

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 19TH OCTOBER 2012

PETITION No.431 (C) of 2011
(M.A. No. 343 of 2011)

M/s. 3 Way Cable Communications Pvt. Ltd., AP ... Petitioner

Versus

M/s. Sai Cable TV Communication Network, AP ...Respondent

PETITION No.432 (C) of 2011
(M.A. No. 344 of 2011)

M/s. 3 Way Cable Communications Pvt. Ltd., AP ... Petitioner

Versus

Meera Saheb Cable TV Network, AP ...Respondent

PETITION No.433 (C) of 2011
(M.A. No. 345 of 2011)

M/s. 3 Way Cable Communications Pvt. Ltd., AP ... Petitioner

Versus

M/s. Nazma Siti Cable Network, AP ...Respondent

PETITION No.434 (C) of 2011
(M.A. No. 346 of 2011)

M/s. 3 Way Cable Communications Pvt. Ltd., AP ... Petitioner

Versus

M/s. Sai Cable TV Network, AP ...Respondent

PETITION No.435 (C) of 2011
(M.A. No. 347 of 2011)

M/s. 3 Way Cable Communications Pvt. Ltd., AP ... Petitioner

Versus

Meera Star TV Cable Network, AP ...Respondent

BEFORE:

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

For Petitioners ; Mr. G.T. Rao, Advocate

For Respondents ;Mr. Sharath Sampath, Advocate
Mr. Manikya Khanna, Advocate

J U D G E M E N T

The Petitioner is a Multi Service Operator operating in the town of Guntur in the State of Andhra Pradesh.

The Respondent in the first case is a proprietary concern of one Akbar Baji.

2. In this petition, the Petitioner has prayed for recovery of diverse sums as specified in the respective petitions.

It may, however, be noticed that in Petition No. 431 (C) of 2011, a decree for a sum of Rs.41,506/- has been prayed for. The fact that there existed an oral agreement between the parties is not in dispute. It is also not in dispute that admittedly upto July 2011, the Respondent had been receiving signals of the channels of which the Petitioner was the distributor.

In these petitions, the Petitioner has prayed for recovery of monthly subscription charges for the period 01.4.2009 and 01.9.2011.

The Petitioner in support of its case, has inter-alia relied upon :-

- (i) A Statement of account;
- (ii) Notice of demand;
- (iii) Payment of Service Tax;
- (iv) Invoices;
- (v) Payments received for the entire period in question.

3. The Respondents, however, in regard to invoices and payments receipts, contend that they all are false and fabricated documents.

The parties hereto in support of their respective cases have examined Shri K.R.H.S. Hanumantharao (PW-1) and the respective proprietors of the concerned Respondents.

4. Before, however, we advert to the rival contentions of the parties it appears from the record that the Respondents were working as Local Cable Operators under one Samba Siva Cable T.V. Network which concern, according to the Petitioner, was taken over by it.

The proprietor of the said concern was one Mr. Brahman. The Respondents contend that although they had received notices, when they met Mr. Brahman were assured that he will take care of the issue.

5. Mr. Tushar Rao, the learned counsel appearing on behalf of the Petitioner, would urge that keeping in view the fact that relationship between the parties is not in dispute, the concerned Respondents in each of these matters having failed to show that they have made the entire payments as were due from them and as reflected in the invoices, these petitions should be allowed.

6. Mr. Sharath Sampath, the learned counsel appearing on behalf of the Respondent, on the other hand, urged that the Petitioner having not

established the service of invoices, its books of accounts, the receipt of payments for the entire period, this petition should be dismissed having regard to the fact that burden of proof in terms of Section 101 of the Indian Evidence Act was on the Petitioner.

It was furthermore contended that the amount mentioned in the invoices being different from those stated in the affidavit of the Petitioner, the purported ledger account produced by the Petitioner should not be held to be incorrect.

We may, at the outset, notice the discrepancies appearing in the invoices and affidavit of evidence of PW-1 :-

<i>Petition No.</i>	<i>Amount as per invoice</i>	<i>Amount as per affidavit of Petitioner</i>
<i>431 (C) of 2011</i>	<i>Rs.10,386.95 (June 2011)</i>	<i>Rs.10,580.90</i>
<i>432 (C) of 2011</i>	<i>Rs.19,566.12 (June 2011)</i>	<i>Rs.19,931.54</i>
<i>433 (C) of 2011</i>	<i>Rs.32,207.60 (June 2011)</i>	<i>Rs.32,809</i>
<i>434 (C) of 2011</i>	<i>Rs.33,173.83 (June, 2011)</i>	<i>Rs.33,793.39</i>
<i>435 (C) of 2011</i>	<i>Rs.5,797.37 (June 2011)</i>	<i>Rs. 5,905.64</i>

7. It may be pointed out that the Telecom Regulatory Authority of India (TRAI) in exercise of its power under Section 11(b)(ii) of the Telecom Regulatory

Authority of India Act, 1997 made a Regulation known as the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 (The Regulations).

