TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 1st July, 2015

Petition No.188(C) of 2013
(M.A. No. 335 of 2014)

M/s Kal Cable Pvt. Ltd. ……Petitioner

Versus

M/s Shalini Zen TV Network, T.N. ……Respondent

BEFORE:

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

For Petitioner : Mr.Ajay Kumar, Advocate

For Respondent : Mr.Jayant K. Mehta, Advocate

ORDER

By Aftab Alam, Chairperson – The petitioner describes itself as a unit of Kal Cables Pvt. Ltd., which is a company incorporated under the Companies Act, 1956. It is a Multi System Operator (MSO), as defined under regulation 2(m) of the 2004 Interconnect Regulations. The respondent is a partnership firm and it works as a cable operator.

The petitioner has filed this petition seeking recovery of the sum of Rs.81,05,301/- from the respondent as dues of subscription fees. According to

the petitioner, it supplied the signals of its channels to the respondent in terms of an interconnect agreement on a monthly subscription fees for Rs.20,00,002/-. The respondent, however, persistently defaulted in payment of the monthly fees and as a consequence,the petitioner's dues against it accumulated to the aforementioned figure.

The period to which the dues relate is not easy to discern from the petition. The date on which the petitioner commenced the supply of its signals to the respondent is nowhere stated in the petition and different dates are given as to when the supply of signals was discontinued and the date to which the claimed amount relates. In paragraph 4 (c) that contains the gist of the petitioner's claim it is stated:

> "c) That the respondent had an (sic) subscription agreement with the petitioner for distribution of petitioner's signals, on the monthly lump sum payment of Rs.20,00,002/-. The relationship between the parties continued till the end of **July 2010**. The petitioner continuously provided signals from its network to the respondent **till July 2010**. So, as per this arrangement between the parties the respondent was mandated to pay to the petitioner, a monthly subscription charges of Rs.20,00,002/- excluding taxes in advance, on or before 10th day of every calendar month. That on the basis aforesaid arrangement, the respondent continuously enjoyed the signals of TV channels from the petitioner network **upto August 2011** and during this period, the petitioner was continuously raising and serving invoices upon the respondent on regular basis. But the respondent was irregular in making payment of monthly subscription charges (copy of monthly invoices alongwith proof of service are enclosed hereto as Annexure P-2 collectively)."
>
> (emphasis added)

In Paragraph 4 (g), however, it is stated that:

> "…… despite consuming signals of the petitioners (sic) network up to **September 2011** ……."
>
> (emphasis added)

The matter is further confounded by prayer clause (a) that seeks from the Tribunal:

> "Order/decree in favour of the petitioner and against the respondent for recovery of the sum of Rs.81,05,301 (Rupees Eighty one Lakh, Five Thousand, Three Hundred and one only) along with interest @ 18% thereon w.e.f. **30/07/2011** being the outstanding subscription fee payable by the respondent to the petitioner."
>
> (emphasis added)

From the prayer it would appear that the relationship between the two sides continued till the month of July of the year 2011 and the amount claimed was due on 30 July 2011.

But if we turn to the documents enclosed with the petition it would immediately appear that the confusion of months (July, August and September) and of years (2010, 2011) is the result of careless and mindless drafting. The petition has enclosed with it invoices for the months of April to August 2010. The first invoice is dated 1 April 2010; it is for the month of April 2010 and the pay-by-date is 7 April 2010. Invoices for the subsequent months are similarly raised in advance and the date of payment for every month is by the 7th of that month. Likewise, the invoice for the month of July 2010 is dated 1 July 2010

and the pay-by-date is 7 July 2010. Here it also needs to be noted that though an invoice was issued also for the month of August 2010, from the statement of accounts enclosed with the petition, it appears that later on it was cancelled and the debit entry for the month of August 2010 was reversed. It thus, appears that notwithstanding the divergent statements made in the petition, the supply of signals by the petitioner to the respondent came to end in July 2010 and as per the invoice issued by the petitioner, the respondent was liable to pay the subscription fee for July 2010 by the 7th of that month.

Here it further needs to be noted that the petition is filed by one J. Rajesh who is described as the authorised signatory of the petitioner company and a copy of the resolution passed at the meeting of the Board of Directors of the company held on 15 April 2010 giving the necessary authorisation to J Rajesh is enclosed with the petition as annexure P 1.

