

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 9th August 2023

Broadcasting Petition No. 391 of 2016

Asianet Satellite Communications Ltd. ...Petitioner

Vs.

M/s Jeevan Telecasting Corporation Ltd. ...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Ms Shirin Khajuria, Advocate
Ms Nayan Gupta, Advocate

For Respondent : Mr Aljo K.joseph, Advocate

JUDGMENT

1. This Petition, under Section 14 read with Section 14 (A) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed by, Asianet Satellite Communications Ltd., petitioner, against M/s Jeevan Telecasting Corporation Ltd.,

respondent, with a prayer for a decree, in favour of Petitioner, against respondent, for a sum of Rs. 1,95,88,705/- (One Crore Ninty Five Lakh Eighty Eight Lakh Seven Hundred Five only), outstanding towards carriage fee up to 31.05.2016, with an amount of Rs. 68,55,109.04/- (Sixty Eight Lakh Fifty Five Thousand One Hundred Nine and Paise Four only), towards interest, calculated @ 18% p.a., over above principal amount of outstanding subscription carriage fee, up to 31.05.2016, with a further prayer for amount of Rs. 2,20,40,000/- (Two Crore Twenty Lakh Fourty Thousand only) towards, the balance carriage fee for period 2016-2017. An interest in the tune of 18% p.a., over it amounting total sum of Rs. 2,64,43,814.04/- (Two Crore Sixty Four Lakh Forty Three Thousand Eight Hundred Fourteen and Paise Four only), with future award of *pendentelite* and future interest from 01.06.2016 till actual date of payment.

2. In Brief, Petition contends that Petitioner is company, registered under the Companies Act 1956. It is a cable TV operator for state of Kerala, providing TV signals, either by way of last mile connectivity or signals to subscribers through other link cable operators. Hence, it is LCO in case of direct signal to individual subscriber and MSO, in case of

Signals through other link cable operators. Its operation area had later on extended to the state of Karnataka, Andhra Pradesh and Telangana. It distributes signals, of various TV channels, either as Free to Air area, as in the case of present Respondent, or as pay channels. In case of Free to Air channels, the channel operator/ broadcaster pays a "Carriage Fee" to the Petitioner for up linking their channels because the MSO has to invest huge sum of money in building and operating its cable TV network.

3. The Respondent is a broadcaster, having TV channel, by the name of "Jeevan TV". The Respondent, requested Petitioner to carry the signals of its channel on its cable network, to show case its channel, for payment of "Carriage Fee". Accordingly, the Petitioner has been carrying the channels of the Respondent, for the past many years. Carriage agreements are each for the period of two years, and the existing agreement expires on 31.06.2017, in terms of the clause 8 of the agreement. Under clause 2 of the agreements, the carriage fee is to be paid as set out in the schedule therein, by post dated cheques and in case of delay in payment, interest @ 18% is payable. Under clause 9 of the 2014 agreement, the Petitioner can terminate the

agreement, after giving notice, in case of default by broadcaster. The carriage agreement, dated 01.02.2014 and 28.07.2015, are **Annexure P-1** and **Annexure P-2** to the petition. Respondent defaulted in regular payments of its dues. Various correspondence and oral communications were extended. Few of those are **Annexure P-3** (Colly) Cheques, given by Respondent, were dishonored for which criminal cases were got registered. Those dishonored cheques, along with banker's advice, are **Annexure P-4** (Colly). **Annexure P-5** to petition is list of those cases filed under Section 138 of Negotiation Instrument Act. Letter, dated 26.05.2016, by Petitioner to Respondent, for making clear of Outstanding dues, was repeated, vide subsequent letter dated 27.06.2016, **Annexed as P-6** (colly) to petition. The copy of Respondent's Statement of Account was **Annexure P-7** to petition. Copy of Statement of interest due against Respondent is **Annexure P-8** to petition.

4. Petitioner continued to carry the channel of Respondent, in terms of agreement, for which Respondent is bound to pay the Petitioner for using its Cable Tv network to broadcast, its channels in Kerala, in view of agreement entered, in between. Total amount, payable by

Respondent, towards carriage fee up to 31.05.2016, amounted to Rs. 1,95,88,705/- (One Crore Ninty Five Lakh Eighty Eight Thousand Seven Hundred Five only), with interest payable @ 18% p.a., amounted to Rs. 68,55,109.04/- (Sixty Eight Lakhs Fifty Five Thousand One Hundred Nine and Paise Four only). Hence, total dues up till 31.05.2016, amounted to Rs. 2,64,43,814.04/- (Two Crore Sixty Four Lakh Forty Three Thousand Eight Hundred Fourteen and Paise Four only). It further accrued to Rs. 220.40 Lakhs, for the period of 01.06.2016 to 31.06.2017, i.e., the end of the agreement. Cause of action had arisen within territorial jurisdiction of this Tribunal, within period of limitation. Hence, this Petition with above prayer.

