

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

**Dated 1<sup>st</sup> July, 2015**

**Petition No.357(C) of 2013**

Tata Sky Ltd. ....Petitioner

Versus

Brand Value Communications Ltd. ....Respondent

**BEFORE:**

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

For Petitioner : Ms. Mamta Tiwari, Advocate

For Respondent : Mr. Jayant K. Mehta, Advocate  
Mr. Kunal Singh, Advocate

**ORDER**

**By Aftab Alam, Chairperson** – The petitioner is a direct-to-home (DTH) operator and it is a distributor of TV channels under the broadcasting regulations. The respondent is a broadcaster of TV channels.

The petitioner has filed this petition against the respondent seeking recovery of Rs.4,12,29,171/- as dues of carriage fee. It has computed its dues as under:

- |      |                                                                                         |   |                  |
|------|-----------------------------------------------------------------------------------------|---|------------------|
| (i)  | the principal outstanding                                                               | - | Rs.3,65,17,000/- |
| (ii) | interest @ 18% per annum<br>on unpaid dues for the period<br>07.11.2011 till 21.08.2013 | - | Rs.23,68,795/-   |

(iii)	interest @ 18% per annum on unpaid dues for the period 07.10.2012 to 31.08.2013	-	Rs.16,54,000/-
(iv)	TDS deducted by the respondent on a certain invoice	-	Rs.6,89,375/-
	<b>Total</b>	-	<b>Rs.4,12,29,171/-</b>

According to the petitioner, it entered into, what is called as an ‘Access Agreement’ with the respondent on 11.11.2010. Under the agreement, the respondent is called as the ‘Programmer’ and it is stipulated that Tata Sky would provide access to the Programmer in respect of its Bengali language programme service known as “Rupashi Bangla”. The term of the agreement was for the period 07.10.2010 to 06.10.2013. Clause 6 of the agreement dealt with Bandwidth Support Fee and provided as under:

“The Programmer shall pay Tata Sky a Bandwidth Support fee of Rs.Seven Crore (7,00,00,000) plus service tax for the Term.

The Bandwidth Support Fee breakup is as follows:-

<b>Years</b>	<b>Carriage Fee</b>	<b>Payment Terms</b>
Year 1	2.5 Cr + Service Tax	100% in Advance
Year 2	2.5 Cr. + Service Tax	4 Equal instalments quarterly in Advance
Year 3	2.0 Cr. + Service Tax	4 Equal instalments quarterly in Advance

In the 2<sup>nd</sup> and 3<sup>rd</sup> year, the DD/at par cheques for each quarters should be sent within one week of commencement of each quarter in advance.

The Bandwidth Support Fee is an admitted debt on the Programmer and payable in full by the Programmer unless:

- (i) there is a breach of the Agreement by Tata Sky and the agreement is terminated by the Programmer in which case, no further bandwidth support fee shall be payable; and
- (ii) in case of pre-mature termination by Tata Sky as stated in Clause 21, in which case, any pro rata advance shall be refunded to the Programmer and no further bandwidth support fee shall be payable.”

The agreement did not prescribe any specified band or frequency on which the respondent's channel was to be carried. It rather gave Tata Sky full rights in this regard by providing, in clause 11 as under:

“Tata Sky shall always have full flexibility in terms of packaging the Channel in any of its Consumer Offerings/Packages/tiers.

Tata Sky shall retail, distribute, package the Channel in any tier/package/bouquet for its subscribers on the Tata Sky DTH platform.”

Clause 18 contained indemnification clause that obliged each party to keep the other indemnified against losses etc. resulting from any breach or non-performance by the concerned party. The provision for termination of the contract under clause 21 gave the right to termination to Tata Sky alone and provided as under:

“Tata Sky will have the additional right to terminate the agreement at any point, with an advance one month's written notice and shall also comply with the relevant provisions of the existing regulatory laws in this respect. In this case, any advance received from the Programmer shall be refunded pro rata to the Programmer and no further bandwidth support fee shall be payable.”

Clause 23 of the agreement dealing with Dispute Resolution provided that any dispute, difference or claim unless resolved through the respective CEOs of

both sides would be finally settled on the application of either party by the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) on any other such Tribunal or court as may be prescribed under the TRAI Act 1997 or any subsequent laws.

