

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 11.7.2011

Petition No. 267 (C)/2010
(With M.A. No.260 & 289 of 2010)

SCOD 18 Networking Pvt. Ltd. ... Petitioner

vs.

United Cable Services ... Respondent

Petition No. 321 (C)/2010

SCOD 18 Networking Pvt. Ltd. ... Petitioner

vs.

United Cable Services ... 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.Arun Kathpalia, Mr.Tejveer Singh
Bhatia, Mr.Yoginder Handoo and Mr.Vikas
Gupta, Advocates.

For Respondent : Mr.C. Mukund, Mr.Avneesh Garg, Mr.Ravi
Kumar and Ms.Shilpi Chowdhary,
Advocates.

J U D G M E N T

S.B. Sinha

The petitioner carries on its business as a Multi Service Operator (MSO) in the town of Mumbai including Kalyan (East) and Kalyan (West). The respondent no.1 has been operating in the same area as a Local Cable Operator (LCO). The parties hereto had entered into a subscription agreement in terms whereof the respondent was to receive signals of the channels of various broadcasters as a MSO.

The parties hereto had also entered into a distributorship agreement on or about 3.6.2008, the relevant portions whereof read as under: -

"C. The Company has agreed to grant to the Distributor, a non-exclusive right to provide the Cable Services to the subscribers within the Territory and use Intellectual Property Rights as a Distributor of the Company on terms and conditions contained in this Agreement.

D. The Distributor has been appointed for the purpose of promotion of the Cable TV Services business of the Company on the terms and conditions more specifically set out herein.

1.9 – "Territory" means the Territory set out in Schedule A."

Schedule A referred to therein provides that 'territory' means and includes the area in and around Kalyan (East) and (West).

We may also notice the duties and responsibilities of the distributors as contained in Clauses 3.5 and 3.6 which read as under :-

"3.5 – shall ensure that no programme is transmitted from the Head End and/or locally inserted which does not conform to the advertisement code and/or Programme code as set out in the Cable Television Networks Rules, 1944 or any other law for the time being in force or otherwise which infringes the copyrights of any third party. The Distributor shall ensure that no Cable TV Operator in the Territory of operation transmit/insert any such program that does not conform to the laws in force at the time or which infringes the copyrights of any third party.

There shall be liability on the Company in case of any such violation by the Distributor or the Cable TV Operators.

3.6 shall ensure the integrity of channel map as decided by the Company. The Distributor shall maintain the channel allocation as directed by the company from time to time and shall ensure relay and transmission exactly in the form and manner in which it is provided by the company."

Consideration specified for the said agreement has been mentioned in Clause 7 as set out in Schedule 'C' appended thereto. We would notice the contents thereof at an appropriate stage.

The amount of consideration was fixed at a sum of Rs. 4 lakhs p.m. by way of minimum guarantee from the date of execution of the agreement. In terms of the said Schedule, SLRs were to be submitted within 15 days from the date of execution of the said agreement.

Clause 12 of the said agreement provided for termination whereby only the petitioner became entitled to terminate the said agreement for non-payment of dues.

The territory mentioned in the said agreement extends to Kalyan (East) and (West). Signals were to be supplied from November, 2008.

Inter alia on the premise that the respondent was not to pay the subscription charge for the months of November, 2008 and December, 2008 (which is denied and disputed) by the petitioner herein, payments started to be made from January, 2009.

Before us, the fact that pursuant to the said agreement the petitioner used to raise invoices is not disputed.

The respondent raised a plea that from April, 2009 onwards the amount of consideration of Rs.4 lakhs was reduced to Rs. 2 lakhs p.m. and it had been making payments of the said amount from April, 2009 onwards. However, the contents of the said invoices have not been disputed.

A contention has also been raised by the respondent, with which we would deal with a little later that the said invoices did not meet the requirements of Clause 3.3 of the Telecommunication (Broadcasting and Cable Services) Regulations, 2004 as amended from time to time (the Regulations).

The respondent in support of its plea that payments used to be made by it for which it had been granted receipts have filed the same before this Tribunal.

