

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

**DATED 23 NOVEMBER, 2010**

**Petition No. 36(C) of 2010**  
(With M.A. No. 103 of 2010)

Kolkata Cable & Broadband Pariseva Ltd.  
Vs.  
G-Net Cable TV Network

...Petitioner

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

For Respondent : Mr. Vineet Bhagat, Advocate  
Ms.Neha Jain, Advocate

**JUDGMENT**

**S.B. Sinha**

The petitioner is a Multi Service Operator. The Respondent is a Local Cable Operator.

Sometime in 2006, the parties entered into an agreement in terms whereof, the petitioner began supplying signals from its network to the respondent.

The respondent had also been taking signals from another MSO known as Siticable. There exists a dispute as to whether the respondent had started taking supply of signals from the petitioner in January 2006 or March 2006.

According to the petitioner whereas it had only the Star package and obtained other packages from February 2006 which would explain as to how the respondent had been taking dual feed; the case of the respondent is that it had been taking supply of signals from the petitioner only from March 2006.

The petitioner, however, in support of its contention that it had been taking supply of signals from the month of January 2006 has produced before us a purported certificate granted by the respondent itself, which is in the following terms :

“That it is submitted that we are taking signal feed from M/s Kolkata Cable & Broad Band Pariseva Ltd. as its affiliate Cable operator.”

The respondent, however, contends that the same is a forged and fabricated document.

According to the petitioner, the annual subscription fee payable by the respondent inclusive of the taxes for the month of January 2006 was Rs. 8346/- plus taxes and subsequently the same was increased to Rs. 39,144.03.

The petitioner in support of its contentions has annexed with the petition a large number of invoices showing levy of subscription charges differently for different months. The petitioner in support of its case has also annexed a statement of account which is said to be a computer generated one and which it allegedly has been maintaining in ordinary course of business.

We have noticed heretofore that the respondent denies and disputes taking supply of signals from January 2006 and February 2006. It also disputes the entries made in the statement of account so far as the entry made for the month December 2006 is concerned.

We may refer to the entry made for the month of December 2008 being a sum of Rs. 20,538/-. In the said statement of account on the 'Debit' side a sum of 3,47,712.00 has been shown; whereas on the 'Credit' side a sum of Rs. 2,60,000/- has been shown leaving a balance of Rs. 87,712/-.

The petitioner contends that as no payment was received toward the outstanding amount, it sent a notice to the respondent on or about 23.06.2009 asking it to pay a sum of Rs. 1,49,326/-. Notice was also sent, according to the petitioner, to the other MSOs of the same area. As no reply thereto was received, a reminder was sent on or about 11.09.2009, asking the respondent to deposit a sum of Rs. 2,10,940/-.

As even thereafter the respondent did not respond, another notice was sent to it on or about 16.12.2009 asking it to pay a sum of Rs. 2,72,554/- . Even the said notice, having not replied to by the respondent, the present petition has been filed claiming a sum of Rs. 2,93,092/- for the period January 2006 to 30<sup>th</sup> June 2010.

On or about 20.04.2010, the petitioner filed an application before this Tribunal which was marked as M.A. No. 103 of 2010 contending that the respondent intended to shift to another MSO.

On the same date i.e. on 20.04.2010, a reply was filed by the respondent together with a counter claim purported to be under Order VIII Rule 6A read with Section 151 of the Code of Civil Procedure, 1908. In the said reply, the respondent has contended that it had migrated to Siticable in March 2009.

The respondent in its reply to the petition has further contended that a notice was served upon the petitioner asking it to disconnect the supply of signal and for issuance of a 'No Objection Certificate' in its favour as also for refund of a sum of Rs. 40,105.86, which according to it was due from the petitioner upon reconciliation of accounts.

From a perusal of the said purported statement of reconciliation of accounts filed by the respondent, it would appear that according to the respondent it had paid a sum of Rs. 70,000/- on 21.03.2007, a sum of Rs. 46,843.30 on 29.03.2007 and a sum of Rs. 96,999.02 on 31.03.2007. It has furthermore claimed that in the month of March 2008, a discount for a sum of Rs. 26,417.36 had been given by the petitioner to it.

