of Rs. 52,500/- @ Rs.10/- per subscriber for bouquet-II it was to pay a sum of Rs.15,750/-, whereupon, the service tax @ 12% and education cess @ 2% was added, totalling a sum of Rs.76,608.80.

The respondent in his cross-examination admitted that on the date on which the memorandum of understanding was signed, he had given three PDCs.

He also admitted that that he had stopped payments of the cheques as a result whereof, the same bounced when presented by the petitioner in the bank. It furthermore appears that this Tribunal had directed a joint survey. Whereas according to the petitioner the respondent deliberately did not join the same, the respondent states that he expressed his inability to join at the joint survey immediately as his son was suffering from 'Malaria'. We have noticed heretobefore that the petitioner had produced before us a tape-recorded version. However, it has not been legally brought on record and in that view of the matter we are not in a position to refer thereto.

We may furthermore notice that the only witness examined on behalf of the petitioner, Shri K. Bhaskar although in his evidence has relied upon a letter dated 30.4.2007 purported to have been written by one Mr. P.A. Babu, but, in his evidence before this Tribunal he contended that after the respondent refused to join in the joint survey, a survey was conducted by the representatives of the petitioner which took about 3 days.

The statements read as under:-

“It is incorrect to say that no such survey was conducted.”

Our attention has been drawn to a letter dated 7.9.06 issued by M/s Bodhan Communication Network to the petitioner. We have noticed the same heretofore.

Although in the aforementioned letter downgradation was sought from 10500 to 5250 from September, 2006 onwards, it appears that the invoice on the subscriber base of 5250 was raised on the aforementioned Bodhan Communication Network from August, 2006 itself.

It furthermore appears on a second reading of the aforementioned letter dated 7.9.06 that the said M/s Bodhan Communication Network was said to be a guarantor to the respondent. The respondent in the rejoinder filed in the aforementioned petition No. **47(C)** of 2006 stated as under:-

“That the contents of paragraph 4 are wrong and are denied. It is denied that the monthly subscription fee of Rs.76,603/- is due from the petitioner to the Respondent. It is most respectfully submitted that the Petitioner’s subscriber base is only

880 and a complete list of the same is annexed hereto and is marked as **ANNEXURE P-1**. The petitioner is therefore required to pay only on that basis. That as the Respondent was intentionally not completing the survey the petitioner vide his letter dated 20.9.06 also sent the above list to the Respondent. Copy of the letter is annexed hereto and is marked as **ANNEXURE P-2.**”

Before this Tribunal, a statement was made that the respondent has sold out its network. The learned counsel for the respondent on 31.7.07 confirmed the same.

The said petition was, on the prayer made by the learned counsel for the petitioner, dismissed with liberty to the petitioner herein to pursue the matter, if any, against the respondent. In the said petition, the respondent had also filed an affidavit, the relevant portions whereof read as under:-

“That I submit that on 29.4.07, at evening hours, at 8 PM, P. Avnesh Babu, Bodhan local Executive of respondent telephoned me that they are going to conduct joint survey at 11 AM on 30.4.07 as ordered by the Hon’ble Tribunal at Bodhan and I readily agreed to join them.

That on the next day i.e., 30.4.07, I telephoned local Executive of respondent P. Anvesh Babu that my son is suffering from Malaria and High Temperature and I will be little late to join them in conducting joint survey. But, to my surprise later on after some time when I went to their appointed place, the representatives and local executives of the respondent had already left and later on in the evening of 30.4.07 P. Anvesh Babu informed me that they will submit a report to their company and will again come and do joint survey.

That I submit that if at all joint survey was done no useful result will come as there is no neutral person in the joint survey and if any report submit by respondent will be bias and I will be prejudice as respondents are my opponents.”

Mrs. Sibal would contend that from a statement made in para 5 of the said affidavit, it would appear that the respondent had understood that a joint survey had been conducted.

In our opinion, the said contention may not be correct. The statement made by a person either in an affidavit or in a pleading must be read in their entirety. The statements made in para 5 of the said affidavit must be, in our considered opinion, read with paras 3 & 4 thereof. The statement made in para 5 has been made, evidently, as an alternative course and by way of abundant caution.

The submission of Mr. Chawla that the memorandum of understanding dated 25.5.06 does not reflect the correct transaction between the parties, is difficult to accept. Apart from the fact that the said agreement was entered into, the said agreement was filed when the matter was pending before this Tribunal, we cannot allow any oral evidence to be taken on record in derogation of terms and conditions thereof.

