TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : May 9, 2011

Petition No.271 (C)/2010

Hathway Bhaskar Multinet Pvt. Ltd. … Petitioner

Vs.

M/s Sahara Sanchar Ltd. and Anr. … Respondents

BEFORE:

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

For Petitioner	:	Mr. Arun Kathpalia and Mr.Nasir Hussain, Advocates
For Respondent No.1	:	Mr. Vivek Kohli and Mr.Abhishek Swaroop, Advocates
For Respondent No.2	:	Mr. Sharath Sampath, Advocate

J U D G M E N T

S.B. Sinha

Introduction

1. The petitioner is a Multi Service Operator. It is a joint venture company of M/s Hathway Cable and Datacom Pvt. Ltd. a Hathway Group of Companies and Bhaskar Group of Companies, the former having 51% share and the later 49%.

2. The respondent no.1 is a Broadcaster. The respondent no.2 is a Multi Service Operator (MSO).

Background Facts

3. The petitioner and respondent no.1 had entered into an agreement in 2006 for the purpose of carriage and placement of the channels of the latter. Admittedly, for the year 2006-2007, the amount payable by respondent no.1 to the petitioner was Rs.85 lakhs whereas for the financial year 2007-2008 it was Rupees One Crore.

4. The respondents inter se entered into an agreement and a Memorandum of Understanding (MOU) on or about 23.5.2008, in terms whereof the distribution of the carriage and placement of the channels of respondent no.1 was to be carried out by respondent no.2; the relevant clauses whereof read as under:-

> **"Gross Consideration: -** Subject to efficient and satisfactory performance of its obligations as specified in this MOU by ABS MEDIA, SAHARA shall pay to ABS MEDIA a Consideration of Rs.

42,00,00,000/0 (Indian Rupees Forty Two Crores) only, all inclusive and subject to all applicable taxes and levies etc. for complete term and above mentioned

against appropriate invoices raised by the ABS MEDIA.

The above mentioned consideration shall not be increased on any grounds whatsoever, SAHARA shall not be liable or be responsible to pay any other charges whatsoever except for the above mentioned consideration on any grounds whatsoever.

In the event services are interrupted or withdrawn for any reasons ABS MEDIA shall promptly intimate the same to SAHARA, in such an event ABS media shall promptly and immediately take appropriate rectification measures without any delay.

In the event the services are suspended or interrupted for a period exceeding 02 working days, SAHARA shall be entitled to adjust/deduct/recover on pro-rata basis as the case may be, besides sooner determination and other remedies."

Affiliation Agreements: - To ensure transparency ABS MEDIA shall provide a copy of all affiliation agreements as may be executed between ABS MEDIA and cable operators/third parties. Neither ABS MEDIA nor any of its agents has any right or authority to assume or create, in writing or otherwise, any obligation of any kind, expressed or implied, in the name of or on behalf of SAHARA.

5. The petitioner contends that in respect of two of the channels of respondent no1, namely, Sahara Samay and Sahara M.P. the parties had entered into a contract, although, no formal agreement was entered into, wherefor negotiations had started after expiry of the earlier agreement on 31.3.2008.

6. However, upon appointment of respondent no.2 as the distributor of respondent no.1, according to the petitioner, both the respondents participated in a meeting held sometimes in June 2008 wherein the carriage fee was fixed at Rs.2,25,00,000 plus applicable taxes payable in four installments.

7. The petitioner raised an invoice in the name of Bhaskar Multinet Ltd. on respondent no.1 for a sum of Rs.63,20,250/- inclusive of taxes comprising of service tax @ 12% amounting to Rs.6,75,000/- and education cess @ 3% amounting to Rs.20,250/-.

8. The respondent no1 does not say that it had not received the said invoice, although, respondent no.2 does.

9. At this juncture it may also be noticed that the petitioner had sent three other invoices i.e. (a) for the period 1.7.2008 to 30.9.2008 on 1.9.2008, (b) for

the period 1.10.2008 to 31.12.2008 on 1.10.2008; and (c) for the period 1.1.2009 to 31.3.2009 on 1.1.2009.

10. Indisputably one Mr. Pulin an employee of respondent no.2 sent an e-mail to Mr. Sakleeha of the petitioner, stating

> "Dear Mr. Pravin,
>
> Just to inform u that the cheque has been couriered to your address.
>
> CHEQUE DETAILS & PAYMENTS TERMS – Cheque No. 021937 for Rs. 30,88,517 for 45 days.
>
> Every quarter you will receive 2 cheques at an interval of 45 days.
>
> In a year altogether 8 cheques aginast your Invoices.
>
> AGREEMENT – Also am couriering 3 Agreements copies which need to be stamped & signed on each page.
>
> As regard the last 2 pages, fill in the relevant information also as specified.
>
> Courier me all sets of which we will send you 1 set.

FREQUENCY – Also EMAIL me the Frequency for

1. Sahara Samay
2. Sahara MP
3. Careworld
4. Aashsirwad

Regards

Pulin 9820145016”

Contentions

11. According to the petitioner, despite the fact that a concluded contract has been arrived at, in the format of an agreement inadvertently, the name of Hathway Cable and Datacom Pvt. Ltd., the parent company of the petitioner was recorded, in stead and in place of the petitioner and sent, which was returned to the respondent upon execution thereof.

12. According to the petitioner the three sets of agreements were signed by Mr. Harish U. Reddy, DGM (Operations) who had the authority to do so but the same has not been received back from the respondents.

13. It is not in dispute that the respondents have paid a sum of Rs.1,66,83,828/- against the amount of Rs.2 crore 25 lakhs demanded by the petitioner and, thus, a sum of Rs.85,97,172/- is said to be owing and due to it.

14. The respondent no.1 contends:-

(i) There is no privity of contract by and between it and the petitioner

(ii) Upon execution of the agreement with respondent no.2, the matter relating to carriage and placement with the MSOs was to be dealt with by respondent no.2 itself on the consideration mentioned therein and the relationship between it and respondent no.2 being on a principal to principal basis, it has no liability in relation thereto.

15. The respondent no.2, however, asserts:-

(i) It was an agent of respondent no.1

(ii) There was only an oral arrangement in terms whereof the parties agreed to carry the aforementioned TV channels of the respondent no.1 on a consideration of Rs.1,12,00,250/- and in view of the fact that the petitioner has received a sum of Rs.1 crore 66 lakhs and odd, excess payments have been made to it.

