

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 24th July 2024

Broadcasting Petition No. 526 of 2018

Hathway Digital Private Limited ...Petitioner(s)

Vs.

Abhitesh Communications & Anr. ...Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent No. 2 : Mr. Upender Thakur, Advocate
Mr. Yashashvi Vashishtha, Advocate

JUDGMENT

1. This Petition, under Section 14(A) (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 Hathway Digital Private Limited, Petitioner, against Abhitesh Communications & M/s IndusInd Media and Communications Limited (IMCL), Respondents, with a

prayer for a direction against Respondents, to pay an amount of Rs. 3,34,000/- (Rupees Three Lakhs Thirty Four Thousand Only), and interest at the rate of 18% per annum, towards outstanding subscription charges of the Petitioners, with a direction to return of 200 STBs or in the alternative pay its cost, amounting to Rs. 2,50,000/- (Rupees Two Lakhs Fifty Thousand Only) @ Rs. 1250/- per STB, to the Petitioner. A further relief was also claimed for grant of permanent injunction against Respondent No. 2, a competitive MSO, for not providing signal to Respondent No. 1, until the liability, written as above, are being cleared by Respondent No. 1 that too, in accordance with a notice, required in Clauses 6.4 and 6.5 of the TRAI Regulations i.e., 21 days' notice.

2. In brief, the Petition contends that Petitioner, namely, Hathway Digital Private Limited is a wholly owned subsidiary company of Hathway Cable and Datacom Limited is a public limited company, incorporated under the provisions of the Companies Act, 1956 having its Registered Office, at 805/806, "Windsor" Off C.S.T. Road, Kalina, Santacruz (E) Mumbai-400098. The Petitioner, is engaged in retransmitting the signals of Cable TV to its various operators on Pan India basis. The Cable TV business of Hathway Cable and Datacom Limited, has been

assigned to Hathway Digital Private Limited, w.e.f. 01.04.2017, due to internal restructuring of the Hathway Cable and Datacom Limited. It has further been stated that the Petitioner has changed its name from Hathway Digital Private Limited to Hathway Digital Limited w.e.f. 03.06.2020.

3. The Respondent No.1, namely, Abhitesh Communications, is a local cable operator, represented, through its proprietor, namely, Mr. Vishal Srivastava, who had been retransmitting the signals / services to the subscribers obtained from the Petitioner and thereby distributing the same in the area of Ghazipur and it has its office situated at 146 B, DDA Flats, Ghazipur, Delhi 110096. The Respondent No.2, namely, M/s IndusInd Media and Communications Limited, is a competitor MSO of the Petitioners, having its office at IN Centre, 10 A, 2nd Floor, Shivaji Marg, Moti Nagar, New Delhi - 110015.
4. On the request, made by the Respondent No.1, the Petitioner agreed to provide its signals / services, to be further retransmission to the subscribers, in the area of Ghazipur and thereby entered into a Model Interconnect Agreement, under the terms of which the Respondent No. 1 was liable to pay the monthly subscription charges accordingly. The Petitioner had issued approximately 200 set top boxes and

viewing cards to the Respondent No.1. That all the LCOs across India availing signals from the Petitioner have been given access to Hathway Connect Portal. Similar is the case of most of all major MSOs operating pan-India. In the case of Petitioner, each LCO is provided a unique user ID and once they are registered the same can only be accessed by them as it can only be operated by using a password. That the LCOs have all the rights through portal to activate, deactivate services of the consumers, change the packaging and provide channels as per choice of consumers and making payments to the Petitioner online through Portal. It was stated that the said system was working in view of TRAI guidelines. The Digital MIA with financial sharing clause is uploaded on the Petitioner's Portal and the LCO, after perusing and going through the terms of the MIA, accepts the same and then it further logs in to conduct its business in its usual course. The terms contained in the MIA are, as per prescribed by the TRAI, and the Petitioner is sharing the revenue with the LCOs at one of the lowest rates in the Industry, which is known to all. At the particular time when the LCO accepts the terms of the MIA, the date, time and IP address from where they agreed to the terms and accepted the MIA gets captured in the digital copy stored with the Petitioner. The LCO's

login, acceptance and doing business through Portal post acceptance without any protest or demur does prove that LCOs have agreed to the terms and conditions of the MIA. A copy of the Model Interconnect Agreement is marked as **Exhibit PW 1/1.**

