

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 13th September 2023

Broadcasting Petition No. 617 of 2016

M/s Intermedia Cable Communication Pvt. Ltd. ...Petitioner

Vs.

M/s Sahara India TV Network ...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Aditya Vibhav Singh, Advocate

For Respondent : Sr. Adv. Mr. Mahabir Singh
Mr. Gautam Talukdar, Advocate
Mr. Vijay Kumar, Advocate

JUDGMENT

1. This Broadcasting Petition, under Section 14, read with Section 14 (A), of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed by Petitioner, M/s Intermedia Cable Communication Pvt. Ltd., a company, incorporated under the

Indian companies Act 1956, having its registered office at 1018, New Nana Peth, Padamjee Peth, Pune, against M/s Sahara India TV Network, company incorporated under Indian Companies Act, 1956, having its registered office at Sahara India Sadan, 2A, Shakespeare Sarani, Kolkata, with a prayer for award of a decree, for a sum of Rs. 68,95,620/- (Rupees Sixty Eight Lakhs Ninety Five Thousand Six Hundred and Twenty only), as being the outstanding towards placement/ carriage charge upto 26.06.2015, along with interest @ 18% p.a., from 27.06.2013 to actual date of payment.

2. In Brief, the pleadings contends that Petitioner is a Multi System Operator (MSO), engaged in business of retransmitting channels to Multi System subscribers through its Digital Addressable System (DAS) in Pune city, directly and through Local Cable Operator (LCO) affiliated with it. Ms. Shyam Sunder Pappu, is the authorized signatory for Petitioner's company, duly authorized vide, a Board Resolution date 01.06.2016, to file and prosecute present Petition.
3. The Respondent is in Media business inter-alia of broadcast, development, distribution and dissemination of entertainment

(software programmes) on its various channels, namely through medium including satellite TV channels or terrestrial TV channels or cable channel or through DTH (Direct to Home) using existing and emerging technologies, including distribution via internet, or web casting, be it analogue or digital. Respondent is a broadcaster as per definition given under Telecommunication (Broadcasting and Cable Services) Interconnect Regulations.

4. Respondent, vide its Email dated 05.08.2013, to the Petitioner appreciated the Petitioner for the prior services provided by the Petitioner for carrying the Respondent's channel on the Petitioner's network with regard to carriage agreement, between Petitioner and Respondent, for Respondent's national news channel, namely "Sahara Samay Rashtriya". It requested the Petitioner to accept the Respondent's offer of Rs. 35,00,000/- (Rupees Thirty Five Lakhs only) plus service tax for carrying and placing the Respondent's channel in the news genre of Petitioner's network. Copy of Respondent's Email dated 05.08.2013 is **Annexure P-2** to Petition. The Petitioner and Respondent, in its meeting held on 13.08.2013 at Pune, agreed on the Promise that detailed agreement/ contract is to be entered into, by

the parties. Copy of minutes of meeting dated 13.08.2013 is **Annexure P-3** to Petition.

5. Petitioner, on the representation and commitment, transmitted the TV channel of Respondent, namely "Samay", in the territory of Pune city, as was agreed by the Respondent to avail the said service, entered into a Service Provider Agreement dated 23.10.2013 for the period of 27.06.2013 to 26.06.2014 for a consideration of Rs. 35,00,000/- (Rupees Thirty Five Lakhs only) for carrying/placing the channel of Respondent in the band/frequency, as set out in the Annexure B to the Agreement. Its placement fee was to be paid on quarterly basis, in advance, and for the said service fee was inclusive of all taxes, levies, statutory deduction except service tax as applicable. This Service Provider Agreement dated 23.10.2013 is **Annexure P-4** to the Petition.
6. Petitioner complied with its obligation of carrying/ placing the channel of the Respondent, i.e. 'Sahara Samay Rashtriya' on its network as per Agreement dated 23.10.2013. Invoices were duly raised as per the terms of the agreement, it were delivered to the Respondent by way of letters (**Annexure P-5**). But despite the Petitioner's raising and

