

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 18.8.2011

Petition No.436 (C)/2010

M/s Kable First Davanagere P. Ltd & Anr. ... Petitioners

Vs.

M/s Cablenet & Ors ... Respondents

BEFORE:

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

HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioners : Mr.Vineet Bhagat and
Ms.Neha Jain, Advocates

For Respondents : Ms.Vandana Jaisingh, Advocate

J U D G M E N T

S.B. Sinha

The petitioners herein are companies incorporated and registered under the Indian Companies Act, 1956.

Respondent no.1 is a partnership firm wherein originally the respondents no.2 to 5 and 7 were partners. The respondents no.6 and 8 to 10, however, joined the firm as its partners later on. The respondents no.11 to 18 are Local Cable Operators. The said respondents were affiliated to respondent no.1 which was a Multi Service Operator.

The petitioner no.2 and the respondent no.1 entered into a Joint Venture Agreement on or about 18.1.2008, in terms whereof the petitioner no.1 company was constituted.

Disputes and differences arose between the petitioners, on the one hand, and respondents no.1 to 10, on the other, with regard to the functionings of the affairs of firm and alleged non-co-operation of some of its erstwhile partners, by resorting to their indulging in some activities which are said to be detriment to the affairs of the company and against the spirit of the said agreement dated 18.1.2008.

By reason of a notice dated 4.11.2010 the petitioner no.1 called upon the respondent no.1 and/or its partners to immediately desist from such activities and to see that it achieves its growth failing which it was threatened that action would be taken to recover the monies invested by petitioner no.2 in petitioner no.1 firm including capital as well as the losses suffered by it, stating:

“We reiterate that M/s Cablenet had grossly misrepresented to KFD regarding ground collections, against which we shall initiate appropriate legal action against Cablenet and its partners liable for the costs and consequences arising thereof.”

According to the petitioners despite sincere efforts and investment of heavy amount to the tune of Rs.163 lakhs, the petitioner no.1 did not achieve any growth in revenue collection and in fact sustained a loss of Rs.91 lakhs.

Meetings allegedly took place between the representatives of petitioner no.1 and the respondents no.2 to 4 and 7 wherein the later undertook to work as a team thereafter.

Allegedly, it was furthermore agreed and understood that all the investments in the business of petitioner no.1 would be done by both

petitioner no.2 and respondent no.1, in their respective shareholding proportions (i.e. to the extent of 51% and 49% respectively).

It is said to have been agreed:-

"It was also made clear that in the event the respondents 2 to 10 fail to work in the interest of petitioner no.1 and improve the revenue of the said company in order to liquidate the current losses, the petitioner no.2 would be forced to recover such losses from respondents 1 to 10, as it deems fit."

The petitioners contend that the concerned respondents did not act in the interest of the affairs of the petitioner no.1 company and respondents no.2, 5, 6, 9 and 10 have been attempting to take link/feed/connection of their connectivity for the network managed by them, and which already stood transferred to petitioner no.1 from a competing MSO in violation of the joint venture agreement entered into by them with petitioner no.2.

We may notice paragraphs 12 and 14 of the petition.

"12 That further, respondents 2, 5, 6, 9 and 10 have not been remitting the subscriptions collected by them to petitioner no. 1 and as on 31.10.2010, they are liable to pay a sum of Rs.1,10,04,920/- (Rupees one crore ten lakhs four thousand nine hundred and twenty only) to petitioner no.1.

14 The respondents 11 to 18 are the Local Cable Operators who are currently with the Respondent

No.1 Company and as on 31.10.2010 they are liable to pay a sum of Rs.17,77,345/ (Rupees seventeen lakhs seventy seven thousand three hundred and forty five only) to Petitioner No. 1 Company, towards monthly feed /link charges as per individual agreements signed by them with the Petitioner No.1 Company."

The parties thereafter exchanged several letters.

Legal notices were also served.

This petition was filed on or about 24.12.2010 inter alia for a declaration declaring the actions of respondents no.2, 5, 6, 9 and 10 in discontinuing the signals of the petitioner and switching to the competitor company to be illegal and contrary to TRAI Regulations.

