

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 8TH OCTOBER, 2010

PETITION No.25(C) OF 2009

M/s Steel City Central Network

...Petitioner

Versus

MSM Discovery Private Limited

...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.Vibhav Srivastava, Advocate

For Respondent : Mr.Aditya Narain, Advocate

JUDGEMENT

S. B. Sinha

The petitioner is a multi system operator. The respondent is a content aggregator. It carries on business as a distribution agent of same broadcasters under the name of 'One Alliance'.

The parties hereto, as is admitted now entered into an agreement on or about dated 24th July, 2006 w.e.f. 1st April 2006 for a period of one year which was renewable. The petitioner contends that it had not been supplied with a copy of the agreement and it was given to understand that it was to pay a sum of Rs. 2,00,000/- per month in terms thereof.

According to the petitioner it had been paying the said sum in advance and in fact in January, 2009 it had paid a sum of Rs. 1,50,000/- by way of advance for the month of February, 2009. In support of the said contention, reliance has been placed on a letter dated 31st January, 2009 which reads as under :-

"We are enclosing herewith following cheques of Rs. 1,50,000/- (Rs. One Lac Fifty Thousand Only) against subscription charges of February, 2009 as advance.

Cheque No.	Date	Amount
849066	31.01.2009	1,00,000/-
849067	31.01.2009	50,000/-
		<hr/> 1,50,000/-

Kindly acknowledge receipt of the same."

The petitioner further contends that the supply of signal was abruptly disrupted on 18th February 2009, in an arbitrary fashion. According to it no notice under regulation 4.1 of the Telecommunication (Broadcasting and Cable Services) Regulation 2004 as amended in the year 2006 (The Regulation) was served nor any public notice as envisaged under Regulation 4.3 thereof was issued in this behalf.

This petition was filed on or about 23rd February, 2009 by the petitioner, praying inter alia for the following reliefs :-

- “(a) direct the Respondent to reconnect the signals of channels of One Alliance being supplied to the petitioner; and/or
- (b) direct the Respondent to provide Channels of One Alliance to the petitioner on non discrimination basis; and/or
- (c) restrain the Respondent from imposing unreasonable and excess demand to the Petitioner; and/or
- (d) restrain the Respondent from blocking the channels in any manner whatsoever; and/or
- (e) direct the Respondent to furnish Subscription Agreement; and/or
- (f) direct the Respondent to furnish the invoices and Statement of Account and keep on furnishing the Invoice regularly in future also; and/or
- (g) declare the Respondent as defaulter for non following the Regulations as issued by TRAI; and/or

For considering the question in regard to grant of an interim relief, the matter came up before this Tribunal on 24th February, 2009.

The respondent contended that a sum of Rs. 2.63 lakhs was owing and due from the petitioner besides which, sum of Rs. 2.57 lakhs had fallen due towards the subscription charges for the month of February, 2009.

On the aforementioned premise, the petitioner had agreed to pay the said amount without prejudice to its rights and contention on the basis whereof the respondent was asked to restore the supply of signal forthwith.

The parties were also directed to reconcile their accounts.

Although the parties met pursuant to the said order but it does not appear they arrived at any consensus.

The respondent, however, on or about 14th January, 2010 filed an application contending that this petition has become infructuous. The petitioner, on the other hand, contended that there were triable issues. The said application was disposed of stating :-

“This application has been filed for disposal of the main petition by the respondent on the premise that most of the reliefs prayed for by the petitioner stand granted. Mr. Aditya Narain, the learned counsel appearing on behalf of the respondent would contend that reconnection of the signals having been directed by this Tribunal and complied with, nothing remains so far as prayer (a) & (b) are concerned.

It was furthermore submitted that the copy of the subscription agreement having been supplied and the accounts having been settled, prayer (e) and (f) must also be held to have been allowed.

So far as prayer (g) and (h) in the petition are concerned, the counsel would contend that no such relief can be granted, keeping in view of the statement made in the petition.

