# TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
# NEW DELHI

**Dated 20th May, 2010**

**Petition No.239(C) of 2007**

IndusInd Media & Communications Ltd. … Petitioner

Versus

Star Vision …Respondent

**Petition No.243(C) of 2007**

IndusInd Media & Communications Ltd. … Petitioner

Versus

S.N.D.S. Cable Vision ....Respondent

**Petition No.249(C) of 2007**

IndusInd Media & Communications Ltd. …Petitioner

Versus

Royal Cable …Respondent

**Petition No.260(C) of 2007**

IndusInd Media & Communications Ltd. …Petitioner

Versus

Uttam Video Channel …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 : Mrs.Vandana Jai Singh, Advocate

For Respondent : Mr. Vineet Mehta, Advocate

**ORDER**

**S.B. Sinha**

These four petitions involving common questions of law and fact 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.239(C) of 2007 (IndusInd Media & Communications Ltd. Vs. Star Vision).

The petitioner is an MSO. It purported to have entered into interconnect agreements with the respondent(s) for supply of signal to their network in respect of various channels of various broadcasters. The petitioner indisputably has been carrying on

business of cable and TV service for a long time. Admittedly, the respondents in each of these cases had been taking supply of signal from the petitioner for a long time. The petitioner contends that the respondents in each of these petitions had not been making full payments of the invoiced amounts. Invoices, according to the petitioner, were being sent to the concerned respondent on a regular basis. It has further been contended that the respondent admittedly had 350 points, although there appears to be a dispute in regard to the rate thereof to which we would advert to a little later.

Whereas according to the petitioner the rate for supply of signals was Rs.180/- per point per subscriber, the respondent contends that the same was at the rate of Rs.150/- per point. The respondent apart from taking the aforementioned plea would contend that no agreement had been entered into by and between the parties. We may, however, notice that in the reply it has been admitted:-

> "7. That the contents of para No.7 of the petition are wrong and denied. It is submitted that the Petitioner had never discussed about Cable Operators Interconnect Agreement or its convenants/terms with the Respondent. Since there was no discussion therefore there was no mutual agreement on any of the alleged terms of the said Cable Operators Interconnect Agreement. The Respondent is not aware of the Cable Operators Interconnect Agreement or any clause 10 of the said agreement to revise the subscription fee."

Indisputably, therefore, in view of the increase in the rate of subscription fee by the petitioner, the respondent had started paying the higher charges. The respondents, however, contend that the quality of signals supplied to their network was bad and there had been frequent disruptions. The petitioner was said to be changing the sequence of channels/ channels lines without prior information and sometimes the channels were even being blacked out as a result whereof the customers became

dissatisfied with the services. The petitioner in support of its case has produced a ledger account from a perusal whereof it would appear:-

"(i) In P.No.239(C)/07 – Closing balance as on 31.03.2007 – Rs.2,220,750.50

(ii) In P.No.243(C)/07 –Closing balance as on 31.10.2006 – Rs.516,467.50

(iii) In P.No.249(C)/07 –Closing balance as on 31.10.2006 – Rs.275,177.50; and

(iv) In P.No.260(C)/07 –Closing balance as on 31.08.2005 – Rs.697870.50"

It furthermore appears that M/s Sai Vision was the authorized area distributor of the petitioner and as despite several complaints the petitioner miserably failed to improve the services, it had migrated to another MSO. According to the petitioner as in terms of Regulations 4.1, 4.2 and 4.3 of the Telecommunication (Broadcasting & Cable Services) Regulation 2004 as amended in the year 2006, it was obligatory on the part of the respondent to serve 21 days' notice and as such an intimation of stoppage of supply of signal was given to the petitioner only on 20.11.2006, it was entitled to charges for supply of signals upto middle of December, 2006. The petitions, however, in these petitioners have confined their claims upto 31.10.2006.

The respondent furthermore contends that for the months of April and May, 2006they did not receive any signal but in respect of aforementioned assertions neither any statement has been given nor any counter-claim has been filed. Even no court fee on the said amount has been paid.

By an order dated 22.01.2010, the following issues were framed:-

"1. Whether the respondent is bound to pay the amount claimed by the petitioner?

