

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

Dated 12th December 2023

**Broadcasting Petition No. 8 of 2018
Miscellaneous Application No. 11 of 2018**

Tata Play Limited (formerly known as Tata Sky Ltd.) ...Petitioner

Vs.

Transmedia Software Limited ...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Nikhil Rohtagi, Advocate
Mr. Shashank Khurana, Advocate

For Respondent : None

JUDGMENT

1. This Petition, under Section 14 read with Section 14 (A) of the Telecom Regulatory Authority of India Act, 1997, as amended to date, (hereinafter referred to as "TRAI Act"), has been filed by, Tata Play

Limited (formerly known as Tata Sky Ltd.), against Transmedia Software Limited, Respondent with a prayer for realization of Rs. 1,34,09,371/- (Rupees One Crores Thirty Four Lakhs Nine Thousand Three Hundred and Seventy One Only), towards the outstanding Bandwidth support fee, alongwith *pendentelite* and future interest @ Rs. 18% p.a., or at such rate as the Hon'ble Tribunal may deem fit, along with cost of the petition.

2. In Brief, Petition contends, that Petitioner is a company, duly incorporated and registered under the Companies Act, 1956. The Petitioner is instituting the present Petition through its authorized Representative, Gyaltsen G. Barfungpa, Assistant General Manager, Legal, who is duly authorized to sign and file the present petition, on behalf of the Petitioner Company, by virtue of the letter of Authority dated 02.02.2017, issued by Mr. Himavat Chaudhuri, duly authorized by Board Resolution, dated 25.11.2013, **Annexure-A (colly)**.

3. The Petitioner company, was incorporated under the Companies Act, 1956, in accordance with the license granted to it under Section 4 of Indian Telegraph Act, 1885 read with Section 5 of the Indian Wireless

Telegraphy Act, 1933 by Government of India, Ministry of Information and Broadcasting, to establish, operate, and provide DTH Broadcasting Services. It provides Direct-to-Home ("**DTH**") Broadcasting Service to its subscribers across the country.

4. The Respondent, herein, is a 'Broadcaster' in terms of clause 2 (g) of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004. It has the requisite permission to uplink and downlink, from the Ministry of Information and Broadcasting, their channel "*TRANSMEDIA SOHAM*". On 30.09.2015, the Petitioner entered into an Access Agreement (hereinafter referred to as the "**Agreement**") with the Respondent for distribution of the channel "*TRANSMEDIA SOHAM*" in its DTH platform, subject to execution of this agreement, till completion of 3 years, from the date of commencement, written in agreement, **Annexure-A**. Channel provider shall pay Petitioner, Bandwidth Support Fee of Rs. 1,75,00,000/- (Rupees One Crores Seventy Five Lakhs only), along with applicable taxes p.a., amounting to total Bandwidth Support Fee of Rs. 5,25,00,000/- (Rupees Five Crores Twenty Five Lakhs only), for the terms towards granting access to the channels on the Tata Sky

platform, towards granting access to the channel on it. Bandwidth Support Fee, payable for each of the channel shall be payable in equal monthly installments, of Rs. 14,58,334/- (Rupees Fourteen Lakhs Fifty Eight Thousand Three Hundred Thirty Four only), in advance. The first installment shall be payable, 30 days prior to the date of launch of the channel, on the Tata Sky platform, but not later than the date of launch. The subsequent installment shall be payable by the channel provider to Tata Sky, monthly in advance, effective from the date of launch of the channel on Tata Sky platform. All payments, due to Tata Sky, under this agreement, shall be made in India, in Indian Rupees. Channel provider must make all payments on or before the due date, irrespective, whether Tata Sky, issues an invoice or not. Time, being the essence of the agreement, any failure to make payment on or before the due date, shall constitute a material breach of the agreement, by the channel provider.

5. Channel provider agreed that immediately on the execution of the agreement, the channel provider shall deposit with the Tata Sky, post-dated cheques(PDCs), for each of the installments, payable on the due date. Each post-dated cheques shall be drawn by Tata Sky Limited.

Channel Provider agreed that Tata Sky, shall be entitled to encash the post-dated cheques on or before the due date, without any intimation to the channel provider. In the event, any cheque returned unpaid, dishonoured or the channel provider instructs bank not to encash the cheques for any reasons, whatsoever, or any of the cheque becomes invalid or not encashable, it shall constitute a material breach of this agreement, by the channel provider resulting appropriate action under the Negotiable Instruments Act.

