

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 10th December, 2014

Petition No.683(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
Vs.
Pragnesh Shar & Anr. ...Respondents

Petition No. 688(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
Vs.
Aatmiya Cable & Anr. ...Respondents

Petition No. 695(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
Vs.
Bhavesh Mehta & Anr. ...Respondent

Petition No. 696(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
Vs.
Rakesh Raval ...Respondent

Petition No. 686(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
Vs.
Jignesh M. Patel & Anr. ...Respondents

Petition No. 689(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
Vs.
Chandreshbhai & Anr. ...Respondents

Petition No. 692(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
 Vs.
 Swami Cable & Anr. ...Respondents

Petition No. 693(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
 Vs.
 Jayedeeep Amin & Anr. ...Respondents

Petition No. 697(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
 Vs.
 Durga Cable & Anr. ...Respondents

Petition No. 698(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
 Vs.
 Leo Vision & Anr. ...Respondents

Petition No. 699(C) of 2012

Den Mcn Cable Network Pvt. Ltd. ...Petitioner
 Vs.
 M/s Binjal Cable Service & Anr ...Respondents

BEFORE :

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner : Mr. Vibhav Srivastava, Advocate

For Respondents (No. 1) : Mr. Sharath Sampath, Advocate

(No. 2) : Mr. Nasir Husain, Advocate

JUDGMENT**Kuldip Singh:**

These are recovery petitions for outstanding dues allegedly owed by respondents at serial no. 1 to the petitioner for availing the transmission of the signals of various pay and free to air channels of the petitioner.

The petitioner has also claimed damages and compensation from respondents at serial no. 1 and respondent no. 2 for the cost of STBs issued to respondents at serial no.1, as well as damages for the loss of property, equipment and optical fiber, as also loss of good-will of the subscribers of the petitioner.

Since facts and circumstances in all these cases are similar, these petitions are being disposed of by this common order.

The petitioner is a Multi System Operator (MSO). Respondents at serial No. 1 are cable operators, who as per the petitioner, were affiliated to it till 17.8.2012 and were re-transmitting the signals of the petitioner in analogue and digital mode. Respondent no. 2 is also a MSO operating in the area of the petitioner.

Though the facts hereunder are taken from petition no. 683(c) of 2012, the same are similar in all the other petitions.

It is the contention of the petitioner that the respondents at serial no. 1 approached the petitioner for its signals and the petitioner has been supplying these both in analogue and digital mode on the basis of oral agreement between the parties and for subscription fees, the details of which are given below in the Table 'A':

Table 'A'

Petition No.	Party/ Respondent No. 1	Monthly subscription (Rs.)	Outstanding claimed. (Rs.)
P.No. 683(c)/12	Mr. Pragnesh Shah	20,337/-	5,13,549/-
P.No. 688(c)/12	M/s Aatmiya Cable	25,000/-	2,94,300/-
P.No. 695 (c)/12	Mr Bhavesh Mehta	11,236/-	2,13,478/-
P.No. 696 (c)/12	Mr. Rakesh Raval	17,977/-	2,43,642/-
P.No. 686 (c)/12	Mr. Jignesh M. Patel	11,236/-	1,93,078/-
P.No. 689 (c)/12	Mr. Chandreshbhai	12,359/-	37,395/-
P.No. 692 (c)/12	M/s Swami Cable	6,400/-	57,600/-
P.No. 693 (c)/12	Mr. Jayedeeep Amin	14,000/-	14,000/-
P.No. 697 (c)/12	M/s Durga Cable	14,000/-	14,000/-
P.No. 698 (c)/12	M/s Leo Vision	31,335/-	4,77,680/-
P.No. 699 (c)/12	M/s Binjal Cable Service	8,000/-	1,48,817/-

In addition to the above, the petitioner also claims to have supplied STBs @ Rs. 1999/- per STB. The details of the number of STBs and the outstanding claimed for the same is also tabulated in Table 'B' given below :

Table 'B'