Issues

16. In view of the rival contentions of the parties, by an order dated 15.11.2010, the following issues were framed:-

1. "Whether there exists any privity of contract between the petitioner and the Respondent No.1 for the period between 01.0-4.2008 to 31.03.20009.

2. Whether the petition is maintainable in the present form?

3. Whether Respondent No. 2 was authorized to act as an Agent for and on behalf of the Respondent No. 1?

4. Whether the petitioner has resorted to disruption of signal of the Respondent No. 1 during the period in question; and if the answer thereto is in affirmative, whether the respondent is entitled to reduction of an amount payable to the petitioner?"

Submissions

17. Mr. Arun Kathpalia, learned counsel appearing on behalf of the petitioner would urge:

(a) Having regard to the E-mail sent by respondent no.2, to the representative of petitioner being dated 27.6.2008, there cannot be any doubt or dispute that the petitioner proved its case beyond all reasonable doubts.

(b) The contention of the respondent that payment of Rs.2 crore 25 lakhs was meant for four channels and not two

channels on a composite basis and, thus, the petitioner would be entitled to a sum of Rs.1 crore 12 lakhs only must be held to be incorrect as the said E-mail is in two parts, the first part relates to the payment in term of the agreement; and the second part relates to the Respondent's seeking information regarding the frequency of the channels concerned and had nothing to do with the agreement/arrangement between the parties,

(c) If the contention of respondents that except the fourth invoice, no other invoice has been received by it, is correct, no explanation has been offered as to why part payments were made to the petitioner as against the said invoices.

(d) The statement of account will clearly show that payments have been made by the respondent only upon receipt of the invoices and not on account or by way of advance, particularly, in view of the fact that admittedly respondent no.1 would not make any payment except on receipt of invoice as has been admitted by the witnesses examined on behalf of the respondent.

(e) The contention of the respondent with regard to disruption of channels twice for a period of 3 weeks each

and consequent reconciliation of accounts in December, 2008 must be held to be wholly false as no payment was to be made for the period for which neither any bill has been raised nor any payment became due, namely, January to March, 2009.

18. Mr. Vivek Kohli, learned counsel appearing on behalf of respondent no.1, on the other hand, urged:-

(i) There being no written contract by and between the petitioner and respondent no.1, and as respondent no.1 had appointed respondent no.2 as its distributor, it cannot be held to be liable to make any payment for any agreement which has been entered into by and between the petitioner and respondent no.2.

(ii) Having regard to the backdrop of events, namely, the quantum of carriage fee paid to the petitioner for the year 2006-2007 and 2007-2008, as well as for the year 2009-2010 for a sum of Rs.1 crore 40 lakhs as has been admitted by Mr.Ramit Kundu in his cross-examination, there cannot be any doubt that the increase in carriage fee per year would be about 10% to 15% and could not have been more than double for the years 2008-2009.

(iii) From a bare perusal of the E-mail dated 27.6.2008, it would be evident that only two channels of respondent no.1 were the subject matter of arrangement between the petitioner and respondent no.2 out of four channels, and, thus, the liability of the respondent no.1, if any, would be about 50% of the said amount.

19. Mr. Sharath Sampath, learned counsel appearing on behalf of respondent no.2, urged:-

(i) The petitioner has improved its case from stage to stage inasmuch as whereas it had based its case on a written agreement, in the evidence, the witness of the petitioner not only stated about four other agreements but also from a letter dated 22.7.2009, it would appear that there an agreement is said to have also been entered into on or about 17.7.2008.

(ii) From the evidence adduced by the respondents, it would appear that not Mr. Harish Reddy but Mr. Alok Govind and Mr. Jairaman had been holding negotiations with Mr. Atul Saraf of the respondent no.2 and, thus, it was obligatory on the part of the petitioner to examine the said Mr. Alok

Govind and, thus, an adverse inference should be drawn as he has not been examined.

(iii) The respondent no.2 has neither received any invoice nor the petitioner filed any proof to establish the delivery thereof. The petitioner has also not explained as to why the first invoice was sent to respondent no.1.

(iv) The witness examined on behalf of respondent no.2 having clearly stated that there were disruptions in carriage of the channels for a period of three weeks only on the basis whereof reconciliation of account was taken and a full and final settlement having arrived at, the claim of the petitioner must be held to be wholly untenable.

Earlier Proceeding

20. Before adverting to the rival contentions of the parties as noticed heretobefore, it may be placed on record that one Hathway Cable and Datacom Ltd. had filed a petition on similar grounds against respondents herein which was marked as Petition No.245 (C)/2009 and another by Scod 18 Networking Pvt Ltd being Petition No.205 (C)/2009.

The said petitions have been allowed. Similar contentions raised by the respondents therein were rejected by the Tribunal. However, we may notice that in the instant case respondent no.1 has filed the minutes of meeting dated 17.7.2008 which however, was not produced before this Tribunal in the earlier litigations.

Privity of contract

21. We may at the outset notice that although the petitioner proceeded on the basis that an agreement in writing had been entered into, no such agreement has been produced or proved. From the evidence adduced on behalf of petitioner, it is clear that the parties had entered into an oral arrangement. It is not in doubt or dispute that a concluded contract between the parties can be inferred on the basis of the conduct of the parties. Has the petitioner been able to prove the terms of the said agreement is the core question. The fact that there has been an oral contract between the parties being not in dispute and the same being not impermissible in law, we may proceed on the premise that the parties had in fact entered into an oral

contract only. The contract can be express or implied.

Implied Contract

In Modahl v. British Athletic Federation Ltd, [2002] 1 WLR 1192 , it is stated:

> "100 For there to be a contract, there must be (a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations and (c) consideration. Both the first two requirements fall to be

judged objectively. In *Chitty on Contracts* , 28th ed (1999), vol 1, p 21, para 1-034, it is pointed out that:

"Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination."

101 The same paragraph concludes:

"Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all."

102 One distinction exists however in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed: *Chitty on Contracts* , vol 1, p 155, para 2-146. It is otherwise when the case is that a contract should be implied from the parties' conduct: pp 156-157, para 2-147. It is then for the party asserting a contract to show the necessity for implying it: see *The Aramis* [1989] 1 Lloyd's Rep 213, *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195, *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 and *Mitsui & Co Ltd v Novorossiysk Shipping Co* [1993] 1 Lloyd's Rep 311.”

