

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : February 15, 2012

Petition No. 329(C) of 2011

M/s Manthan Broadband Services Pvt. Ltd. ...Petitioner

Vs.

Unit One Cable TV Network ...Respondent

BEFORE:

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

For Petitioner : Mr.Tushar Singh, Advocate for Mr. Navin
Chawla, Advocate

For Respondent : Mr.Jayant Kumar Mehta & Mr.Nasir
Husain, Advocates

J U D G M E N T

Petitioner is a Multi Service Operator. Respondent is a Local
Cable Operator.

2. Admittedly the parties hereto entered into an agreement on or about 2.4.2006 for a period of one year i.e. upto 31.3.2007. Despite expiry of the said agreement, however, the relationship between the parties admittedly continued; pursuant where to or in furtherance where of, the Respondent continued to receive supply of signals of the channels of various broadcasters from the Petitioner's network.

3. Respondent had been paying the stipulated monthly subscription fee in terms of the agreement as would appear from the statement of account filed by the Petitioner for the period April, 2008 and July, 2010.

4. This petition for recovery of a sum of Rs.9,04,248/- has been filed by the Petitioner, inter alia, on the premise that the Respondent **for the period 1.8.2010 and 31.7.2011** has failed and/or neglected to pay the due amount of subscription fee.

5. The contention of the Respondent, on the other hand, is that with effect from 1.10.2010, it had migrated to the network of another MSO, known as Kolkata Cable and Broadband Pariseva Ltd.

6. According to the Respondent by a notice purported to be under Clause 4.2 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 (13 of 2004) as amended from time to time (The Regulations) it had expressed its intention to shift to another MSO, wherefor a public notice in terms of Clause 4.3 of the Regulations had been published in Times of India on or about 9.10.2010.

7. Petitioner contends that the said purported notice dated 29.9.2010 had not been received by it and in any event the Respondent having not complied with the imperative provisions contained in Clauses 4.2 and 4.3 of the Regulations, it is entitled to the stipulated amount of subscription fee for the entire period, as it continued to supply signals of its channels.

8. The core question which arises for our consideration in this petition is as to whether migration of the Respondent to the network of another MSO is valid in law.

9. Before, however, the said question is adverted to, we may notice some correspondences exchanged between the parties herein.

10. On or about 29.9.2010 the Respondent, inter alia, on the premise that the Petitioner was guilty of supply of poor quality of

signals and rendition of bad services, issued the aforementioned notice, stating:

"Due to some unavoidable circumstances, we are not able to carry your signal w.e.f. October 01, 2010. It will not be irrelevant to mention here that we have already communicated verbally with your executive for discontinuation of your service. However, please accept our written formal request for the same and do the needful.

Please treat this letter as a disconnection notice after 21-days as per the provisions of Clause 4.2 & 4.3 of September 2006 for poor quality of signal and bad services."

11. In support of proof of service with regard to the said notice, the Respondent has annexed the receipt of the postal department, from a perusal whereof it appears that the same was sent on 4.10.2010. Petitioner apart from denying the receipt of the said notice inter alia contended that the said postal receipt was obtained by the Respondent probably in respect of some other letter.

Although the said purported notice dated 29.9.2010 was sent on 4.10.2010, by reason of a letter dated 1.10.2010 the Respondent stated as under:

"Reference to our letter dated September 29, 2010, please send us the detail statement of our

accounts till September' 10 and send us the current invoice as well.

We would be highly oblige (sic) if your please do the needful at the earliest."

12. By its letter dated 6.10.2010 the Respondent stated:

"We have dispatched one letter asking for statement of our account along with the bills which you have not delivered us since last few months. But the said registered letter has been refused by you for the reason best known to you only.

However, we are, once again, sending this letter with a request to kindly do the needful at the earliest so that your payment is remitted soon."

