

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : November 30, 2011

Petition No. 155(C) of 2011

SRI SIVAKAMI AMMAN CABLE TV

...Petitioner

Vs.

ESPN SOFTWARE INDIA PVT. LTD.

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner : Mr.Jayant Kumar Mehta & Mr. Sukant
Vikram, Advocates

For Respondent : Mr. Kartik Yadav & Mr. N. Ganpathy,
Advocates

J U D G M E N T

S.B. Sinha

The petitioner who is a local cable operator has filed this petition, inter alia, for a direction upon the respondent to execute

a subscription agreement of its channels with it on a fair and non discriminatory basis.

It was desirous of obtaining supply of signals of the channels of the respondent herein which is a broadcaster within the meaning of the provisions of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulation, 2004 (13 of 2004) as amended from time to time (The Regulations)

The petitioner contends that it had approached the concerned officers of the respondent for the purpose of obtaining supply of signals of its channels. According to it one of the officers of the respondent had entered into an arrangement with one Mr. S. Sarvanan said to be a competitor of the petitioner as regards the mode and manner of determining the subscription base viz. that supply of signals would be on the basis of the invoices raised on it by M/s SUN Networks only.

Having regard to the said purported offer of the respondent, the petitioner is said to have visited its office on 16.2.2011 but the respondent refused to supply the decoder boxes to petitioner having been influenced by the said Mr. S. Sarvanan.

The petitioner sent a letter to the said effect to the respondent on or about 16.2.2011, inter alia, stating:

"2. Till today I am prompt in payment of dues as per the invoices of the relevant broadcasters. For your kind perusal the latest invoice of SUN NETWORK is enclosed.

4. On my previous discussion with Mr. ANBU and Mr. KARTHIKEYAN directly, both of them had informed me that basing upon the invoice of one Mr. S. Sarvanan (who is also having control room in my native town Chinnamanoor) to SUN NETWORK. Your channel is billing at the proportionate rate and applying the same scale. I also will be billed proportionately as Sarvanan is being billed. I conceded to the said as fair practice and accordingly I was asked to come to your office with necessary legal documents and to collect the decoders (IRDS) today.

5. Reposing confidence in the words of Mr. Anbu and Mr. Karthikeyan I came to your office immediately. But to my shock I was turned down by both of them that the above said Sarvanan had taken away his invoice and without that they cannot fix the rate. Thereafter I replied that I am having invoices of Sarvanan relating to some networks of Jheni District and with those invoices(illegible) the above said Anbu and Karthikeyan can fix the billing to my network and to provide IRDS to me immediately.

6. This was not accepted by the above said two persons who informed to contact them after 30 minutes. So, I returned back to my rest place and as told earlier, I contacted Mr. Karthikeyan at 2.01 p.m. He intentionally avoided the call. Hence I was constrained to contact Mr. Maruthupandian who diverted me to Mr. Anbu.

Thereafter Mr. Anbu informed me that Mr. Karthikeyan is hurrying for an out-station work and he has no intention of giving IRDS to me. Mr. Anbu also seconded the same decision.

7. Thus the your intention of refusing the IRDS to me is apparent. To be in the good books of some one your office in subduing to the policy of monopolization of Cable TV business which is forbidden by the Honourable TRAI and the Honourable TDSAT. Yourself has no locus standi to refuse IRDS to the operators who opt for it.

It was furthermore stated:

“Hence, if you refrain from providing the necessary IRDS to me within a day from the date of receipt of this letter, I will be knocking the doors of the Honourable TRAI and the Honourable TDSAT against you for the same and you will be held responsible for all the expenses and damages to be incurred by me.

The petitioner in this petition, inter alia, contends that it has already furnished all relevant informations for the purpose of obtaining activated decoder boxes from the respondent. However, except the aforementioned letter dated 16.2.2011 no other or further document has been annexed with the petition.

The respondent in its reply, inter alia, contends that the parties entered into an agreement for the period 17.1.2008 and

31.1.2009 but the petitioner failed and/or neglected to clear the arrears of subscription fee for a sum of for Rs.1,24,742/-.

The petitioner had also been indulging in piracy of the signals of the respondent.

