

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

**DATED 18<sup>TH</sup> JULY, 2011**

**Petition No. 366(C) of 2010**

Intermedia Cable Communication Pvt. Ltd., Pune ... Petitioner

Vs.

Complete News & Entertainment Broadcast Pvt. Ltd. & Anr. ... Respondents

**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. Atul Sharma, Advocate

For Respondent No.1 : Mr. Kunal Madan, Advocate

For Respondent No.2 : Mr. Sharath Sampath, Advocate for  
Mr. Navin Chawla, Advocate

**JUDGMENT**

**S.B. Sinha**

The petitioner herein is a Multi System Operator. The first respondent is a producer of a News Channel and a broadcaster within the meaning of the provisions of the Cable Television Network Act, 1995 and Rules framed thereunder. The Respondent No.2 was the distributor of first respondent. Indisputably, the respondents herein inter-se had entered into an agreement of

distributorship so far as placement of the channels of the first respondent on preferential frequencies is concerned. In that capacity, the respondent No.2 approached Petitioner to put the channel of respondent No.1 on UHF/E-40 frequency on its networks and pursuant to an agreement entered into by and between the parties, a Memorandum of Understanding was entered into on or about 24.3.2009, the terms whereof are as under :-

*“This understanding is for a period of one year w.e.f. 21<sup>st</sup> March 2009 to 20<sup>th</sup> of March, 2010.*

*The above amount of Rs.20,00,000/- (Plus applicable taxes) will be paid by M/s. MEGA REACH DISTRIBUTORS (INDIA) PRIVATE LIMITED in 2 equal six monthly installment, al installments to be paid in advance at the beginning of each period of six months. The first installment of Rs.10,00,000/- (Plus applicable taxes) would be paid immediately by M/s. MEGA REACH DISTRIBUTORS (INDIA) PRIVATE LIMITED to Intermedia Cable Communication Pvt. Ltd., on sign-up of this MOU.*

*Any deviation on the above without mutual consent would be a violation of understanding and will tantamount to breach of contract. In the event M/s. Intermedia Cable Communication Pvt. Ltd. interrupts or shifts the position/ signals of CNEB Channel from the agreed allocations, as mentioned above, M/s MEGA REACH DISTRIBUTORS (INDIA) PRIVATE LIMITED shall be entitled to reasonably and proportionately reduce or recover against the carriage fee amount, accordingly.*

*This M.O.U. is confidential and binding on either parties till the expiry of the same.”*

2. Pursuant to or in furtherance of the said Memorandum of Understanding, the petitioner raised an invoice on or about 21.3.2009 for a sum of Rs.10 lacs and another invoice dated 01.9.2009 for the similar sum, which with tax came to Rs.11.03 lacs. Despite the fact that in terms of the aforementioned agreement, respondent No.2 was to make payments of the said placement charges in two equal installments, the respondent No.1 issued 9 post dated cheques for a sum of Rs.1,66,666/- together with the Service Tax levied thereupon till 20.12.2009 totalling a sum of 15,000/- plus tax.

3. As no payment was received, the petitioner contacted the said Mr. Abhay Veer Singh, who by an e. mail dated 01.4.2010, stated as under :-

*“Respected Mr. Inamdar/Mr. Razzakbhai,*

*Greetings.*

*This has the reference of the Agreement CNEB has with your esteemed organization, M/s. Intermedia Cable Communications for the preferential frequency Placement (S21) to the CNEB for the period of one year from 1<sup>st</sup> April-10 to 31<sup>st</sup> March-11 for the amount of Rs.60 lacs. Sir You are requested to Place CNEB on better frequency for as much as possible period, henceforth I am taking this opportunity to request you to place CNEB on your digital head as well.*

*Looking forwards for warm relations with you in future.*

*Regards*

*Abhayveer Singh*

*Distribution Head*

*CNEB, NOIDA.”*

However, according to the petitioner, on receipt of information from respondent with regard to its interest for renewal of the said agreement, one Mr. Abhay Veer Singh, its Distribution Head is said to have approached petitioner and a Memorandum of Understanding was entered into on or about 31.03.2010, the relevant clauses whereof are as under :-

*“In lieu of the above ‘Complete News & Entertainment Broadcast Pvt. Ltd.’ will pay a Placement Fees of Rs.60,00,000.00 (Rupees Sixty Lac Only) per annum, plus taxes as applicable, to ‘INTERMEDIA CABLE COMMUNICATION PVT. LTD.’*

*This understanding is for a period of one year w.e.f. 1<sup>st</sup> April 2010 to 31<sup>st</sup> March 2011.*

*The above amount of Rs.60,00,000/- (Plus applicable taxes) will be paid by ‘Complete News & Entertainment Broadcast Pvt. Ltd.’ in 3 equal installment of which the first installment of Rs.20,00,000/- (Plus applicable Taxes) would be paid immediately on the Signup of the ‘Channel Placement Agreement’ and the 2<sup>nd</sup> & 3<sup>rd</sup> installment of Rs.20,00,000/- (Plus applicable Taxes) each would be paid in advance on or before 31<sup>st</sup> July 2010 & 30<sup>th</sup> November, 2010.*