Mr. Srivastava, learned counsel for the petitioner, on the other hand, would submit that these payments having been made without prejudice to the rights and contentions of the parties for obtaining an interim order on reconnection, the petitioner does not agree that the accounts between the parties have been settled once for all. In view of the statement of Mr. Srivastava, we are of the opinion that it is not possible for this Tribunal at this stage to dispose of this petition in its entirety."

The respondent in its reply inter alia contended :-

- 1) As the consequence of non-payment had been stated in the invoices itself, it was not required to issue any fresh notice under Regulation 4.1 of 'The Regulation'.
- 2) Public notice under Regulation 4.3 had been published in 2 newspapers published from Ranchi.
- 3) Invoices had regularly been raised and served on the petitioner.
- 4) The statement of accounts would clearly show that the petitioner was a defaulter.
- 5) By reason of an order dated 5th March, 2010 a large number of issues were framed which are as under :-

- a) Whether the disconnection of supply of signals by the respondent was illegal and / or in any way justified?
- b) Whether the petitioner is a defaulter?
- c) Whether the petitioner is guilty for suppression of material facts?
- d) Whether the respondent has supplied the agreement dated 29.07.2006 to the petitioner before the filing of the petition?
- e) Whether the terms of the validation form dated 01.04.2009 are binding on the petitioner?
- f) Whether the validation form was signed by the petitioner on a blank format?
- g) Whether the reconciliation of accounts of the petitioner had taken place in the meeting held on 06.04.2009 in terms of the validation form dated 01.04.2009 and the invoice issued by respondent thereafter, being the subsequent event, would govern the result of the petition.
- h) To what relief, if any, the petitioner is entitled to?

In support of its case, the petitioner has examined its proprietor Mr. M. Khan, whereas the respondent has examined Mr. Mukesh Singh, its Area Manager as their respective witnesses.

Mr. Vibhav Srivastava, the learned counsel appearing on behalf of the petitioner urged :-

- (a) The respondent having not served any notice under clause 4.1 of the regulation as also published public notices in the newspapers which have circulations only in Ranchi and not in Jamshedpur, the respondent could not have disconnected supply of signal to the petitioner.
- (b) The petitioner having paid 75% of the subscription fee for the month of February, 2009 in advance, disconnection could not have been caused to the supply of the signal.
- (c) The petitioner having been supplied a blank validation form, no reliance can be placed thereupon for the purpose of calculating the monthly subscription fee as no basis has been laid down therefor in the agreement itself.
- (d) No statement of account for the period prior to February 2009 having been produced by the respondent, it must be held that no basis had been laid down for disconnection of supply.

Mr. Aditya Narayan, the learned counsel appearing on behalf of the parties, on the other hand, urged :-

- i) This petition, in view of the subsequent events, has become infructuous.
- ii) As the invoices served upon the petitioner contained the necessary ingredients of clause 4.1 of the Regulation, no separate notice in terms thereof was required to be issued.
- iii) Publication of notice in the news papers published from Ranchi serves the statutory purpose.
- iv) The respondent in the interest of justice should be permitted to file some new documents.

It is not in dispute that the Regulations governed the contract between the parties.

Clauses 4.1 and 4.3 of 'the Regulations' read as under:-

"4.1 No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of TV channels without giving three weeks' notice to the distributor clearly giving the reasons for the proposed action.

Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals.

4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks' notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests.

Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case

the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later.

The principal question which arises for our consideration is as to whether the respondent could have brought an end to the contract without service of any notice under clause 4.1.

Alongwith its reply, the respondent has annexed invoices which contained the following stipulation at the foot thereof:-

“Please treat this as a notice under Regulation 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006.”

It however, appears that Shri Singh along with his affidavit enclosed invoices, some of which we may take note of.

One of the invoices dated is 28.02.2009 wherein the balance BF has been shown as Rs. 2,63,383/- and payment of a sum of Rs. 5,20,000 has been mentioned. However, the current monthly bill was shown to be Rs. 1,91,701/-.

However, instead of showing credit balance, a debit balance of Rs. 1,64,916/- was shown. Peculiarly the due date for payment thereof was shown as on 10.09.2009.

We would assume that the same is a mistake and due date of payment should have been mentioned as 10.03.2009.

