TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 1.11.2012

Petition No.240/2012

Crystal Vision Media Pvt. Ltd. … Petitioner

Vs.

Sahara India TV Network & Anr. … Respondents

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

For Petitioner : Mr.Vibhav Srivastav, Advocate.

For Respondent : Mr.Arjun Natrajan, Advocate

J U D G M E N T

S.B. Sinha

This Petition for recovery of `carriage and placement charges', has been filed for recovery of a sum of Rs.35,29,615/- only, by the Petitioner herein who is a `Multi Service Operator' against the Respondents, who is `broadcaster' in respect of its two channels Sahara One and Sahara Filmy.

2. Indisputably the parties entered into an agreement for payment of carriage charges in the year 2010-2011.

3. The second Respondent is a distributor and thus an agent of the first Respondent. In its said capacity, one of its officers, namely, Mr.Devinder Verma entered into negotiations for renewal of the agreement. He sent an e-mail to the Petitioner for renewal of the agreement for the year 2011-2012, addressed to be Shri Gagan and Shri Herbinder, two of the directors of the Petitioner company.

The said e-mail reads as under :-

> " As discussed, please find attached the agreement against the new deal as agreed upon and I am also attaching the agreement. The total annual amount will be 32 lakhs +ST yearly.
>
> The payment is for monthly & Agreement is from 1st April, 2011 to 31 March, 2012. The deal is for Sahara one on Colour band & filmy on S band.
>
> Kindly take the printout of all the pages & sign & stamp all the pages & courier the same back to me urgently.

This is a good deal & will be of mutually benefit."

4. The Petitioner allegedly sent a signed copy of the agreement to the first Respondent which was not returned to it upon counter signing the same by either of the Respondents.

The Petitioner is said to have raised invoices from 9.8.2011 till 3.4.2012 which were sent through courier services.

The Petitioner contends that no payment whatsoever has been made by the Respondent despite service of the invoices.

5. The Respondents have filed a joint reply supported by an affidavit of Mr.Atul B. Saraf, being the CMDO of the Respondent no.2.

It has also been by verified by one Mr.Sunil Laxman Zalmi, the authorized representative of the Respondent no.1.

The Respondents in their reply inter alia contend:-

(i) There is no contractual relationship by and between the Petitioner and the Respondent no.1.

(ii) The Respondent No. 2 also having no such relationship is not at all liable for payment of any amount to the Petitioner and is, thus, not a necessary party.

(iii) The purported e-mail dated 8.8.2011 having been sent by mistake and/or by way of confusion by

Mr.Devinder Verma, an employee of the Respondent no 2, the same is not binding upon the Respondents.

(iv) For the aforementioned acts on the part of Mr.Devinder Verma, he was placed under suspension.

6. In view of the rival contentions of parties the following issues have been framed :-

> "1. Whether the parties had entered into a carriage agreement in writing and if not the effect thereof?
>
> 2. Whether the Petitioner is entitled to a decree for a sum of Rs. 35,29,650/- against the Respondent jointly and severally?
>
> 3. Whether this Petition is maintainable in its present form?
>
> 4. Whether the purported communication received by the Petitioner from the employee of the Respondent No. 2 would be binding on it?"

7. In support of their respective cases; whereas the Petitioner examined Mr.Gagan Arora, one of its Directors; the Respondent examined Mr.Sunil Laxman Zalmi and the said Mr.Devinder Verma.

8. In this case, the fact that the aforementioned e-mail dated 8.8.2011 was sent by Mr.Devinder Verma is not in dispute.

It is also not in controversy that along with the said e-mail an attachment was sent which was a copy of the agreement.

It is, however, also not in dispute that no agreement in writing has been entered into as the Respondent did not execute the same.

9. The core question which arises for consideration is whether Mr.Devinder Verma was authorized to enter into an agreement with the Petitioner or the said e-mail was sent by mistake.

10. The burden of proof to show that the said Mr.Devinder Verma was neither authorized and he having sent the said e-mail by mistake, was on the Respondents.

11. The positive case of the Respondents is that the said act of indiscretion committed by Mr.Devinder Verma was treated to be a case of serious misconduct.

A show cause notice was issued on him by the Second Respondent, on 27.04.2012 i.e. much after of the present Petition was filed.

It reads as under:-

> ".. That you are employed with our company with specific instruction/direction of not to acknowledge/ sign/admit any liability/Debt/contract/agreement on behalf of company or Sahara India of we are the distributor.
>
> We have received copy of Petition filed by Crystal Vision Media Pvt Ltd before TDSAT, wherein one email dated 8th August, 2011 is annexed to the said petition. That the said Email seems to be mailed by you from your mail ID devindra@absgroup.co.in to gaganar@yahoo.com, wherein in violation of said

specific direction/instruction and company's policy you have admitted the liability of Sahara.

