

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated : October 8, 2012**

**Petition No.436(C) of 2011**  
**(M.A. No.214 of 2012)**

Noida Software Technology Park Ltd. ...Petitioner

Vs.

M/s Northern India Holding Pvt. Ltd. ...Respondent

**BEFORE:**

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

For Petitioner : Mr.Vivek Chib & Mr. Joby P. Varghese,  
Advocate

For Respondent : Mr.Nitin Bhatia, Advocate

**J U D G M E N T**

1. The Petitioner is a Teleport service provider, having been granted permission to carry out the said operation by the Union of India.

The said permission was granted in terms of the provision of the Indian Telegraph Act, 1885.

Clause 5.1 of the said permission reads as under:

**"Application of the Indian Telegraph Act and other Laws**

The Permission shall be governed by the provisions of the Telecom Regulatory Authority of India Act, 1997, Indian Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933 as amended from time to time and any other law as application to broadcasting which has or may come into force."

2. According to the Petitioner it provides for a passive teleport service to the broadcasters.

The Respondent is a broadcaster within the meaning of the provision of the aforementioned Acts and the Rules and Regulations framed thereunder.

3. An agreement was entered into by the parties hereto on or about 7.2.2010 with regard to grant of uplinking facility and transponder service on INSAT 4A from the earth station of the Petitioner.

4. The Respondent in terms of the aforementioned agreement made itself liable to pay a sum of Rs.6.00 lakhs p.a. as contained in Appendix 'A' thereto.

5. It is not in dispute that the Petitioner had on several occasions asked the Respondent to make payments of the agreed amount, but despite assurances therefor from time to time, it failed and/or neglected to do so.

6. It is stated that by way of full and final settlement, the Respondent handed over to the Petitioner, a sum of Rs.6.30 lakhs by reason of a cheque dated 24.5.2011, which admittedly bounced upon presentation to the bank.

7. On the aforementioned premise and treating such non-payment to be a breach of the conditions of the agreement, the Petitioner admittedly terminated the said agreement on or about 28.5.2011.

8. In this petition, the petitioner has, inter alia, prayed for the following reliefs:

- a) "Pass an order for recovery in favour of the Petitioner and against the Respondent thereby directing the Respondent to pay a sum of Rs. 17,30,000/- (Rs. Seventeen Lakhs Thirty Thousand) along with pendente lite and future interest @ 24% per annum w.e.f. the date it became due till its actual realization, to the Petitioner;
- b) Pass an order directing the Respondent to pay a sum of Rs. 1,73,30,000/- (Rs. One Crore Seventy Three Lakhs Thirty Thousand) toward unpaid service fee;
- c) Pass an order directing the Respondent to pay a sum of . Rs.10,00,000/- (Rs. Ten Lakhs) towards damages on account of the loss suffered by the Petitioner due to breach on the part of the Respondent;"

9. The Respondent in its reply, inter alia, raised two basic pleas:

1. The termination of the said agreement by the Petitioner was illegal as prior thereto no notice as contemplated under Clauses 4.2 and 4.3 of the Telecommunication (Broadcasting & Cable Service) Interconnection Regulations, 2004 (the Regulations) were issued.
2. The payments having been made by way of a full and final settlement and the Petitioner having accepted the cheque

without any demur is estopped and precluded from claiming a sum of Rs.17.30 lakhs.

10. The Petitioner in support of its case, examined one Shri Rajiv Singh Rawat, its Manager (Accounts). The Respondent was given an opportunity to adduce its own evidence. It, however, despite cross-examining the witness of the Petitioner failed and/or neglected to file affidavits of its own witness.

11. It may be noticed that the Respondent did not file its reply within the time granted by this Tribunal from time to time. On 17.2.2012, a statement was made by the learned counsel appearing on behalf of the Respondent that he did not have any instructions with regard to filing of the reply and in that view of the matter, the Petitioner was asked to file affidavits of its witness.

The said order was complied with.

12. The Respondent, however, filed a Miscellaneous Application which was marked as MA No.116 of 2012 praying for an opportunity to file its reply. The said application was allowed and the Respondent was given an opportunity to file its reply.

13. Issues between the parties were framed on 16.4.2012 and by an order of the said date the Respondent was granted three weeks' time to file its affidavit.

14. From the proceeding sheet dated 21.5.2012, it appears that on a prayer made by the learned counsel for the Respondent another

opportunity was granted to it to file affidavit of its witness Mr. Manish Verma.

