

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 15th December 2022

Broadcasting Petition No. 39 of 2016

Digi Cablecomm Services India Pvt. Ltd. ...Petitioner

Vs.

Arijit Mukherjee (Sole proprietor of Babu Cable Network) ...Respondent

Broadcasting Petition No. 40 of 2016

Digi Cablecomm Services India Pvt. Ltd. ...Petitioner

Vs.

Putul Mukherjee (Sole proprietor of Putul Cable Network) ...Respondent

Broadcasting Petition No. 41 of 2016

Digi Cablecomm Services India Pvt. Ltd. ...Petitioner

Vs.

Subhajit Mukherjee (Sole proprietor of Suvo Cable Network) ...Respondent

Broadcasting Petition No. 42 of 2016

Digi Cablecomm Services India Pvt. Ltd. ...Petitioner

Vs.

Ashis Samanta (Sole proprietor of Ashis Cable Network) ...Respondent

Broadcasting Petition No. 43 of 2016

Digi Cablecomm Services India Pvt. Ltd. ...Petitioner

Vs.

Barun Naskar (Sole proprietor of Barun Cable Network) ...Respondent

Broadcasting Petition No. 44 of 2016

Digi Cablecomm Services India Pvt. Ltd. ...Petitioner

Vs.

Prasenjit Mukherjee (Sole proprietor of Mukherjee Cable N/w)...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Diggaj Pathak, Ms. Shweta Sharma
Ms. Prachi Kohli, Advocates

For Respondent : Mr. Sharath Sampath, Mr. Pranav Pachory,
Advocates

JUDGMENT

Broadcasting Petition No. 39 of 2016

1. This broadcasting petition, under Section 14 read with Section 14A of the Telecom Regulatory Authority of India Act, 1997, as amended to date (hereinafter referred to as "TRAI Act") on behalf of the above Petitioner company – Digi Cablecomm Services Pvt. Ltd., against the Respondent viz Mr. Arijit Mukherjee, Sole Proprietor of M/s Babu Cable Network has been filed with a prayer to direct the Respondent to pay to the Petitioner a sum of Rs. 3,98,558/- towards the outstanding subscription fees with a further direction to the Respondent to forthwith return the 661 Set Top Boxes (STBs) along with Viewing

cards and Remote Control Units and other accessories to the Petitioner and permit the Petitioner to inspect the same for damages and tampering, or in the alternative to pay a sum of Rs.11,23,700/-, being the cost of STB's and the accessories, plus Rs. 40,000/- , being the cost of the 2 Transmitters. Respondent be further directed to pay to the Petitioner a sum of Rs. 16,52,500/- in terms of Clause 3 of the Deed of Undertaking dated 20.11.2014, executed in between, and interest on the above outstanding amount at the rate of eighteen percent per annum (18% p.a.), or at such rate as this Tribunal may deem fit from the date the such payments were due, upto the date on which payment is made future interest be also awarded. Costs of the Petition be also awarded. Any other relief which this Tribunal may deem fit may also be awarded.

2. In brief, contention of the petitioner is that petitioner is a company registered under the provisions of the Indian Companies Act, 1956 and is a Multi System Operator ("MSO") having its presence in and around the city of Kolkata, its peripheries and also to various other districts in the State of West Bengal. The Petitioner operates in many major cities of West Bengal. It had multiple placement agreements/definitive legal Memorandum of Understandings with various Broadcasters/Distributors for retransmitting their respective TV channel signals to the Local Cable Operators(LCOs)/ Affiliate Sub Operators/ MCR's/

LCO's affiliated to the Petitioner and/or subscribers forming part the Petitioner's network.

3. The Respondent, is a cable operator duly registered under the Cable Television Network Regulation Act, 1995 and the rules framed thereunder, having its business in the various areas at Howrah. The said Cable Operator is in the business of providing signals to its individual subscribers. The Respondent approached the petitioner to avail signals / services of the Petitioner and the facilities, if so extended, for the purpose of providing connection through its cable network system to its subscribers. Pursuant thereto, the Petitioner and the Respondent entered into an Interconnection Agreement dated 20.11.2014 authorizing the Respondent to receive the signals from the Petitioner and to further retransmit the same to its subscribers in the DAS area of Howrah. The said agreement contained the terms and conditions upon which the Petitioner had agreed to provide the services to the Respondent and it was for the period of Five years. The rate at which the Respondent was to pay subscription fee and STB Installation charges to the Petitioner was recorded in writing, a day earlier to the signing of the subscription Agreement, that is on 19.11.2014. English Translation of the agreement dated 19.11.2014 is ANNEXURE P-1 and Interconnection Agreement dated 20.11.2014 is ANNEXURE P – 2 of petition.

4. Upon the request of Respondent to the petitioner for Set Top Boxes (STB's) for the purpose of deploying the same at its subscribers' premises for availing the signals of the Petitioner, a Deed of Undertaking was signed and executed between the parties on the same day i.e. on 20.11.2014. It was done, keeping in mind the high capital cost of the STB's provided by the Petitioner. As per the said Deed of Undertaking, the Respondent had promised to inter-alia:

- i. Deploy and install the STB's at the subscriber's premises and deposit subscriber applications forms and Package authorization forms with the Petitioner;
- ii. Collect STB rental and Subscription from the subscribers and pay the same to the Petitioner upon receipt of invoices;
- iii. Not to remove, shift or replace the STB's from the subscriber's location without the written consent from the Petitioner;
- iv. To be associated with the Petitioner for the next 5 years and in case of failure to do so compensate the Petitioner at the rate of Rs. 2500 per STB;
- v. To unconditionally return all the STB's back to the Petitioner in the event of migration before the expiry of 5 years which STB's would be checked for tampering etc. by the Petitioner;

The said Deed of Undertaking dated 20.11.2014 is ANNEXURE P – 3 of petition.

