

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 2nd June, 2011

Petition No.100 (C) of 2010

Hathway V C N Cablenet P. Ltd ...Appellant

Vs.

Cableway Network ...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 Appellant : Mr. Jayant K. Mehta, Advocate

Mr. Nasir Hussain, Advocate

For Respondent : Mr. R.S. Hegde, Advocate

J U D G M E N T

S.B. Sinha

1. This petition at the instance of the broadcaster is for recovery of a sum of Rs. 10,06,821/- purported to be owing and due to it from the respondent herein towards subscription charges for the period April, 2001 to January, 2010.

2. The petitioner herein is a successor-in-interest of one V.C.N. Cablenet Pvt. Ltd. The said company entered into a subscription agreement with respondent herein as far back as in the year 2001. The fact that the respondent has been taking supply of signals from the network of petitioner and/or its predecessor-in-interest in respect of various channels is not disputed.

What is disputed is the rate of the subscription fee. Whereas according to petitioner, the subscription fee payable by respondent was 22,839/-p.m. inclusive of tax or a sum of ` 19,260/- exclusive of tax; respondent contends that the subscription fee payable by it from 2001 was ` 6,250/-, from 2007 ` 12,700/-, during the period November 2003 to June, 2007, `13,750/- and thereafter the rate was ` 12,700/- p.m.

3. The petitioner in support of its case has annexed invoices from 1.4.2008 till 31.1.2010. The said invoices show that the subscriber base of the respondents was 80. It, in support of its case has also filed ledger statement from 20.6.2001. The respondent, on the other hand, alongwith its reply has filed a few receipts showing payments of certain amount towards subscription fee. One of the receipts is for a sum of `12,700/- being dated 28.1.2008, which was said to have been paid by a cheque dated 14.1.2008. The second receipt is dated 30.6.2008, for the

same amount which is said to have been paid by cash. The third receipt is dated 25.12.2008, for a sum of ` 12,700/- only, which is said to have been paid by cheque dated 23.12.2008. The fourth receipt is dated 31.1.2009, for a similar amount and the same is said to have been paid by cheque dated 15.1.2009. It has also annexed a statement of account showing various payments made by it from 8.1.2001 till 8.8.2009. Out of the said payments which are said to have been made by respondent, petitioner in its ledger account has not shown payments allegedly made on 29.7.2009 and 10.8.2009.

4. The petitioner also states that no payment has been made in the months of April, May and June 2007 and, as indicated hereinbefore no payment has been made for July and August, 2009. Other payments said to have been made by respondent, however, find mention in the ledger account of petitioner.

5. The petitioner in support of its case has examined Mr. V. Bharat, its authorized signatory. The respondent has examined its proprietor Mr. Ravinder Reddy.

6. Mr. Jayant Mehta, learned counsel appearing on behalf of petitioner, would submit that keeping in view the fact that PW-1 has

categorically stated that the invoices had been delivered to respondent and furthermore petitioner having served a legal notice upon respondent being dated 26.2.2010 and the same having not been replied to, it must be held that petitioner has proved its case.

7. Mr. R.S. Hedge, learned counsel appearing on behalf of the respondent, on the other hand, urged:-

(i) the receipt of the invoices having been denied and disputed by respondent, the same must be held to have been served upon it in absence of any proof of service filed by petitioner. The invoices having continuous numbering as would appear from a bare perusal thereof, there cannot be any doubt or dispute that the same were fabricated for the purpose of this case.

(ii) The petitioner having not stated that as to on which dates the rate of subscription fee had been changed, no reliance can be placed on its case.

(iii) The petitioner in its rejoinder having not specifically denied or disputed the receipt of cheques

for the months of July and August, 2009 the same must be held to have been accepted.

8. This petition has been filed on 19.4.2010. The petitioner, however, in support of its case, as noticed heretobefore, has filed two invoices only during the period 01.4.2008 to 31.01.2010.

9. The contention of Mr. Mehta, therefore, that the respondent having not terminated the agreement by issuing a notice in terms of Regulation 4.2 as also publication of a public notice in terms of Clause 4.3 of the Telecommunication (Broadcasting and Cable Services) Interconnect Regulations, 2004 as amended from time to time and, thus, the jural relationship between the parties is still continuing cannot be accepted.

10. In this case the statement of PW-1 that as per the industry practice the operators visit the office and the invoices are served on them by hand, prima facie, does not appear to be correct. The relationship between the parties has been existing for a long time. The petitioner is MSO having a Pan India presence. It maintains its books of accounts in regular course of business. The place of business is Banglauru and, thus, it is expected that some invoices should have been served otherwise than by hand and in any event even for delivery of invoices by hand, therefore, receipts therefor should have been obtained.

11. In the aforementioned fact situation, appreciation of evidence is required to be done on the basis of the material brought on record by the parties.

12. Apart from the invoices, the rates of the channels have not been proved. It is difficult to accept that petitioner has been supplying signals to respondent on a fixed subscription base of 80, although, according to respondent itself it's number of subscribers is about 200.