No application for enlargement of time was also filed.

15. A medical certificate of the said witness was, however, produced on 20.7.2012. In the aforementioned situation by an order dated 28.8.2012 the matter was directed to be posted for hearing.

16. Learned counsel appearing on behalf of the Petitioner would contend:

1. Although the Petitioner is a service provider, it was not liable to issue any notices in terms of Clauses 4.2 and 4.3 of the Regulations being not governed thereby.
  2. It is true that the Respondent had handed over a cheque for a sum of Rs.3.50 lakhs but the same having bounced, settlement, if any, as claimed for by the Respondent cannot be held to be binding on the Respondent.
  3. The Respondent not having examined any witness despite opportunities granted by this Tribunal, an adverse inference must be drawn against it by this Tribunal.
  4. The damages claimed for from the Respondent being in the nature of liquidated damages; proof of any actual loss by it was not necessary.
17. Mr. Nitin Bhatia, learned counsel appearing on behalf of the Respondent, on the other hand, submitted:

1. The Petitioner being a 'distributor of TV services', issuance of notice under Clauses 4.2 and 4.3 of the Regulations was imperative in nature.
  2. The Petitioner having accepted the cheque for a sum of Rs.3.50 lakhs is estopped and precluded from raising any contention that the Respondent has not paid a sum of Rs.7.50 lakhs.
  3. The Petitioner itself having terminated the agreement, it is not entitled to any damages.
18. The agreement between the parties dated 7.2.2012 is admitted. We may notice certain provisions thereof.

Clause 1.1 of the Agreement inter alia, provides for the following obligations on the part of the Respondent:

"1. BROADCASTER OBLIGATIONS

To facilitate provision of the services by NSTPL, Broadcaster shall meet the following obligations.

1.1 Broadcaster shall also procure at its own cost necessary clearance, license, permissions, including but not limited to necessary approvals or otherwise from Department of Telecommunications, Wireless Planning Cell (WPC) Network Operation Control Cen.re (NOCC), Ministry of Information and Broadcasting (MIB), Ministry of Home Affairs, or any other Ministry, Department, Agency, Secretariat of the government of India or of the state concerned or by any other Municipality for the purpose of doing necessary demonstrations, dry run, Commercial operations or otherwise necessary for the up linking of said TV Channels and will be maintained in such status throughout the agreement period by the Broadcaster"

19. Clause 3.2 provides for the rate of interest payable by the broadcaster, in the event the amount owed by the broadcaster is not paid on its due date or earlier.

It reads as under:

"3. PRICES

3.2 Notwithstanding anything to the contrary indicated in the bill or Invoice, any amount owned by the Broadcaster to NSTPL which is not paid on its due date or earlier shall bear interest at the rate of (2%) per month calculated on a daily basis from the date or, which such amount was first due, till the amount is paid, besides intimating default in payment of any outstanding charges to Various concerned Government authorities."

20. The other provisions of the Agreement, which in of relevance for our purpose are Clauses 6.2 and 6.2.3, 6.2.4.

They read as under.

"6.2 TERMINATION

Either party may terminate this agreement by giving a prior written notice of 90 days on the occurrence of any of the following events/circumstances:-

- 6.2.1 If either party shall be wound up or makes composition or agreement with its creditors or disposes off its business or any of its undertaking or the substantial part thereof as part of such composition or arrangement or otherwise, save and except in the case of reorganization/ restructuring.
- 6.2.2 If a Receiver, Liquidator or Manager is appointed in respect of the whole or substantial part of the assets or business of either party.
- 6.2.3 Notwithstanding anything contained contrary in this Agreement or otherwise, if the Broadcaster terminates the agreement prematurely before the expiry of agreed contract period for any reasons, not indicated in Section 6.2. The Broadcaster will be

liable to pay to NSTPL all outstanding dues before the service charges for unexpired period of the agreement as provided in clause 6.1 of the Agreement.

- 6.2.4 NSTPL shall have the option of immediately terminating this Agreement in the event Broadcaster fails to make payment of any amount due under this Agreement within this stipulated time period remaining outstanding and unpaid for more than a period of fifteen days from the due date. In such an event, the Broadcaster shall immediately become liable to pay to NSTPL all outstanding dues besides charges for unexpired period of this agreement as provided in Clause 6.2 above.