*Any deviation on the above without mutual consent would be a violation of understanding and will tantamount to breach of contract. In the event M/s. Intermedia Cable Communication Pvt. Ltd., interrupts or shifts the position/signals of “CNEB” Channel from the agreed allocations, as mentioned above, ‘Complete News & Entertainment Broadcast Pvt. Ltd.’ shall be entitled to reasonably and proportionately reduce or recover against the carriage fee amount, accordingly.*

*This M.O.U. is confidential and binding on either parties till the expiry of the same. 'Complete News & Entertainment Broadcast Pvt. Ltd.' hereby undertakes to execute necessary 'Channel Placement' Agreement within one week from the date of this MOU. Further CNEB also undertakes to settle pending channel placement dues for last quarter ending 20.03.2010 amounting to Rs.5,00,000/- (plus taxes) immediately against deal done as per MOU dated 21.03.2009 with M/s. Mega Reach Distributors (India) Pvt. Ltd.*

*For COMPLETE NEWS & ENTERTAINMENT BROADCAST PVT. LTD."*

4. The petitioner raised invoices, the first being dated 08.7.2010. As no payment had been made by first respondent, petitioner issued notices on 11.3.2010, 09.7.2010 and 15.7.2010.

In the last two of them, attention of one Mr. H.S. Saran, (Group Chairman of Respondent No.1) was drawn. No reply was received in respect of the aforementioned demands.

We may notice the contents of the said letter dated 09.7.2010 :-

*"We take this opportunity to bring to your kind attention that we have been carrying your Channel "CNEB" News on our network under preferential channel placement arrangement since 21.03.2009. Our first agreement for the above was entered into with your Distributor M/s. Mega Reach Distributors (India) Pvt. Ltd., Mumbai vide Memorandum of Understanding entered into with them on your behalf dated 21.03.2009. Against this arrangement we have*

*so far received our dues for the first three quarters directly from your company and an amount of Rs.5,51,500/- is still pending and due in respect of the fourth quarter ending on 20.03.2010.*

*Vide our letter dated 11.03.2010 we had conveyed to your company the expiry date of the above MOU i.e. 20.03.2010 and requested you to convey to us your intent for either renewing the subject arrangement or discontinuation of the same. In response to the same your representative Mr. Abhay Veer Singh, Distribution Head personally visited and negotiated with us fresh deal for placement of your channel "CNEB" in Hyper Band (S-21) for a total amount of Rs.60,00,000/- (plus taxes) for the period 01.04.2010 to 31.03.2011. Necessary Memorandum of Understanding was signed by him on behalf of Complete News & Entertainment Broadcast Pvt. Ltd., with our company dated 31.03.2010.*

*Subsequent to the above we received an email dated 01.04.2010 from Mr. Abhayveer Singh, requesting our management to place your channel on better frequency as well as on our Digital Network also. Our management conceded to this request and since 01.04.2010 your channel has been running on S-9 (Color) frequency even as on date.*

*We wish to bring to your kind attention that since then we have been following up with Mr. Abhayveer Singh for settlement of previous agreement outstanding of Rs.5,51,500/- as well as the first instalment of Rs.20,00,000/- (plus Service Tax), to which we have received numerous telephonic and verbal assurances. We however regret to inform you that despite the assurances given we have not yet received any remittance from your company so far.*

*We are now enclosing herewith our invoice bearing No. CU/34/2010-11 dated 08.07.2010 for Rs.22,06,000/- as well as a*

*copy of our previous deal invoice No. CU/59/2008-09 dated 21.03.2009 against which an amount of Rs.5,51,500/- is due and request you to please release our total outstanding of Rs.27,57,500/- due and payable to us as on date.*

*We now request you to please clear our above referred outstanding dues immediately on receipt of this letter.*

*We await your immediate response to the above.”*

5. The aforementioned Mr. Abhay Veer Singh by e. mail dated 08.5.2010, stated as under :-

*“Dear Mr. Zaka,*

*This is to inform you that I am aware of the dues and am following the same, since it was Saturday I couldn't do anything, but assures you that I will try to clear the last year's dues in next week.*

*Regards,*

*Abhayveer Singh”*

6. Despite the same no payment was received; whereupon petitioner issued a notice dated 15.7.2010 wherein attention of the Group Chairman, Mr. H.S. Saran was drawn. The said notice was sent by speed post.

However, as no payment was made, a public notice was issued. By reason of the said notice, the respondent was intimated that placement of the channel would be discontinued and the same was to be treated to be 21 days' notice. The petitioner issued a Public Notice on or about 04.8.2010. A legal notice was also served by Atul Sharma and Co. on 30.8.2010 to both the respondents herein. The said notice was served also under Registered Cover with Acknowledgement Due as also under Certificate of Posting and Speed Post.