5. As per agreement, the Petitioner supplied a total of 661 Set Top Boxes along with Adaptors, Cables, Nodes etc. to the Respondent through Delivery Challans cum Gate pass, which are ANNEXURE P – 4 (COLLY). Installation charges/Security Deposit from the Respondent @ Rs. 200 per STB for 647 STBs and Rs. 300 per STB for 10 STBs was also realised by the petitioner.

6. Based on the understanding in between, invoices were raised by the petitioner from time to time upon the Respondent for the Subscription Fees, furnishing details of statement of accounts. These invoices were duly received and acknowledged by the Respondent. Copies of Invoices raised and sent by the Petitioner to the Respondent for the period January 2015 to December 2015 are ANNEXURE P – 5 (COLLY) of petition. Though the Respondent made partial payments till November 2015, thereafter, stopped making payments.

7. During continuation of providing signals to the Respondent, it came to the knowledge of the Petitioner that the Respondent has stopped retransmitting the signals and is retransmitting the signals of some other MSO, who was a competitor MSO of the Petitioner. In order to set up its business, the competitor

MSO had lured the Respondent to illegally migrate from the Petitioner's network and to take connectivity from that MSO without giving any notice of dis-association, as required under Regulations 6(4) and 6(5) of the DAS Regulations, nor clearing the subscription dues outstanding till date, migration was made by the respondent. Hence, this migration of Respondent from the network of the Petitioner is manifestly illegal arising a huge business and opportunity loss to the Petitioner.

8. A letter, dated 1.1.2016, was issued by the petitioner to the Respondent, demanding the payment of outstanding subscription dues, amounting to Rs. 3,98,958/-, along with 18% interest, till the date of payment and in addition to return 657 STB's valued at Rs.18,42,500/- being the cost of STB's immediately along with Viewing cards, Remote Control Units and other accessories. This Letter was ANNEXURE P – 6 of petition. Neither outstanding subscription fees was paid, nor STBs with accessories were returned. Time and again requests were made for making the payment and reconciliation of accounts with return of STBs with accessories and despite vigorous follow-up, various meetings, deliberations, no heed was there.

9. Activated STBs including the cost of the adaptor, transmitter, remote control and viewing card costs anywhere between Rs. 1600 to Rs. 1800 to the Petitioner MSO. The break up is as follows:

EQUIPMENT	PRICE PAID BY PETITIONER
Cost of STB	Rs.1300 to Rs. 1500 + 30% duty
Cost of Viewing Card	Rs.250
Cost of Adaptor	Rs.135
Cost of Remote	Rs.120
TOTAL	Rs.1700 approximately

Copies of some of the invoices evidencing the price per Set Top Box and adaptors are ANNEXURE P – 7. Apart from the above, the Respondent has been supplied with two number of Transmitters costing Rs. 40,000/-, which was also to be returned by the respondent. Hence, Respondent was liable to return the 661 STBs immediately along with Viewing cards, Remote Control Units and other accessories belonging to the Petitioner or in the alternative pay a sum of Rs.11,23,700/- plus Rs. 40,000/- being the cost of the two Transmitters. As per clause 3 of the terms of Deed dated 20.11.2014, the Respondent was further liable to pay the compensation of a sum of Rs. 16,52,500/- calculated at the rate of Rs.2500/- per STB as compensation for causing business and opportunity loss

and migrating from it before the assured term of five years. An interest of 18% p.a. from the date of outstanding amount till the date of actual payment, on the above payment, is also due. The outstanding subscription amount was Rs. 3,98,958/-. Hence, the cause of action had arisen for filing of this petition before this Tribunal, having its jurisdiction for entertaining the same. The Respondent had enjoyed the services of the Petitioner, but shying away from its principal obligation of paying for those services.

Hence, this petition, with above prayers.

10. Respondent, in its reply, preliminarily objected that petitioner had come before this Tribunal with unclean hands by withholding vital facts. There is no outstanding in favour of petitioner as against answering respondent. Petitioner had provided 657 STBs, which have been duly returned to the petitioner by the respondent. 371 boxes were returned on 12.4.2016 and 13.4.2016, as was recorded in the report of learned Advocate Commissioner and 286 boxes were directly returned to the petitioner on 2.6.2016. Respondent, alongwith respondent in other connected petitions, are members of family and a joint exercise for return of STBs to the learned Advocate Commissioner, were ordered by this Tribunal. A total consolidated STBs provided for all those respondents herein was 3071 against a consolidated count of the respondent being 2668. The

factum of return of all the STBs is evidence from the bare perusal of order dated 26.7.2016, on which date it was submitted by learned counsel for the petitioner that they are yet to receive 283 STBs out of 3071 boxes claimed by it, which as per respondent, were never issued to respondent.

11. A refundable security deposit for STBs, issued by the petitioner, was paid by the respondent in the tune of Rs. 1,32,400/-, for which respondent is entitled to refund from the petitioner.

12. The Understanding dated 19.11.2014, entered in between, followed by interconnection agreement dated 20.11.2014, is the basis of this petition. Whereas understanding, dated 19.11.2014, was undisputedly valid and effective till 31.3.2015, which has been evidence from the documents itself. This agreement dated 19.11.2014 was superseded by interconnection agreement dated 20.11.2014, in which the terms were mutually agreed with regard to rate to be arrived in between the parties subsequently. The parties had agreed that the petitioner would be providing signals @ Rs. 75/- per subscriber per month from April 2015 onwards, which was that rate being charged by other MSO in the area of operation of petitioner. Whereas petitioner, under threat of disconnection, demanded arbitrary sums of money from the respondent, which

were paid under duress by the respondent. Respondent, in fact, over-paid the petitioner. But to harass the respondent, this petition has been filed.

13. Petitioner never issued any receipt to the respondent for the payments made by respondent. Some of which were made in cash by the respondent. Whereas statement of accounts, filed by the petitioner, does not take into account all the payments made by the respondent. Without complying with the Interconnection Regulations, Petitioner disconnected its signals to the network of respondent in December 2015. This illegal disconnection caused severe hardship to the respondent with major losses to the business of the respondent. When asked for, excuse of technical problem etc. was taken. Whereas there was a switch off of the signals by the broadcaster to the network of petitioner, to be attributable to the petitioner himself. Thus, respondent having no alternative, shifted to other MSO for protecting its business. The alleged invoices are false, fabricated documents reflecting arbitrary sums of money. Whereas they have never been issued nor were received by the respondent.