In the 29th Edn. Of Chitty on contract, it is stated that (1-066, 29th Edn. @ Page 44-45):

> *"There may also be an implied contract when the parties make an express to last for a fixed term, and continue to act though the contract still bound them after term expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term."*
>
> *"Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case, the agreement is manifested in words and in the other case by the conduct".*

Oral Contract

In Aloka Bose v. Parmatma Devi,(2009) 2 SCC 582, at page 586, Sathasivam, J. stated the law thus:

> "17. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid.

18. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognised communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale."

In Andre Watts v. Columbia Artists Management, Inc., reported in 188 A.D.2d 799 (1992), Casey, J. of the Appellate Division of the Supreme Court of the State of New York, it was opined:

"We are of the view that the parties' conduct after the expiration of the written contract, including defendant's continued rendition of services, plaintiff's acceptance of those services and plaintiff's payment of commissions in accordance with the terms of the written contract, clearly establish a contract implied in fact with substantially the same terms and conditions as embodied in the expired written contract between defendant and the Corporation (see, New York Tel. Co. v Jamestown Tel. Corp., 282 N.Y. 365, 371; Recon Car Corp. v Chrysler Corp., 130 AD2d 725, 729, lv denied 70 N.Y.2d 612). The mere fact that plaintiff was not a party to the written contract does not preclude the formation of a new contract, implied in fact, between plaintiff and defendant, with terms and conditions similar to those contained in the written contract."

Terms of an Oral Contract

What would be the terms of oral contract has been stated in Janardhanam Prasad v. Ramdas,(2007) 15 SCC 174, at page 179 in the following terms:

> "We are not oblivious of the fact that performance of a contract may be dependent upon several factors. The conduct of the parties in this behalf is also relevant. The parties by their conduct or otherwise may also extend the time for performance of contract from time to time, as was noticed by this Court in Panchanan Dhara v. Monmatha Nath Maity."

22. The fact that an oral arrangement has been entered into is not in dispute. It is not in dispute that petitioner and respondent no.1 had entered into similar contracts for the years 2006-2007 and 2007-2008. It is also admitted that the channels Sahara Samay and Sahara MP are the products of respondent no.1 and ultimately it derived benefits by reason thereof.

Consideration

23. The fact that petitioner has sent an invoice to respondent no.1 is again not in controversy. On the basis of the receipt of the said invoice only, the aforementioned E-mail dated 27.6.2008 were sent. The subject matter of the said E-mail is the payment of `ABS Sahara'. `Careworld' and `Ashirwad' were admittedly not the channels of Sahara.

24. Mr.Atul Saraf, the witness examined on behalf of respondent no.2 admitted that the payment in respect of `Ashirwad' was being made to the petitioner directly and the channel `Careworld' was not carried at all. It is not the case of any of the respondents that any agreement/separate agreement had been entered into by and between petitioner with respondent No.2 or any invoice was raised on it in that regard. In the e-mail of Mr. Pulin, it was already stated that eight cheques would be issued against "your invoices" i.e. the invoice raised by petitioner.

25. The said E-mail is in three parts viz. (i) The first part relates to the payment of the amount for which the bill has been raised. The second part contained the cheque details and payment terms. The payment was to be made towards carriage of channel for a period of 45 days. The payment represented exactly 50% of the amount for which invoice had been raised in stead and in place of payment on quarterly basis. The payment according to respondent no.2 was to be made every 45 days and in a year altogether 8 cheques against the invoices presumably of equal amount were to be sent. If that be so the fact that the petitioner was to receive a sum of Rs.2 crores 25 lakhs plus taxes from the respondents stands admitted. The third part of the said letter reflected the query of the frequencies of the four channels including those of the respondent no.1. It was for respondent to explain as to in what context, the said query was raised.

26. Submission of the learned counsel for respondent no.1 that the amount of Rs.30,88,00,517/- does not tally with the other figures, namely, the

amount of service tax and the amount to be deducted towards TDS does not appear to be correct.

We may, in this connection, notice the statement of account filed by the petitioner in respect whereof there is no other dispute

Billing by Hathway-BTV						Payment				Balance
Period	B.No.	Date	Billing	S.Tax	Total	Date	Amount	TDS	Total	
April-08 to June-08	166	10/6/2008	5625000	695250	6320250	30/6/2008	3088517	71608	3160125	
July-08 to Sep-08	195	1/9/2008	5625000	695250	6320250	31/07/2008	3088517	71608	3160125	
Oct-08 to Dec-08	221	1/10/2008	5625000	695250	6320250	29/10/2008	3095026	65099	3160125	
						31/12/2008	2316753		2316753	
						11/5/2009	2443350		2443350	
						11/5/2009	2443350		2443350	
Jan-09 to Marc-09	242	1/1/2009	5625000	695250	6320250					
TOTAL(A)	**TOTAL**		**22500000**	**2781000**	**25281000**		**16475513**	**208315**	**16683828**	**8597172**

27. The payments made by respondent to petitioner would clearly go to show that the total sum for which invoice has been drawn being Rs.63,20,250/- the 50% thereof would be Rs.30,88,517/-. Upon adjustment of a sum of Rs.71,618/- towards the TDS, payments for the entire invoiced amount of Rs.63,20,250/- has been made before the second invoice was drawn for the period July, 2008 to September, 2008 i.e. on 1.9.2008; the payments for the first invoice having been made on 1.7.2008 and 31.7.2008.

28. So far as the second and third invoices are concerned, payments have been made to the extent of Rs.30,95,026/- on 29.10.2008 and Rs.23,16,753/- on 31.12.2008.

The fourth invoice for Rs.63,20,250/- was raised on respondent no.2 on 1.1.2009 against which part payment of a sum of Rs.85,97,172/- was made on 11.5.2009.

29. On the date on which the said E-mail was sent i.e 27.6.2008 also there was no written agreement. If that be so, there was no reason as to why payments have been made to the petitioner by respondents herein, particularly, as it stands admitted that the channel `Ashirwad' did not belong to the `Sahara Group'.

30. Mr.Saraf in response to a question, as to why it was said if the payments were to be made for `Ashirwad' and `Careworld' also, the subject of the e-mail was ABS Sahara payment, answered : "because payments were

sent for Sahara". It, therefore, stands admitted that payments were to be made for the channels produced by respondent no.1 only and for no other channel.