In its rejoinder the petitioner stated as under:

"3. In respect of the contents of para 3, it is submitted that the respondent had admitted the fact that the petitioner had been approaching its officials, whose names find due mention in para 3 of the petition. The respondent also admits that it had agreed to invoice the petitioner on the basis of the invoices raised by Sun TV and for this purpose the petitioner had been called to the office of the respondent on 16.2.2011. Having admitted this, the respondent is now seeking to raise a completely baseless plea of outstanding dues when admittedly the respondent has neither provided any proof in support of such outstanding. No outstanding exists.

4-5. The contents of paras 4 to 5 are denied and those of the corresponding paragraphs of the petition are reiterated as true and correct. It is denied that the petitioner has not cleared its outstanding dues when in fact it has consistently failed and avoided to respond to the requests of the petitioner made, inter alia, on 16.2.2011. It is reiterated that there is no outstanding. It is submitted that on 16.2.2011 the petitioner had admittedly gone to the office of the respondent along with all the documents, this finds due mention in the letter of the same date. However, in view of the fact that the

respondent's officials did not wish to entertain the petitioner, he was forced to write the letter dated 16.2.2011 which was duly received by the respondent. No reply was sent to this letter by the respondent. When the petitioner has filed the present petition, the plea of outstanding has been raised purely in order to defeat the genuine and bonafide request of the petitioner. It is denied that the petitioner has been indulging in piracy of the respondent's signals. No particulars or proof of any such piracy has been provided. None exists. It is also pertinent to notice that the respondent has mentioned its willingness to negotiate with the petitioner. The petitioner humbly submits that it has no dues to the petitioner. However, without prejudice and purely to expeditiously seek the decoder boxes of the respondent's channel the petitioner is willing to negotiate a reasonable amount which it paid to the respondent against its claim of Rs.1,24,742/- which is otherwise wholly untenable and denied."

In view of the aforementioned rival contentions of the parties, the following issues were framed by this Tribunal:

- (i) Whether the petitioner is a defaulter and if so would it be entitled to issuance of a direction upon the respondent to supply decoders boxes to it in terms of Regulation 3.2?
- (ii) Whether the petitioner is authorized to comply with the essential conditions for obtaining signals in terms of the Regulations.

(iii) To what relief, if any, the petitioner is entitled to?

The petitioner despite framing of the aforementioned issues did not examine its proprietor or adduced any oral evidence.

The respondent examined one Shri Sunil Ganpathy, its Associate Director (Finance & Operations) for the South and Central region.

In his affidavit, he stated that he is associated with the respondent company from the year 2001.

We may notice a few paragraphs of his affidavit:

"5. I say that the respondent by its letter dated 17.10.2008 wrote to the petitioner and requested for payment of the outstanding amounts due and payable by the petitioner to the respondent but to no avail. A photocopy of the said letter is enclosed herewith and marked as Exhibit R-2. After the said letter dated 17.10.2008, the Deponent also personally telephoned Mr. KG Sivasbramani on various occasions and requested him to clear the outstanding dues payable by him to ESPN. It would also be relevant to mention that the last contract between the parties was signed on the basis of a subscriber base of 450 points.

7. I say that Mr. Sarvanan to whom a reference is made by the petitioner is the representative of another MSO known as Aakash Cables and the Respondent do have a contractual relationship with the said MSO but the said Mr. Sarvanan cannot in any manner influence the business

decisions of the Respondent. As already mentioned hereinabove, the petitioner has not cleared his outstanding dues of Rs.1,24,742/-. The respondent are yet to get the complete list of documents from the petitioner, which were also requested by respondent's letter dated 28th February, 2011. Furthermore, the petitioner has been also indulging in piracy of respondent's signals. The respondent has never refused to negotiate for providing their services to the petitioner but petitioner must first clear the outstanding due and payable by him to the respondent and then come forward for bonafide negotiations."

It was furthermore contended that the petitioner in all fairness should have disclosed its subscriber base vis-à-vis other broadcasters from whom it had been receiving signals.

With the said affidavit a service contract dated 17.1.2008 as also a notice dated 17.10.2008 were annexed to show that the petitioner was a defaulter.

In his cross-examination the said witness accepted that although he had been raising invoices in respect of the petitioner's network on a bi-monthly basis, he has not filed any proof of dispatch nor was he present at the time of the execution of the agreement.