8. For the purpose of these petitions, we may notice clause 3.3 and the Explanation appended thereto as well as Section 4(A) thereof.

The said provisions were inserted in the Regulations by way of 5th Amendment Regulations, 2009 which came into force on and from 17.3.2009.

9. We would proceed on the basis, the law in this regard being settled, that in the event the Petitioner despite having not entered into an agreement in writing, would be entitled to the actual amount, benefit whereof was taken by the defendant keeping in view the 'doctrine of restitution' vis-à-vis 'unjust enrichment'.

This aspect of the matter having recently been considered in S.R. Cable T.V. Pvt. Ltd. vs. Gulab Chand Panjre – Petition No. 46 (C) of 2012 disposed of on 18th October, 2012, it is not necessary to consider the quests afresh. A law, therefore, which appears to be applicable is that Section 4-A may have limited application and it does not render the agreement illegal so as to attract the

principles of Section 23 of the Indian Contract Act and/or the doctrine of 'Ex turpi causa non oritur action.

10. We may, keeping in view the aforementioned proposition of law, consider these cases of the Petitioner. So far as the statement of account is concerned, PW-1 who joined the Petitioner company as a Manager (Legal) only after September 2011, evidently does not have any personal knowledge nor did he claim any, although in paragraph 2 of the affidavit, he stated that he had knowledge.

PW-1, in his evidence, inter-alia contended that subscription charges were payable by the Respondent was Rs.10,580.90.

He, in his cross examination, stated as under :-

“The agreed amount between the parties as monthly subscription charges to be paid by the respondent was Rs.10,580.90/-.”

“Q.6 As you say that the monthly subscription charges agreed to between the parties was Rs.10,580.90/- (in Petition No. 431 (C) of 2011) would I be correct in saying that the said figure would also be reflected in the alleged invoices filed by you?”

A. Yes, it is according to the invoices.

Q9. Have you made this statement in your petition?

A. I do not remember but this is the normal practice.”

11. The Petitioner has not proved its books of account.

The books of account could have been found to be relevant provided they were maintained in the ordinary course of business as is stated in Section 34 of the Indian Evidence Act.

According to PW-1, who has no knowledge about the methodology adopted by the Finance Department of the Petitioner, the said statement of account has been prepared on the basis of the invoices alone. He, therefore, does not contend that the ledger account was maintained on the basis of the agreement entered into by and between the parties.

If a statement of account per-se do not tally with the books of accounts and having been prepared for the purpose of these cases, are not to be relied upon. They cannot be held to be relevant.

So far as the invoices are concerned, the Petitioner has filed the same which are at page 69 to 96.

In the invoice for the month of June 2011 a sum of Rs.10,386.95 was mentioned, but according to the Petitioner the amount payable was only Rs.10,580.90. Although so far as the said invoices are concerned, they are said to have been computer generated. The Petitioner has not laid any proof with regard to compliance of Section 65-B(2) and Section 65-B (4) of the Indian Evidence Act.

Moreover, there is nothing on record to establish that the same had been despatched to the correct addresses of the Respondents and/or otherwise served. No statement in that behalf has been made in the petition.

When such a stand was taken by the Respondent in their replies, only in the rejoinder the Petitioner contended that they have either been delivered by hand or have been sent by ordinary post, PW1 in his affidavit stated :-

“That I say that in the present reply, the respondent had time and again referred to some other MSO in the name and style of Ms. Samba Siva Cable TV Network under which the respondent was a LCO before coming to the present petitioner. However, it is respectfully submitted that the respondent has deliberately not filed any document pertaining to the allegation /statement nor its own the Registration Certificate issued by the Post Office of Guntur. It is submitted that the respondent alongwith the said M/s. Samba Siva Cable TV Network had requested the petitioner to provide signals and service when the said network was unable to provide all signals and services to its LCO’s including the respondent herein. At that time M/s. Samba Siva Network was providing only ETV and Gemini and free to air channels (as signals of many pay channels like Maa TV, Zee bouquet, ESPN, Star channels etc. got de activated with M/s. Samba Siva Cable Network sattenapalli for their related business reasons) for which it was authorized. It was at the request of the said Samba Siva cable TV Network and respondent and other similarly placed LCO’s that the petitioner took over the control room of the said M/s. Samba Siva Cable TV Network Sattenapalli and commenced providing signals to them respondent and others

without any hindrance from April 2009. It was only thereafter that invoices were being issued to the respondent and delivered by hand or ordinary post, against which, whenever payments were received, proper receipts were being issued to the respondent.”

12. We have noticed heretofore that in terms of the Explanation appended to Clause 3.3, ordinarily the Regulations enjoin the requirement of proof of service of the invoices.

It is, however, one thing to say that a multi service operator has been able to bring its case within the purview of Section 65 or Section 70 of the Indian Contract Act, but it is another thing to say that the burden of proof would be shifted contrary to the provisions of the Regulations.

Exception to the Regulations for the purpose of passing a decree in a suit for recovery of an amount must be considered from that angle.

If the invoices have not been proved to have been raised and served in accordance with law, the question of considering the same does not arise and consequently no reliance can be placed on the statement of account.

