

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 13th November, 2013

Petition No. 140 (C) of 2012

(With M.A. No. 706 of 2012)

Manthan Broadband Services Pvt. Ltd. ... Petitioner

Vs.

Sahara India TV Network & Ors. ... Respondent

BEFORE:

HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner ... Ms. Nidhi Parashar, Advocate
for Mr. Navin Chawla, Advocate

For Respondent ... Mr. Jayant K. Mehta, Advocate
Mr. Arjun Natarajan, Advocate

JUDGEMENT

By way of the present petition, the petitioner seeks to recover the dues allegedly owed by respondent No.1 to the petitioner herein for receiving and redistributing the signals of the Respondent No.1's channel namely "Sahara One" ,also herein after referred as to " The Channel" ,through its cable services, across the territory of Kolkata Metropolitan Development Area and

districts of West Bengal connected by the head-end installed at the Registered Office of the petitioner.

2. The petition is filed u/s 14 read with section 14 A of the Telecom Regulatory Authority of India Act, 1997. The petitioner is a Multi Service Operator/Cable Operator operating within West Bengal, Jharkhand and other States. It is in the business of distribution of television channels including through Analog/digital conditional access system and holds a license to operate as a cable operator under the Cable Television Networks (Regulation) Act, 1995.

3. The petitioner has in the present petition prayed for the following:-

“(a) Direct the respondents to pay to the petitioner a sum of Rs.2,48,17,500/- (Rupees two crores forty eight lacs seventeen thousand five hundred only) as on 31.03.2012 along with interest at the rate of 18% p.a. and also clear the future monthly subscription dues on time;

(b) Direct the respondents to furnish security of an amount of Rs.2,48,17,500/- pending the disposal of the present petition;

(c) Pass such other and further orders as may be deemed fit and proper in the facts and circumstances of the case.”

4. Respondent No.1, Sahara India TV Network (hereinafter also referred to as 'Sahara') is engaged in the business of distribution and promotion of Television Channels in particular of television channels being Sahara One, Sahara Filmy and Firangi to the viewers through various intermediaries. It is a broadcaster within the meaning of the term in Clause 2(e) of the Interconnect Regulations, 2004 (hereinafter referred to as Interconnect Regulations).

5. Respondent No.2, ABS Media Services Pvt. Ltd. (hereinafter also referred to as 'ABS'), is an agent of Sahara and has been engaged by Sahara to supply the IRD's and VC's to various MSO's/Cable Operators for Analog/Digital Systems/cable services for maximizing the reach and viewership of the channels of Sahara. Respondent No.2 has also been engaged to get the channels of Sahara placed at the preferred frequencies and for this purpose they enter into placement deals for and on behalf of Sahara. It is also a broadcaster within the meaning of the said term as defined in Clause 2(e) of the Interconnect Regulations.

6. The case of the petitioner may be summarized as under :

(i) The respondent No. 1 & 2 approached the petitioner around October 2010 through their authorized representative Mr. Atul Saraf for receiving and redistributing its signals of "Sahara One" channel. However, they kept on delaying the signing of agreement. On an

assurance that the petitioner would be paid its dues, the respondent requested the petitioner to start carrying/retransmitting its Channel on the Hyper band pending negotiations and signing of a formal Agreement. The petitioner believing such commitment, started placement of Sahara One Channel on the Hyper Band of all its networks across the territory of Kolkata Metropolitan Development Area and districts of West Bengal connected by the head-end installed at the Registered Office of the petitioner w.e.f. 29.10.2010. However, having taken advantage of petitioner's belief on 21.09.2011, ABS, being the agent of Sahara, wrote to the petitioner that the respondent No.1 will be paying a placement fees of Rs.175 lacs plus taxes and the petitioner will have to pay 15% as subscription fee for placing Sahara One in West Bengal and Jharkhand on S-Band. This was totally contrary to the understanding reached between the parties. The petitioner, therefore, sensing that it had been taken for a ride, on 22.09.2011, disconnected the channel from its networks.

(ii) That the parties (petitioner and respondent No.2) thereafter met in the office of the petitioner on 24.09.2011 and it was agreed that the petitioner was to place the channel, Sahara One on Hyper frequency at the petitioner's headend for an amount of Rs.2.10 crores plus taxes for a period of 12 months and the effective date would be 1st April 2011 to 31st March, 2012. The petitioner also agreed to payment of Rs.25 lacs plus taxes as subscription fees. However, as there was no written minutes recorded, the petitioner vide e.mail dated 24.09.2011 wrote to

Respondent No.2 and asked the respondent to confirm the said understanding in writing. It was also stated that post such confirmation, the petitioner will reactivate, that is, place the Channel of the respondent No.1 on the desired frequency being hyper band. Thereafter, the respondents through their authorized representative, Mr. Atul Saraf, telephonically confirmed the understanding as stated in the petitioner's e-mail on the same day and requested the petitioner not to delay the reactivation of its channel. Having received the confirmation, the petitioner placed Sahara One at Hyper band on 24.09.2011 itself."

