

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 9th May 2023

Broadcasting Petition No. 356 of 2017

M/s Siti Network Limited ...Petitioner

Vs.

M/s Titu Cable Network & Anr. ...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Ms. Ritwika Nanda, Advocate
Mr. Aryan Yashraj, Advocate

For Respondent No. 2 : Mr. Vibhav Srivastava
Ms. Aashi Arora
Ms. Nitika Kumar, Advocates

JUDGMENT

1. This Petition under Section 14 read with Section 14A of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed for recovery of sum of Rs. 2,09,441.00 (Rupees Two Lakhs Nine Thousand Four Hundred and Forty One only) towards outstanding

subscription dues with return/ recovery/ handover of 423 Set Top Boxes in working condition by Respondent No.1 to Petitioner, and in case of failure a payment of sum of Rs. 6,26,032.00 (Rupees Six Lakhs Twenty Six Thousand and Thirty Two only), in lieu thereof for those STBs.

2. In brief, Petition contends that Petitioner is a company, duly registered under the Companies Act, 1956, having its registered office at Madhu Industrial Estate, Pandurang Budhkar Marg, Worli, Mumbai with its corporate office at FC- 19, Sector 16A, Third Floor, Film City, Noida, Uttar Pradesh. It is a Multi System Operator (hereinafter referred to as MSO) within the meaning of the term under Rule 2(c) of the Cable Television Network Rules, 1994 and has been granted license under Rule 11 C thereof bearing No. 9/50/2012 dated 06.07.2015, valid and subsisting. It has a license to re-transmit the digital cable TV signals of various broadcasters in the territory/ area, in which Respondent operate. Thus, Petitioner is a 'service provider' within the meaning of the term under the TRAI Act, 1997. This Petition was filed after signature and verification made by Mr. V Suresh Kumar, duly authorized, vide Resolution dated 10.04.2017 of Meeting of Board.

Respondent No.1, is proprietorship concern, of Mr. Rajesh Kumar having its office at S-284, Mangolpuri, New Delhi, which is a registered Local Cable

Operator, (hereinafter referred to as LCO) with the local Post Office, authorized to carry on its business, as Cable Operator.

Respondent No.2, is a competing Multi System Operator, for the same area wherein, Respondent No.1 operates.

3. Petitioner entered into an Interconnection Agreement with Respondent No.1 on 27.08.2012 in terms of Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, as notified by TRAI, from time to time. As per Interconnection Agreement, Petitioner was to provide the hardware, such as Set Top Boxes (STBs) and Viewing Cards (VCs), to continue transmission of signals of various channels to Respondent No.1, through Trunk Line/ IP Line/ other permissible mode and means to further or instant re-transmission by Respondent No.1, to the subscribers in the territories. The same Interconnection Agreement is **Annexure P-4** to the petition. As per clause 7 of the Interconnection Agreement, Respondent No.1 was supposed to clear and make the entire payment of the invoices on or before the seventh day of next month, irrespective of the fact, whether the Respondent No.1 had collected the same, from the subscriber or not. The billing/ invoices for subscription charges shall be based on the price of each channel/ bouquet declared by the MSO, for the subscribers and the number

of channels and/or bouquets of channels, subscribed by the subscriber, as per the policy of MSO, from time to time. As per terms of Interconnection Agreement, Petitioner gave full access of its system to the Respondent No.1, in order to cater to the needs of the subscribers, on behalf of the Petitioner.

4. Petitioner, vide its Own Your Customer portal, had raised invoices for a sum of Rs. 9,58,482/- (Rupees Nine Lakhs Fifty Eight Thousand Four Hundred Eighty Two only) till date, which have been duly received, and accepted by Respondent No.1, without any complaint. As against this amount, a sum of Rs. 7,49,041/- (Rupees Seven Lakhs Forty Nine Thousand and Forty One only) was received by Petitioner, as per Statement of Accounts, maintained by Petitioner Company, in the normal course of business, a sum of Rs. 2,09,441/- (Rupees Two Lakhs Nine Thousand Four Hundred and Forty One only), is outstanding and due from the Respondent No.1, against the invoices raised by Petitioner. But the same was not paid. The invoices raised are **Annexure P-5** to Petition and Statement of Accounts of the Respondent No.1, maintained by Petitioner, is **Annexure P-6**. The above outstanding dues, were repeatedly requested, to be paid by Respondent No.1, but accept assurance, nothing was made. But business relationships were maintained and signals were continued. Huge money was invested by Petitioner, to purchase Set Top Boxes issued to