That we have subsequently checked and verified the records of Sahara India carriage deals in respect of their channel "Sahara One" and were shocked to find that we have not entered into any agreement with Crystal Vision Media Pvt Ltd network, nor the channels of Sahara were placed on said network.

That you by said mail have confirmed/agreed the false liability of Sahara, which amounts to misconduct on your part.

You are hereby called upon to clarify/justify immediately within 7 days why you have confirmed the false liability of Sahara by e-mail dated 08/08/2011 to Crystal Vision Media Pvt Ltd network, failure to give satisfactory reason appropriate proceedings will be initiated against you for loss/damage."

12. Cause thereto having allegedly been shown by Mr.Verma explaining the circumstances in which the same had been sent to the Petitioner on 8.8.2011 the show cause notice was withdrawn with a warning.

The Respondents have not filed the said purported explanation of Mr.Verma. The purported order withdrawing the notice has also not been brought on record.

13. Mr.Zalmi (RW-1) is a lawyer working with the Sahara India Commercial Corporation Ltd of which the Respondent no.1 is said to be an unit.

Nothing has been brought on record to show that Sahara Sanchar was also an unit of the said company.

It is accepted that the Respondent no.2 was the distributor of the Respondent no.1 in respect of Sahara One and Sahara Filmy channels.

It admittedly did not deal directly with the Petitioner company but according to Mr.Zalmi, Mr.Atul Saraf of the Respondent no.2 used to do so. The authority of the Respondent No.2 to enter into such an agreement, therefore, is not in dispute. Admittedly, the Respondent No.2 used to hold negotiations therefor.

14. Various questions were put to him in the cross examination, from a perusal whereof it would appear that he had no personal knowledge involving the factual matrix involved in the present case.

15. We may, however, notice the following from his deposition in his cross examination:-

> "Q: Have you ever dealt with Petitioner Company for the purpose of carriage fee?
>
> A: I have not directly dealt with the Petitioner Company.
>
> Q: For how many years you are working with the Respondent No. 1 Company?
>
> A: If I remember correctly it is since 24th May, 2010.
>
> Q: Are you aware of any placement/carriage agreement with the Petitioner company for the year 2010-2011 for carriage of channels Sahara One and Sahara Filmy?
>
> A: I will have to check this.
>
> xxx

Q: Is it correct that these TDS certificates has been issued for the payment made for the assessment year 2011-2012 for the placement/carriage of your channels?

A: It is not correct.

xxx

Q: What was the amount according to you, you were offering to the Petitioner for the carriage of your channels?

A: All negotiations are done by the Respondent no. 2.

Q: Are you aware of the alleged offer by the Respondent no. 2 to the Petitioner?

A: No.

Vol. I do not remember the exact offer, if any. ”

16. The statement of the said witness in his affidavit that Mr.Devinder Verma of the Respondent no.2 never intimated about any agreement with the Petitioner nor it carried the said channels, cannot be accepted in view of the fact that no document has been placed before this Tribunal in support of the said plea.

RW-2 Mr.Devinder Verma in his affidavit stated as under:-

“3. I say that Mr.Gagan had asked me to orally agree to the Petitioner’s oral offer to carry channels of Respondent No.1 on its network from 1.4.2011. I say that no oral understanding could be arrived at due to the Petitioner’s insistence on a high carriage fee which it refused to reduce.

4. I say that my email dated 8.8.2011 at p.11 of the Petition was sent under confusion and by mistake as well as without authorization and consent of the Respondent.”

17. Paragraphs 10 of the reply filed by the Respondent reads as under:-

> "10. It is submitted that with effect from 01.04.2011, the Petitioner had no occasion to place any channels of Respondent No. 1 on its network in view of the fact that no contractual relationship was created between Respondent No. 1 and the Petitioner. In any case, there was no occasion for any contractual relationship to be created between the Petitioner and Respondent No. 2. The alleged agreement at pp. 12-23 of the Petition [the "alleged agreement"] was admittedly never executed and therefore never acted upon."

18. When his attention was drawn to the said paragraph, RW-2 stated that he had oral discussions regarding placement of Sahara One and Sahara Filmy but he has not received any agreement and invoice. He, however, accepted that he had been representing the Respondent no.2.