13. Yet again on 18.10.2010 by reason of a letter which was sent under registered post with acknowledgement due, under certificate of posting as well as under DTDC courier, it was stated:

"With reference to our letter dated September 29, 2010 for request of withdrawal of your services for the reason stated in the said letter and our subsequent letter dated October 01, 2010 for request of submission of our Statement of Account and the pending invoices with was refused by you.

We have also registered our request for the same vide our letter dispatched on 12.10.2010 through under certificate of posting which has become unanswered till date."

Petitioner does not deny or dispute the receipt of the said letters dated 1.10.2010, 6.10.2010 and 18.10.2010.

14. By reason of its letter dated 3.11.2010 the Petitioner, however, contended:

"We are in receipt of your letter dated 1st October, 2010; 6th October, 2010 and 18th October, 2010 wherein we deny your allegations mentioned therein and would like to point out as follows:

- The outstanding stands as on date Rs.301,416.00 (Rupees Three lacs One thousand Four hundred and Sixteen only) as at 01.11.2010 @Rs.75,354.00 (Rupees Seventy Five thousand Three hundred and fifty four only) for 4 months till November, 2010. The huge outstanding clearly proves the point that your good self has been regularly defaulting in your commitment. The Invoices supporting the same which are being provided.
- We strongly refute your allegations that we had refused any receipt of any courier as mentioned, from your end.
- Finally we would like to bring to your kind attention that we have not received any correspondences regarding the withdrawal of our services by your good self. We would like to mention that in any case of transference of receiving service from any MSO to another, a public notification is required to be served at least 21 days before the same can be done as per the TRAI regulations.

We request you to clear our dues on an immediate basis as we had been requesting your good selves in the past and in particular vide our letter dated 6th

October, 2010. In case of non-adherence, we would be left with no other option but to take legal recourse in collecting our dues.”

Service of the said letter on the Respondent is not in dispute.

15. Respondent served a legal notice through its advocate on the Petitioner on or about 22.11.2010 wherein it was alleged that it had `switched over their signals to the other MSO with effect from 1.10.2010'. It was furthermore disclosed that the Respondent had `also given a paper notification as per TRAI Regulations'. The reason for migration was said to be `raising of exorbitant bills without any rhyme or reason' on the part of the Petitioner.

16. Petitioner, however, by its letter dated 9.12.2010 drew the attention of the Respondent to the Explanation appended to Clause 3.2 of the Regulations, contending that apart from the fact that it had not received any communication from it as regards withdrawal of its services and, thus, the purported act of migration was also contrary to the TRAI Regulations. The receipt of the said letter, however is denied.

17. By another letter dated 15.5.2011 the Petitioner raised a contention that it had not disconnected the signals from its end. A

reminder was sent to the Respondent to pay the outstanding amount on 31.5.2011.

Petitioner also issued a public notice on or about 3.6.2011. A letter was also issued on 3.6.2011 by the Petitioner to the said Kolkata Cable and Broadband Pariseva Ltd. asking it not to connect the operator till it provides a 'no objection certificate from its side'.

18. This petition has been filed on or about 12.8.2011.

In the petition it has, inter alia, been averred that that the Respondent in fact did not move to any other MSO and continued to take supply of signals from the network of the Petitioner.

It was furthermore contended:

"16. That thereafter, the Respondent contacted the Petitioner and expressed his desire to continue the relationship. The Respondent further informed the Petitioner that it was facing financial difficulty and would clear the dues in due course. As at one point of time, the proprietor of the Respondent, Mr. Swapan Chowdhury was in fact a director in the Petitioner Company itself. the Petitioner agreed to such request to grant extension of time to the Respondent to make such payment. The Petitioner continued to issue regular invoices to the Respondent, which were again hand delivered to the Petitioner."

19. According to the Petitioner as in April-May, 2011 having regard to the fact that the Respondent again threatened to shift to some other MSO, this petition was filed.