We may furthermore notice the contents of the letter of the respondent dated 25.03.2009 addressed to the petitioner, which reads as under :

“This is to request you to kindly refund the excess payment of Rs. 40,105.86 made to you by us as per your statement of accounts upto March 2009.

You are also requested to disconnect our signal from 01.04.2009 and send us your no objection letter immediately.”

The respondent had also annexed with its reply the statement of account for the period 16.07.2005 to 26.03.2007 maintained by its Bankers 'Vijaya Bank' with a view to show that it had been making payments all along for a sum of Rs. 33,094/- from 2005 onwards.

The petitioner in its rejoinder interalia stated that the contention of the respondent that it had migrated to the Siticable from April 2009 is incorrect as would be evident from the fact that it had been sending Service Line Reports to all the Broadcasters and they confirmed that it had been receiving the requisite charges from the petitioner for supply of signals to the respondent.

One of the replies received by the petitioner in response to its notices was from ESPN in terms of its letter dated 31.05.2010, which reads as under :

“We are in receipt of your letter dated 17.05.2010 and have noted the contents therein.

We hereby confirm that M/s G-Net having its office at 139, Canal Street, Sreebhumi, Kolkata – 700 048 is declared as your affiliate in your Subscriber Line Report (SLR) communicated to us vide your letter dated 29.01.2010.”

In view of the aforementioned rival contentions, the questions which arise for our consideration are :

1. Whether the petitioner had been able to prove that it had started supply of signals to the respondent from January 2006?
2. Whether the respondent had been able to establish that it has made over payments to the petitioner.
3. Whether the respondent had migrated to the Siticable from April 2009?

Mr. Navin Chawla, the learned counsel appearing on behalf of the petitioner would contend :

1. Keeping in view the certificate granted by the respondent itself being dated 2.1.2006 as also the invoices which have been raised and served upon it, it stands amply established that the petitioner had been taking supply of signals from January 2006.
2. The respondent having been paid the lump-sum amounts and in view of the fact that the petitioner had been adjusting the same from the total dues, the petition is not barred by limitation.
3. The respondent having admitted that it had received the invoices and only disputed the alleged payments which have not been accounted for by it for 21.03.2007, 29.03.2007 and 31.03.2007 as well as the alleged discount for bill, the petitioner must be held to have proved that it had been maintaining its books of accounts in regular course of business and on that ground, the petition should be allowed.
4. The contention of the respondent of issuance of the purported notice dated 25.03.2009 must be held to be incorrect as service thereof has not been proved by it.

5. The respondent although received the demand notices served on it by the petitioner and having not responded thereto, there cannot be any doubt or dispute whatsoever that the claim of the petitioner is correct.
6. The respondent has intentionally withheld some documents, including, its books of accounts, invoices which must have been raised upon it by M/s Siticable from April 2009 to January 2010, and, thus, an adverse inference should be drawn against it.
7. The petitioner having been able to prove that it had been paying the subscription charges to the broadcasters even in relation to the respondent herein, this Tribunal should hold that the respondent's contention that it had been taking supply of signals from M/s Siticable from April 2009 is incorrect.

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

1. On a comparison of the amounts mentioned in the invoices vis a vis the purported ledger account filed by the petitioner, it would be evident, that the same had not been matching and, thus, its contentions should not be accepted.
2. The respondent could not have issued the certificate in question as the petitioner till August 2006 was a proprietorship concern and not a Limited Liability Company.
3. From the statement of account filed by the respondent, it would be evident that the parties infact have reconciled their accounts, from a perusal whereof, it would be evident that the respondent had made overpayments to the petitioner and, in that view of the matter, its counter claim should be allowed.
4. The respondent having proved that the agreement with Siticable being dated 03.03.2009, it must be held that it has been able to prove its case that upto February 2009 it has been taking supply of signals from it particularly, having regard to the notice dated 25.03.2009 served upon the petitioner.
5. The respondent having paid the petitioner the subscription fee only upto March 2009 and having not paid any amount thereafter, the petitioner's case must be rejected.