21. Clause 6.3 provides for foreclosure. It reads as under:

**"6.3 FORECLOSURE**

In the event that the Broadcaster terminates the Services before the Term of the Agreement, for any other reasons, not covered in Section 6.2 of this agreement, the Broadcaster shall pay to NSTPL Foreclosure Charges calculated as equal to the stipulated service charges for the remaining unutilized/unexpired period of the term of agreement. The termination of this Agreement for any reason whatsoever shall not relieve the Broadcaster of its obligation towards payment of all outstanding dues.

22. It is not in dispute that the Petitioner is a service provider within the meaning of the provisions of Clause 2(j) of the TRAI Act.

It reads as under:

"(j) "service provider" means the [Government as a service provider] and includes a licensee;"

23. The Regulations, however, defines "service provider" to mean:

“(n) **“service provider”** means the Government as a service provider and includes a licensee as well as any broadcaster, multi system operator, cable operator or distributor of TV channels.

Clause 1(ii) of the Regulations reads as under:

“1.(ii) This regulation shall cover arrangements among service providers for interconnect and revenue share for all Telecommunication (Broadcasting and Cable) Services throughout the territory of India.”

24. The definition of the “service provider” as contained in Clause 2(n) of the Regulations although appears to be exhaustive in nature, keeping in view the nature of services provided by the Petitioner herein, it is difficult to hold that it would come within the purview of a “distributor of TV channels” as defined in Clause 2(j) thereof.

25. We may notice the said provision also:

“(j) **'distributor of TV channels'** means any person including an individual, group of persons, public or body corporate, firm or any organization or body re-transmitting TV channels through electromagnetic waves through cable or through space intended to be received by general public directly or indirectly. The person may include, but is not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator;”

26. For the purpose of attracting the said clause a person must have the right of retransmitting the TV channels.

27. It is, however, not in dispute that whereas uplinking of the channel was to be done by the Petitioner, the down linking thereof was to be performed by the Respondent itself.

28. The Petitioner, in the aforementioned situation, cannot be held to be retransmitting signals in the strict sense of term.

By reason of the said agreement the parties, moreover, cannot be said to have entered into an interconnection agreement whereby any revenue is to be shared.

29. Clause 4.2 of the Regulation primarily would apply to a multi service operator or a local cable operator but not a passive infrastructure provider like the Petitioner.

30. It is of some interest to place on record that some broadcasters have their own teleports but some small broadcasters like the Respondent may avail the teleport services provided to them by others like the Petitioner.

31. The license, however, is confined to the uplinking of the channels only and not the down linking thereof.

It is now a well settled principle of law that the provisions of statute must be read in the text and context in which the same are enacted/made.

32. The Regulations, in the opinion of this Tribunal, do not envisage that a service provider like the Petitioner although would come within

the purview of the provisions of the Act being a licensee, would be governed by the provisions of the Regulations.

This petition, however, shall be maintainable; both the parties being service provider.

33. The question with regard to jurisdiction of this Tribunal recently has been considered in Petition No.75 of 2012 Reliance Infratel Ltd. vs. Etislat DB Telecom Pvt. Ltd., Mumbai disposed of 10.4.2012 wherein it was, inter alia, held:

"63. We need not elaborate on this issue as from the discussions made hereinafter it would be evident that rendition of service can be effected at different stages. It is only in that view of the matter, in our opinion, the term "telecommunication service" cannot be ascribed a narrow meaning.

This would lead to a further question as to what the word `service provider' ordinarily means. It's meaning is simple, i.e, who provides service. It does not say service must be provided to the ultimate consumer. May be that is the ultimate goal but in a given case the licensee may outsource its activities. What, however, is essential is that the last leg of services must be rendered to the customer."

34. It was furthermore opined:

"The term `service provider' includes `licensee'. If we are right in our conclusion that a registrant under ISP Category I Registration Certificate is also a licensee, the logical corollary thereof would be that it would come within the purview of the term `Service Provider'.

If that be so, both the parties hereto being licensees would come within the purview of the term `Service Provider' and thus, a dispute between them as

regards supply of `telegraph` would be amenable to the jurisdiction of this Tribunal as envisaged under Section 14 of the 1997 Act.

35. This Tribunal therein also noticed its earlier decision in IndusInd Media vs. City Cable & Ors. Petition No.67(C) of 2008 disposed of on 27.7.2011.

It is not in dispute that in a situation of this nature the doctrine of purposive interpretation should be followed.