19. We may also notice paragraphs 11 and 12 of the said reply:-

> "11. It is submitted that no liability is cast upon Respondent No. 1 in view of the fact that the alleged agreement was never admittedly executed and therefore never acted upon. *Arguendo*, it was executed and acted upon; the alleged agreement contemplates no contractual relationship between the Petitioner and Respondent No. 2. It follows as a logical corollary that the Petitioner as well as the Respondent owe no obligations to each other in view of the fact that the alleged agreement was admittedly not executed or acted upon. It is submitted by way of abundant caution that no oral understanding of any nature whatsoever was ever created between the Petitioner and the Respondent.

> 12. It is submitted that after the Respondent perused the Petition; to their utter shock and surprise, it came within their knowledge for the first time that an email dated 8.8.2011 was sent from the email account of one Mr.Devinder Verma who is an employee of Respondent No.2."

RW2, however, accepted that he had seen the e-mail on 9.8.2011 and, according to him the amount of Rs.32 lakhs was exorbitant.

20. Mr.Arjun Natrajan, learned counsel appearing on behalf of the Respondent would contend that there was absolutely no reason as to why the carriage fee would be demanded from RW-2.

The reason therefor is not far to seek.

If RW-2 was representing the Respondent no.2, the negotiations having been held by and between PW-1 and the other Director of the Petitioner and RW-2, he would also be informed thereabout.

21. Sofar as the earlier agreement is concerned, it is difficult to believe that he was not aware thereof; although, he accepted that placement of Sahara One and Sahara Filmy was the subject matter of the agreement by and between the parties in 2010 when he was not in picture.

22. In answer to a question as to whether the Respondent no.2 was aware of the deal of 2010-2011, he stated :-

> "Q.15: I put it to you that Respondent no. 2 is aware of the deals of 2010-2011 which was for Rs. 32 Lacs?
> A: It is incorrect.
> Vol.: ABS and Sahara have told me lesser amount for it.
>
> Q.16: I put it to you that when you admitted that you were not in the organization when deals of 2010-2011 took place, then how you have said that R-2 was not aware of the deals of 2010-2011?
> A: I joined in May 2010. My communication started with the Petitioner since May 2010.
>
> Q.17: What communication you have started with the Petitioner in May 2010?
> A: The communication started for the deal of Sahara One and Filmy. Mr. Gagan used to call me often.
>
> Q.18: When you do not have authority of placement of Sahara One and Filmy since in May 2010, then how Mr. Gagan was chasing you for deal of the same?
> A: Mr. Gagan has the information from the market that Sahara One and Filmy had come to ABS.

He furthermore stated :-

> Q.19: I put it to you that you are telling lie on oath and for which you are liable to be prosecuted for perjury as Mr. Gagan has no market information and has not called you in May 2010?
> A: Since April 2010, we were making the deals for Sahara One and Filmy on the instruction of Mr. Atul B Saraf."

23. According to the said witness he was intimated about the e-mail dated 8.8.2011 by the RW-2 only on 29.5.2012. He, however,

for reasons best known to him, denied that the Respondent no.2 has no knowledge about the e-mail dated 8.8.2011.

He responded to a question put to him in the following manner:-

> "Q 22. It means before 29.5.2012, R-2 has no knowledge about Mail dated 8.8.2011. Is it correct"
>
> A. It is incorrect.
>
> Vol. : On 29.5.2012, Mr.Atul B Sharaf came to Delhi and he told me that the Petitioner has sent an invoice dated 9.4.2012, which was received directly by Sahara on 9.4.2012 and returned to R-2 for clarification on 12.4.2012. R-2 Replied the same on 13.4.2012 to the Petitioner."

24. Mr.Natrajan would relying on or on the basis of Section 7 of the Indian Contract Act contend that if the proposal of the Respondent no.2 purported to have been made through RW-2 was to be accepted, the agreement should have been sent through courier service and not by hand as alleged by PW-1.

25. It is a trite law that when an offer is made, the same can be revoked only in terms of Section 6 of the Indian Contract Act and not otherwise. It is difficult to accept that although the e-mail was sent by RW-2 on 8.8.2011, the purported mistake and/or the confusion would be communicated to PW-1 on the next date on the ground that his services would be at stake.

Be that as it may, the Respondents have neither pleaded nor established by any reliable evidence that there had been any oral understanding by and between PW-1 and RW-2 as alleged.

26. Section 7 does not provide for the mode of communication of the acceptance of a proposal. What is important is `acceptance' of the proposal.

PW-1 in no uncertain terms stated that the proposal of the Respondent no.2 was accepted also orally apart from sending the agreement through an employee and he had also talked with Mr.Devinder Verma in that regard.

The word `courier' does not mean that it must be sent through the agencies of courier services, but in my opinion the same could have been sent by any person carrying the same.