5. It has further been contended that in terms of the aforesaid Agreement, the Petitioners raised invoices on the Respondent No. 1, which were duly received by the Respondent No. 1, without any protest or demur. But against the invoices raised, the Respondent No.1 made part payments only, and from the very inception, the Respondent No. 1, had been a regular and chronic defaulter in discharging its liabilities. Copies of the invoices sent to the Respondent No. 1 along with proof of dispatch and delivery are marked as **Exhibit PW 1/2.**
6. The Petitioner maintains a Statement of Account in the usual and ordinary course of its business. A copy of the statement of account is marked as **Exhibit PW 1/3.**
7. The Respondent No.1 had violated the terms and conditions of the Agreement and deliberately avoided to clear the outstanding dues of the Petitioner, towards outstanding subscription dues, despite regular requests, follow-ups and reminders from the Petitioner. The

Respondent No. 1, instead of making the payments, only provided false assurances to the Petitioner, despite the fact that the Petitioner always acted bonafidely in terms of the Agreement with a hope that Respondent No.1 shall honour its contractual commitments, in terms of the Agreement with bonafied intentions.

8. Petitioner mentioned that the intention of the Respondent No.1, from the very inception, was to play fraud upon the Petitioner and the Petitioner received information from the market sources that the Respondent No. 1, in utter disregard of the Interconnect Regulations, had migrated to the Respondent No. 2/ competing MSO, namely, M/s IndusInd Media and Communications Limited, without clearing the outstanding subscription dues of the Petitioner, and also without returning the set top boxes, which are the exclusive property of the Petitioner.
9. It has further been stated that the Respondent No. 1 had deliberately violated the Interconnect Regulations and also the terms of the Agreement and in connivance and collusion with the Respondent No.2, has migrated from the network of the Petitioner, and has swapped all 200 set top boxes belonging to the Petitioner, without complying with the Interconnect Regulations of TRAI, thereby,

breaching the terms of the Agreement as well as the Regulations framed by TRAI on Digital Addressable System [DAS]. It was obligatory on the part of the Respondent No.1 to issue requisite notices before disconnecting the services of the Petitioner, but it unilaterally, without complying with the Regulations, and at the same time without the permission, consent and approval from the Petitioner, has swapped all 200 STBs of the Petitioner, thereby, causing huge financial losses to the business of the Petitioners, which cannot be compensated easily.

10. The Respondent No. 1, in collusion and connivance with the Respondent No. 2, had played fraud upon the Petitioner by swapping all the STBs of the Petitioners with an oblique motive to cause huge financial losses to the business of the Petitioner. The STBs, which have been swapped by the Respondents, carry a substantial cost, which the Respondents are obligated to pay, so as to compensate the Petitioner. In order to secure its hardware in the form of set top boxes and to recover its outstanding subscription dues, Petitioner was constrained to issue a notice, dated 09.03.2018, to both the Respondents, showing deep anguish and disappointment about the unethical acts of swapping the STBs belonging to the Petitioners and called upon the Respondents to pay the outstanding amount of Rs.3,34,000/- (Rs.