So far as the letter sent by Certificate of Posting is concerned, the same was refused to be accepted. The petitioner has filed before this Tribunal the envelope in which it was sent. So far as the notice sent by Registered Post with Acknowledgement Due is concerned, the same has been served upon Respondent No.1.

7. On the aforementioned premise, this petition has been filed claiming inter-alia the following reliefs :-

*“(a) direct the Respondents to jointly and severally pay the outstanding amount of Rs.30,00,000/- (Rupees Thirty Lacs Only) plus applicable Taxes, alongwith interest of 24% per annum from the date of outstanding amount due, till the realization;*

(b) *direct the Respondent, to jointly and severally pay the interest of 24% per annum on the amount due from the date of outstanding amount due, till the realization.”*

8. The first respondent in its reply has inter-alia contended that the aforementioned Mr. Abhay Veer Singh had no authority to enter into the contract with the Multi Service Operators, in support whereof a purported notice dated 01.8.2008 has been placed, which is in the following terms :-

*“This is to inform to all the employees of the company that no employee shall be authorized to enter into any deal and/or sign any contractual obligation on behalf of CNEB Pvt. Ltd. for the value of more than Rs.1 lac. Approval/consent of CEO/GM/Chairman shall be required for entering into any such contractual obligation. Further the deals above Rs.10 Lacs on behalf of CNEB Pvt. Ltd. shall only be signed by any of CEO/GM/Chairman of the company.”*

9. On the aforementioned premise, the MoU dated 31.3.2010 has been described to be a forged and fabricated document. It was furthermore stated that in any event, the normal increase in the placement charges should have been 20-30%. A First Information Report has also been lodged against the said Mr. Abhay Veer Singh and one Mr. Manohar reported before the SHO of Sector 58, Noida Police Station. The Respondent No.2, on the other hand, in its reply contended that it was merely an agent of Respondent No.1 and, thus, it has no

individual liability to pay the amount said to be due in respect of the first MoU dated 24.3.2009. It has further been submitted that having regard to the fact that petitioner has entered into a second MoU dated 31.3.2010, in terms whereof Respondent No.1 has undertaken to pay the balance amount of Rs.5 lacs, it is absolved from its liability.

10. The principal questions, which arise for consideration are :-

- (i) Whether the petitioner is entitled to recover the balance sum of Rs.5 lacs jointly or severally from Respondent No.1 and Respondent No.2?
- (ii) Whether the MoU dated 31.3.2010 is enforceable in law having been entered into by Shri Abhay Veer Singh?

11. The petitioner in support of its case has examined one Mr. Shyam Sunder Pappu.

The Respondent No.1 examined Shri Balvinder Singh, who not only had affirmed an affidavit in support of the reply but also is the author of the said First Information Report against Mr. Abhay Veer Singh and Mr. Manohar. The Respondent No.2 has examined one Mr. Amarjit Singh, working as its General Manager (Network Development).

12. Mr. Atul Sharma, learned counsel appearing on behalf of the petitioner would urge :-

- (i) The petitioner having proved execution of the agreement, the onus to prove that the 2<sup>nd</sup> MoU was forged and/or fabricated and/or has been executed by a person not authorized therefor, was on Respondent No.1.
- (ii) The Respondent No.2 having admitted that it had been working for and on behalf of Respondent No.1 as its distributor, there cannot be any doubt or dispute that both of them are jointly and severally liable to pay the balance amount of Rs.5 lacs.
- (iii) The malafide on the part of Respondent No.1 would be evident from the fact that despite receipt of the invoices and letters of demand as also notice of disconnection, it not only did not issue any reply but also failed to make any payment wherefrom it would be evident that it deliberately and intentionally raised wholly frivolous contentions.

13. Mr. Kunal Madan, learned counsel appearing on behalf of first respondent, urged :-

- (i) The petitioner has failed and/or neglected to discharge the burden of proof to the effect that it had placed the channel of Respondent

No.1 on the frequencies allocated to the Prime Bands, namely 'E-Band' and 'S-Band' and having regard to the fact that Respondent No.1 in its reply denied and disputed the same, this petition must be dismissed.

- (ii) There is nothing on record to show that Respondent No.1 was served with the copy of the invoices and/or notices of demand relating to the MoU dated 24.3.2009 and in that view of the matter, no decree can be passed relying on or on the basis thereof.
- (iii) Mr. Abhay Veer Singh having not been authorized to enter into any agreement with petitioner for placement of its channel, the same must be held to be a forged and fabricated document as he committed criminal breach of trust and cheated the first respondent not only by entering into an agreement with petitioner but several other MSOs.
- (iv) The first respondent cannot be held to be liable as fraud has been committed by its agent as laid down under Section 238 of the Indian Contract Act and in that view of the matter, the claim of petitioner must be rejected. 0
- (v) From the materials brought on record, it would appear that the e. mail sent and received by Shri Abhay Veer Singh was from his personal e. mail ID and thus, the purported e. mails cannot be relied upon.