(iii) There was some further exchange of correspondence between petitioner and respondent No. 2 which subsequently resulted into the petitioner signing the agreement. The agreement along with three invoices for the period 1.04.2011 to 30.6.2011; 01.7.2011 to 30.09.2011; 01.10.2011 to 31.12.2011 was sent to the respondent No. 2 on 17.10.2011. Further, respondent No. 1 in turn also sent invoice dated 14.11.2011 for subscription fees amounting to Rs.1838333/- for the period starting from 01.4.2011 to 30.11.2011. Subsequently on the request of the respondent No. 2, the invoices were re-raised in the name of respondent No.1. As the respondents were not paying dues of the petitioner on one pretext or the other, the petitioner sent an e-mail dated 29.11.2011 requesting the respondents to clear the payments immediately. However, despite the repeated request of the petitioner,

no payment was made and the respondent on the other hand raised another invoice dated 01.12.2011 for an amount of Rs.2290791/- towards subscription fees.

(iv) Vide e-mail dated 12.12.2011, the petitioner again wrote to the respondent informing that the outstanding amount has reached Rs.1.86 crores. Since payments were not forthcoming and respondent No. 2 continued to blame respondent No.1, the petitioner asked the authorized representative of respondent No.2 to arrange for a meeting with respondent No.1. A meeting was confirmed on 13.12.2011 and accordingly Mr. Gurmeet Singh, Director of the petitioner's firm visited Mumbai. However, the meeting did not take place. Subsequently, the respondents called the petitioner for another meeting on 01.02.2012 and offered the petitioner immediate payments if it gave a discount of 50% on the placement fees. This was not agreed to by the petitioner.

7. The respondent in its reply has inter-alia stated as following:-

- i) The respondents i.e. respondent No.1 and ABS Media Services Pvt. Ltd., Mumbai; and the petitioner entered into an Agreement on 16.10.2011. Inadvertently the date in the Agreement has been written as 16.09.2011. The respondent as well as the petitioner had mutually agreed to execute the Agreement to govern the rights and obligations as regards subscription and carriage/distribution of Sahara One.

- ii) Under the Agreement, the petitioner had undertaken to carry Sahara One on an agreed frequency as unequivocally set out therein.
- iii) The agreed Band was Hyper Band due to several reasons. It is pertinent to mention that Sahara One is a Hindi general entertainment channel and the Agreement was for Kolkata metropolitan Development Area (KMDA) and Districts of West Bengal connected by the headend installed at the petitioner's registered office.
- iv) After considering the specific and peculiar requirements of the territory as well as higher viewership of regional channels, it was decided that Sahara One's carriage in Hyper Band would be beneficial to respondent No.1.
- v) The Agreement creates reciprocal obligations in as much as in consideration of the petitioner placing Sahara One at the agreed band and the qualitative and unhindered carriage of Sahara One, respondent No.1 shall pay to the petitioner a total carriage fee amounting to Rs.2,25,00,000/- per annum plus service tax at the rates applicable from time to time.

- vi) Throughout the tenure of the Agreement, i.e., from 01.04.2011 till 31.3.2012, the placement of Sahara One has at no point in time been in terms of the Agreement.
- vii) Throughout the period of the Agreement barring periods of disconnection Sahara One was wrongly placed between Aaj Tak which is a news channel and Star Ananda which is a regional channel from 10.4.2011 till 19.6.2011 as well as from 10.7.2011 till 17.7.2011. furthermore, from 30.10.2011 till 18.3.2012, Sahara One was placed between sports channels like Star Sports, Neo Cricket, Ten Cricket, Ten Action + and Aakash Bangla which is a regional channel. Thus the reach of Sahara One was adversely affected within the territories covered by the petitioner.
- viii) The petitioner placed Sahara One in Super S Band from 03.4.2011 till 25.6.2011. The agreed frequency as per the Agreement was in Hyper Band, however by placing Sahara One in Super S Band, the petitioner has materially breached the Agreement.
- ix) Without assigning any reason whatsoever, the petitioner switched off Sahara One from its networks altogether with effect from 26.6.2011 till 9.7.2011. Thereby the petitioner failed in using its best efforts to ensure that transmission of Sahara One

is without hindrance or disturbance or interruptions. It is pertinent to mention that with effect from 10.7.2011 till 23.7.2011 the petitioner yet again placed Sahara One in Super S Band.

- x) The petitioner yet again without assigning any reason whatsoever, switched off Sahara One from its networks altogether for a period of 14 weeks. Thus, with effect from 24.7.2011 till 29.10.2011, Sahara One was not even being carried by the petitioner.

- xi) With effect from 30.10.2011, the petitioner placed Sahara One in Super Colour Band and yet again acted against its obligation of carrying Sahara One on the agreed frequency in Hyper Band.

The respondent has also filed a counter claim that the petitioner undertook to pay to the counter-claimant a subscription amount of Rs.25.00 lakhs (exclusively of taxes) annually in consideration for the grant of non-exclusive license to distribute/retransmit Sahara One to subscribers situated within the territory, i.e., Kolkata Municipal Development Area (KMDA) and Districts of West Bengal connected by the head-end installed at the Petitioner's registered office.