6. The channel provider, in addition to the outstanding dues, agreed to pay interest on any sum remained unpaid for more than 10 days, following the due date, in the tune of 18% p.a. The Bandwidth Support Fee for each of the channel, payable to Tata Sky, is an admitted debt, of the channel provider, and any failure in making payment on or before the due date, result in disconnection of transmission of channel by Tata Sky, under this agreement. Agreement Dated 30.09.2015 was **Annexure-B**. Under this agreement '**Annexure-B**', Petitioner agreed to re-transmit and distribute the channel of Respondent by means of Direct-to-Home (DTH) satellite transmission, the DTH service, owned/are operated by the Petitioner. This was subject to payment of

agreed service fee in the tune of Rs. 5,25,00,000/- (Rupees Five Crores Twenty Five Lakhs only) plus taxes, for three years. Petitioner duly complied with the obligation of carrying the channel of Respondent in its platform, as per terms of agreement. But Respondent, in spite of, utilizing the benefit of the agreement, became irregular, in making the payment of Bandwidth Support Fees. Invoices, upon the Respondent for the Bandwidth Support Fees, were issued by Petitioner, which were received and acknowledged by Respondent. A true copy of invoices raised by Petitioner, under agreement with the Respondent for the period from 01.03.2016 to 01.02.2017 is annexed as **Annexure-C (colly)** to petition. A calculation sheet showing the outstanding amount due to Petitioner is **Annexure-D** to Petition.

7. Despite several reminders and rightful demands, the Respondent failed to clear the dues, accrued as on 22.03.2017, in the tune of Rs. 1,34,09,371/- (One Crores Thirty Four Lakhs Nine Thousand Three Hundred Seventy One only), excluding interest. This default was willful and habitual. Even after persistent demand, payment was not made. Accordingly, a termination and disconnection notice, dated 10.02.2017 was issued to the Respondent, which was delivered to Respondent on

13.02.2017. This notice is **Annexure-E(colly)**, to petition. On 14.02.2017, Petitioner published Drop notices for various channels including Respondent's channel "TRANSMEDIA SOHAM", and this Respondent's channel was dropped from Petitioner's platform on 16.03.2017. This dropped notice is **Annexure-F (colly)**, to petition. In follow up action, Emails dated 19.04.2017 and 12.06.2017, demanding outstanding subscription dues, were sent to Respondent, but of no avail. These Two Emails are **Annexures - G and H**, to petition. Respondent, had enjoyed the benefit under the agreement, but it's obligations were not fulfilled.

8. A cause of action had arisen, within the jurisdiction of this Tribunal, in the period of limitation, for recovery of Rs. 1,34,09,371/- (One Crores Thirty Four Lakhs Nine Thousand Three Hundred Seventy One only), plus interest, prayed as above. Hence, this petition, is with above prayer.

9. Reply, for and on behalf of Respondent, was with preliminary objection of total denial of contention of petition. But agreement dated 30.09.2015, was admitted one. It was stated that the Petitioner

and Respondent had entered, into agreement dated 30.09.2015, whereunder the Petitioner, was required to retransmit the channel of Respondent in its entirety, in the order and at the time transmitted by respondent company, without any editing, delays, alteration, interruption, insertion of graphic or animated overlays, pull-throughs or crawls, scrawls, scrolls, deletions or additions. However, from the time, the channel was launched on the Petitioner's platform, i.e., 23.02.2016, there were technical issues, at the Petitioner's end in retransmitting the channel of Petitioner to its subscribers. The Respondent was shocked to find that majority of subscribers were not receiving the signals of Respondent's channel. The Respondent, received a large number of complaints from the subscribers of the Petitioner, from Bombay, Ahmedabad, Kolkata and other part of the country, who were unable to watch Respondent's channel. This matter was raised with the officials of the Petitioner's company orally by Respondent, which was assured by Petitioner, that the problem will be resolved immediately. But no action was taken. Respondent, vide its Email dated 29.02.2016, made a written complaint to Petitioner, in this regard. Petitioner was upgrading its platform from MPEG 2 to MPEG 4 Set Top Boxes, and that the Respondent's channel was available on the

GSAT-10 satellite, which is a new satellite, due to which several changes were required at the customer's end and as such, the Respondent's channel was not available to most of its subscribers of Petitioner. Subscribers were required to update the Set Top Box software, update LNB, add a second cable going from the dish to the box, change box from old MPEG 2 to MPEG 4. But it was not done so.

