

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 03rd August 2023

Broadcasting Petition No. 176 of 2018

Hathway Digital Private Limited

...Petitioner

Vs.

Sri Maruthi Sat System & Anr

...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent : Ms Stuti Jain for R-2

JUDGMENT

1. This Petition, under Sections 14 and 14A (1) and 14(a) (ii) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed by Petitioner, Hathway Digital Private Limited, against Respondent, Sri Maruthi Sat System & Anr., with a prayer for an award/ decree for a sum of Rs. 55,58,453/- (Rupees Fifty Five Lakhs Fifty Eight Thousand Four Hundred Fifty Three Only) along

with *pendentelite* and future interest @18% p.a. and also to return 2477 number of set top boxes swapped illegally with Respondent No.

2. A further relief was also claimed for grant of permanent injunction against Respondent No. 2, a competitive MSO, for not providing signal to Respondent No. 1, until the liability, written as above, are being cleared by Respondent No. 1. That too, in accordance with a notice, required in Clauses 6.4 and 6.5 of the TRAI Regulations i.e., 21 days' notice.

2. In brief, The Petition contends that Hathway Digital Private Limited is a wholly owned subsidiary company of Hathway Cable and Datacom Limited. It is registered under Companies Act, 1956, with its registered office at "805/806, "Windsor" Off C.S.T. Road, Kalina, Santacruz (E), Mumbai. It is engaged in the business of retransmitting the signal of cable Television to its various operators on PAN India Basis. The cable Television business of Hathway Cable and Datacom Limited has been assigned to Petitioner, Hathway Digital Private Limited, w.e.f. 01.04.2017, due to internal restructuring of Hathway Cable and Datacom Limited Company. The Respondent No. 1, namely Sri Maruthi Sat System, is a local cable operator, represented through its

proprietor, namely Mr. Shridhar Raju, having its office at Narayanappa Complex, Near Sri Rama Temple, Anekal – 562106, Bangalore. The Respondent No.2, namely M/s Siti Networks Limited, is a competing MSO of the Petitioner, having its office at No. 39, United Mansions, 4th Floor, M.G. Road, Bengaluru – 560001. A memorandum of understanding, having terms and conditions, written in it, and agreed in between both side, was got executed on 24.07.2017.

3. On the request of Respondent No. 1, Interconnect Agreement, dated 24.07.2017, was executed by Petitioner and in compliance of same, Petitioner had issued 4218 set top boxes (STBs) to Respondent No. 1. Interconnect Agreement entered, in between, is **Annexure P-1** to Petition.
4. Petitioner has been demanding the subscription charges from the Respondent No. 1 as per the aforesaid Agreement. But part payments were being made and repeated defaults in discharging its liability were committed by Respondent No. 1.

5. Statement of Account, being maintained by Petitioner, in its usual course of business, having statements and invoices raised and payment made against it, is annexed as **Annexure P-2**. The Interconnect Agreement dated 24.07.2017, was valid for a period commencing from 01.4.2017 to 31.03.2028. A request was followed up for renewal of agreement with Respondent No. 1, but it was avoided deliberately, with some malafide intentions. Respondent No. 1 has been violating the terms and conditions of the Agreement from the very inception and has been avoiding to clear the outstanding dues of the Petitioner, towards outstanding subscription dues, despite of making request, follow-ups and reminders from the Petitioner. Instead of making payments to Petitioner, Respondent No. 1 kept on giving false assurances to Petitioner.
6. Respondent No. 1, in collusion with Respondent No. 2, has partially migrated from the network of Petitioner, without following the due process of law, by way of swapping of 2477 STBs, belonging to Petitioner, with Respondent No. 2, causing huge financial loss to Petitioner. A notice, dated 16.04.2018, was issued to Respondent No. 1 and Respondent No. 2, directing Respondent No. 1 to clear the

outstanding subscription dues and to return the STBs and viewing cards and, also directing Respondent No. 2, to cease and desist from providing feed/ signals to the Respondent No. 1, until it follows due process of law as mandated under the Regulations and unless clears the outstanding dues, returns the STBs, along with viewing cards, to Petitioner. The notice, dated 16.04.2018, is annexed as **Annexure P- 3 (Colly)**. But it was of no heed. Hence, a cause of action, within the jurisdiction of this Tribunal, had arisen and finally, this Petition with above prayer got filed.