It is the case of the petitioner that in full and complete discharge of its obligation under the agreement, it carried the respondent's channel *Rupashi Bangla* on its DTH platform until it terminated the agreement for non-payment of the dues by the respondent vide its letter dated 05.09.2013. According to the petitioner, the bandwidth support fee for the first year was duly paid by the respondent in advance. The first quarter for the second year was also paid in time. But defaults took place in further payments with the result that dues accumulated as indicated above. The dates on which the petitioner raised invoices/demands and received or failed to receive payment against those invoices/demands are detailed in paragraphs 9 to 29 of the petition.

The petitioner has also brought on record the exchange of emails/correspondence in some of which the respondent appears to acknowledge the dues. For instance, in the email dated 07.08.2012, in reply to the demand letter/email dated 06.08.2012 from the petitioner, it is stated on behalf of the respondent as under:

“Dear Mr. Ahuja,

We regret for the delay in paying your payment but our intention is to pay your dues. Due to some unavoidable circumstances, same is

being delayed. We are organising your(*sic*) to release your last qtr payment by 20<sup>th</sup> of this month.

Kindly bear with us for the time being.

Regards,

Tarun Panda”

The petitioner has also enclosed with the petition, a schedule of outstanding payments showing a computation of its dues.

The respondent in its Reply mostly denied the Tribunal’s jurisdiction to adjudicate on a dispute over what it describes as a money claim simplicitor. As to the merits of the dispute, the case of the respondent is summed up in paragraphs 6 and 7 of the reply. In paragraph 6, it is stated that the petitioner failed to provide service as contemplated in the Access Agreement for the following reasons:

- “a. Some place the channel has not been shown clearly.
- b. Sometimes, the channel was not visible at all.
- c. Interruption of Service was reported from various places during existence of the contract.
- d. We have also come to know that our channel has been offered to customer through various pay package i.e. channel can be shown to customers only after the payments of certain monthly rentals though our channel is a free to air channel and we entered into a carriage agreement with the petitioner.”

In paragraph 7 it is stated that on account of the deficiencies in the service provided by the petitioner, respondent suffered severe losses. It not only lost credential of its channel but also lost revenue on account of non-display of its

channel by the petitioner in various regions. The losses were assessed at Rs.6 crores approximately. In this connection, it is further stated as under:

“.....However, on mutual understanding between the parties it was decided that the respondent would not make any further payment till there was an amicable settlement of the disputes with regard to failure of the petitioner in allowing the respondent to access the DTH platform of the petitioner from time to time which has led to various consumers on the DTH platform on the petitioner not being able to view the respondent in various regions. Subsequent thereafter discussions were held and it was decided that other channels of the respondent will be telecasted through the platform of the petitioner on a combined package to instigate the loss of the respondent. It is on such understanding no further invoice was raised by the petitioner. As a matter of fact, the respondent has from time to time received various complaints from the concerns which have advertised on the channel of the respondent that their advertisements were not being shown on the DTH platform of the petitioner. These concerns are seeking return of their advertisement fees and reasons whereof the respondent has suffered further cases.

On the basis of the above, it is denied that the respondent had any dues payable to the petitioner.

It is significant to note that in the reply filed by the respondent there is no denial of the execution of the Access Agreement or the terms and conditions contained therein. Further, though in paragraph 10 of the reply, there is a bald denial that the sum of Rs.2,52,81,000/- or any part thereof was due and payable by the respondent to the petitioner, there is no specific denial of the statements contained in the petition regarding raising of invoices/demands and payments made by the petitioner and the computation of the petitioner's dues on that basis. Further, though a case is sought to be made out that the respondent suffered losses on account of low/non-viewability of its channel in several regions and

the packaging of its channel by the petitioner, there is not a scrap of any contemporaneous complaint or letter in this regard enclosed with or indicated in the reply.