10. While at the time of entering into the said agreement, the respondent was not informed that it's channel would not be available to most of its subscribers. Due to above circumstances, the Respondent's channel was not re-transmitted to all the subscribers of the Petitioner. Respondent, as stated in its Email dated 29.02.2016, had agreed to the carriage fee under the agreement, dated 30.09.2015, on the premise that Channel of Respondent would be available to all the subscribers of the Petitioner and since that was not happening, the carriage fees would have to be re-negotiated. The Petitioner in its Email dated 29.02.2016, for the first time admitted that about 3 Lakhs boxes were not receiving the signal of Respondent's channel. Mr. Himanshu Pandey, on behalf of the Petitioner, mentioned that he could discuss the issue of the revision of carriage fee with his management. The

reply, by Respondent on the same day, by Email was with this denial that out of 30 boxes only 4 were receiving their channel. Hence, the number of 3 Lakhs is incorrect, it is much more than that. Hence, there was non-compliance by Petitioner company. Owing to non-compliance by Petitioner, carriage Fee, being claimed, by Petitioner, was not payable. Rather, was to be negotiated, but no negotiation or fresh issuance of carriage fee, demand was made nor the technical issue was got resolved. Rather this false claim, by this petition, was made. Hence, this petition was requested to be dismissed.

11. In rejoinder, the contention of reply was negated, with reiteration of contentions of petition. The alleged technical issue is an afterthought. Only 3 lakhs Set Top Boxes out of 12 million were with problem for a temporary period and that was resolved instantly. No such reason for non-payment was raised prior to this reply. Rather, Respondent's own correspondences on November 24, 2016, March 02, 2017 and April 20, 2017, in clear terms do not mention the Respondent's unwillingness to pay on any such account. Rather, he clearly states that he could not muster the revenue that was expected by it. Hence, a request was for reduced license fee. Hence, this reply is with afterthought.

12. On the basis of pleadings of both side, following issues were framed by Court of Registrar, on 01.02.2019:-

[1] Whether the Petitioner has violated the terms of Access Agreement dated 30.9.2015 as it has failed to provide proper and uninterrupted transmission of respondent's channels as per agreement to its entire customer base and thereafter has unilaterally dropped the Respondent's channels from its platform causing loss of its customer base and loss of profit to the respondent, as is alleged by the Respondent? If so, whether the respondent is entitled for refund of fees already paid and also to recover the damages from the petitioner?

[2] Whether the Respondent has failed to make timely payments towards Bandwidth Support Fee to the Petitioner under the Access Agreement dated 30.9.2015?

[3] Whether the Respondent is liable to pay a sum of Rs.1,34,09,371/- towards outstanding Bandwidth Support Fee to the Petitioner under the Access Agreement dated 30.9.2015?

[4] Whether the Respondent is liable to interest on the outstanding amount due to the Petitioner and at what rate?

[5] To what relief, if any, the petitioner is entitled?

13. Evidence, by way of affidavit, of Mr Gyaltzen G. Barfungpa, for Petitioner company, and evidence, by way of affidavit, of Mr. Jasmin B. Shah, RW-1, for Respondent, was filed on record.
14. Even after grant of sufficient time, for filing written submission, if any, by Respondent, no appearance, for and behalf of Respondent, was there. Ultimately, an order to proceed ex-parte was passed on 02.08.2023.
15. Heard, argument of learned counsel for Petitioner, and gone through material placed on record.
16. 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.
17. 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 cast 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.