The petitioner in support of its claim that it had been supplying signals to the respondent from January 2006 has principally relied upon the invoices for the months of January 2006 and February 2006 as also a purported certificate issued by the respondent on 02.01.2006. The respondent, on the other hand, has filed its bank statement to show that from 2005 onwards it had been making consistent payment of a sum of Rs. 36,094/- to Calcutta Communications and Siticable from whom it had been taking supply of signals upto February 2006.

The contention of the petitioner that it had in January 2006 was only having a Star package and had been supplying signals to the respondent even those channels which were available on Free to Air, in our opinion, cannot be accepted.

The respondent has by filing the statement of bank account maintained by its bankers, in our considered opinion, has clearly established that it had been making payments to M/s Siticable and Calcutta Communication Ltd.

So far as the purported certificate granted by the respondent is concerned, keeping in view the admitted fact that the petitioner in January 2006 was a proprietorship concern, in our opinion, it has rightly been contended by Mr. Bhagat that the question of issuance of such certificate would not arise.

The petitioner in supports of its claim has cross examined Mr. Avijit Manna. He, in his cross examination admitted that the petitioner was a proprietorship concern till August 2006. If that be so, the respondent evidently, could not have issued the aforementioned certificate in January 2006.

We may notice that the respondent had not entered into an agreement in writing with the petitioner so as to enable us to hold that in fact it had been taking supply of signals from January 2006. Mr. Manna in his deposition although has contended that the petitioner had been taking such certificates from the cable operators and he would produce on the date of hearing the same has not been done. The letters received from other cable operators by the petitioner having not been produced, no credence can be given thereto.

So far as the second issue is concerned, in our opinion the petitioner has been able to establish the same. It is true that if a comparison is made between some of the invoices vis a vis the statement of account, it would appear, that there are certain discrepancies, but the same takes a back seat in view of the fact that the respondent itself with its reply annexed a purported statement of account which would clearly go to show that the entries contained in the statement of account filed by the petitioner are correct.

The said statement of account is at page 112 of the paper book. From the statement of account filed by the petitioner and the said purported reconciled statement it would appear that the respondent had been making payments of lumpsum amount by cheques. If it had been making all payments by cheques, we fail to understand why it should have paid three amounts in March 2007 for a sum of Rs. 70,000/-, Rs. 46,843.30 and Rs. 96,999.02 in cash.

Keeping in view the fact that the petitioner denies and disputes the said payments, it was obligatory on the part of the respondent to prove the same. The said purported reconciled statement of account does not bear the signatures of any officer of the petitioner. Mr. Manna the witness examined by the petitioner in his evidence has denied and disputed the same.

It is a matter of some significance that the respondent has not proved any receipt to support payment of the aforementioned amount in cash. It has also not been able to establish that the petitioner had granted it a discount for a sum of Rs. 20,538/-. It is expected that where the parties had been maintaining documents, the respondent would be able to produce some supporting documents to prove grant of the aforementioned amount by way of discount. It is also of some significance to notice that the respondent for reasons best known to it, although filed the said purported statement of account alongwith its reply but did not annex the same with the affidavit of its witness Shri Biplab Banik.

Submissions of Mr. Bhagat that the amount mentioned in some of the invoices do not tally with the statement of account filed by the petitioner would have received some attention from us had it been not admitted by the respondent in its reply.

We may in particular notice that the respondent had drawn our attention to an invoice dated 01.12.2008, which was for a sum of Rs. 17,500/- and upon addition of the amount of taxes, the total amount payable for the month of December 2008 came to Rs. 20,538/- in stead and in place of the usual amount of Rs. 26,231/-. However, our attention has been drawn by Mr. Chawla to an invoice of the same date which is at page 264 of the paper book wherein the subscription amount had been shown to be Rs. 22,350.69 and a sum of 2,22,490.30 had been shown as the previous balance.

Mr. Chawla would submit that the invoice at page 264 had been issued by mistake and as soon as attention of the petitioner was drawn thereto, it had issued a corrected invoice but by inadvertence again the old invoice has been filed both with the petition as also the affidavit.