The respondent in its Reply completely denied the petitioner's claim.It denied the correctness of the statement of account enclosed with the petition and further took the plea that the petitioner's claims with respect to all the entries/amounts stated in the statement of account, except the last two entries dated 1 August 2010 and 1 September 2010 (by which the latter cancels the former) are barred by limitation (paragraph IV of the Reply). On the substance of the case it is admitted that in terms of a compromise/oral agreement, the respondent received signals from the petitioner from January 2010. It is,

however, stated that for the period January – August 2010, the respondent paid to the petitioner the invoiced amount of Rs.20,00,002/- every month, totalling to the sum of Rs.1,60,00,008/-. It is further stated that the respondent has in fact made excess payment of Rs.14,99,018.90 and it is entitled to refund of that amount. In paragraph 7 of the Reply details are given of specific amounts (aggregating to Rs.14,99,018.90) wrongly collected/received by the petitioner and it is claimed, assigning reasons, that the petitioner has no right to retain those amounts and those must be refunded to the respondent. The petitioner has filed a rejoinder in which there is a bald denial that the respondent has made the excess payment of Rs.14,99,018.90. There is no comment, however, in regard to the specific amounts said to have been received by the petitioner, details of which are given in paragraph 7 of the Reply.We, however, need not go into any further detail on this aspect of the matter as there is no counter-claim by the respondent.

On the basis of the pleadings,the following issues were framed as arising for adjudication:

(a) Whether the petitioner is entitled to Rs.81,05,301/- alongwith interest toward outstanding subscription fees?

(b) Whether the claim of the petitioner is barred by limitation? and

(c) Any other issue/relief as the Hon'ble Tribunal may deem fit and proper?

The petitioner has examined two witnesses in support of its case. The first witness is one Vittal Sampathkumaran. Kumaran, in paragraph 6 of his evidence affidavit, said that the "relationship between the parties continued till the end of July 2010". He further said that "the petitioner has continuously provided signals from its network to the respondent till July 2010". He formally proved the invoices issued to the respondent and the petitioner's statement of account, which were marked as Ex.PW 1/1 and Ex.PW 1/3 respectively.In paragraph 9 of his evidence affidavit he said that the petitioner sent a letter dated 9 November 2011 (Ex.PW 1/4) demanding its dues from the petitioner but the respondent did not even care to reply to this letter. After the demand letter of 9 November 2011, the petitioner sent a number of reminders both orally and in writing but it did not receive any reply from the respondent. The petitioner finally sent a legal notice on 10 July 2012 (Ex.PW 1/5) to which the respondent gave its reply by letter dated 19 July 2012 (Ex.PW 1/6) denying any liability for payment.

The second witness examined by the petitioner is J. Rajesh, who has filed this petition on behalf of the petitioner company. J Rajesh, in his evidence affidavit, said that he is the General Manager-Operations of the petitioner company and he is also its authorised signatory. He further said that by virtue of the resolution passed by the company's Board on 15 April 2010, enclosed as Annexure P-1 to the petition, he is duly authorised to swear the affidavit by way

of evidence. He then proceeded to identify Annexure P-1 which was marked as Ex.PW 2/1.

The respondent did not lead any evidence in support of its case.

On these set of pleadings and evidence adduced by the petitioner alone, the case came up for hearing.

Mr. Jayant K. Mehta, learned counsel appearing for the respondent submitted that the present petition is not maintainable as J. Rajesh had no competence or authority to file the petition on behalf of M/s Kal Cable Pvt. Ltd. Mr. Mehta submitted that in course of his cross-examination, J Rajesh has produced the minutes of the meeting of the Board of Directors of Kal Cable held on 15 April 2010 giving him the authorisation. Mr. Mehta pointed out that the minutes of the meeting produced by J Rajesh are not only completely different from the minutes of meeting enclosed with the petition as annexure P 1 (Ex.PW 2/1), but in the minutes of the meeting produced by him during cross examination he is described as the General Manager of Sumangali Cable Vision (SCV), a unit of Kal Cable and is authorised to file suits etc. and to represent **that unit** alone in instituting or defending any petition etc. Mr. Mehta pointed out that J Rajesh admitted this position in his cross examination as would be evident from his statements as under:

> "I have not seen the Minutes book of the petitioner. I have seen the original resolution dated 15th April 2010(Vol.I have brought to the original Minute Book)

