

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 15TH FEBRUARY, 2012

Petition No.149 (C) of 2011

UCN Cable Network Pvt. Ltd.	...	Petitioner
Vs.		
Nagpur Entertainment News Network	...	Respondent

BEFORE:

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

For Petitioner	:	Mr. Atul Pande, Advocate
For Respondent	:	Mr. Jayant K. Mehta, Advocate Mr. Nasir Husain, Advocate

J U D G E M E N T

This petition has been filed by a Multi Service Operator for recovery of a sum of Rs.61,37,634/- from the Respondent herein, which is a Local Cable Operator, towards the outstanding subscription fee for the period 14.03.2008 to 31.7.2009 and 01.8.2009 to 01.11.2011. This petition has been filed on 14.03.2011.

The relationship between the parties is not denied or disputed.

2. The parties, however, for one reason or the other have not entered into an agreement in writing.

Petitioner allegedly had been supplying signals to the Respondent purported to be on a subscriber base of 550 at the rate of Rs.225/- per month per subscriber.

3. The network in question admittedly was being managed by one Mr. Damodaran.

With effect from 01.4.2004, it was taken over by Mrs. Aneeta P. Patel.

The terms & conditions for supply of signals of the channels, which the Petitioner operated as a Multi Service Operator, continued also with Mrs. Patel.

4. Respondent herein does not deny or dispute that it had been taking supply of signals from the Petitioner. It, however, contends that on and from 01.8.2009, it had been taking supply of signals from another Multi Service Operator, GTPL.

It has further been contended that the Petitioner has never served any invoice upon it and it is not correct to contend that the Respondent's subscriber base was 550 or the rate fixed therefor was Rs.225/- per month.

5. We would consider the pleadings of the parties at an appropriate stage.

6. The issues framed by this Tribunal, however, may be noticed :-

- “i) Whether the petitioner proves that the respondent had disconnected itself from its network in violation of Regulation 4 of the Interconnection Regulations, 2004?*
- ii) Whether the petitioner proves that any amount is due, outstanding and payable by the respondent to it towards subscription of signals? If so, what amount and for what period?*
- iii) Whether the petitioner proves that it had an agreement with the respondent for 550 connections at rs.225/- per subscriber?
If so, the effect thereof?
If not, what was the agreement between the parties regarding subscription of signals by the respondent?*
- iv) Whether the petitioner had served upon the respondent the monthly invoices for subscription charges?*
- v) Whether the claim of the petitioner for Rs.61,37,634/- is barred by limitation?*
- vi) When did the respondent migrate from the petitioner’s network?”*

7. In support of their respective cases, the Petitioner has examined its Director, Mr. Ajay Khamankar; whereas the Respondent has examined its proprietress Mrs. Aneeta P. Patel besides an officer of GTPL.

8. Mr. Atul Pande, learned counsel appearing on behalf of the Petitioner would contend :-

- (a) Having regard to the material brought on record, the Petitioner must be held to have proved its case in view of the clear and explicit admissions made by RW-1 in her cross-examination;
- (b) Respondent clearly admitted the number of connections, as would appear from its own documents submitted to the Entertainment Tax Department;
- (c) Respondent also admitted the fact that it migrated to the network of GTPL without issuance of any notice as contemplated under Clause 4.2 as also a Public Notice in terms of Clause 4.3 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004, as amended from time to time ("The Regulations").

9. Mr. Jayant Mehta, learned counsel appearing on behalf of the Respondent, on the other hand, urged :-

- (i) There is nothing on record to show that the number of subscribers of the Respondent had all along been 550 or the rate therefor was fixed at Rs.225/- per month per subscriber;
- (ii) Even assuming that the same was correct, the Respondent was to pay only a sum of Rs.1,23,750/- per month to the Petitioner; whereas from the purported invoice filed by it for the month of July 2008, it would appear that the same was drawn for a sum of Rs.1,22,062/-;
- (iii) Petitioner in its rejoinder has not denied or disputed that the subscription fees payable was Rs.150/- per month per subscriber, nor the Respondent's witness was cross-examined in that behalf and, thus, this Petition is liable to be dismissed;
- (iv) Respondent having filed a statement of accounts along with the Bank statement, it has been established that in fact, it has made over-payments to the extent of Rs.2,630/-;
- (v) The amount payable by it to the Petitioner having specifically been stated in para 8 of RW-1's affidavit, and she having not

been cross-examined on that question at all and, thus, the Petitioner cannot be said to have proved its case;

- (vi) From the evidence of PW-1, it would be evident that he had not only no knowledge about the accounts of the Petitioner company, but also expressed his ignorance as regards the amount due from the Respondent and, thus, his evidence does not inspire confidence.

