

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****Dated 13th October 2023****Broadcasting Petition No. 640 of 2018**

Hathway Digital Private Limited ...Petitioner

Vs.

YOGI NETWORK PRIVATE LIMITED ...Respondent

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

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent : None

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 company, Hathway Digital Private Limited, against Respondent company, Yogi Network Private Limited, with a prayer for recovery of a sum of Rs. 40,75,532/- (Rupees Forty Lakhs Seventy Five Thousand Five Hundred and Thirty

Two Only), due and payable towards Channel Placement charges, alongwith interest, pendentelite and future, till actual payment, @ Rs. 18% p.a.

2. In Brief, Petition contends, that petitioner, namely Hathway Digital Private Limited, is a wholly owned, subsidiary company of Hathway Cable and Datacom Limited, registered under Companies Act, 1956 and having its office at "805/806, "Windsor" Off C.S.T. Road, Kalina, Santacruz (E), Mumbai-400098, engaged in the retransmitting of the signals of Cable TV to its various operators on Pan India basis. The Respondent, namely Yogi Network Private Limited, is a company, incorporated under the Companies Act, 1956, having its registered office at Survey No. 70, Panchavati Colony, Manikonda, Hyderabad-500089 and is a broadcaster / Channel Provider, distributor of the channel namely "Yogi TV" (Telegu Religious Channel). The Respondent, being desirous of placing/promoting its channel on the Petitioner's network, approached the Petitioner company, entered in a channel placement agreement, in form of Memorandum of Understanding (MOU), in the year 2016, under the terms enumerated in it. In lieu of this placing of above channel by petitioner company,

Respondent was to pay Rs. 45,00,000/- (Rupees Forty Five Lakhs Only) @ 15% p.a., including applicable taxes, to be paid on quarterly basis, in advance. This Memorandum of Understanding (MOU) was executed on 27.02.2017, which was valid for one year, and it was executed for the area of Hyderabad. This Memorandum of Understanding (MOU) is **Annexure P-1**, to petition. Thus in terms of the aforesaid Memorandum of understanding (MOU), Petitioner raised invoices on the respondent which were duly received by respondent without any protest or demur. A part payment with regard to above invoices, since the very inception was being made by respondent and ultimately he became regular and chronic defaulter in discharging its liability. Copy of some of the invoices, sent to respondent, are appended as **Annexure P-2** (colly), to petition.

3. A statement of accounts, maintained by Petitioner company, in its usual and ordinary course of business, was appended as **Annexure P-3**, to petition. Respondent had violated the terms and conditions of Memorandum of Understanding (MOU) and always avoided to clear the outstanding dues of the petitioner, towards channel placement dues despite regular requests, follow-ups and reminders from the

Petitioner to Respondent. Instead of coming forward of bonafide intentions of making payment, only provided false assurances to the petitioner. Whereas, petitioner always acted bonafidely in terms of the Memorandum of Understanding (MOU), channel was continuously placed by petitioner at desired frequencies, but payment was not made. A notice, dated 12.01.2018, calling upon the respondent to pay an amount of 34,59,194/- (Rupees Thirty Four Lakhs Fifty Nine Thousand One Hundred and Ninety Four Only), towards channel placement charges or to face the disconnection, was served on respondent, on the ground of non-payment of outstanding dues. This notice of demand cum dis-connection was appended as **Annexure P-4** (colly). This was not responded, resulting the switching off the channel of respondent, from the network of Petitioner company on 07.03.2018. Various Emails were exchanged between the parties with regard to clearance of dues, towards outstanding channel placement charges, some of them are **Annexure P-5** (colly), to petition. A cause of action, for this petition, within the jurisdiction of this Tribunal, under period of limitation, had arisen. Hence, this petition, with above prayer.