> The petitioner company was incorporated in the year 2006. It is correct that the minute book brought by me today does not contain any resolution prior to 2010.
>
> I do not know if the MinutesBook is required to be maintained by every company in which minutes of the meetings of the board are recorded. I also do not know as to whether the Minutes Book is to be maintained on a running basis and not changed every year.
>
> **It is correct that as per the resolution dated 15th April 2010, I am shown as an employee of M/s Sumangali Cable Vision and not of the petitioner. It is also correct that this resolution authorises me to act on behalf of Sumangali Cable Vision and not for the petitioner.**
>
> **It is correct that the resolution dated 15th April 2010 as contained in the minute book brought by me is different from the resolution which is marked as Exhibit PW 2/1 in my affidavit which is at page 10 of the paper book.** (A copy of the said resolution alongwith cover page of the Minutes Book containing three pages which is taken from the original Minutes Book produced by the witness is marked as "X")
>
> **I cannot show the original of the resolution which has been placed on record at page 10".**
>
> (emphasis added)

Mr. Mehta submitted that J Rajesh admittedly did not have the authority to file this petition on behalf of the petitioner company and the petition is, therefore, not maintainable. In support of his submission, he relied upon two decisions of the Supreme Court in *Shubh Shanti Services Ltd. Vs. Manjula S. Agarwalla and Ors*.[1] and in *State Bank of Travancore Vs. Kingston Computers India Private Limited*[2] and a decision of the Delhi High Court in *Raj Cylinder and Containers Pvt. Ltd. Vs. M/s Hindustan General Industries and Ors.*[3]

[1] (2005) 5 SCC 30 (paragraphs 19, 20 and 21)
[2] (2011) 11 SCC 524 (paragraphs 8, 12, 13 and 14)
[3] 2013 VIII AD(Delhi) 298 (paragraphs 7 to 9)

Mr. Ajay Kumar, learned counsel for the petitioner submitted that any defect in the authorisation of the person filing the petition was curable and it could be rectified at a later stage and even at the stage of appeal. In support of his submission, he relied upon the decision of the Supreme Court in *Maharashtra State Mining Corpn. Vs. Sunil, S/o Pundikarao Pathak*[4]. This decision is on a completely different point and we fail to see how it can be of any help to the petitioner in the present case.

Here it may be noted that about a week after the hearing of the case had concluded and the judgment was reserved, Mr. Kumar sought permission to file a fresh authorisation in favour of J Rajesh. We declined the request,first becausethe hearing of the case was concluded after giving full opportunity to the petitioner to adduce evidence in support of its case and secondly, and more importantly because, we are clearly of the view that this petition is bound to fail both on merits and on the ground of limitation.

Mr. Mehta next submitted that the statement of account produced by the petitioner and that forms the basis of its claim is quite bogus. It was sought to be proved by PW 1 who admittedly did not prepare it and who did not have any concern with the petitioner company's accounts department where, according to him, the statement of account was prepared. Mr. Mehta further submitted that there was complete mismatch of figures in the invoices and the statement of

[4] (2006) 5 SCC 96 (paragraph 7)

account that discredit both. He pointed out that the mismatch in the amounts mentioned in the invoices and those shown in the statement of account was even admitted by PW 1 and invited our attention to the following statements made by the witness in his cross-examination:

> "Q. 4: Is it correct that according to you the monthly subscription charges were payable by the respondent to the petitioner in advance by the 10th day of each month?
>
> A. Yes
>
> Q. 5: Can you show from the record any demand that was made by the petitioner upon the respondent between the period January 2010 to July 2010 claiming dues of subscription charges?
>
> A. According to me, it is by way of invoices. There is no other evidence for this period.
>
> Q.6: Is it correct that in Petition No. 364(C) of 2010, the petitioner had not filed any counter claim for subscription dues recoverable from the respondent?
>
> A. Yes
>
> Vol – We wanted to file a separate petition.
>
> It is correct that I personally do not maintain the accounts of the petitioner company. There is an accounts department in the company for this purpose. I do not supervise the maintaining of the accounts of the company.
>
> It is correct that the accounts of the petitioner company are audited every financial year.
>
> Q7. Is it correct that the statement of account filed at page 15 of the petition is not an audited statement of account?
>
> A. I am not aware of it.
>
> It is correct that I have not personally prepared the statement of account.
>
> Vol – It was prepared by the accounts department of the company.
>
> Q8. Can you please tell us as to what is the balance shown in the entry dated 1.4.2010 in the statement of account.