31. It goes to show that the payments in fact were made for the channels of respondent no.1. No material has been brought on record to show apportionment of the amount in respect of the four channels in question, if the contention of the respondents are to be taken into consideration in this regard. No such attempt has been made. No protest against the invoices was lodged at the relevant time. In a case of this nature any contemporaneous document one way or the other would be of great significance. It is not and cannot be a matter of controversy that for different channels, different carriage fees were to be fixed. Carriage fee for all the channels cannot be uniform. The question of carriage fee will depend upon the popularity thereof, the viewer ship, the revenue that the broadcaster would earn by way of advertisement and other relevant factors. For different channels of different broadcasters, no common invoice could be raised.

32. It is, therefore, preposterous to contend that only because in the said E-mail the frequencies of four channels were to be ascertained, this consideration for the carriage of the two channels of the respondent no.1 was Rs.1,00,12,250/-. If the contention of respondents and in particular respondent no.2 is correct that in stead and in place of a sum of Rs.1,12,25,000/-, more than Rs.1 crore 66 lakhs have been paid, there is absolutely no reason as to why a cross suit was not filed.

Conduct of the parties

33. The conduct of the parties may also have to be ascertained from the correspondences. Payments have been made over a period of time as noticed heretobefore.

34. The petitioner by a letter dated 17.2.2009 had been demanding the amount which is said to be due to it. By a letter dated 17.2.2009, respondent no.1 having come to learn about the non-payment of the carriage fee by respondent no.2 stated as under:-

> "Dear Sir,
>
> On behalf of team Sahara Samay Network, we extend you warm Greetings. We take this opportunity to thank you immensely for being a responsible business partners and ensuring a proper visibility of our channels through out your networks. We do hope that we continue to grow together from strength to strength for the days to come.
>
> As you are aware Sahara Samay News Channel had outsourced its complete distribution activity to M/s. ABS Media Reach Pvt. Ltd. from 1st April, 2008 to 31st March, 2009 in turn, for which you had entered into an agreement with the above firm.

Off late it has been brought to our notice that few of our business associates/operators have not been paid by M/s. ABS Media Reach Pvt. Ltd. under the pretext of non payment from Sahara. As a responsible Media house we would like to clarify and inform you that all the dues of M/s. ABS Media Reach Pvt. Ltd. have been paid by us as on 31st December, 2008, therefore we request you to kindly follow up with M/s. ABS Media Reach Pvt. Ltd. to collect your dues (if any). While you are following up M/s. ABS Media Reach Pvt. Ltd. for your dues, a copy of such communication may be marked to us so that we can also take appropriate steps. Further, our distribution team shall be approaching you within 7 days to discuss the carriage deals for the remaining 3 months i.e. January to March, 09 including the deals for next year. Meanwhile, we seek your support to ensure the visibility of our channels across the network.

Once again, we thank you in anticipation of your support for the days to come.

Warm regards,"

35. The respondent no.2 having come to learn of the contents of the said letter, issued a letter on or about 20.2.2009 addressed to all MSOs/operators, stating:-

"This is to inform you and place on record that we have not received the payments up to 31/12/2008 as alleged by the

Sahara Distribution team to all the MSO/Cable Operators through correspondence.

As soon as we got the information from few MSO about the said correspondence, we have approached the Senior Management to clarify the said issue on priority basis and are expecting the same issue will be resolved soon.

In the meantime on behalf of Sahara, we request you to run the Sahara News channels on our network, as the Senior Management had verbally assured us that they will honour their commitment towards MSO/Cable Operators.

Your kind cooperation will be highly appreciated by us and would request you not to enter into any dialogue with their Distribution team till 31st March, 09."

36. The matter stood thus. Even the fourth invoice was raised.

37. For the first time, respondent no.2 just one day prior to the expiry of the agreement i.e. on 30.2.2009 by a letter stated as under:-

"Subject: Invoice

Dear Sir,

This is with reference to your Invoice No. IND/242 dated 01/01/2009 for Rs. 63,20,250/-.

ABS Media Reach is the Distributor of Sahara Samay & Regional News Channel.

In respect to the aforesaid invoice, we intend to inform you and place on record that the amount raised by you in the said Invoice is incorrect as the same does not reflect the interruptions of Channel as well as negotiated amount for the said period.

Hence we are returning the Invoice for necessary corrections and in the event of any clarification if required, feel free to contact us.

And furthermore, all Outstanding Payments if any will be disbursed, as soon as Sahara Sanchar Ltd. will disburse Payments to ABS Media Reach Pvt. Ltd., which presently has been withheld by them."

38. In the said letter, thus, for the first time the correctness of the invoice was questioned. The plea of interruptions of the channel was also raised. A contention was raised about the negotiated amount without specifying as to what the said negotiated amount was. Why such a vague statement had to be made is beyond anybody's comprehension. Despite the same, an assurance was sought to be given that the outstanding payment shall be disbursed as and when payments were received from respondent no.1. If

nothing was due to petitioner or any overpayment has been made, a clear and specific statement should have been made. It does not behove a distributing agency to raise vague contentions.

39. If the contention of respondent no.2 is correct that in December, 2008 full and final settlement was arrived at, having regard to the interruptions in earnings of the channels, the question of making any further payment would not have arisen. The respondent no.2 at least at that point of time could have stated so. Even the question of alleged excess payment could have been raised.

40. It is in the aforementioned situation the notice dated 27.7.2009, issued to the respondents may be considered. It reads as under:-

> **"Re: Our letter dated 16.3.2009 & Placement Agreement dated 17.7.2008 executed between us.**
>
> As stated in the above referred letter there is a huge outstanding of Rs. 85,97,172/- (Rupees Eighty Five Lakh Ninety Seven Thousand One hundred and Seventy two only) towards the placement charges for the Sahara Channels, which was to be paid for the period between 01st April, 2008 and 31st March, 2009, as set out in clause 2 Annexure – 1 of the Placement Agreement dated 17th July, 2008 executed between you and us for the territory of Bhopal, Jaipur and Indore. ("Herein after called placement charges").

As per the said clause, payment towards placement charges was to be made in four installments. We have been duly raising invoices upon you for payment of amounts specified therein for each quarter, which invoices are raised as per and in accordance with the respective terms of the said Agreements.

From time to time, various part payments have been made by you against these invoices. These part payments have been made by you only after rigorous follow up and persistence on the part of our officers to make payments. Out of the total amount of Rs. 2, 52,81,000/- payable till 31st March, 2009, you made payment of only Rs. 1,66,83,828/- as on 15th July, 2009. Hence huge sums of money still remain outstanding dues and payable against the invoices raised by us and you have failed and neglected to pay these amounts, despite repeated requests and reminders.

