

M/s Hathway Cable and Datacom Pvt. Ltd. & Anr.

...Petitioners

Versus

Sonali Multivision

...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 Petitioners : Mr.Arun Kathpalia, Advocate
Mr. Nasir Husain, Advocate

For Respondent : Mr. Sunil Kumar Verma, Advocate

ORDER

S.B. Sinha

These four petitions being inter-related were taken up for hearing together and are being disposed of by this common judgment.

We would, however, note the fact of the matter from petition No.260(C) of 2008.

This Tribunal, however, by an order dated 19.12.2008 directed the respondent to continue to make payment of the subscription amount in the following terms:

“Issue notice to the respondent for 16.02.2009. *Dasti* as well.

In the meanwhile the respondent is restrained from disconnecting the signals being received by it from the petitioner or from migrating from petitioner to another MSO without clearing the outstanding amount due from the respondent to the petitioner and without giving mandatory notice as per Regulations. The respondent will continue to abide by the agreement and will continue to pay to the petitioner as per the agreement.”

On the aforementioned basis the petitioner claims a sum of Rs.6,62,826.98p.

In Petition No.261(C) of 2008, a claim for a sum of Rs.95,128/- has been made against the respondent therein as on 31.10.2008. In terms of the interim order upto May, 2010, the petitioner claims a sum of Rs.1,13,919/-. In Petition No.262(C) of 2008 the petitioner claims a sum of Rs.1,66,879.76 and in Petition No.263(C) of 2008 the petitioner claims a sum of Rs.4,29,845/- against the respondent.

The petitioner contends that the respondents herein had been receiving signals from it till May, 2009 when it had migrated in violation of the order of this Tribunal restraining them from migrating to any other MSO. It is not in dispute that the parties hereto entered into oral agreements for receiving signals from the petitioner wherefor the respondents were to pay a sum of Rs.45 per point.

In Petition No.260(C) 2007, the number of points is 200, in Petition No.261(C) it is 150, in Petition No.262(C) of 2008 the number of points is 240 and in Petition No.263(C) of 2008, the number of points is 450.

The petitioner contends that at the relevant point of time the number of pay channels was very few which increased manifold in course of time. According to the petitioner with the passage of time the subscription charges increased as agreed to by and between the respondents which is in the following terms:

“(i) Rs.58.5 – July & August 2001

(ii) Rs.60 – December 2001

- (iii) Rs.80 – May, 2002
- (iv) Rs.100 – January 2003
- (v) Rs.110 – June 2005”

It is further contended that with the passage of time the number of subscribers of the respondent increased whereas in the case of Petition No.260(C) of 2008, the number of subscribers increased to 335 in April, 2001 and 375 in January, 2004 but was reduced to 334 owing to claim of loss and reduction in subscriber based in May 2004 which again increased to 350 in January 2006.

In the case of Petition No.261(C) of 2008, the number of subscribers increased to 166 in January 2001.

It has further been contended that having regard to the competition in the field on and from August, 2006 the charges were reduced from Rs.110/- to Rs.50/- but was increased to Rs.80/- per point in September, 2007.

The petitioner in support of its case has relied upon the statement of account (Exhibit PW-1/3) and invoices (Exhibit PW-1/2). It has been contended that the said invoices were raised on a regular basis.

Although, there was no dispute initially that the invoices were received but in their replies the respondents contend that they had not received any invoice from May, 2008.

The principal defence raised on the part of the respondents is that they have made all payments due to the petitioner and in fact, an overpayment has been made. They also alleged forgery and/or doctoring of the invoices.

In Petitions No.260(C) of 2008 and 261(C) of 2008, petitioners has also filed applications in terms of Section 20 of the Telecom Regulatory Authority of India Act, 1997 for committing breach of the aforementioned terms of the order dated 19.12.2008 in as much

as they not only failed to pay the monthly subscription fee after 19.12.2008 but admittedly migrated to another MSO in April, 2009.

Mr.Arun Kathpalia, the learned counsel appearing on behalf of the petitioner would urge that from the pleadings as also the evidence adduced by the respondent themselves it would be evident that they have principally admitted the entire claim of the petitioners. It was furthermore urged that the respondents are also liable for appropriate action against them by this Tribunal for their failure to abide by the interim order dated 19.12.2008.