At the foot of the said invoice there exists a column titled "Please note", which reads as under :-

- "a. All payments to be made only by demand draft/pay order in the name of "MSM Discovery Pvt. Ltd."
- b. MSM Discovery Pvt. Ltd. (MSMD) distributes television channels and is an agent of Multi Screen Media Pvt. Ltd. and Discovery Communications India (DCI) for the distribution of channels distributed by Multi Screen Media Pvt. Ltd. and DCI respectively.
- c. This is a computer generated statement & does not require signature."

The respondent has annexed other invoices with similar terms.

Mr. Aditya Narayan would contend, as noticed hereinbefore, that the notice portion of the said invoice which is at pages 51, 52 and 53 must be considered to be a due and valid notice in terms of clause 4.1 of the regulations.

In our opinion, the submission of Mr. Narayan cannot be accepted for more than one reason.

Clause 4.1 provides for assignment of reason. It is couched in the negative language. It is, therefore, imperative in character.

The proposed action must not only be stated; the reasons therefor, must clearly be assigned. A notice of three weeks is given to a party so as to enable him to remedy the defect or approach this Tribunal. In a given case,

the `Distributor of TV Channels may raise a bonafide dispute; it may make a part payment; it may contend that the invoiced amount is not payable having regard to the subscriber base or the other terms and conditions of contract.

Can in the aforementioned situation, only a purported notice mentioned at the foot of the invoice be treated to satisfy the statutory requirements ?

In our opinion the same does not.

While a statute requires a party to a contract to do something in a particular manner, it must be done in that manner only.

The invoices annexed by the respondent itself with the affidavit of its witness point out to the absurdity of the claim of the respondent.

We have noticed heretofore the first invoice being dated 28.02.2009.

The due date for payment was mentioned as 10.09.2009.

Could the respondent disconnect the supply of signal for non-payment of the said dues before the due date?

We have come across invoices raised by the Broadcasters where payments are required to be made immediately.

Would thus 3 weeks be counted from the date of service of the invoice ?

At page 172 there is another invoice which is dated 23.2.2009, wherein the due date for payment has been shown as 15.02.2009. It is really a matter of great surprise as to how a payment can become due even before the invoice is served, particularly when non-payment thereof would lead to a grave consequence.

We have noticed heretofore that the invoices appended to the affidavit of the witness do not contain any such notice clause, as are contained in the invoices appended to the reply.

Mr. Aditya Narayan would ask us to ignore the invoices appended to the affidavit and rely upon the invoices appended to the reply. We cannot do so. Any document annexed with a pleadings would only be a part of the pleading. They have to be proved. Pleading, it in trite, is no part of the proof. The respondent itself having relied upon different formats of invoices cannot rely upon one of them nor can ask this Tribunal to ignore the others at its sweet will.

Furthermore, the said witness in his affidavit stated as under :-

"I say that the Respondent had issued the invoices to the Petitioner for the relevant period covered by the dispute raised by the Petitioner herein, which also constituted a Notice under Clause 4.1 of the Telecommunication Interconnection Regulation; true copies of the Invoices with proof of delivery are annexed herewith and marked as Exhibit-RW 1/3. A true copy of the Statement of Account of the Petitioner for the relevant period showing outstanding dues of subscription fees payable to the respondent is annexed herewith and marked as EXHIBIT-RW1/4.

Although the invoices were enclosed, no proof of service thereof had been annexed thereto. The respondent therefore, failed to prove service of the invoices on the petitioner.

Why such a statement has been made is difficult to comprehend, if the respondent did not have any proof of delivery. Thus, apart from the fact that no notice under Regulation 4.1 was separately issued and served, we are of the opinion that the respondent has also failed to prove that even the invoices containing any stipulation in terms of Regulation 4.1 of 'the Regulation' has been served.

In fact the proprietor of the petitioner in his affidavit stated as under:-

"The petitioner is also paying to the respondent the subscription fees. The petitioner has not received any invoice from the Respondent till date."

Mr. Aditya Narayan, submitted that the petitioner having signed the validation form knew that it has to pay a sum of Rs. 2,30,599/-. Two different validation forms are before us. Validation form undoubtedly forms part of the agreement. It is also not been disputed that the monthly subscription fee payable in terms of the agreement had been stated only in the validation form and not in the body of the main agreement.