- (vi) The petitioner has also not been able to prove service of any notice including the legal notice upon Respondent No.1, and in that view of the matter, the question of its responding thereto denying and disputing the claim of petitioner does not and cannot arise.

14. Mr. Sharath Sampath, learned counsel appearing on behalf of Respondent, on the other hand, submitted :-

- (i) The Respondent No.2 being admittedly an agent of Respondent No.1, it has no liability whatsoever, in terms of Section 230 of the Indian Contract Act;
- (ii) From a perusal of the petition and in particular, paragraphs 3, 5 & 6 of the Petition, it would be evident that Respondent No.2 having been described as the authorized agent and acting for and on behalf of Respondent No.1 and furthermore, except the legal notice, all the demands having been raised against Respondent No.1, there cannot be any doubt or dispute that the claim of petitioner, if any, was against the said respondent only and not against Respondent No.2.

15. **Re. Question 1**

- (i) So far as the 1<sup>st</sup> MoU is concerned, the execution thereof is not in dispute. It is also not in dispute that although in terms thereof, Respondent No.2 was to make payments, Respondent No.1 had issued 9 cheques in favour of petitioner, which have been encashed.

The only payment, which has not been made, was for the last quarter of the MoU.

So far as the said MoU is concerned, there cannot be any doubt that Respondent No.1 is bound thereby. It is, thus, idle to contend that Petitioner and Respondent No.2 had entered into the said agreement keeping Respondent No.1 in dark. Even according to Respondent No.1, the said arrangement between them was an oral one.

Significantly, Shri Balwinder Singh, Manager (Accounts) of Respondent No.1 lodged a First Information Report against the concerned employees. In the said First Information Report, it was clearly stated that Shri Abhay Veer Singh had entered into the second contract, as a result whereof Respondent No.1 has suffered a loss of Rs.40 lacs. Similar allegations have been made in respect of the contract entered into by the said Shri Abhay Veer Singh with 'Satellite

Channel’, ‘Hathway New Concept’, ‘Jagdamba Cable Network’, ‘Fastway Transmission’, ‘Mussorie Cable Network’, ‘Gujarat Telelink Pvt. Ltd.’

We may notice the chart, which is a part of the said First Information

Report :-

| Name of Network            | City             | 2009-10  |          | Amount    | 2010-201 |          | Amount      | Signed By         | Increase Amount |
|----------------------------|------------------|----------|----------|-----------|----------|----------|-------------|-------------------|-----------------|
|                            |                  | To       | From     |           | To       | From     |             |                   |                 |
| Satellite Channel          | Delhi            | 08.05.09 | 07.06.10 | 26,00,000 | 08.06.10 | 07.06.11 | 30,00,000   | Abhyvir           | 4,00,000        |
| Hathway New Concept        | Delhi            | 01.05.09 | 30.04.10 | 22,00,000 | 01.05.10 | 30.06.11 | 25,00,000   | Abhyvir & Manohar | 3,00,000        |
| Jagdamba Cable Network     | Bharat pur (Raj) | 01.11.08 | 31.10.09 | 2,50,000  | 01.12.10 | 31.12.11 | 3,00,000    | Abhyvir & Manohar | 50,000          |
| Fastway Transmission       | Punjab           | 01.12.08 | 31.03.09 | 40,00,000 | 25.05.10 | 24.05.10 | 1,28,00,000 | Abhy Vir          | 88,00,000       |
| Mussoorie Cable Network    | Uttarakhand      | 12.06.09 | 11.06.10 | 50,000    | 12.06.10 | 11.06.10 | 75,000      | Abhyvir & Manohar | 25,000          |
| Gujarat Telelink Pvt. Ltd. | Ahmedabad (GJ)   | 11.03.09 | 10.03.10 | 50,00,000 | 15.04.10 | 14.04.11 | 90,00,000   | Abhyvir           | 40,00,000       |
| Inter Media                | Pune (M.H.)      | 21.03.09 | 20.03.10 | 20,00,000 | 21.03.10 | 20.03.11 | 60,00,000   |                   | 40,00,000       |
| <i>Total</i>               |                  |          |          |           |          |          |             |                   | 1,75,75,000     |

- (ii) It is, thus, evident that in the said First Information Report, it has clearly been admitted that an agreement was entered into for the period 21.3.2009 to 20.3.2010 which was exactly the period, for which the MoU was executed. If Respondent No.1 had made payments therefor in 9 installments, the same itself is a proof of the fact that it was aware of the

amount required to be paid to petitioner for placement of its channel on a prime band.

It, therefore, does not lie in its mouth to contend that it was not aware of the said contract or Respondent No.2 could not have entered into the said contract on its behalf or otherwise. So far as the defence of Respondent No.2 is concerned, it may be, that petitioner has stated that the said MoU had been entered into by Respondent No.2 for and on behalf of Respondent No.1 as its agent. But, by reason thereof, the liability to pay the entire amount of Rs.20 lacs in terms of the said MoU is not wiped off.