Mr.Verma, the learned counsel appearing on behalf of the respondent, on the other hand, urged:

- (i) From a comparison of the letter dated 03.08.2006, Exhibit R/1 filed in Petition No.260(C) of 2008 and with the letter dated 17.08.2007 filed in Petition No.262(C) of 2008, it would appear that the signatures of the alleged authorized signatory is the same and as such the certificate granted on behalf of the petitioner that no amount is due should be accepted.
- (ii) From the various documents filed by the petitioner bearing the signature of Mr.Rajesh Vohra would appear and having regard to the fact that he has been in the service of the petitioner, there is no reason as to why he has not been examined.
- (iii) From a perusal of the purported invoices filed by the petitioner, it would appear that although in the petition, a practice of mentioning of outstanding amount in the invoices was stated but it would appear from the invoices that such outstanding has been mentioned and only in his evidence PW-1 raised a contention that the same was because of change in the software, but from a perusal of some of the invoices it would appear that it has been shown in one invoice and in the other no such outstanding amount has been shown and, thus, the same must be held to have been forged.

- (iv) It is true that the respondent has filed invoices issued by one M/s Wire & Wireless India Ltd. (WWIL) for three months but as would appear from the explanation offered in that regard by the witness appearing on behalf of the respondent that during those three months as signals were not provided by the petitioner they have no other option but to take signals from WWIL.
- (v) The filing of the said invoices and reference thereto in the reply were inadvertent errors.
- (vi) The respondents are ready and willing to pay the admitted amount being Rs.17,367/- in Petition No.260(C) of 2008.
- (vii) For taking signals from another MSO, the respondent have tendered unqualified apology and, thus, no action need be taken by this Tribunal.

The relationship between the parties being admitted and the differences of the respondent having been noticed by us heretobefore, we may consider the effect thereof.

It has been denied or disputed that the respondent had been receiving invoices w.e.f. January, 2007. The witness of the respondent, Shri Anil B. Sonawane, proprietor of Sky Link Cable Network clearly admits the same. He furthermore admitted that the subscription fee was increased or reduced which is exactly the case of the petitioner stating:

“Q. When was the subscription fee was enhanced from Rs.45/- to Rs.50/-?”

A. From 2007 to 2008 I have been paying subscription fee @ Rs.50/-. From, 2000 to 2007 the subscription fee was Rs.50/-. The subscription fee was increased from Rs.50/- to 80/- then from 100/- then to 110/- but thereafter it was reduced to Rs.50/- then Rs.30/- for two months then again Rs.50/- uptil 2008 thereafter increased to Rs.80/-.”

He has furthermore admitted that it was Hathway Nashik Cable Pvt. Ltd. which have been supplying signals to the respondent and the petitioner No.1 came into the picture in 2007 or 2008. When his attention was drawn that the bills were issued in 2008 by petitioner No.1 he accepts the same. It is, therefore, difficult to conceive as to on what basis the respondent seeks to rely on two invoices dated 13.09.2007 and 15.10.2007 (Exhibits R-4 and R-5) to contend that the petitioner have been raising invoices at the rate of Rs.50/- for the said period. We have noticed heretobefore that the invoices placed on record by the respondent are not issued by the petitioner but by WWIL. In its explanation the respondent's witness contends that for three months it was WWIL who had supplied only one channel of the broadcaster ZEE TV which have not been pleaded the same must be held to be inadmissible in evidence.

The petitioner has placed on record invoices for the period even prior to May, 2008 the receipt whereof is not disputed which clearly show that the rate per point was Rs.80/- per month. We have also been taken through the statements of accounts from a perusal whereof it would appear that all payments made by the respondents have been given due credit. The said payments also would clearly show the increase in rates as also payment thereof by it. We may furthermore notice that no suggestion had been given to the witness of the petitioner that the invoices and the statements of account are forged and fabricated. Even no such plea has been raised in the reply and only in the evidence for the first time such a plea has been raised by the witnesses.