2. Whether the respondent is bound to pay interest @ 18% p.a. from the due date till realization?

3. Whether in the absence of any written agreement the respondents are liable and bound to pay penalities?

4. What relief, if any, can be granted to the petitioner?"

Ms.Vandana Jai Singh, the learned counsel appearing on behalf of the petitioner contends that having regard to the fact that the respondents admit supply of signals in 150 points and as in 2007, and furthermore the rate per point has been admitted to be Rs.180 per point, the petitioner must be held to have proved its case. It was furthermore contended that although the respondents in the reply denied or disputed the receipt of the invoices, having regard to admitted position the same loses all significance. The respondents in any event before disruption of supply of signals were required to give at least 21 days' notice.

Mr.Vineet Mehta, the learned counsel appearing on behalf of the respondents, on the other hand, would contend that the respondents had made all payments to the distributor of the petitioner. It was urged that although it is the case of the petitioner that draft agreement was sent to the respondent but admittedly the same having not been signed, it cannot be said that any agreement has been entered into by and between the parties. It was urged that no reliance can be placed on the ledger account as on 01.10.2003 and in that view of the matter the petitions must be held to be barred by limitation. It was furthermore submitted and urged that the claim of the petitioner being based on ledger account and the invoices but no proof of service thereof having been filed, no reliance can be placed thereupon, particularly, when the petitioner is capable of generating any invoice at its sweet will. Our attention in this behalf has been drawn to the fact that along with the petition only one invoice has been produced but with the rejoinder a number of them have been produced only for the purpose of filling-up the lacunae in its case. The learned counsel would furthermore point out that no outstanding amount has been shown in any of the invoices. Our attention has furthermore been drawn to the fact that the supply of signal stopped from August, 2006. It was urged that having regard to the fact that no agreement had been entered into, the proviso appended to Regulation 4.2 would not be attracted.

The relationship between the parties is not in dispute. We would assume that no written agreement had been entered into. The respondent, however, admittedly had been receiving signals. It might have been making payments to the distributor M/s Sai Vision but it is difficult to accept that there was no privity of contract by and between the parties. It is in our considered opinion, incorrect to suggest that for the purpose of supply of signal and in particular for the purpose for attracting the proviso appended to 4.2 of the Regulation of 2006, an agreement in writing is imperative in character as the law stood at the relevant time.

We may for the aforementioned purpose notice the provisions of clause 4 of interconnect regulations as amended on 04.09.2006. A bare perusal of the aforementioned provisions would clearly go to show that the proviso appended to Regulation 4.1 did not envisage only one situation, namely; there has to be a contract in writing. The said proviso as noticed hereinbefore refers both to a written agreement as also an oral one. For the purpose of entering into an oral agreement, it is not necessary to prove the signature of the parties in a document in writing. An oral agreement, it is trite, can be proved even on the basis of conduct of the parties. The respondent in its reply categorically admitted that it had been receiving supply of signals from the petitioner. It furthermore stands admitted that such supply of signal was made to 350 points. Although it had been contended that the rate for supply was Rs.150 per point, as indicated hereinbefore in unequivocal terms it has been accepted that from 2007 when the petitioner raised the subscription fee and the same had been paid. Having paid the subscription fee at the market rate, the respondents cannot be heard to say that the contractual rate of subscription fee was only Rs.150/- per point per month.

It is now a well settled principle of law that a thing admitted need not be proved. Section 58 of the Evidence Act lays down the aforementioned principles of law which reads as under:

"**58. Facts admitted need not be proved.** – No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

We have noticed heretobefore that the respondent had made a categorical admission in the pleadings itself. An admission made in the pleading, as is well known, would be admissible against the maker thereof proprio vigore.

In this case, this Tribunal has not taken recourse to the proviso appended to Section 58 of the Act or requirements of Rule 5 of Order VIII of the Code of Civil Procedure.

In Broadway Centre Vs. Gopaldas Bagri - AIR 2002 CAL 78, it has been held -

"21. ……The aforesaid affidavits were confronted to the defendant in his cross-examination. He has not denied and disputed the legality and validity of the same. No suggestion has been put as to the illegality and invalidity of the aforesaid two affidavits. He was given a chance to explain but no explanation was put forward retracting from the aforesaid admission. It is settled principle of law as has been rightly argued by Mr. Roy that an admission unless explained furnishes best evidence and since there is no explanation even after opportunity being given this admission in affidavit is conclusive proof of formation of partnership and retirement of defendant as partner from the firm. In support of this proposition I find a decision of the Supreme Court reported in AIR 1981 SC 2085 (Ramji Dayawala and Sons (P) Ltd. v. Invest Import). In that case the aforesaid

proposition of law has been explained. Therefore, I hold that the defendant is estopped from challenging the validity and legality of the said deed of retirement as well as deed of partnership."