Petition No.	Respondent No. 1	STBs supplied @ Rs. 1999/- per STB	Outstanding claimed. (Rs.)
P.No. 683(c)/12	Mr. Pragnesh Shah	Large number (No quantity specified)	99,950/-
P.No. 688(c)/12	M/s Aatmiya Cable	No information	-
P.No. 695 (c)/12	Mr Bhavesh Mehta	Large number (No quantity specified)	1,19,940/-
P.No. 696 (c)/12	Mr. Rakesh Raval	Large number (No quantity specified)	1,09,945/-
P.No. 686 (c)/12	Mr. Jignesh M. Patel	Large number (No quantity specified)	1,39,930/-
P.No. 689 (c)/12	Mr. Chandreshbhai	Large number (No quantity specified)	2,39,880/-
P.No. 692 (c)/12	M/s Swami Cable	No information	-
P.No. 693 (c)/12	Mr. Jayedeeep Amin	Large number (No quantity specified)	1,49,925/-
P.No. 697 (c)/12	M/s Durga Cable	Large number (No quantity specified)	99,950/-
P.No. 698 (c)/12	M/s Leo Vision	Large number (No quantity specified)	4,99,750/- *
P.No. 699 (c)/12	M/s Binjal Cable Service	No information	-

* In prayer it has claimed Rs. 4,99,710/-

As per the petitioner, it raised invoices on respondents at serial no. 1 seeking payment of the monthly subscription amount. These invoices were hand delivered each month to the respondent. But as is the common practice in the area, no acknowledgment for the same was given to the petitioner by respondents at serial no.1.

That respondents at serial no. 1 were irregular in making the monthly subscription payments which led to the building up of arrears. In spite of repeated requests to respondents at serial no. 1, they did not clear their dues to the petitioner.

As per the petitioner, during the subsistence of the business relations with it, respondents at serial no. 1 conspired with respondent no. 2 to cut off the petitioner from the LCO's network and started taking signals from respondent no. 2. As a consequence of which, the petitioner was exposed to huge business losses. The petitioner further alleged that the respondents forcibly cut the optical fiber cables of the petitioner and took away its equipment.

During the course of the hearing, Mr. Vibhav Srivastava, learned counsel appearing for the petitioner stated that he does not want to press the claim for compensation and damages.

The petitioner has filed the evidence by way of affidavit of Shri Samit Khona, authorized representative of the petitioner company in all the cases. The witness stated that he is the authorized representative of the petitioner company and conversant with the facts and circumstances of the cases and competent to swear the affidavit.

The following evidence of the witness is given on affidavit in Petition No. 683(C) of 2012. Similar affidavits exhibiting similar documents are on record and similar statements are made in all the other petitions. Relevant paragraphs of the evidence is reproduced as below :

"4. I state that the Respondent No. 1 was a Cable Operator affiliated to the Petitioner herein till 17 August 2012 and was retransmitting the signals in analogue and digital mode to its subscribers after obtaining them from the Petitioner. The Respondent No. 2 is the competitor MSO of the Petitioner, who was earlier not present in the area of operation of the Petitioner; the Respondent No. 2 has now entered into the area of the Petitioner in connivance with the Respondent No. 1 in an illegal manner to the detriment of the business of the Petitioner.

5. I state that the Respondent No. 1 was desirous of obtaining the signals of various free to air and pay channels from the Petitioner and for this purpose approached the Petitioner. I further state that the Petitioner had been supplying signals both in the analogue and digital mode to the Respondent on the basis of the agreement entered into between the parties for the last many years. I state that as per mutual negotiations and the last agreed upon subscription fees was an amount of Rs. 20337/- per month inclusive of relevant taxes.

6. I state that apart from the above the Petitioner had also supplied a large number of set top boxes to the Respondent No. 1 on its request. I state that each set top box provided by the Petitioner to the Respondent No. 1 was for an amount of Rs. 1,999/- and the Respondent No. 1 has an outstanding to the tune of Rs. 99,950/- for the same.

7. I state that the Petitioner raised invoices on the Respondent seeking payment of the monthly subscription amount which were hand delivered each month to the Respondent, however as is common practice in area of the Petitioner no acknowledgement for the same is given by the Cable Operators and in this case the Respondent No. 1. Copy of the some invoice issued by the Petitioner and received by the Respondent No. 1 are exhibited as Exhibit- PW1/2. (Annexure P2 of the Petition).