14. The statement of account placed on record by the petitioner is entirely concocted and false and formulated with sole intention of harassing the respondent. The respondent has no outstanding towards petitioner till date of

disconnection of the signals to the network of respondent by the petitioner. As against this fact, the very contention of petitioner was against the facts in between. Hence, the para-wise reply is all negative to the contention of petitioner.

15. Replication was there with the same reiteration of contention of petition and denial of contentions of the reply.

16. The Court of Registrar has framed the following issues vide order dated 22.2.2017 :

- 1) Whether the petitioner is entitled to recovery of alleged dues along with interest, if any, towards subscription fees? If so, what is the amount that the petitioner is entitled to receive?
- 2) Whether there was any violation of the provisions of Deed of Undertaking dated 20.11.2014 by the respondents, if so, whether the petitioner is entitled to any amount for such violation from the respondent?
- 3) Whether the petitioner has supplied the number STBs as claimed in the Petition No.39, 40, 41, 42, 44 of 2016. If so, whether any boxes are still to be returned by the respondent to the petitioner?
- 4) Whether the petitioner has supplied any transmitters to the Respondent in Petition No.39, 40, 41, 42, 44 of 2016. If so, whether any boxes are still to be returned by the respondent to the petitioner?
- 5) Whether the understanding dated 19.11.2014 was superseded by the Subscription Agreement dated 20.11.2014 w.e.f. April, 2015?

- 6) Whether the respondent is entitled to refund of Security Deposit?
- 7) Whether the respondent migrated from the Petitioner's network without issuing a disconnection notice as mandated by the TRAI Interconnect Regulations, 2012? If so to what effect?

17. Though the Tribunal had previously framed issues on 26.7.2016 with this order that :

“Pursuant to order dated 23.3.2016 and 22.4.2016, it is submitted by Ms. Shweta Sharma, learned counsel for the petitioner that still 283 STBs have not been returned alongwith 10 transmitters. Mr. Sharath Sampath, learned counsel for the respondent submits that according to his instructions, all STBs in terms of order dated 23.3.2016, have been returned.

The two issues need to be adjudicated in this Petition are:

- (a) The claim of subscription fees by the petitioner.
- (b) The security deposit charged by the petitioner from the respondent as well as compensation @ Rs. 2500/- per STB in the event of migration to another MSO before the expiry of deed of understanding.....”

18. These are two issues which were to be decided in this petition and are really matter of lis. Whereas Court of Registrar has framed those seven issues. Besides documentary evidence, annexed with the petition and affidavit filed, in

support of same, evidence by way of affidavit, in examination-in-chief, for and on behalf of petitioner, as of PW-1 Koushik Mitra and affidavit of Mr. Arijit Mukherjee for and on behalf of respondent, were filed. Whereas in cross-examination PW-1 Mr. Koushik Mitra was put under cross examination and was examined by counsel for respondent at length. Whereas the witness of respondent could not be produced for cross-examination, rather, said to be not be produced by cross-examination. Hence, in oral testimony there is only examination-in- Chief by way of affidavit, without its cross-examination for and on behalf of respondent.

19. Heard learned counsel for both sides at length and gone through the written submissions filed by both sides. The submissions made by respondent is of legal principles, that is to be firstly taken.

20. The first and foremost argument was with regard to non-maintainability of this petition based on oral agreement with regard to fixing of subscription charges, to be agreed in between, as per terms of agreement dated 20.11.2014. Agreements dated 19.11.2014 and 20.11.2014 are undisputed agreements, entered in between. Rate at which respondent were to pay subscription fees for the period from January 2015 to March 2015 was mentioned in clause 2 of the

agreement / understanding dated 19.11.2014. Admittedly, this agreement dated 19.11.2014 was superseded in view of clause 21 of the agreement dated 20.11.2014. The sole witness for and on behalf of petitioner i.e. Mr. Koushik Mitra has already stated in his cross examination that agreement dated 19.11.2014 qua rate of subscription charges was valid and subsisting only till March 2015 and for the period April 2015 onwards there was only a verbal understanding as to rate of subscription charges as per clause 1(B) of Annexure II of Interconnection Agreement dated 20.11.2014. Clause I (B) of Annexure-II of the Interconnection Agreement deals with agreement qua Subscription Charges and not with 'consideration payable to the affiliate'. Whereas Clause B (f) of Annexure-I of the Interconnection Agreement provides that headings and titles are for ease of reference only and does not affect the interpretation of the agreement dated 20.11.2014. Thus, monthly subscription amount payable by the Respondent to the Petitioner for the period from April, 2015 onwards was to be mutually decided as per Annexure-II of the Interconnection Agreement dated 20.11.2014. Hence, as per testimony of PW-1, Mr. Koushik Mitra, petitioner had opted for clause 1(B), which provides for mutual understanding to be arrived at, between the parties, qua subscription charges, in answer to its question No. 7 in cross-examination. Clause 20 of the said Agreement contemplates that any understanding/variation including Annexures shall be

mutually agreed and be executed in writing between the parties. Admittedly, in the present case, the rate of subscription charges was never agreed to between the parties in writing, which is in violation of Clause (B) of the Agreement as well as the Telecommunication (Broadcasting and cable services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (i.e. "Interconnection Regulations, 2012").

21. As per law laid down by Tribunal as well as Apex Court in UCN Cable Network India Pvt. Ltd. v. Raj Cable Network & Anr., 2016 SCC OnLine TDSAT 125, in Paras 36 to 45, this Hon'ble Tribunal has held that Clauses 5 (17) to 5 (20) of the Interconnection Regulations, 2012 prohibits any supply of TV signals for redistribution, in the absence of an interconnection agreement in writing. This Hon'ble Tribunal further held that supply of TV signals on an oral arrangement is contrary to the scheme of the regulatory framework and 'is antithetical to both orderly growth of the sector and non-discrimination in interconnect arrangements with different distributors.'

