

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

DATED 9th August, 2012

PETITION No.236(C) 2011

S.Radhakrishnan & Anr. ...Petitioners

Versus

M/s Solamalai Communique & Anr. ...Respondents

BEFORE:

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

For Petitioners : Mr.Balaji Srinivasan, Advocate
Ms. Jaikriti Jadeja, Advocate

For Respondent No.1 : Mr.M.P.Prathiban, Advocate

For Respondent No.2 : Mr. N. Ganpathy, Advocate

JUDGMENT

P.K.Rastogi, Member

The petitioners have filed this petition for supply of signals of the channels of the respondent no. 2 to the petitioner against the payment made by them to the respondents. In the alternate, the petitioner has requested to direct the respondent to refund the amount paid by it alongwith interest.

2. The petitioners have submitted that the petitioner No. 1 is a Deed Writer by profession. His son petitioner No. 2 being unemployed was assisting him in the work of documentation. As the petitioner No. 2 was unemployed but a qualified Civil Engineer, petitioner No. 1 wanted to set up an independent business for his son petitioner No. 2. The respondent No. 1 was officiating as authorized Distributor of ESPN and Star Sports channels owned by respondent No. 2 for down south Tamil Nadu.

On the insistence of the Respondent No. 1 to invest in the business of cable T.V. networking and avail decoder for enabling the same in Surandai Town and nearby area, the petitioners decided to avail the business of cable T.V. operations in the said area. As decided in the negotiations, the petitioners agreed to pay a sum of Rs. 12,27,084/- (Twelve Lakhs Twenty Seven Thousand and Eighty Four Rupees) to respondent No. 2 through respondent No.1 for ESPN and Star Sports channels provided by it. At the time of making payment respondents estimated around 2,500 subscriber base at a subscription rate calculated at Rs. 39.70/- per subscriber for a period of one year. Accordingly, the petitioners purchased the Demand Drafts bearing Nos. (i) 078470 for Rs. 1,54,830.00/-; (ii) 078471 for Rs. 72,254.00/-; (iii) 078472 for Rs. 10,00,000.00/ in favour of ESPN Software India Pvt. Ltd. and delivered the said DDs through Mr. Ashok, who was the staff of respondent No.1. The

petitioner also informed the respondent vide their letter dated 29.11.2004 containing the details of the Demand Drafts drawn and duly handed over as aforesaid.

3. The petitioners further submitted that when they approached respondent No. 1 for providing decoder, the respondent No. 1 demanded an additional amount of Rs. 1,35,000/- (One Lakh Thirty Five Thousand Rupees) on the ground that the subscription charges were hiked. The petitioner No. 2 complied with the respondent No.1's demand by purchasing Demand Draft in the name of respondent No. 2 drawn on 28.12.2004 for Rs.1,35,000/- drawn on the Tirunelveli District Central Co-Operative Bank Limited, Surandai Branch. Even after paying full amount of Rs. 13,62,084/- as demanded by the respondent, the petitioners were not provided with the decoder to enable them to establish the said cable T.V. network.

4. According to the petitioners, it sent a Lawyer's notice dated 21.03.2006 to respondent No. 1. The respondent No. 1 sent a reply to the notice vide their Advocate's reply notice dated 07.04.2006 containing all false and untenable contentions. Therefore, the Petitioners filed a complaint against the Respondents being Consumer Complaint No. 53 of 2006 before the Learned

District Consumer Forum of Tirunelveli, Tamil Nadu. The Learned District Forum allowed the Complaint filed by the Petitioners and directed the Respondents to pay jointly and severally a sum of Rs. 13,62,084/- alongwith interest.

However, aggrieved by the order passed by the Learned District Forum in C.C. No. 53 of 2006, Respondent No. 2 filed First Appeal No. 511 of 2007 and Respondent No. 1 filed First Appeal No. 651 of 2007 before the State Consumer Dispute Redressal Commission at Chennai. The State Commission vide its order dated 20.12.2010 allowed both the Appeals filed by the Respondent No. 2 and Respondent No. 1 and set aside the order passed by the District Consumer Forum, Tirunelveli in C.C. No. 53 of 2006 on ground of want of jurisdiction as the Petitioners were not 'consumers' within the Consumer Protection Act, 1986.