The petitioner, however, by reason of notice dated 28.6.2010 called upon the respondent herein to pay a sum of Rs.36,58,860/- only. A copy of the statement of account, which has also been filed before us, had been sent to the respondent. It was contended that in the event a

reply was not received from it within a period of 7 days from the date of receipt thereof, the same would be deemed to have been accurate.

The respondent through its learned Advocate by a notice issued on or about 10.7.2010, raised the following defences: -

(i) the sum of Rs.4 lakhs towards subscription charges was based on negotiated subscriber base between the parties hereto which was not a fixed amount

(ii) the petitioner had not provided signals as per the terms and conditions of the agreement as in stead and in place of under ground cable line, over ride cable line have been provided.

(iii) As the petitioner did not have the right to distribute the signals of some of the broadcasters and, thus, being in violation of the provisions of the Copyright Act, 1952, the police and other authorities initiated legal actions pursuant where to one of the partners of the respondent Mr.Lakhvinder Singh faced prosecution in a criminal case resulting in tremendous fall in the customers of the respondent.

The subscription amount in the aforementioned situation was reduced to Rs. 2 lakhs per month.

(iv) the respondent was entitled to commission towards the distributorship agreement which has not been paid.

The petitioner has filed this petition claiming inter alia the following reliefs :-

a) Order/decreed in favour of the petitioner and against the respondent for an amount of Rs. 44,32,460/- (Rupees forty four lakh thirty two thousand four hundred and sixty only) being the outstanding amount due from the respondent as on 30.6.10 for the cable services received by the respondent from the petitioner.

b) an order awarding interest @12% in favour of the petitioner on the aforesaid payment of Rs. 44,32,460/- (Rupees forty four lakh thirty two thousand four hundred and sixty only) till date.

The petitioner in support of its case has examined one Mr.N.K. Rouse working as its Head (Content). It also examined Mr.Vineet Chandra Sharma its authorized signatory.

The respondent, on the other hand, has examined Mr.Rajinder Tandale one of its partners.

We may furthermore notice that, that the petitioner in view of the fact that allegations were made to the effect that it did not have the copyright to distribute the channels of four broadcasters, filed before us some agreements in a sealed cover to disprove the said contention.

The respondent filed Misc. Application No.90/2011 for a direction upon the Registry to de-seal the documents. An alternative prayer was also made therein that the aforementioned documents be taken off the record.

Keeping in view the fact that Mr.Kathpalia, learned counsel appearing on behalf of the petitioner did not press the second petition being Petition No.320 (C)/2010, wherein inter alia the termination of the agreement by the respondent herein upon service of notices as also a public notice as envisaged under Clauses 4.1 and 4.3 of the Regulations were in question, it is not necessary to notice the contentions raised therein.

Although, a large number of issues have been framed and voluminous records have been produced by the witnesses examined on behalf of the parties, the core question which arises for our consideration is as to whether the petitioner can be said to have made out a case for recovery of the amount mentioned heretobefore.

The respondent has produced a partnership agreement, from a perusal whereof, it would appear that it had three partners. The agreement, however, was inter alia signed by 5 persons including the aforementioned Mr.Lakhvinder Singh and one Mr.Madhukar Kadam.

We may furthermore place on record the statement of accounts wherein from the very beginning, namely, September, 2008 till June, 2010, the amount of the subscription fee has been shown at Rs. 4 lakhs.

The respondent had been paying varying sums towards the subscription fee. It, however, as would appear from the said statement of account did not make any payment for the months of October, 2009 to June, 2010.

The agreement in question is in writing. It contains an 'Amendment' Clause being Clause No.19 in terms whereof the terms of the agreement were not to be amended, altered or modified except by an instrument in writing expressly referring to the said agreement and signed by the parties.

The respondent, however, contends that from April, 2009 onwards for the reasons noticed heretobefore the amount of subscription fee was reduced to Rs. 2 lakhs. The receipts granted by the petitioner towards payments made by the respondent, have been filed alongwith the reply.