5. The reply / Written submission, for and on behalf of Respondent company was filed, with this contention that Respondent company is a company registered, under Companies Act 1956. It runs a free to air regional satellite TV channel and operates with the aim of providing great service to the people of Kerala, by promoting family and constitutional values, respect for integrity of the country as well as providing the public with the Kerala centric view of the word in India, as well as Persian gulf. This petition seeks recovery of alleged sums,

due, in favour of Petitioner, regarding the agreement for carriage and channel placement, dated 01.02.2014, as well as 28.07.2015 (hereinafter said agreements). These agreements contain an arbitration clause i.e. clause 11.2, which expressly provides that all disputes, controversies, or difficulties, arising out of or in connection with this agreement, or for breach thereof, shall be settled by arbitration in Trivandrum, and the arbitration shall be governed by the Arbitration and Conciliation Act 1996, and the Arbitration Conciliation Rules 96 or in statutory amounting or reenactment thereof. The Arbitration proceeding shall be conducted in the English language. The Arbitration award will be financial and binding on parties. Hence, this petition is not maintainable. Rather appropriate forum is of Arbitration. This petition is abuse of process of law. Petitioner has admittedly pursuing remedies under Section 138 of Negotiable instrument act 1881, before the Courts of Kerala, in respect of certain payments alleged by it to be due, from Respondent company.

6. It was admitted to the extent that Respondent company had entered into agreements dated 01.02.2014 and 31.05.2015, with the Petitioner company for the supply of Respondent companies TV channel on the

Petitioner's cable TV network. Respondent company is a Free to Air TV channel operator, and the Petitioner has been carrying the channel of Respondent company i.e., "Jeevan Saathi". But outstanding dues in the tune of Rs. 1,95,88,705/- is being categorically denied, likewise, interest claim is also being denied. More so, given rate of interest is exorbitant, unreasonably high, illegal and against public policy.

7. It was admitted that the Petitioner has been carrying the TV channel of the Respondent, for the past many years; however, the arrangement was initially entered into, on the basis joint negotiations/discussions between the parties. Subsequently, Petitioner, arbitrarily and unilaterally increased its rates disproportionately causing huge financial burden to the Respondent company, in respect of which the Respondent company had no choice, but to agree, in order to maintain continuity of its broadcast.
8. Execution of agreement, including inter-alia contention i.e., agreement dated 01.02.2014 and 28.07.2015 was entered, in between, but claim of interest @ 18% was not due. As per agreement dated, 01.02.2014 the channel placement charges were set at Rs. 1, 60,00,000/- for the

first year and Rs. 1,70,00,000/- for the second year, whereas agreement dated 31.05.2015 enhanced annual charge, by setting at Rs. 2,80,00,000/- per year for the two year terms, of the said agreement, it itself shows undue enhancement and this resulted great financial burden on the Respondent company, which was operating Free to Air channel for wider social cause for the people of Kerala.

9. Payment by Respondent, as written in paragraph 4 of the Petition, was admitted, but certain payments being delayed or missed by Respondent company was owing to this financial scarcity. Respondent company has always been ready and willing to make payment of just and legitimate dues to its accrued, albeit in accordance with law and due process. In spite of financial constrains, Respondent is making at continuous time to make payment for the outstanding amount to its best abilities and it already made regular payment of money as per receipts page which is **Annexed P-3** to reply.
10. Presently, there being no regulation governing channels placement charges and carriage fees, MSOs are with free hand to unilaterally fix their placement charges as well as carriage fees, leaving LCOs or

broadcasters with no discretion in it. Hence, this Petition was requested to be dismissed.