Our attention has been drawn to the statement made in the rejoinder to the following effect :

“That the contents of para No. 5 to the extent they form matter of record are not denied. It is denied that the petitioner is guilty of committing forgery. It is admitted that the petitioner raised an invoice amounting to Rs. 17500/- for the month of December 2008, however, the respondent’s allegation that the invoice annexed at page 48 are fabricated is wrong and is vehemently denied. It is most respectfully submitted that the petitioner had issued the invoice at page 48 to the respondent who then subsequently approached the petitioner and requested the petitioner to reduce the subscription amount as the respondent had lost certain subscribers and on such request the petitioner reduced the subscription amount and resent the invoice for the month of December 2008 at newly fixed subscription amount. The petitioner however due to an inadvertent error on its part, annexed only the old invoice and not the new invoice. It is however pertinent to mention here that the respondent had received both the invoices raised by the petitioner.”

In view of the said explanation we are of the opinion that the invoice in question was not fabricated.

Furthermore, the respondent’s witness in his cross examination and / or affidavit did not dispute the same. In view of the admitted position, we are of the opinion, that the petitioner had been able to prove that it had been supplying signals to the respondent from March 2006 to the March 2009

and it was entitled to the payments for the said period.

The next question, which arises for consideration as to whether the respondent has migrated to Siticable from April 2009 or not.

As indicated heretofore, according to the respondent, it had entered into an agreement with the M/s Siticable on or about 23.03.2009. The respondent did not examine any other witness in support of its plea apart from Shri Biplab Banik. It is not in dispute that the respondent apart from the said purported notice dated 25.03.2009 did not issue any other letter or notice. The genuineness of the said notice dated 25.03.2009 is in dispute.

The petitioner had been sending notices to the respondent beginning from 23.06.2009. It has also filed proof of dispatch thereof. In law, there is a presumption that such notice must have been served. The respondent admittedly has been taking supply of signals for a long time. It has itself shown that from Siticable it had been taking supply of signals earlier from 2005. It has furthermore been shown by it that all payments used to be made to the MSO by cheques. In the aforementioned situation, it is expected that the respondent must have been making payments to the said operator from April 2009 by cheque. Why no person from Siticable was examined and no payment made to it has been brought on record is of some significance.

In a situation of this nature where the continuity of transaction is to be presumed, in law, the burden of proof would shift to the respondent.

The respondent had been maintaining its books of accounts. It could have brought on record the same. It is said to have issued a notice on 25.03.2009, the contents whereof have been noticed by us. In the first paragraph of the said notice, the respondent has asked for a refund of Rs. 40,105.86.

The notice dated 25.03.2009 is not a notice in terms of Clause 4.2 of the Regulations. No public notice has been issued. As the petitioner has denied the receipt thereof, it should have examined the employee who has served the same on an officer of the petitioner. Why such an important

letter was not sent by a Registered post with acknowledgment due and / or through courier service has not been explained.

It is interesting to note that Mr. Banik in his cross-examination stated as under :

“Q: As per you when did you leave the petitioner company?

A: End of March, 2009. Before leaving the petitioner I informed them.

Q: Was there any meeting held for the same?

A: I do not remember.

Q: If you had already informed the petitioner that you were leaving, why did you give a letter dated 25<sup>th</sup> March, 2009?

A: The petitioner had given me a statement of accounts which showed that I had to claim money from them and as I requested for the same and they did not refund the amount I decided to leave them.

Q: As you have stated that the petitioner did not refund the amount and hence you decided to leave them, was this the only reason?

A: As they refused to refund the amount I decided that it was time to leave the petitioner.

Further states that there was one more reason which was bad quality of signals.

Q: Did you complain in writing about the bad quality of signals as stated by you?

A: No. There is no system of written complaints.

Q: Do you have any written complaints or recordings of customers complaining about bad quality of signals?

A: Yes. I will have to check whether I have records pertaining to year 2009 as they are very old.

It is incorrect to suggest that the petitioner did not provide me bad quality of signals and I have stated so only for the purpose of the present petition.

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Attention of the witness is drawn to page No. 300

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Q: As per you whom did you give this letter to?

A: I did not give this letter personally. As per me my staff has given this letter.

Q: What is the name of staff who has given this letter to the petitioner?

A: It is difficult to remember whom I must have sent.

Q: Did your staff atleast tell you whom he gave the letter to in the petitioner company?