As per the counter-claimant, the petitioner has to pay Rs.27,57,497/- towards subscription charges dues alongwith 18 per cent interest. Rs.2.26

crores have been claimed as damages towards losses incurred due to not showing Sahara One on the petitioner's network and a further amount of Rs.2.45 crores as damages towards losses incurred due to not showing Sahara One on hyper band as required under the agreement and for depriving it from favorable neighborhood.

8. After hearing the Counsel for the parties , Issues were framed by the Tribunal vide order dated 5th July, 2012 .

9. The following are the undisputed facts of the case:-

- (i) A tripartite agreement was executed between the petitioner and respondents Nos. 1 & 2 on 16.10.2011. The agreement was given retrospective effect from 1.4.2011. The clause regarding terms of the agreement is as under:-

“TERM: This Agreement shall come into effect from 1st Day of April 2011 and shall be valid for a period of 12 (Twelve) months commencing from the Effective Date (Term), unless terminated prior to the expiry of the validity period of 12 (Twelve) months, in accordance with the terms and conditions of this Agreement.

Within two months prior to the expiry of this Agreement the MSO/Cable Operator and Sahara may take steps towards renewal of this Agreement on terms and conditions agreed by and between the parties hereto.”

- (ii) As per the agreement, the Sahara One channel of the respondent No. 1 was to be placed in Hyper band. The clause regarding placement is as under:-

“Placement:

The MSO/Cable Operator has undertaken to carry the said Channels being Sahara One, Sahara Filmy and Firangi on the below agreed frequencies:

Neighbourhood channels

<i>S.No.</i>	<i>Channel</i>	<i>Band</i>	<i>Frequency</i>	<i>Before</i>	<i>After</i>
<i>01</i>	<i>Sahara One</i>	<i>Hyper</i>	-	-	-
<i>02</i>	<i>Sahara Filmy</i>	-	-	-	-
<i>03</i>	<i>Firangi</i>	-	-	-	-

- (iii) In consideration of the above, the carriage and subscription fee payable as per the agreement is as under:-

“Carriage and Subscription fee:-

- 1. In consideration of the Cable operator/MSO placing the said channels at the agreed frequency and the qualitative and unhindered carriage of the said channels, SAHARA shall pay to the MSO/ cable operator a total carriage fee amounting to Rs.2,25,00,000/- (Rupees Two Crore Twenty Five Lacs Only) per annum plus Service-tax at the rates applicable (said Carriage Fee) from time to time.*

2. SAHARA shall pay the said Carriage fee to the MSO/ cable operator in 12 (Twelve) equal installments of Rs.18,75,000/- (Rupees Eighteen Lacs Seventy Five Thousand Only), each payable by or before the 25th Day of the month immediately following the month in which the payment becomes due. However, every payment of Carriage Fee amount shall be subject to receipt of appropriate invoice by SAHARA from the MSO/cable operator and its due verification.
3. Accordingly, the MSO/Cable operator undertakes to pay to SAHARA, a Subscription Amount of Rs.25,00,000/- (Rupees Twenty Five Lacs only) exclusive of taxes, payable monthly/Quarterly/ Half Yearly/ Yearly, in consideration for the grant of non-exclusive right to distribute/re-transmit the said channels to subscribers situated with the said Territory.
4. SAHARA shall have the right to vary the Subscription Amounts not during the specified deal period after giving notice of not less than one month to the MSO/ cable operator and in compliance with the applicable law in force. The total subscription amounts payable by the MSO/cable operator to SAHARA shall also vary accordingly.”

- (iv) Invoices were raised by the petitioner and the respondent on each other as per the agreement.
- (v) With effect from 30.10.2011, the petitioner placed Sahara One in Super Color Band.

10. The main issues/disputes between the parties arise from the following:-

- (a) Whether the placement of the respondent's channel "Sahara One" in Color band instead of Hyper band, w.e.f. 30.10.2011 was due any understanding reached between the parties or it was a unilateral action by the petitioner, in violation of the agreement .
- (b) Whether the petitioner has blacked out Sahara One from 20.6.2011 to 9.7.2011 and from 24.7.2012 to 29.10.2012 as alleged by the respondent No. 1 and whether the same was placed correctly till 29.10.2011 or not?

The other issues and claims and counter-claims of the parties can be decided once the above two issues are decided.

11. As per the petitioner, acting on the reassurance of Mr. Atul Saraf given on behalf of respondent No. 2, the petitioner had already placed the channel of respondent No. 1 on hyper band and thereafter the petitioner upgraded the same to color band without revising the amount payable. However, as per the respondent, it was placed in S-band from 3.4.2011 till 25.6.2011 and between 10.7.2011 to 23.7.2011. Further, as per the respondent, the same was switched off from petitioner's network from 26.6.2011 to 9.7.2011. Further the channel was again switched off w.e.f. 24.7.2011 to 29.10.2011.