The petitioners' witness in paragraph 3 of his affidavit stated as under:-

"The respondent has also not filed the copy of the agreement which was served on the counsel of the Petitioner. The copy of the Agreement which was supplied to the counsel for the petitioner is exhibited as Exhibit PW1/2."

It is, however, admitted that copies of the affiliation agreement has been served upon the petitioner only on 4.3.2009, i.e. during pendency of this petition. We, therefore, need not go into the question as to which of the validation form is correct. There is another aspect of the matter. The respondent has filed a statement of account. It's first entry shows an opening balance as on 1st February 2009, why it did not file the earlier balance sheet to show the amount received from the petitioner is difficult to comprehend.

Mr. Aditya Narayan would contend that the petitioner should have made payments in terms of the affiliation agreement and/or validation form.

We do not agree. In a situation of this nature where according to the petitioner it had regularly been paying a sum of Rs. 2 lakhs and in fact paid a sum of Rs. 1,50,000/- in advance for the month of February, 2009, the respondent should have produced the books of account for the relevant period at least to show that the petitioner was a defaulter, if not earlier but at least on the date of issuance of the public notice.

Mr. Aditya Narayan would contend that the petitioner is not correct in contending that a blank validation form was signed by him in as much as on a comparison of two forms; one of which is at pages 24 and 25 and other at pages 156 and 157, it would appear that the latter contains the signature of the proprietor in between a stamp and the place of signature also varies.

It would furthermore appear that even at page 25 vis-à-vis at page 157 the gap between two signatures are different and the stamps are also different. The names of the network have also been differently but we agree that

on the aforementioned premise the petitioner may not be correct in contending that its proprietor had signed a blank validation form which had later on being converted into a full fledged agreement.

Mr. Aditya Narayan would further contend that from the order of this Tribunal dated 24.02.2009, directing the respondent to restore the supply of the signal, it would appear that endeavours on the part of this Tribunal were to see that the accounts of the parties be reconciled, which would be evident from the proceeding sheet dated 16.3.2009. Furthermore, there exists a dispute as to whether a meeting taken place or not. Whereas according to the petitioner, no such meeting took place; according to the respondent not only such a meeting had taken place, the validation form for the subsequent years namely 2009-2010 was signed by the parties having regard to the reconciled accounts.

We do not agree with the aforementioned submissions of Mr. Aditya Narayan.

In absence of any material having been brought on record and particularly in view of the order of this Tribunal dated 5th March, 2010, it is difficult to agree with the submission of Mr. Aditya Narayan that there had been a reconciliation of accounts in between the parties as a result whereof no further dispute remained between them.

Had a reconciliation of accounts taken place, we are sure, the petitioner would not have insisted for hearing of the matter on merit.

The learned counsel for the petitioner is correct that the payment of Rs. 5,20,000/- having been made without prejudice to its right and only for the purpose of obtaining an interim order of restoration of signal, the petitioner

cannot be said to have waived its right of reconciliation.

The matter might have been different if the respondent, on whom the burden of proof lies, produced before us the relevant statement of account.

It, for reasons best known to it failed and/or neglected to do so. Faced with the aforementioned situation on the last day of argument namely 9th September 2010 Mr. Aditya Narayan sought to produce before us the entire accounts as also proof of delivery of the invoices.

In support of its contention that adduction of such additional evidence is permissible in law, strong reliance has been placed on Billa Jagan Mohan Reddy and another Vs. Billa Sanjiv Reddy and others reported in 1994 (4) SCC 659 wherein it was held :-