The liability of Respondent No.2 was an independent one. The said MoU was entered into for the benefit of Respondent No.1, but we are not aware as to what were the terms & conditions of the agreement entered into by respondents inter se. The said distributorship agreement has not been produced and in that view of the matter, an adverse inference must be drawn that had the said agreement been produced, the same would have gone against the contentions of respondents herein.

16. In that view of the matter, Respondent No.2, in our considered opinion, cannot take the benefit of Section 230 of the Indian Contract Act.

It reads as under :-

**“230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal -**

*In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.*

**PRESUMPTION OF CONTRACT TO THE CONTRARY. -**

*Such a contract shall be presumed to exist in the following cases :-*

*(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;*

*(2) where the agent does not disclose the name of his principal; and*

*(3) where the principal, though disclosed, cannot be sued.”*

(iii) The MoU dated 24.3.2009 was not entered into on behalf of Respondent No.1 by Respondent No.2. In that view of the matter, respondents were bound to bring the said agreement on record. The said agreement was within their special knowledge and, thus, having regard to the provisions contained in Section 106 of the Indian Evidence Act, they

should have proved the contents thereof. This Tribunal in Hathway Cable & Datacom Ltd. Vs. Sahara Sanchar Ltd. & Anr. (Petition No. 245 (c) of 2009) and Scod 18 Network Pvt. Ltd. Vs. Sahara Sanchar Ltd. & Anr. (Petition No. 205 (C) of 2009) in almost an identical situation, raised an adverse inference against respondents therein. In that case also like the present one, respondent No.2 denied and disputed its liability to pay any amount. This Tribunal held that Respondent No.2 was jointly and severally liable to pay the demanded claim and Section 230 of the Indian Contract Act will have no application.

17. In Petition No. 245 (C) of 2009, it was held as under :-

*“The Respondent No. 2 was admittedly entrusted with the job of holding negotiations with the MSOs for the purpose of placement of its channels. It did so on behalf of the Respondent No. 1 purported to be in terms of the ‘Distributorship Agreement’. The matter might have been different, if the Respondent No. 1 which having regard to the provisions contained in Section 106 of the Indian Evidence Act, being in possession of special knowledge, could have brought on sufficient materials on record to show that the transactions between the respondents inter se were on a ‘principal to principal’ basis.”*

18. An adverse inference against respondent therein was drawn as the distributorship agreement was not produced before this Tribunal. Similar observations were made even in Petition No. 205 (C) of 2009, stating :-

*“In the aforementioned factual background, we may notice the provisions of Section 230 of the Indian Contract Act. It provides for the rule that an agent contracting in the name of the principal only, is not liable to be sued nor can sue on such contracts.*

*It is, not the case of either of the respondents that the respondent No. 2 was entitled only to enter into negotiations on behalf of the respondent No. 1, but not to enter into a contract with the petitioner or other MSOs with regard to carriage and placement of the channels of the respondent No.1.*

*We have noticed heretofore the contentions raised by both the respondents in their respective pleadings. Nowhere any of them and in particular the respondent No. 2 stated that while making a counter offer or negotiating the terms and conditions on behalf of the respondent No. 1, the matter had been referred to it for its approval.*

*In a case of this nature, having regard to the peculiarity of the situation, we cannot say that both the respondents were not liable and/or the respondent No. 2 cannot be sued having regard to the provisions contained in Section 230 of the Indian Contract Act.*

*So far as the petitioner is concerned, the situation was uncertain. It did not know the internal arrangements between the respondents inter se. Although it entered into a MoU with respondent No. 2 and raised invoices on it, but when it made complaints to the respondent*

*No. 1 relating to non-receipt of its dues, the respondent No. 1 responded favourably thereto.*

*It not only gave an assurance of payment, but also acknowledged its liability by way of balance confirmation. In a situation of this nature, therefore, we are of the opinion that the petition cannot be thrown out on that ground alone.*

*Reliance has been placed by Mr. Chawla on Midland Overseas v. M.V. 'CMBT Tana' & others' reported in AIR 1999 Bombay page 401, which in our opinion, does not lay down any law. Section 230 was invoked having regard to the admitted fact involved as the third defendant therein was merely a shipping agent for and on behalf of the second defendant, and was admitted in paragraphs 3 and paragraph 11 of the plaint."*

The said question, therefore, may be answered in favour of the petitioner and against the respondent.

19. **Re. Question 2 :**

1. Mr. Abhay Veer Singh was admittedly an officer of respondent No.1. Whether he had the authority to enter into a contract or not for and on behalf of Respondent No.1 was within its special knowledge. The burden of proof in that behalf lay on it.

Even if stricto sensu he was not authorized, whether the MoU dated 31.3.2010 became illegal and/or was a forged and fabricated document, is the question.