The learned counsel for the petitioner refers to affidavit by way of evidence of petitioner's witness (PW-1). Para 17 of the affidavit is as under:-

"17. I state that SAHARA ONE was during the course of negotiations and even after the signing of the agreement placed on Hyper Band. I further state that after having signed and sent the agreement to ABS Media, Mr. Saraf again repeated the request he had made on 24.09.2011 and asked me to upgrade the placement of Sahara One to Colour Band. I state that on this specific request of Mr. Atul Saraf, Managing Director of ABS Media, the Petitioner had upgraded the channel Sahara One to Colour Band on 20.10.2011. I state that prior to Sahara One, NDTV Imagine, another general family entertainment channel, was being placed on the said position on Colour Band."(Emphasis supplied)

The learned counsel for the petitioner submitted that the respondent himself wanted the channel to be placed on S-Band for which he was willing to pay Rs.1.75 crores plus taxes. In support of the arguments, the counsel referred an e-mail dated 21.9.2011 from Mr. Atul Saraf. The relevant portion of the email is as under:-

"Dear Mr. Gurmeet,

As per our telephone discussion please start Sahara One on your manthan network in West Bengal and Jharkhand on S-band.

We will be paying Rs.175 lacs plus taxes and 15 % as subscription will be paid by Manthan per year.

Please do this favour to me and obliged.

Regards

*Atul B. Saraf
CMD”*

In response, the petitioner vide e-mail dated 24.9.2011 stated as under:-

“Dear Mr. Atul Saraf,

As per the meeting held at our office regarding placement of your Sahara One Channel at our Kolkata headend we are pleased to confirm that we will be placing you on Hyper frequency at an agreed value of Rs.2.10 crores plus taxes for a period of 12 months effect 1st April 2011 to 31st March, 2012.

You are requested to confirm the same vide return mail to enable us to reactivate the channel.

Regards

Gurmeet Singh”

The learned counsel also refer to another email dated 14.10.2011 (page 20 of the paper book) wherein again the request for placement of Channel on S-Band was made.

The learned counsel for the respondent drew my attention to this e-mail wherein it is stated:-

“You are requested to confirm the same vide return mail to enable us to reactivate the channel”

As per the respondent, this shows that channel of the respondent was disconnected.

However, the learned counsel for the petitioner states that since, in spite of the fact that the petitioner was placing the channel in the hyper band, the respondents were not executing the agreement and therefore, the petitioner had disconnected their channel for two days on 22nd and 23rd September, 2011 and subsequent to the exchange of e-mails, the signals were reactivated on 24.9.2011.

The learned counsel for the petitioner referred to an e. mail dated October 14, 2011 addressed to Mr. Atul Saraf of ABS Group and reply to the same by Mr. Atul Saraf in which payment of Rs.2.25 crores plus tax was confirmed along with subscription of Rs.25 lakhs plus tax. As per the same mail, it was stated that starting date as per the Mapping report will be confirmed and the petitioner was also requested to send the signed agreement with all the details.(E-mails are at page 22 of the Paper Book). The learned counsel argued that it is important and significant that the agreement signed subsequently was made effective from 01.4.2011. It is the contention of the counsel that the starting date was, therefore, as per the Mapping details confirmed by the respondent. It was also argued that though the agreement specified that placement of Sahara One channel will be on Hyper band, the neighborhood of the channel, which is channel before

and channel after, was not specified. It was further submitted that the petitioner signed the agreement and sent the same to respondent No.2 on 17.10.2011 and a Courier receipt is placed at page 36 of the Paper Book. As per the petitioner, the respondent sent back the signed agreement on 15.02.2012. The learned counsel argued that very fact that the agreement was sent back after signature by the respondent as late as February 2012 and the fact that the same was effective from 01.4.2011, shows that till that date the respondent had no grievance, whatsoever.

12. The learned counsel for the petitioner submitted that initially they raised invoices regularly on respondent No.2 but subsequently on request of respondent No.2, they were re-raised on respondent No.1. The learned counsel further submitted that respondent No.1 was also raising invoices on the petitioner for placement charges and argued that it goes to state that the agreement was being worked upon. The petitioner also reminded respondent No.1 vide letter dated 12.12.2011.

The fact that this communication was inter-changed is not disputed. As per the petitioner, the respondent never protested regarding placement of their channel in Color band and also never denied liability to pay the invoices. The learned counsel also referred to pleadings made in para 26 of the Petition as per which the respondents called the petitioner for a meeting on 01.02.2012 and offered the petitioner immediate payment if it gave them discount of fifty percent on the placement fee. The said meeting was

attended by the officials of both respondent No.1 and respondent No.2. The learned counsel argued that the fact of this meeting has not been denied by respondent No.1 in its reply and it shows that respondent No.1 has admitted its liability to pay the due amount. The learned counsel for respondent, however, argued that the same was denied by respondent No.1 as per para 42 of its reply. However, this denial relates to another meeting on 13.12.2011. Respondent No.2 in its pleadings has denied the contents of para 26 of the Petition in toto. With regard to the averment of the meeting, though respondent No.1 was unable to show its denial, it was argued that since respondent No.2, who is its agent, has denied the same, it amounts to a denial of this meeting. The learned counsel for the petitioner also referred to page 206 and 207 of the Paper Book, which is Form No.26 AS and as per which respondent No.1 has deducted tax from the invoices raised by the petitioner for the placement charges.