Hence, this petition is not maintainable on this legal score itself.

22. In the present case, although a standard form of agreement was executed between the parties on 20.11.2014 for a period of 5 years, however, the parties

had consciously decided to mutually negotiate and decided to execute a separate written agreement/understanding qua the subscription amount, payable by the Respondent to the Petitioner for the period April 2015 onwards. Hence, this verbal arrangement de hors a written agreement, which is squarely hit by the bar in Clause 5 (17) of the Interconnection Regulations, 2012.

23. From the very perusal of judgment of this Tribunal, in UCN Cable Network (supra) 2016 SCC Online TDSAT 125, it is apparent that:

“35. We may at this stage advert back to the statutory position. Interconnection Regulations, 2004 were issued by the Telecom Regulatory Authority of India (TRAI) vide notification issued on 10th December 2004 in order to cover arrangements for interconnection and revenue sharing among service providers in the broadcasting sector. On 17th March 2009 a notification was issued incorporating clause 4A in the body of the Regulations. Clause 4A lays down as under:

“4A. Interconnection Agreements to be in writing.

4A.1 It shall be mandatory for the broadcasters of pay channels and distributors of TV channels to reduce the terms and conditions of all their interconnection agreements to writing.

4A.2 No broadcaster of pay channels or distributor of TV channels, such as multi system operator or head end in the sky operator, shall make

available signals of TV channels to any distributor of TV channels without entering into a written interconnection agreement.

4A.3 Nothing contained in regulations 4A.1 or 4A.2 shall apply to any supply of signals or continuance of supply of signals of TV channels by a broadcaster or distributor of TV channels, such as multi system operator or headend in the sky operator, in pursuance of or in compliance with any order or direction or judgment of any court or tribunal, including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or Tribunal.

4A.4 It shall be the responsibility of every broadcaster of pay channels who enters into an interconnection agreement with a distributor of TV channels to hand over a copy of signed interconnection agreement to such distributor of TV channels and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement and, similarly, it shall be the responsibility of every multi system operator or headend in the sky operator, as the case may be, who enters into an interconnection agreement with a cable operator to hand over a copy of signed interconnection agreement to such cable operator and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement.”(emphasis added)

36. Provisions identical to the above are to be found in the Das Interconnection Regulations in causes 5 (17) to 5 (20) which are as under:

5. General Provisions relating to interconnection agreements —

(17) It shall be mandatory for the multi system operator to reduce the terms and conditions of the interconnection agreements into writing.

- (18) *No multi system operator, shall make available signals of TV channels to any linked local cable operator without entering into a written interconnection agreement.*
- (19) *Nothing contained in regulations (17) or (18) shall apply to any supply of signals or continuance of supply of signals of TV channels by a multi system operator in pursuance of or in compliance with any order or direction or judgment of any court or tribunal, including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or tribunal.*
- (20) *It shall be the responsibility of every multi system operator to hand over a copy of signed interconnection agreement who enters into an interconnection agreement with a linked local cable operator/s to hand over a copy of signed interconnection agreement to such cable operator and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement.*
(emphasis added)

37. As may be seen, these provisions, phrased in the negative plainly forbid any supply of TV signals for redistribution in the absence of an interconnect agreement in writing. Apart for the rigor of these provisions, it is also important not to look at these provisions in isolation but as a part of the overall regulatory framework.

38. The preamble to the TRAI Act reads as under:

“An Act to provide for the establishment of the Telecom Regulatory Authority of India and the [Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector] and for matters connected therewith or incidental thereto.” (emphasis added)

39. It is further to be noted that the scheme of interconnections for distribution of TV signals as set out under clause 3.2 of both the Interconnect Regulations, 2004 and the DAS Interconnect Regulations, 2012 rests on the principle of “must provide on a non-discriminatory” basis.

40. Further, clause 9 of the DAS Regulations, 2012 casts the obligation of reporting to TRAI all Interconnect agreements. Clause 9 provides as under:

“9. Reporting Requirements. - (1) Every multi system operator shall submit to the Authority information, in the proforma specified in Schedule-III to these regulations, all interconnect agreements entered into by it with the broadcaster and local cable operator and subsequent modifications made therein.

(2) Every existing multi system operator shall submit to the Authority by 31st July, 2012, all interconnect agreements entered into by it and amendments made therein prior to the date of notification of these regulations.

(3) Every multi system operator commencing its services after the

notifications of these regulations shall submit to Authority its interconnection agreement within in thirty days of entering into the agreement or 31st July, 2012 whichever is later.

(4) Every broadcaster shall furnish the details of carriage fee paid by him to the multi system operator along with the information furnished by him under the Register of Interconnect Agreements (Broadcasting and Cable Services) Regulation 2004 (15 of 2004), as amended from time to time. Such information henceforth shall also include details of carriage fee paid to the multi system operator by the broadcaster.”

41. The supply of TV signals on an oral arrangement, therefore, does not only flout the statutory injunction but viewed in the larger perspective such an arrangement cuts at the very roots of the statutory scheme of interconnections. Any oral arrangement for supply of TV signals without an agreement in writing is antithetical to both orderly growth of the sector and non-discrimination in interconnect arrangements with different distributors.

42. Here it would be relevant to note that clause 5(16) of the DAS Interconnect Regulations 2012 (corresponding to clause 8 of the Interconnect Regulations 2004) allowed, after expiry of an agreement, three months' time to the parties to negotiate the terms of the fresh agreement (which on being executed would relate back to the date of expiry of the previous agreement). The provision was widely misused, especially under DAS transmission, and supply of TV signals would be continued, in many cases for long periods of over a year after the existing agreement came to end. The Regulator clearly viewed it as an abuse of the regulation and by notification issued on 07.01.2016 amended

clause 5(16) of the DAS Regulations 2012 with effect from 01.04.2016. In terms of the amended regulation, no supply of signals can be made for a single day unless a fresh agreement is executed to replace the previous agreement on its expiry. The change brought about in the Regulations clearly shows the importance attached by TRAI to an agreement for interconnection in writing

43. In our view, in a case for recovery of dues for supply of TV signals the Tribunal, unlike a court established under the Code of Civil Procedure, cannot view the matter as purely a private dispute concerning the rights of two individuals. This Tribunal set up under the TRAI Act is duty bound to also examine whether or not the relationship between the parties from which the claim arises was lawful and in case the relationship was not lawful, its likely impact and consequences on the broadcasting sector as a whole.