The mode of acceptance inter alia means that if the same was to be sent to a particular place so that it may not be sent elsewhere and that the acceptance has to reach the offeree.

In Chitty on Contracts 29th Edition, para 2-044 states the law as under:-

> **"2-044 - What amounts to communication -** For an acceptance to be "communicated" it must normally be brought to the notice of the offeror. Thus there is no contract if the words of acceptance are "drowned by an aircraft flying overhead"; or if they are spoken into a telephone after the line has gone dead or become so indistinct that the offeror does not hear them. The requirement of "communication"

> may, however, in some circumstances be satisfied even though the acceptance has not actually come to the notice of the offeror: *e.g.* where a written notice of acceptance is left by the offeree at the offeror's address."

Reliance has been placed on the case of Bhagwandas Goverdhandas Kedia vs. M/s Girdharlal Parshottamdas and Co. and Ors. reported in AIR 1966 SC 543 by Mr.Natrajan. Therein Hon'ble Mr.Justice Shah for himself and Wanchoo, J stated the law in the following terms :-

> "8 Acceptance and intimation of acceptance of offer are, therefore, both necessary to result in a binding contract. In the case of a contract which consists of mutual promises, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise. When parties are in the presence of each other, the method of communication will, depend upon the nature of the offer and the circumstances in which it is made. When an offer is orally made, acceptance may be expected to be made by an oral reply, but even a nod or other act which indubitably intimates acceptance may suffice. If the offeror receives no such intimation, even if the offeree has resolved to accept the offer, a contract may not result. But on this rule is engrafted an exception based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post. In Adams v. Lindsell (1818) 1 B and Ald 681, it was ruled as early as in 1818 by the Court of King's Bench in England that the contract was

> complete as soon as it was put into transmission. In Adams's case (1818) 1 B and Ald 681, the defendants wrote a letter to the plaintiff offering to sell a quantity of wool and requiring an answer by post. The plaintiff accepted the offer and posted a letter of acceptance, which was delivered to the defendants nearly a week after they had made their offer. The defendants however sold the goods to a third party, after the letter of acceptance was posted but before it was received by the defendants. The defendants were held liable in damages."

In this case, the requirements of law have been complied with.

27. It is also difficult to accept the submission of Mr.Natrajan that the Petitioner has not been able to prove the acceptance of the proposal in some usual or reasonable manner having regard to the fact that the Respondent no.2 itself has raised a defence that during the tenure of contract, carriage of the signals of the channels of the Petitioner remained disturbed, said to be owing to migration of the Petitioner from one MSO to the other. The Petitioner has categorically contended that migration from one MSO to the other having nothing to do with its right to down link the free to air channels and transmission the signals thereof, and there could not have been any disruption in carriage of the said channels.

28. The Petitioner furthermore has not only brought on record the proof by way of dispatch of the invoices; the Respondents also have accepted a part of the performance of contract. It is, thus, not possible to arrive at the conclusion that there had been no

acceptance of the offer or otherwise the terms of the contract was not performed.

29. Moreover, the Court is entitled to take into consideration the circumstantial evidence as also the conduct of the parties to arrive at a conclusion as to whether the offer of the Respondent was accepted by the Petitioner or not.

30. Mr.Natrajan submitted that the principles of Financing Ltd. vs. Stimson [1962] 3 All ER 386, which is said to be distinguished in Hichens vs. General Guarantaee Corpn. LTd. [2001] EWCA Civ 359, should be applied in the facts of the present case.

However, copies of the said judgments have not been supplied to this Tribunal.

It may, however, be placed on record both the aforementioned decisions have been noticed in the Law of Contract published by Michael Furmston and Ors., 3rd Edition at page 462, in the following terms :-

> "2.199- In general it may be said that a statement will not be construed as an offer unless it sets out the main terms of the proposed contract. At the very least it must state the obligation to be undertaken by the offeror and, generally, the price demanded as the consideration for that promise. However, a statement which satisfies these minimum criteria may nevertheless not be an offer. The more complicated or valuable the transaction, the less likely it is that a person will be willing to undertake a legal obligation without defining the scope of the agreement in

> detailed terms. Since an offer involves an unequivocal indication of willingness to be legally bound if the proposed terms are accepted, a proposal which anticipates further negotiation, or from which it appears that the proposer reserves the right to decide whether or not to proceed, cannot be an offer.