Apart from the said declaration it was furthermore prayed: -

(b) Pass an order directing respondents 2, 5, 6, 9 and 10 restraining them from taking any action or step with regard to taking feed/connectivity from any other MSO/person or transferring the connectivity of petitioner no.1 to any competing MSO or to any other person;

(c) Pass an order declaring the actions of the Respondent Nos.2, 5, 6, 9 and 10 in inviting, soliciting, alluring or encouraging Respondents No. 11 to 18 to discontinue the signals of the Petitioner and switch to Competitor Company to be illegal and contrary to TRAI regulations;

(d) Pass an order prohibiting the Respondent No. 2, 5, 6, 9 and 10 from inviting, soliciting, alluring or encouraging Respondents no. 11 to 18 to discontinue the signals of the Petitioner and switch to Competitor Company except in strict accordance with applicable TRAI regulations and upon paying the dues of petitioner no.1;

(e) Pass an order directing respondents 2, 5, 6, 9 and 10 restraining them from carrying out any activity or taking any step which is against the growth and interest of petitioner no.1;

(f) Pass an order directing respondents 2, 5, 6, 9 and 10 to pay Rs.1,10,04,04,920/- to petitioner no.1 towards subscription fee collected from Local Cable Operators with interest at 18% p.a. from the due date till the day of payment;

(g) Pass an order directing respondents 11 to 18 to pay Rs.17,77,345/- to petitioner no.1 towards subscription fee with interest at 18% p.a. from the due date till the day of payment;

(h) Pass an order directing respondents 2, 5, 6, 9 and 10 to 18 regularly pay the subscription fee collected from Local Cable Operators to the petitioner no, 1;

(i) Pass an order prohibiting the Respondents no. 2, 5, 6, 9 and 10 to 18 from switching their Multi System Operator except in strict accordance with applicable TRAI regulations and upon paying the dues of the Petitioner no.1 company;

A reply was filed by the respondents no.2, 5, 6 and 9 to 18 wherein it was pointed out that the Joint Venture Agreement had not been produced. It was denied and disputed that the concerned respondents were liable to pay the amount mentioned in prayers `f' and `g'. It was furthermore stated

that by a notice through their Advocate dated 23.11.2010, the petitioners were informed that the respondents were no longer in business with them. It was contended that respondent no.1 was merely an unregistered partnership firm which was no longer in existence as all the partners had been doing their businesses independently. It was furthermore denied and disputed that they had executed an independent agreement with petitioner no.1 or had been taking feed from it. According to the said respondents, the petitioners and the respondents no.3 and 4 have committed offences against the respondents other than respondents no.7 to 18 by taking recourse to practice of fraud and cheating and had taken away the equipments in which they had their own shares. It was alleged that after October, 2010 the concerned respondents had not been taking any feed from the petitioner.

A prayer for passing an interim order was made but by its order dated 4.1.2011 this Tribunal while refusing to pass an order of injunction observed that the concerned LCOs would comply with the provisions of Clauses 4.2 and 4.3 of the Regulations. A statement was made at the bar that the concerned respondents have discontinued taking supply of the signals of the petitioner and in fact some of them had never taken supply of signals from its network and moreover no agreement having been produced, it was opined that no interim order need be passed at that stage.

The petitioner filed a rejoinder to the said reply wherein a new stand was taken that the petitioner no.1 started giving signals to the respondents no. 2 to 18. A copy of the shareholders/ joint venture agreement as also the agreement dated 3.2.2008 were filed. A large number of documents including agreements and invoices have also been filed.

The petitioner in support of its case has examined one Mr.Kailasam P. whereas the respondents examined one Mr.Shashidhar Koti its GPA holder.

The petitioner, however, filed a Miscellaneous Application being M.A. No.221/2011 praying inter alia for adduction of additional evidence in terms of Order 18 Rule 17 of the Code of Civil Procedure (the CPC).

Mr.Bhagat, learned counsel appearing on behalf of the petitioner would contend that in the interest of justice, this Tribunal should permit adduction of additional evidence to show that the witness of the respondent is an independent LCO and was incharge of the cable business of IN CABLE, a big MSO.

The petitioners have joined multiple causes of action in this petition.

The contention of the petitioners is that respondents no. 1 to 10 have committed breaches of the agreement dated 5.2.2008, and, thus, this Tribunal has no jurisdiction to determine the issues arising therefrom having

regard to the provisions contained in Sections 14 and 14 A of the TRAI Act, 1997.

This Tribunal's jurisdiction is inter alia confined to the disputes between two service providers in relation to the "telecom activities" of the parties which in view of the notification dated 9.1.2004, would also include 'broadcasting and cable services'.