It is also not the case of the respondent that such admission has been obtained by the petitioner from it by commission of fraud. The respondent also has not offered any explanation as to why such admissions were made in absence whereof the same shall be deemed to furnish the best evidence.

We may, however, notice that Mr.Mehta has also drawn our attention to the cross-examination of Mr.V.B.Sharma, the DGM(Finance) of the petitioner wherein he admitted that there is no proof of service of any invoice.

It may be true that in terms of the regulations, ordinarily service of invoices is required to be proved but in view of the categorical admission made by the respondent even the same was not necessary.

The Interconnection Regulations were made for regulating the transactions between the parties. When a migration is caused by an LCO, the MSO would be entitled to 21 days prior notice. The new MSO with which the LCO may join may also refuse to supply signals unless the last invoice is produced before it. The last invoice in this case however does not show outstanding amount. The Explanatory Memorandum appended to the said regulations, however, lead to an inference that the same was made for the benefit of the new MSO as also LCOs as would be evident from Section 9 therein which reads as under:

"9. Sometimes LCOs switch from their affiliated MSO when they are either unable or unwilling to pay their outstanding dues to their affiliated MSO. This results in bad debts for their affiliated MSOs leading to the latter's

inability to pay broadcasters for the LCOs portion of dues. Broadcasters are also unable to recover these dues from the MSO to whom such defaulting LCO gets affiliated. On the other hand, in the absence of regular issue of invoices, the LCOs are suddenly confronted with huge arrears, which they have no means of paying. The problem can be tackled by ensuring that the LCOs are issued invoices on a monthly basis clearly showing the arrears as well as the current dues. In such a situation, if an LCO wants to switch to a new MSO, then the latest invoice would clearly show the level of arrears outstanding against the LCO. At the same time this will protect the LCO from unexpected and unforeseen arrears being suddenly thrust upon him."

In view of the fact that the said Regulations may be held to be in the nature of statutory directions, and in view of the fact that general law of this land is clear, it would be permissible in law to take the assistance from the Explanatory Memorandum for construing the Regulations.

It may not, therefore, be, in our considered opinion, correct to contend that in absence of any invoice for the amount of outstanding mentioned thereunder, the contract shall not be enforceable at all. A contract, as noticed hereinbefore, may be inferred from the conduct of the parties. It may be inferred on the basis of admissions also. In a case of this nature where not only the contract is admitted but also the principal terms thereof, namely, the number of points, the rates etc., it was obligatory on the part of the respondent to make payments. The amount consideration fixed by reason of a contract is required to be paid even where the contract itself is denied or disputed; in the event, a party receives a benefit from another which was not intended to be done gratuitously i.e., payment by way of compensation is required to be made in term of from Section 70 of the Indian Contract Act, 1872.

The petitioner has served a notice upon the respondent on or about 5th April, 2007. It reads as under:

"Your said notice, abruptly discontinuing feed/signal is blatantly illegal and not acceptable to us. Please be informed as per the agreement existing between us, you are required to give 30 days notice of termination. Besides, as per Interconnection Regulation issued on September 4, 2006, you are required to give mandatory notice of atleast 21 days before discontinuing the feed.

We have information that you have plans to join our competitors, M/s Wire & Wireless India Ltd.

While, we have no complaint or grievances of your switching loyalties to our competitors, provided you had settled/cleared outstanding payments. Again, as per Interconnection Regulations, you are legally bound to settle/clear all outstanding dues before you decide to sever relations with us.

As per our statement of accounts Rs.22,20,750/- (Rupees Twenty Two Lakhs Twenty Thousand Seven Hundred and Fifty Only) is due and payable to us – being accumulated subscription fees upto February 2007. Further you are also holding materials/ equipments of the Company.