44. Cases coming to the Tribunal show a clear pattern. When a major MSO wishes to enter a market, it poaches upon the LCOs, affiliated with other MSOs operating in the area from before by offering them much lower rates. As the LCOs shift to the new entrant in large numbers, conflicts arise between the LCOs and the MSO from which they earlier received signals. The new entrant gives its own STBs to the LCOs shifting to it for having the boxes seeded at the subscribers' places. After LCOs in substantial numbers come under it and a large number of its boxes are seeded, the new entrant starts increasing its rates and then there is another round of conflict between the new entrant and its poached LCOs. All the arrangement is oral and without any interconnect agreement. Hence, when the matter comes to the Tribunal, it is the word of one side

against the word of the other side. In the past months, a large number of such cases have come to the Tribunal. It is obvious that such practices based on oral arrangements, besides being in violation of the regulation, vitiate the market and disrupt the orderly growth of the sector.”

Meaning thereby, all the arrangements being oral or without any interconnect agreement, the petition is not maintainable.

24. Whereas in present case, admittedly there was a written memorandum of understanding dated 19.11.2014 validly effective till March 2015 and had been superseded with interconnect agreement dated 20.11.2014. Hence, a written interconnect agreement, as per schedule is very well there. Mere saying that subscription amount to be charged, was to be mutually agreed, may not change this interconnect agreement, to be an oral agreement. The subscription charges which was to be charged or varied, subsequently, on the basis of mutual agreement or on the basis of levy, being charged by broadcaster or business competitor, existing there at, was a contingent condition, which may occur in future and for that, it was to be mutually agreed and then after, reduced in writing. Whereas upto March 2015, charges were very well there, undisputedly, under the agreement, and then after, it continued in same continuation. The testimony in cross-examination has stated that invoices were raised and it were

partially paid. These invoices were never challenged. More so, in reply it has been admitted and payment was made by respondent but it was under threat of disconnection, hence, it may never be said that it was an oral agreement i.e. it was not an interconnect agreement, fulfilling the statutory requirements, mentioned above. Hence, this very argument by counsel for respondent with regard to maintainability is of no force. Rather there is a written interconnect agreement with details of provisions, wherein supply of STBs and accessories were made. Business were running till December 2015, when it was said to be shifted to another MSO by the respondent.

25. **Burden of proof:**

Hon'ble Apex Court in Anil Rishi Vs. Gurbaksh Singh – AIR 2006 SC 1971 has propounded that onus to prove a fact is on the person who asserts it. Under Section 102 of The Indian Evidence Act, initial onus is always on the plaintiff to prove his case and if he discharges, the onus shifts to defendant. It has further been propounded in Premlata Vs. Arhant Kumar Jain- AIR 1976 SC 626 that where both parties have already produced whatever evidence they had, the question of burden of proof ceases to have any importance. But while appreciating the question of burden of proof and misplacing the burden of proof on a particular party and recording of findings in a particular way will definitely vitiate the judgment. The old principle propounded by Privy Council in Lakshman

Vs. Venkateswarloo – AIR 1949 PC 278 still holds good that burden of proof on the pleadings never shifts, it always remains constant. Factually proving of a case in his favour is cost upon plaintiff when he fulfils, onus shifts over defendants to adduce rebutting evidence to meet the case made out by plaintiff. Onus may again shift to plaintiff. Hon'ble Apex Court in State of J& K Vs Hindustan Forest Co. (2006) 12 SCC 198 has propounded that the plaintiff cannot obviously take advantage of the weakness of defendant. The plaintiff must stand upon evidence adduced by him. Though unlike a criminal case, in civil cases there is no mandate for proving fact beyond reasonable doubt, but even preponderance of probabilities may serve as a good basis of decision, as was propounded in M Krishnan Vs Vijay Singh- 2001 CrLJ 4705. Hon'ble Apex Court in Raghvamma Vs. A Cherry Chamma – AIR 1964 SC 136 has propounded that burden and onus of proof are two different things. Burden of proof lies upon a person who has to prove the facts and it never shifts. Onus of proof shifts. Such shifting of onus is a continuous process in evaluation of evidence.

26. **Issue No. 7**

Undisputedly, respondent shifted to another MSO in December 2015. In para (G) of the Written Submissions, it has been written that on the respondent questioning the petitioner on the disconnection, the petitioner started making excuses of technical problems etc. and it was thereafter discovered that the services had been switched off by the broadcasters to the network of the petitioner due to various reasons solely attributable to the petitioner herein. Thus, it is most respectfully submitted that respondent, having no alternative and in an attempt to save its business, started taking signals from another MSO. Hence, migration to another MSO is of no dispute. Neither it has ever been written in reply nor given any evidence that notice of disassociation, required under the interconnection Regulations 2012, was ever issued by this respondent before migration to some other MSO. Whereas petition and affidavit filed in support of it, is with the specific contention that migration to any other MSO had taken place and it was very well there in oral testimony of PW, too. Hence, there is no contention by the respondent on this fact that any notice of disconnection was issued before migrating to any other MSO. This was also undisputed fact that interconnection agreement dated 20.11.2014 was for a validity of five years with a specific condition that in case of migration to any other MSO, without observing the notice under interconnection Regulations, a

compensation is to be paid by the respondent. Hence, no such notice was ever complied with.

Hence, this issue no. 7 is being decided in favour of the petitioner.

