

**TELECOM DISPUTES SETTLEMENT & APPELLATE  
TRIBUNAL**

**NEW DELHI**

**DATED 6<sup>th</sup> MAY, 2010**

**Petition No. 310(C) OF 2007**

Win Cable & Datacom (P) Ltd.

...Petitioner

Vs.

Win Cable Entertainment Pvt. Ltd.

...Respondent

**BEFORE:**

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

**HON'BLE MR. P.K.RASTOGI, MEMBER**

For Petitioner

: Mr. Jayant K. Mehta, Advocate  
Mr. Nasir Husain, Advocate

For Respondent

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

**ORDER**

S.B. Sinha, J

1. The petitioner is a Multi Service Operator. Allegedly it entered into an agreement to supply signals to the respondent for re-transmission to its customers. According to the petitioner the parties hereto also entered into an agreement of distributorship

in terms whereof the later became responsible for collection of dues from the sub-operators, stating

*“The Respondent was also acting as the Distributor of the Petitioner under the Agreement, whereby the Respondent was also responsible as Distributor of the Company for timely collection of subscription revenue from sub-operators of the Respondent.”*

**2.** The petitioner in the aforementioned context has averred :

*“the petitioner had form time to time had called upon, persuaded and reminded the Respondent to clear his outstanding liabilities but the respondent failed to remedy his defaults. Owing to default and failure on the part of the Respondent to make the payments to the petitioner, the petitioner vide their letter dated 06<sup>th</sup> November, 2007, had finally called upon the respondent, to clear his outstanding liabilities alongwith other cable operators affiliated to the Respondent. The outstanding liability of the respondent was Rs. 32,37,286/- , whereas the outstanding liabilities of its affiliated operators were Rs. 36,57,308/- which total amounts to Rs. 68,94,495/-. The respondent has also committed default to the tune of Rs.2,31,000/- for 154 SET Top Boxes supplied by the Petitioner to the respondent.*

The Petitioner submit that the present petition is being restricted only against the Respondent toward cable TV feed charges defaulted by the Respondent as cable operator to the Petitioner.

*“The petitioner reserves its right to proceed against the Respondent jointly and / or severally against the operators listed herein, before this forum toward cable TV feed signal charges and / or for recovering SET Top Boxes separately. The petitioner by the notice had called upon the respondent that in case if the respondent fails to clear dues, then appropriate action would be initiated against the respondent.*

*Annexed herewith and marked as Annexure P-2(colly) are copy of the letter dated 06<sup>th</sup> November, 2007 addressed by Petitioner to the Respondent along with copy of the Registered A/D as the proof of dispatch of letter to the Respondent.”*

(underlining is ours for emphasis)

- 3.** In the prayer portion of the petition, the petitioner has confined its claim to Rs. 32,37,286/- towards cable TV feed charges alone. Alongwith the petition five invoices drawn in the name of the respondent were annexed. The so called distribution agreement, however, was not annexed.

4. It may, moreover, be placed on record that in the cause title of the petition the respondent was said to be represented by Mr. Bharat Harwani.

The respondent in its reply inter-alia stated as under :-

*“.....The Respondent vehemently denies that Bharat Harwani ever represented the Respondent Company and the title of the suit has the name of said Bharat Harwani, which is deliberate, mischievous and misleading, so made out for reasons best known to the Petitioner. The Petitioner has falsely, baselessly and mischievously stated in Para number 1 of the petition that the Respondent Company was represented by Bharat Harwani. I deny that Bharat Harwani ever represented the Respondent Company for purpose of any lawful obligations being created against the Respondent and in favor of the Petitioner Company.”*

5. It furthermore stated:

*“The Respondent Company also denies the allegations leveled in Para No.5 c of the Petition, in respect of the Respondent being invoiced for by the Petitioner. The Petitioner Company has no enforceable right under the law of the land at all as they have claimed earlier in respect of “agreed monthly subscription fees”, hence the very question which needs to be addressed first is what is the*

*legal right the Petitioner Company has against the Respondent Company. In absence of any such document to support and substantiate the claim of the Petitioner, it is crystal clear that there is no question of any payment needed to be made as is being claimed by the Petitioner.*

*In Para no. 5 d of the Petition, the Petitioner has falsely stated that Respondent was also acting as a Distributor under the Agreement. The crux of the entire Petition is the so called Agreement which the Petitioner has repeatedly referred while making claims and allegations against the Respondent Company, but has failed to produce any iota of evidence to support such a claim. The Petitioner has not got any legal right against the Respondent nor has the petitioner suffered any legal injury as is being feebly attempted to be made out to mislead this Hon'ble Tribunal in a bid to snatch an order against the Respondent Company.*

