

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**DATED 8<sup>TH</sup> OCTOBER, 2010**

**PETITION No.59(C) OF 2010**

**(alongwith M.A.No.77 OF 2009)**

**M/s Ushodaya Enterprises Ltd.**

**... Petitioner**

**Versus**

**M/s Sri Gouthami Cable Network**

**...Respondent**

**BEFORE:**

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

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

**For Petitioner : Mr. Balaji Srinivasan,Advocate**

**Mr.Mani Kumar,Manager-Legal**

**Mr. Prabhat Ranjan, Asst. Manager –Legal**

**For Respondent : Mr. B. S. Sai, Advocate**

**JUDGEMENT**

**S. B. SINHA**

The petitioner, who is a broadcaster and a producer of two channels ETV and ETV-2 in relation where to the respondent herein and/or its predecessor in interest had entered into a contract for retransmission of signals, is before us for recovery of a sum of Rs. 35,63,468.20 purported to be due and owing to it from the respondent for the period 7.4.2009 and 20.02.2010.

Keeping in view the fact that the parties hereto had been before this Tribunal in connection with a petition filed by the respondent herein marked as Petition No. 5(C) of 2009 disposed of on 18.11.2009, the basic fact of the matter being admitted need not be dilated.

We may, however, notice such facts which only are necessary for disposal of this matter.

Indisputably, the respondent had been taking supply of signals from the petitioner wherefor they entered into an agreement on or about 10.04.2007.

The said agreement was signed by one Mr. G. Butchaiah Chowdhary admittedly now a partner of the respondent firm and one Mr. Muthaiya for and on behalf of the petitioner. The subscriber base of the respondent as mentioned in the said agreement was Rs. 20,000 per month and in terms thereof the amount of subscription fee was payable @ Rs. 10 per subscriber per month plus admissible taxes.

Although, the execution of the said agreement was denied, Shri Mani Kumar who has been examined on behalf of the petitioner in his deposition stated that he was present when the agreement had been signed by Mr. G.

Butchaiah Chaudhary. He also stated that the column relating to subscriber base was duly filled in by Shri Chaudhary himself.

We may notice the statements made by Shri Mani Kumar in his affidavit.

- “4. My signatures are found in page 16, 17 & 18 of the agreement. They are marked as Pw.2/2 a & Pw 2/2c. I can recognize signatures of Mr. Uttaya that are Exhibited as Pw.1/1 a to e in other pages, of the agreement he has affixed his initials. I was present when the subscription agreement Ex.PW1/1 was executed.
5. It is borne out of records that one Mr. G.Butchaiah Chowdary has executed the agreement on behalf of the respondent. He has affixed his seal and signature, which is marked as Exhibit- RW1/2.
6. At the time of filing of the agreement Mr. G.Butchaiah represent that he is Managing Partner and is vested with the authority to execute this agreement. Before signing of the agreement all the essential details were filled in by ink.

7. In Annexure B at page 19, the connectivity agreed is shown as 20,000/-. At no point of time, Mr. G.Butchaiah Chowdhary, ever protected that his signatures were taken in blank subscription agreement. Therefore, the say of the respondent that he signed a blank agreement is false and untenable.”

The said witness was cross examined on behalf of the respondent, from a perusal whereof, it does not appear that the statements made by the said witness in the aforementioned paragraphs had seriously been disputed. In fact the entire cross examination of the said witness more or less was confined to a few letters and issuance of invoices.

On behalf of the respondent, one Parvathaneni Venkata Siva Prasad examined himself.

He in his affidavit contended that the petitioner had obtained his signatures on a blank format of agreement from Mr. Gorantla Butchaiah Chaudhary. In his cross examination, however, he categorically stated that he had no personal knowledge in regard thereto.

In answer to a question as to when the same was signed, he was a partner of the respondent firm or not, he acknowledged the signature of Shri G. Butchaiah Chaudhary on the agreement. He also admitted that he had knowledge of the earlier proceedings.

It is not in dispute that the said Shri Parvathaneni Venkata Siva Prasad became a Managing partner of the respondent firm on or about 27.08.2008.

Shri Butchaiah Chaudhary, however, did not examine himself, although he was the only person who could testify with regard to the allegations of the respondent so far as the same related to obtaining his signature by the petitioner on a blank format of the agreement is concerned.

The petitioner also examined one Mr. Ajay Kumar Ghosh, Senior Manager (Accounts), who deposed that after the said agreement was signed, the respondent was allotted an unique customer code being 10021505. He also identified the signature of Mr. Muthaiya on the agreement.

According to him, the invoices being computer generated, the same were not required to be signed. He also proved the ledger account as being a document maintained regularly and in due course of business.