5. In the present petition, the petitioners prayed for following reliefs :

(i) Order directing the respondents to provide decoders and signals for ESPN and Star Sports channels of respondent No. 2 to the petitioners against the payment of Rs. 13,62,084 (Thirteen Lakhs Sixty Two

Thousand and Eighty Four Rupees) towards the same to the respondents by the petitioners.

(ii) In the alternate, order directing the respondents to pay jointly and severally to the petitioners, the sum of Rs. 13,62,084 (Thirteen Lakhs Sixty Two Thousand and Eighty Four Rupees) together with interest at - 9% per annum from the date of issuing of Demand Drafts and also to direct the respondents to make payment of a sum of Rs. 50,000/- (Fifty Thousand Rupees) being the estimated damages.

6. On the other hand, respondent No. 2 submitted that there was no privity of contract between the petitioner and the respondent No.2 which would warrant any relief as sought for by the petitioners being given against the respondent No.2. The claim for recovery of money alleged to have been paid by the petitioner to the respondent No.2 for the respondent's services is a time barred claim. The petitioner not being a service provider is not entitled to invoke the jurisdiction of this Tribunal.

In the records of the respondent No.2 these payments were received on behalf of the following:

- a) Karan TV, Tirunelveli paid Rs. 10,00,000/- on November 30, 2004.
- b) Sindu Cables paid Rs. 1,54,830/- on November 30, 2004.
- c) Air Media Network paid Rs. 72,254/- on November 30, 2004.
- d) Sky Satellite Private Limited paid Rs. 1,35,000/- on December 29, 2004.

The respondent received all the above payments by way of DDs and issued their respective receipts to the above cable operators against the payments.

7. The respondent No.1 submitted that it never approached the petitioners to avail the instrument, decoder to enable them to start independent business of cable TV Network in Surandai Town and never recommended them to avail the business of cable TV Operator in the said Town. There was no negotiations about payment of Rs.12,27,084/-. It had no knowledge of petitioners' estimation of 2500 sub base.

The petitioners never gave respondent No.1 any Demand Draft or cheque except one Demand Draft No. 079472 drawn on Pandian Gram Bank favouring ESPN Software India Pvt Ltd dated 29.11.2004 which was received

from one Mr. Swaminathan who is a close relative of the petitioners and the said Mr. Swaminathan is employee of the respondent No.2 and he also receives commission and incentives directly from the respondent No.2.

The respondent No.1 did not make any additional demand of Rs. 1,35,000/- quoting hike in the subscription charges. The petitioners did not pay any additional sum of Rs. 1,35,000/- by way of DD dated 28.12.2004 bearing No. 188432 drawn on the Thirunelveli District Central Corporative Bank Ltd., towards the respondent No.1's account.

8. The respondent No.1 has further submitted that it is the sole distributor for Madurai town for ESPN Software India Private Ltd. One Area sales Manager Mr. Bala Murugan and one Mr. S. Swamynathan, Area Manager for Tamil Nadu both are employees of the ESPN Software India Private Ltd. Mr. S. Swamynathan, is having control over all the distributors in Tamil Nadu. Both have targets fixed by the respondent no.2, incentives also paid by the ESPN software India Private Ltd. to them directly being their employees. Hence, they used to canvass for ESPN Software India Private Limited and collect DD in favour of ESPN Software India Private Ltd., in their own accord and used to hand over the respective DDs to the respective distributors.

Accordingly, one such DD dated 29.11.2004 bearing No. 079472 for a sum of Rs. 10 Lakhs drawn on Pandiyan Grama Bank in favor of ESPN Software India Private Ltd., was handed over to respondent No.1 by the above said S. Swamynathan, also stating that, that DD was taken by one Karan TV, Thirunelveli. Hence respondent No.1 simply redirected that to respondent No.2 in Karan TV's account and receipt also duly issued to that effect. The respondent No.1 did not receive any other DD other than the above said DD received from S. Swamynathan.

9. In its rejoinder, the petitioners further submitted that while making the payment of three drafts, it had written a letter to respondent no. 1, which was duly signed and acknowledged by one of the staff of respondent no. 1, Mr. Ashok.