serving the Respondent with the invoices of the service provided, the Respondent was not making any payment. Repeated letters were issued, which are **Annexure P-6** (Colly). Service Provider Agreement, provided by Respondent was duly signed by Petitioner and sent to Respondent for its execution along with letter dated 21.11.2013. But in spite of repeated request, the same was not given to Petitioner. Petitioner, vide order dated 03.01.2014, annexed invoices for the period from 27.12.2013 to 26.03.2014. However, after discussion with Ms. Rohaan Francis of the Respondent, the Petitioner raised invoices for period 27.12.2013 to 31.03.2014 and sent vide letter dated 12.03.2014 to Respondent. A request was there for remitting amount of Rs. 20,19,732/- (Rupees Twenty Lakhs Nineteen Thousand Seven Hundred Thirty Two only). This letter is **Annexure P-7**. Respondent, vide letter dated 21.04.2014, appreciated the Petitioner, for the support and service provided by the Petitioner. But mentioned its pitiable circumstances and tough phase with a promise of renewing placement and the Carriage Agreement for financial year 2014-2015. This Email dated 21.04.2014 is **Annexure P-8** to Petition. Vide letter dated 10.05.2014, invoice for the period of 01.04.2014 to 26.06.2014 for amount of Rs. 9,29,718/- (Rupees Nine Lakhs Twenty Nine

Thousand Seven Hundred Eighteen only), were further raised, this letter is **Annexure P-9** to Petition.

7. Service Provider Agreement dated 23.10.2013, was to expire by 26.06.2014 by efflux of time and this was communicated to Respondent, in response of which Respondent vide Email dated 19.09.2014, appreciated the support given by the Petitioner and assured for new agreement between parties, with the request for raising invoices on pro-rata basis, till the agreement was not placed in between the parties. Invoices on pro-rata basis for the period of 27.06.2014 to 26.12.2014 with letter to remit the outstanding as per the service provider agreement dated 23.10.2013, totaling amount of Rs. 49,15,750/- (Rupees Forty Nine Lakhs Fifteen Thousand Seven Hundred Fifty only), were requested vide letter of Petitioner dated 19.01.2015. Despite of those letters, Respondent did not make any payment. A legal notice, dated 23.07.2015, calling upon the Respondent to clear those outstanding dues of Rs. 68,95,620/- (Rupees Sixty Eight Lakhs Ninety Five Thousand Six Hundred Twenty) as on 26.06.2015 was written by Petitioner to Respondent. This is

Annexure P-14 to Petition. The service of it by way of courier slip is

Annexure P-15 to Petition.

8. Neither notice was replied nor any payment was made. A cause of action had arisen, within the jurisdiction of this Tribunal, within limitation period. Hence, this Petition, with above prayer.

9. Respondent, in its reply to Petition, preliminarily objected the jurisdiction of this Tribunal to adjudicate the present Petition, because of the fact that Petitioner is neither a 'licensee' nor a 'service provider' within the meaning of Section 2(e) and 2(j) of the Telecom Regulatory Authority of India Act, 1997 (herein after said to be TRAI Act). This Petition does not fall under purview to Section 14 and 14A of the said act. The Petition is with a prayer, for payment of carriage fee for the period of 27.06.2013 to 26.06.2015 along with interest from 27.06.2013 @ 18% p.a. till actual date of payment. But in view of Section 27 of TRAI, Act the Petitioner ought to have approached a Civil Court in order to seek redressal of his grievance. The reply to contention to Petition was with this contention that onus is upon Petitioner to prove that during the period of alleged dispute and

service as rendered, the petitioner had a valid license to claim any liability from any entity of any nature, because Respondent disputes in existence of any license qua the Petitioner to come, within the purview of the Act. It was admitted that Respondent is a broadcaster. The Petitioner did not enclose any certificate, under the provision of Evidence Act to substantiate the genuineness of the communication dated 05.08.2013. More so, this communication dated 05.08.2013 was not forwarded by any authorized signatory of the answering Respondent to the Petitioner. Communication dated 05.08.2013, is not a concluded contract enforceable in the eyes of law, minutes of meeting dated 13.08.2013, **Annexure P-3**, was neither signed nor acknowledged by any representative of answering Respondent. Agreement dated 23.10.2013, is with no signature of any of authorized person of Respondent company. It was of no evidentiary value, but a request was made for dismissal of this Petition, as of being not maintainable under the provision of the Section 14 and 14A of the Act. It was with no cause of action and not, within the jurisdiction of this Tribunal.

10. A replication cum rejoinder by Petitioner was with reiteration of the contention of Petition. Ministry of Communication and Information Technology (Government of India) vide notification No. 39 dated 09.01.2004 notified broadcasting services and cable services to be Telecommunication services and accordingly, the Petitioner come, within the definition of service provider, under TRAI act 1997, this notification is **Annexure A** to this replication. This TDSAT has been established to adjudicate dispute between.

- I. A licensor and a licensee.
- II. Two or more service provider.
- III. A service provider and group of consumers.