So far as the contention that the statement of account is false and contrary to the record is concerned, we may notice that as all payments made by the respondent had duly been credited, it is difficult to accept that that respondent has made overpayment or that some of the payments made by it had not been credited at all. In the statements of account, the number of points as also the rates, have been mentioned.

We may notice one of the entries in the ledger account being dated 31.08.2004 showing a debit entry of Rs.33,400/-. Had the rate been Rs.50/- per point the invoiced amount would have been Rs.19,000/- only. The petitioner in fact made payments of

Rs.34,000/- each in the month of August, 2004 and October, 2004, Rs.36,807 in November, 2004 against the invoice bill for a sum of Rs.33,400/- each for the months of August and September, 2004; Rs.2305/- towards service tax and a sum of Rs.24,860.80p each for the months of October and November.

We may refer to the entries dated 30.09.2001, 16.10.2001, 02.07.2001, 20.07.2002, 31.01.2005, 28.02.2005, 01.04.2006, 29.04.2006, 01.05.2006, 30.05.2006, 01.02.2006, 30.06.2006, 01.07.2006 and 30.07.2006 which clearly go to show that payments have been made at the increased rate. In fact as noticed hereinbefore the respondent's witness has admitted to the said effect. So far as the defence of the respondent that it had made overpayment to the extent that it had paid a sum of Rs.2.69 lakhs as against the subscription charges of Rs.1.96 lakhs is concerned, we may only point out that the same is premised on the fact that it was to pay subscription fee from 2001 to October, 2008 which being incorrect and contrary to the admission made by the witness. We are unable to accept the same.

Furthermore, the defence of the respondent is the purported letters dated 03.08.2006, 21.11.2007 and 04.01.2008 issued by the petitioner. Evidently, they appear to be forged and fabricated. It is an admitted fact that the MSO was supplying signals and dealing with the respondent at the relevant time is concerned, was petitioner No.2 being Hathway Nashik Network Pvt. Ltd.

The effect of the admission made by the witness of the respondent in his cross-examination clearly established that he had started dealing with the Petitioner No.1 only after February, 2008 and if that be so there is absolutely no reason as to why the said letters would be on the letter heads of Petitioner No.1. The petitioners are companies incorporated under the Indian Companies Act, 1956. They have all India dealings. We have noticed the other letters issued to the respondents by the petitioners. It is, therefore, difficult to accept that the petitioner would issue letters in such language which are as under:

“Dated 03.08.2006(Exhibit R/1)

Dear Sir,

This is reference to your payment of Monthly Feed Charges as per record, you have cleared payment up to Jun-06.”

Another Letter dated 02.11.2007 reads as under:

“Date 02.11.2007(Exhibit R-2)

(To whom it may concern)

Dear Sir,

This is inform you that due to pay Rs.50/- (Fifty only) per Point from November 2007 to October 2008. This is for your information purpose only”

It is true that the petitioner has not examined Mr.Vohra but if the letters are found to be forged on the face of it, no reliance can be placed thereupon. It is also pertinent to notice that the said witness of the respondent despite having been called upon by Mr.Kathpalia to produce all invoices in his possession did not produce the same. It is also relevant to notice that in the stamp purported to be of the Petitioner No.1 bears the Pin Code of Nashik, has wrongly been stated.

Mr. Verma would contend that the documents having been issued by or on behalf of the petitioner, it is too late in the day to say that they are manufactured. The letters produced from the custody of the respondent is contended to be manufactured which on the face of it contains such gross inaccuracies like the Pin Code, we are of the opinion that no reliance can be placed thereupon.

So far as the non-mentioning of two invoices, one of which mentions the amount of outstanding and other did not, is concerned, we may notice that the one at Page 13 is a physical copy of the original invoice which bears the signatures of the authorized representative of the petitioner, whereas the other at page 76 the same being a print out which was obtained after the petitioner shifted to 'Oracle's' software from 'Tally' software and being a computer generated one does not contain any signature, and, thus, we do not find any discrepancies therein. Moreover, the amounts mentioned in both the letters are the same.