13. Mr. Natarajan, learned counsel for the respondent referred to clause regarding dues and responsibilities of MSO's/Cable operators. Sub-clause (vii) of which is as under:-

“(vii) The MSO/Cable Operator shall not, without prior written authorization from Sahara, take any action for or on behalf of Sahara. Neither MSO/Cable Operator nor any of its agent(s) has any right or authority to assume or create, in

writing or otherwise, any obligation of any kind, express or implied, in the name of or on behalf of Sahara.”

The learned counsel argued that as per this clause the petitioner had no right to place their channel in any band other than the Hyper Band. He states that though respondent No. 1 never protested in writing, the invoices were not paid and therefore, the liability for the same was never accepted. While admitting that the Color Band is superior to Hyper Band, he further argued that Hyper Band had channels such as, Star Gold, which was comparable to the respondent's channel, Sahara One whereas Color Band had some regional language channels with which Sahara One had no competition. As per the counsel Hyper Band was preferable to the respondent in view of the neighborhood, i.e., the other channels being telecasted in the Hyper Band being in the same genre. The learned counsel for the petitioner, however, argued that no neighborhood was defined in the agreement as per which only Hyper band was defined and the petitioner had placed the respondent No.1 in a superior Color Band on the oral request of Mr. Atul Saraf, the authorized representative of respondent No. 2. The learned counsel for the petitioner further argued that respondent No.2 acting on behalf of respondent No.1 has always been asking the placement of Sahara One on either S-Band or Color Band and the plea has now been taken by the respondent only to deny the due charges for the same to the petitioner. The counsel further argued that prior to Sahara 1, NDTV Imagine which is another general family entertainment channel and in the same genre was being placed on this position in Color Band. The learned

counsel for the petitioner referred to the reply to the counter-claim and submitted that reach and frequency of Color Band is much better than the Hyper Band and the petitioner earns more revenue by placing channels on Color Band. The counsel argued that it would be against the commercial interest of the petitioner to place the respondent's channel on Color Band instead of Hyper Band and the same was done only to accommodate the request of Mr. Atul Saraf, the authorized representative of respondent's firm and to strengthen the commercial relationship with the respondent.

14. Mr. Mehta, learned counsel for the respondent argued that there was a written agreement for placement of respondent's channels on Hyper Band and the placing of same in Color Band was a violation of the same. As per him, due to this wrong placement, the respondent was denied the benefit of the desired neighborhood.

Mr. Mehta further refers to the evidence by affidavit of Shri Atul Saraf. The relevant portion of which is as under:-

“3. That from 03.04.2011 to 25.6.2011, Manthan placed Sahara One [the “Channel”] in Super S Band.

4. That for a period of 16 weeks, Manthan had blacked out Sahara One [the “channel”] from its network. The said period of 16 weeks was in two slots.

5. *That the first slot of blackout was from 26.06.2011 to 09.7.2011 and the second slot of blackout was from 24.7.2011 to 29.10.2011.*

6. *That during the second slot of disconnection, Manthan and Sahara entered into an agreement for placement of the Channel in Hyper Band pursuant to several round of negotiations wherein I had participated.*

7. *That out of the said span of 16 weeks, Manthan did not at all show the Channel on its network for a continuous period of 14 weeks, i.e., from 24.07.2011 to 29.10.2011. During the said period, an agreement was entered into between Manthan and Sahara for carriage of the Channel in Hyper Band.*

8. *That Sahara has suffered serious loss on account of the Channel's black out.*

9. *That the said blackouts were effected without complying with law.*

10. *That despite such blackouts, Sahara and ABS Media Services Pvt. Ltd. entered into an agreement with Manthan solely on the basis of the representations which were made and assurances which were given by Manthan to me that once an agreement document is executed, shall refrain from*

disconnecting the Channel and start placing it as desired by Sahara and that Manthan shall waive the Carriage fee in respect of the period of unauthorized and illegal blackout of the Channel on its Network prior to the signing of the Agreement.

11. That the said representations and assurances were made during the course of various discussions which took place in September and October, 2011.”

He further drew attention to the cross examination of the same witness with regard to Hyper Band which is as under:-

“Q24: How many channels can be carried in Hyper band?

A: I have to check the numbers.

Q25: Can you give me approximate figure?

A: About 20 channels.

Q26: Is there any written communication that you have placed on record where in you have complained to the petitioner about Sahara One been displaced as is being alleged by you now?

A: It was never written but we informed them verbally since we share a good relation.

