

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated April 18, 2011

Petition No.152(C)/2009

M/s Mahesh Channel

... Petitioner

Vs.

Star Den Media Services Pvt. Ltd.

... 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.Tarun Kashyap, Advocate

For Respondent

: Mr.Maninder Singh, Sr. Advocate

with Mr.Gaurav Juneja and

Mr.Praveen Pahuja, Advocates

J U D G M E N T

S.B. Sinha

The petitioner is a Multi Service Operator. It had been operating its network in the town of Hoshangabad in the State of Madhya Pradesh. Since 2007 it is a distributor of TV channels of the respondent herein, which is a broadcaster.

The petitioner at one point of time was the sole MSO operating in the said town Hoshangabad.

Inter alia on the premise that in October, 2008, the respondent started supplying signals of its channels to one M/s Nidhi Enterprise for a sum of Rs.30,000/- p.m., it sought for reduction in its subscriber base and consequent reduction in the subscription fee. It had entered into an agreement with the respondent on or about 14.3.2008 on a subscription fee of Rs.3,09,900/- excluding tax and inclusive of tax comes to Rs.3,48,204/-

The petitioner inter alia on the plea that it was entitled to down gradation and on the basis of a purported request from the respondent started depositing a sum of Rs.50,000/-per month.

On the premise that the petitioner was a defaulter, its signals were disconnected upon issuance of a notice under 4.1 of the Telecommunication Broadcasting and Cable Services Interconnections Regulations, 2004, (Regulations) in December, 2008.

The petitioner filed a petition before this Tribunal in January, 2009.

On or about 14.1.2009, the said petition was disposed of, directing :-

“... Keeping in view the facts of the case, we direct the petitioner to pay to the respondent a sum of Rs.8,76,878/- within a period of three weeks of which at least half the amount shall be paid within one week from today and the rest within two weeks thereafter. This amount will be subject to adjustment on the basis of reconciliation of the subscriber base between the two parties effective

from 1.10.2008. Along with the first payment, i.e. within one week from today, the petitioner will also furnish to the respondent the details of the subscriber base for every month from October, 2008 onwards. If necessary, both the parties may conduct a joint survey which shall be completed within a period of three weeks from the date of supply of the information by the petitioner to the respondent. The respondent shall not disconnect signals to the petitioner on the understanding that the payment will be made as directed above. If the payment is not made, the respondent is discharged from this direction. The petitioner will continue to make payments as per the agreement which will be in force till such time the negotiations take place as per the regulations. These payments will also be subject to adjustment on the basis of the subscriber base to be arrived at. The respondent will also furnish to the petitioner immediately a copy of the Agreement signed in December,2008.

In the event of lack of agreement or dispute on the subscriber base, if any, it is open to the petitioner to approach this Tribunal once again with a fresh petition.”

It is not in dispute that prior thereto, the claim of the respondent in regard to the arrears of subscription fee was Rs.13 lakhs, and odd. The petitioner was directed to make the said payments on or about 28.2.2009 and 18.4.2009 i.e. beyond the period prescribed.

The petitioner aggrieved by and dissatisfied with the said judgment and order dated 14.1.2009, preferred an appeal before the Supreme Court of India in terms of Section 18 of the Telecom Regulatory Authority of India Act, 1997 (the Act) which, however, was dismissed.

The petitioner started negotiations with the respondent for a fresh agreement in March, 2009. The parties thereafter agreed that on or from 1.1.2010, subscription fee payable by the petitioner would be Rs.1,55,009.32paise.

Admittedly, the parties entered into an agreement for the period 1.1.2009 to 31.12.2009, on or about 14.4.2009, on the aforementioned terms. Admittedly, nothing was stated in the said agreement or otherwise in regard to the reduction of the subscriber basis vis-à-vis the amount of subscription fee from October, 2008 till December, 2008. The petitioner, however, did not pay any

amount in terms of the said agreement. According to it, having made payments since 25.7.2007 in excess; it was entitled to set off the same from the amount due from it.

The respondent issued a notice under Regulation 4.1 of the Regulations to the petitioner on or about 26.5.2009, which is in the following term:-

“... You are requested to treat this letter as three (3) weeks’ notice in terms of Clause 4.1 of TRAI’s Interconnect Regulations dated 04.09.2006. We are also taking necessary steps to inform the consumers by way of Public Notices as per the said Regulations...”

Public notices were also issued on or about 27.5.2009, which are as under :-

“ SWADESH --BHOPAL

27.05.09

Public Notice

This is to inform our esteemed customers that signals of some of the channels (comprising of STAR Movies; STAR. Plus, STAR World, STAR Gold, National Geographic Channel, The History Channel, STAR One, STAR Vijay, Hungama, The Disney Channel, Toon Disney Channels, Times Now

Zoom and Channel [V], CNBC TV18, CNN-IBN, CNBC Aawaz and MGM) are likely to be disconnected three weeks' from today to the following Cable Operator(s). The reason for deactivation is non-payment of dues by the following cable operator(s).

M/s Mahesh Channel — Hoshangabad, Palash Restaurant, Anand Nagar, Hos.hangabad, Madhya Pradesh — 461 001.

Services to the Cable Operator and its franchisees shall get affected.

