

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

Dated 9th September, 2015

Petition No. 139(C) of 2013

M/s. Manthan Broadband Services
Pvt. Ltd., Kolkata

....Petitioner

Vs.

INX News Private Ltd., Mumbai
& Fifth Avenue Media , Mumbai

...Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIPERSON

HON'BLE MR. KULDIP SINGH, MEMBER

HNO'BLE MR. B. B. SRIVASTAVA, MEMBER

For Petitioner

: Mr.Navin Chawla, Advocate

For Respondent

: Mr. Karthik K.R., Advocate

JUDGMENT

Kuldip Singh:

By way of the present petition, the petitioner seeks to recover placement charges amounting to Rs. 95,76,798/- along with interest at the rate of 24% per annum from the respondents for the placement of its channel namely "INX News" across the areas covered by the headend of the petitioner installed at Kolkata.

The petitioner is a Multi System Operator/ Cable Operator operating in West Bengal, Jharkhand and other states. Respondent No. 1 is a company incorporated in India and is a broadcaster in terms of The Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004.

As per the petitioner, respondent no. 2 is the distributor and agent of respondent no.1 and as such has been dealing with the petitioner on behalf of respondent no.1. As respondent no.1 was desirous of placing its channel on the network of the petitioner, it approached the petitioner through respondent no. 2 for the same. Thereafter a meeting was held on 6.5.2011 at the petitioner's office at Kolkata during the course of which it was agreed that the petitioner would place the channel "INX News" (herein after also referred as "the channel") of the respondent no.1 on UHF (Ultra High Frequency) band. As per the petitioner, after some discussion and exchange of e-mails between the parties, it was agreed that for placing the channel "INX News" of the respondent no.1 , the petitioner will be paid Rs. 1.15 crores plus taxes for the period 01.06.2011 to 31.05.2012. It was also agreed that the petitioner would be paid this amount in advance in three equal installments. The petitioner, in support of its averments, has annexed copies of the e-mails dated 06.05.2011 and 15.05.2011 as Annexure P-1 (Colly).

As per the petitioner, it placed the channel in UHF band from 21.05.2011, although the term of the agreement was to commence from 01.06.2011. It is further case of the petitioner that though it commenced placement of the channel, the respondents failed to share the agreement copy

as well as to remit payments as agreed. After exchange of some further e-mails, a draft agreement was shared with the petitioner, who after finding the same in order, signed and sent the same to respondent no.1. However, despite several requests, the respondents failed to share a signed copy of the same with the petitioner. The petitioner has annexed copies of e-mails dated 17.06.2011 , 29.06.2011 and 30.06.2011 as Annexure P-2 (Colly) and AnnexureP-3. A copy of the agreement signed by it, and the proof of service of same to respondent no. 1, is annexed as Annexure P-4.

The petitioner further submitted that though as per the agreement, the placement fee was to be paid in three equal installments, it agreed for the payment in four equal installments of Rs. 31,71,125/- (inclusive of all taxes) as requested by the respondents. It accordingly raised the first invoice on 19.07.2011 for the period 01.06.2011 to 31.08.2011 for Rs. 31,71,125/- which was paid by respondent no. 1 on 08.09.2011. Thereafter, though it continued to place the channel as per the agreement and raised invoices from time to time, the respondents failed to make the payments in spite of several reminders as well as assurances given by the respondents to the petitioner.

Respondent No. 1, however, denies any agreement with the petitioner for placement of its channel. It denies that it approached the petitioner through respondent no. 2 for the same or that the parties met together on 06.05.2011 at the petitioner's office. Respondent No. 2 did not appear before the Tribunal despite due notice and, therefore, the case proceeded ex-parte against it.