The foot note No.2 of the said passage reads as under :-

> "…See *Financings Ltd v Stimson* [1962] 3 All ER 386 where in anticipation of a hire-purchase agreement for a car the plaintiff signed the defendants' standard contract form and was allowed to take the car away, but the form stated that it was not to be binding until accepted by the defendants. Cf *Carlyle Finance Ltd v Pallas Industrial Finance* [1999] 1 All ER (Comm) 659; *Hichens v General Guarantee Corpn Ltd* [2001] EWCA Civ 359, [2001] All ER (D) 246 (Mar) where in each case the customer's offer was held to have been accepted by conduct.

31. There is no reason as to why the statement of PW-1 shall not be believed particularly, having regard to the contradictory and inconsistent stands taken by the Respondents herein.

32. Mr.Natrajan would submit that when an agreement was surrounded by uncertainties, the same would be incapable of being enforced. In this case, there is no uncertainty nor any such case has been made out by the Respondent in its reply.

33. It is one thing to say that the agreement in writing was not executed but it is another thing to say that no contract at all has come into being.

34. Mr.Natrajan submitted that RW-2 in his deposition has stated that e-mail dated 8.8.2011 being in a set format, by reason thereof no contract has come into existence. The Respondents' aforementioned stand is inconsistent with its other stands, in as much as, it had not denied that RW-2 indeed sent the e-mail to the Petitioner on or about 8.8.2011. Moreover, the language used in the said e-mail clearly depicts that the same was sent upon due consideration of the negotiations preceding the same.

35. It is one thing to say that the said e-mail was sent by mistake but it is another thing to say that the proposal has not been accepted by the Petitioner.

There was absolutely no reason, why it should not.

36. In fact, the acceptance thereof has been asserted by PW-1.

The question of revocation of the proposal would arise when the same is communicated before the acceptance thereof.

Once the contract came into being, the question of revocation of the proposal does not arise.

37. So far as the performance of contract is concerned; from the Respondent's no.2 letter dated 13.4.2012, it is evident that it had taken a specific plea therein that for certain period viz during the switching over of the channels from Hathway to Digicable, the

channel was not carried. It has, thus, accepted that the Respondent No.2 was keeping it abreast of the factum of placement of channels.

It is, thus, evident that the Respondents have accepted by necessary implication that the contract between the parties came into being as non-performance thereof for a particular period could not have been mentioned. In fact on that occasion only, the existence of this contract should have been denied.

38. So far as the matter relating to the mistake in entering into the contract is concerned, it is not a case of mistake of fact. If it were so, it was required to be specifically pleaded.

In a case of this nature where Mr.Devinder Verma having regard to the materials brought on record evidently had been authorized to make negotiations on behalf of the Respondent no.2, he could have held the negotiations and communicate the decision of Respondent no.2 to the Petitioner.

39. Mr.Natrajan would contend that RW-2 in his affidavit categorically stated about the withdrawal of the proposal in paragraphs 6 to 9 of his evidence.

Learned counsel, however, when questioned, very fairly stated that no specific plea in that behalf has been raised. The Respondent in paragraphs 12 and 13 merely stated that the Respondent no.2 has checked the record of the Respondent no.1.

No evidence, it is trite, is admissible when the necessary foundational fact has not been pleaded.

Order VI Rule 8 of the Code of Civil Procedure mandates that the effect of a contract, if any, must be pleaded.

40. Mr.Natrajan drawing the attention of this Tribunal to the deposition of RW-1 contends that although the Respondent no.2 had the requisite authority to enter into negotiation with a LCO or MSO but the agreement was required to be a tripartite one.

In a case of this nature, this Tribunal in concerned with the substance of the dispute viz whether a legal, valid and binding contract has come into being and not the format thereof.

As an agent, all lawful acts on the part of the Respondent No.2 were binding on the Respondent No.1.

RW-2 categorically admitted that PW-1 approached him in May 2010 as the people operating the cable business knew that Respondent No.2 has been authorized by the first Respondent therefor.

41. So for as the basis of not entering into the contract as contended by the Respondents is concerned viz the purported excessive carriage fee quoted by the Petitioner. I may notice the statements made by RW-1 to the following effect :-

> Attention of the witness is drawn to para 13 at page no. 38 of paper book.

Q: What was the alleged exorbitant carriage fee Petitioner quoted to you?

A: The exorbitant carriage fee was quoted by the Petitioner to the Respondent no. 2 as the Respondent no. 1 has never negotiated any deal with the Petitioner.

Q: What was the amount of this alleged exorbitant carriage fees?

A: I do not remember the exact amount off hand as the same occurred somewhere in May, 2012.

Vol. I do remember that the figure was not warranted by the kind of contribution that came from the Petitioner's network and the same was put across by the Respondent no. 2.

Q: How you come to know that Petitioner was asking exorbitant carriage fee?

A: The same was communicated to us by the Respondent no. 2.