Issued by:

STAR DEN Media Services Pvt. Ltd., B-65, Ist Floor, Phase — I, Okbla Industrial Area, New Delhi — 20"

According to the petitioner, however, the said notice under Regulation 4.1 was not served on it. Disconnection of signal of the petitioner's network thereafter was effected.

There is a small dispute as regard the date of disconnection, in as much as whereas according to the petitioner such disconnection

took place on 16.6.2009, according to the respondent the same was effected on 17.6.2009.

The present petition has been filed inter alia praying for the following reliefs:-

A. Declare that the act of dis-connection of the signals of the petitioner network by the Respondent on 16.6.2009 as null, void, and illegal and/or;

B. Restrain the Respondent from switching off/ disconnecting the signals for (i) Star Movies, (ii) Star Plus, (iii) Star World, (iv) Star Gold, (v) Channel V, (vi) National Geographic, (vii) History Channel, (viii) Vijay in bouquet 1 and in Bouquet II, following channels (i) Star One, (ii) Hungama, (ii) The Disney, (iv) Toon Disney for the area of Hoshangabad on the cable television network of the Petitioner and/or;

C. Pass such other/ further Orders as this Hon'ble Tribunal

The respondent filed a brief reply.

It did not file any detailed reply.

In the said reply it was contended:-

(i) Disconnection of supply of signal was effected upon due compliance of the requirements of Clauses 4.1 and 4.3 of the Regulations.

(ii) The petitioner having suppressed a large number of documents is not entitled to any equitable relief.

(iii) The subscription agreement dated 14.4.2009, was executed bona fide by the parties.

(iv) The petitioner, having not raised any objection with regard to the terms of the agreement at the time when the same was entered into, cannot be permitted to do so at a later stage.

(v) Although in the year 2008, the petitioner had been making payments for 5780 subscribers for bouquet one, it became liable to make payments for 2598 subscribers only for the subsequent period and

furthermore in view of the fact that down gradation in relation to the number of subscribers for bouquets two also was given, the impugned notices are unassailable.

(vi) The petitioner should not be permitted to raise any plea of alleged coercion and in any event no such prayer having been made, this Tribunal cannot pass any order in regard thereto.

(vii) Grant of connection to M/s Nidhi Enterprise was on the basis of an order passed by this Tribunal in petition no.82 (C)/2008 and 106 (C)/2009 and, thus, no grievance in relation thereto can be raised by the petitioner.

Para 16 of the said reply, which is of some relevance, reads as under :-

“In view of the above mentioned facts and circumstances the Respondent submits that Nidhi Enterprises be made a party to the present proceedings and a Joint survey may be conducted in

presence of the representatives of all the parties to ascertain the exact number of subscribers being created by the Petitioner and Nidhi Enterprises.”

The petitioner herein has filed a detailed rejoinder to the said reply wherein it not only took several new points, but also annexed several new documents without obtaining leave of this Tribunal.

It inter alia contended that the petitioner was forced to sign a blank agreement for the amount of Rs.1,55,009.32/-, although, it did not have so many subscribers.

It has set out a chart showing the payments made by it from 2008 to claim adjustments of the amount payable by it in terms of the agreement entered into with the respondent.

It also complained of a discriminatory treatment, as according to the petitioner the respondent having been accepting a payment of Rs.25,000/- p.m. from M/s Nidhi Enterprise, there is absolutely no reason as to why it should charge any sum higher from the petitioner, as it, before coming into existence of M/s Nidhi Enterprise, as an MSO, was the exclusive MSO operating in the area.

The respondent also filed an additional affidavit and annexed a large number of documents therewith including invoices.

This Tribunal by an order dated 26.2.2010, opined as under:-

“We have heard Mr. Kashyap and Mr. Juneja appearing for the parties. Upon going through the pleadings, it appears, that questions which arise for our consideration in this petition are as to whether the purported notice dated 28.05.2009 was issued by the respondent and have been served upon the petitioner and as to whether the public notices published in the news papers namely Swadesh at Bhopal and Central Chronical having wide circulation in Hoshangabad where the head-end of the petitioner is situated or not?

As the manager of the petitioner is present before us, we, by way of an exceptional measure, permit Mr. Tarun Kashyap, the learned counsel for the petitioner to examine Mr. Chandrashekar Jaiswal today.

The said witness is examined, cross-examined and discharged.”

On or about 20.7.2010 the respondent filed a list of witnesses naming the following:-

1. Rana Amitabh Singh

Working as (Vice President-Sales) with
the Respondent

2. Ajay Gupta

Working as (Manager) with the
Respondent

3. Vikas Tiwari

Working as (Office Boy) with the
Respondent

5. Post Master, (Kalkaji HO)

Through concerned clerk/incharge,
To show that the notice dated 27.05.2009
was dispatched

6. Advertisement Manager, Swadesh

To prove the certificate dated 23.01.2010

7. Circulation Manager Central Chronicle

To prove the certificate dated 23.01.2010

8. Any other witness to prove the case of the
Respondent with the leave of this Hon'ble
Tribunal.

The respondent also filed applications for summoning the
Post Master of Hoshangabad Post Office and the Manager of Indian
Postal Department, National Speed Post Centre.