Kindly note that by not making the payments that you are liable to pay, you are violating the explicitly agreed terms of the Agreement dated 17th July, 2008. hence we hereby give you notice to clear all your outstanding within 7 days from the date of receipt of this notice which comes to a total of Rupees 85,97,172/ - (Rupees Eighty Five Lakh Ninety Seven Thousand One hundred and seventy two only), with interest at the rate of 24% per annum, with effect form the date of accrual till the date of realization, failing which we shall be constrained to initiate legal proceedings against you at your own risk, costs, responsibility and consequences."

The respondent no.1 did not give any reply thereto.

The respondent no.2 did by its letter dated 10.8.2009, stating:-

"At the outset we do hereby again deny and disagree with the amount stated in your said letter under reply as the demanded amount is excess of our negotiated amount and is with out any adjustment towards disruption of service. It would be pertinent to mention over here that the said fact was informed to you by our reply to your letter dated 16-03-09 which was nor disputed nor denied by you.

We do hereby again intend to inform you and place on record that we were mere distributor of Sahara Sanchar Ltd. and due to some misunderstanding created by Distribution Team of Sahara Sanchar Ltd. between their senior Management an us, the dispute has been erupted between t Sahara Sanchar Ltd and us as such the Sahara Sanchar Ltd. has withheld the agreed amount due to us as such we were unable to disbursed the payment further to any MSO.

We further intend to inform you that we are taking steps available under law to recover the dues form Sahara Sanchar Ltd. and as son as if any amount is recover we will inform/approach you and you are also at liberty to speak/touch with the management of Sahara Sanchar Ltd. or take appropriate legal steps against Sahara Sanchar Ltd. to recover your actual dues. "

41. Yet again it does not specify the alleged negotiated amount. Why after such a long time and making full/excess/part payments, it raised the contention of non-receipt of the invoices has not been explained. Despite the categorical defence that respondent no.2 has taken before this Tribunal, it went to the extent of stating that it would take legal steps against respondent no.1 and advised the petitioner also to take appropriate legal steps to recover its actual dues.

42. The only contention which was expected to be raised by respondent no.2 at that juncture would have been that in view of full and final settlement between the parties the question of payment of any dues did not arise.

Oral Evidence of Mr. Atul Saraf

Mr. Atul Saraf in paragraph 9 of his affidavit stated as under:-

> "I deny the allegation of the Petitioner that though the alleged formally signed agreement was not received back by the Petitioner, all parties acted on the basis of the Agreement. I state that the Petitioner and the Respondents acted upon the oral agreement between the parties and the Respondent No. 2 was making payments to the Petitioner as per the said oral agreement. I vehemently deny that the Petitioner regularly raised invoices upon the Respondent on the basis of the aforesaid agreement. I deny that the same was duly accepted by me. I deny that the invoice was to be for a sum of Rs. 56,25,000/- plus tax. I further deny that against the alleged invoices raised by the Petitioner, the Respondents have made part payments aggregating to Rs. 1,66,83,828/-. I deny that there remains Rs. 85,97,172/- due and payable to the

Petitioner. I deny that some on-account part payments have been made by the Respondent No. 1 and some by the Respondent No. 2. I again state that the oral agreement between the parties was for placement of channels of the Respondent No. 1 for an annual consideration of Rs. 1,12,50,000/- plus taxes payable in 4 installments of Rs. 31,60,125/- each inclusive of service tax at the rate of 12.36%. I state that the Respondent No. 2 paid 3 installments of Rs. 30,88,517/- which was the amount payable after deducting TDS and an amount of Rs. 23,16,753/- in full and final settlement of the accounts of the Petitioner for Placement of channels of the Respondent No. 1. I state that the reconciliation was done by Mr. Alok Goyal and Me who had visited my office sometime in the second week of December, 2008, however, no written document was executed due to friendly relations between the parties."

Even, therein, it is not stated as to why the payments have been made against the invoices.

We may notice his statement in the cross-examination:

"Q: If you had not received payments upto 31.12.2008 from R1 as you have stated in your letter dated 20.02.2009, why did you make complete payment to the petitioner even for the period January to March, 2009, as you say?

A: The payment for the petitioner was done full and final in December, 2008 and the letters written to all MSOs, which were extra networks which were not in the MOU between R1 and R2. In this full and final settlement we also reduced payments for the period when the channel was not run.

Q: You have still not answered my question as to why payments were made by you for a subsequent period when, according to you payment for the previous/current period had not been received from R1 according to you?

A: I have answered before also that we have not received payments for extra network. We have received the payment for the MSOs whose deals were there in 2007-08 with R1.As Mr. Alok Govil had come to our Mumbai office and during that we had done the full and final payment as per understanding with Mr. Govil.

Q: Is there any writing of any such full and final settlement?

A: No.

Q: In any of your letters do you refer to any full and final settlement having taken place?

A: To my knowledge we had never exchanged any letter between petitioner and R2 for the above matter.

(Shown **Exhibit PW1/8** at Page 30 of the paper book)

Q: If a full and final settlement had been made as you say why do you in this letter state that “outstanding payments if any will be disbursed….”

A: This letter is written by the accounts department. Perhaps they were not aware of this.

Q: Is the account department aware of interruptions in the channel?

A: Yes.

Volunteer: The distribution team gives them the quarterly report of all the MSOs who had not run the channels according to the agreement.

(Shown **Exhibit PW1/10** at Page 35 of the paper book)

Q: Is this letter signed by you?

A: Yes.

Q: If a full and final settlement had been made as you say why do you state in the letter “that we are taking steps under law… and you are a liberty to speak/touch with management of Sahara Sanchar Limited or take appropriate legal steps against Sahara Sanchar Limited to recover your actual dues”?

A: The petitioner had started exchanging letters with R2 after they came to know that R1 and R2 had differences and thus this letter was written to them if they want to recover their dues they can go to Sahara Sanchar directly.

Volunteers: We had also mentioned about disruption of service.”

Q: If payment were to be made every quarter, as you say why does this letter refer to payment every 45 days?

A: There are four channels mentioned in this mail. We were supposed to give 8 cheques, four for Sahara Samay and Sahara MP and four for Careworld and Aashirwad.

