

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 6th February 2025

Broadcasting Petition No. 21 of 2018

Hathway Digital Private Limited ...Petitioner(s)

Vs.

Bhupender Cable Network & Anr. ...Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent No. 2 : Mr. Vibhav Srivastava, Advocate

Ms. Aashi Arora, Advocate

Ms. Rhea Yadav, Advocate

JUDGMENT

1. This 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 Hathway Digital Private Limited, Petitioner, against Bhupender Cable Network & M/s Den Networks

Ltd., Respondents, with a prayer for award of decree in the tune of payment of amount of Rs. 10,873/- (Rupees Ten Thousand Eight Hundred Seventy Three Only), with interest, due thereon, at the rate of 18% per annum, towards outstanding subscription charges, with a direction to respondents to return 159 STBs, or in the alternative to make payment of Rs. 1,98,750/- (Rupees One Lakh Ninety Eight Thousand Seven Hundred and Fifty Only), @ Rs. 1250/- per STB, to the Petitioner; with further mandate of permanent injunction, against Respondent No. 2, a competitive MSO, restraining it from providing signals to Respondent No. 1, until it makes amount paid, as above or returns STBs, alongwith payment of subscription charges.

2. In brief, the contention was that, Petitioner, Hathway Digital Private Limited, 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, with regional office at Plot no. B-1 / G-3, Mohan Co-operative Industrial Estate, Main Mathura Road, New Delhi. It was engaged in the retransmitting of signals of Cable TV to its various operators on Pan India basis. The Petitioner is a Cable Service Provider, duly

registered under the provisions of Section 3 of Cable Television Networks (Regulation) Act, 1995, i.e. Petitioner is a MSO / Cable operator, engaged in the business of distribution of TV channels, by holding a licence to operate as a Cable operator, under Cable TV Regulations 1995.

3. The Respondent No. 1, Bhupender Cable Network, is a local cable operator, represented through its proprietor, Mr. Kiran Kumar, in the business of retransmitting the signals / services to the subscribers obtained from the Petitioner, and thereby distributing the same, in the area of Sultanpuri. It has its Head office, situated at Jhuggi No. BH-1, Block P-1, Sultanpuri, Delhi-110086.
4. Respondent No. 2, namely, M/s Den Networks Limited, is a competitor MSO of the Petitioner, having its office situated at 236, Okhla Industrial Estate, Phase 3 Road, Near Modi Mill, Delhi-110020.
5. On the request, made by Respondent No. 1, an agreement, dated 10.7.2017, was got executed with petitioner for providing its signal / services for further re-transmission to the subscribers in the area of Sultanpuri. Thereby a Model Interconnect Agreement, dated 10.7.2017, was got executed. Respondent No. 1 was under obligation to pay the monthly subscription charges to the Petitioner, in view of

services availed. Petitioner had issued 159 STBs to Respondent No. 1, for getting the contract implemented. Model Interconnect Agreement, dated 10.7.2017, is Annexure P-1 to petition. Petitioner raised invoices on Respondent No. 1, which were duly received by Respondent, without any protest or demur. It was part payments, being made by Respondent, since the very inception. Respondent had been regular and chronic defaulter in discharging its liability. The invoices raised and issued are Annexure P-2 (colly) to the petition. The Statements of Account, being maintained by the Petitioner, in its usual and ordinary course of business, having the statement of Respondent No. 1, was annexed as Annexure P-3 to the petition. The total outstanding subscription charges, despite repeated requests and follow ups, were written in this statement of account. It was not paid by Respondent No. 1. Rather, Respondent No. 1 migrated to Respondent No. 2, a competing MSO, without clearing of the outstanding dues of petitioner, and completing the statutory obligations, and returning the STBs in good and working condition, from 01.12.2017. Respondent No. 1, in connivance and collusion with Respondent No. 2, without observing clauses 9.6 and 9.11 of the Model Interconnect Agreement, migrated from network of Petitioner

and has swapped all the STBs, belonging to the Petitioner, without complying with Interconnect Regulations. Thereby, it has caused huge financial loss of business of the petitioner. Petitioner, in order to secure its hardware, in form of STBs, was constraint to send a legal notice, dated 09.12.2017, to both of the Respondents, with the request for making payment of outstanding subscription charges Rs. 10,374/-, with 18% interest per annum over it and return of 159 STBs, in good and working condition, or to make payment for it, at the rate of Rs. 1250/- per STBs, amounting to total at Rs. 1,98,750/- (Rupees One Lakhs Ninety Eight Thousand Seven Hundred Fifty Only). A notice dated 09.12.2017, sent by Petitioner to Respondent, along with proof of its dispatch and delivery was appended at Annexure P-4 to the petition. Again, a notice at Annexure P-5 was sent on 12.1.2018. But of no avail. Hence, the cause of action had arisen. Hence, this petition, under limitation, within jurisdiction of this Tribunal, has been filed with above prayers.

6. A notice was ordered to be issued against both of Respondents, vide order dated 29.01.2018. But in spite of sufficient service of notice, and filing of affidavit of service, against Respondent No. 1 and even publication in newspaper on 04.05.2018, none appeared for

Respondent No. 1. Hence, matter was ordered to proceed ex parte, vide order dated 22.05.2018. Respondent No. 2 appeared and filed its reply, with a contention of 'no migration', 'no Privity of Contract', in between, and arraying as non-necessary party to petition.