2. Shri Balwinder Singh is the authorized representative of Respondent No.1. A Board resolution was passed in his favour. He, in that capacity, had lodged the First Information Report. He is also a witness examined on behalf of Respondent No.1. The aforementioned employee of Respondent No.1 had been sending e. mails to petitioner's officers. He had been sending a copy thereof to his official e. mail also, as would appear from the e. mail dated 01.4.2010.

Mr. Kunal Madan, however, would urge that the official site of Respondent No.1 is 'cneb.in'. However, it would appear that in the e. mail ID of Mr. Abhay Veer Singh @ 'cneb.com', an e. mail was sent by petitioner on 08.5.2008. An e. mail had also been sent in his private e. mail ID. We would assume that the said Abhay Veer Singh committed a fraud on Respondent No.1. There is, however, nothing on record to show that by entering into any transaction with petitioner, Shri Abhay Veer Singh has personally gained.

It is of some significance to notice that petitioner in its notice dated 11.3.2010 addressed to Respondent No.1, which address is the same in which the earlier communications have been sent, stated as under:-

*“The subject channel placement arrangement is expiring on 20.03.2010 and hence needs to be renewed. Should you be desirous of seeking a renewal of the same we request you to kindly depute your representative or your designated distributor to our office at your earliest for necessary discussion and renewal of the same.*

*However, in the event you are not desirous of continuing with the channel placement arrangement we request you to kindly communicate your intent immediately so that the subject frequency can be offered by us to other broadcaster of our choice. We therefore request you to please convey your intent immediately by email/letter so as to enable us to do the needful in the matter.*

*Whilst on the subject we wish to bring to your kind attention that we are yet to receive the last quarter payment of the existing channel placement arrangement amounting to Rs.5,51,500/-. We therefore request you to please settle the same immediately.*

*By a copy of this letter we are also requesting M/s. Mega Reach Distributors India Pvt. Ltd., to intervene in the above matter and arrange for immediate settlement of our outstanding dues.”*

20. Evidently, therefore, Respondent No.1 was aware of the contents of the said letter being that on expiry of the term of the MoU, the Channel placed into would be discontinued. If on receipt of the said notice it had sent Shri Abhay Veer Singh, who is admittedly a high ranking officer for holding negotiations with petitioner, no exception can be taken thereto.

The petitioner would negotiate only with the officer who had been deputed for the said purpose by the respondent No.1. It is not its case that it did not receive the said notice. Even if it did not receive the said notice (assuming for the sake of argument), some material ought to have been brought on record to show that Shri Abhay Veer Singh was never sent to petitioner's office for holding negotiations. In that event, a question would have arisen as to on what basis, the said officer visited the office of the petitioner. As Shri Abhay Veer Singh had entered into the MoU with petitioner, it is not surprising that the subsequent e. mails have been sent to him.

There is another aspect of the matter. The petitioner in the Petition has clearly stated :-

*“That the petitioner placed the Respondents channel on preferential frequency. Accordingly the petitioner raised a bill No. CU/34/2010 dated 08.07.2010 for placement charges, to the Respondent No.1. A copy of the Bill No.CU/34/2010 dated 08.07.2010 is annexed herewith this Petition as Annexure P-5.”*

21. The Respondent, in its reply, merely made a bald denial, which is to the following effect :-

*“That contents of para 14 of the petition are wrong and therefore denied. It is denied that the Petitioner placed the Respondents channel on preferential frequency. It is denied that petitioner raised*

*any bill to the Respondent. That contents of preliminary objections are reiterated and not repeated for the sake of brevity.”*

22. The Respondent No.1 has not been able to show that the broadcaster would not know as to whether its channel had been placed on more prime frequency or not. Any broadcaster will keep track of it as a lot of revenue is generated by reason thereof.

It is furthermore not denied or disputed that mechanically it is not possible to keep records, so far as petitioner is concerned, as to whether the channel of respondent No.1 was placed on ‘E. Band’ or ‘S. Band’. If they were not to be placed in the preferential frequency, Respondent No.1 would have come to know thereabout in no time.

It could have taken up the matter with petitioner. However, each broadcaster wherefor a judicial notice can be taken, keep a watch on the placement of its channel as the revenue from advertisement would solely depend on it. The only contention of the aforementioned Mr. Balwinder Singh in his cross-examination is, that had there been increase only to the extent of 30-35%, the MoU would not have been contended to be a forged one, stating :-

*“Q. Is it correct that you are saying that this MOU as forged because the amount has gone from Rs.20 Lakhs to Rs.60 Lakhs .*

*A. It is incorrect.*

*Volunteers : We don't have agreement or document to show rs.60 Lakhs MOU.*

*Q. It is correct to say that because you don't have a copy of document to show the Rs.60 Lakhs MOU, therefore, you have stated that Mr. Abhay Veer Singh has forged the MOU?*

*A. Yes. It is correct."*

23. Although Mr. Balwinder Singh is the only authorized person to depose on behalf of Respondent No.1 and he is said to be aware of 80% of the agreements entered by his employees with the MSOs, he has expressed his ignorance even in respect of the distributorship agreement between Respondent No.1 and Respondent No.2.