Moreover, it has been accepted that the ledger statement has also not been filed.

10. We may, at the outset, notice that on a query made by us as to why a part of claim of the Petitioner should not be held to be barred under the law of Limitation, Mr. Pande gave up the claim for the period prior to 30th March, 2008.

According to the Petitioner, Respondent had been making short payments for the period 31.03.2008 and 28.07.2009, as a result whereof it became entitled to a sum of Rs.22,24,736/-, out of which the Respondent had paid only a sum of Rs.7.40 lacs, leaving an outstanding of a sum of Rs.14,84,736/-.

For the period 31.07.2009 to 01.11.2010, the Respondent admittedly having not paid any amount, Rs.23,63,782/- is owing and due from it.

11. Petitioner is a company registered and incorporated under the Indian Companies Act.

The Regulations were amended in the year 2009, in terms whereof inter alia Clause 4-A was inserted.

It reads as under :-

“4A. Interconnection Agreements to be in writing.

- 4A.1 It shall be mandatory for the broadcasters of pay channels and distributors of TV channels to reduce the terms and conditions of all their interconnection agreements to writing.*
- 4A.2 No broadcaster of pay channels or distributor of TV channels, such as multi system operator or headend in the sky operator, shall make available signals of TV channels to any distributor of TV channels without entering into a written interconnection agreement.*
- 4A.3 Nothing contained in regulations 4A.1 or 4A.2 shall apply to any supply of signals or continuance of supply of signals of TV channels by a broadcaster or distributor of TV channels, such as multi system operator or headend in the sky operator, in pursuance of or in compliance with any order or direction or judgment of any court or tribunal, including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or tribunal.*
- 4A.4 It shall be the responsibility of every broadcaster of pay channels who enters into an interconnection agreement with a distributor of TV channels to hand over a copy of signed interconnection agreement to such distributor of TV channels and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement and,*

similarly, it shall be the responsibility of every multi system operator or headend in the sky operator, as the case may be, who enters into an interconnection agreement with a cable operator to hand over a copy of signed interconnection agreement to such cable operator and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement.”

12 It is difficult to appreciate as to how despite the said clear provision in the Regulations, parties had been continuing to transact businesses on the basis of an oral agreement only.

Be that as it may, the Petitioner contended that rate for supply of signal was Rs.225/- per month, as would appear from para 8 of the petition, however, from a letter dated 27.12.2010, it would appear that the Petitioner had allegedly been charging Rs.150/- per connection for 520 connections per month. Petitioner, therefore, must be held to have not proved the rate of subscription fee was Rs.225/- per month per subscriber.

13. Before us, a large number of documents have been produced to show that although the Respondent had been paying Entertainment Tax and/or the subscription charges on the basis of 520 customers, but there are also documents to show being dated 19.5.2004, 14.12.2007, 04.12.2007, 27.5.2008

and the affidavits wherein the Petitioner had disclosed varying customer base. The said assertion of the Respondent has not been traversed by the Petitioner neither in its rejoinder nor any question was put in that behalf to RW in her cross-examination. We, however, as has been noticed heretobefore, are concerned only with the demand of the Petitioner for the period 31.3.2008 to 28.7.2009.

14. So far as the number of subscribers is concerned, the Petitioner principally relies upon the purported admissions of the RW-1 in her cross-examination, the relevant portions whereof read as under :-

“It is correct that initially the respondent was owned by Mr. Damodaran.

I have no idea that what were the terms and conditions between Mr. Damodaran and the petitioner and whether there were any oral agreements between them.

It is correct that on 1.4.2004, I have taken over the respondent from Mr. Damodaran and started taking feed from the petitioner company.

It is correct that there was no written agreement between the petitioner and the respondent, after I took over the respondent and there was oral agreement between the parties.

It is correct that there were certain verbally agreed terms and conditions between the petitioner and the respondent after 1.4.2004.“

15. We may notice the relevant documents.

Petitioner has relied upon a list of cable operators for the year 2011-12 maintained by the Collector, Nagpur for the purpose of payment of Entertainment Tax. The same has been attested to be a true copy on 20.01.2011. It is difficult to conceive as to how a document attested on 20.01.2011 could correctly show a list of cable operators for the year 2011-2012.

It, furthermore, appears that the Respondent by a letter dated 27.5.2008 stated as under :-

“We are paying UCN (Universal Cable Network) based on 520 customers. But over the last one year around 220 customers have shifted to DTH. Hence our customer are now reduced to 300. We are herewith enclosing the list of customer who have shifted to DTH Services. This is the second time to submit this information and also in future we will submit the list of deduction in customer.

You are requested to deduct the invoice from further invoices based on our actual number of customers, so as to make the business viable.