4. A notice was issued to Respondent, and counsel for respondent had appeared. A time was granted for filing its reply, but the same was not utilized. Ultimately this tribunal, vide order dated 03.07.2019, closed opportunity for filing reply. Ultimately formal order for proceeding ex-parte, was also passed on 10.07.2019. Subsequently, Ms. Babita Sant, Advocate for respondent, had withdrew her Vakalatnama, because of conduct of respondent and no instruction by it. Ultimately, none appeared for respondent, nor any reply was filed. As listing was made after about three years, Hence, in utter precaution, a notice was issued to respondent even through police mode, as was requested by petitioner for making service because of deliberate avoidance of service of notice by respondent. But even after sufficient service by police mode, none appeared for respondent. Evidence, by way of affidavit of petitioner, was filed and the same was along with application in form of affidavit, with regard to compliance certificate, required under Section 65 B, of Indian Evidence Act. Copy of authority letter dated 21.08.2019 was also filled depicting the authority of witness Mr. Sunil Kukreja, for filing its evidence, for and on behalf of petitioner company. Copy of Memorandum of understanding (MOU), executed in year, exhibit PW- 1/2 and copies of some of the invoices,

sent to Respondent, exhibit PW-1/3 with copy of statement of accounts maintained in ordinary course of business by Petitioner company, exhibit PW-1/4, along with copy of dis-connection notice, issued by Petitioner, against Respondent, exhibit PW-1/5 (colly), few of the Emails exchanged, in between, filed as exhibit PW-1/6 (colly), and the copy of notice dated 18.12.2018, sent by Petitioner to Respondent, along with proof of dispatch exhibit PW-1/7 (colly) was filed.

5. Heard arguments of Learned Counsel for Petitioner and gone through material placed on record.
6. 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.
7. 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.

8. Petitioner, by way of ex-parte evidence affidavit, has proved its contention of Hathway Digital Private Limited, to be wholly owned subsidiary company of Hathway Cable and Datacom Limited, a company registered under Companies Act, 1956, and Respondent also being a company registered under Companies Act, having its registered office, given in petition. Respondent used to distribute channel namely “Studio N News” (Telugu Religious Channel) for which it was desirous of placing/promoting its channel on the Petitioner’s network. Hence, it approached Petitioner company, whereupon agreed to place the channel of Respondent over Petitioner’s network. A Memorandum of Understanding (MOU), in the year 2016, for placement charge of pay Rs. 45,00,000/- (Rupees Forty Five Lakhs Only) @ 15% p.a., plus services applicable, to be paid on quarterly basis, in advanced, for a period of one year, was executed on

27.02.2017, in between. This is exhibit PW-1/1 of paper book. A Memorandum of Understanding (MOU) dated 27.02.2017, in terms and conditions agreed therein, inter alia of placed channel for amount of Rs. 45,00,000/- (Rupees Forty Five Lakhs Only) plus taxes applicable thereat, on quarterly basis in advance for a period was executed on 27.02.2017, exhibit PW-1/2, at page no. 11 and 12 of the paper book was entered. Invoices with a notice for demand followed by a disconnection notice, was issued. Which were delivered. The same have been annexed with petition as well as with affidavit, filed in evidence. The same are depicted in Statement of Account, being maintained in usual and ordinary course of business of Petitioner Company, filed and annexed with evidence of Petitioner company, which apparently reveals Rs. 40,75,532/-(Rupees Forty Lakhs Seventy Five Thousand Five Hundred and Thirty Two Only), due towards placement charge till above notice. But no payment was ever made against this outstanding placement charge. This evidence is unrebutted affidavit corroborating the contention of pleading. Hence, case of Petitioner has been fully proved with no contravention. Accordingly, this petition is to be allowed, with cost.

ORDER

Petition is being allowed with cost, with direction to respondent, for making deposit of Rs. 40,75,532/-(Rupees Forty Lakhs Seventy Five Thousand Five Hundred and Thirty Two Only), along with pendetelite and future interest, till actual date of payment @ 9% p.a., within two month from the date of judgment in this Tribunal, for making payment to petitioner company.

Formal order/decre, be got prepared, accordingly.

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(Justice Ram Krishna Gautam)
Member

13.10.2023
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