It also filed an application for summoning Post Master, Kalkaji,
the Newspapers Swadesh and Central Chronical through their
Advertisement Manager and Circulation Managers, respectively.

The petitioner also filed an application for summoning the Post Master, Hoshangabad Post Office and the Manager, Indian Postal Department. The said applications were allowed.

The aforementioned witnesses were summoned and examined before this Tribunal only for proving and/or disproving service/publication of notices under Regulations 4.1 and 4.3, as it was alleged by the petitioner that no notice under Regulation 4.1 was served and the newspapers wherein the purported public notices were published in terms of Regulation 4.3 had no circulation in the town of Hoshangabad.

On the aforementioned backdrop of factual event, the questions which principally arise for our consideration are as under:-

- (i) Whether before disconnecting the petitioner's network at Hoshangabad, the respondent complied with the requirements of Regulations of 4.1 and 4.3 of the Regulations.

(ii) Whether the claim of the respondent that the petitioner has failed and/or neglected to pay a sum of Rs.12,68,908/- as contended in its notice dated 27.5.2009, was justified.

(iii) Whether the petitioner was entitled to reduction of subscriber base for the months of October to December, 2008 in Petition no.3 (C)/2009 disposed of on 14.1.23009.

(iv) Whether the petitioner having not prayed for any consequential relief as is required under proviso to Section 34 of the Specific Relief Act this petition is maintainable.

Mr.Tarun Kashyap, learned counsel appearing on behalf of the petitioner would urge:-

(i) The respondent having been making inconsistent and contradictory claims with regard to the quantum of arrears inasmuch as, whereas in its reply the respondent made a claim of Rs.13,60,096.82 paise, it confined its claim to Rs.12,68,908/- in its letter dated 27.5.2009. Assuming that the respondent is correct that the petitioner was liable to pay a sum of

Rs.1,55,009.32 paise per month by way of subscription fee excluding tax in terms of the agreement dated 14.4.2009, it was only entitled to five months' subscription fee calculated on that basis.

(ii) The respondent having not been able to prove service of notice in terms of Regulation 4.1 of the Regulations, disconnection of the petitioner's signal must be held to be illegal. Moreover, the respondent has also failed to prove due compliance of the requirements of Regulation 4.3 of the Regulations.

(iii) The respondent must be held to have acted illegally insofar as it failed to treat the petitioner on equal footing with M/s Nidhi Enterprises, as it had only been charging a sum of Rs.25,000/- from it on a mere subscriber base of 443 subscribers; whereas the petitioner was being charged @ Rs.1,55,009.32 paise per month.

Mr.Maninder Singh, the learned Senior Counsel appearing on behalf of the respondent, on the other hand, urged:-

(i) Keeping in view the nature of the reliefs prayed for by the petitioner, no relief can be granted by this Tribunal having regard to the proviso appended of Section 34 of the Specific Relief Act, 1963.

(ii) The materials brought on record by the parties would clearly show that the notice under Regulation 4.1 having been sent on 27.5.2009 by speed post and the same having not been received back, a presumption must be raised that the same had been served upon the petitioner having regard to the provisions contained in Section 114 (g) of the Indian Evidence Act and Section 27 of the General Clauses Act, 1922.

Strong reliance in this behalf has been placed on C.C. Alavi Haji vs. Palapetty Muhammed and Anr. (2007) 6 SCC 555 and M/s Madan and Co. vs. Wazir Jaivir Chand (1989) 1 SCC 264.

(iii) The respondent having examined two witnesses viz Mr.Vikas Tiwari and Mr.Nawab Beg, who having categorically stated that the envelopes sent to the

petitioner under speed post were not received back, the certificates issued by the Post Master, Hoshangabad in favour of the petitioner must be held to be a procured one.

(iv) The newspapers concerned in their letter dated 23.1.2010 having categorically stated that the said newspapers have wide circulation in the town of Hoshangabad and the publication of the notices under Regulation 4.3 of the Regulations having been effected therein, the public notice cannot be said to be illegal.

(v) Having regard to the fact that the petitioner is an experienced as well as a large MSO, which had a monopoly in his town of Hoshangabad at one point of time and furthermore in view of the fact that it had been approaching this Tribunal again and again, it is difficult to comprehend that it would succumb to any coercion or pressure from the respondent or would have signed a blank agreement.

(vi) The agreement dated 14.4.2009, having been entered into after holding negotiations, which has

been given a retrospective effect with effect from 1.1.2009, it must be held that the petitioner made its demand for deduction of subscriber base from the months of October to December, 2008, voluntarily.

(vii) The public notice being necessary only for the benefit of the public, and the petitioner admittedly had the knowledge of the publication at least in one of the newspapers, cannot take any benefit thereof.

(viii) Having regard to the order of this Tribunal dated 14.1.2009, the petitioner cannot claim any set off for any period prior thereto.

(ix) The petitioner being guilty of commission of fraud by taking recourse to suppression of various documents is not entitled to any relief, in view of the decision of the Supreme Court in the case of Jay Laxmi Salt Works (P) Ltd. vs. State of Gujarat (1994) 4 SCC 1.

(x) In any view of the matter, the agreement having expired on 31.3.2010, and no fresh agreement having been entered into within a period of three months from the date of expiry thereof, as is provided under Regulation 8.1 of the Regulation, no relief should be granted to the petitioner.