P.S.-

This is also to inform the Affidavit letter is also submitted to the Entertainment Tax Dept. under Executive Magistrate-District Nagpur.”

16. A letter was written to the Petitioner on or about 07.5.2007, the relevant portion whereof reads as under :-

“With the introduction of DTH, the number of customers has substantially reduced over the past few months. Since the monthly charges are based on the number of customers, the monthly charges are required to be revised according to the customer base.

We have been paying our charges based on customer strength of 498. We have lost 125 customers as per list attached to DTH. The present position of our customer base is 373 customers. We are enclosing herewith the list of customer who have shifted to DTH. You are requested to accordingly revise on monthly charges o as to make the operations viable for us.

Also since the area of operations are defined we cannot extend our network without exploring newer areas of operations. Please advise us the mode to enhance the number of customers for mutual benefit.”

17. Along with the said letter, a list of subscribers was also annexed.

18. Yet again, a letter was written sometimes in April 2004. Petitioner contended that the number of customers had fallen from 545 to 498, stating :-

“The number of customers listed at the time were 545. However, when we started the actual administration of the network and began to collect customers’ dues we discovered that a number of customers had left the network and joined other networks. The actual number of customers in our network stands at 498.

As you may appreciate paying for an additional 47 customers who are not with us is not financially possible. I have enclosed a copy of my letter to U.C.N. informing them of the same. A list of customers who have left my network to join other networks are also included.

I would request you to deduct these customers from my billing and transfer their billing to the other networks that they have joined, so that I may clear my dues.”

19. Respondent had issued another letter on 04.04.2004 giving the details of the customers who had left its network and joined IN Cable as also those who had joined other networks.

20. Apart from the letter dated 27.5.2008 there is nothing on record to show that number of customers of the Respondent had constantly been 520.

21. However, we are concerned with the purported dues from April 2008 which Respondent had been contesting. Furthermore, there are other documents to show that the number of subscribers had been varying. There are enough documents to show that the number of subscribers of the Respondent had been varying from time to time.

22. We may, furthermore, notice that the Respondent in its reply stated as regards the amount payable to the Petitioner in the following terms :-

“4. It is submitted that another peculiar aspect of the present case is that the Respondent acknowledges that it has no written agreement with the Petitioner. The totality of the material on which it has approached this Hon’ble Tribunal are the invoices, its demands dated 23.11.2010 and 27.12.2010 and its statement of account. As aforesaid, the proof of dispatch or delivery of the invoices is not filed and the letters dated 23.11.2010 and 27.12.2010 and the statement of account lack any basis whatsoever and are in fact contradicted by the contents of the petition. The Petitioner’s statement of account shows that the last payment received by the Petitioner from the Respondent was on 28.7.2009.

A. It is submitted that the agreed monthly subscription charges between the petitioner and the respondent were as follows :-

- | | |
|---|-----------------------|
| <i>a). September 2005 to June 2006:</i> | <i>Rs. 1,05,000/-</i> |
| <i>b) July 2006 to June 2007:</i> | <i>Rs. 89,550/-</i> |
| <i>c) July 2007 to December 2007:</i> | <i>Rs. 65,000/-</i> |
| <i>d) January 2008 to July 2009:</i> | <i>Rs. 60,000/-</i> |

It is submitted that the Respondent, after making due payments to the Petitioner until July 2009 migrated to another MSO since the Petitioner was harassing the Respondent and trying to disturb its business.”

23. Petitioner, in its rejoinder, has not specifically denied or disputed the said statements.

We may, however, notice that it in para 4 has stated as under :-

“4. The reply to para 4 wrong, misconceived, misleading & hence denied & the contents of para 4 of the petition are reiterated & reaffirmed. It is submitted that according to the oral agreement between the Petitioner & Mr. Damodaran the subscription & service charges of the feed were calculated upon 550 connections. Thereafter, when the respondent concern was taken over by the present management on 01.04.2004, the new management also continued the feed of the petitioner company upon the same terms & conditions as agreed with Mr. Damodaran. It has been specifically agreed between Mr. Damodaran & the Petitioner Company that 550 connections would remain as the yardstick in calculating the subscription & service charges for present & future also & the respondent was liable to pay the subscription & service charges taking into consideration 550 connections irrespective of its increase or decrease. Therefore, it does not lie in the mouth of the Respondent to deny the whole veracity of the oral agreement.”

24. As indicated heretofore in her affidavit, RW-1 repeated the said allegations.

Petitioner, however, chose not to cross-examine the said witness on the said question.

It may, furthermore, be placed on record that the Respondent along with the reply annexed a tabular chart showing the amount paid by it to the Petitioner. Petitioner, in its rejoinder, did not deny the said payments received by it.