A. It is Rs.55,55,305.06. This balance has been arrived including the invoice for the month of April 2010 which was raised on 1.4.2010.

Q 9. I am now showing you the invoice which the petitioner claims to have raised for the month of April 2010, which has been filed at page 11 of the petition. Is it correct that the outstanding amount as on 31.3.2010 shown in this invoice is Rs.56,05,303.54?

Yes, it is.

Q10. Can you please show us any entry of Rs.56,05,303.54 in the statement of account at page 15?

A. No.

Q 11. Please see the entry dated 4.5.2010 in the statement of account. Is it correct that it shows a balance of Rs.75,55,306.58 after adding the invoice for the month of May 2010, which according to you was raised on 4.5.2010 ?

A. Yes

Q 12. Please see the invoice dated 4.5.2010 at page 12 of the petition. Is it correct that according to this invoice as on 30.4.2010 an amount of Rs.76,05,305.66 is shown to be outstanding from the respondent?

A. Yes

Q 13. Can you please show us any entry for Rs.76,05,305.66in the statement of account at page 15?

A. No.

Q 14. Please see the entry dated 1.6.2010 in the statement of account. Is it correct that it shows a balance of Rs.80,05,308.10after adding the invoice for the month of June 2010, which according to you was raised on 1.6.2010?

A. Yes.

Q 15. Please see the invoice dated 1.6.2010 at page 13 of the petition. Is it correct that according to this invoice as on 31.5.2010 an amount of Rs. 80,55,306.58 is shown to be outstanding from the respondent?

A. Yes

> Q 16. Can you please show us any entry for Rs.80,55,306.58 in the statement of account at page 15?
>
> A. No.
>
> It is correct that there is a similar mismatch in respect of the entry dated 1.7.2010 at page 15 when compared with the invoice for the month of July 2010 at page 14."

From a perusal of the invoices and the statement of account and the deposition of PW 1 it is evident that there is a difference of Rs.49,998.48 in the invoice dated 1 April 2010 and the entry of that date in the statement of account with the invoice showing the higher amount and this difference is carried forward in the subsequent months. No explanation for this difference comes from the witness or from the counsel appearing on behalf of the petitioner in course of hearing of the case. Had the petitioner cared to examine someone familiar with the statement of accounts he might have been able to explain this recurring difference of amounts appearing in the invoices and the entries in the statement of account but as things stand, the difference remains completely unexplained. In this situation it is difficult to rely upon the statement of account for giving a decree, for the sum claimed by the petitioner and no finding on issue no. 1 can, therefore, be rendered in favour of the petitioner.

This, however, is not the end of the petition's difficulties and it faces a far more formidable and insurmountable obstacle on the issue of limitation.

In order to examine the question of limitation it would be useful to summarize certain facts emerging from the pleadings of the parties and the

evidence lead by the petitioner, which are admitted or, in any event, are undeniable.

i.The petitioner supplied the signals of its channels to the respondent from 1 January 2010(as admitted by the respondent and as stated by PW 1 in answer to question no.1)

ii. The supply of signals continued till 31 July 2010 (as would appear from the invoices and the statement of accounts and as is admitted by PW 1 in answer to question no. 2)

iii. The subscription fee for each month was payable in advance, by the 7th day of the month (as would appear from the invoices) or in any event by the 10th day of the month (as stated by PW 1 in answer to question no. 4)

iv. The subscription fee for the month of July 2010 thus became due and payable on 7 July 2010 (according to the invoice) or in any event on 10 July 2010 (according to the statement of PW 1)

v. The present petition was filed on 15 July 2013.

vi. There is no averment in the petition that the recovery petition was being filed in terms of Article 1 of the schedule to the Limitation Act, 1963, much less there is any evidence to this effect.

In light of the facts enumerated above it would clearly appear that this recovery petition was filed beyond the period of 3 years from the date when the

amounts claimed by the petitioner became due and is, therefore, barred by limitation.