The petitioner has merely prayed for a declaration that the act of disconnection on the part of the respondent is null, void and illegal.

The contention of the respondent is that no consequential relief having been prayed for, the petition is not maintainable particularly when where they relate to a prohibitory injunction and not a mandatory injunction which cannot be granted as the supply of signal has already been disconnected.

Section 34 of the Specific Relief Act 1963 reads as under :-

“34. Discretion of court as to declaration of status or right.- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to

deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.- A trustee of property is a " person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

On a plain reading of the aforementioned provision, it is evident that it speaks of declaration of a legal character or a right in an immovable property. As the proviso appended thereto raises a legal bar in instituting another suit which evidently is the object for enacting the aforementioned provision, there cannot be any doubt whatsoever that the same deserves strict construction.

Would a declaration that an act of disconnection of supply of signal which has an element of public policy involved in it, the statute having been provided for 21 days notice, can it be said that

by reason thereof the petitioner has sought for a declaration of a legal character?

The answer to the aforementioned question, in our opinion, should be rendered in the negative. The relationship between the parties is not in dispute. The termination of contractual relationship was not effected by reason of the provision of a contract, qua-contract.

Before termination of contract relating to supply of signal of the channels of the respondent can be effected, indisputably it was required to comply with the provisions of Regulations 4.1 and 4.3 of the Regulations, in terms whereof, the respondent was to serve 21 day's notice on the petitioner as also 21 days' public notice.

The legal character between the parties being not in question, the petitioner has neither sought for nor was it necessary to it seek for a declaration in respect thereof.

As the Regulations undoubtedly shall prevail over the contractual terms, subject to just exception, the consequences of violation of a statutory provision would be automatic.

An action which is contrary to the mandatory provisions of a statute would be rendered a nullity. If that be so, in our opinion, it was not necessary for the petitioner to seek for a further consequential relief.

In any event, the petitioner has in fact sought for a consequential relief. It is one thing to say that in the facts and circumstances of the case, no order of injunction can be issued, but it is another thing to say that no consequential relief having been prayed for, this petition is not maintainable.

We, therefore, are of the opinion that the preliminary objection raised by Mr. Maninder Singh has no force to and must be rejected accordingly.

It is true that the signals of the petitioner were disconnected by the respondent on or about 16.6.2009. This petition having been filed on 1st July, 2009, and ordinarily having regard to the provisions contained in Order VII Rule 7 of the Code of Civil Procedure, 1908, prayer for an injunction in mandatory form was imperative.

But would it mean that this Tribunal which has been constituted for resolution of a dispute inter alia between two service providers must throw the petition out? We do not think such a course is necessary.

Evidently the mistake, if any, has been committed by the petitioner's legal advisor. In that view of the matter, the petitioner, in our opinion, should not be deprived of a legal right to which it may otherwise be found entitled to.

Order VII Rule 7 of the Code of Civil Procedure reads thus:-

Relief to be specifically stated – Every Plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

From a bare perusal of the aforementioned provision, and even otherwise, it is now well settled, it is evident that the courts can mould its relief.

In a given case, therefore, it is not wholly impermissible in law to pass an order or a decree for mandatory injunction in stead and in place of a prohibitory injunction.

In Satilila Charitable Society and Anr. Vs. Skyline Education Institute being FAO Nos.213/2003 and 212/2003, the Delhi High Court has held as under:-

“...Normally once all the ingredients like prima facie case, balance of convenience, equity if not found in favor of grant of injunction, injunction in any form ought not to have been granted. At the same time, that does not mean that Court in order to do justice cannot mould the relief or can grant an injunction in terms not prayed for to do justice between the parties. The concept of grant of injunction also have to be seen in the light as to what would be the loss suffered on account of an injury by non-grant of such an injunction.”

Effect of Regulation 4.1 and 4.3

Regulations 4.1 and 4.3 of 2004 Regulations read thus :-

4. In the Principal Regulation, in place of the existing clause 4 and the entries relating thereto, the following clause and the entries relating thereto shall be substituted,

namely:-

"4. Disconnection of TV channel signals

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.

4.3 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.

Explanation

1. In case the notice is published in two newspapers on different dates then the period of three weeks shall start from the latter of the two dates.

2. Broadcaster/multi system operator/ distributor of TV channels may also inform the consumers through scrolls on the concerned channel(s).

However, issue of notice in newspapers shall be compulsory.

Both the Regulations are couched in negative terms. It is, therefore, ex-facie imperative in character. Even otherwise the Regulations clearly provide for the same.

What would be the effect of violation of aforementioned provision? To our mind, subject to any other or further order that may be passed by a court of law / court of equity, such an action would be rendered illegal as a result whereof ordinarily a multiservice operator would be entitled to an order of restoration of connection. But it must be made clear that this Rule has exceptions.

A court, moreover, having regard to the fact situation obtaining in this case may not pass such an order.

The respondent despatched a notice under Regulation 4.1 on 27.5.2009 through speed post. It, in support of the proof thereof that said notice was annexed a receipt given by the Department of Indian Telecom.

Indisputably in terms of Illustration (e) of the Indian Evidence Act, 1872 and Section 27 of the General Clauses Act a presumption may be drawn. What would be the extent of the presumption is the question?