Furthermore, admittedly the invoices were served. There was a dispute with regard to the genuineness thereof and, thus, not only a point was required to be taken in the reply by the respondent but also to say the least, a suggestion ought to have been given to the petitioner's witness in this behalf. We may also notice that the five invoices which have been filed by the petitioner along with the petitioner, those which are at pages 13 to 16 are in one format in Tally software whereas the others are in different formats which also goes to show that these petitioners has shifted from one software to the other.

It will bear repetition to state that the only plea raised by the respondent in its reply was that the rate was Rs.50 per point per month and even in respect of statement of account, no fault has been found therewith. It is also of significance to notice that witnesses examined in other cases as for example Mr.Dilip in Petition No.261(C) of 2008 has clearly stated that all payments have been made through cheque/cash for which receipts used to be granted. The petitioner has produced on record the receipts issued towards the sale of set-top boxes. If the respondent disputes the correctness of the invoices vis-à-vis the ledger account it ought to have raised specific plea that the invoice are forged and fabricated.

So far as the Miscellaneous Application filed by the petitioner in terms of Section 20 of the 1997 Act is concerned, we may notice that petitions have been filed only in two cases and not in all the four, although same pleas in regard to the violation of our order dated 19.12.2008 have been raised.

Mr.Kathpalia would contend that having regard to the decision of the Supreme Court of India in Tayabbhai M. Bagasarwalla & Anr. Vs. Hind Rubber Industries Pvt. Ltd. – AIR 1997 SC 1240, the respondent should not be allowed to be heard as they have not purged their contempt.

Reliance in this behalf has been placed on Para 7 of the said decision which reads as under:-

“7. It appears that Defendants 1 and 2 applied for setting aside the said order (dated July 28, 1994). It was dismissed by the High Court on November 7, 1994. It would be relevant to notice the contents of this order:

“Mr.Apte (counsel for the plaintiff) submitted that the appellants cannot be heard on this Civil Application . He submitted that they are in contempt of the court inasmuch as they have willfully and blatantly violated the injunction order. He submitted that unless the contempt is first purged, the Appellants cannot be heard.

I see great substance in this contention. The Applicants were asked whether they were willing to purge the contempt and restore the premises to the State they were in 1991. The Applicants are not willing to do so. The whole attempt has been to try and confuse. The whole attempt has been to try and justify. By the ex parte order dated 11.2.1991 as confirmed by the order dated 21.11.1991, the Applicants have been restrained from carrying out any construction work. As is set out hereafter, it is clear to Court that in spite of this injunction order, construction work has been carried on almost continuously by the Appellants.””

The aforementioned para does not contain any findings of the Apex Court. We may, however, notice that it although referred to, a well known authority of Court of Appeal in Hadkinson Vs. Hadkinson – 1952(2) All ER 567, it did not deal with the last sentence thereof, namely, “the second is that no application to a court by such a person will be entertained until he has purged himself of its contempt”.

Hadkinson (supra) has been referred by the Supreme Court of India in a large number of cases inter alia in A.R. Antulay Vs. R.S. Nayak - 1988(2) SCC 602. Hadkinson(Supra) although has also been followed by various high courts, we may notice that in B.K. Savithri & Anr. Vs. B.V.S. Anand & Ors. - 2005(10) SCC 207, it has been held as under:

“6. We are also of the view that the impugned order directing demolition of the alleged unauthorised construction of the temple on the land could not have been passed by the High Court without deciding the question whether any contempt was committed by the contemnors, and was required to be purged.”

In the matter of Anil Panjwani , In re v.- (2003(7) SCC 375, it was held:-

“6. It is no rule of law and certainly not a statutory rule that a contemner cannot be heard unless the contempt is purged. It has only developed as a rule of practice for protecting the sanctity of the court proceedings and the dignity of the court that a person who is prima facie guilty of having attacked the court may be deprived of the right of participation in hearing lest he should misuse such opportunity unless he has agreed to disarm himself. The court would not be unjust in denying hearing to one who has shown his lack of worth by attacking the court unless he has agreed to beat a retreat and the court is convinced of the genuineness of such retreating. It would all depend on the facts and circumstances of a given case and the nature of contempt under enquiry which would enable the court exercising its discretion either way.