27. **Issue no. 5**

The execution of understanding dated 19.11.2014 valid and effective till March 2015 is an undisputed fact. It has never been disputed in written submission that this understanding dated 19.11.2014 was superseded by interconnection agreement dated 20.11.2014. Then after reducing the terms in writing is also undisputed in written submission. Hence, facts pleaded, undisputed in written submission, do not make any issue for adjudication. Once this superseding of agreement dated 19.11.2014 by interconnection agreement dated 20.11.2014 is not being disputed, in reply by the respondent, no such issue arises. More so, the oral testimony of PW of petitioner as well as contention and pleadings are of this fact that the agreement dated 20.11.2014 had superseded the understanding dated 19.11.2014.

Hence, this issue is being decided in favour of the petitioner.

28. **Issue no. 6**

Annexure P-2 of the interconnection agreement between MSO affiliates and cable affiliates filed at page no. 17 of the paper book is an undisputed deed

itself with signatures of both sides and with terms and conditions written in it. With regard to para 8, security deposit, the line written are “The affiliate shall deposit with the MSO a sum of Rs. NIL (Rupees NIL only) interest free refundable security deposit. This security deposit will cover the cost of the STBs provided to him. At the time of expiration or termination of this Agreement, Affiliate shall be entitled to refund amount of the security deposit, subject to the adjustment of arrears of bills, and any other payments due from the Affiliate to the MSO. This shall be settled within 30 days of the expiry/termination of the agreement.”

Once the NIL security deposit was to be deposited, then, how and with what condition this refundable security deposit have been deposited? Nor any documentary evidence with regard to this refundable security deposit have been filed by the respondent.

The petition is of this fact that in para 8 “the petitioner also collected installation charges / security deposit from the respondent @ of Rs. 200/- per STB for 647 boxes and Rs. 300/- per STB for 10 STBs.” Neither this deposit was refundable security, nor installation charges being refundable were proved by the respondent. More so, nor any counter claim or set off for this amount, has been made by the respondent. Nor it was there to be refunded one, in agreement of interconnection dated 20.11.2014.

The witness examined by the respondent in examination-in-chief was not produced for its cross-examination. Hence, this fact, which was said by respondent to be refundable security deposit, was with burden of proof for proving the same, hence, witness should have been cross-examined by the petitioner and it could not be borne so, nor it be proved.

Hence, this issue is being decided negatively.

29. **Issue no. 4**

Challan, by which STBs were supplied to respondent in form of delivery – cum gate pass mentions delivery of 661 STBs alongwith adopters, cables, nodes etc., annexed with the petition as Annexure P-4, are with specific mention of four transmitters. The supply of two transmitters to present respondent with cost of Rs. 40,000/- has been stated in pleadings and supported by evidence on oath. As against it there is no evidence by the respondent.

Hence, this issue is being decided in favour of the petitioner.

30. **Issue No. 1**

Civil claims are decided on the touchstone of preponderance of probabilities. Interconnection agreement dated 20.11.2014 is undisputed. The previous understanding made in writing dated 19.11.2014 was merged in interconnection Agreement dated 20.11.2014. This subsequent agreement was

for a period of five years. In para 6 of the petition, it has been specifically written that rate at which the respondent was to pay subscription fees and STB installation charges to the petitioner was recorded in writing, a day earlier to the signing of the subscription agreement, on 19.11.2014. Hence, the rate of subscription was agreed and written in between. At page no. 15 of the paper book, agreement dated 19.11.2014 is of this specific mention that Digicable will offer four packages and rates till March 2015. Four groups of packages and revenue generated to be adjusted and shared in the ratio of 50:50 between Digicable and the operator is very well there and this was written to be rate of subscription to be realised by the petitioner.

In para 9 of the petition, it was written “that on the understanding between the parties the petitioner from time to time raised invoices upon the respondent for the subscription fees and also furnished the detailed statement of accounts. It is pertinent to mention here that these invoices were duly received and acknowledged by the respondent. Copies of the invoices raised and sent by the petitioner to the respondent for the period January 2015 to December 2015 are annexed hereto and marked as Annexure P-5(colly).”

31. This has been vehemently denied by the respondent in its reply. Rather, it was denied that any invoice was ever received or acknowledged by the

respondent. The invoices filed alongwith instant petition were said to be fabricated document created solely for the purpose of present petition. No such invoices were ever raised or received by the respondent.

32. Learned counsel for respondent had vehemently argued on this point with this contention that rate at which the respondent was to pay subscriber fees for the period January 2015 to March 2015 was mentioned in the clause 2 of the agreement / understanding dated 19.11.2014 and this agreement was admittedly superseded in view of clause 21 of the agreement dated 20.11.2014. Sole witness, Mr. Koushik Mitra has admitted in his cross examination that agreement dated 19.11.2014 qua rate of subscription charges was valid and subsisting only till March 2015 and for the period from April 2015 onwards, there was only verbal understanding as to the rate of subscription charges as per clause 1(b) of the Interconnect agreement dated 20.11.2014. Hence, monthly subscription amount payable by the respondent to the petitioner from April 2015 onwards was to be mutually decided and no such written agreement with regard to subscription charges was entered. Hence, subscription charges, because of non-written agreement, was not recoverable, in view of law pleaded by respondent. The invoices are forged and fabricated, liable to be rejected. The continuous numbering which is unlikely if the said invoices were raised by the petitioner at the relevant time clearly depicts that the invoices were made solely

for the purpose of this petition wherein tax component for the month of January to May 2015 was said to be @ 14%. Whereas the Service Tax (ST) applicable was at 12%. The invoices raised for the month of October 2015 was raised on 2.10.2015 (Gandhi Jayanti). It was incumbent upon the petitioner to show that invoices raised for the concerned months delivered to the respondent and they have been issued in accordance with the ST component and ST was paid for that component. In view of the law laid by Apex Court in Loop Telecom and Trading Ltd. Vs. UOI and Ors. (2022) 6 SCC 762 that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.