Q33: *Since the Petitioner had placed Sahara One as per the deal, I put it to you that no such e-mails have been placed on record.*

A: *It is incorrect.*

Vol: *Petitioner had never placed Sahara One as per the agreement filed by the petitioner alongwith the petition.*

Q36: *I put it to you that your plea of blackout for 16 weeks is an afterthought since had the petitioner blacked out Sahara One as stated by you, you would have not executed the agreement with the petitioner.*

A: *It is incorrect.*

Vol: *The deal was done during the blackout period. (Witness points out to the e-mail dated 15th October, 2011 at page 47 of the Evidence folder). This e-mail is the finalization of the deal and I had stated therein about the mapping report. I had told him orally that 16 weeks displacement will be deducted from the final amount but he insisted to sign the agreement first and then he will re-activate the channel, which is also mentioned in one of the e-mails dated 24.9.2012 at page 19 of the paperbook. This e-mail shows that the channel was blacked out when the deal was being negotiated.*

Q37: *I put it to you that the above statement is false to your own knowledge and you are aware tht the petitioner had displaced Sahara One only on 22nd and 23rd September.*

A: *It is incorrect.”*

Mr. Mehta also referred to the evidence of Mr. Tapan Pal who testified on behalf of respondent No.1. As per the witness, he is a Co-founder and

Director of Media Sys Entertainment Solutions Pvt. Ltd. which inter-alia offers consultancy. As per the witness after considering the specific and peculiar requirements of the territory as well as higher viewership of regional channels, it was decided that the channels placement in Hyper band would be beneficial for Sahara. As per his witness, the placement trend and neighborhood data of 'Sahara One' for the period from 3.4.2011 to 29.7.2011 was as given in Exhibit RCCW-2/3 and as per the same was placed from 03.4.2011 to 26.6.2011 on Super S-Band from 26.6.2011 to 3.7.2011 the channel was not available for two weeks. For the next two weeks again it was on Super S-Band. Again for the next 14 weeks, i.e., 24.7.2011 to 30.10.2011, the channel was not available and subsequent to that it was available on Super Color Band. Mr. Mehta submitted that the witness was suggested that these documents were not authentic, which was denied by the witness.

15. Coming to the issue of whether the placement of the respondent's channel "Sahara One" in Color band instead of Hyper band, w.e.f. 30.10.2011 was due to an understanding reached between the parties or it was in violation of the agreement, the fact that Sahara one channel was placed in colour band with effect from 30.10 .2011 is accepted by both the parties. It is also not in dispute that as per the written agreement between the parties, the same was to be in hyper band.

The five main bands in which the channels may be placed in order of priority and reach are (i) Prime (ii) Color (iii) S-Band (iv) Hyper Band and (v) UHF Band.

The contention of the petitioner in this regard is twofold. One, that Color band is superior to the Hyper band and second, the channel was placed in Color band on the request of Mr Atul Saraf, who was representing the respondent number two and, therefore, respondent number one. The first contention that color band is superior is not denied by the Respondent. However, the Respondent denies that its channel was placed in color band due to any understanding between the parties. The main contention of the respondent is that by placing its Channel in the Color band, it was denied the benefit of a desired neighbourhood.

16. Mr Mehta, Ld . Counsel for the respondent, referred to the judgement of the Tribunal in Wire and Wireless(India) Ltd. Vs Mahuaa Media Pvt. Ltd, in petition no. 384(C) of 2011 and argued that in similar matter, the petition was not allowed as the channels were not placed as per agreement . However, the facts of the said case are different, as in that case the respondent had pleaded that it had denied and disputed its liability to pay the amount demanded by the petitioner in writing and has on several occasions raised serious objections and brought it to the notice of the petitioner that its channels were not being carried on the desired band. Further, the case of the petitioner was that it had placed the channels correctly as per the agreement which was found otherwise by the Tribunal. Moreover, in that case, though the agreement was signed retrospectively, the period was only one month as the agreement dated 15.6.2010 was given effect from 15.5.2010 whereas in the present case, the agreement was signed much later than the effective date and was shared with the petitioner

at the end of almost the entire period of the same . The other significant difference in the present case is that the petitioner claims it has placed the channel of the respondents in Color Band instead of Hyper Band on the request of the Respondents.

17. It as an admitted fact that the respondent has been depositing TDS for the invoices raised by the petitioner. The Ld. Counsel for the petitioner referred to (1) Earth Enterprises Ltd. Vs Kuljit Singh Butalia 199(2013) DLT 194 (2) Sudesh Madhok vs Paam Antibiotics Ltd. 174(2010) DLT 594 and argues that deposit of the TDS was considered an acknowledgement of relationship between the parties. However, in the present case, the fact of the agreement between the parties is not disputed. The counsel relied on Phool chand Gupta Vs. State of A.P. (1997) 2 SCC 591 and Shree Digvijay Cement Co. Ltd and another Vs. State of Rajasthan (2000) 1 SCC 688 and submitted that deposit of TDS with the other circumstances is an admission of liability on part of the respondent no. 1 . The Ld . counsl for the Respondent , however, relies on M/s Actal vs M/S India Infoline Ltd. In arbitration petition no. 449 of 2012 before Hon'ble High Court of Judicature at Bombay and submitted that issuance of TDS certificate does not amount to acknowledgement of liability.

18. The Ld. Counsel for the respondent further submitted that there is clear legal position as regards three ingredients to support a cause of action under section70 of the Indian Contract Act, 1872. These are that firstly, the goods or services are to be delivered lawfully, secondly not intending to provide these gratuitously and thirdly the recipient enjoys the benefit

thereof. The Counsel relies on Hon'ble High Court of Judicature at Bombay Judgement dated 14.9.1928 in Punjabi Bhilasa vs Bhagvandas Kisandas , (1929) 31 BOMLR 88 and submitted that in this case lawful would be obeying the terms of the agreement and the benefit would be that enjoyed within the terms of the agreement. He further argues that to ascertain what is done lawfully would be to apply the test as laid down by Straight and Mahmood JJ in Chedi Lal vs Bhagwan Das , (1888) ILR 11 All. 234 .