10. We may note certain facts which are undisputed. The respondent no. 1 is the distributor for down south Tamilnadu for respondent no. 2. The petitioners have taken 3 DDS on 29.11.2004 for an amount of Rs. 12,87,084/- and these DDs were issued from Pandyan Grama Bank. Another DD for Rs. 1,35,000/- was obtained from Tirunveli District Central Cooperative Bank by second petitioner on 28.12.2004. Thus, the petitioner purchased these DDs

for 13,62,084/-. These DD were drawn in the name of respondent no. 2 and it has encashed the DDs on 29.11.2004 and on 30.11.2004.

11. The respondent no. 1 has denied having received any DD from the petitioners except Rs. 10 lakhs vide DD No. 079472 drawn on Pandyan Gram Bank favouring respondent no. 2. The said DD amount was received from one Mr. Swaminathan, an employee of respondent no. 2.

12. The petitioner's contention is that it gave 3 drafts to one Mr. Ashok, who is the employee of respondent no. 1. The petitioner has produced a copy of the letter dated 29.11.2004 which was received by one Mr. Ashok, an employee of respondent no. 1. This letter addressed to the respondent no. 1 indicates that the DDs were handed over to Mr. Ashok for supply of decoder of ESPN channels. We may read the said letter :

"From :
R Shanmuga reenganathan
Surandai

To

Mr. Karmegamani
c/o solaimalai Communique

*ESPN-Star Sports distributors
Maduarai*

Sir,

As per your request we are sending the DDs worth Rs. 12,24,084/- (Rupees Twelve lakhs tenty four thousand and one eighty four only) through your office staff Mr. Ashok. Kindly acknowledge the DDs by issuing receipt and we also request you to issue a decoder at the earliest.

<i>DD Number</i>	<i>Amount</i>	<i>Bank</i>
<i>049473</i>	<i>154830</i>	<i>Pandiyan</i>
<i>049471</i>	<i>72254</i>	<i>Grama</i>
<i>049472</i>	<i>1000000</i>	<i>Bank</i>
<i>Total</i>	<i>1227084</i>	

Thanks & regards

Yours sincerely

*(Signed by)
R Shanmuga renganathan*

*(Signed by)
Mr. Ashok"*

However, according to respondent, these DDs were credited in the names of a) Karan TV, Tirunelveli - Rs. 10,00,000/- on November 30, 2004. b) Sindu Cables - Rs. 1,54,830/- on November 30, 2004. c) Air Media Network - Rs. 72,254/- on November 30, 2004. d) Sky Satellite Private Limited - Rs. 1,35,000/- on December 29, 2004. Accordingly, receipts have also been issued to the respective parties by the respndent no. 2. The amount received by the respondent was against the subscription amount on behalf of the cable operators.

The respondent no. 1 has denied the receipt of such letter. In his Cross examination Shri S. Radhakrishnan, the first petitioner first said that he hand delivered the letter dated 29.11.2004 to Mr. Ashok, but later he said this letter was sent by post. We may read the relevant evidence :

*"In the respondent no. 1, i negoatiated with two gentlemen by the name of Mr. Ashok and Mr. Annamalai.
I do not know their designations
I caused three DDS to be obtained aggregating in all to a sum of Rs. 12,27,084/- based on the instructions from respondent no. 1 company.
I did not receive these instruction writing. I received these instructions orally from the representatives of the respondent no. 1 company.*

A person name Mr. Ashok visited me and i hand delivered the letter dated 29.11.2004"

"Q. I put it to you that the letter dated 29.11.2004 is not corect any you have never sent the same to respndent no. 1?

A. My son sent it to resopndent no. 1

Q. How did you sent the letter dated 29.11.2004 to respondent no. 1.

A. By post."

Therefore, the statement of the petitioner that it gave a letter dated 29.11.2004 to Mr. Ashok cannot be relied upon.

However, respondent no 1 has admitted that it received an amount of Rs. 10 lakhs from Mr. Swaminathan who is the employee of the respondent no. 2. It seems probable that the employee of respondent no. 2 will send the DDs to its employer through the distributor instead of handing the amount directly

to the broadcaster. Therefore, the involvement of respondent no. 1 in the process cannot altogether be denied.