*In Para number 5 e, the Petitioner has repeated the baseless allegation again believing that an allegation if oft repeated would probably appear to be true, even if it has no legal substance, truth or base. The Petitioner has again falsely alleged that the LCOs like the Respondent has deliberately and persistently committed defaults in respect*

*of obligations to make payments for services availed. As stated earlier, the Petitioner is repeating that there was an obligation, but has nowhere in the Petition substantiated the basis of any such lawful obligation on part of the Respondent. Merely by repeating the allegation, the Petitioner is only attempting to mislead the Hon'ble Tribunal and causing harassment to the Respondent Company. The Petitioner in the entire Petition has not established any legal right under which it is entitled to any payment or obligation for the same from the Respondent, but has been making wild, baseless allegations in respect of financial claims, subscription fees and other monetary claims against the Respondent.”*

- 6.** Curiously the petitioner even in its rejoinder did not annex any other invoice. It also did not annex a copy of the so called distribution agreement therewith.

Only the witness of the petitioner Mr. Ramesh Ramanna Prabhu said to be an authorized representative of the petitioner company in his affidavit interalia stated as under :-

*“I say that apart from the payment obligation arising out of the agreement / arrangement of providing feed signals to direct subscribers of Win Cable Entertainment Private Limited, Mr. Bharat Harwani the person in charge of affairs*

*of Win Cable Entertainment Private Limited entered into Distributorship Agreement with the Petitioners.*

*Copy of the Said Distributorship Agreement is produced and tendered in evidence and be taken on record and marked as Exhibit – “PW1/1.”*

- 7.** The distribution agreement appears to have been entered into by Mr. Bharat Harwani, said to be thence working as a distributor through its company Win Cable Entertainment Pvt. Ltd. (the respondent) and the petitioner herein. We may notice that at the foot of the agreement Mr. Bharat Harwani did not sign the agreement on behalf of the respondent. Alongwith the said affidavit, however, a large number of invoices were annexed. Additional evidence was filed by way of affidavit on or about 27<sup>th</sup> October, 2009 wherewith a large number of invoices were annexed. A reply thereto was also filed on behalf of the respondent.
- 8.** Mr. Mehta, the learned counsel appearing on behalf of the petitioner would contend:-

  - (i) Having regard to the fact that distribution agreement (marked as PW1/1) dated 11.1.2002 whereby the respondent was appointed through Mr. Bharat Harwani for collection of the subscription amount, 20% commission of the collected amount through the invoices

raised(Exhibit PW1/2), the ledger account which would show some payments made by the company for which credit has been given (Exhibit PW1/3) and the notice sent by the petitioner to the respondent claiming the dues arising out of the said distributorship agreement, which also was not replied to, would clearly go to show that the petitioner has established its case.

- (ii) The affidavit of Mr. Chandan Wadhwa, DW1, wherein the following statement has been made :

*“3. I state that there is no agreement between the parties requiring any payment being made by the Respondent to the Petitioner I state that Mr. Bharat Harwani never represented the Respondent company for purpose of any lawful obligations being created against the Respondent and in favour of the Petitioner company.”*

is evidently false as would appear from his cross-examination which reads as under :-

*“I am working as Manager(Operations) since January, 2006 with the Petitioner company.*

*The dealings between the Petitioner and the Respondent companies started in 2002 with the signing of the distributorship agreement.*

*The distributor agreement is at page 69 and market exhibit PW-1/1.*

*This was the only agreement or understanding between the parties.*

*I cannot say off hand that Bharat Harwani was authorized to sign on behalf of the Respondent company. Our understanding is that he was the authorized person to act on behalf of the Respondent.*

*Que: do you have any document to show that the Respondent agreed to pay you any subscription amount, and if so, what amount?*

*Ans : It is provided in the agreement (page 69). I do not have any other document in this regard.*

*The invoices of the company are always hand delivered to the distributor who in turn hands them over to the cable operators. However, no receipt of the same is taken by the Petitioner company. He later volunteered that in the present case, we used to raise the invoices in the name of the Respondent and hand deliver the same to it.*

*...*

*It is incorrect to suggest that invoices from page 78 to 83 were never delivered to the respondent or have been fabricated for the purpose of this case.*

*The signals were supplied to the Respondent till March, 2007 whereafter the Respondent shifted to another MSO without informing the Petitioner.*