The respondent, as noticed heretofore, filed a petition before this Tribunal, which was marked as Petition No. 5 (C) of 2009 wherein inter alia the following prayers were made.

“(a) Direct the Respondent to provide uninterrupted good quality signals its ETV and ETV2 channels to the Petitioner network through Decoders and SIM Cards to the entire Rajamandry (Rural and Town) area.

- (b) Direct the Respondent to immediately invite the Petitioner for a meeting in order to work out further modalities and entering into fresh agreement as like Channel Plus agreement with the Petitioner.
- (c) Direct the Respondent to enter into a proper agreement is required by law without any discriminating terms as per the present subsisting connectivity.
- (d) Direct the Respondent to provide the proper and legal Written Agreement duly signed by both parties; and
- (e) Pass such other order or orders as this Hon'ble Tribunal may deem just and proper under the facts and circumstance of the matter."

The invoices were regularly drawn up by the petitioner and the respondent also made payments in part satisfaction thereof, which are to the following effect:-

<b>Date</b>	<b>Amount</b>
30.05.2007	Rs. 2,24,480/-
30.06.2007	Rs. 2,24,480/-
23.08.2007	Rs. 2,24,480/-
23.08.2007	Rs. 2,24,480/-
28.09.2007	Rs. 2,24,480/-
12.10.2007	Rs. 2,24,480/-
28.11.2007	Rs. 2,24,480/-
25.12.2007	Rs. 2,24,480/-

28.02.2008 (Jan. 08 & Feb. 08)	Rs. 4,49,440/-
For 3 months (Mar.08, Apr.08 & May 08)	Rs. 6,74,160/-
23.10.2008	Rs. 2,00,000/-
31.12.2008	Rs. 1,25,000/-

The records of the proceeding of the said Petition No. 5(C) of 2009 show that an interim order of injunction was issued therein by us on or about 16<sup>th</sup> January, 2009.

By an order dated 15<sup>th</sup> April, 2009, the said interim order was directed to continue subject to the respondent's depositing a sum of Rs. 1,00,000/- towards past arrears and Rs. 50,000/- per month with effect from 1.4.2009.

It was, however, clearly stated therein that the payments as ordered were to be made by way of an interim measure without prejudice to the rights and contentions of the parties.

In the said petition, the petitioner herein filed a counter claim.

By reason of an order dated 18<sup>th</sup> November, 2009 this Tribunal held:-

"11. Keeping in view of the contentions raised by the petitioner it is evident from several documents including the letter of the petitioner dated 10.01.2009 that genuineness of the said agreement has not been questioned. The jurisdiction of this Tribunal is limited to the adjudication of any dispute between two or more service providers. Negotiations held between the parties before entering into a binding

contract is not disputed. We will assume that the petitioner prior to entering into the said agreement dated 10.04.2007, raised a contention that it has a subscriber base of 2037 subscribers only. The said representation of the petitioner was not accepted by the respondent. It insisted upon the subscriber base of 20000 for the purpose of entering into the said agreement.

12. From the aforementioned letter of the petitioner's firm dated 5.4.2007, it is evident that the demand of the respondent was accepted. It is, therefore, difficult to accept the plea raised on behalf of the petitioner that only on a blank document signed by the authorized representative of the petitioner firm, the agreement was drawn up. The fact that the respondent would agree to supply signals to the petitioner only on 20000 subscriber base was known to the petitioner. It, therefore, must be held to have entered into said agreement with its eyes wide open. Only because the said letter dated 5.4.2007, it used the term 'wish' or it stated that 'it would keep on depositing the said amount in question,' the same would not absolve the petitioner from its obligation towards the respondent with regard to its contractual liability arising under the said agreement dated 10.04.2008. Moreover, it does not appear from the records that the petitioner at any point of time raised any protest with regard to the actual subscriber base. It is furthermore not in dispute that the initial agreement was for a period of one year. The agreement dated 10.04.2007 has not only been acted upon but has also expired. The agreement entered into for the period 10.04.2008 to 10.04.2009 has also expired. It is furthermore, well settled principle of law that a binding contract may come into

being by complying the principles of 'Acceptance sub silentio as enunciated in Ramji Dayawal and Sons (P) Ltd. V. Invest Import reported in (1981) 1 SCC 80.

13. In construing a contract the court of law, therefore, is entitled to take into account the conduct of the parties. In this case, the genuineness of the agreement has not been disputed. Execution of the agreement on the part of the petitioner in fact stands admitted. If that be so, we see no reason as to why the petitioner should be held to be absolved from its liability to pay the amount of consideration specified in the said agreement to the respondent. It is of some significance that the petitioner even after the receipt of the disconnection notice and publication of public notice paid a sum of Rs. 1,25,000/- to the respondent with a covering letter dated 30.12.2008. Even at this stage, no protest has been raised with regard to the subscriber base. No contention even at that stage was raised that the agreement cannot be acted upon as the respondent had procured a blank agreement signed by the authorized representative of the petitioner.