The notice under Regulation 4.1 dated 27th May 2009, reads as under:

"... We write to you with reference to the Subscription Agreement dated 14/04/2009 ('Agreement') entered into between STAR DEN Media Services Private Limited ('STAR DEN') and Mahesh Channel - Hoshangabad, whereby, you have been authorized to distribute the STAR DEN channels subscribed by you against payment of monthly subscription fees of Rs.1,55,009.32/- (excluding applicable tax) for subscribers declared by you.

We note from the records that, as on date there is an outstanding of Rs.12,68,908.82/- (Rupees Twelve Lacs Sixty Eight Thousand Nine Hundred Eight and Paise Eighty Two Only) payable by you (the "said outstanding") and would request you to clear the same immediately. Please note that if you fail to clear the said Outstanding immediately, we would be constrained to discontinue the services of STAR DEN channels to your network. On disconnection of the services, the Subscription Agreement shall be deemed to be terminated and you shall be liable to return the DSR (s) and Viewing Cards issued to you at the earliest.

You are requested to treat this letter as three (3) weeks' notice in terms of Clause 4.1 of the TRAI's Interconnect Regulations dated 04.09.2006. We are also taking necessary steps to inform the consumers by way of Public Notices as per the said Regulations."

The petitioner in his evidence has categorically stated that he has not received any such notice. He in his cross examination stated:-

"The petitioner did not receive any letter dated 27.05.2009."

In his cross examination merely a suggestion was given to him which is to the following effect :-

"It is incorrect to suggest that I have not given the number of subscribers who have migrated from us."

Except given that suggestion no other question on that issue was put to the said witness.

The respondent sought to prove the fact that the said letter had not been returned back to it. We may, however, notice that the respondent in support of its case that the notice was not served upon it examined one Mr.Navor Beck a Public Relation Inspector of Kalkaji Post Office. He was asked to produce the record pertaining to postal receipt.

According to Mr.Beck, the record has been weeded out because tenure of maintaining such record is six months. He proved the weeding out of the said report. According to him the

number of the receipt cannot be verified since the records have been weeded out. He categorically stated that the letters to be sent by speed post are listed and the list along with letters is sent to the Speed Post Centre, Gole Market.

He furthermore, stated :-

“Upto the point of speed post center the no. of receipt is only placed on record. At the time of delivery of the letter, the complete address name is mentioned as per the relevant number to deliver the same to the addressee.

Q. Can you get the confirmation of the delivery of this letter to the addressee from the concerned post office which has delivered the same.

A. No. It is not possible because the records have already been weeded out after the expiry of six month.

Q. Has the counsel handed over the receipt of speed post for which you have been called for ?

A. No

I am seeing the receipt of the speed post letter in question for the first time.

There is no manual record being maintained for such transactions. All records have been computerized.

If the sender's name and address is within our jurisdiction then only the returned letters which are not received by the addressee are received by us.

The booking for speed post can be done by anybody approaching us irrespective of the address of the sender.

It is not correct to suggest that the records for the letter in question are available with the post office at Kalkaji and the same has not been deliberately not brought in the Court.

It is wrong to suggest that letter in question has not been delivered to the addressee in case the address mentioned therein is correct."

Another witness was examined in support of the respondent's contention that the letter in question was handed over to the postal authorities is Mr. Vikash Tiwari.

He is an employee of the respondent company. He in his cross-examination stated as under :-

"There is no entry for the speed post however, there is entry for the courier.

Mr. Akshay Vashisht is the Assistant Sales Manager in my office.

There is no entry made for the letter returned back which includes the speed post letters.

The letter sent by courier are entered in our records however, letter sent by speed post are not entered anywhere.

The letters are placed in the dispatch section where the courier come and take these letters for delivery.

In case we receive any letter returned back, we handover those letter to concerned official/ officer who has given those letters.

The letters which were returned by the post office are not received by any official of the company and the postman himself put his remarks and the seal of the company is put by the officials of the company in dispatch section and takes back the dispatch report.

It is wrong to suggest that the letter which we have sent has come back to us.”

The petitioner examined one Mr. Prashant Kumar Verma. His attention was drawn to a letter dated 6.3.2010 at page 322 of the paper book, the translated copy whereof reads thus :-

“It is submitted that I have not received the Speed Post document having S.No. ED-678097330IN dated 27.05.2009, which was sent through Kalkaji Post Office, Delhi. You are kindly requested to please provide me the details of the same.”

An endorsement therein had been made by the Deputy Post Master in response to the question as to whether the letter bearing no. ED 678097330IN has been received by the addressee or not, stating that the same was returned to the centre. His attention was also drawn to a distribution slip issued by the concerned clerk of the delivery branch of the post office to show that the same had been returned from Bhopal.

The witness stated :-

“The last entry at point `B’ is of the post man. The said letter received by us on 30.05.2009 and the same was sent for delivery on the same date i.e. 30th may, 2009 and upon receiving the information from post man that the addressee is out of station for indefinite period, we returned the same to National Centre for Speed Post at Bhopal on 30th May, 2009 itself.”

In his cross-examination he stated as under :-

Q: Is it correct that you have no personal knowledge of status of mail prior to July, 2009?

A: Yes it is correct.