Mr. Kumar, however, submitted that the present claim was based on a mutual, open and current account and it would be governed by Article 1 of the Limitation Act and the period of limitation would commence from the close of the year 2010. According to him, the petition was, thus, filed well within period of limitation. In support of his submission, he relied upon a decision of the Delhi High Court in *Bharth Skins Corporation Vs. Taneja Skins Company Pvt. Ltd*.[5]

Mr. Mehta, on the other hand, strongly contended that the plea based on Article 1 cannot be raised in such off-the-cuff manner. Learned counsel submitted that for the application of Article 1, not only should the facts of the case satisfy the conditions prescribed under the Article but the plea must also be clearly taken in the petition/plaint and established by leading cogent evidence. He submitted that in this case there was no averment in the petition that the dues arose from a mutual, open and current account and there were reciprocal demands between the parties, there was no evidence to that effect and the admitted facts of the case clearly showed otherwise. He submitted that there could be no question of any mutual, open and current account or any reciprocal demands between an MSO and a cable operator. He further submitted that

[5] 186(2012)DLT 290 (DB)

relationship between an MSO and a cable operator is akin to that of a seller and a buyer. The MSO supplies its signals to the LCO for which the LCO is obliged to make payments. There is no element of any reciprocal demand from the side of the LCO upon the MSO. The relationship is based on a single contract and there are no dual contracts creating any reciprocal demand between the parties. Mr. Mehta relied upon a decision of the Supreme Court in *The Hindustan Forest Company vs. Lal Chand and Ors.*[6]in support of his submissions that for the application of Article 1, not only should the facts of the case satisfy the conditions prescribed under the Article but the plea must also be clearly taken in the petition/plaint and established by leading cogent evidence. He referred to paragraphs 9 and 13 of the judgment where it is held and observed as under:

> "9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had agreed to pay for them and had in part made the payment in advance. There can be no question that in so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments.
>
> 13. We think it fit also to observe that it is somewhat curious that any question as to the application of art. 115 was allowed to be raised. The applicability of that article depends on special facts. No such facts appear in the plaint. There is no hint there that the account was mutual. We feel sure that if the attention of the learned Judges of the High Court had been drawn to this aspect of the matter, they

[6] (1960) 1 SCR 563

> would not have permitted any question as to art. 115 being raised, and the parties would have saved considerable costs thereby."

Mr. Mehta also relied upon a decision of the Delhi High Court in *Gujarat Heavy Chemicals Ltd. Vs. Diwan Mundhra Bros Pvt. Ltd. and Anr*.[7] . The Delhi High Court judgment took into consideration the Supreme Court decisions in *The Hindustan Forest Company* and in *Chandradhar Goswami* and in paragraphs 13 to 15 held and observed as under:

> "13. For the purposes of making good the plea that there was a running account between the parties, it was incumbent on DMBPL to have pleaded such fact in the first place. The importance of this requirement has been emphasized in the two decisions of the Supreme Court relied upon by learned Senior counsel for the GHCL. In Hindustan Forest Company v. Lal Chand, the Supreme Court discussed Article 115 of the Jammu and Kashmir Limitation Act which was in Pari Material with Article 85 of the Limitation Act, 1908 and which in its essential features was no different from Article 1 of the Schedule to the LA, except as regards the actual period of limitation. Even in that case, the question was whether the suit of the Plaintiff based purportedly on a running account was within limitation. The Supreme Court held that the decision of the Calcutta High Court in Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah (1930) ILR 58 Cal 649, laid down the correct test for determining whether there was "a mutual, open and current account where there have been reciprocal demands between the parties". It required examination whether the payments made "were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer". In para 13 of the decision in Hindustan Forest Company v. Lal Chand, the Supreme Court categorically held that the applicability of Article 115 depended on special facts which were not pleaded in the plaint. It was observed that in the pleadings "there is no hint there that the account was mutual. We feel sure that if the attention of the learned Judges of the High Court had been drawn to this aspect of the matter, they would not have permitted any question as to

[7] 2012IXAD(Delhi)185; MANU/DE/4873/2012

Article 115 being raised, and the parties would have saved considerable costs thereby".

14. The issue was revisited by the Supreme Court in Chandradhar Goswami v. Gauhati Bank Ltd. The entries in the accounts produced were examined for determining the question whether there was an 'open, mutual and current account' for the purposes of limitation.

