

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****Dated 19th May 2023****Broadcasting Petition No. 24 of 2019**

Hathway Digital Private Limited

...Petitioner

Vs.

Syas Cable Tv Network & Anr.

...Respondent(s)

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

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent No. 2 : Mr. Aryan Yashraj, Advocate

JUDGMENT

1. This Petition, under Section 14(A) (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, Hathway Digital Private Limited, petitioner, against Syas Cable Tv Network & Siti Networks Ltd, respondents, with a prayer for a direction against respondent, to pay an amount of Rs. 1,62,780/- (One lakh sixty two thousand seven hundred eighty only) towards

outstanding subscription dues, with *pendentelite* and future interest @18 % p.a. and a direction to respondent to return 750 Set Top Boxes (STBs) in working order to petitioner and in case of its failure, to make payment, in the tune of Rs. 9,37,500/- (Rupees Nine lakh thirty seven thousand five hundred only) @ of Rs. 1250/- per STB. 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 petitioner - Hathway Digital Private Limited is wholly owned subsidiary company of Hathway Cable and Datacom Limited, a company registered under Companies Act, 1956, and operating PAN India retransmitting the signals to its various operators. That Cable Tv business of Hathway Cable and Datacom Limited, has been assigned to Hathway Digital Private Limited, w.e.f. 1.4.2017, due to internal restructuring of petitioner company.

Respondent No. 1 is a Local Cable Operator(LCO), represented through its proprietor, namely Mr. Sharafat Ahmed, operating for retransmitting the signal to the subscribers.

Respondent No. 2-Siti Networks Ltd., is a competitive MSO, operating in above area of operation of respondent No. 1.

3. On the request of respondent No. 1, Interconnect Agreement, dated 26.6.2016, was executed by petitioner and in compliance of same, petitioner had issued 750 STBs along with Viewing cards(VCs) to respondent No. 1. Interconnect Agreement entered, in between, is **Annexure P-1** to petition. The petitioner issued invoices to respondent No. 1, which were duly received by respondent. Part payments were being made and repeated defaults in discharging its liability, were committed by respondent No. 1. The invoices are **Annexure P-2** (colly).

4. 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-3**. The agreement dated 26.6.2016, expired by efflux of time on 25.6.2017. A request was followed up for renewal of agreement with respondent No. 1, but it was avoided deliberately. However, signals were availed by respondent No. 1. A notice dated 15.6.2018, was issued to respondent No. 1, which is **Annexure P-4**. But, it was of no heed. Rather respondent No. 1, against, Interconnect

Regulations, had migrated to respondent No. 2, without clearing outstanding subscription amount and returning STBs, along with viewing cards, to petitioner.

5. Respondent No. 1, in collusion with respondent No. 2, played fraud with petitioner, by way of swapping of 750 STBs, belonging to petitioner with Respondent No. 2, causing huge financial loss to petitioner. Each of STBs were of Rs. 1250/- cost and the total amount was Rs.9,37,500/- (Rupees Nine lakh thirty seven thousand five hundred only) @ 1250/- STBs, to be compensated by Respondent No. 1 to petitioner, exclusive of outstanding subscription amount of Rs.1,62,780/-. This was requested by way of notice dated 15.11.2018 too. But it was not answered. Hence, a cause of action, within the jurisdiction of this Tribunal, had arisen and finally, this petition with above prayer, got filed.

6. Respondent No. 1 was absent and matter was proceeded ex-parte against him. Respondent No. 2 filed its written statement, denying the contention of petition and its liability with regard to subscription charges, being said to be due against respondent No. 1. No swapping of STBs by and on behalf of respondent No. 2, was there. Rather respondent No. 2, being a

competitive MSO, had entered in Interconnect Agreement with respondent No. 1, and had transmitted by way of its own system. As there is no privity of contract in between respondent No. 2 and petitioner, hence, no claim of petitioner, against respondent No. 2, is tenable. More so, no such swapping could be proved by petitioner as against respondent No. 2.

7. Replication by petitioner with the reiteration of petition was there.

8. Court of Registrar, vide order dated 27.8.2019, framed following issues, for and on behalf of pleadings of petitioner and respondent No. 2. :

[1] Whether the Respondent No.1 has illegally and unilaterally migrated from the network of the Petitioner to the network of Respondent No.2 and swapped its STBs without clearing the outstanding subscription fees and without returning the 750 STBs to the Petitioner in contravention of Digital Addressable System Regulations, issued by TRAI, if so, its effect?

[2] Whether the Petitioner had provided 750 STBs to Respondent No.1 and whether the Respondents are liable to return the same to the Petitioner or in alternative, whether the respondents are liable to pay a sum of Rs.9,37,500/- towards the cost of 750 STBs?

[3] Whether in the absence of any Subscription Agreement between the Petitioner and Respondent No.2, Respondent No.2 is not a

necessary party and whether the present petition suffers from the defects of misjoinder of parties, as is alleged by Respondent No.2?

[4] Whether no cause of action has arisen against Respondent No.2 and whether the present petition is not maintainable qua Respondent No.2?

[5] Whether the Petitioner is entitled to recover an amount of Rs.1,62,780/- from the Respondents towards the outstanding subscription charges and whether the Petitioner is also entitled to claim the interest @ 18%, as has been claimed.