The petitioner in support of its averments, adduced evidence by way of affidavit of Mr. Gurmeet Singh Jaspal, working as director with the petitioner company. The witness reiterated the averments made by the petitioner. He also identified copies of the e-mails dated 06.05.2011 and 15.05.2011 as Exhibits PW-1/1 and PW-1/2, copy of e-mail of respondent no.2 dated 17.06.2011 as Exhibit PW-1/4, copies of e-mails dated 29.06.2011, 30.06.2011 and copy of the agreement signed by the petitioner along with proof of its delivery as Exhibits PW-1/5, PW-1/6 AND PW-1/7, respectively. Respondent No.1 in turn adduced the evidence by way of affidavit of Mr. Aman Thukral, working as company secretary in the respondent company.

We may note that though the initial e-mails exchanged were between Mr. Gurmeet Singh representing the petitioner and Mr. Gaurav Kohli of Fifth Avenue Media, respondent no.2, but on June 29, 2011, an e-mail was written by one Mr. Anuj of respondent no. 1 to Mr. Gaurav Kohli enclosing a soft copy of the distribution agreement for Manthan (The petitioner). The same was forwarded by Mr. Gaurav to Mr. Gurmeet on June 30, 2011, with a copy to Mr. Anuj. These e-mails are as under:

“Dear Gurmeetji,

Do confirm if the attached document for our arrangement is fine with you. It is the standard that we use with all MSOs.

I am proceeding with sending you the final agg subsequently.

Best regards,

Gaurav

Dear Guarav,

PFA soft copy of distribution agreement for Manthan, please take their approval.

Regards,

Anuj “

Again on November 9, 2011, Mr. Anuj sent an e-mail to Mr. Gaurav Kohli with a copy to Ms. Jaspreet Khurana of respondent no.1 asking for 2nd quarter invoice from the petitioner. The same was forwarded to the petitioner by Mr. Gaurav on the same day. These e-mails are reproduced under:

“From : Gaurav Kohli [mailto:gaurav.kohli@fifthavenuemedia.net]

Sent: 09 November 2011 14:37

To: Gurmeet Singh

Subject: Fwd: Manthan Invoice

Sir,

Kindly instruct your accounts to send us the same at our Noida office address.

Best regards,

Gaurav

-----forwarded message-----

From: Anuj Dw<anuj.dw@newsx.com>

Date: 2011/11/9

Subject: Manthan Invoice

To: Gaurav Kohli<Gaurav.kohli@fifthavenuemedia.net>

Cc: Jaspreet Khurana <Jaspreet.Khurana@newsx.com>

Dear Gaurav

As discussed, please arrange Manthan 2nd Qtrs Invoice.

Regards,

Anuj”

On February 13, 2012 Mr. Gaurav sent an e-mail to the petitioner with a copy to Mr. Praveer Gaur and Mr. Anuj of respondent no. 1 stating that payment process will take longer and the dues might be cleared in March. The e-mail is as under:

“Dear Gurmeetji,

As discussed with you the payment process will take longer than we anticipated as there are some investor level changes happening at Newsx.

It might be sometime in March that the dues might be cleared.

Looking forward to continued support from your company.

Best regards,

Gaurav “

On March 31, 2012, the petitioner sent an e-mail to Gaurav, Anuj and Praveer giving details of the invoices raised by it and stating the total dues on that date as Rs. 95,13,375/- (copy of e-mail at page 43-44 of the paper book).

The printout of the e-mail dated 09.11.2011 was identified by the petitioner’s witness as Ex PW-1/9, e-mail dated 13.02.2012 as Ex PW1/14 and e-mail dated 31.03.2012 as Ex PW-1/18.

During cross examination, the respondent’s witness admitted that Mr. Anuj, Mr. Praveer and Ms. Jaspreet are all employees of respondent no.1. The relevant part of the examination is as under:

“Q 6. Are you aware of any person by the name of Ms. Jaspreet Khurana?

A. Yes.

Q 7. How?

A. She is an employee of the respondent no. 1 company.

Q 8. Are you aware of any person by the name of Mr. Anuj ?