Respondent No.1, for installation at subscriber's premises, on behalf of the Petitioner, to avail digital cable TV services from the Petitioner. Total number was 481 STBs with viewing cards(VCs). Those are of exclusive ownership of the Petitioner, and as per Clause 14 of Interconnection Agreement, on the expiry of the Interconnection Agreement, Respondent No.1 was liable to re-possess the hardware, especially the STBs with viewing cards of the Petitioner for handover the same to the Petitioner. And in the event of its failure to do so, under Clause 14 (iii) of the Interconnection Agreement, Respondent No.1 is liable to compensate the Petitioner, towards the cost of each STBs along with interest @15%. But Respondent No.1 didn't return those 481 STBs and its viewing cards. Hence, it is liable to make return the same, in working condition or to make payment for same. STBs and VCs amounting to Rs. 7,39,437/- (Rupees Seven Lakhs Thirty Nine Thousand Four Hundred Thirty Seven only) along with interest. Respondent No.1 had continuously availed the uninterrupted supply of digital cable TV signals from the Petitioner, even though Respondent No.1, time and again, defaulted in paying the subscription fee, as per the terms of the agreed arrangement and Interconnect Agreement executed, in between. Rather, Respondent No.1 has unilaterally migrated to Respondent No.2 network, without clearing the outstanding dues, or returning STBs and viewing cards, nor any mandatory legal requirements, of a

notice of three weeks, was ever given by Respondent No.1. Respondent No.2 is unlawfully providing Digital Signals to Respondent No.1 knowing well of this illegal migration by Respondent No.1. Notice was issued to Respondent No.1 on 15.06.2016, for making the payment of the outstanding subscription amount and owing to Interconnection Agreement, but it was with no response. Hence, a cause of action had arisen on 27.08.2012, when the Petitioner and Respondent No.1 entered into the Interconnection Agreement and this was further arisen on 15.06.2016, when legal notice was issued and it was not obeyed.

5. Hence, this Petition, being in the jurisdiction of this Tribunal, has been filed, with a prayer for recovery of sum of Rs. 2,09,441.00 (Rupees Two Lakhs Nine Thousand Four Hundred and Forty One only) towards outstanding dues, as on 01.10.2014 and return/ handover 423 number of Set Top Boxes and Viewing Cards, by Respondent No.1 to Petitioner, in working condition, or to make payment of Rs. 6,26,032/- (Rupees Six lakhs Twenty Six Thousand and Thirty Two only) towards the cost of those 423 STBs and Viewing Cards, with a further interest @ 15% for *pendentelite* and future, till actual payment.

6. As per order dated 27.11.2017, none appeared for respondent No. 1. Hence, matter proceeded ex-parte against respondent No. 1.

7. Respondent No. 2 filed its reply with this contention that respondent No. 1 has been a Local Cable Operator(LCO) in that area for respondent No. 2, since 01.11.2012 and an Interconnect Agreement dated 13.09.2012 was executed, in between, respondent No. 2 and respondent No. 1. No illegal migration by respondent No. 1 to respondent No. 2, was there. More so, there was no privity of contract, in between, respondent No. 2 and petitioner. Hence, respondent No. 2, cannot be made responsible for liabilities of respondent No. 1, if any, as alleged by petitioner. No cause of action against respondent No. 2 is there. Hence, respondent No. 2 is of no concern with alleged cause of action. Petition was requested to be dismissed for respondent No. 2.

8. On the basis of pleadings of both sides, following issues were framed on 25.01.2018 :

1. Whether the Petitioner is entitled to the reliefs against Respondent No.1 as sought for in the prayers of the present Petition?

2. Whether the Respondents, in connivance with each other, swapped the STBs of the Petitioner?
9. Petitioner, filed its evidence, by way of affidavit of PW – 1, Mr. V. Suresh Kumar. No evidence by respondent No. 2 got filed. Written submissions, by petitioner and respondent No. 2 were filed.
10. Heard arguments of learned counsel for both side and gone through materials, placed on record.
11. 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.
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 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**

Outstanding amount of Rs. 2,09,441/-, as on 09.04.2018, has been said in the affidavit, filed in evidence by petitioner, as Exhibit PW- 1/5 at page No. 24 and Para No. 9, at page Nos. 10 – 11 wherein, the Statement of Account, given in Exhibit PW - 1/6 at page No. 25-31 and Para 9 at page Nos. 10-11, has been elaborated. This statement on Oath, is with no contradiction. Rather, it is un-controverted averment reiterating the contention of petition. Hence, with regard to respondent No. 1 nothing against this proved fact is there. So far as respondent No. 2 is concerned, he is a competitive MSO, admittedly, having no privity of contract, with petitioner, and as per settled proposition of this Tribunal, the competing MSO may never be held liable for mis-deed of LCO. Hence, neither respondent No. 2 was in any Interconnect Agreement with petitioner nor subscription amount was said to be due against respondent No. 2. Hence, it was claimed against respondent No. 1 and respondent No. 1 was LCO of petitioner, against whom this outstanding due, was said to be due and against whom legal notice was issued.