11. A replication, by way of rejoinder, by Petitioner was filed, with this contention, that present petition is maintainable before this Tribunal only, as per Section 14 of TRAI Act, having no effect of arbitration clause in agreement. Rather this Tribunal had got exclusive jurisdiction to entertain this Petition, which is in the nature of recovery suit, between service providers. Cheques issued towards payments by Respondent were dishonored and for criminal offences complaints, under Section 138, of Negotiable Instrument Act, were filed, for which criminal proceedings are pending. But bringing of this civil suit, before this Tribunal, for recovery of amount, is not barred by pending criminal cases. Interest @ 18%, in case of delayed payment, was very well there in the agreement, itself. It is just and reasonable interest. Both of the agreements were entered freely with their free consent, without any in duress. Terms and conditions are fully owed by both side. Principal as well as interest accrued thereon are mentioned in the Statements of Account, maintained in usual course. Execution of both of the agreements, terms and liabilities, carriage and placement of channel

“Jeevan Sathi’ over the TV channel of Petitioner company and Respondent broadcaster of same is under dispute. Entering into agreements by Respondent in its own free will, by way of reducing terms and conditions in writing, is undisputed fact. Contention of petition was reiterated.

11. Court of Registrar, vide order dated 3.11.2016, framed following issues:-

1. Whether the present Petition under Section 14 of the TRAI Act is maintainable in view of the Arbitration clause in the agreement, and in view of the complaints filed by the petitioner against the Respondent under Section 138 of the Negotiable Instruments Act?

2. Whether the present dispute is to be referred to Arbitration by application of Section 8 of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015?

3. Whether the Respondent has been in breach of the Carriage Agreements dated 1.02.2014 & 28.07.2015 inasmuch as, it has failed to make payments/timely payments to the Petitioner?

4. Whether the Petitioner is entitled to recover the principal amounts under the above Carriage Agreements from the Respondent as prayed for in the Petition?

5. Whether, in view of the specific terms of the Agreement, and the conduct of the Respondent in repeatedly and deliberately failing to pay the dues under the Agreement, the Petitioner is entitled to interest @ 18% on the principal amounts due, from the dates they became due till the date of actual payment?

12. Evidence by way of affidavit of PW-1, Mr. RP Arun Raj, for and on behalf of Petitioner, and affidavit of Mr. PJ Antony, for and on behalf of Respondent, got filed, by both side. Both of these witnesses were cross-examined, for and on behalf of other side counsel.
13. Additional affidavit by Petitioner with statement of account, subsequent to the fact stated by PW affidavit on 14.01.2017, was filed by counsel for Petitioner. With this contention that when the evidence affidavit was filed on 04.01.2017, It was stated that Respondent had made some intermittent payment after the filing of the present Petition on 31.05.2016, amounting to Rs. 3,83,05,645/-, as of 31.12.2016, towards the outstanding dues short in the present petition. After adjusting the aforesaid payment, the Respondent was obligated to pay a sum of Rs. 3,31,76,705/- towards the balance

principal amount up to the end of the agreement period i.e., 31.05.2017 and Rs. 86,13,292.49/- (Eighty Six Lakhs Thirteen Thousand Two Hundred Ninety tow Hundred and Paise Forty Nine only), towards interest @ 18% p.a., calculated up to 10.12.2016 and this Statement of Account, to show the further said payment made by Respondent after filing of the PW-1 evidence affidavit on 04.01.2017, which as adjusted towards the outstanding dues under the Petitioner was filed. As per the PW-1 evidence affidavit the Respondent update a total sum of Rs. 3,83,56,450/- up to 31.12.2016. Then after additional payments were made which were shown in the table. In paragraph 5 it was specifically calculated that principal due amount was Rs. 7,14,42,350/- and total amount paid by Respondent is to be Rs. 6,09,14,020/-. Hence now, as on date of this affidavit, outstanding amount remains Rs. 1,05,68,330/-. Accordingly in light of above mentioned amount received by Petitioner from the Respondent, Petitioner is now seeking to recover a sum Rs. 1,05,68,330/- towards the principal amount under the agreement dated 01.02.2014 and 28.07.2015 along with interest calculated @ 18% p.a., over above amount till 21.012.2022, in the tune of Rs. 2,31,55,612.42/-. Meaning thereby, the claimed

amount is now reduced to above principal amount and interest calculated till 21.12.2022 @ 18%p.a.

15. In Reply to this affidavit, Respondent had filed, affidavit, dated 18.04.2023, with this narration that balance to be paid, amounted to (Rs. 1,41,18,605/-)only for which proper order was requested to be passed.
16. Heard arguments of Learned Counsel for both side, gone through material placed on record.
17. 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.
18. 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.