Volunteers: Aashirwad had paid directly to the Petitioner and Careworld channel was never run as per the oral agreement.

Q: If the payment, as you say was also for Aashirwad and Careworld channels, why is the subject of the mail "ABS Sahara payment"?

A: Because payments were sent for Sahara.

43. We have noticed heretobefore that respondent no.2 or even respondent no.1 did not issue any letter to petitioner that the channels in question were not running. Such a question has been raised only on 30.3.2009. The respondent no.1 should have taken up the matter not only with petitioner but also with respondent no.2. It did not do so.

44. The respondent no.2 has made out a new case in cross-examination that no payment has been made for the fourth quarter. Mr.Saraf also accepted that there has been no settlement in writing. Even no letter was sent in that behalf. Attention was drawn to the letter of the petitioner being dated 30.3.2009. He pleads his ignorance thereto stating that it was written by the Accounts Department. The said letter, however, was not disowned. So far as the E-mail dated 27.6.2008 is concerned, we have noticed heretobefore, a copy thereof has been sent to him. He, however,

could not deny that he himself wrote the letter dated 10.8.2009. There was, thus, no reason as to why he should be ignorant about the correspondences issued by respondent no.2 and why he had been thinking of taking legal step to recover its dues from the respondent no.1.

45. Sofar as the E-mail is concerned, in his cross-examination he stated that payments were to be made for the other two channels also which cannot be correct as admittedly `Ashirwad' and `Careworld' channels did not belong to the respondent no.1. Mr. Saraf did not say that respondent No.2 was authorized to negotiate for the said channels also. Nothing has been brought on record to show as to when and in what manner negotiations were held, who had held negotiations and who had negotiated with the petitioner. No evidence far less any documentary evidence has been brought on record by respondent No.2 in this behalf.

46. Sofar as the payment of Rs.30,85,517/- payable every 45 days is concerned, he clearly admits that the said payment as referred to in Ex.PW-1/2 was for Sahara Channel but stated that the same for the first quarter. What was the amount of consideration fixed for `Ashirwad' and `Careworld' channels has not been disclosed. The respondent No.2 as an agent of respondent No.1 was expected to disclose the details of the dues in respect of Sahara Channel. It was expected that they would produce the internal correspondence.

47. Yet again in relation to the payment to be made as is contained in the said letter Ex.PW-1/2, Mr. Saraf merely stated that it was written by one of the distribution persons, although, he has not denied any genuineness thereof nor had he disowned the same. What is the size of respondent No.2 organisation ? How many departments are there? Is it possible that Mr. Saraf would not know what has been communicated to petitioner by its revenue department or operations department? I do not think so. The explanations offered in his cross-examination are too simplistic to be believed.

48. So far as the first invoice is concerned according to him he was not even aware thereof, as it was raised on and paid by respondent no.1 which is contrary to the evidence on record and, particularly, the aforementioned E-mail. He admits that he has not made any averment in his reply or his affidavit to the aforementioned extent. It is wholly unlikely that the same would escape his notice. He, however, admitted that `Sahara' does not make any payment without invoice. He has not said respondent no.2 does so. Even it is not expected of a company incorporated and registered under the Companies Act, 1956.

49. If we have to assume that none of the respondents would make payments without receipt of an invoice, a presumption must be drawn that the invoices must have been served on them. It is not expected that in that event respondent No.1 would make payments also in respect of `Careworld' and `Ashirward'. On a question as to why he did not disclose the quantum of negotiated amount, he stated that Alok G. meaning thereby Alok Govind knew about it. Such a contention cannot be accepted for mere the one reason.

50. The respondent no.2 is a company incorporated and registered under the Indian Companies Act, 1956. It is bound to maintain its books of accounts. The amount paid to each of the Multi Service Operators by way of carriage fee for and on behalf of respondent no.1 or other operators, if any, must have been entered in the books of account. It is expected to maintain ledger accounts for each of the Broadcasters vis-à-vis the MSOs. The respondent no.2 has not produced any books of accounts to show that payments have not only been made against the account of respondent no.1 but also against others. It is also wholly unlikely that it would not ask for refund of the excess amount or would not file a counter claim.

51. Sofar as the agreement is concerned, admittedly a franked copy of the agreement had been sent to the petitioner. Mr.Saraf, however, denies that respondent no.2 or its other group of concerns had an arrangement of "franking" with postal authority. It is not expected that a person of his experience would not even know thereabout.

In this connection, we may notice that even Mr.Ramit Kundu contended that Hathway Cable and Datacom Pvt. Ltd., in whose name the agreement was drawn up was not operating in the town of Indore, Bhopal and Jaipur and that in those cities only the petitioner had been working.

Evidence of Mr. Ramit Kundu

52. Mr.Kundu in paragraph 23 of his affidavit stated that respondent no.2 had negotiated its terms with the petitioner and all other MSOs which according to the learned counsel for the respondent no.1 was `discretionary' and thus the agreement between the respondent no.1 and respondent no.2 was on a principal to principal basis.

53. In his cross-examination, however, he stated that the statement made by him in paragraph 23 of the reply came to be known to him on telephonic informations given by Mr.Atul Saraf, although, he did not remember the date thereof. In answer to the most of the questions in his cross-examination, he stated "I do not know". He is supposed to be a responsible officer. His so called ignorance would lead to the conclusion that he intended to avoid uncomfortable questions. He evidently took recourse to suppression of fact.

54. Sofar as payments made by respondent no.1 is concerned, he in his cross-examination stated as under:-

> "No separate placement agreement was entered into by us with the petitioner for the period 01.01.2009 to 31.03.2009.
>
> Q: Under which agreement was this payment for the period 01.01.2009 to 31.03.2009 made?
>
> A: Actually they asked some amount for that period and we paid.

Volunteers: We are compelled to make payment, because our channel was off from the networks. They asked without this payment they are not ready to go further deal.

Q: Do you make any payment to anybody who asks you for amounts?

A: Obviously, few of them. We make payments without agreement.

Q: On what basis then do you make payments?

A: Actually, we have long relations with the operators. That is why we believe their demand and pay them.

Q: Was there any invoice for the period 01.01.2009 to 31.03.2009?

A: I do not know.

Q: I put it to you that the payment for this quarter of 01.01.2009 to 31.03.2009 was made by you pursuant to and under the agreement of June, 2008?

A: No. Because we do not know the details of the agreement of June, 2008. Whatever Petitioner asked for the period 01.01.2009 to 31.03.2009, we paid."

