

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

Dated 26th November, 2010

Petition No.277 (C) of 2007

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IndusInd Media & Communications Ltd.

...Petitioner

Vs.

Archana Cablenet

...Respondent

BEFORE:

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

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

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For Petitioner

: Ms. Vandana Jai Singh, Advocate

For Respondent

: Mr. Tejveer Singh Bhatia, Advocate

ORDER

G.D. Gaiha, Member

1. Petitioner is a multisystem operator engaged in the business of the cable and TV services and the respondent is a cable operator.

The respondent herein entered into a contract with M/s. City Cable, from whom it was receiving signals and was retransmitting them to the subscribers. This arrangement *inter-alia* exists for more than a decade. The petitioner claims to have made all payments for the signals directly to M/s. City cable and the same were made by cheque regularly. The petitioner has produced a statement of account from March 2003 to April 2007 which shows the payments for the said period to M/s. City Cable.

2. By this petition, the petitioner is challenging the act of the respondent in wrongly and illegally disconnecting the petitioner signals to the subscribers in violation of the interconnect agreement/arrangement between the petitioner and the respondent is also in violation of the relevant provisions of the Interconnect Regulations of 10th December 2004, as amended on 4th September 2006 by TRAI. The petitioner also seeks to recover a substantial outstanding amount which the respondent has willfully and deliberately not paid to the petitioner.

3. The learned counsel for the petitioner would submit that the respondent herein is a franchisee of the petitioner and was receiving, *inter-alia*, free to air channel/pay channels signals from it and further re-transmitting the same to its subscribers.

4. The petitioner claims to have sent an agreement to the respondent, which was to enable the respondent to receive signals from the petitioner in the service area of the petitioner. The petitioner has filed a sample copy of the said interconnect agreement. It appears from the sample copy of the agreement annexed with the petition that no details in regard to the subscription charges, subscriber base, area of operations, etc. have been filled up either by the petitioner or by the respondent.

However, the various clauses of the said agreement had been interpreted in the petition and the following inferences have been drawn.

(A) That the petitioner was entitled to revise the subscription amount unilaterally.

(B) That respondent had to pay to the petitioner the prevailing charges as may be levied by the petitioner from time to time.

(C) That the respondent was obliged to pay subscription fee in advance by 7th day of every month regularly.

(D) The respondent was also obliged to disclose the correct number of its subscribers in its network regularly every month as and when the connectivity increased.

5. The learned counsel for the petitioner would further contend that the petitioner continued to provide signals to the respondent and over a period of time, owing to the increase in the number of subscribers of the franchisee, there have been changes in the subscription fee payments by the respondent and, therefore, by virtue of its rights/authority under clause 10 of the Interconnect Agreement and subject to the notification dated 15th January 2004 from Telecom Regulatory

Authority of India and other applicable notifications, Regulations etc, the petitioner has been increasing the subscription fee from time to time, which was accepted by the respondent.

6. The learned counsel for the petitioner would further contend that petitioner continued to provide signals to the respondent even without receiving any payments in the hope that the respondent would settle the dues. However, when the petitioner came to know that the respondent is negotiating with another Multi System Operators and that finally the respondent started taking cable TV signals from another MSO around June 2007, the present petition has been filed in October 2007.

7. It is submitted by the learned counsel for the petitioner that there is a huge outstanding amount of Rupees 2,89,277.57 payable by the respondent to the petitioner and the last relevant invoice raised by the petitioner on the respondent dated 1st May 2007 has been annexed with the petition along with a copy of the ledger account for the period from March 2003 to May 2007.

8. The learned counsel for the petitioner would further submit that a notice dated September 2007 had also been sent to the respondent to clear the said outstanding amount. A receipt from the courier has been placed in the petition, which does not indicate receipt of the same by the respondent.

9. The learned counsel for the petitioner would finally submit that the respondent has not paid the huge outstanding amount as mentioned, while it has chosen to illegally break with the petitioner and has approached another operator/multisystem operator to receive signals so that while the respondent's business is not affected, the petitioner is put to a loss of huge amount of Rs. 2,89,277.57 as unpaid dues.

10. The petitioner has further filed an affidavit by way of evidence of one Mr. V. B. Sharma, Deputy General Manager in the petitioner's company, working in the Finance Department and posted at Delhi. The affidavit has been verified by Mr. Sharma in regard to the content of the paragraph 1 to 15 to be true is based upon his personal knowledge which has been derived from the official records. The main contention in this affidavit is that the respondent was receiving signals and they were retransmitting them to their subscribers and the respondent has not produced any contract with the City Cable. The respondent has also not denied payments received by the petitioner from it as per the ledger accounts furnished along with the petition. Mr. Sharma during his cross-examination admitted that he had no knowledge of day-to-day business of the company in Bombay. He also admitted that a sample copy of the interconnect agreement for signatures has been sent in the year 2003 however the same was never signed and returned. When confronted with the

question that whether petitioner used to receive payments through City Cable on behalf of the respondent, Mr. Sharma admitted that sometimes it did use to come through City Cable. When Mr. Sharma was confronted with another question as to whether any direct payments had been received from the respondent, he only stated that he has to check whether any direct payments received from the respondent to the petitioner. In regard to a certificate from chartered accountant Mr. Chirag Mehta the witness admitted that this certificate has been obtained from the chartered accountant only to file this particular petition. It will also admitted by witness that some professional fee have been paid to Mr. Mehta for producing this certificate; however it is not a false certificate.