36. So far as the first prayer of the Petitioner is concerned, the Respondent does not deny or dispute the quantum thereof.

Although the Respondent has not examined any witness, it is not in controversy that the Petitioner clearly stated that a cheque for a sum of Rs.3,60,000/- was issued on 24.5.2011.

37. Would it mean that the Petitioner is not entitled to the arrears of charges upto 28.5.2012?

38. In the opinion of this Tribunal it is entitled thereto. It is not a case where a party to a agreement despite larger claim accepts a payment made towards full and final settlement without any demur whatsoever.

39. The cheque was accepted as a payment, but the same was subject to clearance by the bank. Had the cheque not bounced, it could have been treated to be valid payment on the day on which the cheque was handed over to the Petitioner. But as it has bounced,

the Petitioner did not receive the payment. It, therefore, cannot be said that the Petitioner has accepted the payment without any demur.

40. If two parties agree that a one time payment may be held to be term of settlement, the same must fructify into actual payment. The Respondent itself has failed to abide by the terms of said full and final settlement. It must thank itself therefor. It would not be open to it to canvass that the handing over of a cheque itself would amount to fulfilling the obligations on its part to make payments in terms of the settlement.

41. This Tribunal is of the opinion that the rule of Estoppel as contended by Mr. Bhatia would not be applicable in a case of this nature.

42. The Petitioner, however, as noticed heretobefore, itself has terminated the agreement on the ground of non-payment of dues.

It may further be noticed that the Petitioner has brought on record a large number E-mails being dated 13.5.2011 15.4.2011, and 4.4.2011 in response to the Petitioner's notices dated 4.8.2011, 16.2.2011, 13.12.2010 as well as various other documents, from a perusal whereof it would appear that the Respondent had accepted its liability in terms of the agreement and furthermore agreed to pay the demanded sum.

43. A notice was also issued by the Petitioner to the Respondent on 12.5.2011 in the following terms:

"Dear Sir,

This is reference to the uplinking agreement dated 7<sup>th</sup> Feb 2010. We would like to bring to your kind notice that in spite of sending regular reminders for the Uplinking and Security payment, we are not receiving the payments on regular basis. As per our finance department your total outstanding as on date is Rs.13,30,000/- (Doesn't include May invoice of Rs.6,00,000/-).

We had requested you many times to settle the account and clear outstanding dues. We request you to kindly make the payment by 14<sup>th</sup> May 2011.

On failure of above we will be free to take appropriate action including termination of services as per the agreement dated 7<sup>th</sup> Feb 2010, clause No. 6.2.4."

44. It appears that the cheque had bounced due to insufficient fund and not on the ground that the Respondent stopped the payment. In either of the cases, the same would not constitute payments in terms of the settlement.

45. After the agreement was terminated, as contended by Mr. Bhatia, a cheque was issued by way of acknowledgment of a debt, irrespective of the fact as to whether it is in whole or in part.

The Petitioner, therefore, is entitled to a decree towards the charges payable to it by the Respondent under the agreement.

46. So far as the amount of damage claimed by the Petitioner for a sum of Rs.1,80,80,000/- for the period 16.6.2011 to 6.12.2013 i.e. the charges which were to be paid by the Respondent for the balance term till expiry of the agreement is concerned, the same cannot be allowed.

The matter might have been different, had the Respondent terminated the agreement.

47. It is accepted that the Petitioner itself has terminated the agreement. The Petitioner had terminated the agreement in terms of Clause 6.2.4. The said Clause provides for foreclosure.

The broadcaster has made itself liable only to pay charges for the unexpired period of the agreement and thus, in this case the foreclosure clause would not be attracted.

48. It is now well settled that a clause of foreclosure and/or forfeiture should be strictly construed.

For the reasons aforementioned, this petition is allowed for a sum of Rs.17.30 lakhs.

49. The Petitioner shall also be entitled to interest on the said amount.

Mr.Chib would contend that the Petitioner shall be entitled to obtain interest at the rate of 24% per annum in terms of Clause 3.2 of the agreement.

50. This Tribunal is of the opinion that Clause 3.2 of the agreement in a situation of this nature is not applicable.

The Petitioner would be entitled to interest at the rate of 9% per annum.

The Petitioner would also be entitled to proportionate costs.

Counsel's fee assessed at Rs.50,000/-.

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

**October 8, 2012**  
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