13. The universe of LCO, however, cannot be treated to be the declared subscriber base as the same is required to be negotiated and a consensual figure is required to be arrived at.

14. The conduct of the parties, therefore, would play an important role.

Mr. Bharat, the petitioner's witness has no personal knowledge of the matter. He has deposed principally on the basis of the record of the case. The only documentary evidence by reason whereof a demand had been made was the legal notice dated 26.2.2010.

15. The respondent did not deny or dispute the receipt thereof. But by reason thereof only, we cannot arrive at a conclusion that the respondent has accepted its case.

16. The respondent has not only been paying by cheques, it has also been paying by cash.

17. Mr. Reddy in his evidence has categorically admitted that receipts were issued by the petitioner acknowledging the amount paid. The same has categorically been admitted on a question put to him, which is as under: -

“Q. Is it correct that against every payment made by you to the petitioner, receipts were issued by the petitioner acknowledging the amount paid?”

A. No. Not for every month. Some receipts were not issued.”

18. Why would he withhold the receipts which are very vital for the purpose of determination of issues between the parties has not been explained, particularly, when he has accepted that he had other receipts with him also.

19. It must, therefore, be held that had those receipts been produced, the same would have gone against the contention of the party concerned.

20. Although, respondent did not complain that he had not been getting monthly invoices, it was for the petitioner to prove the service thereof, keeping in view the peculiar facts and circumstances of the case.

21. It is true that proof of service of invoice is not imperative in character. Invoices, although are required to be served in terms of the Regulations, but if other evidences become available on record to show that petitioner has been able to prove its case of default on the part of respondent, proof of service of invoices cannot be held to be so imperative so as to compel us to dismiss the petition on that ground alone.

22. Be that as it may, apart from the admission on the part of respondent that it had been taking supply of signals from petitioner, there exists a dispute with regard to rate as also the other details and in that view of the matter it was essential for petitioner to prove the same.

23. The respondent in its evidence accepts that a statement of account was sent with the legal notice. It was, therefore, obligatory on its part to peruse the same. If he has not done so, he must thank himself for the same. He, in his evidence did not state that the said statement of account is not correct.

24. According to respondent, it had taken signals only upto September, 2009 but Mr. Reddy admits that he had not issued a notice before discontinuing the signals from the petitioner. Such a notice was essential to be issued in terms of Clauses 4.2 and 4.3 of the Regulations.

25. We, therefore, have to proceed on the basis that he has availed the supply of signal upto January, 2010.

26. In absence of any proof of rate, we have no other alternative but to proceed on the basis that respondent's statement with regard to the amount of subscription fee is correct.

27. Even on that basis it is a defaulter. It has not paid a sum of ` 1,56,900/- as would appear from the following :-

Respondents have filed various receipts :

A table of payments is also on record. If the same is compared with the ledger account filed by petitioner maintained in the ordinary course of business and having regard to the fact that the period of limitation is three years, it would appear :-

(1) From April, May and June 2007, there is no corresponding entry in the ledger.

- (2) Payment by cheque in the year 2008 reflected in the ledger account.
- (3) So far as the year 2009 is concerned, except for the last two entries i.e. July and August 2009, all other payments are reflected in the ledger account.
- (4) From August 2007 to January 2010, there is shortfall of Rs.10,000/- for 30 months i.e. a sum of Rs.3,00,000/- per month.
- (5) Respondent on his own showing has paid a sum of Rs.2,28,600.71P. Out of the total demand of Rs.4,57,200/-, thus, a sum of Rs.1,56,900/- became due.
- (6) Even if the invoices were not served, a decree for the admitted amount can be passed.

We think that interest of justice will be served if a decree for that amount is passed.

28. We reject the contention of respondent that it had made payments for the months April, May and June, 2009. We, furthermore, reject its contention that any payment has been made for July and August, 2009. It is true that petitioner while denying the statements made in the reply to the aforementioned effect has not specifically denied or disputed that

the cheques for months of July and August, 2009 had not been received by it.

29. However, the rejoinder is not a part of pleadings within the meaning of provisions of Order VIII of the Code of Civil Procedure (CPC).

30. The provisions of Order VIII Rules 3 and 5 CPC would have, thus, no application.

31. Moreover, respondent had the benefit of going through the statement of account furnished to it even before the petition was filed. The respondent received a legal notice wherewith also a copy of the statement of account had been annexed in February itself whereas the petition has been filed in April, 2010. It was, therefore, obligatory on its part not only to plead but also to prove by calling for the requisite evidence from its bankers that cheques having been encashed by petitioner. We, therefore, are of the opinion that it is one of those cases where the onus of proof was on respondent to the aforementioned effect.

32. For the reasons aforementioned, this petition is allowed in part and to the extent mentioned hereinbefore. The respondent, in our opinion, must be held to be liable to pay interest @ 9% p.a. from the date of filing

of the petition till realization thereof. In the facts and circumstances of this case there shall be no order as to costs.

.....
(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member

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(P.K. Rastogi)
Member

/NS/rkc