The receipts not only show the amount received but also from whom and against which bills.

It appears from the receipts dated 1.10.2009 (page 131) and 31.10.2009 (page 130) that sums of Rs. 2 lakhs have been paid in the month of October which had been adjusted towards subscription charges for the month of May, 2009.

The respondent contends that from April, 2009, onwards the amount of subscription fee was reduced to Rs.2 lakhs but the said contention stands belied by the fact that the receipt dated 3.9.2009 clearly goes to show that it had paid a sum of Rs.4 lakhs for the month April, 2009.

To show that the respondent had been paying varying sums to the petitioner, we may also notice that the receipt dated 13.4.2009, demonstrates that a sum of Rs. 2,50,000/- had been paid for the month of January, 2009 and another sum of Rs. 1,50,000/- has been paid for the same month i.e. totaling Rs.4 lakhs. Similarly, in the month of November, 2008 a sum of Rs. 4 lakhs has been paid by respondent on or about 13.1.2009. Yet again a sum of Rs. 2,54,500/- was paid for the month of August, 2010 whereas sums of Rs. 2 lakhs have been paid on two occasions i.e. 3.2.2010 and 26.2.2010 for the month of July, 2009.

On similar basis sums of Rs.2 lakhs have been paid for the month of June 2009 on 6.12.2009 and 31.12.2009. It may also be noticed that a sum of Rs. 50,000/- paid by the respondent on 27.7.2010 was adjusted on account.

The agreement entered into by the parties was in writing.

In terms of Sections 91 and 92 of the Indian Evidence Act, therefore, no evidence is admissible for the purpose of contradicting, varying, adding to or subtracting from its terms.

Strong reliance has been placed by Mr.Kathpalia on a decision of the Apex Court in Bai Hira Devi and Ors. vs. Official Assignee of Bombay reported in 1958 Ind Law SC 23 wherein upon considering the said provisions, it has been held :-

".... The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas s. 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike s. 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that s. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the

terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by s. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of s. 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document."

The amount of consideration was fixed at Rs. 4 lakhs p.m. by way of minimum guarantee.

Mr.Mukund, however, would contend that the same was subject to the furnishing of SLR by the respondent. We do not agree. Negotiated subscriber base was to be arrived at for the purpose of fixation of the amount of consideration.

Whether any subscriber line report had been submitted by the franchisee at the time of entering into the agreement or not is a matter of contract between the parties.

If the petitioner had not insisted thereupon and had agreed that the service line report may be filed by the respondent within a period of 15 days, we fail to see any reason as to how on the premise that furnishing of SLR was mandatory, the entire agreement becomes a nullity.

The respondent admittedly has not filed any document showing any variation/alteration/modification of the terms of contract in any manner whatsoever. The agreement in question being a commercial document, save and except in some exceptional cases, effect thereto must be given by this Tribunal. The provisions of Section 91 and 92 of the Indian Evidence Act cannot be disregarded by us, and thus, the contention of Mr.Mukund that the agreements stood modified because the supply of signals started in November, 2008 cannot be accepted.

The agreement was valid for a period of five years. If for any reason the supply of signals could not be started and/or the respondent had been taking supply of signals from the petitioner from November, 2008 without any demur whatsoever, the same itself goes to show that the terms of the agreement had been acted upon.

Mr.Mukund would submit that if the contention of the petitioner that it had constantly been supplying good signals to the network of the respondent is correct, there was absolutely no reason as to why demand was made for the first time only on 28.6.2010 and why petitioner had not replied to the legal notice of the respondent dated 10.7.2010.

Mr.Kathpalia, however in our opinion rightly contended that as this petition itself was filed on 16.8.2010, it was wholly unnecessary to enter into any further correspondence.

If the petitioner had not made any demand further for some time, we fail to understand as to why the respondent had not been raising any protest against raising of the invoices which admittedly were being served. If the contention of the respondent that the amount of consideration was reduced from Rs. 4 lakhs to Rs. 2 lakhs was correct, any prudent businessman would immediately on receipt of the invoice for the month of April, 2009 would lodge a protest thereagainst. Not only no protest was made, as indicated heretobefore, it had even made payment for a sum of Rs. 4 lakhs for the month of April, 2009.