The petitioner in support of its case examined one Abhishek Pathak working as Deputy General Manager in the company as its witness. He fully supported the case of the petitioner in all respects. He identified the Access Agreement and proved its execution by the two sides which was marked Exhibit PW-1/4. He stated that the petitioner at all material time discharged its obligations under the agreement and carried the signals/programmes of *Rupashi Bangla*. But the respondent defaulted in payment of the bandwidth support fees and as a result the petitioner's dues accumulated to the figure as stated in the petition. He proved the invoices for the different periods that were marked as Exhibit PW-1/5(colly) and Exhibit PW-1/13(colly). He also identified the emails and the demand notice that were marked as Exhibit PW-1/6 and Exhibit PW-1/7 respectively. He further identified the emails exchanged by the two sides that were marked as Exhibit PW-1/8, Exhibit PW-1-9, Exhibit PW-1/10, Exhibit PW-1/11(colly) an Exhibit PW-1/12. He also identified the demand notice dated 11.03.2013 which was marked as Exhibit PW-1/14. He also identified the statement of account and the schedule showing outstanding carriage fee which was marked as Exhibit PW-1/15(colly). He also identified the notice of termination dated 05.09.2013 which was marked as Exhibit PW-1/16. He finally identified the public notice of disconnection published in The

Statesman newspaper which was marked as Exhibit PW-1/17. He was subjected to a brief cross-examination in which there is nothing that might come to the aid of the respondent.

In respect of the alleged losses suffered by respondent he was asked the following questions, and his replies are as under:

“Q.1: Is it correct to state that in view of your statement that the services provided were of a reasonable standards, there occurred occasional signal losses, etc.?”

A: It is incorrect.

Q.2: How would you describe reasonable standards?

A: Reasonable standard would mean that the consumers who are subscribers of the channel ‘rupashi bangla’ were able to view it without interruption at all times.”

The respondent similarly examined one Syamkumar Divakaran working as the Senior System Admn. in the respondent company. He accepted the execution of the Access Agreement on 11.11.2010 and produced its copy (marked as Exhibit RW-1/2) which is identical to the copy of the agreement produced by the petitioner. However, supporting the case of the respondent of having suffered losses due to the deficiencies of service by the petitioner in paragraphs 3 and 4 of his evidence affidavit, he stated as under:

“3. I state that the channel “Rupasi Bangla” is a free of air channel. However, the petitioner who has several packages for which it charged a certain amount included the free to air channel “Rupasi Bangla” and accordingly changed nature of the channel “Rupasi Bangla” from a free air channel into a paid channel. I further state that the petitioner was also under an obligation under the agreement to provide a platform for airing of the channel of the respondent which the petitioner has failed to do.

4. The respondent lost viewership and revenue due to inclusion of same in the paid packages. I say that such damages had been assessed at a figure of Rs.6 Crores. I state that on mutual understanding between the parties it was decided that the respondent would not make any further payment till there is an amicable settlement of disputes with regard to the failure of the petitioner in allowing the respondent to access the DTH platform of the petitioner from time to time. During the talks between the petitioner and respondent and despite being aware of such talks the petitioner had sent a purported notice to the respondent to clear their dues. In consideration on on-going talks we responded to such notice and agreed to clear the dues by 20<sup>th</sup> August 2012.”

He was cross-examined on this aspect of the case, and the relevant extract from his cross-examination is as under:

“Q. Did you complain to the petitioner with respect to the deficiency in service which you allege in Para.4.

A. Yes. My company’s representative informed to Tata Sky.

Q. Can you identify the document by which the information was given?

A. There is no documental proof, it was a telephonic conversation.

Q. Is that telephonic conversation referred to in any other document that you may have filed in these proceedings?

A. I am not aware.

Q. I put it to you that you are deposing falsely and that there was no telephonic conversation of the kind your refer to?

A. I disagree.

Q. Did you inform the petitioner that the respondent had suffered damages to the tune of 6 Crores as a result of the so called deficiency in service by the petitioner?

A. Yes.

Q. Can you identify the document?

A. Yes. It is Annexure ‘I’ colly, Page.50 of the paper book.

Q. Can you please point out the exact excerpt from Page.50 of the paper book where the respondent makes such a complaint?