55. It is difficult to accept that a company incorporated under the Indian Companies Act would make payments without knowledge of the terms of the agreement and without receiving any invoice. It is also difficult to accept

that only because the petitioner threatened that they would not carry the channels, still payments have been made. It is inconceivable that a reputed broadcaster would make payments on mere asking of the MSO, double the amount which is actually and legally due. His evidence to say the least is wholly unbelievable.

56. At the relevant point of time the demand made by the petitioner was Rs.63 lakhs plus Rs.85 lakhs.

57. A sum of Rs.63 lakhs was paid. According to the said witness even he did not know as to whether any invoice had been raised for the said period. He even was not aware of any agreement and allegedly payments have been made only on the asking of the petitioner. We have noticed heretobefore that even according to Mr. Saraf, respondent no.1 would not pay any amount for which no invoice has been raised.

58. While considering the evidence of Mr.Ramit Kundu, we may notice his cross-examination by Mr.Sharat Sampath appearing for respondent no.2. It reads as under:-

Cross-Examination of Mr. Ramit Kundu by Mr. Sharath Sampath, Advocate for Respondent No. 2

Q: Would it correct to say that Sahara had directly entered into a carriage deal with the petitioner for the year 2009-10?

A: Yes.

Q: What was the consideration agreed to between the parties for placement of the channels of the R1 on the network of petitioner in the year 2009-10?

A: Rs. One Crore and Forty Lakhs.

Q: Do you have any document to show that an amount of Rupees One Crore and Forty Lakhs was agreed to between the R1 and petitioner as stated above?

A: Yes.

(Witness produces the MOU dated 28.04.2009. Original seen and returned to the witness. Copy of the MOU is placed on record and is marked as **Exhibit B**)

Q: Is it correct to say that in the industry, any MSO would claim a higher amount for renewal of carriage agreement with the broadcaster for the subsequent year?

A: May be.

Volunteers: Around 10-15% hike is admissible.

Q: Would it be correct to say that the carriage amount payable for the channels of the R1 to the petitioner for the year 2008-09 has to be lesser than Rupees One Crore and Forty Lakhs?

A: Yes, it is correct.'

59. No question was put to him that respondent no.2 was the agent of the respondent no.1. No question was put to the said witness that any amount was due from it and that is the reason why the respondent no.2 could not make necessary payments to the petitioner. In other words, respondent no.2 even does not put forth to the said witness any question with regard to its own case.

60. The respondent no.2 according to Mr. Saraf even for the subsequent period has become the Consultant of the respondent no.1. It is in the aforementioned context only the statement made by Mr.Ramit Kundu in his cross-examination is required to be considered.

61. The parties, therefore, must have thought about a common plan as in the meantime this Tribunal had delivered judgments in the case of Hathway Cable and Datacom Ltd. It made out a new case. The respondent no.1 could have pleaded that the demand of Rs.2 crore 25 lakhs was wholly illogical. It could have stated about the market condition for that year. It could have cross-examined the witness examined on behalf of the petitioner on the said question. They did not do so. They merely took the said stand, only on the statements made by Mr.Kundu in the cross-examination made on behalf of respondent no.2.

62. Had such fact been pleaded and such a statement had not been made at the fag end of the evidence of the witnesses, the petitioner could have shown that it had a larger market or viewership which the respondent no.1 had in the year 2008-2009. It could have brought on record some facts to show that in the year 2008-2009, the consideration of the sum of Rs.2 cores and 25 lakhs towards carriage of channels was reasonable and/or otherwise justified.

63. In absence of any other evidence this Tribunal cannot act only on the basis of a statement made by Mr.Kundru that increase in the carriage fee could be having regard to the market conditions to the extent from 10% to 15% only.

64. Mr.Kohli relying on the basis of the said statement would urge that a progressive increase in the carriage fee was more logical. That may be so, but such a contention was required to be pleaded and proved. If the said contention has not been pleaded, no evidence in support thereof would be admissible.

65. This Tribunal cannot be asked to take `judicial notice' of a fact which would not come within the purview of the said term as contained in Section 57 of the Indian Evidence Act. Moreover, a specific issue was raised by the respondent no.2 with regard to the status of its position, namely, the issue no.3. It was an issue inter-se between the respondents hereto.

66. From the cross-examination of Mr. Atul Saraf on behalf of respondent no.2, as noticed heretobefore, such a case must be held to have completely been given a go bye.

Credibility of the witness – the legal principle

67. The question with regard to appreciation of evidence in a case of this nature vis-à-vis the credibility of a witness like Mr.Atul Saraf should be taken into consideration on the touch stone of the background fact.

Mr.Atul Saraf has appeared before this Tribunal in all the three matters. Even in this proceeding he has prevaricated his stand from time to time.

68. When confronted with various documents issued by respondent no.2 itself, he sought to explain the same by taking recourse to irrelevant materials in support whereof no pleading had been raised. He, even in relation to his own part in the transactions entered into by and between the petitioner on the one hand and the respondents on the other, had deviated from his earlier stand.

69. The Supreme Court of India in Ramchandra Rambux vs. Champabai and Ors. AIR 1965 SC 354 opined as under:-

> "In order to judge the creditability of the witnesses, the Court is not confined only to the way on which he witnesses have deposed or to the demeanour of witnesses but it is open to it to look into the surrounding circumstances as well as the probabilities, of that it may be able to from a correct idea of the trustworthiness of the witnesses. This issue cannot be determined by considering the evidence adduced in the Court separately from the surrounding circumstances which have also been brought out in the evidence or which appear from the nature and contents of the document itself."

70. How a witness can go against the contents of the documents of which he is the author or his employees are the authors cannot be conceived of. A statement made by a person should not ordinarily be allowed to be retracted from. It, however, can be explained.

71. Even a mistake can be pleaded but then one cannot, while acknowledging the functioning of a body corporate, deny or dispute and/or feign ignorance only on the basis that the other department had been dealing therewith.

72. So far as the E-mail is concerned, although a copy of it has been sent to him, but still he did not accept the contents thereof.

73. I have, therefore, no hesitation in saying that Mr. Atul Saraf is not at all a reliable witness.

74. So far as Mr. Ramit Kundu is concerned, as indicated heretobefore, he too has deposed in all the three cases.

75. He has been feigning ignorance in respect of vital matters, which is difficult to comprehend. We would have appreciated a specific stand taken by a party of the status of respondent no.1. It is also difficult to comprehend as to how a limited liability company would ignore its practice of not making payment till an invoice is received or could make payments only on the asking of the petitioner.