Since the Petitioner and Respondent are service providers. Hence, this Hon'ble Tribunal has got the jurisdiction to adjudicate the present dispute, in view of bar, given under section 27 of the Act.

11. On the basis of pleadings of both sides Court of Registrar, vide its order dated 29.03.2017, framed following issues:-

- i. Whether agreement dated 23.10.2013 was duly executed between the parties?*

ii. Whether the Petitioner is entitled to amount along with interest from the Respondent, as claimed in the Petition?

12. Learned Counsel for Petitioner examined Mr. Shyam Sundar Pappu, as its witness for Petitioner, whereas, Respondent examined Mr. Ramit Kundu, as its witness.
13. Heard arguments of Learned Counsels for both sides and gone through material placed on record.
14. 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.
15. 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.

16. Learned senior advocate, Sh. Mahabir Singh, in his arguments has vehemently mentioned that Petitioner is neither a licensor, nor a service provider, within the meaning of section 2(e) and 2(j) of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act). Therefore, this petition could not have been filed, before this Tribunal, constituted under Section 14 and 14A, of above Act. Section 14/ 14A of the Act specifies, that Telecom Dispute Settlement and Appellate Tribunal, has jurisdiction to adjudicate, disputes which arise only between:

- (a) a licensor and a licensee
- (b) two or more service providers; and
- (c) a service provider and a group of consumers.

This dispute in hand, does not fall, within the purview of this restriction. Section 2(j) of the TRAI Act, envisage that a 'service provider' is as follows:

'2(j) "Service provider" means the Government as a service provider and includes a licensee.

The term licensee is defined, under section 2(e) of the Act as follows:

'2(e) "licensee" means any person licensed under sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services".

17. The term licensor is defined under Section 2(ea) of the Act as follows;

"2(ea) "licensor" means the Central Government or Telegraph Authority who grants a license under section 4 of the Indian Telegraph Act, 1885."

But present Petition, does not fulfil, above condition. Hence, it is not maintainable, before this Tribunal, constituted under Section 14, for adjudicating under Section 14 and 14 A, of the Act. The bar of jurisdiction of Civil Court, given under Section 27, of this Act is with regard to disputes coming under Section 14 and 14 A of the Act, that too, within the jurisdiction of this Hon'ble Tribunal. Hence, for the

present Petition the bar is not there, with regard to jurisdiction of Civil Court for getting redressal of dispute in hand.

18. The undisputed fact is that Respondent company is a broadcaster, it has been specifically admitted, in reply filed by Respondent "Sahara Samay Rashtriya" was a news channel, being broadcasted by Respondent company. Petitioner is an MSO, having license, under Indian Telegraph Act, effective till 26.10.2013, filed at page No. 16 of Petition book. It was in effect from 27.10.2012 to 26.10.2013 and the Onus was said to be over Petitioner to prove existence of license for the period, for which this outstanding is being pleaded.

19. The license, is valid and effective for Intermedia Cable Communication Pvt. Ltd. w.e.f 27.10.2012 to 26.10.2013 and the period for claim of carriage charges relates with a period from 27.06.2013 to 26.06.2015 i.e. the date of beginning of this disputed period, very well falls, within the effective period of this license. Hence, the very contention made by Learned Senior counsel for Respondent, that Petitioner was not a licensee is of no avail. Now a judicial notice is being taken of the Order

passed by Delhi High Court, over a petition, Writ Petition (C) 7631 of 2013 M/s Intermedia Cable Communication Pvt. Ltd. and Anr., Petitioner vs. Union of India and Anr. Respondent, dated 03.12.2013, which specifically provides an interim injunction in the tune of :

“In the meantime there shall be ad-interim stay on the directions contained in para 5 of the impugned order/ communication dated 27.11.2013 issued by the Under Secretary, Ministry of Information and Broadcasting.”

This ad-interim order was extended vide subsequent orders. It was further extended many times. A registration letter of Government of India, Ministry of information and Broadcasting, New Delhi, dated 21.02.2013 is with grant of provisional Multi System Operator(MSO), registration to M/s Intermedia Cable Communication Pvt. Ltd. under Rule 11 e of the Cable TV Network Rule 1994, for operating in the areas notified, under Section 4a of the Cable TV Network Regulations Act 1995. Hence, apparently, Petitioner company is a MSO, with regard to cable TV channel. More so, in rejoinder, substantiating replication, replying this preliminary objection, was with specific mention that Ministry of Communications and Information Technology (Government of India), vide notification No. 39 dated 09.01.2004, notified