Q: Is it a written communication?

A: No.

Q: When Respondent no. 2 has communicated this to you?

A: The same was communicated somewhere in May, 2012.

Q: Is it correct that as per your statement the Respondent no. 2 who keeps the records for carriage agreement and not the Respondent no. 1?

A: Both keep their respective records for carriage agreements.

Q: Is it correct that you came to know about the alleged non execution of agreement only when Respondent no. 2 has informed you?

A: No.

Vol. The Respondent no. 1 after conducting a preliminary verification of its records realized that no agreement was ever executed with the Petitioner and upon verification by the Respondent no. 1, the

Respondent no. 1 requested the Respondent no. 2 to verify their records.

Attention of the witness is drawn to para 14 at page no. 38 of paper book.

Q: Is the show-cause notice was ever served upon you?

A: No.

Q: Is Mr. Devender Verma have met you before the filing of this petition?

A: No.

Q: Is it correct that you do not know Mr. Devender Verma personally and you do not had any conversation with him before filing of this reply?

A: Yes.

42. RW-1 cannot be believed, being not a reliable witness as also on the ground that he had no personal knowledge with regard to the merit of the matter.

RW-2 has also been prevaricating his stand from stage to stage.

43. If there was no negotiation between the parties at all, it is difficult to conceive as to when the Petitioner had asked for an exorbitant carriage charges.

RW-2 in his evidence stated as under:-

"Q.50: Do you have direct talks with Respondent no. 1?
A: Yes because I receive phones of Mr. Gagan on daily basis.
The witness again says I have talks with ABS, i.e., with Mr. Atul B Saraf."

Moreover, RW-1 could come to know the said fact, if any, only after expiry of the contractual period. At that point of time any discussion about the quantum of the carriage charges would be irrelevant.

44. The Respondent No.2 should have brought on record some evidence to show that RW-2 was informed that he had no authority to deal with the MSOs/LCOs.

RW-2 in his deposition categorically admitted that from May, 2010 onwards, Mr.Gagan Arora had been talking to him on the premise that it was the Respondent No.2 who had been appointed by the Respondent No.1 as its distributor.

45. It may further be placed on record that according to RW-1, he had raised objections with regard to the quantum of carriage fee for 2010-2011.

He, however, states in his deposition that he has raised the same only in May, 2012.

46. In view of the fact that the agreement had expired on 31.3.2011, the question of non-renewal thereof should have been raised at that point of time. In an ordinary situation the Respondent No.1 ought to have taken up the matter with the Respondent No.2 then and there.

47. It is the case of the Petitioner that talks for renewal of the agreement were going on. It also appears to be so from the record. From the e-mail dated 8.8.2011, it becomes evident that the same was not only to be given retrospective effect but negotiations therefor had been going on immediately after expiry of the agreement for the period 2010-2011.

The said e-mail furthermore is clear and unambiguous as it speaks of negotiations, as well as the amount of carriage fee for period for which the same would remain valid.

48. If RW-1 is correct in his statement, the question of issuance of said e-mail would not have arisen.

Furthermore in view of the clear language used in the said e-mail, it cannot be said that being a set format some confusion had arisen in the mind of the RW-2.

It is evident that:-

(i) the Respondent no.2 has been acting on behalf of Respondent no.1.

(ii) the Respondent no.2 for the purpose of carriage deals was being represented by RW-2;

(iii) negotiations by and between the representatives of the Petitioner and Mr.Devinder Verma had been

carried out not only with PW-1 but also that the other Director as otherwise sending the same to two of the Directors of the Petitioner company would not have arisen;

(iv) the Respondent no.2 has admitted that it had received an invoice but it did not protest thereto; and

(v) invoices having been sent through courier services, a presumption would arise that the same had been delivered, the postal address of the Respondent no.2 and/or RW-2, in view of the admitted fact that the invoices were sent to the correct postal address of the Respondent No.2.

(vi) RW-2 accepted that Mr.Saraf was aware of the said e-mail.

49. Submission of Mr.Natrajan that the ledger filed by the Petitioner does not inspire confidence in as much as although PW-1 in his deposition categorically stated that he has received the payment of carriage fee for 2010-2011 in the ledger an amount of Rs.7,97,759/- is said to be due.

Attention has furthermore been drawn by Mr.Natrajan to the demand notice dated 3.4.2012 wherein a demand for a sum of

Rs.43,27,374/- was made; although, in this petition the Petitioner has prayed for a decree for a sum of Rs.35,29,615/- only.

50. The Petitioner on the other hand, urged that the parties heretobefore having entered into agreements for carriage for the channel of Respondent no.1 for a long time, the dues of 2008 had also been included in the demand but no decree therefor has been prayed for being barred under the law of limitation.