*The last payment was received from the Respondent in May, 2005. Till May, 2005 the Respondent made payments.*

*Between June, 2005 and March, 2007, invoices were sent to the Respondent claiming amount due and he promised to make the said payment. Thereafter, a notice dated 6.11.07 was also sent to the Respondent through Regd. Post as also UPC. Apart from the above, no other steps were taken for making recovery.*

*.....*

*It is incorrect to suggest that the ledger account (page 84) is false or has been fabricated to the purposes of the present petition.”*

- (iii) Our attention has further been drawn to the evidence of the witness of the respondent which reads as under :

*“.....*

*Mr. Kumar Hinduja and and Ms. Sakshi Harwani are the directors of the Respondent company.*

*To my knowledge the aforementioned two persons are the only directors of the Respondent Company.*

*It would be wrong to suggest that aforesaid persons are not the directors of the Respondent company.*

*It is incorrect to suggest that Mrs. Saraswati Bharat Harwani and Mr. Lekhumal Hukumartai Harwani are the directors of the Respondent Company.*

*It is wrong to suggest that aforesaid persons are the directors of the company as per the records of the Register of companies.*

*Ms. Shakshi Harwani is the wife of Mr. Bharat Harwani.*

*The other director is not related to Mr. Bharat Harwani.*

*I do not have any idea about the shareholdings of Respondent Company.*

*I would be wrong to suggest that M. Bharat Harwani is in control of shareholding as well as management of the Respondent company.*

*...*

*I came to know Mr. Bharat Harwani during my visits to the field operations as a person in the same business.*

*....*

*Attention of the witness is drawn to page 69, 70 and 77 of the paper book.*

*According to me the signatures appearing at the aforementioned pages are not the signatures of Mr. Bharat Harwani. However, I am not sure of this as the signatures do not match the ones which I have seen.*

*...*

*We have been taking supply of signals from Digit Cable. At the time when I joined the company the supply of signals used to be taken from WWIL.*

*I am not aware as to whether the company had been raising invoices or not as the invoices is handled by the accounts department.*

*It would be wrong to suggest that Mr. Bharat Harwani had been representing the Respondent and had signed the agreement which is Exhibit PW 1/1 on behalf of the Respondent.*

*It is wrong to suggest that the Petitioner Company had been raising invoices towards subscription charges.*

*Vol – I have checked with the account department in this regard.*

*I am not aware if there is an outstanding amount of Rs. 32,37,286/- which is payable by the Respondent to the Petitioner towards subscription charges.*

*According to my knowledge Mr. Bharat Harwani is not a shareholder in the company nor has any concern with the company.”*

(iv) The evidence as subsequently brought on record, the correctness whereof has not been denied or disputed would also categorically go to show that Mr. Bharat Harwani for all intent and purpose was the sole representative of the respondent company.

9. Our attention in this behalf has also been drawn by Mr. Mehta to Exhibit A to A-6, from which it would appear:

*“..... the authorized share capital of the Respondent is Rs. 5 lacs, divided into 4,900 equity shares and 100 preference shares of Rs. 10/- each respectively.*

*Out of the said authorized, the Respondent has issued 4820 equity shares of Rs. 10/- each to the following persons and in the following proportion:*

<i>(i)</i>	<i>Mr. Bharat Harwani</i>	<i>3,150 equity shares</i>
<i>(ii)</i>	<i>Mrs. Saraswati Bharat Harwani</i>	<i>1650 equity shares</i>
<i>(iii)</i>	<i>Mr. Lekhumal Harwani</i>	<i>20 equity shares”</i>

**10.** The learned counsel submitted that although Mr. Bharat Harwani personally holds 65% share in the respondent company, he alongwith his wife Mrs. Saraswati Harwani holds 4800 equity shares out of total 4820 shares constituting 99.60% holding and in fact the remaining 20 equity shares are owned by father of Mr. Bharat Harwani. The said documents would further show that Mrs. Saraswati Bharat Harwani and Mr. Lekhumal Harwani are the directors of the respondent company and, thus, it is evident that Mr. Bharat Harwani fully owns and controls the respondent company and the respondent is merely its alter ego.

