

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****Dated 3rd August 2023****Broadcasting Petition No. 274 of 2016****With Misc Application 26 of 2017**

GTPL Hathway Private Limited ...Petitioner

Vs.

Nisha Electronics & World Vision & anr. ...Respondent

BEFORE:**HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER**

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent No. 2 : Ms. Kanupriya Gupta, Advocate

JUDGMENT

1. This Petition, under Section 14A (1) read with Section 14 (a) (ii) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed by, Petitioner, GTPL HATHWAY Ltd., against Respondent, Nisha Electronics & World & Indus Ind Media & Communications Ltd, through its proprietor and another with a

prayer for an award/ decree for a sum of Rs. 61,878/- (Rupees Sixty One thousand eight hundred and seventy eight only) towards subscription charges with an interest @ 21% p.a. with a further prayer for direction to Respondent No. 1 and Respondent No. 2 for return of Set Top Boxes i.e. 209 Set Top Boxes in working condition or to make payment of Rs. 3,86,650/- (Rupees Three Lakhs Eighty Six Thousand Six Hundred and Fifty Only) towards them @ Rs. 1850/- STBs, with a further prayer of ad-interim injunction order, reiterating Respondent No. 2, from providing signals to Respondent No. 1, otherwise than compliance with Interconnect regulations as well as ensuring the full payment and return of STBs, in favour of Petitioner.

2. Petition contends that GTPL HATHWAY LTD is a private limited company incorporated under the provision of Companies Act, 1956, having its Registered Office at C-202, 2nd Floor Sahajanand Shopping Centre, Opp. Swaminarayan Mandir, Shahibaug, Ahmedabad, Gujarat. It is cable TV service provider company, duly registered under provision 3 of cable TV regulations act, 1995, and is Multi System Operator (MSO), in business of distribution of TV channels through analog/ digital mode, in view of license to operate as a cable operator.

3. Respondent No. 1 namely Nisha Electronics & World Vision through its proprietor Mr. Dipakkumar R Parekh, is a local cable operator having its office at L- 104, Radhey Apartment, Near Ashopalav Bungalows, Thalthej, Ahmedabad, is an LCO, engaged in the retransmission of signal/ service of the Petitioner to the subscribers in certain area of Ahemdabad, for collecting subscription fee from subscribers.
4. Respondent No.2 is a competing MSO, engaged in the business of distributing TV channel, like Petitioner, having license for it.
5. Petitioner and Respondent No.1 had entered in an Interconnect agreement, for retransmitting signals of Petitioner to its subscribers and collect subscription fee. According to the agreement 209 STBs were issued by Petitioner to Respondent No. 1. Interconnect agreement, entered, in between, Petitioner and Respondent No.1 which is **Annexure P-1** (colly) to petition. The Statement of account of Petitioner Company, made in usual and ordinary course of business, having entries of invoices and dues, are **Annexure P-2** to petition. Respondent No.1, in defiance of agreement, in a view to defraud

Petitioner deliberately usurpt, subscription charges collected by him not only this after a letter, dated 23.04.2016, sent by Petitioner to Respondent No. 1, for making payment of dues Rs. 61,878/- (Rupees Sixty One thousand eight hundred and seventy eight only) towards outstanding subscription dues, as on April 2016, Annexure P-3, Respondent No.1 swapped with Respondent No.2, in utter disregard of Interconnect regulations i.e., without making payment of Outstanding subscription dues of Rs. 61,878/- (Rupees Sixty One thousand eight hundred and seventy eight only) and making return of 209 STBs, taken by him. It caused huge loss to Petitioner. Repeated request, by way of notices, were made by petitioner to Respondent No. 1, but of no avail. A cause of action, within limitation, within jurisdiction of this Tribunal, had arisen. Hence, this petition with above prayer.

6. In spite of sufficient service of notice and grant of opportunity to Respondent No.1 no reply by it was there. Hence, a proceeding as ex-parte was held against him. Respondent No. 2 appeared and filed its reply with preliminary objection of non maintainability of this petition, because of being no privity of contract, in between, and no defiance

by Respondent No. 2, no cause of action had ever arisen, against Respondent No.2.

7. Respondent No. 2 is a cable business operator, having license for it, was in his business as per regulations, and is a MSO. He was with no concern for any act of Respondent No. 1 nor there was any illegal migration, by Respondent No.1 with Respondent No. 2. No dues is against Respondent No.2. Respondent No. 2, is unnecessary party to this petition. Hence, a prayer was made for deletion from the array of party. This Tribunal directed for filing of evidences and disposal in accordance of evidences filed on record.

8. Court of registrar vide order dated 23.11.2017 framed following issues:-

(1)Whether the petition is liable to be dismissed as the petitioner has not approached the Hon'ble Tribunal with clean hands?

(2)Whether the respondents are liable to pay the petitioner the outstanding amounts along with interest towards subscription dues and return the STBs as prayed for in the petition?