19. **Issue No. 1 and 2**

Both of these issues relates with one and common question. But at the very beginning, Learned Counsel for Respondent admitted that, in view of judgement give by this Tribunal, in some of cases previously decided, this law has been settled that this Tribunal, being of specific and exclusive jurisdiction, is for deciding cases falling under Section 14 of TRAI Act, and is of no effect of any Arbitration Clause given in agreement or by jurisdiction of any other forum. Hence, in view of law laid down in **Union of India Vs Satish Sugar Ltd., 2023 SCC online TDSAT 15**, as well as **Gaur Distributors Vs Hathway Cable & Datacom Ltd, 2016 SCC online Delhi, Del 4605**, and **Aircel Digilink India Ltd. Vs Union of India and Another, 2005 SCC online TDSAT 105**, The Jurisdiction of this Tribunal is not barred, in view of arbitration clause, in the agreements.

20. A criminal proceeding, with regard to offences, committed for dishonor of cheque, punishable under Section 138 of NI Act, is not bar for this Civil Proceeding, for recovery of amount, for which cheque were given. Law is well settled, on this point in The Bhajanpura Cooperative Urban Thrift & Credit Society Ltd. Vs Sushil Kumar, 2014 SCC online TDSAT Del 4507 and Vishnu Dutt Sharma Vs Daya Sapra (2009) 13 SCC 729. Hence, both of these two issues, are being decided in favour of Petitioner, as against Respondent.

21. **Issue No. 3**

Entering in the agreement, by Respondent broadcaster, with Petitioner MSO, for broadcasting "Jeevan Sathi" Free to Air channel, at Petitioner's network for placement and carriage charges, under terms and conditions, stipulated therein, are undisputed fact. Payments by way of cheques, as per given terms, which were subsequently dishonored and for whom criminal proceedings by way of complaint under Section 138 of NI Act, filed by Petitioner, and still pending are also undisputed fact. Carriage fees, along with interest, in case of defiance, @ 18% p.a., are admitted by Respondent. Both of those two

agreements and their period of operation are undisputed fact. The non compliance of the payments schedule and the statement of account, filed by Petitioner, are also not disputed. The failure to make payment, because of financial scarcity, has been pleaded by Respondent. The intention to make payment and being ready to make payment by Respondent is there. Hence, the parties had no issue with regard to alleged liability accruing out of agreed agreement, entered, in between, and acted upon by Petitioner. Both of the agreements dated 01.02.2014, as well as 28.07.2015, are undisputed. Hence, the arguments advanced by Learned Counsel for Respondent, with regard to interest, being exorbitant unjust and against public policy is with no reason, because of the fact that both of these agreements are of Commercial transaction, and once interest was of 18% p.a. in agreement dated 01.02.2014, The same was again there in agreement, dated 28.07.2015. At no point of time, the agreement was challenged before any forum, saying it to be of no free consent or voidable at the option of Respondent. Rather benefit arising out of these agreements were availed by Respondent. The payment has been made by Respondent, Even after filing of this petition and in written submissions, the dues to be awarded has been said to be Rs.

1,49,80,355/- (One Crore Forty Nine Lakhs Eighty Thousand Three Hundred Fifty Five only), at page No. 14 of affidavit, filed on 18.04.2023, by Respondent. Through its counsel, Mr. Aljo K. Joseph. It was specifically given that balance to be paid at Rs. 1,41,68,605/-. Hence, the dispute remains only with regard amount, which is to be awarded i.e.. not with regard to question of liability. Hence, as per additional affidavit filed by Petitioner, adjusting the payment made by Respondent, in between, specifies the dues in the tune of Rs. 1,05,68,330/- and interest Rs. 2,31,55,612/-. But this calculation is @ 18% p.a. even for the period, *pendentelite* and future. But this Tribunal in many judgments and also considering the present fiscal and financial scenario, had awarded simple interest @ 9% p.a. Hence, considering those statements of account, affidavits and additional affidavits, by both side, it comes that the Tribunal is to award Rs. 1,05,68,330/- as a principal outstanding with simple interest @ 9% *pendentelite* and future. Both of these two issues, are being decided, accordingly in favour of Petitioner.

22. Issue No. 5

This issue has already been covered and decided under disposal of issue No. 3 and 4. Hence, decided, accordingly.

Petition is liable to be allowed accordingly.

ORDER

Petition is being allowed. Respondent is being directed to make deposit, in the Tribunal, within two months of judgment, Rs. 1,05,68,330/- (Rupees One Crore Five Lakh Sixty Eight Thousand Three Hundred Thirty only) as a principal along with *pendentelite* and future simple interest @ 9% p.a. over above principal amount, till actual date of payment, for making payment to Respondent.

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

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(Justice Ram Krishna Gautam)
Member

09.08.2023
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