13. The petitioner has produced a letter from Pandyan Grama Bank, where it has been shown that petitioner have taken DDs on 29.11.2004 in the name of respondent no. 2. The later has shown receipt of these amounts in their accounts as if paid by certain cable operators and certain receipts were issued in the name of 4 cable operators. The respondent no. 2 has neither produced any document nor produced those cable operators as witness to show that the said amount was paid by the said cable operators or the DDs were given to it on their behalf. Ordinarily, alongwith the DD for such high value, a forwarding letter would be issued. In absence of any evidence, simply issue of receipts to these cable operators cannot be relied upon. Therefore, it is proved beyond doubt that the petitioners have paid the amount of Rs. 13,62,084/- by way of DDs in favour of the respondent no. 2 and later has encashed the said amount to its account.

14. Regarding premiliminary objection of respondent no. 2 that the petitioner not being a service provider is not entitled to aproach this Tribunal, we are of the opinion that although the petitioner could not produce any evidence of Postal Registration at the relevant time and existence of network etc. the

respondent was not able to establish anything to show that amount received by it was for any civil liability against the petitioners or there was any other relationship. If that was the stand of the said respondent, ordinarily it would have rejected the request of the petitioner and would return the said drafts. The demand drafts have been received either through Mr. Subramanian its own employee or respondent no. 1, its authorised distributor in South. The circumstantial evidence shows that there has been discussion and the amount paid to the respondent no. 2 related to the supply of signals. A signal seeker may not fulfill certain criteria to get relief from this Tribunal but it does not take away the jurisdiction of this Tribunal to determine the same.

15. Regarding the objection of the respondent no. 2 that petitioner's claims are time barred, we are of the view that the demand of the petitioner for returning its amount is not time barred as the period of litigation gone at the Consumer District Forum and the State Consumer Redressal Forum is to be excluded, having regard to the fact that they were being proceeded against by the petitioner bonafide.

16. The petitioner has prayed for providing decoders and signals by the respondent no. 2 and in case, the signals cannot be supplied, the amount paid by them is to be paid back alongwith the interest.

The respondents hereto do not deny or dispute the relationship of agent and principal between them. The respondent no.1 was in fact held out to all concerned as agent of respondent no. 2.

The petitioner no. 2 as a principal was bound by the acts of its agents. It is also bound by the acts of its servants.

In the law of contract of Butterworths at page no. 1341, it has been stated :

"6.168 Right to enforce contract. Any person who makes a contract in his or her own name without disclosing the existence of principal, or who, through disclosing the fact that he or she is acting as an agent on behalf of a principal, renders himself or herself personally liable on the contract, is entitled to enforce it against the other contracting party, notwithstanding that the principal has renounced the contract. A similar right appears to exist where the agent purports to contract as agent only for a unnamed principal who in fact is non-existent. But where he or she names his or her principal and makes the contract expressly as agent on his or her behalf, he or she cannot enforce it, even though he or she is the real principal, unless the other party has affirmed the contract with knowledge of the fact. Where an agent signatory seeks to add him or herself to the existing named principals as a party to the contract, he or she can do so if he or she was once of the principals at the relevant time.

An agent cannot sue for a promised bribe, even though he or she was not influenced thereby in the discharge of his or her duty to his or her principal.

In an action brought by an agent on his or her principal's contract, the defendant is entitled to discovery from the principal as fully as if he or

she were the plaintiff on the record, even though he or she is a foreign principal."

In Krishna Mohan Kul v. Pratima Maity, (2004) 9 SCC 468, at page 468, the law is stated in the following terms :

"A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage."

In Govind Prasad Sharma vs Board of Revenue And Ors. (AIR 1965 MP 66), while making distinction between an agent and servant, it was stated :

"In taking this view the learned Member of the Board of Revenue overlooked, the distinction between a servant, an agent and an independent contractor, and failed to note, the limited exceptional cases in which the rule that an employer of an independent contractor is not liable for the faults of the contractor does not apply. The distinction between the position of an agent, a servant and an independent contractor is well known and, has been noted by the Supreme Court in Lakshminarayan Ram Gopal and Son Ltd. v. Govt. of Hyderabad, 1955-1 S C R 393 at page 401 : (AIR 1954 SC 364 at page 367) by reference to the statement of the law contained in Halsbury's Laws of England Hailsham Edition--Volume 1 at page 193. That statement of law, which is now contained in paragraph 350 of Halsbury's Laws of England, Simonds Edition, Volume 1, is as follows:

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course

of his work; an independent contractor, on the other hand, is entirely independent of any control or interference, and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though, bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such, is not a servant but a servant is generally for some purposes his master's agent, the extent of the agency depending upon the duties or position of the servant, and in some cases an independent contractor may also be an agent."