We make all attempts to provide information regarding the status of mail at the earliest to the querist. We maintain all the records regarding receipt of mails, delivery of mails and status of mails.

It is incorrect to suggest that speed post No. 678097330 IN has been received by its addressee M/s. Mahesh Channel, Hoshangabad.

Volunteer: As per record of the post office it has not been served.

It can not be said that remarks at point 'A' on exhibit PW 2/1 are false and the same has been done at the behest of M/s. Mahesh Channel.

We received the letter vide speed post No. 678097330 IN in the morning working hours of the post office. The working hours of the mail branch is 7 am to 10 am and from 2 pm to 6 pm. After receiving the mails in the morning session we enter the same in our records and after entering the same we hand over the same to the concerned post man for delivery.

We generally receive around 200 mails daily in morning session which are required to be recorded. The recording of such details of mails in the morning session takes generally three hours. The mails are handed over to the post man at around 10 am. The post man reports back regarding delivery and non-delivery of mails at around 5 pm and after that the mail branch again enters the delivery details in its records on the same day which takes around 1 to

1.5 hours. We make attempts to deliver the undelivered mails to the addressee on following 2-3 days before returning the same back.

Another witness examined by the petitioner was Mr. P. S. Raghuvanshi, Superintendent, National Speed Post Centre, Bhopal.

His attention was drawn to a letter dated 26.5.2010 written in vernacular, the translated copy whereof reads as under :-

Subject : Regarding providing the information of Speed Post No. ED 678097330IN

Reference : Your application dated 26.06.2010

-----00-----

The subject speed post no. ED 678097330IN has been received by the Speed Post Bhopal from Hoshangabad on 31.05.2009 and the said speed post article was entered and sent on the same date on 31.05.2010 from speed post centre Bhopal to Speed Post Centre New Delhi in the prepared Speed Post bag no.E102155268IN in Serial No.5/(50+1 Bundle).

In his cross-examination, the said witness stated:-

It is incorrect to suggest that the content of the report exhibit PW3/1 is false. It is incorrect to suggest that we weed out records after 6 months.

Volunteer: It depends upon records.

I don't know whether the speed post ED678097330IN has been served upon M/s. Mahesh Channel.

Volunteer: As per our records the Speed Post ED678097330IN received from Hoshangabad, **H.O.** on 31st May, 2009 and the same was dispatched returned to Speed Post Centre, New Delhi on the same day.

It is wrong to suggest that same was not returned to national Speed Post Centre, Bhopal by Hoshangabad Post office or that we have not dispatched to Speed Post Centre, New Delhi.

It is wrong to suggest that there is no record pertaining to receipt of above speed post from Hoshangabad by our Bhopal office or dispatch to New Delhi as stated by me above.

The materials brought on record by the parties, clearly show, that the respondent has not been able to establish that the aforementioned notice dated 27.05.2009 was indeed served on the petitioner. The respondent, it is not denied or disputed could have

found out the service of the said letter from the 'internet', as the Indian Postal Department displays the status of services. No witness examined on behalf of the respondent has contended that any attempt has been made on its behalf to find out the status of service of the said letter from the internet within a reasonable time.

Why it did not take recourse thereto cannot be countenanced.

Mr. Maninder Singh would contend that the letters written by the petitioner to the authorities of Hoshangabad Post Office and Bhopal Post Office may not be relied upon. One of the reasons assigned is that the petitioner could not have known the registration number. The said submission has no factual foundation. The respondent has filed a reply before this Tribunal on 23rd October, 2009 wherewith it annexed the said letter as also the receipt of Indian Post Office as Annexure '1' thereto.

The registration number of the said speed post, must have been taken by the petitioner from the said reply.

The submission of Mr. Maninder Singh is that having regard to the fact that Mr. Mahesh Mrugalani had written a letter to the

National Speed Post Centre, Bhopal only on 26.5.2010, it is improbable that the reply would be given on the same date.

We do not find any reason to accept the said contention. An act of efficiency and particularly that of Speed Post Centres which even according to the respondent is supposed to deliver a letter within 24 hours cannot give rise to such a presumption. A prompt action necessarily is not malafide. If there is a presumption of service of letter, there is also a presumption in terms of Section 114 of the Indian Evidence Act that all official acts must be said to have been done in normal course of business.

Furthermore we have noticed heretobefore that the petitioner has proved the official records to show that the letter in question had been returned which, is at page 324 of the paper book. To the same effect is the endorsement of the Deputy Post Master on the letter head of the petitioner dated 6.3.2010. The respondent, on the other hand, has merely proved that the records maintained in the Kalkaji Post Office, were weeded out. There is, therefore, nothing on record to show that in fact the same had not been returned and/or in fact it was served on the petitioner.

The petitioner having denied the receipt of the letter, the onus to prove the same shifted on the respondent herein to prove the

actual service. If it had failed and/or neglected to do so, the petitioner cannot be blamed therefor.

Faced with the said situation Mr. Maninder Singh would rely upon two decisions of the Supreme Court of India. One of them is the decision rendered in M/s. Madan and Company Vs. Wazir Jaiveer Chand reported in 1989 (1) SCC page 264.

