

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 07TH MAY, 2012

Petition No.384 (C) of 2011

Wire & Wireless (India) Ltd.	...	Petitioner
Vs.		
Mahuaa Media Pvt. Ltd.	...	Respondent

BEFORE:

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

For Petitioner	:	Mr.Manikya Khanna, Advocate Mr. Tejveer Singh Bhatia, Advocate Mr. Upender Thakur, Advocate
For Respondent	:	Mr.Ayush Agrawal, Advocate

J U D G E M E N T

Petitioner is a Multi Service Operator having a Pan India presence.
Respondent herein is a Broadcaster of two channels – 'Mahuaa 'and 'Pragya'.

Parties hereto entered into a Channel Placement Agreement on or about 15.6.2010, the relevant clauses whereof read as under :-

“3. *DISTRIBUTION :*

In consideration of the covenants contained herein, MSO agree and undertake to retransmit and/or carry the Services of the CHANNEL on band tunable in all Color and black & white TV sets and channel position will be at PRAGYA (C-Band) MAHUA (P-BAND) in analogue transmission on the cable network of MSO. The said Channel shall also be available on the entire network in DIGITAL transmission also if the network is transmitting signals in DIGITAL mode. In case the same is not operational, the MSO agrees to transmit the same on the DIGITAL transmission whenever operational.

This agreement is valid for all WWIL networks on the cities of Kanpur, Allahabad, Varanasi only.

Note : Placement in Color band in WWIL for N/W for Pragya by mid October 2010.

5. *CHANNEL PLACEMENT CHARGES :*

For the carriage of the said CHANNEL, on the MSO's cable television network, MAHUA shall pay to MSO as Channel Placement Charges of Rs.55,00,000/- (Rupees Fifty Five Lacs Only) exclusive of all taxes. The said amount will be payable quarterly during the term of this Agreement.

a) Payment will be made by way of cheque drawn in favor of WIRE AND WIRELESS INDIA LTD.

b) All Payments will be made by the due date or within 30 days of receipt of invoice from MSO, whichever is later and

will be subject to deduction of applicable income tax at source. In the event MSO produces valid documentary evidence that no tax should be deducted prior to the date of deduction, then MAHUAA shall not deduct any tax at source.

c) The payment will be subject to compliance of clause 3 by MSO.

9. **WAIVER :**

No failure or delay on the part of any party hereto in exercising any power or right hereunder shall operate as a waiver thereof nor shall any single or partial exercise of such right or power preclude any other or further exercise of any other right or power hereunder.”

2. Pursuant to or in furtherance of the said agreement, the Petitioner allegedly placed ‘Mahuaa’ and ‘Pragya’ Channel on ‘P’ Band and ‘C’ Band respectively during the entire period except in respect of the ‘Pragya’ channel, so far as the town of Kanpur is concerned.

Admittedly, out of the consideration of Rs.55 lakhs, the Respondent has paid a sum of Rs.25,27,705/- by four cheques for the amount of Rs.5,05,541/- on 14.7.2010, Rs.10,11,082/- on 22.7.2010, Rs.5,04,541/- on 27.12.2010 and Rs.5,05,541/- on 02.02.2011 to the Petitioner.

3. This Petition has been filed for a decree for a sum of Rs.35,55,786/- on the premise that the Respondent, despite performance of contract on the part of the Petitioner, has failed and/or neglected to pay the amount of consideration.

Petitioner issued letters to the Respondent demanding the said amount inter alia on 05.07.2011 and 21.07.2011. It also issued a legal notice on or about 09.08.2011. Respondent in its reply, however, denied and disputed its liability to pay the said demanded amount inter-alia contending that the Petitioner has acted in violation of the said agreement.

It, furthermore, stated :-

“The Respondent herein has on several occasions raised serious objections and brought it to the notice of the Petitioner MSO that the channels were not being carried by it on the desired frequency. Unfortunately, one Mr. Praveer Gaur, who was the Head (Distribution and Syndication), Mahua Media (who has since been relieved of his post), for ulterior reasons of his own and in collusion with the Petitioner MSO has destroyed all the data base including the various e-mails and letters sent by the Respondent to the Petitioner channel.”