15. As far as the present case is concerned, the mere statement in para 33 of the affidavit of Mr. Mundhra that there was a running account is hardly sufficient to prove the point. The mere production of credit notes (Ex. P.81 to P.96) was also not sufficient. Also, the mere fact that there was no dispute that payments under the credit notes were made later than the dates of the credit notes did not per se establish that there was a running account. For there to be a running account, there obviously had to be a periodic reconciliation of accounts. At the least, the certified accounts had to be produced to prove the relevant entries as regards the payments in respect of credit notes. No such accounts were produced in the instant case before the learned Arbitrator. The statement by Mr. Mundhra in his affidavit that there was a running account between the parties was, therefore, not proved. There was no basis on which the learned Arbitrator could have rendered a finding to that effect. It must also be recalled that GHCL witness Mr. Jassal had categorically denied that there was any running account between the parties."

This issue also came up for consideration before the full Bench of the Tribunal in Petition no. 33 of 2009, which was decided by judgment and order dated 26th July 2010 containing a detailed discussion on the application of Article 1. The relevant passages from the judgment are reproduced below:

"14. Article 1 of the Limitation Act reads as under:-

Description of suit	Period of limitation	Time from which period begins to run
(1) For the balance due on a mutual, and current account, there have been	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

> reciprocal demands between the parties.

15. A bare perusal of the said provision would clearly go to show that it applies in a case where balance amount is due on mutual, open and current account on the closure thereof and when there had been reciprocal demands between the parties.

The test of mutuality evidently would be that the dealings between the parties are such that the balance is sometimes in favour of one party and sometimes in favour of the other,

16. For the aforementioned purpose, requisite pleadings are required to be made in the Petition. The account to be mutual, open and current account, it is necessary that the parties enter into independent transactions, pursuant whereto, reciprocal demands and shifting balances are made and in any event, there should have been a possibility therefor.

Before, however, application of the aforementioned provisions is taken into consideration, we may notice the definition of 'open account' and 'running account'.

17. In Black's Law Dictionary, 7th Edn., Page 19, the said terms are defined as under:-

> "**Open account. 1.** An unpaid or unsettled account. **2.** An account that is left open for on-going debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability.
>
> **Running account.** An open, unsettled account that exhibits the reciprocal demands between the parties".

18. Mr.Tyagi, the learned counsel appearing on behalf of the petitioner placed strong reliance upon a decision of the Supreme Court of India in Kesari Chand Jaisukh Lal v. Shillong Banking Corporation Ltd., wherein referring to a decision of the Madras High Court with approval Hirada Basappa v. G. Muddappa, 6, Mad HC, 142, the law was laid down the following terms :-

> "To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one

> side, those on the other being merely complete or partial discharges of such obligations."

It was held—

> "In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of the obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 20, 1950 when the last entry in the account was made. <u>It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to S. 46(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative."</u>
>
> **(Emphasis supplied)**

19. Reliance has also been placed by Mr.Tyagi on a decision of the Delhi High Court in Era Constructions (India) Ltd v. D.K. Sharma reported in 2008(1) Arb. L.R. 205(Delhi), wherein a learned Single Judge of the said Court opined as under:-

> "In other words, a running account is one which is unsettled and is open. It is distinct and different from a stated and/or liquidated account where the amount stands crystalised. In this context, it would be fruitful to refer to Article 1 and Article 26 of the Schedule to the Limitation Act, 1963. Article 1 relates to suits in respect of balance due on a mutual open and current

> account, where there have been reciprocal demands between the parties. The period of limitation prescribed is three years from the close of the year in which the last item admitted or proved is entered in the account and such years is to be computed as in the account. If the statement of account between the parties is to be regarded as a mutual open and current account, then the period of limitation of three years would begin from the close of the year in which the last item admitted or proved is entered in the account. It was contended on behalf of the claimant that the last admitted item in the account between the parties was the payment made by the petitioner to the respondent on 3.4.99 and, therefore, the start of the period would be the close of the year in which this payment was made. He submitted that the financial year ending on 31st March was taken as the accounting year and, therefore, in point of fact, the period of limitation would begin not from 3.4.99 but from 31.3.2000 which is the close of the year in which the last payment (i.e. on 3.4.99) was made. This would be the position, if Article 1 of the Schedule to the Limitatin Act, 1963 were to apply."

It was furthermore held:-

> "What the learned arbitrator failed to consider was that for Article 1 of the Schedule to the Limitation Act, 1963 to apply, it was necessary to establish that the account was not only open and current but also mutual where there have been reciprocal demands between the parties. This aspect of the matter has clearly escaped the attention of the learned arbitrator. Article 1 of the Schedule to the Limitation Act, 1963 falls in Part I which pertains to suits relating to accounts."