The statements made in para 12 of the petition read with prayer `f thereof would prima facie indicate that the respondents no.2, 5, 6, 9, and 10 had collected a huge amount from the LCOs which they were bound to deposit with petitioner no.1; whereas in the rejoinder a contention has been raised that they have been taking supply of signals independently from the network of petitioner no.1.

There does not appear to be much controversy that the respondents no.11 to 18 are the Local Cable Operators. It also stands admitted that some of the respondents have also migrated to the network of the other competing MSOs of petitioner no.1.

Having regard to the fact that no interim injunction has been granted and most of the respondents have already migrated to the network of

another MSO, for all intent and purport, no permanent injunction or declaration as prayed for can be granted in favour of the petitioners.

The petitioners, however, have not amended the petition. They have not claimed damages against the concerned respondents who have migrated to the network of another MSO without complying with the provisions of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 and in particular Explanation I appended to Clause 3.2 thereof.

This Tribunal would indisputably have jurisdiction to determine the question as to whether some of the parties hereto have been taking supply of signals from the network of petitioner no.1 and/or has defaulted in payment in terms of the Regulations, but the causes of action therefor against each of the concerned respondents would be distinct and separate.

It is not a case where having regard to the principles contained in Order I Rule 3 CPC, any right to obtain a relief arises out of the same act or transactions or series of acts or transactions and/or if separate suits were brought against such persons, any common question of law or fact would arise.

Order II Rule 3 CPC provides for joinder of causes of action. A suit becomes bad for misjoinder for parties, when plaintiff claim its relief against a set of defendants or different defendants. It is not a case where two or more plaintiffs are jointly interested in two or more causes against the said defendant or where the cause of action arises out of a same transaction. A cause of action means every fact which is necessary to establish to support a right or obtain judgment. To put it differently, it means a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. It can as well be said to be the media upon which the court arrives at a conclusion in the suit in favour of the plaintiff. It means, every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

If the contention of Mr. Bhagat is correct that the petitioner no.1 in the present proceedings has no claim against the respondents in terms of the joint venture agreement and its cause of action arose as the concerned respondents have failed and/or neglected to pay the subscription fees to the petitioner despite continuously receiving signals from its network, we are of the opinion that Order II Rule 3 CPC will have no application.

Even otherwise the petitioners could not have claimed any relief against the concerned respondents jointly as they are said to have entered

into separate agreements with petitioner no.1 for supply of signals of the channels of the broadcasters.

It would, in our considered opinion, otherwise be not possible to pass separate decrees against the concerned respondents keeping in view the prayers made in the petition as noticed heretobefore.

In view of this situation, Mr.Bhagat prays for withdrawal of the petition with leave of this Tribunal to file separate petitions against the concerned respondents. Mr.Bhagat, however, would submit that this Tribunal may hold that the respondent's witness has committed forgery and, thus, made himself liable to be proceeded against for commission of an offence under Section 195 of the IPC.

We have bestowed our attention to the said submission of Mr.Bhagat. Keeping in view the fact that we are of the opinion that this petition suffers from misjoinder of causes of action, as it is not possible to determine the several causes of action in one suit, this prayer of Mr.Bhagat cannot be acceded to.

We are not required to go into the merit of the matter. The culpability of respondent no.1 M/s Cablenet could not be said to have been proved. We have not gone into the merit of the matter.

If the merit of the matter cannot be gone into, the question of initiating any proceedings as envisaged under Section 340 Cr.P.C. does not arise.

However, we are of the opinion that while permitting the petitioner to withdraw this petition, leave should be granted to it to file fresh petitions against the concerned respondents for such relief (s) as it may be considered necessary to be prayed for by the petitioners. Such leave is accordingly granted.

The petition is disposed of on the aforementioned terms.

Before we part with this case, it must be placed on record that by our order dated 22.7.2011, at about 4.30 pm as the cross-examination of Mr.Shashidhar Koti could not be completed, Mr.Yoginder Handoo, learned advocate practicing before this Tribunal was appointed as an Advocate Commissioner to conduct the further cross-examination of the said witness. While passing the said order, we have not directed payment of his fee. Keeping in view the facts and circumstances of the case, we direct that a

sum of Rs.10,000/- be paid to the learned Advocate Commissioner by the petitioners herein.

Such payment must be made within a period of one week from date.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

August 18, 2011
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