In support of his contention that in a case of this nature the doctrine of lifting the corporate veil should apply, the learned counsel has relied upon:

- (i) *TELCO vs. State of Bihar, AIR 1965 SC 40*
- (ii) *DDA vs. Skipper Constructions, (1996) 4 SCC 622*
- (iii) *Kapila Hingorani vs. State of Bihar, (2003) 6 SCC 1*
- (iv) *Jai Narain Parasrampuriah vs. Pushpa Devi Saraf, (2006) 7 SCC 756*

**11.** Mr. Navin Chawla, learned counsel appearing on behalf of the respondent, on the other hand, urged:

- (i) Mr. Bharat Harwani having not been impleaded as a party in this petition, it is not maintainable.
- (ii) From the pleadings of the parties it is evident that no case has been made out for claiming any amount relying on or on the basis of the distributorship agreement.
- (iii) Mr. Bharat Harwani having entered into the so called distributorship agreement in its personal capacity and not on behalf of the company, the claim made in this petition is unsustainable.

**12.** We have noticed heretobefore the pleadings of the parties as also the evidence of the witnesses examined on their behalf in some details.

**13.** The petitioner in the petition has clearly divided his claim into two parts :

- (i) Claim towards feed charges
- (ii) Claim towards distributorship agreement

**14.** The word “also” used by the petitioner in Para 4(g) of the petition assumes significance in this context. It is, thus, the case of the petitioner in respect of its claim is based on the distributorship agreement is that in terms of the distributorship agreement the respondent had not only been taking the supply of signals for their re-transmission to their customers but also undertook to collect the feed charges from all other LCOs wherefor it was to obtain commission of 20% of the collected

amount. The claims of the petitioner, thus, were absolutely distinct and separate. It has not been pleaded that supply of signal was in terms of the distribution agreement. If that be so, the contention raised by Mr. Jayant Mehta that the evidence of the witness examined on behalf of the petitioner is clear and explicit in this behalf cannot be accepted for more than one reason; firstly because there being no such pleading, no evidence is admissible in evidence and, secondly the purported distributorship agreement is not by and between the parties hereto, and in any event Mr. Bharat Harwani could represent the respondent company provided he had executed the same having been authorized by the company in that behalf.

**15.** Section 46 of the Companies Act, 1956 reads as under :-

*“46. Form of contracts – (1) Contracts on behalf of a company may be made as follows :-*

*(a) A contract which, if made between private persons, would by law be required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;*

*(b) A contract which, if made between private persons, would by law be valid although made by parol only and*

*not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.*

*(2) A contract made according to this section shall bind the company.”*

**16.** In terms of the aforementioned provisions, therefore, an agreement whereby some liabilities are fastened on a company being incorporated under the Indian Companies Act, 1956 and which having regard to the provisions contained in Section 34 of the Companies Act, a company is a separate entity being a juristic person must be represented by a person being authorized therefor.

**17.** Furthermore, in a case where privity of contract between the parties is denied, it was for the petitioner to prove the existence thereof. We have noticed heretofore that the petitioner has not even annexed a copy of the distributorship agreement either with the petition or with its rejoinder. It, even didn't annex the purported invoices except five alongwith its petition. It, therefore, could not have annexed a large number of invoices or the distributorship agreement for the first time in the affidavit of the witness. The same, in our view, are wholly inadmissible in evidence.

**18.** The respondent, therefore, was right in its contention that Mr. Bharat Harwani could not have fastened any liability on the respondent company having not signed the agreement on its behalf. We may notice that apart from the alleged payments shown in the ledger account in respect of the petitioner, no other evidence has been brought on record to establish that in fact the petitioner had been supplying signals to the respondent company. We have noticed heretobefore that only 5 invoices have been annexed to the petition; the receipt whereof was denied and disputed by the respondent.

The witness examined on behalf of the petitioner has not brought on record sufficient far less any reliable evidence to establish service of invoices on the respondent company and/or payment in respect thereof by it. It has also not been able to establish service of the notice dated 6.11.2009 on the respondent.

If that be so, no claim can be said to have been established for supply of signals relying on or on the basis of the materials brought on record.

**19.** Another aspect of the matter cannot also be lost sight of. By reason of the alleged distributorship agreement entered into by

and between the petitioner and Shri Bharat Harwani, it was the latter who was to receive some commission, namely 20% of the amount collected. If certain payments have been deposited by the said Bharat Harwani and shown in the ledger account of the petitioner; it having failed to establish any privity of contract by and between the parties hereto cannot fasten any liability on the respondent only because the alleged payments have been made by Bharat Harwani or some commission has been paid to him. It is now a well settled principle of law that in absence of any pleadings, no evidence can be adduced.

- 20.** For the views we have taken, it is not necessary to refer to any of the decisions of the Supreme Court of India whereupon reliance has been placed by Mr. Mehta.
- 21.** For the reasons aforementioned herein this 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**

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