Three Lakhs Thirty Four Thousand Only) and interest due thereon at the rate of 18% per annum, towards subscription charges and also to return 200 number of STBs of the Petitioner and viewing cards of the Petitioner, forthwith, which were in the unlawful custody and possession of the Respondents or in the alternative, pay an amount of Rs. 2,50,000/- (Rs. Two Lakhs Fifty Thousand Only) @ Rs. 1280/- per STB. Copy of the notices dated 09.03.2018 & 24.05.2018 are marked as **Exhibit PW 1/ 4.**

11. The Respondents, neither replied to the notices of the Petitioner and neither paid the outstanding subscription dues nor returned the STBs belonging to the Petitioner being the exclusive property at all times. It has been contended that due to the illegal acts on the part of the Respondents, the Petitioners have suffered huge financial losses and at the same time is deprived of its legitimate outstanding dues payable by the Respondents and the valuable property of the Petitioner in the form of set top boxes / viewing cards, which are in the illegal custody of the Respondents, who in connivance and collusion with each other, had facilitated the illegal migration of Respondent No. 1 from the Petitioners network to Respondent No. 2.

Hence, a cause of action, within the jurisdiction of this Tribunal, had arisen and finally, this petition with above prayer got filed.

12. Respondent No. 1 was absent and matter was proceeded ex-parte against him. Respondent No. 2 filed its written statement, denying the contention of Petitioner and its liability with regard to subscription charges, being said to be due against Respondent No. 1. No swapping of STBs by and on behalf of Respondent No. 2 was there. Rather Respondent No. 2, being a competitive MSO, had entered in Interconnect Agreement with Respondent No. 1, and had transmitted by way of its own system. As there is no Privity of Contract in between Respondent No. 2 and Petitioner, hence, no claim of Petitioner, against Respondent No. 2, is tenable. More so, no such swapping could be proved by Petitioner as against Respondent No. 2.
13. Replication by Petitioner with the reiteration of Petition was there.
14. Court of Registrar, vide order dated 31st July 2019, framed following issues, for and on behalf of pleadings of petitioner and respondent No.2:
 - (i) Whether Respondent No. 1 has illegally migrated from the network of the Petitioner to the network of Respondent No. 2 without clearing the outstanding dues

and without returning STBs belonging to the Petitioner in violation of Interconnect Regulations, 2012, if so its effect?

- (II) Whether the petitioner had handed over and delivered 200 STBs to the Respondent No. 1 in terms of the Interconnect Agreement and whether the petitioner is entitled to receive them back in good and working condition from the Respondent or in alternative whether the Respondents are jointly liable to pay to the Petitioner a sum of Rs. 2,50,000/- with interest @ 18% p.a. towards the cost of STBs?
- (III) Whether no cause of action has arisen against the Respondent No. 2 for filing the present petition and whether the present petition suffers from the defect of misjoinder of parties?
- (IV) Whether the petitioner is entitled to recover an amount of Rs. 3,34,000/- towards the outstanding subscription fee and whether the petitioner is also entitled for interest @ 18% p.a. from the Respondent No. 1 & 2.
- (V) To what relief, if any, the Petitioner is entitled?

15. Evidence by way of affidavit of Petitioner, along with a certificate under Section 65B of Indian Evidence Act, and Resolution of Board was filed, by Petitioner. The same was filed by Respondent No. 2 as affidavit of Mr. Abhishek Goel. No evidence by Respondent No. 1 was there.
16. Written submission by Petitioner and Respondent No. 2 got filed.
17. Heard learned counsel for both side and gone through the material placed on record.
18. 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.
19. 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.

20. **Issue No. 2**

Petitioner's evidence i.e. Affidavit of Mr. Hemaljeet Tamang is with reiteration and the contention of the Petition, wherein the interconnect agreement has been made Annexure to affidavit, and it was not controverted by Respondent No. 1. Issuance of 200 STBs, along with VCs, in compliance of Interconnect Agreement in between, Petitioner and Respondent No. 1, has been stated in this uncontroverted affidavit. The price per STB, is given as Rs. 1250/-, and total amount, as a cost of these STBs as well as VC has been calculated to be Rs. 2,50,000/-. Whereas, as per Model Interconnect Agreement (MIA) and the agreement entered, in between, the compensation for STBs, ought to be the depreciated value of STB and this Tribunal, very often has decided depreciation of 15% p.a. for the value of purchase. Hence, Rs.1250/- has been claimed as the value of per STBs, and with depreciated value, it will come to Rs. 1062.50/- per STB. Hence, the amount payable in case of failure to restore the STBs and VCs, will come to Rs. 2,12,500/- (Rs.1062.50*200 STBs). The written submissions filed by the petitioner and arguments advanced is of this