He has also accepted that except the aforementioned notice, the respondent has not filed any other record to support its claim of Rs,1,24,724/- against the petitioner.

So far as its contention that the petitioner had indulged in piracy is concerned the witness stated that although documents are available but the same have not been filed.

Admittedly the respondent has also not filed its statement of account.

It was stated by the said witness:

“We have not written to the petitioner pointing out the documents that he had not provided.

Vol. But we told him orally in the course of negotiations.

In case the petitioner provides all the documents, we will provide signals to the petitioner.

Vol. Provided the petitioner makes the payment of Rs.1,24,742/- We are also ready to provide signals on the very same terms as contained in Ex.R-1.”

Mr. Jayant K. Mehta, learned counsel appearing on behalf of the petitioner would urge:

1. The respondent having failed to establish its allegations that the petitioner was a defaulter to the extent of Rs.1,24,742/- as also act of piracy, the petition should be allowed.
2. Having regard to the provisions contained in Section 106 of the Indian Evidence Act, the burden of proof lay upon the respondent to show that the petitioner was a defaulter.
3. Having regard to the fact that the respondent was ready and willing to supply signals to the petitioner and it, having failed to prove that it is a defaulter, should be directed to supply signals of its channels to petitioner's network.
4. The petitioner during negotiations having furnished all the documents to the respondent, it is entitled to a direction as prayed for.

Mr. Yadav, learned counsel appearing on behalf of the respondent, on the other hand, urged:

1. The contentions raised by the petitioner in paragraph 5 of its petition vis-a-vis its letter dated 16.2.2011 as contained in Annexure P/2 of the petition are inconsistent with each other in so far as no document has been annexed therewith; and

2. The petitioner being a defaulter and having indulged in piracy of the signals and furthermore having not complied with the provisions of the Regulations is not entitled to the benefit of clause 3.2 of the Regulations.

It is now a well settled principle of law that Clause 3.2 of the Regulations providing for a 'must provide' clause should be construed strictly being contrary to the common law principles as well as the provisions of the Indian Contract Act.

There cannot be any doubt or dispute that having regard to the provisions contained in Sections 101 and 102 of the Indian Evidence Act, in the event, no party adduces any evidence, the petition would fail.

The fact that the parties hereto had entered into a subscription agreement on or about 17.1.2008 is not in dispute. In terms of the aforementioned contract, the petitioner was to pay a sum of Rs.2,81,096/- per month towards subscription fee exclusive of taxes and with taxes thereon the sum payable would be Rs.3,15,839/-.

It is a well established principle of law that the pleadings do not constitute proof.

The petitioner in its rejoinder denied the contention of the respondent that it had not cleared the outstanding dues of the respondent. If that be so, it must be in possession of documents to establish that it had been making payments of the subscription amount in terms of the said agreement.

The statements made in the rejoinder have been verified as true to the knowledge of the deponent derived from the official records maintained in due course. No such record having been produced, even the said statements are not admissible in evidence. Even otherwise, the petitioner in paragraph 5 of the petition contended that it had furnished all relevant informations but evidently it had failed and/or neglected to do so in view of the fact that it did not disclose its subscriber base with its letter dated 16.2.2011.

It may also be placed on record that during pendency of this petition the parties had met.

No minute of meeting has, however, been produced. There is nothing on record to show that the petitioner has furnished its statement of account and/or other documents to establish that it had paid all the outstanding dues of the respondent in terms of the aforementioned agreement. No other or further document

has also been brought on record to show that all requisite informations and in particular the subscriber base of the petitioner was communicated to the respondent as is required under Clause 9 of the Regulations.

We have noticed heretofore that the contention of the respondent is that the petitioner has also not furnished its subscriber base so far as the other broadcasters are concerned. The petitioner has also not divulged as to what would have been its area of operation.

The petitioner who was required to establish the essential ingredients of its right to receive signals at least should have examined himself to prove that he had held talks with the officers of the respondent and it was agreed that the invoices were to be drawn on the same basis as was being done in the case of Mr. Sarvanan vis-a-vis SUN TV Network .

The respondent in its reply has denied or disputed the fact that any such meeting had taken place.

A party to a lis, it is well settled, must examine himself before a court of law particularly in a case where the burden of proof lay on it. Even otherwise the petitioner was required to

examine himself to show that the contentions of the respondent that it was a defaulter was not correct.