76. It may be true that at one point of time there were disputes and differences inter se between respondent no.1 and respondent no.2. But that would not mean that respondent no.1 was wholly ignorant about the transactions.

77. The petitioner had brought its demand to the notice of respondent no.1. It complained of non-payment. It only on that ground threatened to dissuade itself from carrying the channels of respondent no.1.

78. It is expected that even if respondent no.1 wanted its channels to be carried by petitioner, it would make payments only when it was satisfied about the quantum of the carriage fee and as was agreed by and between

petitioner and respondent no.2. It would dissociate itself from the transactions entered into by and between petitioner and respondent no.2; if its contention that the latter was a principal and not its agent was correct.

79. If the discretion to be exercised by respondent no.2 was wholly contrary to the interest of respondent no.1, any prudent businessman would not agree to the arrangements entered into between the parties.

80. It may, in a given situation, force to make payments to a third party despite its not being liable therefor, but steps were required to be taken for realization of the said amount by way of damages from the respondent no.2. Not only no such action was taken; it was again appointed as a Consultant.

81. The respondent no.1's witness Mr.Ramesh Kundru in all fairness should not have produced the agreement for the year 2009-2010 at the asking of Mr.Atul Saraf. It goes to show that he was not acting as an independent witness but had deliberations with Mr.Atul Saraf. The respondents were colluding with each other.

Mr. Reddy's authority to represent petition

82. The only question which remains for consideration is as to whether Mr.Reddy could represent the petitioner company. Mr.Reddy in his evidence

has categorically stated that he was the person incharge so far as the carriage deal is concerned. He, although, is not an employee of the petitioner but according to him he looks after the carriage deals on behalf of the Hathway Group of Companies. If Mr.Reddy had no connection with the deal as contended by the respondents, there was absolutely no reason as to why respondent no.1 has addressed the letter to him on 17.2.2009. An E-mail dated 15.6.2010, had also been sent to Mr.Reddy. If Mr.Reddy had no concern with the deal, there was no reason for the respondents to interact with him.

83. Submission on behalf of learned counsel for respondent no.1 is that Mr. Harish Reddy is not a competent witness as only Mr. Alok Govind was in the know of the entire affairs. We have noticed heretobefore that Mr.Harish Reddy looks after the matter relating to carriage of channels on behalf of all the companies of Hathway. It has been accepted by the respondent. It is not the case of the respondent that Mr. Alok Govind is an employee of the petitioner. If the fact that Mr. Alok Govind was the only competent witness was within the knowledge of the respondent, why his name was disclosed by witnesses of the respondent for the first time in their deposition is difficult to appreciate. At that stage, it cannot be expected of the petitioner to adduce additional evidence.

84. If the respondents were correct in their contention that Mr. Alok Govind alone was in the know of entire transactions as also the fact that in December, 2008 upon reconciliation of accounts a full and final settlement

have been arrived at, he could have been summoned as a witness. A prayer could have also been made to examine Mr.Govind as a court witness. No such step was taken.

85. Mr.Sarat Sampath has relied upon a decision of the Madhya Pradesh High Court in Gulla Kharat Painter vs. Nand Kishore Rawat reported in AIR 1970 MP 225 wherein it has been stated:-

> "When a material fact is within the knowledge of a party and he does not go into the witness box without any plausible reason, an adverse inference must be drawn against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box particularly when a prima facie case has been made out against him."

86. No exception to the law laid down therein can be taken but the said decision cannot be said to have any application in the peculiar facts and circumstances of the case.

87. Mr.Sarath Sampath in view of the decision of this Tribunal in petition No.205 (C)/2009 SCOD 18 Networking Pvt. Ltd. vs. Sahara Sanchar Ltd. and Anr. and Petition No.245 (C)/2009 Hathway Cable and Datacom Ltd. vs. Sahara Sanchar Ltd. and Anr. did not make any submission with regard to the question as to whether the respondent no.2 being an agent is a proper party to the proceeding and thus not liable in terms of Section 230 of the Indian Contract Act.

Conclusion

88. Construction of agreement entered into by and between the respondent no.1 and respondent no.2 is not in question. In the earlier litigations, the respondents did not file the agreement. It did so for the first time in these proceedings. No adverse inference, therefore, can be drawn against them. But to what extent and in what manner the said agreement has been acted upon falls for consideration of this Tribunal.

89. The respondent no.1 was to pay a sum of Rs.42 crores to the respondent no.2 under the said agreement. From the materials brought on record, it is evident that respondent no.2 had all along been contending that it had not received the stipulated amount from the respondent no.1. This Tribunal has noticed heretobefore that respondent no.2 categorically even after expiry of the agreement stated that the amount shall be paid to the petitioner on receipt thereof from the respondent no.1. It, thus, even after expiry of the agreement contended that the amount shall be paid to petitioner on receipt thereof from respondent no.1.

90. It even intended to take legal actions against respondent no.1 and advised the petitioner also to do the same.

91. The petitioner had been carrying the channels of respondent no.1. If respondent no.2 was its agent for all intent and purport, it having acted independently and in fact according to respondent no.1 having acted contrary to its own interest, respondent no.1 should have raised the plea that respondent no.2 had been exceeding its authority. It was not bound by the action of respondent no.2. In the aforementioned situation it cannot be said that respondent no.2 was not a necessary party, particularly, in view of the fact both respondents had been throwing blame on each other and only at a later stage respondent no.1 took over liability of respondent no.2 and made part payments for a period of 3 months.

92. The respondent no.1, therefore, although is not a party to the agreement, having accepted the liability must also be held to be liable to make the payments even if the contracting party was respondent no.2 by its own conduct. In the aforementioned situation it cannot be said that respondent no.2 was not a proper party nor can respondent no.1 contend that it was also not a proper party.

The respondents also failed and/or neglected to plead and prove that at any time there had been disruption of the carriage of channels by the petitioner.

93. For the reasons aforementioned, this petition is allowed. However, in the facts and circumstances of the case, I am of the opinion that the rate of

interest on the balance amount should be directed to be paid by the respondents @ 9% p.a.

94. As the petitioner has raised a plea of contract in writing which has not been accepted, the parties shall pay and bear their own costs.

(S.B. Sinha)

Chairperson

May 9, 2011

/NS/