Under the circumstances, you are hereby called upon to forthwith and without further delay remit the said amount of Rs.22,20,750/- (Rupees Twenty Two Lakhs Twenty Thousand Seven Hundred and Fifty Only) and also surrender the materials/ equipments to our authorized officer at Kalachokie headend."

The respondent in reply thereto stated by a letter dated 9th May, 2007:-

"With reference to the above which was received by us on 7th May, 2007 we are surprised and also deny that there are any outstanding whatsoever due to your firm. Again it is very surprising to note that, although the

letter is dated 5th April, 2007, we have received the same on 7th May, 2007?

We have been regularly making all our payments to M/s Sai Vision, you distributor. We deny that we had sent any communication directly to you about disconnection of your feed. We fail to understand the reason why our feed was stopped by your people in spite of our having made regular payments to your distributor M/s Sai Vision.

We further deny in TOTO about understanding about our views without having any direct communication/ relation/ agreement between us. M/s Sai Vision was pressurizing us to take WWIL feed instead of your feed again for reasons better known to them, for which we totally refused to accept. It is know that your distributor is also distributor for M/s WWIL who in turn disconnected our feed for reason best know to them.

Since past one year we have been regularly complaining to the Headend Manager of M/s Sai Vision about regularly irregular disturbance on your line for which they advised us to go for any other company whose line is without any disturbance and later on they insisted on us to go for M/s WWIL. Many times channels were changed without any prior information which was causing many difficulties to our clients. We at many times wanted to keep you informed about all these irregularities for which again M/s Sai Vision stopped us from approaching you directly and informed us it will be solved very soon.

Again we deny in TOTO about the outstanding amount as shown and further deny that NO MATERIALS/EQUIPMENTS etc are in our network till date, so that no question of surrender of the same arises.

We understand that wise counsel will prevail on, and advice you to take action accordingly. In case, inspite of all the explanations if you still feel like taking any action, we wish to say that the same will defended at your

cost and consequences, which kindly note. As an ample precaution we are also forwarding a copy of this letter under certificate of posting."

It has, however, been admitted in one of these matters, that notice was in fact served on the petitioner with only a copy thereof to the distributor. The respondent in view of their conduct had the requisite knowledge that the distributor is merely an agent of the petitioner.

It is in the aforementioned situation that the petitioner made a demand for a sum of Rs.22,20,750/- as on the date of disconnection. The petitioner in our opinion would be entitled to the payment for a period three years prior to the date of filing of the respective petitions.

Ms. Jaisingh would contend that the accounts being open and correct, the entire amount of claim is payable. It is not a case where Article 1 of the Schedule appended to the Limitation Act, 1963 would be attracted. It reads as under:

**"PERIODS OF LIMITATIONS**
**FIRST DIVISION-SUITS**
**PART I - SUITS RELATING TO ACCOUNTS**

| | **Description of suit** | **Period of limitation** | **Time from which period begins to run** |
|---|---|---|---|
| 1 | For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties. | Three years. | The close of the year in which the last, item admitted or proved is entered in the account; such year to be computed as in the account." |

For the purpose of attracting the aforementioned provision, it was necessary that the accounts would be not only open and current but also mutual. The agreement between the parties is one sided. The payments were not being mutually made. The respondent also did not indicate as to how the payment should be appropriated in absence whereof Sections 59 and 60 of the Indian Contract Act, 1872 would be attracted. For supply of signal even according to the petitioner invoices used to be raised. No outstanding was demanded except in the notice dated 30.04.2007. The respondent was to make payment for each of the said invoices raised in respect of supply of signal for each of the month separately.

The petitioner has not indicated that it has in terms of Section 60 of the Indian Contract Act has appropriated the amount towards any other period for which it fell due, no other circumstances in this behalf has also been pointed out before us.

The petition has been filed on 10.10.2007. The petitioner would, therefore, be entitled to the amounts payable at the rate of Rs.180 per points for the points connected as shown in the ledger accounts wherefrom the amount paid by the respondent for a period of three years from the date of filing of the petition during the said period will have to be deducted.

This petition is allowed in part and to the extent mentioned hereinbefore. The petitioner would be entitled for interest of pendentelite and future @ 12% per annum.

The petitioner is also entitled to costs in each of the petion. Advocate's fees assessed at Rs.50,000/- in each case.

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

**…….....**
**(G. D. Gaiha)**
**Member**

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