A. Yes

Q 9. How?

A. He was an employee of the respondent no. 1 company.

Q10. Since when was he an employee of Respondent No. 1 Company and till when?

Ans: He was an employee of the Company prior to its takeover on 15.07.2012 and he remained an employee till around November-December, 2012. I am not very sure about the date.”

Q11. Are you aware of any person by the name of Mr. Praveer Gaur?

A: Yes. He was an employee of the Company prior to its takeover. As on 15.07.2012 he was not an employee of the Respondent No. 1 Company.”

We may also note that averment of the petitioner that respondent no.2 is an agent of respondent no. 1 is not denied in its reply by respondent no.1. The pleadings of the petitioner and reply of respondent no.1 in this regard as under:

Petition

“3. That the respondent no. 1 is a company incorporated under the laws of India and is engaged in the business of collection / aggregation, production, programming and dissemination of English News through various platforms. It is a broadcaster

within the meaning of section 2 (e) of The Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (as amended from time to time). Respondent no. 2 is the distributor and agent of Respondent No. 1 and as such has been dealing with the petitioner by and on behalf of respondent no. 1.”

Reply

“3. The contents of paragraph no. 3 need no reply. “

We may further note from the pleadings that though the respondent no.1 denies that petitioner raised any invoice on it, the fact that a payment amounting to Rs. 31,07,702/- was made by it to the petitioner is not denied. The pleadings of the petitioner and the reply of respondent no.1 in this regard are as under:

Para 10 of petition

“10.That thereafter the petitioner in accordance with the terms of the agreement raised its first invoice on 19.07.2011, for the period 01-06-2011 to 31-08-2011 amounting to Rs. 31,71,125/-. The respondent after many requests by the petitioner, made payment vide cheque bearing number 907203 dated 08.09.11 amounting to Rs. 31,07,702 after making necessary deductions. A copy of the invoice alongwith proof of service is annexed hereto. “

Reply

10. The contents of paragraph no. 10 are incorrect and to that extent denied. It is denied that there were any terms of agreement. It is denied that the petitioner raised its first invoice on 19.7.2011 for the period 01.06.2011 to 31.08.2011 amounting to Rs. 31,71,125/-.

No explanation for this payment, made by respondent no.1 to the petitioner, is given. When the respondent’s witness was asked about the same, he replied that he did not know about it. When the witness was asked about

the TDS deducted for the payments to the petitioner, he again stated that he did not know. The relevant questions and answers are reproduced as under:

“Q 16. Why was cheque bearing No. 907203 dated 08.09.2011 issued by respondent no. 1 company in favour of the petitioner?”

A. I do not know.

Q 17. I put it to you that respondent no. 1 company also deposited two payments of Rs. 63,423/- each on 23.11.2011 and 18.08.2011 as TDS for payments made to the petitioner. Is it correct ?

A. I do not know?”

When we asked Mr. Karthik, Ld. Counsel for respondent no.1, whether the respondent had any other business relationship with the petitioner, he denied the same but was unable to explain why such a large sum was paid to the petitioner.

As per section 8 of The Indian Contract Act, 1872, “performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.” The payment made by respondent no.1 to the petitioner was clearly for the first quarterly installment and, therefore, respondent no.1 having acted upon the proposal, cannot now deny the agreement with the petitioner.

There are a number of decisions, both in English Law and by the Hon’ble Supreme Court, where the contracts have been found to have arisen by conduct and when the parties have acted on the terms of an agreement

even when no formal agreement was executed.

