

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 14th September 2023

Broadcasting Petition No. 193 of 2015

Hathway Cable and Datacom Limited ...Petitioner

Vs.

Ganga Enterprises ...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent : None

JUDGMENT

1. This Petition, under Sections 14 and 14A (1) and 14(a) (ii) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed by Hathway Cable and Datacom Limited, Petitioner, against Ganga Enterprises, Respondent, with a prayer for a direction against Respondent, to pay an amount of Rs.

44,83,200/- (Rupees Forty Four Lakhs Eighty Three Thousand and Two Hundred Only) towards outstanding dues, with *pendentelite* and future interest @21% p.a. towards channel packaging/ tiering and Placement Charges.

2. In brief, the Petition contends that Petitioner – Hathway Cable and Datacom Limited is a public limited Company incorporated under the provisions of the Indian Companies Act, 1956, having its Registered Office at 'Rahejas' 4th Floor, Corner of Main Avenue & V.P. Road, Santacruz (West), Mumbai – 400054 and Regional Office at AB-6, 2nd Floor, Safdarjung Enclave, New Delhi – 110029. The Petitioner is a cable television service provider, duly registered under the provisions of Section 3 of the Cable Television Networks (Regulation) Act, 1995 (hereinafter referred to as "Cable Television Act"). The Petitioner is an MSO/ Cable Operator, engaged in the business of distribution of television channels through Analog/ Digital, and holds the license to operate as a Cable Operator, under the Cable Television Networks (Regulation) Act, 1995.

3. The Respondent, Ganga Enterprises is a proprietor firm, engaged in the business of inter alia, distribution of its channel namely "Cinema TV" for the consumers/ subscribers through Television, having its registered office at 103, 104 Urvashi Complex, Dehradun Road, Rishikesh, Uttarakhand – 249201.

4. Respondent approached Petitioner for placing its channel namely "Cinema TV" and its content over Petitioner's network for getting promotion, as well as maximum coverage to its subscribers. A Memorandum of Understanding (MOU), having terms and conditions, written in it, and agreed, in between, both side, was got executed on 30.10.2012. It was agreed therein that in lieu of placing the said channel, Respondent would pay an amount of Rs. 1,20,00,000/- (Rupees One Crore and Twenty Lakhs only) plus taxes as per the terms of understanding. This payment was to be made by Respondent on quarterly basis, in advance, upon receipt of invoice from Petitioner. The period of understanding was since 01.12.2012 and was valid for one year.

5. The Memorandum of Understanding was **Annexure P-1** to Petition. This was acted upon by Petitioner and as per Memorandum of Understanding. Petitioner raised invoices over Respondent, which were duly received, without any protest or demur. But Respondent made part payments only and from very inception, he was a chronic defaulter in discharging its liabilities. Copies of invoices were **Annexure P-2 (Colly)** with Petition.
6. The copy of Statement of Account, of Petitioner's company, made and prepared under the usual and ordinary course of business, was **Annexure P-3** to the Petition. In spite of repeated request, as well as follow-ups and reminders, from Petitioner to Respondent, for making payment of Outstanding dues, Respondent withheld the payment of placement charges to Petitioner and as on date, he was liable to pay Rs. 44,83,200/- (Rupees Forty Four Lakhs Eighty Three Thousand and Two Hundred Only), alongwith interest @ 21% p.a., to the Petitioner.
7. Copy of the notice dated 05.02.2015, demanding the outstanding dues was **Annexure P-4 (Colly)** to Petition was made by Petitioner, but no payment was made. Cause of action, within period of Limitation and

jurisdiction of this Tribunal, had arisen in favour of Petitioner against Respondent. Hence, this Petition with above prayer.

8. In reply to the Petition, Respondent denied accrual of any outstanding dues against him. Rather Petitioner himself had not complied with the terms and conditions stipulated in the MOU. So far as carrying the channel of Respondent in the territory of Mumbai, having highest rating of channels throughout the country for considerable period of time i.e. from December 2012 till March 2013, Petitioner contumaciously avoided disclosing the payment of Rs. 10 lakhs on 04.06.2013, made to the travel agent, who was taking the various local cable operators of the Petitioner to the foreign trip. Respondent, on the instruction of the officials of the Respondent, on 05.02.2014 paid Rs. 20,00,000/- (Rupees Twenty Lakhs only) to one entity Venkata Sai Media Pvt. Ltd., having affiliation with the Petitioner, and the said amount had never been adjusted by the Petitioner. Respondent reserves his right to initiate appropriate recovery proceeding for this non-compliance of MOU, and non-adjustment of received money. Invoices were never raised nor channel was ever carried in Mumbai. Petition was requested to be dismissed.

