

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 24th January 2024

Broadcasting Petition No. 569 of 2021

Den Networks Ltd

...Petitioner

Vs.

Three Star Net And Anr.

...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner

:

Mr. Vibhav Srivastava, Advocate

Ms Nitika Kumar, Advocate

Ms Aashi Arora, Advocate

For Respondent

:

None

JUDGMENT

1. This Petition, under Section 14 read with Section 14 A of the Telecom Regulatory Authority of India Act, 1997, hereinafter after said to be Act has been file by Den Networks Ltd., Petitioner against Three Star Net, Respondent No. 1 and Kerela Communicators Cable Limited,

Respondent No. 2, with a prayer for a direction to Respondents jointly and severally to return total number of 2094 Set Top Boxes in good and working condition or to make payment, in lieu of that, a total amount of Rs. 41,85,906/- (Rupees Forty One Lakhs Eighty Five Thousand Nine Hundred and Six only) @ Rs. 1999/- per Set Top Boxes.

2. In brief the Petition contends that Petitioner is carrying on Distribution Platform Operator (hereinafter referred to as "DPO") business i.e., a cable television service provider, duly registered under the provisions of the Cable Television Networks Regulation Act, 1995. The Respondent No. 1 is a Local Cable Operator, having entered in a Model Interconnection Agreement dated 14.10.2019 with Petitioner Company for obtaining Cable Signal feed. The same agreement is **Annexure P-1** to Petition.

Respondent No. 2 is also engaged in the business of Cable Television service under the provisions of Cable Television Networks Regulation Act, 1995, and is working in area of operation of Petitioner Company. In continuation of Interconnect Agreement, Annexure P-1, Respondent No. 1 had taken total number of 2094 Set Top Boxes, along with accessories, for deployment at subscribers' end, from Petitioner Company. Cost of each STB was Rs. 1999/- (Rupees One

Thousand Nine Hundred Ninety Nine only). Petitioner Company was the sole proprietor of all those STB's. Respondent No. 1, in utter defiance of Interconnect Agreement, involved in swapping the STBs of Petitioner with Respondent No.2. Resultantly, Cease cum Desist notice, dated 16.06.2021, was issued by Petitioner to Respondent No.1, restraining such illegal activity. This notice is **Annexure P-2** to Petition. Respondent No. 1 migrated to network of Respondent No. 2 without complying with the provisions of Interconnect Regulations. Respondent No. 1 is bound to restore Petitioner, all those 2094 STBs in good and working condition, along with other accessories, and in case of failure, make payment of compensation in the sum of Rs. 41,85,906/- (Rupees Forty One Lakhs Eighty Five Thousand Nine Hundred and Six only) @ Rs. 1999/- per STB. A cause of action, within the period of limitation, within the territorial jurisdiction of this Tribunal had arisen for this Petition. Hence, this Petition with above prayer.

3. In spite of sufficient service of notice, none appeared for Respondent nor any reply got filed. Hence, an order to proceed ex-parte, against Respondent No. 1 was passed by this Tribunal. Respondent No. 2 filed its reply, denying the contention, qua Respondent No. 2. It was

specifically mentioned that Respondent No. 2 itself is a MSO, registered under Cable Television Regulation Act, 1995. It is engaged in Cable Services in the State of Kerela. He is of no concern with Petitioner or Respondent No. 1. There is no Privity of Contract, either with Petitioner or Respondent No. 1. No question of swapping ever arisen. No STB's were ever issued to Respondent No. 2. Petition against Respondent No. 2 is not maintainable.

4. Replication cum rejoinder for and on behalf of Petitioner, reiterating contention of Petition was filed.

5. On the basis of Pleadings, Court of Registrar vide its order dated 07.10.2022 framed following issues:

(1) *Whether the instant Petition is maintainable in its present form?*

(2) *Whether the Petitioner is entitled to a decree for recovery of 2094 STBs in good working condition or an amount of Rs. 41,85,906/- towards the cost of such STBs @ Rs. 1999/- per STB from Respondent No. 1?*

(3) *Whether Respondent No. 1 has breached the terms of the agreement executed between the Petitioner and Respondent No. 1 on 14.10.2019?*

(4) *Whether the Respondents have illegally swapped the STBs of the Petitioner in violation of the TRAI Regulations?*

(5) *To what other relief / reliefs the Petitioner is entitled to?*

6. Petitioner filed its evidence by way of affidavit of Mr. Vikas Rawat.

Respondent No. 2 filed its affidavit in evidence as of Suresh Kumar PP.

7. Written submission by Petitioner got filed on record.

8. Heard arguments of Learned Counsel for Petitioner as well as Respondent No. 2 and gone through the record.

9. The proceeding before this Tribunal is a civil proceeding, as has been given in 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.

10. 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.

11. **Issue No. 2**

The Interconnect Agreement, **Annexure P-1** to Petition is on record and has been said to have been executed by Respondent No. 1, LCO with Petitioner DPO/ MSO. Respondent No. 2 is with no concern of this agreement. No Privity of Contract between Respondent no. 2 and Petitioner or Respondent No. 1 is there. Hence, relief claimed against Respondent No. 2, on the basis of no Interconnect Agreement is not maintainable. So, far as claimed against Respondent No. 1 is concern, the evidence affidavit filed by Mr. Vikas Rawat is in fully corroboration of the contention of Petition, with no rebuttal by Respondent No. 1. Neither any reply nor any evidence against the evidence of Petitioner, by Respondent No. 1, is there on record. Whereas, Interconnect Agreement in **Annexure P-1** is undisputed. It has been entered in between Petitioner and Respondent No. 1. Total number of 2094 Set Top Boxes were issued by Petitioner to Respondent No. 1 for installation at subscribers end. The cost of per STB's was said to be Rs. 1999/- per Set Top Box. There is no rebuttal of this evidence. Hence, the Interconnect Agreement and Model Regulation provides the

ownership of STBs to remain with Petitioner MSO. Hence, the LCO, Respondent No. 1 is bound to repay either the 2094 STB's along with accessories in good and working condition or to compensate by way of payment of worth for same @ Rs. 1999/- per STB, total amounting Rs. 41,85,906/- (Rupees Forty One Lakhs Eighty Five Thousand Nine Hundred and Six only) along with pendentelite and future interest @ 9% per annum. Hence, this issue No. 2 is being decided in favour of Petitioner.

12. Issue Nos. 3 and 4

The contention made in the pleading and the evidence filed by way of affidavit, reiterating and corroborating the contention of pleading, is with no rebuttal or controvert by Respondent No. 1. Hence, the same has been fully proved by Petitioner. Hence, these two issues are being decided in favour of Petitioner.

13. Issue No. 1

No dispute by Respondent No. 1, with regard to maintainability of this Petition is there. Whereas, finding qua Respondent No. 2 has been given supra. Hence, this issue is being decided accordingly.

14. **Issue No. 5**

On the basis of above discussion, this Petition merits to be allowed against Respondent No. 1.

Order

Petition is being decreed against Respondent No. 1. It is being directed to make return of 2094 STBs, along with accessories, in good and working condition, to Petitioner, within two months from the date of Judgment, or to make payment of Rs. 41,85,906/- (Rupees Forty One Lakhs Eighty Five Thousand Nine Hundred and Six only) @ Rs. 1999/- per STB, along with simple interest pendentelite and future till date of actual payment, for above amount, to Petitioner, by way of deposit, in Tribunal, within two months from the date of Judgment, for making payment to Petitioner.

Formal decree be got prepared by office, accordingly.

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(Justice Ram Krishna Gautam)
Member

24.01.2024
/BN/