25. Keeping in view the aforementioned backdrop of events, we may notice the evidence of PW-1. Mr. Khamankar, in his cross-examination, stated as under :-

“Accounts of the petitioner are regularly audited. The accounts for the year 2009-2010 would also have been audited. I have seen the audited accounts of the petitioner for the year 2009-2010. I have not filed the audited accounts of the petitioner. The accounts of the petitioner are prepared on accrual basis. I will not be in a position to say as to whether the audited accounts for the year 2009-2010 contain any entry in respect of the respondent. “

26. The said witness accepts the fact that there is nothing on record to show that invoices, at any point of time, had been served upon the Respondent. The said witness furthermore admitted that accounts of the Petitioner had been audited, but the said audited statements have not been filed. It is contended by him that the understanding regarding 520 connections was an oral one and there is no document in that regard but evidently, a large number of documents as also affidavits have also been brought on record to show that the subscriber base was a variable one and not a fixed one. He furthermore admitted that he has no document to prove that the connectivity of the Respondent had all along been 550.

27. Attention of PW-1 was drawn to a large number of documents including the one dated 27.5.2008. The witness accepted that the said letters have not been replied to.

We may notice the statement made by him in this behalf :-

*“(Attention of the witness is drawn to page 114 of the paper book.)
We did not give any reply to this letter.*

*(Attention of the witness is drawn to page 119 of the paper book.)
I do not remember if we had replied to this letter.*

*(Attention of the witness is drawn to page 122 of the paper book.)
I do not remember if we had replied to this letter.*

*(Attention of the witness is drawn to page 123 of the paper book.)
I do not remember if we had replied to this letter.*

It is correct that the letter dated 27.5.2008 at page 114 of the paper book shows the connectivity of the petitioner to be 300.

The petitioner continued to bill the respondent at 550 connections between the period April 2004 to July 2009. It was never reduced. Vol. Even for the period from 2009 to 2010, we billed the petitioner at 550 connections.

It is incorrect to suggest that the connectivity of the petitioner was never 550.

*(Attention of the witness is drawn to para 4 of his affidavit.)
My reference to the understanding between petitioner and Mr. Damodaran for 550 connections was only oral. There is no document in this regard.”*

28. The said witness furthermore accepted that no demand for any arrear was made upon the Respondent prior to November 2010.

From the conspectus of the evidence brought on record, it is difficult to accept the contention of the Petitioner that the subscriber base of the Respondent had all along been 550 or that the Respondent had been raising invoices on that basis.

29. The question, which remains for our consideration, is as to whether the Petitioner continued to supply signals from August 2009 till November 2010. Respondent has examined one Mr. Dharmendra P. Rami, RW-1, who is an officer working with GTPL.

According to the said witness, the Respondent had entered into an agreement with the said company in terms whereof it had been taking supply of signals from it from August 2009.

Our attention, however, has been drawn to the fact that GTPL got its registered as an Operator only on 16.10.2009.

The said witness stated :-

“It is correct to say that the registration of GTPL was registered in the office of Senior Postmaster Nagpur, GPO, Nagpur on 16.10.2009 as MSO.

It is correct that no MSO is permitted to give its feed to any cable operator without registration with the authority.

Vol. We provided feed to the respondent from Chandrapur head-end where we were already registered.

I have not filed on record registration certificate of Chandrapur on the record. However, I can produce the same.”

30. No record has been produced before us to show that the signals were received by the new MSO of the Respondent from Chandrapur.

In absence of GTPL having any registration of a cable operator at Nagpur, the Respondent's claim of receiving supply of signals from other MSO prior to October, 2010 cannot be relied upon.

31. Moreover, the conduct of the parties must also be taken into consideration. During the aforementioned period, no notice was served on the Respondent for reasons best known to it. Petitioner did not make any demand till 20.11.2010. If the Respondent had been taking supply of signals from the Petitioner's network, there was no basis as to how it in its petition accepted that the Respondent migrated with effect from 27.12.2010.

32. We have noticed heretofore that demand on the Respondent was made only on 20.11.2010.

33. However, the Petitioner has relied upon a letter of an alleged subscriber being dated 22.11.2010 to contend that from the said letter only it came to learn that the Respondent had been obtaining signals of another MSO.

The author of the said letter has not been examined. The said letter has also not been legally proved.

34. Keeping in view the facts and circumstances including the material brought on record by the parties, we are of the opinion that the petitioner has made out a case only for recovery of subscription fee for three months i.e. August 2009 to October 2009. Petitioner is, therefore, entitled to a decree for a sum of Rs.1,80,000/- only.

The petition is allowed to the aforementioned extent. However, in the facts and circumstances of this case, there shall be no order as to costs.

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

.....
(P.K. Rastogi)
Member

rkc