So far as 423 number of STBs are concerned, the same were said to be issued, and deployed at subscriber's premises, by respondent No. 1 in Para 26 at the page 18 of the affidavit, filed in evidence. The STBs log report Exhibit PW – 1/7 at pages 32 – 41 of the affidavit, is with mention of those STBs and the cost of those STBs issued to respondent No. 1. There is no contravention of these facts stated on oath, for and on behalf of petitioner, admitted by respondent No. 1, against whom this liability had been claimed. Hence, the Interconnection Agreement dated 27.08.2012 Exhibit PW – 1/4, is on record. It was executed between petitioner and respondent No. 1, which is a sacrosanct, and terms of this Interconnect Agreement, were mandate of Interconnection Regulations for that period. The illegal migration by respondent No. 1, to competing MSO, respondent No.2 has been said in breach of the clauses of Interconnect Agreement. This has been specifically said in an un-controverted affidavit. Hence, the price of STBs written in above Annexure are said to be ranging from Rs. 1406/- to Rs. 1448/- (some of them were said to be of Rs. 1,732/-). Hence, what should be the actual depreciation value of those hardware is to be considered? Learned counsel for petitioner vehemently argued the law propounded by this Tribunal in B.P. No. 119 of 2018, wherein the actual cost was said to be worth for each STBs. But considering the depreciating value @ 15% generally comes to the amount of

Rs. 1200/- per STB, to be reasonable fair and true worth for each STBs. Hence, amount of Rs.5,07,600/- (Rupees Five Lakhs Seven Thousands and six hundred only) (Rs. 1200*423 STBs) is to be paid by respondent no. 1 to the petitioner. A simple interest @ 9% per annum, which is being very often given by this Tribunal, considering the fiscal atmosphere, for *pendentelite* and future interest, appears to be reasonable for its award over above amount, against respondent No. 1. This issue is being decided in favor of petitioner, against respondent No.1, accordingly.

14. **Issue No. 2**

Un-rebutted statement of petitioner with regard to illegal swapping by respondent No. 1 of those STBs of petitioner is there and learned counsel for respondent No. 2, in its argument has said that the relay of signal by MSO - respondent No. 2 to respondent No. 1, was in accordance with Interconnect Agreement executed, in between, competitive MSO- respondent No. 2 and LCO- respondent No. 1. There was no swapping of STBs of petitioner by respondent No. 2 over the connection of respondent No. 2. But the liability of respondent No. 2 for misdeed of respondent No. 1 had been denied. It was a burden of proof over petitioner for proving illegal swapping by respondent No. 1 and this has been borne by petitioner. The evidence had been taken, by

way of affidavit, under Order 19 and this with categorical mention of this illegal swapping. It has never been rebutted and controverted by respondent No. 1. Hence, respondent No. 2, having no privity of contract with petitioner, is of no concern or of with no liability of respondent No. 1. Hence, the issue No. 2 is being decided against respondent No. 1 in favour of plaintiff/petitioner.

15. Having discussed as above, it is apparent that respondent No. 2 is of no liability and is to be imposed nothing for misdeed by respondent No.1. But for respondent No.1, there is liability for outstanding subscription dues amounting to Rs. 2,09,441.00 (Rupees Two Lakhs Nine Thousand Four Hundred and Forty One only) and Simple interest @ 9% per annum *pendentelite* and future over above outstanding subscription dues. Respondent No. 1 is also to be directed to restore and hand over 423 STBs along with viewing cards, in working order to the petitioner, within two months of judgment and in case of its failure, the compensation amount i.e, actual and reasonable depreciated value @ Rs. 1200/- per STB, for those hardware of these 423 STBs and viewing cards amounting to of Rs. 5,07,600/- (Rupees Five Lakhs Seven Thousands and six hundred only) with a simple

interest @ 9% per annum *pendentelite* and future, is to be paid by respondent No. 1 to petitioner. This petition is to be allowed, accordingly.

Order

Petition is being allowed. Respondent No. 1 is being directed to make deposit in the Tribunal, within two months from the date of judgment Rs. 2,09,441.00 (Rupees Two Lakhs Nine Thousand Four Hundred and Forty One only) along with 9% per annum simple interest *pendentelite* and future, till actual date of payment, for making payment to petitioner. Respondent no. 1 is being further directed to hand over 423 STBs and Viewing cards in the working condition, to petitioner, within two months of judgment and in case of its failure, to deposit Rs. 5,07,600/- (Rupees Five Lakhs Seven Thousands and six hundred only) @ Rs. 1200/- per STB and Viewing cards, along with simple interest of 9% per annum, for above amount in the Tribunal, within two months from the date of judgment, for making payment to petitioner.

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

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(Justice Ram Krishna Gautam)
Member

09.05.2023
/NC/