Another aspect of the matter also cannot be lost sight of namely that the petitioner rightly or wrongly had been adjusting the sums paid towards the bills raised for a particular month.

Admittedly, receipts therefor were being granted.

The respondent, therefore, could have even then lodged protest thereagainst contending that the receipts have not been correctly issued as adjustments of Rs. 2 lakhs have been made against the subscription fee for each month and not against the bill for the month when it was raised.

Mr.Kathpalia has drawn our attention to a letter signed by Mr.Madhukar Kadam being dated 14.2.2010 (Annexure P-5), which reads as under: -

"We express our gratitude to provide uninterrupted and good quality of signals in the area of Kalyan. We must admit that it is due to better quality of signals we have received from your Company we are in a position to compete with other Local cable Operators and extend the area of operation of the Company by adding subscribers to our network. Our Customers are extremely happy with the quality of signals and the large number of channels carried on by us on our network due to your effort.

We cannot forget the support you have provided us in contesting the litigations filed against us both in civil and criminal courts regarding transmission/retransmission of channels.

Today, when we are at the verge of growth and development of our market we see your support to provide us fibres to expand the subscriber base of the Company. We request you to appoint your representative who may discuss the issue of laying down of fibres with us so that we may tackle the competition and connect large number of subscribers."

It appears that an identical letter was issued by Mr.Lakhvinder Singh, said to be partner of the respondent.

A disturbing feature, however, must be noticed.

The petitioner in support of its contention that the respondent had started taking signals from Indus Media and Communications Ltd. filed a compact disc. The said CD was filed by way of evidence supported by an affidavit of Mr.Lakhvinder Singh. Why a partner of the respondent firm became the witness of the petitioner and that too against the interest of the respondent has not been explained.

The CD, however, has furthermore not been proved as Mr.Lakhvinder Singh has not been examined. Even otherwise, no certificate has been issued in respect of the said CD as is mandatorily required under Section 65 B of the Indian Evidence Act. Mr.Mukund, therefore, in our opinion, is correct in submitting that no reliance can be placed thereupon. Moreover, the said Mr.Lakhvinder Singh was arrested in connection with the criminal case and, thus, it is difficult to accept that he would in ordinary course become a witness for the petitioner.

It has, however, been brought on record in the pleadings of Petition No.327 (C)/2010 that some broadcasters have also initiated civil proceedings against the parties hereto.

Mr.Mukund urged that an adverse inference should be drawn as the petitioner has not produced its books of accounts.

Mr.Mukund would contend that according to PW-2 Mr.Vineet Chandra Sharma, the audited accounts of the company have been filed, as would appear from the following questions and answers: -

“Q : Is it correct that the audited balance sheet is a public document and was not required to be filed in the sealed cover?

(The counsel of the petitioner objected to this saying that this is a legal issue and need not be put up to the witness.)

A : The audited accounts of the company as on 31.03.2010 have been filed before the Hon’ble Tribunal in a sealed cover, however, the company have no objection to furnish a copy of audited accounts if directed by the Tribunal.”

It is true that the books of accounts as such have not been filed by the petitioner but the respondent also has not filed its books of accounts.

Apart from the embargo in adduction of oral evidence to prove terms contradicting, modifying or varying the terms of a written contract in terms of Sections 91 and 92 of the Indian Evidence Act, the onus of proof was on the respondent.

The respondent by filing its books of accounts the respondent could have shown that in fact it had been paying a sum of Rs. 2 lakhs only from April, 2009 and the amounts mentioned in the statement of accounts of the petitioner and/or receipts granted by the petitioner were incorrect. It could have also filed the SLRs which it was otherwise bound to do in

terms of Clause 11 of the Regulations to show that in fact its subscriber base had gone down.