In that case a notice under registered cover was issued on 26th November, 1976 by reason whereof the termination of the demised premises was sought to be effected on the expiry of 31st December, 1976. The notice was sent by post. The postman had called at the address on the 7th December 1976 and 8th December, 1976.

An endorsement was made "left without address, returned to centre".

The question which arose for consideration was whether such a service would serve the purpose as contained in Section 11 of the Jammu & Kashmir Houses and Shops Rent Control Act.

The said provisions reads thus :-

“Section 11:

Protection of a tenant against eviction-(1)
Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any house or shop shall be made by any court in favour of the landlord against a tenant...

Provided that nothing in this Sub-section shall apply to any suit for decree for such recovery of possession....

(i) subject to the provisions of Section 12, where the amount of two months rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable for by not having been validly deposited in accordance with Section 14:

Provided that no such amount shall be deemed to be in arrears unless the landlord on the rent becoming due serves a notice in writing through post office under a registered cover on the tenant to pay or deposit the arrears within a period of fifteen days from the date of the receipt of such a notice and the tenant fails to pay or deposit the said arrears within the specified period.

Section 12:

When a tenant can get the benefit of protection against eviction-

(1) If in a suit for recovery of possession of any house or shop from the tenant the landlord would not get a decree for possession but for Clause (i) of

the proviso to Sub-section (1) of Section 11, the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made Subsection (4) and effect thereof upto the date of the order mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and three eights per centum per annum from the day when the rents became arrears upto such date, together with the amount of such costs of the suit as if fairly allowable to the plaintiff landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before a date fixed in the order.

(2) Such date fixed for payment shall be the fifteenth day from the date of the order excluding the day of the order.

(3) If, within the time fixed in the order under Sub-section (1) the tenant deposits in the Court the sum specified in the said order, the suit so far as it is a suit for recovery of possession of the house or shop, shall be dismissed by the court. In default of such payment the Court shall proceed with the hearing of the suit.

The proviso appended to Section 12 of the said Act reads thus:-

Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section, if, notwithstanding the receipt of notice under proviso to Clause (i) of the proviso to Sub-section (1) of Section 11, he makes a default in the payment of rent referred to in Clause (i) of the

proviso to Sub-section (1) of Section 11 on three occasions within a period of eighteen months.....

In terms of the aforementioned provision, therefore, a default which is committed, is after the service of notice.

Ranganathan J., in the aforementioned legal situation, stated the law thus :-

“We are of opinion that the conclusion arrived at by the courts below is correct and should be upheld. It is true that the proviso to Clause (i) of Section 11(1) and the proviso to Section 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through posts. All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee Under Section [27](#) of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised

by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence." (underlining is by us)

The said decision is, therefore, not an authority for the proposition as to on which date, the service of a notice would be deemed to have been effected.

Mr. Maninder Singh would contend that handing over of the letter to the postal authorities which is an agent of the sender should be treated to be the date of service.

We do not think that the said contention is correct. Apart from the fact that although in a given case actual tendering of the letter to the addressee may not be possible, as has been noticed heretofore, the postal authority is obligated to maintain the records.

In fact even the `status of service' is maintained on the internet. A sender of a letter, therefore, would be at liberty to make enquiries thereabout. The official records maintained by the Hoshangabad and the Bhopal Post Offices would clearly show that the letter in question had been received at Bhopal on 29.05.2009. It had been sent to the sender namely the respondent herein on 30thMay, 2009. In fact the same had been dispatched on 31.5.2009.

The serial No. of the bundle had also been noticed by the Superintendent, National Speed Post Centre, Bhopal in his letter dated 26.05.2010. The letter was sent from Kalkaji Post Office on 27th May. The envelop must have been sent at the first instance

to Bhopal and then onwards to Hoshangabad which is a district town, Bhopal being the State Capital.

It is, therefore, might not have been possible for the postal authority to serve the said letter on the petitioner on 28th May, 2009. For the purpose of raising a presumption of service, in our considered opinion, a few days gap may have to be considered to be reasonable. A couple of days' gap may be taken into consideration for raising the said presumption.

We, therefore, are of the opinion that notice in terms of Regulation 4.1 of the Regulation was not served upon the petitioner.

What is the effect of wrong mentioning of the amount of default may now be considered.

The respondent, as noticed heretobefore, in its notice under Regulation 4.1 of the Regulations stated that a sum of Rs. 12,16,000 is due and payable.

The petitioner, however, has not paid the monthly subscription fee for the period January 2009 to May 2009. The stipulated

monthly subscription fee admittedly was Rs. 1, 75,000. The total amount payable was, therefore, 8.75 lakhs and not Rs. 12,68,000/-

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On what basis such a demand was made is not known. We, however, do not intend to lay down a law that the demand must be correct to the extent of Rupee and Naya Paise.

It may be true that a wrong demand may lead to some adverse inference, as a broadcaster should in all fairness not only raise the correct demand but, the same should be in consonance with the fact that it had been maintaining its books of account in regular course of business.

If it has failed to do so, other consequences may ensue. Minor variation or mistakes or some calculation mistake may be overlooked but we fail to understand as to on what basis such a huge difference in a demand could be made particularly in view of the fact that it is now well settled that a distributor of a telecommunication services is expected to pay the amount demanded within the period of 21 days or remedy the other defects which may be pointed out therein.