A: He did not tell me.

Q: Is it correct that any rubber stamp can be prepared in the market?

A: I do not know.”

It is furthermore stated that :

“Q: Do you maintain books of accounts?

A: Yes we maintain register of accounts.

Q: Have you filed the register of accounts in the present case for the period staring from April, 2009?

A: No.”

Why the respondent withheld the best evidence has not been explained. As the respondent did not examine its employee an adverse inference must be drawn against it. The respondent did not assign any reason in its reply for discontinuing the network of the petitioner. Only in his cross examination he has sought to assign such reasons. Why no protest was made earlier has also not been stated.

It is in the aforementioned situation, the contention of the petitioner that it had been submitting SLRs to the broadcasters assumes significance. The petitioner has filed a large number of documents to show that it had been writing letters to various broadcasters.

Indisputably in terms of the Regulations framed by the Telecom Regulatory Authority of India known as “The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004” as amended from time to time, the MSOs are bound to file SLRs to the broadcasters.

The subscription fee is paid by the MSOs to the broadcasters keeping in view the number of LCOs it had with it. If the contention of the respondent that it had not been taking supply of signals from the petitioner from April 2009 was correct, we fail to see any reason as to why the petitioner would volunteer to show the name of the respondent in its SLR. Such letters have been issued by the petitioner to ESPN Software India Pvt. Ltd. (page 185), M/s Neo Sports Broadcast Pvt. Ltd., (page 186), M/s UTV Global Broadcasting Ltd. (page 188) and M/s Ushodaya Enterprises Pvt. Ltd. (page 190). The petitioner has also filed proof of despatch of the said notices as also service report thereof.

We have noticed heretofore that atleast one of the broadcasters, namely, M/s ESPN Software India Pvt. Ltd. has acknowledged that its contention that M/s G-Net’s name has also been included in the SLR, is correct. Atleast there is some evidence adduced on behalf of the petitioner to show that it had been paying the subscription amount to the broadcasters even in respect of the respondent.

On the other hand, as noticed hereinbefore, as the respondent has withheld the best evidence, an adverse inference must be drawn against it. Apart from the fact that in a case of this nature, the burden of proof would be on the respondent, there is absolutely no reason whatsoever as to why the respondent being an established cable operator would not produce all evidences in its possession.

In the facts and circumstances of this case, we are of the opinion that the petitioner has been able to prove that the contention of the respondent that it has migrated to Siticable in April 2009 is not correct.

The question which survives for consideration is the question of limitation.

The petition has been filed on 19.02.2010.

Mr. Chawla urged that account maintained by the petitioner was a continuing account.

Ex-facie a part of the claim is barred by limitation.

The petitioner in his petition did not state that the account is a continuing account. Apart from the fact that such a plea has not been raised, the petitioner also did not make any averment as required in the petition under Order VIII Rule 6 of the Code of Civil Procedure so as to how an exemption has been claimed with regard to the prescribed period of limitation.

It is true that the respondent had been making payments in lump-sum.

It, however, had been making payments towards the amount due.

There is nothing on record to show that at the end of a certain period, any statement of account used to be sent to him and he had made payments either by way of part payment of the arrears shown therein. The petitioner has also not shown as to how it had been adjusting the said amount. Only because before us a statement of account has been filed, the same would not mean that the petitioner could adjust the amount on arrears. Even the Income Tax Returns and Orders of Assessment could have been filed to prove the said fact.

We, therefore, are of the opinion that the petitioner is entitled to a decree for only a period of 3 years prior to date of filing of this petition and not any for any period prior thereto.

This petition is thus allowed in part and to the extent mentioned hereinbefore.

The petitioner, however, has filed before us certain documents, which, according to us, are not genuine. The certificate purported to have been issued by the respondent is one of them.

We, therefore, are of the opinion that the petitioner should be granted interest only till date of filing of the petition and not any pendential interest. The respondent must pay the decretal amount within a period of 3 months from the date of communication of the decree, failing which it shall be liable to pay interest @ 12% p.a. till the realisation.

In view of the conduct of the parties, they shall pay and bear their own costs.

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

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

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

/NC/