9. Rejoinder-cum-replication was with reiteration of Petition. There was denial of contention of reply. Terms and conditions of MOU was complied by Petitioner. Channel of Respondent was carried by Petitioner in the territory of Mumbai for the period from December 2012 till March 2013. Rs. 10,00,000/- (Rupees Ten lakhs only) said to be spent to the travel agent was of different head, having no concern with present relief.

10. Court of Registrar, vide order dated 31.03.2016, framed following issues, on the basis of pleadings of Petitioner and Respondent:

- (1) Whether there has been a material breach of terms and conditions of the MOU by the Petitioner?*
- (2) Whether the Respondent is entitled to an adjustment in the placement charges, if yes to what extent?*
- (3) Whether the channel of the Respondent was placed in accordance with the terms of the MOU?*
- (4) Whether the Respondent is liable to pay carriage fee/ placement charges to the Petitioner?*
- (5) What relief, if any, the Petitioner is entitled to?*

11. In spite of sufficient service of notices, as evident from the order-sheets, none appeared for Respondent, and the matter was proceeded ex-parte.
12. Petitioner filed its evidence by way of affidavit of Shri Rajkishor Pathak, in evidence, under Order 19 of CPC.
13. Respondent filed the evidence of Shri Ajay Kumar Singh, in its evidence.
14. Written submission, by Learned Counsel for Petitioner, was also placed on record.
15. Heard arguments of learned Counsel for Petitioner and gone through materials 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 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.

18. **Issue Nos. 3 – 4**

Both of these issues are connected. Hence, are being decided together. This Petition, for and on behalf of Petitioner Company, for recovery of packaging/ tiering and Placement Charges, in the tune of Rs. 44,83,200/- (Rupees Forty Four Lakhs Eighty Three Thousand and Two Hundred Only), due as on 31.10.2014, alongwith with *pendentelite* and future interest, @21% per annum, was filed by Mr

Ram Prakash s/o Late Karan Singh. The Memorandum of Understanding with the Respondent, entered on 30.10.2012, in between Petitioner and Respondent Company, for the territory of Mumbai and Delhi, for placing the channel, namely 'Cinema TV', on the agreed frequencies, for a fee amounting Rs. 1,20,00,000/- (Rupees One Crore and Twenty Lakhs only), for a period of 01.12.2012 to 30.11.2013, i.e., **Annexure P-1** to Petition, was said to be the basis of this dispute. The execution of this MOU, terms and conditions written therein, were not disputed in reply filed by Respondent. But the dispute was with regard to non-performance of obligations by Petitioner itself. The other dispute was with regard to non-adjustment of the payment made in the tune of Rs. 10,00,000/- (Rupees Ten lakhs only) as well as Rs. 20,00,000/- (Rupees Twenty lakhs only). Hence, the very burden of proof of the fact that liabilities, incurred by Petitioner Company, was very well fulfilled by it, whereas, it was defaulted by Respondent, lied upon Petitioner Company and once the contention of pleading, which was being denied, was proved than the burden will shift over defendant/respondent to prove its contention. But, in present Petition, the witness examined by Petitioner Company is Mr. Rajkishor Pathak. It was written in **Para-1** of testimony that "the

deponent has been duly authorized, vide Resolution of Board of Directors of Petitioner Company, dated 11.03.2015, to act, sign, depose, present the affidavit, appoint Lawyers and do all necessary acts for all intents and purposes". But no such Resolution of Board of Directors of Petitioners Company has been filed on record. Rather, in cross-examination, in Answer to Question No. 4 witness had said that said Resolution has not been exhibited in affidavit, by way of evidence. He has further been confronted with the Board Resolution dated 11.03.2015, filed alongwith the Petition, which is kept in Part-II of the Original Record, marked as **Mark-A** and the witness replied that it is correct that as per above Resolution, this witness was having no mention of his name, authorized to represent the Petitioner in any capacity before this Tribunal. In Answer to Question No. 6, this witness had categorically admitted that there is no document on record, authorizing this witness to depose in present Petition. Hence, literally there is no evidence, for and on behalf of Petitioner Company, to discharge its burden of proof.