33. This Tribunal in 3 Way Cable Communications Vs. Sai Cable TV Communications Network, AP MANU/TD/0155/2015 in paragraphs numbers 2, 11-13 has held that no reliance can be placed on an invoice if the same is not raised and served in accordance with law. Hence, this burden of proof of this fact was upon the petitioner, who alleges for raising and issue of invoices and service of the same on the respondent. But petitioner has miserably failed to discharge his burden of proof.

34. In reply of arguments by counsel for respondent, learned counsel for the petitioner argued that respondent had raised a contention for the first time during arguments that invoices for the month of January to May 2015 have been

raised on the wrong rate of ST of 14% instead of 12%. The correct ST was payable for the above period was @ 12%. The invoices were raised and a part payment with regard to same was made by the respondent, as has been admitted, in para 9 of the petition. The reply of respondent in para 9 has specifically written that "it is most respectfully submitted that the respondent has made payments of all amounts which were legitimately due and payable by it to the petitioner."

35. Now, the question arises as to what amount were due and what were paid? When it was paid and how much payment was there? For this proof, it was burden upon respondent to show and prove before this Tribunal that how much money was accrued and how much was raised, how much was paid and what is books of account? Whereas petitioner has filed invoices, statement of account and in oral testimony had proved it. Respondent had failed to prove it and no testimony on this point is there. Hence, it was utter failure of respondent to prove his contention that he had paid, as was due. The subscription amount with technical / typographical error of ST levied @ rate of 14%. Instead they have mentioned that it was payable @ 12% have now been corrected, upon the query made by this Tribunal and this is the question to be adjudged, while awarding the amount due. This would be vitiated to held that invoices were not issued and were not raised.

36. The law pressed by counsel for respondent, as written above, are the law of the land and are relevant proposition on the point of law. But the facts and circumstances in those cases are not in consonance with the facts of the case in hand. Rather in accordance with those stated laws, the respondent had failed to prove its contention.

37. The subscription at the rate of Rs. 75/- per STB has been admitted by the respondent and it being Rs. 100/- per subscriber, as has been billed, challenged. Reference made to there at para (e) at page 85 of the paper-book of BP no. 39 of 2016. Whereas petitioner had produced the invoice of the very same respondent issued by another MSO for paying subscription charges @ Rs. 81.88 in the month of February 2014 at page 113 of BP no. 39 of 2016. Hence, the very contention of the respondent is of no substance.

38. The subscription amount against the respondent comes to Rs. 4,01,008/- shown balance in statement of account in the End of December 2015 and upon this an interest @ 9% p.a., which has been from past awarded by this Tribunal in various judgments including Judgment of BP no. 394 of 2014 (UCN Cable Network Pvt Ltd Vs Pearls Broadcasting Corporation Ltd.) is reasonable one to

be paid from the date of due to the actual payment by the respondent to the petitioner.

This issue is decided in favour of the petitioner.

39. **Issue no. 3**

It is undisputed that in order dated 23.3.2016, willingness of respondent for return of all STBs supplied to them in BP No. 39 of 2016 as against 661, 657 were returned. In all 283 STBs were said to be unreturned. Admittedly, respondent in all six batch of petitions BP Nos. 39 to 44 of 2016 are family members and they have entered in an agreement with the petitioner, who is common in all these petitions and they made the return of STBs to Advocate Commissioner, appointed by this Tribunal for and on behalf of each other saying that they are family members, having common interest amongst. Hence, so far as present petition is concerned, the dispute in number of STBs and accessories are with regard to 661, which has been said to be only 657. Petitioner by its evidence, has proved 661 STBs, whereas no evidence by respondent of this fact that it was only 657, as against 661 STBs. Because this fact was said by the respondent that it was not 661 but 657, which were returned, then for proving this, burden shifts upon the respondent, which was not borne. Hence, the STBs which were 661 alongwith its accessories and were returned 657 resulting in loss of 4 STBs in number. The accessories delivered to Advocate Commissioner

and the accessories issued by Challan shown the non – delivery of entire equipment taken as accessories alongwith STBs. Hence, para 3 of the agreement will come into play which had given Rs. 2500/- per STB in case, non-return of same. No question of considering the amount of 1200/1600/1700 per STB arises as has been argued by learned counsel for respondent.

40. Because there is specific recital in para 3 of interconnection agreement dated 20.11.2014 in case of default, the amount payable for per STB including accessories etc. will be Rs. 2500/-. Hence, for these four STBs, it comes to Rs. 10,000/- exclusive of interest @9% per annum from the date of due i.e. When it was returned to the Advocate Commissioner to actual payment.

Issue is decided, accordingly, in favour of the petitioner.

41. **Issue No. 2**

It is admitted that Deed of Understanding executed in between the parties on 20.11.2014 and it is Annexure P-3 of the petition wherein respondent have undertaken to take due care of STBs and return the same to the Company on the termination of the Interconnect Agreement or efflux of time, or otherwise. Clause 3 of the said Deed is reproduced as under :

“In case the affiliate disassociates with the company at any time before the term of the said agreement, in that even, the affiliate undertake to pay the company Rs. 2500/- (Rupees Two Thousand Five hundred only) per STB (alongwith all applicable taxes) or in the alternate, the affiliate shall unconditionally return the all the Set-Top Box to the Company in working condition as certified by the authorized official of the Company. In case, if free boxes are sold by the operator/ LCO to him/her customer/ end-user in that case the full amount has to be deposited to the Principal Company.”

42. Meaning thereby it is quite clear that respondent was to pay Rs. 2500/- per STB or in the alternate, return the STBs to the petitioner unconditionally upon its disassociation before the expiry of terms of the agreement. It is admitted fact that respondent disassociated itself from the petitioner after December 2015 and thus, the respondent migrated before the period of 5 years, which was term of the agreement. Though the STBs and accessories were not returned immediately, Rather these were returned after intervention by this Tribunal. Hence, the number of STBs returned i.e. 657 were less of four in number than 661 supplied to the respondent and for these four STBs, Rs. 10,000/- @ Rs. 2500/- has been awarded in disposal of above issue.

Hence, no question of any further compensation or its award, as has been claimed in relief clause arises. Hence, this issue is being decided in favour of respondent.