7. On the basis of pleadings of both side, following issues were framed vide order dated 2.8.2018 :

- (i) Whether the petition is maintainable against Respondent No. 2?
- (ii) Whether the petitioner is entitled to recover the outstanding dues amounting to Rs. 10,873/- towards subscription charges along with interest at the rate of 18% per annum from the Respondents?
- (iii) Whether the Respondents are liable to return 159 STBs to the petitioner or in the alternate pay an amount of Rs. 1,98,750/- towards the cost of STBs at the rate of 1250/- per STB to the Petitioner?
- (iv) Whether the Respondent No. 1 has complied with the provisions of Interconnect Regulations before migrating to the network of Respondent No. 2?

8. Evidence by both side i.e., Petitioner and Respondent No. 2 were got filed by affidavits.

9. Petitioner also filed written arguments in this petition, specifying the details of the amount to be awarded to the petitioner.
10. Heard arguments and gone through the material placed on record.
11. 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.
12. 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.

13. Issue No.1

It was submitted by Learned Counsel for Respondent No. 2 that petition was not maintainable, against Respondent No. 2, for lack of cause of action, against Respondent No. 2 and of mis-joinder of

parties. The subscription charges were said to be due against Respondent No. 1. The STBs were said to have been issued to Respondent No. 1 and the claim of return is against Respondent No. 1, and Respondent No. 1 was said to be LCO in the petition, who had entered into Interconnect Agreement with Petitioner. Hence, the cause of action had arisen between Petitioner and Respondent No. 1. Respondent No. 2, is a competitive MSO, against whom the allegation is of illegal swapping by Respondent No. 1. This was said to be under connivance with Respondent No. 1. This has been held by this Tribunal at repeated stages, particularly, in B.P No. 107/2021 with M.A No. 76/2021, that Respondent No. 2, being a competitive MSO, is having no privity of contract. Model Interconnect Agreement entered, in between, MSO and LCO, was of no concern for liability incurred owing to above Model Interconnect Agreement. There is no privity of contract, in between, petitioner and competitive MSO, i.e. Respondent No. 2. Hence, no liability can be there against competitive MSO.

14. Learned Counsel for Petitioner in its argument had categorically admitted this proposition, laid down by this Tribunal in previous precedents. He too admitted that there is no privity of contract, in

between, respondent no.2 and Petitioner. Under above settled proposition, as well as acceptance by Learned Counsel for Petitioner and the lack of privity of contract, in between, Petitioner and Respondent No. 2/ competitive MSO, no cause of action, against Respondent No. 2, had arisen in present petition. Hence, this petition was not maintainable against Respondent No. 2. Accordingly, this is being decided in favour of Respondent No. 2.

15. **Issue Nos. 2, 3 and 4**

Facts, not disputed, are admitted one, and evidences, proving those facts, if not controverted, are to be taken as such, as un-rebutted. In present petition, the contention of petition has been reiterated, by way of evidence filed by way of affidavit of Petitioner' witness, Mr Atul Pandey, who had categorically said on oath that working as Assistant Manager (Operations) with the Petitioner's company, he had gone through the facts involved in this dispute. He is well conversant with the facts of case and the Petitioner is an MSO. Respondent No. 1 is a Local Cable Operator. Respondent No. 1, being desirous of providing services in the area of Sultanpuri, Delhi had approached petitioner company, made a request and entered in the execution of Model Interconnect Agreement dated 10.7.2017, annexed P-1 with

this affidavit of evidence, whereby monthly subscription charges were to be borne as per given agreement and in the acting upon that agreement, STBs, given in number, were got issued to Respondent No.

1. The invoices were raised and it were got issued to Respondent No. 1, which were being partly paid with a chronic default in making full payment. Statements of account of petitioner company, made in due and ordinary course of its business, mentioning the entire due account of Respondent No. 1, was with specific mention of balance of outstanding subscription amount of Rs.10,374/- against Respondent No. 1, for which a notice dated 09.12.2017, was got issued and above money with 18% interest per annum, was demanded.

16. The total number of STBs '159' were got issued and they were asked to be returned in good and working condition, and in case of its failure, the compensatory cost of Rs.1,98,750/-, at the rate of Rs. 1250/- per STBs, were claimed. Whereas, as per 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% for the value of purchase. **(BP No. 267 of 2019 - Hathway Digital Private Limited Vs. Jaipur Cable Network)**. 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. 1,68,937.50. (Rs. 1062.5 * 159 STBs).

17. The legal demand notice, along with its dispatch and delivery receipt, were annexed as Exhibit P-4 (Colly) to this affidavit, and they were also attached with the petition. Again another notice, with correct outstanding subscription dues, is Exhibit P-5 (colly), was got issued, and it was not paid or returned by Respondent No. 1. Rather there was swapping of these STBs by Respondent No. 1. This un-rebutted affidavit of Petitioner is with no iota of evidence by Respondent No. 1. Rather the evidence submitted by Respondent No. 2, as of affidavit of Mr. Siddharth Priya Srivastava is not with regard to responsibility against respondent no.1 only.
18. The Petition is to be decreed for an amount along with *pendentelite* and future interest @ 9% p.a., an interest, which is being very often awarded in present fiscal scenario, by this Tribunal in other decided Petitions. Hence, the entire contention of petition has been proved by petitioner as against Respondent No. 1. Hence, issue Nos. 2, 3 and 4 are being decided in favour of Petitioner, as against Respondent No. 1.

19. On the basis of above discussions, this petition merits to be allowed against respondent no.1 for relief claimed as above.

ORDER

The petition is decreed. Respondent No. 1, is being directed to make deposit of Rs. 10,873/- (Rupees Ten Thousand Eight Hundred Seventy Three 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 159 STBs in good and working condition, to Petitioner by Respondent No. 1, within two months of judgment, and in case of failure, to make the payment, of a compensation in the tune of Rs. 1,68,937.50. (Rs. 1062.5 * 159 STBs) @ 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

06.02.2025
/NC/