(3) Whether the Respondent No. 2 is proper and necessary party to the present proceedings?

(4) Whether the Respondent No. 1 has migrated to the network of Respondent No. 2? If so, whether such migration is legally valid?

9. Petitioner filed its evidence by way of affidavit of Mr. Ram Prakash, in evidence under order 19 of CPC, PW-2 Mr. Naval Pandeya filed its evidence, by way of affidavit.
10. Respondent No.2 filed the evidence of Mr. Pankaj Ojha, in its evidence.
11. Written submissions by Petitioner as well as Respondent No. 2 got filed, on record. Heard argument of Learned Counsels for both side and gone through record.

12. The proceeding before this Tribunal is a civil proceeding, as has been given in the 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.

13. 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.

13. Issue No. 1

It is a vague issue. This Tribunal had previously decided that the lis is to be adjudged after the evidence of both sides. Hence, evidence of both side was got filed. There is nothing to show that this petition was

not filed with a clean hand, nor this issue was pressed, at the time of arguments. Hence, this issue is being decided as against Respondent.

14. Issue No. 3

This Tribunal, in previous judgments in other cases had categorically held that there being no privity of contract, nor defiance of any contract, in between, two competitive MSOs, The competitive MSOs, having no Interconnect agreement or any contract with Petitioner MSO, may not be compelled, for making good of the wrong committed by LCO. In present case too, there is specific denial in the pleading as well as in the affidavit filed in evidence by Respondent No. 2, that there was no swapping or migration by Respondent No. 1 with Respondent No.2, nor any signal are provided by Respondent No. 2 to Respondent No.1, against Interconnect regulations. There is no evidence by Petitioner except its affidavit that Respondent No. 1, migrated illegally to Respondent No. 2, i.e., oath against oath. But no proof of this migration is there. More so, there is no privity of contract, in between Petitioner and Respondent No.2, no defiance of any

contract is there. Hence, Respondent No. 2 is neither a proper nor a necessary party to this proceeding. Accordingly, this issue is being decided in favour of Respondent No.2.

15. Issue No. 2 and 4

They are connected issues and related in between Petitioner and Respondent No. 1. Evidence, by way of affidavit, for and on behalf of Petitioner i.e. PW-1 and PW-2 are with Annexure P-1/1, having invoices sent to Respondent No. 1 and exhibit P-1/2, Copy of Statement of account prepared in the ordinary course of business by Petitioner company and exhibit PW-1/3 letter dated 23.07.2016, issued by Petitioner to Respondent No.1 with regard to outstanding dues which was said to be due against Respondent No. 1. The evidence filed by petitioner by its affidavit by petitioner are with no rebuttal by Respondent No. 1. Rather they are in full corroboration and reiteration of the contention of petition, So far as Respondent No. 1 is concerned. Hence, the Outstanding subscription fees to the tune of Rs. 61,878/- (Rupees Sixty One thousand eight hundred and seventy eight only), as on April 2016, has been duly Proved by its evidence. The

same is there with regard to 209 STBs issued by petitioner to Respondent No. 1 for getting them installed at subscribers precincts for giving effect to Interconnect agreement, entered in between, Petitioner and Respondent No. 1. After the lapse of agreement by efflux of time, the return of them was to be there but nothing can be brought on record, with regard to it. Hence, the hardware which remains the property of MSO, as per model Interconnect regulation, ought to have been returned. But, was not returned by Respondent No. 1. Hence, Respondent No. 1 is to make payment of those subscription dues of Rs. 61,878/- (Rupees Sixty One thousand eight hundred and seventy eight only) along with *pendentelite* and future interest @ 9% p.a. to Petitioner is further liable to make return, in good and working condition, of 209 STBs along with VCs etc, to petitioner, and in case of its failure, award of Rs. 3,86,650/- (Rupees Three Lakhs Eighty Six Thousand Six Hundred and Fifty Only) @1850/- STB are to be there. Hence, both of these issues are being decided in favour of Petitioner, as against Respondent No.1.

16. On the basis of above discussions, the petition is liable to be allowed with cost.

Order

Petition is being allowed against Respondent No. 1. Nisha Electronics & World Vision, is being directed to make deposit of Rs. 61,878/- (Rupees Sixty One thousand eight hundred and seventy eight only) with *pendentelite* and future interest @ 9% p.a., from the date of filing till actual payment, in the Tribunal, within two month from the date of judgment. Respondent No. 1 is being further directed to make return of 209 STBs along with hardware in good and working condition to Petitioner, and in case of failure, to make deposit of Rs. 3,86,650/- (Rupees Three Lakhs Eighty Six Thousand Six Hundred and Fifty Only) @ Rs. 1850/- STBs for making payment to Petitioner within, two months of judgment. Future interest @ 9% p.a. over above amount for this period will be payable by Respondent No.1.

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

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(Justice Ram Krishna Gautam)
Member

03.082023
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