24. We have been taken through his deposition generally and we find that in answer to most of the questions he stated that 'he was not aware' or 'he did not know'.

Even he could not state as to how long Shri Abhay Veer Singh had been working in Respondent No.1 Company. Even if he was not aware as to whether there is any record with regard to his appointment.

25. It now stands admitted that although Shri Abhay Veer Singh, according to Respondent No.1, committed grave criminal misconduct, nothing has been produced before this Tribunal to show what is the stage of investigation or whether in fact any First Information Report has been recorded.

Furthermore, it is stated that Shri Abhay Veer Singh was allowed to resign. How in such a situation, an employee would be allowed to resign and no disciplinary proceeding would be initiated against him, is beyond anybody's comprehension.

So far as contention of Mr. Kunal Madan that petitioner has not proved that the channels have been placed on 'S. Band' is concerned, the same is based on the statements made in the reply by Mr. Balwinder Singh.

He, however, has shown his total ignorance about the preferential bands. He, in his cross examination, stated as under :-

*“Q. Why was the verbal agreement entered into between the respondent No.1 and the petitioner?”*

*A. It was for carriage fee.*

*Q. This carriage fee as you say was for which band?”*

*A. I don't know.*

*Q. Do you have knowledge of the terms preferential band. S. band etc. in the cable industry?”*

*A. I am aware of the names of the bands however, I do not know what their function is.”*

26. As to on what basis he has made the aforementioned statement in para 14 of the reply, is not known. It is also of some significance to notice that Shri Abhay Veer Singh by an e. mail sent on 01.4.2010 addressed to Shri Zaka of petitioner stated as under :-

*“This has the reference of the Agreement CNEB has with your esteemed organisation M/s. Intermedia Cable Communications for the preferential frequency placement (S21) to the CNEB for the period of one year from 1<sup>st</sup> April-10 to 31<sup>st</sup> March,11 for the amount Rs.60 Lac. Sir you are requested to place CNEB on better frequency for as much as possible period, henceforth I am taking this opportunity to request you to place CNEB on your digital feed as well.*

*Looking forwards for warm relations with you in future.”*

27. Admittedly, no such agreement was entered into. If the said Shri Abhay Veer Singh was colluding with the officers of petitioner so as to make unlawful gain for himself and causing unlawful loss to Respondent No.1, even a further agreement could have been entered into.

28. Reliance placed by Mr. Kunal Madan on Section 238 of the Indian Contract Act, in our opinion, is not opposite.

29. Strong reliance has been placed by Mr. Kunal Madan on Shri Ram Refrigeration Ind. Ltd. & Anr. Vs. State Bank of India & Anr. reported in AIR 1983 Patna page 203. The said decision has been rendered on its own facts. **(See also – Mandavkar Narendra Shankar & Ors. V. MBBSHSE & Ors. reported in AIR 1988 Bom 234, Firm Rupram Kailash Nath V. Co-operative Union & Anr. – AIR 1967 All 382).**

30. The case of Respondent No.1 is that the agreement in question is a fraudulent act of the parties. If that be so, the onus lay upon respondent.

In R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Another reported in (2003) 8 SCC page 752, the Supreme Court of India held as under :-

*“28. Whether a civil or a criminal case, the anvil for testing of “proved”, “disproved” and “not proved”, as defined in Section 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be “proved” when, if considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by the applicability of the rule, which makes the difference.*

*“The probative effects of evidence in civil and criminal cases are not, however, always the same and it has been laid down that a fact*

may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. Best says: 'There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required.' (Best, § 95) While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See Sarkar on Evidence, 15th Edn., pp. 58-59.) In the words of Denning, L.J. (Bater v. Bater [ (1950) 2 All ER 458 : 1951 P 35 (CA)] , All ER at p. 459 B-C): It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability. Agreeing with this statement of law, Hodson, L.J. said: "Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (Hornal v. Neuberger Products Ltd. [ (1956) 3 All ER 970 : (1957) 1 QB 247 : (1956) 3 WLR 1034 (CA)] , All ER at p. 977 D)."

**“29.** In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *A. Raghavamma v. A. Chenchamma* [ AIR 1964 SC 136]

*there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.”*

31. Recently, in Alva Aluminum Ltd., Bangkok Vs. Gabriel India Ltd. (2011 (1) SCC page 167), the Apex Court has clearly held that heavy onus lies on the party, who alleges fraud.