13. So far as the alleged receipts granted to the Respondents towards the payment received by the Petitioner is concerned, evidently the same had not

been admitted. In that view of the matter, it was obligatory on the part of the Petitioner to prove the same.

PW-1 admittedly was not present when the statement of account was prepared. He did not have any personal knowledge with regard thereto. The said receipts were also required to be proved in terms of the provisions of the Indian Evidence Act. They having not been proved in accordance with law, no reliance can be placed on that. The purported notices of demand by itself cannot be a proof of the amount outstanding.

14. Mr. Tushar Rao would, however, contend that it was for the Respondent to prove the fact that they have paid the entire amount. We would proceed on the basis that the Respondents have not been able to prove their defences or their defences are otherwise weak, but keeping in view the provisions of Sections 101 and 102 of the Indian Evidence Act, in the fact situation when a court of law finds itself unable to appreciate the evidence having regard to their relevance and/or authenticity must fall back on the abstract doctrine of burden of proof.

In Rangammal Vs. Kupuswami and Another reported in (2011) 12 SCC 220, a Division Bench of the Supreme Court of India held as under :-

“21. Section 101 of the Indian Evidence Act, 1872 defines ‘burden of proof’ which clearly lays down that:

“101. Burden of proof -- Whoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.

22. *In view of this legal position of the Evidence Act, it is clear that in the instant matter, when the plaintiff/respondent No.1 pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24.2.1951, then it was clearly for the plaintiff/respondent No.1 to prove that it was executed for legal necessity of the appellant-while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the defendant/appellant who should have challenged the sale deed after attaining majority as she had no reason to do so since the plaintiff /respondent No.1 failed to first of all discharge the burden that the sale deed in fact had been executed for legal necessity of the minor's predecessor mother was without permission of the court. It was not the defendant/respondent who first of all claimed benefit of the sale deed or asserted its genuineness, hence the burden of*

challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all.”

15. So far as the books of accounts are concerned, the Apex Court in Central Board of Investigation Vs. V.C. Shukla & Others reported in (1998) 3 SCC 410, stated the law thus :-

“17. From a plain reading of the Section it is manifest that to make an entry relevant thereunder it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business. From the above Section it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as relevant evidence, still, the statement made therein shall not alone be sufficient evidence, still, the statement made therein shall not along be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the documents, with which we are concerned, fulfil the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed.”

16. This Tribunal, moreover, in Indusind Media and Communication Ltd. Vs. Poly Cable – Petition No.122 (C) of 2009 and other connected matters, held as under :

“7. There cannot be any doubt or dispute that things admitted need not be proved in terms of the Section 58 of the Indian Evidence Act.

A question which, however, arises for consideration is as to whether the statement by way of admission or otherwise made in the cross examination can be a ground for passing a decree in these petitions filed by the petitioner herein, although for all intent and purpose; no evidence has been adduced to prove the privity of the contract by it. Indisputably the witness examined on behalf of the petitioner in his deposition based his statement on the records of the case. He has no personal knowledge in the matter. It is however, of some importance to notice that the Board or Directors of the petitioner also in terms of the resolution dated 10th December, 2009 authorised him to depose in these matters and in the following terms :

“RESOLVED THAT, Mr. Vishwa Bandhu Sharma, DGM Finance be and is hereby authorized on behalf of the company to sign and file Affidavits verifying the Accounts statement(s) in the recovery petitions filed before the TDSAT, New Delhi for recovery of outstanding debts against Old Cable Operators associated with IMCL.”

- 8.** *Shri V.B. Sharma has deposed exactly on the line of the statement of account filed by it.*

We may furthermore notice that Mr. Sharma in cross examination accepted that the entries appearing in the statement of account/ledger account, had not been entered in the Books of Accounts to his personal knowledge.

He furthermore accepted that the petitioner has not filed the proof for despatch of invoices to the respondent nor any proof of service thereof. According to him the invoices were served by hand through the respective Area Manager. He, however, evidently has no personal knowledge in this regard. He has also not produced any record to establish his aforementioned contention.

- 9.** *It is also not in controversy that the parties hereto had not entered into any agreement in writing. The petitioner also bases its claim only on oral agreement. Furthermore in these cases the invoices which have been filed alongwith the petition and/or the affidavit and/or the rejoinder thereto are maintained in electronic form and printouts were taken later.*

- 10.** *It has, however, been pointed out before us by Mr. Tejvir Singh Bhatia, the learned counsel appearing on behalf of the respondents, that the invoices although were stated to be true copies of the originals, it is evident that dates of some invoices are different so far as the dates of transactions shown in the later invoices as would appear from pages 47 to 51 of Petition no. 141(C) of 2009 are concerned. Similar instances are there in other cases also.”*

17. In view of the aforementioned well settled principles of law, I am of the opinion that the Petitioner has not been able to bring home its case even within the purview of the doctrine of restitution.

18. These petitions are, therefore, dismissed without any order as to costs.

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(S. B. Sinha)
Chairperson

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