

(Broadcasting and Cable Services) Interconnection Regulation 2004”(as amended from time to time), in the State of Kerala. It distributes signals of various TV channels directly, as well as through other cable operators, to individual subscribers. The respondent is a broadcaster having TV channel by the name of “Darshana TV”.

A carriage agreement dated 8.8.2011 was signed between the parties. This agreement was valid for one year from 1.9.2011 to 31.8.2012. As per the agreement, the petitioner was to carry and retransmit signals of “Darshana TV” channel of the respondent. For the carriage of this channel, the respondent was to pay an amount of Rs. 60 lakhs per year exclusive of taxes, for the period of the agreement. This agreement or the payment under it are not in dispute.

The dispute pertains to a period starting from 1.9.2012 till the disconnection of carriage of signals by the respondent on 20.11.2013. It is the case of the petitioner that though the agreement dated 8.8.2011 expired on 31.8.2012 by efflux of time, both the parties were desirous of continuing relationship in terms of the clause 8.2 of the same. As per this clause the agreement may be renewed for a further period, on terms and conditions mutually acceptable to the parties.

On 17.10.2012 the petitioner addressed a letter to the respondent asking it to make a formal request for continuation of the telecast of its signals so that the terms of renewal agreement could be discussed. This letter of the petitioner was replied by the respondent on 19.10.2012. In this letter, it drew attention of the petitioner towards some problems in the petitioner's network and also problems in regard to the positioning of the respondent's channels. It asked for the resolution of these problems so that the parties could go for a renewal of the carriage agreement. This letter of the respondent is as under:

"We received your letter asking for renewal of channel carriage agreement. We highly thankful to your continued support to carry our channel in your cable networks.

In this regard we are inviting your serious attention towards the problem which are still in your network and also towards the problem of channel position. We mailed you several times about the same. But the problem still continues.

We received so many complaints as no signal or signal strength week from the areas like Pathanathina(Pantahanapuram), Kottayam(Kanjeerapally), Thrissur(Chavakkad, Kunnakulam, Andhatode) Kannur(Thalassery), Mallappuram (Othukumagal), Kozhikodeparmbil Bazar, Utteri), Wayanad(Manathavadi).

And also you are placed our channel at spiritual group although we are in general entertainment mood. This made a huge lose in our advertisements.

So please mind to solve the remaining problems as soon as possible and then we can go for the renewal of the carriage agreement.

Hope you will solve it asap”

On 28.2.2013, the petitioner sent an email to the respondent referring to a telephonic conversation with the chairman of the respondent company and enclosing a draft agreement. As per this draft agreement, the period of which was to be from 1.9.2012 to 31.8.2013, the respondent was required to pay a sum of Rs. 1.50 crore plus applicable taxes, per year. This e-mail of the petitioner was replied by the respondent on the same day acknowledging the receipt of the agreement copy. The respondent suggested some modifications in the agreement and also asked that its channel should be placed between position 100 and 112 in the petitioner’s digital network and before position 25 in its analogue network. The agreement period was also suggested as 1.1.2013 to 31.12.2013. The modifications suggested were, however, not acceptable to the petitioner who sent another email to the respondent on 1.3.2013 stating as under :

“We have priced Rs. 2 crs/per annum for the channel to carry in analogue and digital. The pricing of Rs. 1.5 crs is a special consideration to collect the payment in advance. If you are looking for a specific placement in analogue we will rework the pricing and revert. If the content is GEC, we will consider to carry after 112. Please note the agreement expired on 31st August 2012 and we have carried the channel with a good faith that you will renew the contract. If you are looking to renew the contract from 1st January the rate for 1st Jan to 31st December is Rs. 2 Crs. Please ensure to transfer Rs. 1 crs tomorrow to continue the service.”

This being not acceptable to the respondent, it in turn suggested some further modifications in the agreement vide e-mail dated 14.03.2013 and also asked that Rs. 20 lakhs already paid by the respondent can be adjusted for the payment for the months of September to December 2012 and January 2013 to March 2013 and a fresh agreement could then be signed from 1.4.2013. After some further correspondence between the parties on the same lines, the petitioner issued a notice for disconnection of the petitioner's channel on 24.10.2013 and thereafter disconnected the same on 20.11.2013.

Ms. Shirin Khajuria, learned counsel for the petitioner, argued that since the petitioner had sent the draft agreement and asked the respondent to execute the same and the respondent did not stop supplying its signals to it, this is tantamount to an oral contract between the parties. As per Ms. Khajuria, the respondent is liable to pay Rs. 1.30 crores in terms of this oral agreement as a balance of carriage fees. Our attention was also drawn to para 11 of the reply filed by the respondent, which is as under :

“As aforementioned, the respondents herein, for the purpose of showing their bonafides, had paid a sum of Rs. 20,00,000/- as a part payment during the interim period which the channel was being carried until a final sum could be agreed upon.”

The petitioner adduced evidence by way of an affidavit of Mr. R.P.Arun Raj, working as Senior Manager (Finance & Accounts) in the petitioner company. The relevant paras 12 and 13 of the affidavit are as under :

“12. That the respondent on the same date, vide its email dated 28.2.2013 to the petitioner specifically stated that it was willing to pay a carriage fees of Rs. 1.5 crores. It sought payment in installment and also sought specific placement of its channel in the cable TV network of the petitioner. Furthermore, the respondent sought the agreement period to be from 1.1.2013 to 31.12.2013. Copy of the letter dated 28.2.2013 from the respondent is annexed herewith and marked as Exhibit P-5.