fact too. Hence, the total amount comes to Rs. 5,46,500/-, for which Petitioner is entitled. Hence, this issue is being decided, accordingly.

21. **Issue No. 3.**

Respondent No. 2 is a competitive MSO, written in Petition itself and transmission of signals to LCO, Respondent No. 1 is being stated to be by competitive MSO, Respondent No. 2. The same is there in evidence filed by Respondent No. 2, in its affidavit, which is uncontroverted. Hence, admittedly, there is no Privity of Contract, in between, Petitioner and Respondent No. 2 and proposition of law laid down by this Tribunal, in many cases is of this effect, as competitive MSO, having no Privity of Contract, be not held liable for any default made by LCO. With regard to liability arisen with other competitive MSO, out of interconnect agreement, in between, Petitioner and that LCO. Hence, Respondent No. 2 is not to be fastened with any liability. Accordingly, this issue is being decided in favour of respondent no. 2.

22. **Issue No. 4**

In view of decision made in Issue No. 2, Petitioner is entitled for amount of Rs. 3,34,000/-, with *pendentelite* and future interest over it, @ simple interest 9% p.a., being very often provided by this Tribunal

in Petitions, decided by this Tribunal. Hence, this issue is being decided accordingly, in favour of petitioner.

23. **Issue No. 1**

Proof of fact made by testimony of Petitioner, ought to be rebutted by Respondent No. 1. But owing to its failure to appear and contest, the same burden could not be exhausted by Respondent No. 1. However, Petitioner, in its evidence, by way of uncontroverted affidavit, had proved this fact. But illegally swapping had been rebutted by evidence, by Respondent No. 2. Hence, the very burden of proof of swapping with Respondent No. 2 could not be proved by Petitioner. Hence, this issue is being decided in negative.

24. **Issue No. 5**

On the basis of discussion made above, the Petition is liable to be allowed against Respondent No. 1, for total amount of Rs. 3,34,000/- towards subscription charges, alongwith, *pendentelite* and future interest over it, @ simple interest of 9% p.a., till date of actual payment and a direction for restoration of 200 STBs alongwith VCs, in good working condition to Petitioner by Respondent No. 1 and in case of failure to make the payment, a compensation in the tune of

Rs.2,12,500/- (Rs.1062.50*200 STBs) for 200 STBs and VCs @ Rs. 1062.50/-, depreciated value per STB.

No relief against Respondent no. 2 is to be awarded. This issue is being decided accordingly.

ORDER

The petition is allowed. Respondent No. 1 – Abhitesh Communications, is being directed to make deposit of Rs. 3,34,000/- (Rupees Three Lakhs Thirty Four Thousand Only) towards outstanding subscription amount, alongwith *pendentelite* and future interest over it @ simple interest of 9% p.a., till date of actual payment in the Tribunal, for making payment to petitioner, within two months of date of judgment with a further direction for restore/return of 200 STBs alongwith VCs, in good working condition, to petitioner by respondent no. 1, within two months of judgment and in case of failure, to make the payment, a compensation in the tune of Rs. 2,12,500/- (Rs.1062.50*200 STBs) for 200 STBs and VCs @ Rs. 1062.50/-, depreciated value per STB, alongwith *pendentelite* and future, simple interest @ 9% p.a., till date of actual payment, in the Tribunal for making payment to the petitioner.

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

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(Justice Ram Krishna Gautam)
Member

24.7.2024
/BN/