11. The learned counsel for the respondent would submit that the petitioners had no contract or agreement, whatsoever, with it and there were no outstanding dues between City Cable and the respondent.

12. The learned counsel would further contend that there was no privity of contract between the petitioner and the respondent and, therefore, no payments were due at any given period of time to the petitioner herein. The learned counsel for the respondent would further emphasise that no contract was ever executed between the petitioner and the respondent and, therefore, no right or liability arises between the parties.

13. It was further submitted that at any given point in time no signal was were ever provided by the petitioner herein to the respondent and, infact, when the respondent was served the dasti notice and an advance copy of the petition, the respondent contacted the petitioner in this regard and communicated repeatedly that the petitioner will withdraw the petition against the respondent only if the respondent carries the signals of the petitioner.

14. The learned counsel for the respondent would further contend that the conduct of the petitioner is only an attempt to force the respondent to carry its signals and not to shift to any other Multi System Operator.

15. The respondent has also filed in evidence by way of affidavit of one Mr. Rajendra Awasthi. Mr. Rajendra Awasthi is the sole proprietor of the respondent and has verified the averments of the affidavit as true and correct and as per his personal knowledge. The deponent has consistently maintained its stand taken in its reply to the petition. During cross-examination the witness has stated that it had 133 points at the rate of Rs.180/- per month per point and all payments had been made by cheque and never by cash. He has also admitted that he received the notice dated 6th September 2007 from the petitioner but he has not given any reply this notice. He volunteered to say that he gave a reply City Cable, however reply to City Cable has not been produced. The witness has stated that he has written to City Cable to stop the signals and not to the petitioner. The witness would admit the receipt of signals from the petitioner till June 2007, but he

has made the payments due to City Cable. The witness also produced an uncertified copy of the Bank account statement of Sangli Bank Ltd. Chembur, which was objected to by the counsel for the petitioner. When asked whether he can bring the City Cable as one of the witnesses; he commented that he shall speak to City Cable.

16. The petitioner has not been able to produce any agreement with the respondent. As a matter of fact the draft agreement placed in the petition also does not indicate any information about the respondent's network, subscriber base, area of operation, monthly subscription rate etc, which could have become the basis of coming to any conclusion about the privity of contract between the petitioner and respondent. On the other hand, the respondent claims to have an oral agreement with City Cable and has also produced a statement of account showing various payments on a monthly basis to City Cable.

17. The petitioner has also not pleaded that the respective invoices have not only been raised against the respondent also have been delivered by hand or by some other mode of transmission. There is no proof of delivery of the invoices by post/courier.

18. The affidavit by way of evidence of Mr. Sharma is also based on the official records and does not conform to any personal knowledge of the same while verifying the contents of the affidavit.

19. The respondent had categorically denied any relationship with the petitioner and has consistently maintained that it was having a relationship with City Cable. There is no privity of contact between respondent and petitioner.

20. The cross-examination of the witness of the petitioner does not confirm that any direct payments were made by the respondent to the petitioner. The witness also does not have any personal knowledge of day-to-day business of the company in Bombay.

21. The receipt of signals and payment thereof to the M/s. City Cable by cheques from the Sangli Bank A/c has a reasonable proof of the relationship between it and the petitioner, while the petitioner has miserably failed to prove either the receipt of any payment from respondent as well as delivery of any invoice. Even the certificate from the chartered accountant Mr. Chirag Mehta seems to be a doctored document. In any event the same has not been legally proved. Mr. Chirag Mehta should have been produced as a witness to prove this document being the author of the said document, which the petitioner has failed to do. On what basis, such a certificate has been issued is not known.

22. There is no proof of sending of the blank agreement to respondent as contended by the petitioner. The signals in many cases of this nature are distributed by distributor and the relationship of receiver of signals is only limited upto the distributor. All payments have been made to distributor by cheque and the petitioner could not prove or produce a single documentary evidence or deposition of the witness of having received any payment for the respondent to establish even a shadow of relationship with the respondent. Nothing has been brought on record to show that even the City cable had been depositing any amount to the petitioner on account of the respondent or otherwise has been acting as its agent to the knowledge of the respondent.

23. Petitioner has failed to prove raising of any invoices upon the respondent. No payment is shown to have been made from the respondent's account to the petitioner and, therefore, in the peculiar facts and circumstances of this case, the question as to whether the signals of petitioner were being received by the respondent, becomes irrelevant. It is sufficiently established that M/s. City Cable only used to supply signals to the respondent. What were the terms and conditions of contract, if any, between the petitioner and the said M/s. City Cable is not known.

24. We are therefore of the opinion that the petitioner has not made out any case of recovery of outstanding amount from the respondent. It is dismissed with costs. Advocate's fee assessed at Rs.50,000/-.

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

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(G. D. Gaiha)
Member

HKC/