Respondent in its reply would contend that it had no other option but to shift to the network of another MSO owing to supply of bad quality of signals by the Petitioner and, thus, it was liable only to pay the subscription fee only upto 30.9.2010.

However, according to it, in view of the supply of bad quality of signals by the Petitioner, it is also not liable to pay the subscription fee for the said months.

20. In view of the rival contentions of the parties, by an order dated 10.10.2011, the following issues were framed:

- i) "Whether the Petitioner is entitled to a sum of Rs.9,04,238/- as prayed for in the petition ?
- ii) Whether the Respondent's case that it had migrated from the Petitioner's network is correct?
- iii) To what relief, if any, the Petitioner is entitled to?"

21. Petitioner examined one of its Assistant Sales Manager, Shiladitya Ghosh in support of its contention.

Respondent examined Swapan Chaudhary, its proprietor.

We may notice that Mr. Ghosh in his affidavit reiterated the contentions raised in the petition.

Mr. Chaudhary, proprietor of the Respondent in his affidavit, inter alia, stated as under:

"13. I state that the Respondent did not receive any letter dated 15.5.2011 from the Petitioner and has been fabricated to somehow support a patently false case filed by the Petitioner. The letter dated 15/05/2011 and even the subsequent letter dated 31/05/2011 and 03/06/2011 are wholly misconceived and denied."

22. We may at the outset notice certain provisions of the Regulations to which our attention has been drawn.

"3.3 Explanation:

Any claim for arrears should be accompanied by proof of service of invoices for the period to which the arrears pertain."

.....

4.2 & 4.3 Explanation

1. In case the notice is published in two newspapers on different dates then the period of three weeks shall start from the latter of the two dates.

2. Broadcaster/ multi system operator/ distributor of TV channels may also inform the consumers through scrolls on the concerned channel(s). However, issue of notice in newspaper shall be compulsory."

23. We will proceed on the basis that the purported notice dated 29.9.2010 was sent to a correct address. The receipt thereof, however, having been denied and disputed, it was obligatory on the part of the Respondent to prove as to whether the same had been tendered to the postal authorities and what happened to the acknowledgement due.

24. The Petitioner's witness having denied the receipt of the said notice in his evidence, the onus of proof shifted to the Respondent. [See Mahesh Channel vs. Star Den, Petition No.152(C) of 2009 disposed of on 18.4.2011]

There are certain circumstantial evidences surrounding issuance and service of the said notice which may also be considered.

If the purported notice dated 29.9.2010 was sent under registered post on 4.10.2010, we fail to see any reason as to how reference thereof could be made by the Respondent in its letter dated 1.10.2010. The said letter dated 1.10.2010 was sent under certificate of posting.

25. The letter of the Respondent dated 6.10.2010, however, states about a registered letter which is said to have been refused to be accepted by the Petitioner. It is difficult to conceive as to how the

Respondent, if it intended to refer to the letter dated 29.9.2010 could come to know about the purported refusal thereof by the Petitioner as early as on 6.10.2010.

26. Mr. Chaudhary in his evidence does not state that despite the Petitioner's denial of receipt of the said letter, the Respondent had made any inquiry with the postal authorities as to whether the said letter dated 29.9.2010 was served upon Petitioner or not.

27. This Tribunal in Petition No.396(C) of 2011 Eswara Communications (S Channel) vs. Sun Network disposed of on 21.10.2011 opined that whether a service by reason of presumptive evidence in terms of Section 114 of Indian Evidence Act has been effected or not would depend upon the facts and circumstances of each case. [See also Samitri Devi & Anr. vs. Sampuran Singh & Anr reported in (2011) 3 SCC 556.]

28. If the said notice was not served, it was for the Respondent to prove the same as onus of proof shifted to it. If the Petitioner is correct in its contention that w.e.f 1.10.2010 it had shifted to another network, it defies any logic as to why by its letter dated 1:10.2010 it had sought for the current invoice meaning thereby the one for the month of October, 2010 as well.