20. In the matter of Kesari Chand Jaisukh Lal v. Shillong Banking Corporation Ltd., (supra), the Respondent was a Banking Company. The appellant therein had a combined overdraft and deposit account. Two cheques were handed over to the Bank for collection on 9.12.46 which were credited. They were sent to another bank for collection. Instead of obtaining cash, the respondent obtained a cheque on one Nath Bank Ltd. It was done without consulting the appellants. The said cheque was returned by Nath Bank. The respondent contacted the appellant for the instructions. Under instructions on 13.12.46, a Demand Draft from

the Bharati Central Bank was accepted for an identical amount which was sent to the Bank's Calcutta Branch for collection. The Calcutta Branch asked Bharati Central Bank to present it to the Shillong Bank, which was complied with. In the meanwhile, Bharati Central Bank had applied for moratorium and the Demand Draft was not encashed. In the proceedings for reconstructing the Bharati Central Bank the respondent asked to be treated as preferential creditors in respect of the amount for which the draft had been made out. The respondent thereafter was ordered to be wound up. An application for settlement of list of debtors was filed under Sec. 45-D of the Banking Companies Act, 1949. The appellant resisted the claim on the ground that the respondent having credited the appellant's account with the amount of the two cheques on the Bharati Central Bank having accepted on its own responsibility from the Bharati Central Bank the cheque dated December 9. 1945 on the Nath Bank ought not to be allowed to show that it received the cheque on account of and as agent of the appellant.

It was in the aforementioned situation, a finding of fact was arrived and held that the respondent therein owed a duty to the appellant to take steps in the liquidation proceedings for the realization of the amount of draft as there was no substance in the contention that by preferring a claim as mediator in respect of the draft in the liquidation of the Bharati Central Bank. The respondent accepted the draft in satisfaction of its dues from the appellant. It was on the basis of the said findings that the dealings were held to be mutual between the parties and a last entry in the account having being made on 29.12.1950 and the suit having been filed within three years from the close of the year, it was held to be not barred by limitation, in view of Article 85 of the Old Limitation Act.

24. To create an open, mutual and current account, there must be an intention. Such intention must be deducible from the course of dealings, to have mutual dealings, create the reciprocal obligations which are independent of each other, with the intention that these transactions are to continue and are not so closed until the parties decide to close their accounts. In this case parties were not maintaining any common account. The petitioner has claimed a money decree for non-payment of the roaming charges for particular month(s). The dues of the month(s) in question were not to be carried forward to the next month as interest was to be paid on the invoiced amount of the creditor minus the invoiced amount of the debtor and, thus, the transaction must be held to have come to a close on the happening of the said event. This Petition is not based on account but on invoice."

Mr. Mehta also invited our attention to a number of other decisions by the Tribunal in which a similar view is taken. These are i. Judgment dated 20.5.2010 in Petition No. 239 (c) of 2007 and analogous cases (paragraphs 12 and 13); ii. Judgment dated 28.5.2010 in Petition No. 37(c) of 2009 (paras 27 and 28); iii. Judgment dated 10.3.2010 in Petition no. 135 (c) of 2006(paras 14 and 15); iv. Judgment dated 26.3.2010 in Petition No. 99(c) of 2005(page 24 25) and Judgment dated 1.10.2010 in Petition No. 123(c) of 2009 (paras 27 and 29).

The submission made by Mr. Mehta that the present case is not governed by Article 1 is well founded and must be accepted.

The reliance placed by the learned counsel for the petitioner on the Delhi High Court decision in *Bharth Skins Corporation* is quite misconceived. In that decision the court clearly held that Article 1 of the Limitation Act had no application to the case but in the special facts of the case found and held that the case was governed, not by Article 14, but Article 113 of the schedule to the Limitation Act and under that Article it was filed within the period of limitation.

In light of the discussions made above, we have no hesitation in holding that in the present case there is no application of Article 1. The petitioner's claim falls under Article 113 and the petition being filed beyond the period of three years from the date of the right to sue first accrued is clearly barred by limitation.

Thus, apart from the negative finding on issue no. 1, the present petition is bound to fail on the ground of limitation as well.

The petition is, accordingly, dismissed but with no order as to costs.

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(AftabAlam)
Chairperson

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(Kuldip Singh)
Member

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