4. Respondent with its Reply to the petition filed a counter claim for a sum of Rs.22 lakhs claiming damages.

Petitioner has filed a rejoinder to the said Reply annexing therewith a Channel Placement Mapping including a purported summary thereof.

5. Keeping in view the rival contentions of the parties, by an order dated 09.12.2011, the following issues were framed :-

- “i) Whether the petitioner is entitled to a decree for a sum of Rs.35,55,786/- with 12% interest?*
- ii) Whether the Petitioner is guilty of violation of the Placement Agreement in so far as the channel of the Respondent had not been placed in the stipulated frequency?*
- iii) Whether the Respondent is entitled to a sum of Rs.22 lakhs by way of damages from the Petitioner for breach of conditions of Placement Agreement?”*

6. In support of its case, the Petitioner examined Shri Sanjay Arya, Vice President (Technical), Shri Anil Jain, Assistant General Manager (Finance & Accounts) and Shri V. Suresh Kumar.

Respondent, however, did not examine any witness.

7. The core question, which arises for consideration, is as to whether the Petitioner performed its part of contract or otherwise is entitled to any amount by way of placement charges from the Respondent herein.

Placement of a channel, it is stated, is important for a Broadcaster for supplying better quality of signals in respect of its products. Channels are placed in the better frequencies so as to achieve higher viewership, particularly in TAM towns for earning higher revenue by way of advertisement. In view of the limited nature of dispute, it is not necessary for us to notice the deposition of PW-2 and PW-3. Suffice it to say that although the Petitioner in terms of the agreement as also in its letters of demand as well as averments made proceeded on the basis that it had agreed that 'Pragya' channel was to be placed on 'C' Band and 'Mahuaa' channel on 'P' Band, Shri Sanjay Arya in its cross-examination candidly admitted that the same has not been done.

We may, for the aforementioned purpose, notice the following questions and answers :-

“(Attention of the witness is drawn to page 77 of the paper book.)

Q.3: Is Mahuaa channel on P-Band?

A: No.

(Attention of the witness is drawn to page 78 of the paper book.)

Q.4: Is Mahuaa channel on P-Band?

A: No.

Q.5: Would I be correct in saying that this channel S-24, Frequency 327.25 is not P-Band?

A: Yes.

(Attention of the witness is drawn to page 94 of the paper book.)

Q.6: Is Pragya channel on C-Band?

A: No.

(Attention of the witness is drawn to page 95 of the paper book.)

Q.7: Is Pragya channel on C-Band?

A: No.

Q.8: Would I be correct in saying that channel no. S-20 and frequency 294.25 is not C-Band?

A: Yes.

Q.11: Would I be correct in saying that channel no. S-12, frequency 238.25 is not C-Band?

A: Yes.

(Attention of the witness is drawn to page 140 of the paper book.)

Q.12: Is Pragya channel on C-Band?

A: No.

Q.14: Would I be correct in saying that channel no. U-51, frequency 711.25 is not C-Band?

A: Yes.

(Attention of the witness is drawn to page 143 of the paper book.)

Q.15: Is Pragya channel on C-Band?

A: No.

Q.17: Would I be correct in saying that channel no. S-39, frequency 447.25 is not C-Band?

A: Yes.”

These questions and answers are illustrative in nature.

8. Mr. Thakur, learned counsel appearing on behalf of the Petitioner would submit :-

- (i) Respondent, despite service of the invoices having never protested with regard to the correctness thereof nor having replied to any of the letters demanding the balance amount, it must have sub-silentio accepted the same;
- (ii) Respondent's representative even having visited the headends of the Petitioner and no questions having been raised as regards the quality of the supply of signals , he must be held to have satisfied himself;
- (iii) In any event, the Respondent having not adduced any evidence, whatsoever, to prove breach of contract on the part of the Petitioner must be held to have admitted that it has performed its part of contract.