13. I state I replied by email dated 1.3.2013 that the channel of the respondent was continued to be carried in good faith that respondent will renew the contract. That the fees for carriage for channel in analogue and digital mode is Rs. 2 crores per annum and the price of Rs. 1.5 crores was special concession if payment is made in advance. It was also clarified that in case specific placement is sought then the price will be reworked. Further, if the contract is renewed from 1.1.2013 instead of 1.9.2012 the rate for carriage fees is Rs. 2 crores. Copy of the email of the petitioner dated 1.3.2013 is annexed herewith and marked as Exhibit P-6.

We are, however, unable to agree with the submission of Ms. Khajuria that there was a concluded agreement between the parties. As can be seen from the correspondence exchanged between the parties, the petitioner was asking Rs. 1.5 crore per year, exclusive of taxes, for carriage of the channel. The respondent, however, wanted its channel to be placed in certain specific slots in both digital and analogue head-ends of the petitioner. The petitioner in turn was asking more than Rs. 2 crores for the

placing the channel in the specific slots, which was not acceptable to the respondent.

We may note here that the primary reason why broadcasters pay for placement of their channels is to popularize them. Revenue to the broadcasters comes from two streams which are subscription fees, and advertisements. The channels having more viewership command more subscription fees as well as revenue from advertisements. It is for this reason that when channels are relatively new, broadcasters pay for their placement. Naturally, they want their channels to be placed with existing popular channels of a similar genre. For example, if an entertainment channel is placed near some religious channels, it is not likely to be visible to the viewers looking for an entertainment channel. Even when a viewer is surfing different channels, the channels in earlier slots are more likely to be viewed than those in the later slots. It is for this reason that both the slot and the neighborhood in which a channel is placed becomes important for a broadcaster. As seen from the facts of this case, it was the major reason why an agreement was not reached between the parties.

There were other differences with respect to the payment terms and other clauses of the agreement as well as the period of the agreement. Even

from the evidence adduced by the petitioner it can be seen that there was no agreement between the parties as the witness admits that the respondent sought payment in installments and also sought specific placement of its channels in the cable TV network of the petitioner. Furthermore, the respondent sought the agreement to be from 1.1.2013-31.12.2013.

There is no acceptance of the offer made by the petitioner by the respondent and hence, there is no concluded contract. On the contrary, the respondent was willing to enter into agreement subject to the petitioner agreeing to certain terms and conditions. The law in this regard is very clear and in a fairly recent case, the Hon'ble Apex Court held that in the absence of an acceptance of the bid of the plaintiff by a written communication, there is no concluded contract in favor of the plaintiff in relation to the offer made by it¹.

Ms. Khajuria, with reference to her submission on a concluded agreement, relied on Trimex International Fze Limited Vs. Vedanta Aluminum Limited², and M/s Jeevan Telecasting Corporation Ltd. Vs.

¹ See U.P. Avas Evam Vikas Parishad and Ors, appellants Vs. Om Prakash Sharma, respondent Civil Appeal Nos. 3908-3909 of 2013 (Arising out of Special Leave Petition (Civil) Nos. 20848-20849 of 2011) Decided On: 18.04.2013.

² (2010) 3 SCC 1

Asianet Satellite Communications Ltd³. However, the facts of these judgments were different.

In case of Trimex International Fze Limited's case, the respondent had conveyed their acceptance of the offer through email. The relevant para 3 of the same is as under :

“3. On 15.10.2007, the petitioner submitted a commercial offer through e-mail for supply of bauxite to the respondent. After several exchanges of e-mails and after agreeing on the material terms of the contract, the respondent conveyed their acceptance of the offer through e-mail on 16.10.2007 confirming the supply of five shipments of bauxite to be supplied from Australia to Vizag/Kakinada.”

In case of M/s Jeevan Telecasting Corporation Ltd., an interim prayer was made by the petitioner for a direction to the respondent not to discontinue the carriage of TV channels of the petitioner and by order dated 8.7.2010, the Tribunal directed the parties to maintain status quo.

Ms. Khajuria submitted that even in terms of Section 70 of the Indian Contract Act, since the respondent has availed the services of the petitioner and since all the three conditions of the said section are met, the respondent is liable to pay for the services that were not provided graciously. In this regard, she relied on State of West Bengal Vs M/s B.K.Mondal and sons

³ TDSAT Petition No. 210(C) of 2010 delivered on 22.09.2011.

(AIR 1962 SC 779) and Bharat Petroleum Corpn. Ltd. Vs. Great Eastern Shipping Co. Ltd. (AIR 2008 SC 357). She submitted that silence of the respondent coupled with its conduct constitute an acceptance of the agreement sub-silentio.

We do not agree with these submissions also. It is also not a case where the respondent has remained silent and availed the services of the petitioner. As the parties were in discussion but could not come to any agreement, we find it difficult to agree with the submission of Ms. Khajuria in regard to a contract sub-silentio. Further, we do not find any merit in the submission with regard to Section 70 of the Contract Act. We note that though the respondent was not satisfied with the services that were being provided both in terms of its quality and placement of channels, it had made ad-hoc payment of Rs. 20 lakhs to cover the interim period during which the channel was being carried with the hope that in the meanwhile, the parties will come to a concluded agreement. This payment, made by the respondent purely as a good will gesture and in the hope of reaching an agreement, in our view, cannot be taken to mean that the parties had reached any agreement or the respondent had given any approval for the same.

We, therefore, find no merit in the petition and the same is dismissed accordingly. The parties to bear their own costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

/NC/