It is interesting to note that the Respondent in reply to the said demand notice in terms of its letter dated 13.4.2012, stated as under:-

> "… It is pertinent to mention over here that you have changed your Network from Hathway to Den in CAS region as such during the said transit period the channels of Sahara were switched off in your region."

Attention of this Tribunal has further been drawn to the affidavit of PW-1 which is to the following question:-

> Q: I suggest that vide letter dated 13.4.2012 your letter of 3.4.2012 was responded to.
>
> A: It is denied.
>
> Vol. It was mentioned in their reply dated 13.4.2012 that we have changed our digital transmission from Hathway to Den in the transit period. I would like to mention here that the agreement with us of the Respondent were to carry their channels on analog mode and not on digital mode so their reply that we migrated from

Hathway to Den in digital mode does not affect the said deal.

It is borne out from the record that the Respondent no.1 admits that all the agreements relating to carriage of the Respondent's no.1 channel was to be done through the Respondent no.2 only; it being the authorized distributor.

It is, therefore, surprising that the Respondent no.2 while denying and disputing the existence of the agreement would verify the records of the Respondent no.1, including its accounts to find out as to whether any agreement had been entered into, in so far as it could have denied the existence of the agreement from the very beginning.

The Respondent no.2 admits that it has received an invoice dated 31.3.2012 for the period 1.9.2011 to 31.3.2012 which has been sent to the Gurgaon Office of the Respondent no.1. If there was no agreement, again the same having been referred to the Respondent no.1 appears to be an afterthought.

In view of the explanation of the Petitioner with regard to the ledger account as also the amount mentioned in the review demand notice, I do not find any merit in the aforementioned contention of Mr.Natrajan.

So far as the invoices for the months of April 2011 to March, 2012, are concerned whereby monthly instalment for a sum of Rs.32,00,004/- was claimed; the statements of the said witness are as under:-

> "Q 23. Is this invoice has been received by R-2?
> A. No.
> Vol. : It was received by Sahara and after clarification, Sahara sent it to R-2 that deal is there or not. R-2 replied the same on 13.4.2012 to the Petitioner.
>
> The address of the R-2 mentioned on the invoice is correct."

51. So far as the purported misconduct committed by the said witness is concerned, he stated as under :-

> Q.26: What misconduct you have committed?
> A: I have sent a mail in confusion and by mistake to the Petitioner, without taking permission from the Respondent.
>
> Q.27: What confusion and mistake you had?
> A: The confusion and mistake was that that without taking permission from the Respondent, I had sent the mail to the Petitioner.
> Vol.: On 9.8.2011, I informed Mr. Gagan that the said mail has been sent in confusion and by mistake and requested him to ignore the same and the deal may be treated as cancelled. Since I was in fear of loss of my job, Mr. Gagan agreed to the same. Thereafter, I told Gagan that I am writing a mail to this effect to you and send a copy of the same to Mr. Atul B Saraf. Then Mr. Gagan advised me not to send a mail since you will lose your job and I will treat the deal as cancelled. Thereafter we have never communicated.
>
> Q.28: Do you have any record of what you have said in the voluntary statement above?

A: I do not have any record.
Vol.: I telephonically called Mr. Gagan that my job is in danger and Mr. Gagan agreed for cancellation of the deal.

Q.29: When did you call Mr. Gagan?
A: I called Mr. Gagan on 9.8.2011.

Q.30: When no one was aware of the deal as you said, then how your job was in danger?
A: Because I have taken permission from the Respondent.
Vol.: Please see Page 18 in which Mr. Atul B Saraf has been authorized by Sahara.

Q.31: Who told you about this page 18?
A: I have seen it.

Q.32: Where you have seen it?
A: My advocate has shown me page 18.
Vol.: I do agreement on daily basis.

Q.33: Did your advocate tell you about this page 18?
A: He did not tell anything.
Vol.: This agreement we do on daily basis and Mr. Atul B Saraf is authorized to sign this agreement.

Q.34: What is your job profile in R-2?
A: Collection of subscription amount of Sahara One and Filmy and placement deals as per the instruction of ABS, Mumbai office."

So far as the purported assurance given by Mr.Gagan about not taking the said offer by reason of the said e-mail forward is concerned, he even could not remember the phone number of Mr. Gagan.

So far as the show cause notice is concerned, he stated as under :-

> "Q.45: What happened to your show cause notice dated 27.4.2012?
> A: I got the show cause notice by hand on 29.4.2012.
>
> Vol.: In which the company asked me clarification on why you have written this mail without permission. After that company gave me a warning and withdrew the show cause notice in the first week of June 2012."