Even this Tribunal in Petition No.84 (C) of 2005 – Star India Pvt. Ltd. Vs. Sky Set Pvt. Ltd. disposed of on 29.3.2006, stated the law thus :-

*“The next objection taken by the Respondent is with regard to genuineness of the agreement signed between the parties which the Respondent contends is a forged and fabricated document. Prima facie this document bears signature of the parties through their representatives and the genuineness of the signatures is not specifically denied by the Respondent. That apart, the burden of proving that the document in question is either forged or fabricated being on the Respondent and the same having not been discharged in any manner whatsoever this contention of the Respondent has to be rejected as not having been substantiated.”*

32. Mr. Kunal Madan, however, relied upon an order of this Tribunal dated 18.12.2009 passed in Petition No. 5 (c) of 2008 –Hathway Bhawani Cabletel & Datacom Ltd. vs. Swastik Cable, wherein it has been held as under :-

*“29. The burden to prove its case having regard to Section 101 of the Evidence Act was on the petitioner. It has failed to discharge the said onus. In terms of Section 101 of the Evidence Act if the petitioner has not been able to prove its case, it would not succeed on the weakness of the defence. In Justice Y.V. Chandrachud’s Law of Evidence, it is stated:-*

*“The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure.*

*The party on whom the onus of proof lies must, in order to succeed, establish a prima facie case. He cannot, on failure to do so, take advantage of the weakness of his adversary’s*

*case. He must succeed by the strength of his own right and the clearness of his own proof.*

*This expression means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance where by reason of not discharging the burden which was put upon it, a party must eventually fail.”*

In *Anil Rishi Vs. Gurbaksh Singh – 2006(5) SCC 558* para 19-20, the Supreme Court of India held as under:-

*“19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.*

20. *In R.V.E. Venkatachala Gounder v. Arulmigu Viswesarawami & V.P. Temple the law is stated in the following terms:*

29. *In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in Addagada Raghavamma v. Addagada Chenchamma there is essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying in the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."*

33. The question, which arises for consideration in each case with regard to burden of proof, would depend upon the fact situation obtaining therein. The question as to whether the onus of proof vis-à-vis the burden of proof is on which party would depend on the issue involved. Shifting of onus of proof would also not only depend on the factual matrix involved but also the issues involved.

34. Mr. Kunal Madan would contend that trade practice is that normal rise in the placement fees would be 20-30%. However, no evidence in their behalf has been placed. Moreover, in this case, the channel was not to be placed on the same band but only on a higher band.

What is the difference between two preferential bands namely, 'E. band' and 'S. Band' is not known, as no material has been placed in support thereof. Moreover, at least from the First Information Report, it would appear that so far as the agreement entered into with 'Fastway Transmission' is concerned, whereas for the Punjab circle in 2009-10 the placement charges was Rs.40 lacs, the same has been increased to Rs.1.80 crores. Even in respect of 'Gujarat Telelink', the increase is from Rs.50 lacs to Rs.90 lacs. We, therefore, are not in a position to accept the contention of the learned counsel.

### **Service of Notice**

35. In terms of Section 114 (e) of the Indian Evidence Act, a presumption arises that an official act is presumed to have been done in ordinary course of business. All the letters and invoices had been sent to Respondent No.1 on the same address. It must be held to have received the same, as otherwise it would not have made payments regularly to Respondent No.1. Payments of the said amounts by cheques stand admitted by Shri Balwinder Singh.

36. The petitioner has sent the letter dated 09.7.2010 through speed post. As indicated heretofore, it was sent in the corporate address of Respondent No.1. The letter dated 15.7.2010 was also sent by speed post. It was addressed to Respondent No.1.

Attention of Mr. H.S. Saran, Group Chairman was, however, drawn to it. If Mr. H.S. Saran had not been working as Group Chairman or his son had been working, there is no reason as to why the letters did not reach the office of Respondent No.1.

37. So far as the legal notice is concerned, it had been sent under Registered Cover with Acknowledgement Due, under Certificate of Posting as also through Courier services. We have noticed the service report in relation to the first two modes of services, namely one which was sent under Certificate of Posting, was refused and the other has been delivered.

38. It is, therefore, difficult for us to accept that a broadcaster of the status of Respondent No.1 would not even respond to any of the said letters and/or notices and would merely raise a vague and evasive contention that the same had not been received.

The aforementioned contention of respondent cannot be relied upon keeping in view the fact that at least one of the notices as per the records of the Post Office has, in fact, been delivered to it.

39. For the reasons aforementioned, we hold as under :-

- (i) So far as the dues under MoU dated 24.3.2009 is concerned, petitioner is entitled to a sum of Rs.5.51 lacs against both the respondents jointly and severally.
- (ii) So far as the MoU dated 31.3.2010 is concerned, petitioner is entitled to get a decree as against Respondent No.1 for the amount claimed.
- (iii) The petitioner would also be entitled to interest @ 12% per annum till filing of the petition, and @ 9% per annum pendente lite and future.

**Costs**

40. The Respondent No.1 shall pay and bear the costs of the petition.  
Advocate's fee assessed at Rs.50,000/-.

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

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

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

rkc