'Broadcasting Services' and 'Cable Services' to be a Telecommunication services. Accordingly, Petitioner became within the definition of 'Service provider' under TRAI Act, 1997. There is no rebuttal of this contention on oath. Apparently, there was a license in favour of Petitioner company, well effective on the date of period of beginning of the claim and subsequently it was extended vide judicial order of injunction granted in favour of Petitioner company. Hence, Petitioner company was a licensee, required under essential condition of a licensee, written as above that. This dispute does not come with regard to terms and condition of license, between licensor and licensee i.e. between Government of India and Petitioner company. Hence, the very first category for bringing the dispute within the jurisdiction of this Tribunal is a dispute between two or more Service provider and Respondent being a broadcaster is admitted one and vide notification of Union of India No. notification No. 39 dated 09.01.2004 broadcasting services and cable services were brought under the Head of Telecommunication services. Hence, the Cable Service Provider i.e. Petitioner, became a Service provider of broadcasting and cable service, vide above notification. Hence, Petitioner is a service provider and admittedly Respondent, being

broadcaster, is also a service provider. Hence, present dispute between two service providers, are fully within, the jurisdiction of this Tribunal.

20. The second argument, was with regard to absence of certificate required, under Section 65 B of Evidence Act, to substantiate the genuineness of communications dated 05.08.2013 and other Emails annexed with Petition. On the very perusal of Petition, it is apparent that contention of Petition was substantiated with affidavit filed, with it and while filing evidence, Petitioner's witness, Mr. Shyam Sundar Pappu, had filed, its affidavit under Section 65 B, of the Indian Evidence Act, 1872 saying on oath that:

"2 I state that I have filed printouts of certain emails received and sent through the e-mail address Zaka@iccnetwork.com used by Mr. Zaka Shaikh, Head of Finance and Accounts of the Petitioner company. The printouts of the said emails have been taken on my instructions by Mr. Zaka Shaikh. I state and confirm that the contents of the print outs of the aforementioned emails are identical to the information stored in the email account."

"4. I state that I am authorized to use the computer terminal installed at the office stated above, from which the print out of the said emails have been taken. I further state that the computer output containing the e-mail was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by me and Mr. Zaka Sheikh."

"5. I state that all times, information of the kind contained in the electronic records/emails or of the kind from which the information so contained is derived was regularly fed into the computer terminal at the office in the ordinary course of activities. I certify that the print out of the aforementioned emails is a "true copy"/ reproduction of the electronic record. I further state that at all times the computer terminal utilized by me was operating properly and there was no distortion in the accuracy of the contents of the print out of the emails."

Hence, a very requirement of Section 65 B of Evidence Act, have been fully fulfilled by Petitioner. This fact was very well said on oath, in replication-cum-rejoinder too. Hence, the very argument of Learned Counsel for Respondent with regard to it is of no avail.

21. The reply to Petition as well as the arguments of Learned Counsel for Respondent, at no point of time, denied the fact of placement of “Sahara Samay Rashtriya” channel by way of carriage by Petitioner company for those period of claim. Rather the argument was that this carriage was unilaterally by Petitioner for its own benefit because of reputed channel and status of Sahara in that period of time.
22. The Email of Respondent **Annexure P-2** specifically provides the promise to continue carriage of Respondent’s channel by Petitioner for worth of Rs. 35,00,000 (Rupees Thirty Five Lakhs only) plus taxes for 2013-2014 period. This was a letter issued by Mr. Shashidhar N. Kotian for Sahara company. A Copy of same was given to Rohan Francis, too. It was with specific mention of subject for carriage deal for 2013-2014 with Intermedia Cable Communication and the

Respondent's witness in its cross-examination has specifically admitted this fact that Mr. Shashidhar N. Kotian, was the working Manager of Sahara India TV network, for above period. In reply of question No. 7, 8, 9, 10 & 11, it was specifically admitted, that Respondent company is a broadcaster company. Mr. Shashidhar N. Kotian, was a colleague of witness working in above company Mr. Kotian, was distribution representative of western India Mr. Rohan Francis, was also colleague of this witness and he was distribution representative for whole of Maharashtra except Mumbai. Pune falls in the region allocated to Mr. Shashidhar N. Kotian and Mr. Rohan Francis Mr. Gautam Sarkar was holding a post in Respondent company and he was head of distribution in year 2014. He was posted in the headquarter of the company. Mr. Gautam Sarkar, on behalf of Respondent Company to Petitioner had issued an Email, on Email handle of Respondent Company gautam.sarkar@media-sahara.com on 21.04.2014. Hence, the very contention of the Petition that Mr. Kotian, Mr. Francis and Mr. Gautam Sarkar, vide Emails annexed with Petition and said on oath had represented Respondent company, for the period under dispute with a request for continue services of placement and carriage of "Sahara Samay Rashtriya" channel by Petitioner company,

in response of which, it was done so. The Petitioner's witness in its consistent statement on oath had substantiated the contention of pleadings, including the annexure, specifying the conclusion of contract by way of conduct and acceptance of services of carriage, given by Petitioner. Hence, the very denial by Respondent company is of no proof. Rather the contention of pleading has been fully proved, the invoices have been regularly raised, specifying the outstanding dues for the period of services provided by Petitioner company, but except request and promise to make payment, no payment was ever made by Respondent company.