7. Respondent No. 1 was absent and matter was proceeded ex-parte against him. Respondent No. 2 filed its written statement, denying the contention of Petitioner that Respondent No. 2 is not transmitting digital cable television signals to the Respondent No. 1. Neither Respondent No. 2 has any agreement with Respondent No. 1 for supply of digital cable signals. As there is no Privity of Contract in between Respondent No. 2 and Petitioner, hence, no claim of Petitioner against Respondent No. 2 is maintainable.
8. Replication by Petitioner, with the reiteration of Petition, was there.

9. Court of Registrar, vide order dated 19.11.2018, framed following issues, for and on behalf of pleadings of Petitioner and Respondent

No. 2 :

(1) *Whether the Respondent No. 2 is still transmitting digital cable TV channel in a signal of Respondent No. 1 and swapping the said set top boxes in the Petition, it fact.*

(2) *Whether the petition is not maintainable as against the Respondent No. 2, as alleged in paragraph 6 of preliminary objections?*

(3) *Whether the petition suffers from the defect of mis-joinder of the parties and as is alleged in paragraph 6 of preliminary objections.*

(4) *Whether the Petitioner is entitled for relief as is prayed in the petition?*

10. Evidence by way of affidavit of Petitioner, along with a certificate under Section 65 B of Indian Evidence Act, and Resolution of Board was filed by Petitioner. The same was filed by Respondent No. 2 as affidavit of Mr. V. Suresh Kumar. No evidence by Respondent No. 1 was there.

11. The proceeding before this Tribunal is a civil proceeding, as has been given in TRAI Act itself. In a civil proceeding, the preponderance of probabilities is the touchstone for making a decision, as against strict burden of proof, required in criminal proceeding.

12. 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 bonus 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.

13. Heard Learned Counsel for both side and gone through the material placed on record.

14. Issue No. 2 and 3

Both of these issues are one and common. Hence, being discussed together.

This Tribunal has settled this issue by many judgments, earlier delivered that because of no Privity of Contract, in between Petitioner- MSO and Competitive-MSO, no relief for the wrong of LCO, may be claimed against Competitive MSO and in the present case too, Learned Counsel for Petitioner is arguing for no relief against Respondent No. 2. Hence, Respondent No. 2 is not a necessary party in this Petition and no relief against it is being claimed or may be awarded. Hence, both of these two issues are being decided against Petitioner.

15. Issue No. 1 and 4

Both of these issues are being discussed together. Un-rebutted affidavit of Petitioner's witness **PW-1** filed in evidence under Order 19 of CPC is full reiteration and corroboration of Petition. No rebuttal by Respondent No. 1 is there. Respondent No. 1, inspite of sufficient service and opportunity neither appeared nor filed its reply i.e., pleading in form of written statement, rebutting the contention of

Petition. Hence, proceeding against him was taken as ex-parte. The contention of Petition is very well proved by way of uncontroverted affidavit of **PW-1**. The annexure to affidavit are with full reiteration. 2477 STBs along with viewing cards and allied hardware were issued to Respondent No. 1 for giving effect to Interconnect Agreement and they were swapped against the Regulations. The invoices were there. The Respondent No. 1 was bound to restore i.e., return back these hardware to Petitioner or to make payment for it @ rate of depreciated value Rs. 1280 per STB.

The outstanding subscription dues Rs. 55,58,453/- (Rupees Fifty Five Lakhs Fifty Eight Thousand Four Hundred Fifty Three Only) are to be awarded against Respondent No.1.

Pendentelite and future interest @ rate of 9% per annum, as is being provided by this Tribunal, as decided in many other precedent cases, in view of present fiscal scenario, it will be appropriate and just. Hence, these two issues are decided in favour of Petitioner, as against Respondent No. 1. Thereby, this Petition is to be allowed for above award.

Order

The Petition is being allowed with cost. Respondent No. 1 - Sri Maruthi Sat System is being directed to make payment, by way of deposit before this Tribunal, within two months from the date of Judgment an amount of Rs. 55,58,453/- (Rupees Fifty Five Lakhs Fifty Eight Thousand Four Hundred Fifty Three Only) along with *pendentelite* and future interest @ rate of 9% per annum, over above outstanding dues, for making payment to Petitioner, with a further direction for return of 2477 number of set top boxes along with viewing cards in good working condition to Petitioner or to pay Rs. 31,70,560/- (Rupees Thirty One Lakhs Seventy Thousand Five Hundred and Sixty Only) @ Rs. 1280/- towards the cost of per STB for making payments to Petitioner.

Formal award/ decree be got prepared by office, at an earliest.

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(Justice Ram Krishna Gautam)
Member

03.08.2023
/BN/