The 3rd and 4th Provisos appended to Section 92 of the Indian Evidence Act, in our opinion, cannot be said to have any application in the instant case. It does not refer to a subsequent event. It is not a case where the nature of the document is in

question. The respondent has merely pleaded different terms of the contract, and not the validity thereof or the nature of transactions. No fraud has been alleged. In fact as noticed hereinbefore, the respondent in his evidence categorically admitted that he had no proof that any force was applied to him and furthermore accepted that on the said date, he had also given three PDCs. Furthermore, when the matter was pending before this Tribunal, the respondent had nothing to fear. In that view of the matter, we are of the opinion that a valid agreement had been entered into by and between the parties hereto. We, however, accept that the validation form or the registration form did not constitute an agreement between the parties as such.

There is, however, another aspect of the matter which we must take note of. The respondent in reply stated:-

“That further has for your conditions I undertake to take over the remaining 5250 connections of Bodhan Network in future if the Bodhan Communication Network discontinues complete and stop receiving the signals from you totally.”

We may notice that the petitioner has not cross-examined the witness on the aforementioned statement that the respondent had sold its business to its competing MSO itself, namely, Bodhan Communications and that too on the insistence of the petitioner but also assured the respondent that it will be full and final settlement of its accounts.

The respondent in his evidence by way of affidavit also stated:-

“That I state that the present petition highlights how a broadcaster firstly ensures that any person daring to give competition to its favoured MSO is first forced to close down/sell his business to the favoured MSO itself and then an example is sought to be made of him so that no one else dares to even contemplate to stand in competition of its favoured MSO. It is

submitted that when I went begging for decoders to the petitioner, the petitioner first imposed unreasonable terms by demanding subscription fee at 5250 subscriber base though I had only 880 subscribers. I was promised that

The petitioner would carry out a survey and give due adjustment to me. However, instead of conducting the survey or giving such adjustment, the Petitioner started harassing me for payment. I realized that I could not survive in this business as the petitioner would never act fairly with me and without such fairness and signals of the petitioner there is no chance of my survival. I, therefore, sold my business to my competing MSO itself, namely M/s Bodhan Communication. This was done on the insistence of the petitioner itself who also assured me that this will be full and final settlement of all its accounts.”

He furthermore stated –

“I state that the undertaking of payment for 5250 subscribers was an adhoc arrangement. That on supply of petitioner’s signals the subscriber base of the Respondent increased to 880. The same has been stated by me in my rejoinder in the previous petition.”

Admittedly, he had entered into an agreement for sale on or about 21.6.07 in favour of one Kuldip Sawhney. The plaintiff of the witness Mr. Bhaskar, in his cross-examination, stated as under:-

“We came to know that the respondent had sold its network to a third party. I do not know that the respondent had sold out its network to M/s Bodhan Communication.

I know Kuldeep Sahni who is a MSO in Nizamabad. He has connected the optical fiber to Bodhan.

I do not know that he is supplying signals in the name of Bodhan. I do not know what name he is supplying signals.

The petitioner is raising the bills on Bodhan Communication separately and Kuldeep Sahni separately.

We do not bill Kuldeep Sanhi for Bodhan town.

We have not taken any action for not paying the bills of the respondent.

Discussion however had been going on but, however, they have been postponing the issues.

We have not filed any recovery petition against Bodhan Communication.

Q. Why you did not do it?

A. Because the due is of Chanti Communications.

Even as guarantor we have not impleaded M/s Bodhan Communication in this petition.”

The arrangement between the parties vis-à-vis M/s Bodhan Communications appears to be a bit strange. If half of the customers of M/s Bodhan Communications had been handed over to the respondent, it is difficult to conceive that the latter would be a guarantor in respect of default in payment by the respondent to the petitioner.

The fact that Kuldip Sahni who had connected the optical fiber to Bodhan had something to do with it can neither be denied nor disputed. The petitioner at this juncture cannot be heard to say that it did not know about the sale transaction. As a matter of fact, the order sheet of this Tribunal dated 31.7.2007 itself suggests that the information with regard to the sale of its

network by the respondent was disclosed to this Tribunal by the counsel for the petitioner itself, to which, the learned counsel for the respondent intended to have instructions.

Why, thus, the statement of the respondent in its reply, this position had not been denied and disputed, is beyond any comprehension. The petitioner in this regard has not traversed the said allegations. It made vague and evasive denial in respect of the other statement made by the respondent in its reply. When it failed to respond to this crucial aspect of the matter, namely, that the respondent had sold the premises to Bodhan Communications itself on the insistence of the petitioner, and as the statement made by the respondent is that it was done towards full and final settlement must be held to have been admitted. On this ground alone, although some of the issues have been decided in favour of the petitioner, we are of the view that the claim of the petitioner must fail.

The petition is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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

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