8. I state that the Respondent was totally irregular in making payment of the monthly subscription amount resulting in building up of an arrear of Rs. 5,13,549/- as on August 2012. A complete statement of account of the Respondent for the period 01.07.2008 to 23.08.2012 is exhibited as Exhibit- PW1/3 (Annexure P3 of the Petition). I further state that the Petitioner maintains regular accounts and the statement of account annexed alongwith the Petition is the computer print out of the Ledger Account of the Respondent duly maintained by the Petitioner."

The witness exhibited Board Resolution dated 21.9.2012 in support of the statement. (Exhibit PW 1/1) (Annexure P-1 of the

petition). The witness confirmed the averments made in the petition by the petitioner and exhibited copy of an invoice issued by it as Exhibit PW 1/2(Annexure P-2 of the petition).

A complete statement of account was exhibited as Exhibit PW 1/3(Annexure P-3 of the petition).

The witness further stated that he demanded outstanding charges from the respondent but the respondent neither replied to the demand notice issued by the petitioner nor paid the outstanding amount. A copy of the letter dated 17.8.2012 demanding outstanding was exhibited as Exhibit PW 1/5 (colly) (Annexure P-5(colly) of the petition).

Mr. Sharath Sampath, learned counsel appearing on behalf of respondents at serial no. 1 made the following submissions :

- (a) No invoice was raised on the respondent and the invoices on which the petitioner has relied are fabricated and were not served to the respondent.
- (b) No STBs were supplied to the respondent and there is nothing on record to prove the supply of the same.
- (c) The petitioner has failed to prove the statement of

accounts.

- (d) There was no connivance between respondent no. 1 and respondent no. 2 and the petitioner has not been able to make out any case for damages / losses of equipment.

In regard to invoices, Mr. Sampath drew our attention to para 6 of the petition as per which the petitioner raised invoices on the petitioner seeking payment of the monthly subscription amount which were hand delivered each month to the respondent. Mr. Sampath referred to the statement of accounts at page 22 of the paper book and argued that the amounts booked in the statement of accounts are for quarterly period which is contrary to the stand of the petitioner that the invoices were raised monthly.

He referred to the cross-examination of the witness in Petition No. 698(c) of 2012¹ with regard to the delivery of invoices. The relevant questions and answers are as under:

"Q 10. I put it to you that you have not filed any proof of delivery of the invoice at page no. 32 & 33 of the paper book?"

A. It is correct that there is no proof of delivery on record for the invoice at page 32, however, the proof of delivery of the invoice

¹ It was agreed by the witness and the learned counsel for both the parties that the cross examination of the witness conducted in Petition No. 698(c) of 2012 be read as cross-examination in all these Petitions.

at page 33 is on the face of it.

It is incorrect to suggest that the alleged signature does not belong to any person associated with the respondent no. 1.

Q 11. Who as per you does the signature at page 33 of the paper book?

A. Looking at the surname, it should be his wife/son/daughter/some relative.

Q12. Is it correct to say that you personally deliver invoices to the respondent no. 1?

A. It is incorrect.

(Attention of the witness is drawn to para 7 of his affidavit.)

Q 13. As you say that no acknowledgment is given for delivery of invoices and in answer to Q. 10 you have said there is infact proof of delivery of the invoice, which of your statements is correct?

A. Both.

(Vol.: Certain things which are needed to be done and are not followed need correction and that is what I did after my joining. I tried to do things as they were supposed to be done.)"

Mr. Vibhav Srivastava, Ld. Counsel for the petitioner, however, argued that the proof of service of invoices is not imperative and with regard to his this submission, he relied on the Tribunal judgment dated 2.6.2011 in Hathway VCN Cablenet P. Ltd. Vs Cableway Network².