29. Moreover the letter dated 1.10.2010 does not contain any reason. The letter of the Respondent dated 6.10.2010 also does not mention about the notice purported to have been issued under Clause 4.2 of the Regulations. The said fact was mentioned by the Respondent in its letter dated 18.10.2010. Respondent's Advocate by its notice dated 22.11.2010 disclosed the reasons for disconnection to be 'exorbitant bills'; whereas the Respondent itself in its reply as also in the public notice dated 9.10.2010 stated the reasons therefor to be supply of poor quality of signals and bad services. The public notice under Clause 4.3 of the Regulations was not published in two newspapers, although the Regulations require so.

30. Mr. Mehta would contend that as the Petitioner came to know of the intention of the Respondent to migrate to another MSO at least on 1.10.2010 as also from the public notice dated 9.10.2010, it may only be held to be entitled to the subscription fee for the month of October, 2010 also.

In *Hathway Bhawani Cabletel & Datacom Ltd. v. Swastik Cable*, Petition No. 5(C) of 2008 disposed of on 18.12.2009, it was held as under:

"14. The Respondent not only in its pleadings but also through its proprietor Shri Vinod T. Patil

categorically denied and disputed receipt of those invoices. It is true that a presumption in terms of Section 114 of the Evidence Act may be raised in favour of the Petitioner as it has been brought on record that the invoices have been sent through courier services and/or under registered cover acknowledgment due to the Respondent. But the Respondent not only has affirmed on oath but also having categorically stated that it has not received the said invoices; the onus placed on him was discharged. It is now a well settled principle of law that onus upon a person in regard to non-receipt of a letter may be discharge by making a mere statement that he had not received. The burden of proof, thereafter, shifts on the Petitioner to prove the endorsement of refusal of examining the person who had tendered the same to the addressee. In Sarkar's Law of Evidence (Sixteenth Edition 2006) Vol.2, page 1586, it is stated:-

"A Party Asserting the Affirmative Must Prove it.
- It has been stated earlier that the ordinary rule is that the burden is upon the person making the affirmative allegation. Onus of proof is not discharged by showing facts consistent with the case of both parties [Gopinath v. Ajharrul, A 1927 P225]."

31. Mr. Tushar Singh, however, submitted that keeping in view the language used by the Regulator in framing Clauses 4.2 and 4.3 of the Regulations, the notice was required to be issued before actual migration was effected and not thereafter. The said contention may not be correct.

32. In a case of this nature, however, the effect of the non-compliance of a regulatory provisions must be considered having regard to the facts and circumstance of each case.

33. Respondent although denied and disputed receipt of the letters issued by the Petitioner, Mr. Swapan Chaudhary (RW 1) in his cross-examination, however, accepted the same, stating:

"Q: In your affidavit you have stated that you did not receive any letters dated 15.5.2011, 31.5.2011 from the Petitioner and the same have been fabricated to somehow support a patently false case filed by the Petitioner. Whereas today you have stated that you do not recall receiving any such letters. Which of your statement is correct?

A: After going through your documents, I got to know that I received the same. Again said-Statement on the affidavit is correct."

34. We may furthermore notice that the said witness as regards requirements of the Regulations stated as under:

"Q: What are the requirements of Inter Connect Regulations 2004 as mentioned by you in para 2 of your affidavit?

A: As per my knowledge, according to the Regulations, disconnection can take place only on issuance of a disconnection notice as well as a public notice.

It is correct to state that before migrating to some other MSO, a cable operator has to issue a disconnection notice as well as a public notice.

(Attention of the witness is drawn to para 3 of his affidavit)

No such request was made in writing. Only verbal request was made.

Because of the understanding between the parties, no communication was made in writing."

35. As regards the reason for migration namely supply of poor quality of signals, Mr.Swapan Chaudhary stated that there had been no record of any complaint from the customers as they were being made telephonically.