43. Hence, upon the above discussion on above those seven issues, the very two questions raised by this Tribunal to be decided written as above, stood disposed of.

ORDER

Accordingly, this petition for award of subscription amount in the tune of Rs. 4,01,0008/- plus interest @ 9% p.a. from the date of petition till actual payment as well as award of Rs. 10,000/- for four STBs and its accessories with 9% p.a. from the date of petition till actual date of payment alongwith cost of this petition, plus Rs. 40,000/- with interest @ 9% p.a from the date of petition to actual payment towards cost of two transmitters (@ 20,000/- each), is to be awarded.

Accordingly, this BP stood allowed for reliefs mentioned above and denied for relief of compensation.

Respondent is being directed to make deposit of -

(a) Subscription amount in the tune of Rs. 4,01,008/- plus interest @ 9% p.a. from the date of petition till actual payment.

(b) Rs. 10,000/- for four STBs and its accessories with 9% p.a. from the date of petition till actual date of payment.

(c) Rs. 40,000/- as Cost of two transmitters supplied to respondent @ Rs. 20,000/- each with 9% p.a. from the date of petition till actual date of payment.

(d) cost of petition

With this Tribunal within two months of judgment for payment to the petitioner.

Formal award / decree to be got prepared by office, accordingly.

Rest of the Petitions:

This batch of cases has been heard together because of similar facts and issues involved in these petitions. Hence, we take **Broadcasting Petition No. 39 of 2016**, as a lead case, for the purpose of a common judgment, to be followed in other cases.

Since these petitions are heard together and petitioner is common in all the above petitions and respondent claimed to be a family, and considering the above discussions and decisions in **BP No. 39 of 2016**, following consolidated order is being passed in these subsequent petitions:

(a) With regard to **subscription amount**, following are the details (page 5 of the written arguments) mentioned below separately with respect to each petition:

S.NO.	PARTICULARS OF THE RESPONDENT	OUTSTANDING SUBSCRIPTION AMOUNT
1.	DIGI CABLE COMM SERVICES PVT. LTD. VS. PUTUL MUKHERJEE - PUTUL CABLE NETWORK B.P No. 40 of 2016	Rs. 299428/-
2.	DIGI CABLE COMM SERVICES PVT. LTD. VS. SUBHAJIT MUKHERJEE – SUVO CABLE NETWORK B.P NO. 41 of 2016	Rs. 405101/-
3.	DIGI CABLE COMM SERVICES PVT. LTD. VS. ASHIS SAMANTA - ASHIS CABLE NETWORK B.P No. 42 of 2016	Rs. 110094/-
4.	DIGI CABLE COMM SERVICES PVT. LTD. VS. BARUN NASKAR - BARUN CABLE NETWORK B.P No. 43 of 2016	Rs. 162452/-

5.	DIGI CABLE COMM SERVICES PVT. LTD. VS. PRASENJIT MUKHERJEE - MUKHERJEE CABLE NETWORK B.P No. 44 of 2016	Rs. 450752/-
----	---	--------------

Accordingly, it is directed to the respondent to pay the above mentioned amount with respect to above petitions alongwith 9% p.a. from the date of petition till actual date of payment, in each of the petition, separately.

(b) As per details provided at Annexure D of the written arguments, following is the number of **STBs returned by the respondent** in each of the petitions, separately :

S.NO.	PARTICULARS OF THE RESPONDENT	STBs supplied	STBs returned
1.	DIGI CABLE COMM SERVICES PVT. LTD. VS. PUTUL MUKHERJEE - PUTUL CABLE NETWORK B.P No. 40 of 2016	650	604
2.	DIGI CABLE COMM SERVICES PVT. LTD. VS. SUBHAJIT MUKHERJEE – SUVO CABLE NETWORK B.P NO. 41 of 2016	654	593
3.	DIGI CABLE COMM SERVICES PVT. LTD. VS. ASHIS SAMANTA -	200	184

	ASHIS CABLE NETWORK B.P No. 42 of 2016		
4.	DIGI CABLE COMM SERVICES PVT. LTD. VS. BARUN NASKAR - BARUN CABLE NETWORK B.P No. 43 of 2016	225	188
5.	DIGI CABLE COMM SERVICES PVT. LTD. VS. PRASENJIT MUKHERJEE - MUKHERJEE CABLE NETWORK B.P No. 44 of 2016	681	558
		3071	2770

Therefore, as per petitioner, 301 (3071 – 2770) STBs are yet to be returned by the respondent.

However, in terms of Tribunal's Order dated 26.7.2016 and the statement made by counsel for the petitioner at the Bar on that date, petitioner is candidly claiming the amount with respect to only 283 STBs in total, as not returned to it @ Rs. 2500/- per STB. Reference is also made to the written arguments filed by the petitioner at page no. 7. Hence, petitioner is entitled to Rs. 7,07,500/- for only 283 STBs in total and its accessories with 9% p.a. from the date of petition till actual date of payment. Accordingly, we allow the same.

However, as we have already awarded cost of four STBs alongwith accessories to be paid to the petitioner by the respondent in BP No. 39 of 2016 to the tune of Rs. 10,000/- @ Rs. 2500/- per STB and is to be deducted from the total number of 283 STBs, we now direct the respondent to pay the cost of Rs. 6,97,500/- (Rs.7,07,500/ - Rs.10,000/) towards 279 (283-4) STBs alongwith accessories to the petitioner with 9% p.a. from the date of petition till actual date of payment.

(c) As per Annexure D of the written arguments, petitioner is claiming that one in number of transmitter supplied to the respondent has not been returned by it in BP No. 41 of 2016. Hence, we may allow Rs. 20,000/- as cost of one transmitter to be paid alongwith 9% p.a from the date of petition to the actual payment.

(d) Cost of petitions towards each of the petitions separately.

These amounts shall be paid by the respondent with this Tribunal within two months of judgment for payment to the petitioner.

Formal award / decree to be got prepared by office, accordingly.

.....
(Justice Ram Krishna Gautam)
Member

/NC/