[6] Whether the Petitioner is entitled to claim the Relief of Permanent injunction against Respondent No.2

[7] To what relief, if any, the Petitioner is entitled?

9. Evidence by way of affidavit of petitioner, along with a certificate under Section 65B 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.

10. 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.

11. 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.

12. Written submission by petitioner and respondent No.2 got filed.
13. Heard learned counsel for both side and gone through the material placed on record.
14. **Issue No. 2**

Petitioner's evidence i.e. Affidavit of Mr. Ashish Singh is with reiteration and the contention of the petitioner, wherein the interconnect agreement has been made Annexure to affidavit, and it was not

controverted by respondent no. 1. Issuance of 750 STBs along with VCs, in compliance of interconnect agreement, in between, petitioner and respondent no. 1, has been stated in this uncontroverted affidavit. The price per STB, is given as Rs. 1250/- and total amount, as a cost of these STBs as well as VC has been calculated to be Rs. 9,37,500/-. Whereas, as per Model Interconnect Agreement (MIA) and the agreement entered, in between, the compensation for STBs, ought to be the depreciated value of STB and this Tribunal, very often has decided depreciation of 15% p.a. for the value of purchase. Hence, Rs.1250/- has been claimed as the value of per STBs, and with depreciated value, it will come to Rs. 1050/- per STB. Hence, the amount payable in case of failure to restore the STBs and VCs, will come to Rs.7,87,500/- (Rs.1050*750 STBs). The written submissions filed by the petitioner and arguments advanced is of this fact that towards outstanding subscription amount, a cheque of Rs. 99,630/- was paid by respondent no. 1 and it was got cleared. Hence, the subsisting outstanding subscription amount remains Rs.63,150/-, for which petitioner is entitled. Hence, this issue is being decided, accordingly.

15. **Issue No. 3.**

Respondent No. 2, is a competitive MSO, written in petition itself and transmission of signals to LCO, respondent no. 1 is being stated to be by competitive MSO, respondent no. 2. The same is there in evidence filed by respondent no. 2, in its affidavit, which is uncontroverted. Hence, admittedly, there is no privity of contract, in between, petitioner and respondent no. 2 and proposition of law made by this Tribunal, in many cases is of this effect, as competitive MSO, having no privity of contract, be not held liable for any default made by LCO. With regard to liability arisen with other competitive MSO, out of interconnect agreement, in between, petitioner and that LCO. Hence, respondent no. 2 is not to be fastened with any liability. Accordingly, this issue is being decided in favour of respondent no. 2.

16. **Issue No. 4**

In view of decision made on Issue No. 3, this issue is being decided in favour of respondent no. 2.

17. **Issue No. 5**

In view of decision made in Issue No. 2, petitioner is entitled for subscription amount of Rs. 63,150/-, with *pendentelite* and future interest over it @ simple interest 9% p.a., being very often provided by this Tribunal in petitions, decided by this Tribunal. Hence, this issue is being decided, accordingly in favour of petitioner.

18. **Issue No. 6**

This has been written in petition itself that by efflux of time, the interconnect agreement got its effect infructuous. Hence, no relief for permanent injunction related, with above interconnect agreement, is to be awarded. More so, learned counsel for petitioner is not pressing for this relief given in Issue no. 6. Hence, this is being decided in negative.

19. **Issue No. 1**

Proof of face-made by testimony of petitioner, ought to be rebutted by respondent no. 1. But owing to its failure to appear and contest, the same

burden could not be exhausted by respondent no. 1. However, petitioner, in its evidence, by way of uncontroverted affidavit, had proved this fact. But illegally swapping had been rebutted by evidence, by respondent no. 2. Hence, the very burden of proof of swapping with respondent no. 2, could not be proved by petitioner. Hence, this issue is being decided in negative.

20. **Issue No. 7**

On the basis of discussion made above, the petition is liable to be allowed against respondent no. 1, for outstanding subscription amount of Rs. 63,150/-, alongwith *pendentelite* and future interest over it @ simple interest of 9% p.a., till date of actual payment and a direction for restoration of 750 STBs alongwith VCs, in good working condition to petitioner by respondent No. 1 and in case of failure to make the payment, a compensation in the tune of Rs. 7,87,500/- (Rs. 1050*750 STBs) for 750 STBs and VCs @ Rs. 1050/- depreciated value per STB.

No relief against respondent no. 2 is to be awarded. This issue is being decided accordingly.

ORDER

The petition is allowed. Respondent No. 1 – Syas Cable TV Network is being directed to make deposit of Rs. 63,150/-, alongwith *pendentelite* and future interest over it @ simple interest of 9% p.a., till date of actual payment in the Tribunal, for making payment to petitioner within two months of date of judgment with a further direction for restore/return of 750 STBs alongwith VCs, in good working condition, to petitioner by respondent no. 1, within two months of judgment and in case of failure, to make the payment, a compensation in the tune of Rs. 7,87,500/- (Rs. 1050*750 STBs) for 750 STBs and VCs @ Rs. 1050/-, depreciated value per STB, alongwith *pendentelite* and future simple interest @9% p.a., till date of actual payment, in the Tribunal for making payment to the petitioner.

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

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(Justice Ram Krishna Gautam)
Member

19.5.2023
/NC/