In *Sardar Gurbakhsh Singh vs. Gurdial Singh & Anr.* AIR 1927 PC 230 the Judicial Committee stated the law thus:

"30. Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manœuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness.

31. This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranji Lal* [1910] 32 All. 104, calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."

32. The present case, however, is a pointed instance of the evils which flow from such a practice. Bhagwan's case had been the subject of prolonged investigation in the revenue Courts, and had been pronounced by them a bogus case. She had appeared and told a story there, and it had not been believed. She was, however, also present in this civil suit, the issue in which was the legitimacy of the boy that she was putting forward as the jaghir of the estate. Her non-appearance in answer to the challenge, that is to say, to disclose the actual fact as to her condition shortly after her husband Jawala's death, her disappearance into a foreign state, and all the other circumstances mentioned, had been established. If her story were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit, telling the whole facts in support of her and her alleged son's case; but she did not. If under advice she did not do so, that advice was of the worst description, and

worthy of the animadversion above made. But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth, of her case."

[See also M/s Polimer Channel vs. M/s Sumangali Cable Vision Petition No.132(C) of 2010 disposed of on 4.2.2010, and Hathway VCN Cablenet Private Limited, Mumbai vs. Mukesh Dish View, Bangalore Petition No.98(C) of 2010, disposed of 4.2.2011.]

In *IndusInd Media & Communications Ltd. vs. City Cable & Ors.*, Petition No.67(C) of 2008 disposed of on 27.7.2011, this Tribunal observed:

"We may, however notice that the Supreme Court of India in *Iswar Bhai C.Patel vs. Harihar Behera & Anr.* reported in (1999) 3 SCC 457 and *Vidhya dhar vs.Manikrao & Anr.*(1999) 3 SCC 573 following a Privy Council decision in *Sardar Gurbakhsh Singh vs. Gurdial Singh* reported in AIR 1927 PC 230 opined as under:

"18. As early as in 1927, the Privy Council in Sardar Gurbakhsh Singh v. Gurdial Singh took note of a practice prevalent in those days of not examining the parties as a witness in the case and leaving it to the other party to call that party so that the other party may be treated as the witness of the first party."

It was further stated:

"29. Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated

by Respondent 2 in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of Respondent 1 in Central Bank of India Ltd., Sambalpur Branch and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of Respondent 1 in its entirety and passing a decree against the appellant also."

The main contention of the respondent is that the petitioner is a defaulter and did not pay a sum of Rs.1,24,742/- towards the subscription fee in terms of the earlier agreement for the period 17.01.2008 to 31.01.2009. Secondly, the petitioner was indulging in piracy of the signals of the respondent.

Regarding default of payment on the part of the petitioner, the respondent has produced the agreement of the relevant period as well as notice issued to the petitioner of 17.10.2008 demanding the said amount.

The respondent, it is true has not filed any record to establish the dues of Rs. 1,24,742/- as demanded by it. It should have at least filed a statement of account showing what was the amount payable under the previous agreement and the amount(s) was paid by the petitioner. Similarly, the respondent did not produce any record to show that the petitioner was indulging in piracy of its signals.

If plea of default and piracy had been taken, it was expected that the respondent would produce records to show as to how and in what manner the other party defaulted and committed the piracy of the signals.

However, having regard to the factual matrix involved herein, we need not determine the extent of default on the part of the petitioner, if any, finally.

On the other hand, we are of the opinion that the petitioner has failed to submit the requisite documents to obtain a direction for supply of signals even along with this petition. We are, thus, not in a position to hold that it has supplied all the documents as were required under the Regulations for supply of signals.

For the reasons aforementioned, we are of the opinion that the ends of justice shall be sub-served if a direction is issued that the petitioner may supply all the requisite informations in terms of the Regulations to the respondent within a period of 10 days, whereafter both the parties may meet and reconcile their accounts and if any outstanding amount is found to be ^{done} ~~done~~, the petitioner will pay the same and then enter into an agreement for the supply of signals to the petitioner.

This direction is in consonance even with the petitioner's stand that it has always been ready and willing to pay a reasonable amount to the respondent.

With the aforementioned directions this petition is disposed of.

In the facts and circumstances of the case, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

November 30, 2011
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