“It is clear from its bare reading that the parties or their counsel shall be required to produce all the documentary evidence in their possession or power which they intend to rely on to establish their right along with pleadings or before settlement of the issues. The Court is enjoined under Sub-rule (2) to receive such documents provided they are accompanied by an accurate list thereof prepared in the prescribed form. If they are not in the party's possession or custody, it shall be filed by the party along with an application to condone the delay in filing them. The explanation for delay is not as rigorous as one filed under Section 5 of the Limitation Act. These documents were not in the possession or custody of the appellant, but they have obtained certified copies from the revenue authorities and sought to be produced. It is undoubted that there is a delay in production of the said documents. But the trial court

had stated that the application was filed at the stage of arguments, seeking to produce those documents and sought to rely upon the documents. It is settled law that, if the documents are found to be relevant to decide the real issue in the controversy and when the Court felt that interest of justice requires that the documents may be received, exercising the power under Order 41, Rule 27 C.P.C. the appellate court would receive the documents and consider their effect thereof. When such is the position, when the documents are sought to be produced in the trial court, before the arguments are completed, normally they may be received; an opportunity given to prove them and rebuttal if any and their relevance and effect may have, be considered in deciding the issues arose in the controversy. Under these circumstances, the trial court was not justified in refusing to condone the delay and to receive the documents.”

We are afraid, the said decision does not have any application in the facts and circumstances of the present case. In that case the application of the provisions of Order 41 Rule 27 of the Code of Civil Procedure was in question. Evidently, the documents in question were public documents, certified copies whereof were required to be obtained from the revenue authorities. It is in that situation and particularly in view of the fact that the matter was one under Section 30 of the Land Acquisition Act; an observation was made that the appellate court should have accepted the additional evidence sought to be adduced.

In this case not only no such application has been filed by the petitioner for the aforementioned purpose, no material has been brought on record to establish as to why it failed to bring on record the said documents at an

appropriate stage of the proceeding. The respondent was aware of the issues between the parties. It had with it the affidavit of the witness of the petitioner. The witness of the petitioner has been cross examined at great length. The witness examined on behalf of the respondent was its Area Manager who had been dealing with the affairs of the petitioner.

The proof of service of the invoices to the petitioner, the nature of invoices served as also the books of accounts were in the custody of the respondent. It even sought to annex the copies of proof of delivery of the invoices along with the affidavit of the witness Shri Singh, but for reasons again best known to it, failed and/or neglected to do so.

It filed two different types of invoices. There is, thus, nothing on record to explain as to why such document had not been brought on record in this case at an appropriate stage.

The Parliament enacted Code of Civil Procedure Amendment Act, 1976 whereby and whereunder two provisions namely Order 18 Rule 2 Sub-rule 4 and Order 18 Rule 17A were inserted.

Although the said provisions have been deleted by the Code of Civil Procedure 2002 Amendment Act, the Supreme Court of India in Salem Advocates Bar Association Vs. Union of India 2005 (6) SCC 344 held that the Courts in exceptional situation may allow the parties to adduce in additional evidence. No case within the purview of Order 18 Rule 17A C.P.C. has also been made out. No application has been filed even to examine any witness to prove the said documents. Some documents sought to be put on the record across the bar without anything more cannot be accepted. We, therefore, have refused to accept the said documents.

We are, thus, of the opinion that despite subsequent events, the petitioner is entitled to a declaration that the disconnection of the supply of signal is illegal. The same was arbitrary as an act on the part of the respondent and such a recourse might have been taken by it to take undue advantage of the fact that it was to broadcast an important sport event, by way of an arm twisting measure. We are also satisfied that the respondent has not supplied a copy of the agreement to the petitioner which it ought to have done.

The petitioner is also entitled to a declaration that it was entitled to reconciliation of the accounts. As a logical corollary thereof the respondent shall send a copy of the entire accounts to the petitioner. It would be open to the petitioner to point out any payment(s) which might have been made but not considered by the respondent.

We furthermore direct that in future keeping in view the Regulations of 2009, the respondent must serve copies of the agreement and validation forms in accordance with law upon the petitioner. The respondent, in the event, it is found to have not adjusted any payment made by the petitioner should adjust the said amount and refund the amount together with the interest of 18% per annum.

For the reasons aforementioned, the petitioner is entitled to a declaration that the respondent has failed to comply with the statutory requirement of regulation 4.1.

The disconnection of the petitioner's signal therefore is illegal. This petition is allowed. The petitioner is also entitled to costs. Counsel's fee assessed at Rs. 50,000/-.

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

Chairperson

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(G. D. Gaiha)
Member

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