² Petition No. 100(c) of 2011

With regard to the delivery of invoices, we may note that the witness (PW 1) has categorically stated that the same were raised and hand delivered each month to the respondents. Though, from the cross examination of the witness, a doubt is cast on the proof of delivery of invoices, the Tribunal has held in Hathway VCN Cablenet P. Ltd. Vs Cableway Network that proof of service of invoice is not imperative in character. The relevant part is as under:

"21. It is true that proof of service of invoice is not imperative in character. Invoices, although are required to be served in terms of the Regulations, but if other evidences become available on record to show that petitioner has been able to prove its case of default on the part of respondent, proof of service of invoices cannot be held to be so imperative so as to compel us to dismiss the petition on that ground alone."

Mr. Sampath relied on judgment of the Supreme Court in Central Bureau of Investigation Vs. V. C. Shukla and others (1998) 3 SCC 410 and submitted that it is for the petitioner to prove its case.

The judgment relied by Mr. Sampath was in respect of a criminal case. Moreover, the respondents at sr. no. 1 have not denied the existence of relationship between the petitioner and the respondents or that they have been receiving the signals of the petitioner. As seen from parawise reply (petition 683 (C)/2012), the respondent therein only denies receiving signals in digital mode. The reply is as under:

"3. That the contents of para no. 3 to the extent they form matter of record are not denied. **It is denied that the petitioner provided signals to the Respondent in digital mode.** It is further submitted that to the knowledge and belief of the Respondent No. 1 herein that the Respondent No. 2 has always been present in the area of operation of the petitioner. It is denied that there is any connivance between the answering Respondent and the Respondent No. 2 as alleged or at all." (emphasis supplied).

With regard to the statement of accounts, Mr. Sampath submitted that statement of accounts filed by the petitioner is false and has been fabricated and in this regard he referred to para 3 of the preliminary submissions of the reply filed by the respondent at serial no. 1(at page 47 of the paper book) in Petition No. 683(c) of 2012, which is as under:

"3. That the Statement of Account filed by the Petitioner is false and has been fabricated for the purposes of the present petition. It is most respectfully submitted that in the month of August, 2012 reconciliation of accounts was done jointly by the petitioner and the answering respondent and it was found that only an amount of Rs. 2,83,700/- was due and payable to the Petitioner. Copy of the reconciled Statement of Account is annexed hereto and is marked as Annexure R-1. It is most respectfully submitted that the Respondent No. 1 had thereafter paid the amount of Rs. 2,83,700/- to the petitioner in cash, on the assurance of the petitioner that a receipt for the same would be provided. However, the petitioner till date has failed to provide a receipt for the same. It is most respectfully submitted that the Statement of Account filed does not capture all the payments made by the Respondent, and thus this petition deserves to be dismissed on this ground alone."

Mr. Sampath referred to page 23 of the Petition No. 693(c) of 2012 and submitted that the statement of accounts filed in this case is in different format than those filed in other cases. It was explained by Mr. Srivastava that since some of the ledger has been maintained jointly for a number of operators, the SOA in Petition No. 693(c) of 2012 and Petition No. 697(c) of 2012 are extracts of accounts.

Mr. Sampath further submitted that the respondents had made certain payments in cash which have not been accounted for in the statement of accounts.

Mr. Vibhav Srivastava, learned counsel appearing on behalf of the petitioner, however, argued that if that was the case, the respondents should have produced their witnesses to prove their SOA. He referred to the judgment of the Tribunal dated 26th March 2010 in Petition No. 99(c) of 2005 in Hathway Media Vision Pvt, Ltd. Vs. Spider Cable and judgment of Hon'ble Supreme Court in Iswar Bhai C Patel Vs. Harihar Behera - (1999) 3 SCC 457, referred by the Tribunal in Hathway Media, and stated that since the respondents have not entered into the witness box an adverse inference must be drawn against them.

We may note that the petitioner's witness has denied cash receipt of any payments from the respondents. An extract of cross examination of the witness in Petition no. 683(c) of 2012 is as under :

"It is incorrect to suggest that after due reconciliation of accounts between the petitioner and respondent no. 1 a sum of Rs. 2,83,700/- was found due and payable by the respondent no. 1 which was duly paid in cash on the assurance of the petitioner that receipt for the same would be provided to the respondent no. 1.

It is incorrect to suggest that the petitioner has failed to provide the receipt till date.

Vol - There was no reconciliation of accounts held between the parties and no payment was made as alleged."