In *Brogden Vs. Metropolitan Rly Co.*¹, Mr Brogden, the chief of a partnership of three, had supplied the Metropolitan Railway Company with coal for a number of years. Brogden then suggested that a formal contract should be entered into between them for longer term coal supply. Each side's agents met together and negotiated. Metropolitan's agents drew up some terms of agreement and sent them to Brogden who wrote in some parts which had been left blank and inserted an arbitrator who would decide upon differences which might arise. He wrote "approved" at the end and sent back the agreement documents. Metropolitan's agent filed the documents and did nothing more. For a while, both acted according to the agreement document's terms. But then some more serious disagreements arose, and Brogden argued that there had been no formal contract actually established. The House of Lords (The Lord Chancellor, Lord Cairns, Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon) held that a contract had arisen by conduct and Brogden had been in clear breach, so he must be liable.

In the case of *Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Co. Ltd.*², the Hon'ble Apex Court has held, ".....under certain circumstances, the offeree's silence, coupled with his conduct, which takes the form of positive act, may constitute as acceptance- an agreement *sub silentio*. Therefore, the terms of a contract between the parties can be proved

¹ [1893] 1 QB 256

² (2008) 1 SCC 503

not only by their words but also by their conduct.”

Again in Trimex International FZE Ltd. Vs. Vedanta Aluminium Ltd., India³, the Apex Court held as under:

“ Once the contract is concluded orally or in writing, the mere fact that a formal contract has to prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed.”

Yet again in Visa International Ltd. Vs. Continental Resources (USA) Ltd. ⁴, while examining the issue of whether there existed a valid arbitration agreement between the parties, the Hon’ble Supreme Court held that what is required to be gathered is the intention of the parties from their conduct as well as the correspondence exchanged between them.

A similar view was taken by the Apex Court in Shakti Bhog foods Ltd. Vs. Kola Shipping Ltd. ⁵ The appellant in that case was a company dealing in the business of manufacturing and exporting food products and cereals/grains, etc. It wanted to export certain cargo to the State of Niger for which it addressed e-mail to the respondent promising it to load a stated amount of cargo at Kakinada port for transportation to Cotonou. However, it subsequently informed the respondent that it could not get the order from the

³ (2010) 3 SCC 1

⁴ (2009) 2 SCC 55

⁵ (2009) 2 SCC 134

State of Niger. As per the respondent there was a charter party agreement as per which the appellant had to load maize to Colombo in case it failed to get order from Niger. This was, however, denied by the appellant. After exchange of e-mails and various proceeding, the respondent moved an application under Section 45 of the Arbitration and Conciliation Act, 1996 which was allowed by the Additional District Judge. The appeal against the same was dismissed by the High Court who found the existence of a charter party agreement. The appellant then went in appeal before the Apex Court. While dismissing the appeal, the Hon'ble court held that there existed a charter party which can be identified from the correspondence between the parties. The Court further noted that the appellant had agreed to pay compensation to the tune of \$90000 to the respondent on its own initiative. The Hon'ble Court noted that if as per the explanations provided by the appellant, it had not committed any breach then why it agreed to pay a huge sum as compensation for no fault on its part, if there was no charter party agreement to that effect between the parties.

Considering the facts of the case, rival submissions and evidence on record as well as the law in this regard, we are convinced that respondent no. 2 was acting on behalf of respondent no.1 and there was an agreement between the parties for placement of the channel of respondent no. 1 on the network of the petitioner. Respondent no. 1 was to pay a sum of Rs. 1.15 crores for the placement of the channel for the period 01.06.2011 to 31.05.2012. Though the channel was placed as per the agreement, respondent no.1 made a payment of Rs. 31,07,702/- only and has not made

any further payment to the petitioner.

In view of the foregoing, the petition is allowed. Respondent no.1 is directed to pay the outstanding dues of Rs. 95,76,798/- to the petitioner after deducting TDS, if any deposited by it with the income tax authorities, for which it will provide the TDS certificates. The amount shall be paid within 6 weeks from the date of this order. The sum so payable shall also carry interest at the rate of 8% from May 17, 2013, the date of filing of this petition and till the same is paid to the petitioner.

Cost of litigation is assessed as Rs. 25,000/-.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

.....
(B.B. Srivastava)
Member