9. Mr. Ayush Agrawal, learned counsel appearing for the Respondent, on the other hand, urged :-

- (i) From the materials brought on record by the Petitioner and in particular, the cross-examination of Mr. Sanjay Arya, it is

evident that the Petitioner has violated the terms of the contract and in that view of the matter it is not entitled to recovery of a sum of Rs.35,55,786/-;

- (ii) A bare perusal of the agreement would clearly go to show that the Petitioner was contractually obligated to place the channels of the Respondent in the desired frequencies, subject of-course to an exception that it was otherwise mandated by any statute etc. for compulsory carriage of TV channel or by any other instruction issued by the Government, for which also advance notice of seven days was mandatorily required to be served;
- (iii) The purported placement channel mapping having not correctly been reflected in the summary, no reliance can be placed thereupon as would appear from various pages of the Paper Book;
- (iv) It is not a case where payments could be made on a pro-rata basis or in terms of the provision of Section 70 of the Indian Contract Act; placement of channel in the specified frequency on a continuous basis being the *sine qua non* thereof;

10. The agreement entered into by and between the parties being in writing, no parole evidence is admissible in regard thereto; the terms thereof being clear and unambiguous.

11. It is, therefore, difficult to agree with Mr. Thakur that the agreement should be read in a manner so as to arrive at a conclusion that placement of 'Pragya' channel would be in 'C' band and that of 'Mahuaa' channel in 'P' Band and/or the bands which are near the same.

The agreement dated 15.6.2010 has been given a retrospective effect on and from 15.5.2010. It was valid till 14.5.2011.

The amount, which was appended to para 1 of clause 3 of the agreement makes an exception to the placement of channel at 'C' band and 'P' band respectively in respect of 'Pragya' and 'Mahuaa' channels for the town of Kanpur only. In respect of 'Pragya' channel, it was permitted upto middle of October, 2010.

Petitioner having categorically pleaded that it has performed its part of contract in terms of the agreement, in our opinion, cannot be heard to say that it was not contractually or otherwise obligated to place 'Pragya' channel in 'C' band and 'Mahuaa' channel in 'P' band. We, therefore, reject the said contention.

12. Moreover, in terms of the said agreement itself, payment of the agreed amount of Rs.55 lakhs was subject to compliance of clause 3 by the Petitioner. The doctrine of 'acceptance sub-silentio' in a case of this nature would not be attracted as a formation of contract can be inferred only when a silence on the part of the offeree is coupled with his conduct, which takes the form of a positive act.

(See Bharat Petroleum Corporation vs. Great Eastern Shipping Co. Ltd. (2008) 1 SCC 503 para 19).

13. When in a case of this nature, as the parties are governed by the terms of the contract, the question of applying the sub-silentio doctrine does not arise, particularly in view of the fact that Shri Sanjay Arya in his cross examination categorically admitted that the Petitioner has deviated from its promise on many occasions.

Moreover, nothing has been brought on record as to how the term of the contract has been performed.

14. Similarly, not raising of a protest to the demand by reason of invoices by itself would not lead to a conclusion that the Respondent had accepted that its channels have been placed on the specified bands.

It stands admitted in this case that the Petitioner has failed and/or neglected to perform its part of contract in its entirety. In that view of the matter, the question of admitting the Petitioner's claim by the Respondent does and cannot arise.

15. Mr. Agrawal would contend that in a case of this nature, Section 52 of the Indian Contract Act would apply.

The said provision reads thus :-

“52. Order of performance of reciprocal promises.

Order of performance of reciprocal promises.- Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.”

16. In the fact situation obtaining in the present case, we are of the opinion that Section 52 has no application to the facts and circumstances of the present case.

17. Nathulal Vs. Phoolchand reported in (1969) 3 SCC 120, whereupon reliance has been placed by Mr. Aggarwal, a decree was prayed for on the basis of part performance of the contract and in that view of the matter, the said decision is not applicable.

In that case, finding of fact was arrived at that out of two conditions, the first condition of getting the revenue record rectified, was not fulfilled till 06.10.1952; and the second condition that he would secure the sanction of the Collector to be transferred in terms of Section 70(4) of the Madhya Bharat Revenue and Tenancy Act, 1950 having never been fulfilled, one party to the contract could not have required compliance of the obligations of the other party without at the first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier.