In Punjabi Bhilasa vs Bhagvandas Kisandas , (1929) 31 BOMLR 88 (Supra), it was found by the hon'ble High Court that the plaintiff in making payment on behalf of the defendant was endeavouring to support the compromise which was beneficial to her and detrimental to the interests of defendant No. 8 who was then in an unsound state of mind and the same was not found lawful. In the present case, the regulations provide for the placement of a Broadcaster's channel by a distributor of signals. Whether the same was placed correctly as per the agreement between the parties is no doubt an issue to be decided. However, I am unable to agree with the Counsel that it was not lawful.

The Ld. Counsel further relied on the judgment of Hon'ble Supreme Court in Food Corporation of India Vs. Vikas Majdoor Kamdar Sahkari Mandli Ltd. (2007) 13 SCC 544 and submits that the principal of quatum meruit has no relevance in this case as there is a specific agreement in operation. However, the core issue before the Hon'ble Supreme Court was whether higher rate than that contracted would be applicable for additional quantity

discharged beyond that contracted and whether higher transportation rate would be applicable. The Hon'ble Supreme Court held as follows:

“In view of above, we direct that the respondent –society shall be paid at the rate of Rs. 108 per M.T. in terms of the contract up to 750 M.T. and at the rate of Rs. 215 per MT for quantum beyond that.” However, for transportation, the higher rate beyond the agreed rate was not allowed.

In this regard, I may also refer to V.R. Subramanyam Appellant Vs. B. Thayappa and Ors. Respondents AIR 1966 SCC 1034 (V53 C 201). The judgement addresses the issues of additional work done not covered by contract, additional construction not done gratuitously, claim for compensation on oral agreement and proof of such agreement not being necessary. In that case construction work was done in addition to that done under the contract. The direction of the High Court for assessment of the compensation for additional work was upheld.

In the present case, though the petitioner is claiming that it upgraded the Band from Hyper to Color on the request of the respondents, its claim is as per the rates agreed in the contract whereas the case of the respondents is that they never asked for the up gradation and though, the placement of channel in color band is not denied, they deny their liability to pay as per the contract.

19. Mr. Mehta argued that respondent wanted Hyper Band because of the similar genre of channels and the neighbouring channels. With regard to the issue of respondent remaining silent and not protesting, the Ld. Counsel for the respondent relied on the observation of the Tribunal in Wire and Wireless (I) Ltd Vs Mahuaa (supra) on the doctrine of sub-silentio. The same is reproduced as under:

“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. “

In this regard, I may refer to the Judgement of Hon’ble High Court of Delhi in Vasudeva Publicity Service & Another Vs. MRF Ltd. CS(OS) No. 2635 of 2000 decided on 2.7.2010. The case was with regard to recovery for advertisements of defendant displayed by the plaintiff prior to the signing of written agreement. In the case the Hon’ble High Court observed that if the defendant had been receiving the letters and bills for all the sites, then why no objection was raised earlier by the defendant has not been explained. It was further observed as under :

“If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again section 70 would not apply. In other words, the person said

to be made liable under section 70 always has the option not to accept the thing or return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under section 70 arises”

20. In the present case, the respondents, admittedly, were well aware about where its channels were getting placed. As per the evidence of the petitioner witness PW-1 (relevant part at para 11 above), the placement of the channel was upgraded to “Color” Band on the request of Mr. Atul Saraf. It was argued by the Ld. Counsel for the respondent that there being a written agreement, no evidence introduced by the petitioner is admissible. The Ld. Counsel for the petitioner relied on *Rajeev Mehra Vs Sudhir Kumar Sachdev*, 157 (2009) DLT 309 in support of the admissibility of their evidence. It was also argued that as per Proviso (4) to Section 92 of the Indian Evidence Act, 1872, the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to law in force. It was argued that a placement agreement is neither required to be in writing nor is the same required to be registered.

It is noted that the evidence sought to be introduced here is not with regard to the interpretation of any of the terms of the agreement but whether the up gradation from agreed band to a better band was based on an understanding between the parties.

As per Mr. Atul Saraf , the channel was never placed correctly as per agreement even for the period even prior to the signing of agreement. However, it is difficult to believe him as the agreement was signed and given effect from 1-4-2011 after the channel mapping report was seen as is clear from the email of same Mr . Atul Saraf dated 15.10.2011 as per which the effective date of agreement was to be decided as per the channel mapping report (page 22 of paper book). Further the respondents never protested in writing. It is only at the stage of pleadings and evidence that this plea is taken up for the first time.

21. It is also a fact that not only the respondents never protested in writing to the petitioner with regard to the placement of its channel in colour band but it shared the agreement with the petitioner as late as 15.2.2012 as is clear from the cross-examinaion of Mr. Atul B saraf, who filed evidence by way of affidavit on behalf of the respondent no. 1. The same is as under:

“Q.38: I put it to you that your voluntarily statement stating that Petitioner would only activate Sahara 1 after signing of the agreement is also false to your own knowledge since you first shared the signed copy of the agreement only on 15.2.2012.