It has been noticed heretobefore that RW-1 in his affidavit as also in cross-examination categorically stated that only upon the clarification sent by Mr.Devinder Verma, the show cause notice was withdrawn with a warning to be cautious in future.

So far as the show cause notice issued to Mr.Devinder Verma is concerned, the same appears to be an internal affair of the Respondent. No reliance can be placed thereupon as it is difficult to conceive that even when Mr.Devinder Verma had put both the Respondents to ligation as also the likelihood of payment of a huge sum of money, which in the words of RW-2 as was `exorbitant amount', the show cause notice would be withdrawn merely on the plea that the e-mail dated 8.8.2011 had been sent under some mistake.

The said plea appears to here been taken by way of an afterthought.

In any event, when the show cause notice has been issued in writing, there was absolutely no reason as to why the same would not be withdrawn by way of a document in writing.

It is also difficult to accept as to on what basis RW-2 intimated to PW-1 that his job was in danger.

He was served with the show cause notice only after filing of this petition.

He, as noticed hereobefore, admitted the same.

52. The defences raised by the Respondent are inconsistent with each other. Whereas contending that the e-mail has been sent by mistake, an additional ground was added in the deposition of the RW-2 that it was also sent under certain confusion.

53. If there was any confusion, the same per se would not render the contract void. It was, in any event, for the Respondents to prove that any mistake occurred out of any confusion. The alleged confusion even concedingly arose as according to Respondents, RW-2 was not authorized to enter into any contract with the LCOs/MSOs. He, however, stated that he entered into contract on daily basis.

54. As indicated heretobefore that from May, 2011 onwards the Respondent had been receiving the invoices.

Such invoices had been received evidently in view of the fact that the Petitioner had been continuing to carry the channels of the Respondent no.1 despite expiry of the earlier agreement.

It is difficult to believe that Mr.Atul B. Saraf who runs the affairs of the Respondent no.2, would not send any reply to the invoices received by it or by the Respondent no.1, and would talk to RW-2 thereabout only when he came to Delhi in May, 2011 and not prior thereto.

55. If to his knowledge no agreement had been entered into and the Petitioner had not been carrying the channels of Respondent no.1, it was expected of a prudent business man like him to protest against the raising of the invoices and/or demanding an amount from them forthwith.

56. Mr. Arjun Natrajan would submit that from the materials brought on record it would appear that in August, 2011 the Petitioner lost interest to carry on any business with the Respondent as they were not agreeable to the exorbitant amount of carriage fee paid by it as contended in paragraph 8 of affidavit of RW-2.

It is difficult to accept that RW-2 had approached the Petitioner and if it had said so, there was absolutely no reason as to why the said stand was not taken at the earliest possible opportunity.

57. Mr.Natrajan would contend that there is no pleading as regards service of invoices in the Petitioner.

The Petitioner in the petition itself has not only pleaded the said fact but also annexed the courier receipts, the genuineness whereof is not in dispute.

Evidently the Petitioner had brought on record the requisite documents to show that the invoices were being raised and sent to the Respondents in ordinary course of its business.

58. Moreover, admittedly, the Respondents have received, if not more, at least one invoice as has been accepted by RW-1 in paragraphs 10, 11 and 12 of his affidavit, which reads as under:-

> 10. "I say that Respondent No. 1 disputed the invoice at p. 29 of the Petition as the Petitioner is not entitled to any payment. I further say that Respondent No. 1 handed it over to Respondent No. 2 on 12.04.2012.
>
> 11. I say that Respondent No. 2 vide its letter dated 13.04.2012 returned the invoice at p. 29 of the Petition to the Petitioner and denied the claims made by the Petitioner in its letter dated 03.04.2012 at p. 32 of the Petition. Copy of Respondent No. 2's letter dated 13.04.2012 along-with the invoice bearing number 086/2011-2012 which is Exhibit **R1W-2** at p. 57-60 of the Brief Reply.
>
> 12. I say that only after the Petition was served upon the Respondent and the same was perused, the Respondent came to know about Mr. Devinder Verma's email dated 08.08.2011 at p. 11 of the Petition."

It is, therefore, evident that this is the third stand which has been taken by the Respondent.

For the reasons aforementioned, this petition is allowed.

The Respondents are directed to pay a sum of Rs.35,29,615/- with interest @ 9% per annum till realization. The Respondents shall also pay and bear the cost of the Petitioner. Counsel's fee assessed at Rs.25,000/-.

(S.B. Sinha)
Chairperson

November 1, 2012
`ns'