We also note that respondents at serial no. 1 have neither provided any proof nor produced any witness that would substantiate their claim for such payments. We are, therefore, unable to agree with the contention of the respondents at S. No. 1 regarding cash payments made by them which have not been accounted for by the petitioner.

With regard to STBs, Mr. Sampath referring to the para wise reply in response to para 1, stated that respondent was not receiving any signals in digital mode and was not issued even one STB. We may note the reply in response to para 1 as under:

"1. That the contents of para 1 are wrong and are denied and that the present petition is not maintainable for reasons as stated hereinabove. It is denied that the Respondent No. 1 was receiving any signals in digital mode. It is further denied that the Respondent No. 1 is liable to compensate the petitioner for the cost of set-top boxes and/ or alleged damages as claimed in the present petition. It is further denied that there was any cutting of wires as alleged or at all. It is most respectfully submitted that the petitioner has not issued even one set-top box to the Respondent No. 1 herein, nor has the Respondent No. 1 seeded any set-top box to the premises of its customers and therefore the claim for set-top boxes is without any basis whatsoever. Further, there is no question of damage to equipment and/ or optical fiber cables as all equipment and optical fiber cables belongs to the answering Respondent. The petitioner be put to strict proof for the allegations levelled by it against the answering Respondent."

Mr. Sampath referred to the cross examination of the witness and argued that from the statement of accounts, the witness was unable to show which entries pertain to subscription income and which pertain to STB activation charges. The relevant questions and answers are as under:

"Q 7. As you say that the only additional amount was towards activation charges of STBs, have you filed any proof on record to show that such charges were taken/levied on respondent no. 1?"

A. Witness points out to page 19, entries dated 20.8.2009, 5.11.2009. Further at page 22, certain entries showing credit of Rs. 20,000/- are towards activation fees of STBs at Rs. 1,000/- per box equal into 20 boxes. I am, however, unaware of which entries pertain to subscription income and which pertain to STB activation fees.

Vol – Details if needed, can be provided.

He further referred to the para 5 of the rejoinder of the petitioner in Petition No. 683(c) of 2012 and argued that on the one hand the petitioner says that its STBs and equipment were taken away and on the other hand it claims the supply of same which are contrary to each other.

With regard to the STB, we may note that the statement of the petitioner's witness is vague with regard to the number/quantity of STBs supplied as the witness just states that the petitioner has also supplied large number of STBs to respondent at serial no. 1 on its request. At another place, the witness stated that the petitioner **had installed** approximately 50 STBs in the area of Ishwar Shanti Society and other surrounding locations and was providing analogue and digital cable connections. The said statement of the witness in this regard, is as under :

"11. state that however, the Petitioner was shocked to note that the during the subsistence of the business relation with the petitioner, the Respondent No. 1 had conspired with the Respondent No. 2 to cut off from the petitioners local service area network and start taking signals from the Respondent No. 2. I further state that the petitioner in the recent past had installed approximately 50 digital set top boxes in the area of Ishwar Shanti Society and other surrounding locations as also was providing analogue signals and digital cable connections to

its area and by the action of the Respondents the petitioner was exposed to huge business losses. (emphasis supplied)

Similar statements were made in some of the other petitions also with the number of STBs being different. From this statement of the witness it appears that the petitioner had installed some set top boxes on its own volition. We also note that there are no invoice/delivery challans etc. raised for the STBs on record that would confirm the contention of the petitioner.

In view of this, we are unable to agree with the claim of the petitioner with regard to STBs.

In the aforesaid circumstances, we find that the petitioner has been able to make out its claim for the outstanding amount of subscription fees as tabulated in column "Outstanding claimed" of Table 'A'.

The petitions are accordingly, allowed to the extent of outstanding in column "Outstanding claimed" of Table 'A'.

The petitioner has also claimed interest on due payment @ 18%

p.a. with effect from 23.08.2012. However, there being no written agreement between the parties, we find it fair and just if the interest @ 9% is allowed on the due payment w.e.f. 23.08.2012 and till the time the due amount is paid.

The petitions are partly allowed to the above extent. Parties to bear their own costs.



.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

/NC/