17. The petitioners although have produced some papers but failed to produce the copy of the Postal Registration Certificate existing at the relevant time. The supply of signals by the distributor and the broadcaster depends upon fulfillment of the certain conditions as prescribed under the clause 9 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (as amended from time to time). However, the petitioner has failed to prove the relevant documents in this regard.

We may produce the relevant portion of the cross-examination of the petitioner no. 1 :

*"My Income Tax PAN No. is AEUPR1749H.
I have invested about Rs. 70,000/- in purchase of cable equipments.
I have purchased Dish Cable Wire. My son know all the details.
I do not have the receipts of purchase of cable equipments now but may be I can check if they are available in my house.
I do not know the name of the company from whom the cable equipments referred to above, were purchased but my son would know.*

(Attention of the witness is drawn to pages 75 to 82 of the Evidence folder)

The said documents were prepared on the basis of the formats obtained by me from cable companies.

All other channels that I had were free to air channels.

I have not placed on record any receipts raised by me on my subscribers.

I have placed on record the registration obtained by me from the Entertainment Tax Authority.

According to me, the most expensive item of cable purchased by me was the fiber optics cables."

"In the respondent no. 1 company, I negotiated with two gentlemen by the names of Mr. Ashok and Mr. Annamalai.

I do not know their designations.

I caused three DDs to be obtained aggregating in all to a sum of Rs. 12,27,084/- based on the instructions from respondent no. 1 company.

I did not receive these instructions in writing.

I received these instructions orally from the representatives of the respondent no. 1 company.

A person name Mr. Ashok visited me and I hand delivered the letter dated 29.11.2004."

Therefore, the petitioners are not entitled for any relief with regard to the supply of signals by respondent no. 1 and 2.

The respondent no. 2 does not deny and dispute that the said Shri Ashok and Shri Annamalai were its employees.

In a case of this nature, to our opinion, the contention of Mr. Ganpathy that the petitioner here not made a formal request to it for supply of signals, is not entitled to any relief cannot be accepted as a proposition of law.

A formal request in writing is required to be taken into consideration where the distributor of TV services intends to enforce its rights under clause 3.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (as amended from time to time).

The parties hereto in a situation of this nature must be bound by the contract having regard to the fact that where a representation was made that it would supply signals of its channels of the respondent no. 2, in the event, it pays the requisite amount. The said representation having been acted upon by the petitioner, by way of payment to the distributor of signals of respondent no. 2, it was bound by its representation through its agents and / or servants.

18. However, we have no doubt to say that the petitioners have paid the amount and the respondents have received the said amount. Therefore, the petitioners are entitled for the refund of their amount received by the respondent no. 2.

The respondent no. 1 acknowledges the receipt of Rs. 10 lakhs. It was for it to show as to on whose behalf the said amount had been received. It could have been shown by the respondent no. 2 that the amount was received by it not on account of petitioner but somebody else.

It is, therefore, jointly or severally bound to repay the amount of Rs. 10 lakhs to the petitioner.

19. We have no hesitation to place on record that the conduct of the respondent no.2, although a reputed company cannot be appreciated to say the least. It should have returned the amount of petitioners at the initial stage itself instead of making them to suffer for more that 7 years.

20. Accordingly, we allow the petition partially with cost. The respondents no. 1 and 2 are jointly and severally liable to refund a sum of Rs. 10,00,000/- to the petitioners.

For the rest of the amount received by the respondent no. 2 through its servants, it is liable to refund the amount to the petitioners. The respondents shall return the entire principal amount alongwith the interest @ 9%

compounded at annual rest from the date of receipt till the date of payment including the period pendente lite.

The cost is quantified as Rs. 1,00,000/- against respondent no. 2 and Rs. 50,000/- against the respondent no. 1.

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

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(P.K. Rastogi)
Member

/NC/