7. The leading English authority on the subject is *Hadkinson v. Hadkinson*. Under a decree of divorce the custody of the child born from the wedlock was given to the wife with an undertaking that the child should not be taken out of the court's jurisdiction except by its leave. The wife defied the court's order. In an appeal against the order of custody preferred by the wife she was refused to be heard unless she purged the contempt by returning the child. Lord Denning stated the rule by observing (at All ER p. 575 B) that disobedience with an order of the court is not itself a bar to be

heard but “if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make” — the court may form opinion for exercise of the court’s discretion in favour of refusing to hear the contemner. Romer, L.J. with whom Somervell, L.J. agreed, held that the contempt committed by the wife was one of grossest kind and stated as a general rule that no application to the court by such a person would be entertained until the contempt had been purged. In our opinion, the view taken by Denning, L.J. is more acceptable being less rigid. The House of Lords in *X Ltd. v. Morgan-Grampian Ltd.* chose to follow the view taken by Denning, L.J. and observed that in a case where a contemner not only fails wilfully and contemptuously to comply with an order of the court but makes it clear that he will continue to defy the court’s authority if the order should be affirmed on appeal, the court must have a discretion to decline to entertain his appeal against the order.”

We may notice that in *Raja Vs. Van Hoogstraten - 2004(4) All ER 793*, the rule in *Hadkinson* has been explained stating that there was no general rule that a court would not hear an application for his own benefit by a person in contempt unless and until he has purged the same.

It was observed:

“82. That an appellate court may refuse to hear a party who has been found to be in contempt and who has made no attempt to purge that contempt is not in doubt (see *Hadkinson Vs Hadkinson* [1952] 2 All ER 567, [1952] P 285, *Astro Exito Navegacio SA v Southland Enterprise Co Ltd.*, *The Messiniaki Tolmi* [1981] 2 Lloyd’s Rep 595 and *X Ltd. v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1). But it is now recognized that there is no general

rule that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt; so that, in order to avoid the application of that rule the party in contempt must bring himself within some established exception. The approach which the court should adopt is now found in the judgment of Lord Bingham of Cornhill CJ, in *Arab Monetary Fund v. Hashim* (21 March 1997, unreported). After referring to the speeches of Lord Bridge of Harwich and Lord Oliver of Aylmerton in the *Morgan-Grampian* case, Lord Bingham CJ said this:

‘From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then to ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.’

83. Adopting that approach in the present case, I thought it reasonably plain that the interests of justice were best served by hearing Mr. van Hoogstraten’s appeals, notwithstanding that he had been held to be in contempt and to have made no serious attempt to purge that contempt.”

One of reasons as to why the respondent therein was required to be heard, was stated in the following items:

“83(4) If these appeals were allowed to proceed, this court would have the opportunity to determine whether, in the particular circumstances of this case, it was right that Mr. van Hoogstraten should have been found to be in contempt of court without having had a proper opportunity to be heard on those questions. When giving permission to appeal on 13 June 2003 this court was satisfied that the appeals had a real prospect of success. If this court were to accede to the claimant’s contention that Mr. van Hoogstraten should not be heard on these appeals, it would be in danger of compounding what would (if there is, indeed, merit in the appeals) be a serious injustice and a breach of Mr. van Hoogstraten’s convention rights.”

[See also JSC BTA Bank Vs. Ablyazov – (2009) EWCA Civ 1125]

The court is, thus, required to ask itself a question as to whether the interest of justice would be best served by hearing a party in contempt or by refusing to do so.

In any event, having regard to the fact that contempt petition has been filed only in two cases, we do not intend to punish the contemnors as thereby the doctrine of equality and level playing field would be violated.

The petitioner, in our opinion, would be entitled to the payment for a period of three years prior to the date of filing of application.

The petitioner would also be entitled for interest pendente lite and future @ 12% per annum.

In the facts and circumstances, the respondents must pay and bear the costs of the petitions. Counsel's fee assessed at Rs.50,000/- in each case.

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

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

.....
(P.K. Rastogi)
Member