However, in this case, the petitioner is admittedly a defaulter. There was absolutely no reason for the petitioner not to pay the stipulated amount.

Mr. Kashyap, however, would contend, that the petitioner was entitled to adjustment of all payment made by it from 2007. We do not think such a contention can be permitted to be raised in this petition.

As noticed heretofore, the petitioner had approached this Tribunal earlier. The judgment of this Tribunal dated 14th January, 2009 has attained finality. The principle of Res-Judicata shall, therefore, apply in a case of this nature.

The petitioner in fact had preferred an appeal against the said judgment before the Supreme Court of India. Admittedly the same has been dismissed. For reasons best known to the petitioner, a copy of the order of the Supreme Court of India dismissing the said appeal has not been produced before us. We, therefore, do not know as to whether the appeal was dismissed by reason of a speaking order or not. When there is a hierarchy of the courts, the decision of a higher court merges with that of the lower court. Even in relation to an order dismissing a Special Leave Petition, the doctrine of merger shall apply as has been held by the Supreme

Court of India in Kunhayammeo & Ors. Vs. State of Kerala and Anr reported in 2000(6) SCC page 359.

Even if the appeal has been dismissed in limine, the doctrine of merger shall apply.

In the aforementioned premise, the petitioner should have annexed a copy of the order of Supreme Court of India. It did not do so. In any event, keeping in view the fact that this Tribunal by reason of the aforementioned order dated 14th January, 2009 had issued a direction upon the petitioner to pay the amount in question namely Rs.8,76,878 in two installments, would clearly go to show that all the contentions raised by the petitioner must be held to have been considered.

Mr. Kashyap, however, urged that all the contentions have not been raised therein by the petitioner. Even if that be so, the general principles of constructive res-judicata as envisaged under Explanation IV appended to Section 11 of the Code of Civil Procedure shall be attracted.

Mr. Kashyap urged that the petitioner must be held to have been coerced by this Tribunal to comply with the said order. We are

afraid that such a comment is wholly unwarranted. If that be so, the petitioner should have filed a review application. It could have drawn the attention of this Tribunal that it had not got enough opportunity to explain its position.

It could have pointed out that the counsel for the petitioner had raised all contentions including the one that it was entitled to adjustment of all excess amounts paid by it from 2007 onwards.

The same having not been done, we are firmly of the opinion that the doctrine of 'Estoppel by Records' shall apply in the instant case.

Mr. Kashyap advanced a novel argument. It was urged that as signal of the petitioner was sought to be disconnected on incorrect grounds, viz demand of excess amount, the signals should be restored and at least at that stage it was entitled to show that the arrears was not to the tune of Rs.8,76,878 but in fact the petitioner has paid an excess amount. Such a contention, in our opinion is not available. Keeping in view the order of this Tribunal dated 14.1.2010.

The said order reads thus :-

“It is stated that the parties are likely to settle their disputes. As prayed for by the learned counsel for the parties, put up on 28.01.2010 for directions.”

By reason of the said order the respondent was directed to give credit to the petitioner for the months of October, 2008 to December 2008. It is true that in the said order a mistake has been committed by this Tribunal namely it referred to the agreement of December, 2008; what however, was meant thereby by the Tribunal was that the agreement would expire in December 2008 and, thus, it was expected that within the aforementioned period the parties would have ordinarily entered into a fresh agreement, which should be treated to mean that an agreement which would be effective from January, 2009.

The parties had entered into negotiations after the passing of the said orders. They arrived at a concluded contract.

The agreement dated 16.04.2009 was given a retrospective operation from the month of January, 2009. The terms and conditions of the agreement are binding on the parties; the same being not in question.

Mr. Maninder Singh, however would urge that as the petitioner had agreed to down gradation of subscriber base and consequent lowering of the subscription amount, it must be held to have accepted that no down gradation was necessary for the months of October to December, 2008. We do not agree. If the petitioner had waived its right, the same was required to be expressly stated. We, therefore, are of the opinion that the petitioner shall be entitled to the said benefit from the month of October, 2008.

Keeping in view the fact that the signal of the petitioner was disconnected on 16th June, 2009 the respondent would be entitled to the subscription fee for the period during which the signals were supplied.

The petitioner, in the peculiar facts and circumstances of this case must also be held to be entitled to the reduction in the amount of the subscription fee to the same extent as had been agreed to by and between the parties in the aforementioned agreement of the year 2009-2010 for the period of October, 2008 to December, 2008, i.e. Rs.522505.62/-.

In the event the petitioner pays/deposits the said amount within two weeks, the supply of the petitioner should be

restored. Such restoration must take effect within 48 hours from the time of the deposit.

The parties may hold negotiations for entering into a fresh agreement on such subscriber base as may be agreed by and between the parties hereto for the subsequent period.

However, the petitioner shall be entitled to extension of the period of agreement from the date of disconnection till the expiry of the agreement subject to the condition that it pays the agreed subscription charges as referred to hereinbefore for the remaining months.

Keeping in view the conduct of the parties, they are directed to pay and bear their own costs.

The petition is allowed to the aforementioned extent.

(S.B. Sinha)
Chairperso

Gaiha)

(G. D.

Member

(P.K. Rastogi)

Member

April 18, 2011

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