According to him he had forwarded a complaint in writing to the Petitioner but it refused to accept the same. However, no such case had been made out in the reply nor any document in that behalf has been produced. The said contention, thus, also cannot be accepted.

36. We may, however, take note of the fact that after the letter dated 9.12.2010 wherein a statement has been made that supply of signals had been continuing, there was a lull from the side the Petitioner for a period of about five and half months.

37. We have noticed heretofore that the Petitioner has made out a case that the Respondent approached it to continue to receive supply of signals of its channels and had also been assuring it to make payments of its dues.

No such case, however, has been made out in the correspondences including the letters dated 15.5.2011 and 31.5.2011.

38. Moreover as indicated heretofore the Petitioner itself had published a public notice on 3.6.2011.

39. The parties hereto for reasons best known to them had not filed all documents in their power and possession.

40. Mr. Ghosh in his cross-examination categorically stated that no record had been produced to show that the Petitioner communicated to any Broadcaster that the Respondent had continued to remain one of its cable operators after October, 2010. As regards receipt of supply of signals from Kolkata Cable and Broadband Pariseva Ltd, he stated:

"I am not aware that as to whether the Respondent is taking signals from Kolkata Cable and Broadband Pariseva ltd. on and from 1.10.2010.

Volunteers: As per my knowledge, our signals continued."

He, therefore, did not deny the same.

41. Similarly the Respondent also could have proved the payments made out to Kolkata Cable and Broadband Pariseva Ltd. from 1.10.2009. It for reasons best known to it did not do so.

42. Mr. Mehta submitted that having regard to the Explanation appended to Clause 3.3 of the Regulations, it was obligatory on the part of the Petitioner to prove service of invoices. Clause 3.3 provides for issuance of monthly invoices.

The Explanation appended thereto, however, is not decisive as it has not been couched in imperative terms.

43. Regulations being only a law within the meaning of Article 13 of the Constitution of India and assuming it to be a subordinate legislation, it cannot override the provisions of a Parliamentary Act.

44. If otherwise a contract between the parties is established, recipient of a benefit thereunder cannot refuse to restore the same to the supplier thereof.

In *Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.*, (2011) 10 SCC 420, at page 431, it is noticed as under:

"33. In *R.N. Gosain v. Yashpal Dhir*¹¹ this Court has observed as under: (SCC pp.687-88, para 10)

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide Nagubai Ammal v. B. Shama Rao¹², CIT v. V.MR.P. Firm Muar¹³, Maharashtra SRTC v. Balwant Regular Motor Service¹⁴, P.R. Deshpande v. Maruti Balaram Haibatti¹⁵, Babu Ram v. Indra Pal Singh¹⁶, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors¹⁷, Ramesh Chandra Sankla v. Vikram Cement¹⁸ and Pradeep Oil Corpn. v. MCD¹⁹.)"

[See Petition No.307(C) of 2011 Jak Communications Private Ltd. vs. Star Den Media Services Pvt. Ltd. & Anr. disposed of on 18.1.2012]

45. As far as service of invoices upto the period upto August, 2010 is concerned, keeping in view the fact that the Respondent had been making the exact payments to the Petitioner, we have no doubt that it had been receiving the invoices.

46. So far as the service of invoices after September, 2010 is concerned; from a perusal of the Petitioner's letter dated 3.11.2010, it would appear that the invoices supporting its claim as on 1.11.2010 being for a sum of Rs.75,354/- for four months had been annexed therewith.

47. In the facts and circumstances of this case, we are of the opinion that the interest of justice would be subserved if while granting a decree for the stipulated subscription fee for the period August-October, 2010, the Petitioner is allowed damages quantified at one month's subscription fee. Interest, past, pendent lite and future @ 9% is allowed on the principal amount.

48. It is directed accordingly. This petition is allowed in part and to the aforementioned extent with costs. Advocate's fee assessed at Rs.20,000/-.



(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

February 15, 2012
'anu'