14. The conduct of the petitioner thus anterior to, during the subsistence of the contract and even subsequent to the notice terminating the same would clearly demonstrate that he had acted thereupon and in that view of the matter, in our opinion, cannot now be permitted to resile therefrom upon raising a plea which, in our opinion, is an afterthought."

The said petition was dismissed. However, the counter claim filed by the petitioner herein was directed to be treated as a separate suit. The registry was directed to assign a separate number thereto.

Pursuant thereto only, this petition has been placed before us.

Mr. Sai, the learned counsel appearing on behalf of the respondent would contend that having regard to the fact that the agreement was of the year 2007 and no agreement having been entered into by the parties subsequent thereto and moreover this Tribunal having directed undertaking of a joint survey, the decision in the earlier proceeding would not operate as res-judicata.

Learned counsel would submit that at no point of time, the respondent had more than 2,037 subscribers and furthermore having regard to the fact that the petitioner demanded a sum of Rs. 7,51,640.76 in terms of its notice under Regulation 4.1 of the Telecommunication (Broadcasting and Cable Services) (Interconnection Regulations), this petition should be dismissed.

The subscription amount, in the event it is held that the subscriber base of the respondent is 20,000, indisputably would be more than 2 lacs of rupees. It is not in dispute that the rate of the channels in respect whereof, signals were to be supplied to the respondent by the petitioner was Rs. 10.00 per subscriber per month which was increased to Rs. 10.40/- per subscriber per month.

The respondent was also bound to pay taxes on the said amount besides the subscription amount.

The fact that the petitioner had been maintaining books of accounts in a regular course of business is not in dispute. The fact that the respondent had paid a huge sum to the petitioner towards the subscription charges, as noticed heretofore is also not in dispute.

The respondent, however, contended that as per representation made by the petitioner it had been depositing the amount not by way of subscription fee but as advances on the premise that the same would be refunded.

If the contention of the respondent is correct, that it was required to pay only a sum of Rs. 20,000/- per month, it is really difficult to accept its contention that it had been depositing a huge amount relying on or on the basis of any alleged representation made on the part of the petitioner or otherwise that all the excess amount paid by the respondent shall be treated to be the deposits and the same would be refunded at a later date.

If the contention of the respondent is correct, it had been depositing advance for at least 9 months if not more, in the account of the petitioner on a regular basis. Such a conduct on the part of a local cable operator cannot be countenanced.

It is furthermore a well settled principle of law that any decision rendered inter parties shall operate as res-judicata. The principles of res-judicata shall apply also in different stages of the same proceedings (See Satyadhyan

Ghosal Vs. Deorajin Debi AIR 1960 Supreme Court page 941 paragraph 7, Barkat Ali Vs. Badrinarain (2008) 4 SCC 615 para 13 and Ajay Mohan Vs. H. N. Rai (2008) 2 SCC 507 para 19.

In terms of the decision of this Tribunal dated 18.11.2009, the agreement must be held to have been proved. The subscriber base also must be held to have been proved.

Consequently the amount of subscription fee payable by the respondent must also be held to have been proved.

If that be so, having regard to the fact that the said order dated 18.11.2009 has attained finality, the principle of Res-judicata shall be attracted.

Even assuming that there has been some reduction in the subscriber base, it was obligatory on the part of the respondent herein to take recourse to clause 10.2 of the Regulations. The same having not being done, it is not possible for us to accept the submission of Mr. Sai that the actual subscriber base of the respondent had all along been only 2,037.

It is true that in the notice issued by the petitioner, a sum of Rs. 7,00,000/- and odd was said to be due but keeping in view the interim order passed by this Tribunal, the petitioner became entitled to the arrears of the

subscription charges each month to the extent of more than Rs. 1,50,000/- and it is on that account alone the outstanding amount has increased.

We may furthermore notice that the petitioner had not given the details of the local cable operators for the purpose of invoking the provisions of clause 10.2 of the Regulations.

For the reasons aforementioned, this petition must be allowed.

It is directed accordingly. The rate of interest in the facts and circumstances of this case, and furthermore having regard to the fact that the agreement had continued and the maximum amount of claim occurred during the pendency of the earlier proceedings and this proceeding, interest @ 12% per annum should be directed to be paid from the date from which it fell due till the discontinuation of the agreement. The petitioner shall be entitled to interest pendente lite and future at the same rate.

The petitioner is also entitled to costs from the respondent. Advocate's fee assessed at Rs. 10,000/-

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

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

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

V/MKS/\