23. **Issue No. 1**

Having received services of carriage of Respondent's channel broadcasted, by Respondent and placed by Petitioner company, payment for same, even for a single penny could not be pleaded or proved by Respondent. Even equity requires that services rendered and accepted are to be compensated. But in present dispute, there is no payment of a single penny. Rather outstanding dues in the tune of Rs. 68,95,620/- (Rupees Sixty Eight Lakhs Ninety Five Thousand Six Hundred and Twenty only), towards the placement/ carriage fee up to

26.06.2015, has been fully proved by Petitioner company, to be paid to the Petitioner. Hence, issue No. 1 is being allowed in favor of Petitioner.

24. **Issue No.2**

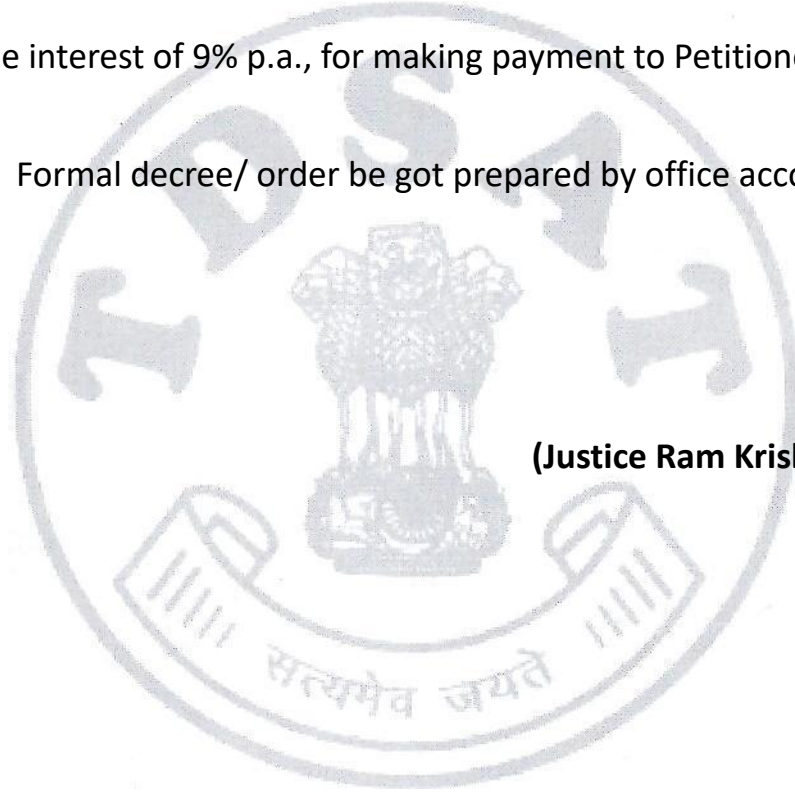
Though interest @ 18% p.a., pendente lite and future, has been claimed, but this Tribunal, considering the present fiscal scenario and the interest awarded in many cases by this Tribunal, had very often awarded a simple interest @ 9% p.a., for the period pendente lite and future. Hence, in the present case, it will be just and reasonable to award pendente lite and future interest, till date of actual payment from 26.06.2015, a simple interest @ 9% p.a. over above amount Rs. 68,95,620/- (Rupees Sixty Eight Lakhs Ninety Five Thousand Six Hundred and Twenty only). Accordingly, this issue is being decided in favor of Petitioner.

ORDER

Petition is being allowed with cost. Respondent is being directed to make deposit, within two month from the date of judgment outstanding dues of Rs. 68,95,620/- (Rupees Sixty Eight Lakhs Ninety Five Thousand Six Hundred and Twenty only), along with pendentelite and future interest, from 26.06.2015 till actual date of payment @ simple interest of 9% p.a., for making payment to Petitioner company.

Formal decree/ order be got prepared by office accordingly.

13.09.2023
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(Justice Ram Krishna Gautam)
Member