For the sake of discussion, though of no avail, it is apparent that it was admitted by this witness that placement was not for entire period under this dispute, of Respondent's channel, by Petitioner

Company, in territory of Mumbai. Rather, there was no placement or carriage for 7 – 10 days, owing to technical glitches. But nowhere it was pleaded or specified. A third party report regarding running of channel by a technical support team for substantiating placement of Respondent channel is being said to be with Petitioner Company, but has not been placed on record, as has been answered in Question No. 13, 14, 15 respectively. Hence, the very contention of Petition couldn't be proved by Petitioner. There is no question of preponderance of probabilities under above circumstances. Requirement of certificate, as per Section 65 (b) of Evidence Act, for taking into consideration the emails, statement of accounts, legal notice etc is also lacking. Hence, literally there is no iota of admissible evidence in this Petition, for and on behalf of Petitioner Company. Hence, both of these two issues are being decided against the Petitioner.

19. **Issue Nos. 1 and 2**

Burden of proving these two issues were upon Respondent. But none appeared to place its arguments or to press these issues. Nor there is any proof of payment of Rs. 20,00,000/- (Rupees Twenty lakhs only), upon the instruction of Petitioner's officially. Because, in the reply

itself, payment of Rs. 20,00,000/- (Rupees Twenty lakhs only) has been said to be on the instruction of Respondent's official itself. Accordingly, both these issues are being decided against Respondent.

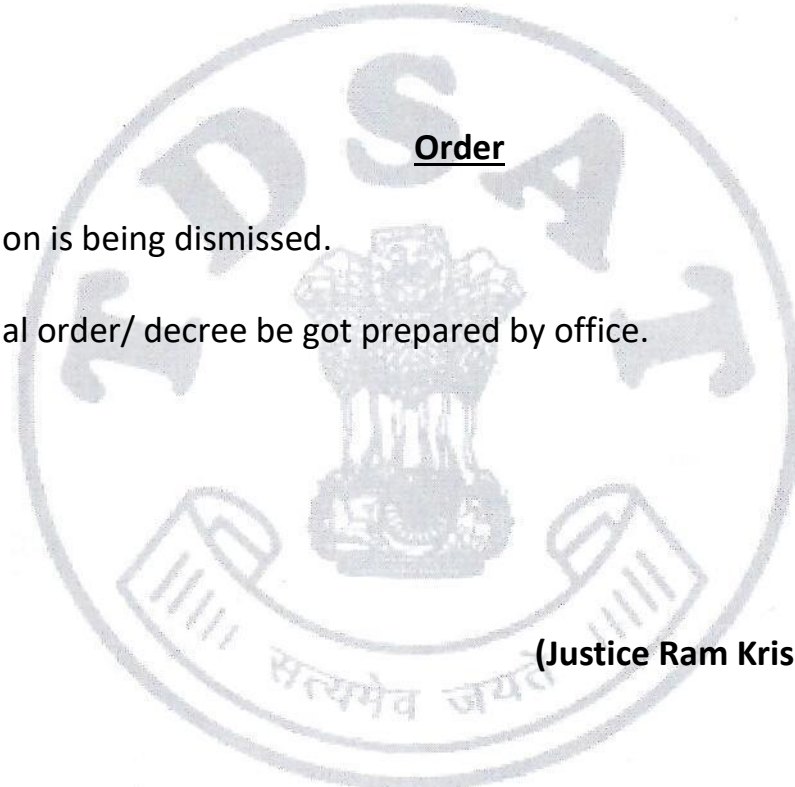
20. **Issue No. 5**

On the basis of above discussions, this Petition fails.

Order

Petition is being dismissed.

Formal order/ decree be got prepared by office.



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(Justice Ram Krishna Gautam)
Member

14.09.2023
/BN/