- A. Mail sent on October 9 2012 at 12.44 PM by Abhishek Pathak to Soumendu. Attention is drawn to the words “We spoke”.
- Q. Is it correct that this mail has been sent by the petitioner to the respondent and not by the respondent to the petitioner as a complaint?
- A. Yes, correct.
- Q. So there is no formal complaint by the respondent to the petitioner with respect to suffering damages to the tune of 6 Crores that you falsely say the respondent made?
- A. There is no formal complaint, but the figure is correct.
- Q. Where is the figure of 6 Crores as damages referred to at Page.50.
- A. This is just a telephonic communication.
- Q. Was there any mutual agreement entered into between the parties that you will make no further payments till the alleged ‘disputes’ are ‘amicably’ settled that you refer to in Para.4 of your affidavit?
- A. No agreement was done, only communications going on.
- Q. When you say “no agreement was done”, you mean that there was no written agreement. Is that correct?
- A. Yes. I am referring to a written agreement.
- Q. Can you explain your response “only communications going on”.
- A. I mean telephonic communication.
- Q. Was there an agreement dated 9<sup>th</sup> October 2012 entered into between the parties?
- A. No.
- Q. Please see the letter dated 6<sup>th</sup> August 2012 at Page.45 where a demand of Rs.70,22,500/- was made. Is that correct?
- A. No figures are mentioned in this mail.
- Q. Is it correct that you did not raise any dispute with respect to this demand?
- A. I am not aware.
- Q. Please see Page.47 and your e-mail dated 7<sup>th</sup> August 2012. You acknowledged the payment due referred to in the petitioner’s letter of 6<sup>th</sup> August 2012.

- A. No figures are mentioned in this mail.
- Q. Mr. Syamkumar I put it to you that you are deposing falsely and contrary to the records in these proceedings and in particular your e-mail dated 7<sup>th</sup> August 2012 at Page.47 of the paper book?
- A. I disagree. "Dues" means after adjusting our losses.
- Q. Can you identify the reference to "adjusting our losses" in this e-mail dated August 7, 2012 of 16.28 hours?
- A. Not mention in the e-mail."

In his cross-examination, the witness manifestly appears to be making false statements and we find the witness wholly untrustworthy. We also find that the respondent completely failed to substantiate its plea that there were many deficiencies in the service provided by the petitioner under the agreement and as a result it suffered losses amounting to Rs.6 Crores approximately.

In course of hearing of the case however, Mr. Jayant Mehta, counsel for the respondent disregarded the pleas taken in the Reply filed by the respondent and it must be said to his credit that he did not even once refer to the deposition of the respondent's witness. Referring to the number of demand notices and reminders sent by the petitioner, Mr. Mehta submitted that the petitioner ought to have been more vigilant and terminated the agreement and discontinued the carriage of the respondent's channel on its network much earlier in order to mitigate its own losses and to save the respondent from shouldering such heavy burden of dues. We mention the plea simply because it was raised on behalf of the respondent. Needless to say, we don't find any force of substance in the submission. As noted above, the agreement was for a period of three years from

07.10.2010 to 06.10.2013 and the right to termination under the agreement was given to the petitioner alone. Having executed the agreement, the petitioner was obliged to reserve certain band/frequencies for carrying the respondent's channel for three years and it might not have been commercially helpful or even convenient for the petitioner to terminate the agreement mid-term and thereby spare the band/frequency that might not find any other customer.

An objective reading of the agreement indeed shows that its terms were loaded in favour of the petitioner, but it was a commercial arrangement to which the respondent had entered into with its eyes open and it must, therefore, be held liable to bear the consequences.

As regards, the plea raised on behalf of the respondent that its channel *Rupashi Bangla* was a free-to-air channel and its packaging by the petitioner in bouquets of paid channels adversely affected its viewership and consequently the advertisement revenue, it is found above that the respondent has failed to establish its case. Apart from that, it is noted above that the agreement, in clause 11, gave the petitioner the full right as regards retailing, distribution and packaging of the respondent's channel in any tier/package/bouquet for its subscribers on the Tata Sky DTH platform. It is thus to be seen that the plea raised by the respondent is, in any event, quite unsustainable in face of the clear terms of the agreement.

In light of the discussions made above, we find that the claim of the petitioner is fully established and none of the pleas raised by the respondent

absolve it from its liability of payment of dues in terms of the Access Agreement executed by it and as claimed by the petitioner.

We, accordingly, hold and find that the respondent is liable to pay to the petitioner the sum of Rs.4,12,29,171/- along with interest @ 10% from 12.05.2014 (the date of the filing of the petition before the Tribunal) till the date of payment. Let a decree be prepared accordingly.

In the result, the petition is allowed but with no order as to costs.

.....  
**(Aftab Alam)**  
**Chairperson**

.....  
**(Kuldip Singh)**  
**Member**

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