18. The question, which survives for consideration, is as to whether the provision of Section 70 of the Indian Contract Act is attracted in the facts and circumstances of this case. The channels placement mapping is not in dispute. The purported summary appearing at page 159 of the Paper Book, however, as noticed heretofore, is not exhaustive.

19. Mr. Agrawal submitted that where a contract has been entered into in writing, Section 70 of the Indian Contract Act will have no application.

Learned counsel, in this behalf, has relied upon Food Corporation of India and Others Vs. Vikas Majdoor Kamdar Sahkari Mandli Ltd. reported in (2007) 13 SCC 544, wherein it is stated :-

“19. The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay reasonably for the work done, to the person who does the work. The provisions of this section are based on the doctrine of quantum meruit, but the provisions of the Contract Act admit of a more liberal interpretation; the principle of the section being wider than the principle of quantum meruit. The principle has no application where there is a specific agreement in operation. A person who does work or who supplies goods under a contract, if no price is fixed, is entitled to be paid a reasonable sum for his labour and the goods supplied. If the work is outside the contract, the terms of the contract can have no application; and the contractor is entitled to be paid a reasonable price for such work as was done by him.”

20. In a case of this nature, the doctrine of quantum meruit or the principle of compensation payable on implied or quasi contract is not applicable in equity, the parties being bound by the terms of the contract.

21. In this case the Petitioner, moreover, has not claimed any equity.

There is no evidence on record also as to what were be the viewerships of 'Mahuaa' and 'Pragya' channel separately.

The contract of placement of channel was a consolidated one.

Two products, furthermore, were to be placed on two different frequencies. There is nothing on record to show the importance of the respective bands viz. 'P' band and 'C' band.

What was the impact of placement or non-placement of the products of the Respondent in two different bands is not clear.

Parties have not brought any material on record in this behalf.

Petitioner in view of the terms of the placement agreement, was obligated to establish that it has performed the terms of the contract or at least a substantial part of it and in any event by reason of any breach, the Respondent had not suffered any damages.

If that be so, it is difficult for us to arrive at a definite finding as to how and in what manner the Petitioner can be deprived of the agreed amount by invoking equity.

As the Petitioner does not state that the Respondent has waived its right, it is very difficult for us to proceed on the basis of the equity.

Petitioner having claimed the reliefs only upon basing its case on performance of the agreement, it must stand or fall on its own grounds.

Even in his evidence Mr. Sanjay Arya stated that he was Incharge of the Channel Mapping in the Northern Region. The said witness, therefore, has also

relied upon the channel mapping. Despite the same, Petitioner and its witnesses contended that the terms of the agreement had been adhered to. When the terms of the agreement had not been adhered to, we fail to see any reason as to how a decree, as has been prayed for, can be passed. If the terms of the agreement had been adhered to, the same ordinarily should have been reflected in the Channel Mapping.

We have noticed heretofore the deposition of the Petitioner's witnesses. Deposition of PW-1 in no uncertain terms in his cross-examination admitted that the channels have not been placed in 'P' Band and 'C' Band.

22. Mr. Thakur, however, would contend that the default on the part of the Petitioner is only in respect of ten items, it is entitled to obtain a decree for a sum of Rs.27,91,896/- apart from the sum of Rs.22 lacs which has already been paid by the Respondent to it.

23. We do not find any reason to pass a decree for the said amount having regard to the fact that once the Petitioner has taken a positive stand that it had complied with the channel placement agreement, it does not lie in its mouth to

say that it had done as far as possible, meaning thereby the channel which was near the agreed band i.e. 'P' band or 'C' band.

In view of the aforementioned state of affairs, the Tribunal in law cannot be asked to pass a decree on a proportionate basis.

24. So far as the counter claim of the Respondent is concerned, it has not sought for refund of the amount of Rs.22 lacs. It prayed for a decree for the said sum being an estimated loss suffered by the Respondent. It, however, has failed to prove the actual damages suffered by it, having not even examined any witness.

25. In this view of the matter both the petition as also the counter claim, are dismissed with no order as to costs.

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

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(P.K. Rastogi)
Member

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