A: My above voluntarily statement is correct although we may have shared the signed copy of the agreement only on 15.2.2012”

The evidence has to be weighed keeping in view the conduct of the parties. Admittedly, the petitioner was placing the Channel of the Respondent No. 1 much before the signing of the agreement on the verbal assurances of respondent no. 2. Still the agreement was not signed till as late as 16.10.2011 when it was signed and made effective from 1.4.2011 after a lot of persuasion by the Petitioner as is evident from the correspondence between the parties. Even then the signed agreement is not shared with the petitioner till as late as 15.2.2012. The agreement is signed after due diligence by seeing the channel mapping. No protest is ever made to the petitioner regarding any wrong placement of its Channel by the respondents. The invoices are received and the Tax is deducted and deposited on the same. The respondent no.1 in turn raises invoices for subscription charges on the petitioner still without any protest. The respondent does not deny that it was well aware where its channel Sahara 1 was placed still it shares the agreement which is effective from 1.4.2011 as late as 15.2.2012 without raising any issue with regard to the wrong placement of the channel. The Respondent's witness in reply to question no. 26 confirms that they shared a good relation with the petitioner. Admittedly, the Channel is placed in a better band. The argument with regard to the neighbourhood is not convincing because the correspondence exchanged between the parties clearly shows that the respondent was always asking for S Band and not the Hyper Band. Rather, it was the petitioner who was offering to place the respondent in Hyper Band. Moreover, if the neighbourhood was that important to the respondent, why it was not defined in the agreement and

why the respondent never raised this issue with the petitioner. It is not the case of the respondent that it was not known to it where its channel was placed.

The Ld. Counsel for the Respondent argued that the petitioner placed its channel in Color band so that it could earn more revenue. If that be so, than it contradicts the stand of the Respondent that it's Channel was less popular due to placement in the Color Band as how would the petitioner earn more revenue if the channel was less popular.

It is not denied that the Channel of Respondent was placed with effect from 30.10.2011 in Color Band, it is not disputed that this was a band superior than the band agreed in the agreement, it is a fact that there was no definition of neighbourhood in the agreement and it is also a fact that when the agreement was shared with the petitioner on 15.2.2012 the respondent was well aware where it's channel was placed. In my view, this conduct of respondent seen along with the evidence of the PW-1 clearly shows that the placement of the Respondent's Channel in Color Band was an up gradation based on an oral understanding between the parties. Under the circumstances, I find that the petitioner is not in breach of the agreement by placing the Channel in Color Band.

22. I now come to the issue of Whether the petitioner has blacked out Sahara One from 20.6.2011 to 9.7.2011 and from 24.7.2012 to 29.10.2012 as alleged by the respondent No. 1 and whether the same was placed correctly as agreed till 29.10.2011 or not. As per the e-mail from the

respondent dated 15.10.2011, the starting date of the agreement was to be as per the mapping report of the respondents. The same is confirmed during cross examination of Mr. Atul B Saraf appearing on behalf of the respondent . The relevant part is as under:

Q.15 Please see e-mail dated 15th October ,2011 sent at 12.45 PM. I put it to you that according to the said e-mail the effective date of the present agreement was to be as per your mapping report.

A: It is correct that effective date was from April and the same has been signed.

From the admission of the witness it is clear that the agreement dated 16.10.2011 was made effective from 1.4.2011 only after checking the placement as per the mapping report. Therefore, the contention of the respondents regarding the blackout periods and wrong placement of channel on S-Band prior to 30.10.2011 appears to be an afterthought otherwise why would the respondents enter into an agreement with the petitioner effective from 1.4.2011.

23. As far as the issue of unlawful disconnection of respondent's channel is concerned, it is seen that that the agreement was signed subsequent to this alleged disconnection and moreover, the same was not pressed during arguments. As regards the liability of the Respondent No. 2 to pay the placement charges, though there is a tripartite agreement, it is clearly Sahara, who is respondent no. 1 , who has to pay the placement charges as per the agreement.

24. As regards the counter claim of the Respondent, the petitioner has to pay the subscription charges as per the agreement. However, in view of the findings, no case is made out for damages.

25. Accordingly, the Respondent no. 1 has to pay the petitioner a sum of Rs. 2,48,17,500/- as on 31.3.2012 being placement charges as per the agreement for its Channel Sahara One. The petitioner has to pay Rs. 27,57,497/- to the respondent towards the subscription charges for Sahara One. The petition and the counter claim are allowed to these extent. The respondent No. 1, therefore, shall pay net Rs. 2,20,60,003/- to the petitioner.

26. The Respondent No.1 is accordingly directed to pay the sum of Rs. 2,20,60,003/- to the petitioner along with pendente lite and future interest till the date of payment @ 10%.

Keeping in view the facts of the case, there is no order as to the costs.
M.A. No. 706 of 2012 is also disposed of.

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(Kuldip Singh)

Member

Rkc/hkc