In any view of the matter, the only remedy available to the respondent in a situation of this nature was to claim reduction of the subscription amount in terms of the second proviso appended to Clause 10.2 of the Regulations. Even such a claim has not been made.

Only in the event of the respondent's showing migration of its LCOs from its network and/or decrease in its subscriber base, ordinarily the annual subscription fee cannot be refused to be paid as would be evident from a bare perusal of Clause 10.2 of the Regulations.

Moreover, the petitioner has filed the auditor's certificate. It may not be sufficient to attract the provisions of Section 34 of the Indian Evidence Act but the same can be taken into account as a corroborative piece of evidence.

It may also be placed on record that the invoices issued by the petitioner does not contain the details of the arrears. However, in this case the petitioner has not pressed its claim on the basis of the books of accounts. It has based its claim in terms of the agreement. Sufficient materials have been brought on record by the respondent itself and in particular the receipts issued by the petitioner to show that in fact the subscription amount as stipulated in the agreement dated 3.6.2008 and

as contained in the schedule B thereof was correct and the parties had acted thereupon.

We need not advert to the question as to whether the petitioner had any agreement with the broadcasters. Our attention has been drawn to a chart filed by the petitioner to show that at least in relation to other broadcasters the petitioner had entered into agreements on a later date. We may proceed on that basis. It is a matter between the petitioner and the broadcasters. Broadcasters have admittedly initiated proceedings against the parties hereto. The appropriate courts in the proceedings pending before them will have to determine the question arising therein as also the conduct of the parties and in the event the respondent contends that it had no hand in relation thereto, it would cease to have any liability and the entire liability, if any, would be on the shoulders of the petitioner. In any event the respondent did not lodge any protest in regard thereto.

Another question which arises for our consideration relates to the broadcaster Neo Sports.

Sofar as New Sports' is concerned, no issue, however, has been raised by the respondent in its reply.

No allegation has further been made with regard to any disruption in supply of signals owing to any copyright violation.

The only issue which survives for our consideration is as to whether the respondent is entitled to any commission.

We may notice the relevant clause of the distributorship agreement.

It is stated in schedule C and reads as under: -

"CONSIDERATION

The distributor will be entitled to the following consideration on a monthly basis Commission from Collection

More than 95% of current month billing collected	18% of subscription revenue collected plus 18% of carriage for the area (on prorated basis)
Between 70% to 95% of the current month revenue collected in the same month.	15% of subscription revenue collected plus 15% of carriage for the area on prorated basis
Less than 70% of the of the current month revenue collected in the same month	13% of revenue collected.

"

The respondent has not filed any counter claim. It has also not asked for any adjustment or set off. No demand has been raised by the

respondent in this behalf prior to the issuance of the said legal notice in July 2010.

The amount of commission would have been payable provided the respondent could have shown that it had been responsible for addition to the list of the LCOs in the network of the petitioner and/or it had collected the subscription fee from other LCOs and/or subscribers of the petitioner in other words if the condition transfer were satisfied.

The respondent had two functions, one as a Local Cable Operator and another as a Collection Agent. In view of the conduct of the respondent itself, in our opinion, it would be safe to arrive at a conclusion that it did not pay any subscription charges, and furthermore having failed to prove collection of any amount, it is not entitled to any adjustment of any commission from the amount of subscription charges.

Mr.Kathpalia would urge that the respondent has committed contempt of this Tribunal as it violated the interim order dated 17.3.2010 wherefor MA No.260/2010 has been filed.

The only proof in support of the said contention being the CD produced by the petitioner which for the reasons stated heretobefore, is inadmissible in evidence, no order need be passed in the said MA.

For the reasons aforementioned the petitioner is entitled to a decree as prayed for in Petition No.267 (C)/2010.

However, keeping in view the conduct of the parties, the rate of interest is fixed @ 9% p.a. from the date of payment till realization.

The parties shall also pay and bear their own costs.

(S.B. Sinha)
Chairperson

(G.D. Gaiha)
Member

(P.K. Rastogi)
Member

July 11, 2011
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