18. **Issue No.1**

Undisputed fact is the execution of the agreement dated 30.09.2015, with terms and condition written in it. The acting upon of agreement wherein Respondent's channel was transmitted by Petitioner on its platform for above agreed scheduled Bandwidth Support Fee of Rs. 1,75,00,000/- (Rupees One Crores Seventy Five Lakhs only) p.a., resultantly Rs. 5,25,00,000/- (Rupees Five Crores Twenty Five Lakhs only) for three years. Issuing of invoices, also not disputed. The main dispute is of technical glitches, with complaints by subscribers, that they are not getting the channel of Respondent, owing to technical upliftment of system of Petitioner. This was admitted to be for above 3 Lakhs Set Top Boxes out of 12 million, that too for a temporary period. The reply filed by Respondent, is of this fact that there ought to be some negotiations regarding above technical failure. This was not

disputed by Respondent that it's channel was not being transmitted on Petitioner's platform .Rather, the complaint was with regard to non-receiving of Respondent's channel, by all subscribers of Petitioner and complaints with regard to it. But no specific number or any complaint or termination by Respondent, or the actual amount for which Respondent agrees to negotiate for payment, is there. Hence, this burden was over Respondent to specify as to how much Access Fee was payable by him to Petitioner, or how many subscribers were of that category, who could not receive the Respondent's channel. Hence, execution of agreement, transmission by Petitioner, receiving by few of the subscriber, channel owned by Respondent, entering into the agreement by both of the parties, and period of continuation, Ultimately, discontinuing by Petitioner, are undisputed fact. All these contentions, raised in petition have been supported by uncontroverted affidavit, filed by Petitioner, in its evidence. Neither its witness got cross-examined by Respondent, nor specific plea of the unsatisfactory transmission or interrupted transmission could be put to the witness of Petitioner company. Hence, the very burden of proving the reply was upon the Respondent, and it could not be fulfilled. Whereas, the specific Email, of Respondent, is of this

contention, that owing to non-earning of revenue, the amount agreed to be paid, could not be paid by Respondent company. Meaning thereby, the non-payment, owing to some technical glitches, was not complained, by respondent company. Hence, this issue no. 1 was to be specifically proved by Respondent, and it could not be proved so. Rather, contention of Petition has been fully proved by Petitioner, by way of this uncontroverted affidavit. Hence, this issue is being decided in favor of Petitioner.

19. **Issue No.2**

The payment for the invoices raised by Petitioner, for this cause of action, had not been complained, or said to have been made by Respondent. Rather, the contention is that the services were not up to the mark and subscribers could not receive the channel of Respondent. Hence, payment was not made. This fact of unsatisfactory transmission, and non-receiving of channel by specific or accurate subscriber, was failed to be proved by Respondent, in disposal of issue no.1. Hence, the failure to make payment, towards demanded amount, in view of access agreement dated 30.09.2015,

has been duly proved, by Petitioner company. Hence, this issue is being decided in favor of Petitioner.

20. **Issue No.3**

This issue is one and the same as issue No.2. Hence, the demand notice, demanding the amount of Rs. 1,34,09,371/- (Rupees One Crores Thirty Four Lakhs Nine Thousand Three Hundred and Seventy One Only), towards Bandwidth Support fee, to the Petitioner, as against Respondent, in connection with Access Agreement 30.09.2015, had been filed, as annexure to petition. And the contention of this notice has been proved by way of uncontroverted affidavit of PW-1. The payment towards it has not been said by Respondent. Hence, this due has been duly proved by Petitioner.

21. **Issue No.4**

The interest in the tune of 18% p.a., towards outstanding dues, if any, was entered in the agreement itself. But considering the fiscal scenario, and the rate of interest, being awarded by this Tribunal, in many of the petitions, decided previously, the interest payable to the Petitioner company, will be just and reasonable, in the tune of 9% p.a.,

towards the outstanding dues, as just and reasonable interest. Hence, this issue is being decided, accordingly.

22. **Issue No.5**

On the basis of discussions made above. The petition is to be allowed with cost, for the principal amount claimed, as on the date of filing of this petition, with a simple interest, *pendentelite* and future, till actual date of payment, in the tune of 9% p.a. This issue is being decided, accordingly.

ORDER

Petition is being allowed, with cost. Pending MAs, if any, shall also stand disposed of. Respondent, Transmedia Software Limited, is being directed to make payment, by way of deposit, within two months, from the date of judgment, an amount of Rs. 1,34,09,371/- (Rupees One Crores Thirty Four Lakhs Nine Thousand Three Hundred and Seventy One Only), along with simple interest, *pendentelite* and future i.e., till actual date of payment, in the tune of 9% p.a., in the Tribunal, for making payment to Petitioner company.

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

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

12.12.2023
/TU/

