

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated : July 27, 2011**

**Petition No. 91(C) of 2009**

M/S INDUS IND. MEDIA & COMMUNICATIONS LTD. ...Petitioner

Vs.

AASHISH CABLE NET (INDIA) PVT. LTD. ...Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON**

**HON'BLE MR. G. D. GAIHA, MEMBER**

**HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner : Mr.Kailash Vasudev, Sr. Advocate with  
Ms.Kanika Agnihotri & Mr. Vaibhav  
Agnihotri, Advocates

For Respondent : Mr.Navin Chawla & Mr.Tejveer Singh  
Bhatia, Advocates

**J U D G M E N T**

**S.B. Sinha**

The petitioner is a Multi Service Operator.

The respondent herein is engaged in cable business as a Local  
Cable Operator (LCO).

It is not in dispute that the respondent also is a local cable operator within the meaning of the provisions of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 as amended from time to time (Regulations).

2. The petitioner has filed this petition inter alia for a direction upon respondent to make payment of a sum of Rs.1,73,33,916/- as also holding its action in switching off the signals of the petitioner's network as illegal, arbitrary and unsustainable in law and connect the signals of the petitioner in cable network.

3. The basic fact of the matter, which is not much in dispute, may be noticed.

4. The parties hereto entered into an agreement on or about 12.1.1999 with effect from 20.2.1999.

The terms of the said agreement was in a standard form. It was valid for a period of three years.

According to the petitioner, however, the arrangement continued despite expiry of the said term; whereas according to respondent, the said agreement expired due to efflux of time.

5. In terms of the said agreement the area of operation of the respondent was `Vashi', `Kopar Khairna', `Gansoli', `Airoli', `Sanpada', `Juinagar', `Turbe', `Khargar' and `Kalamboli'.

6. No document has been brought on record to show as to whether any transaction took place by and between the parties hereto from 2002 to December, 2006.

7. On 1.9.2007, the petitioner served a notice upon respondent which is to the following effect:

"This is to inform you that as per our arrangement with you to act as our Distributor in charge of ensuring collection of subscription charges from the cable operators affiliated to our company in Vashi (Navi Mumbai), you have failed to deposit the subscription charges collected from the cable operators operating in the area designated under your charge from December, 2006 till date.

You will appreciate the fact that in spite of not receiving any subscription charges from Navi Mumbai being the area under your charge as a distributor our company has fulfilled its obligation of making substantial payment to the Broadcasters on time. This has put tremendous pressure on our cash flow, solely due to you failure to ensure timely and exact remittances in the form of collections from the cable operators.

In the backdrop of the above circumstances, please be informed that in case you fail to deposit within the next two days, the exact collection due from you end from December, 2006 till date, we shall be constrained to initiate appropriate legal action as laid down under the law to recover our

legitimate dues from your end. Also, kindly note that you alone shall be responsible for the cost and consequences thereof."

8. A legal notice was served upon respondent on 14.4.2008, the relevant paragraphs whereof are as under:

1. "That My Client is a registered company carrying on business, inter alia, as an MSO (Multi Operating System) having its business all over India. You are a cable operator and a distributor in the area of `Vashi', `Kapur Kahairana', `Gansali', `Airoli', `Sampada', `Jui Nagar', `Turbhe', `Khargar', `Kalamboli' and other areas of Navi Mumbai.
2. My client is supplying signals to you i.e. supply of programmes/package/TV Channel bouquets etc. For the above services supplied by my Client to you, you are liable to pay fees to my client every month before 10<sup>th</sup> of every subsequent month.
3. Further you being my clients' distributor you are also liable to pay Advertisement Guarantee as agreed by you to my client every month before 10<sup>th</sup> of every subsequent month.
4. The fees are dependent on the points service at mutually decided rates between you and my client. The statement showing, outstanding amounts due and payable by you to my client along with interest is annexed with this notice.
5. Unfortunately you have not been making payment to my client. My Clients have repeatedly requested you orally to pay the outstanding dues keeping in mind the good relation shared between you. But you have not paid any heed to my clients' requests, despite speaking with you orally and you assuring my clients that the dues payable would be remitted shortly.

6. As per my Clients books of Account you are liable and responsible to pay amount of Rs.97,72,081/- (Rupees Ninety seven lakhs, seventy two thousand, eighty one) to my client up to 31.3.2008 as principal amount and Rs.24,72,901 (twenty four lakhs, seventy two thousand, nine hundred and one) as interest @14% per month from 31.3.08, when my clients received the last payments from you along with future interest till realization.

7. I call upon you by this Notice to pay the total amount of Rs.1,22,44982 (Rs.97,72,081/- to my Client till 31.3.08 as principal amount and Rs.24,72,901 as interest @ 14% per month from the date of default till 31.3.08.) to my client till 31.3.08 with further interest calculated @14% p.m. till realization to my client within 7 days from the receipt of this notice. If you fail to do so my Client shall be constrained to take legal action against you before civil & criminal court of law for the costs and consequences of which you shall be held liable and responsible."

9. Along with the said notice, a purported statement of account was annexed showing the transactions between the parties from January, 2005 to March, 2008.

Various columns contained in the said statement of account are as under:

- (i) Month
- (ii) Royalty
- (iii) AD MG( Advertisement Minimum Guarantee)
- (iv) Calculation,

(vi) Percentage of interest i.e. 14% and the amount payable.

10. In terms of the said statement of account a sum of Rs.97,72,081/- was said to be due from respondent towards operator's fee , ADMG and the amount of interest totaling Rs.24,72,901/-.

11. The respondent herein sent two replies to the said notice, one addressed to the learned Advocate for the petitioner and the other to petitioner.

12. In the first notice it was stated:

"We are in receipt of your communication dated 14.04.2008 wherein you have made false and frivolous allegations against us and also made a demand of Rs.1,22,44,982/- from us on the alleged ground of outstanding.

It seems from your communication that you are not properly and rightly briefed by your client. We have received various documents regarding the arrears from your client which itself is contradictory to each other.

We have duly replied your client about the same and are not reiterating the same for the sake of prolixity. Please find enclosed herewith the copy of the communication dated 26.4.2008 sent to your client."

13. In its reply to respondent, which was issued, 'without prejudice', it was stated:

"At the outset we deny that any outstanding/arrears is due upon us. We would like to inform you that your alleged demand is not merely incorrect but is also contradictory to the statement of Accounts provided to me from time to time by your officials. We have requested you time and again to reconcile the statement of Accounts with us, but you took no heed to our request and raised your demand at your whims and fancies.

We would like to inform you that you have failed to provide us the details of accounts on the basis of which you are alleging the outstanding upon us.

It is categorically stated that we have no arrears and outstanding to your network as claimed by you. Further, you are liable to make the payment of commission to us towards our distribution agency/intermediary relationship.

It is surprising to note that you have disconnected the signals transmitted by you on 6.4.2008 in order to put pressure to extract monies from us. Earlier also you had adopted such an arm-twisting technique to extract monies from us in a blatant violation of TRAI Regulation. Despite our request you have not connected you signals to our network and hence we had left with no option but to take the feed from the other MSO of the area.

We hope that you will not pursue your illegal demand any further and let us apart our ways in an amicable manner.

Considering your illegal act of disconnection of signals wherein you have disconnected our signals without due compliance of law, we are not required to issue any notice/public notice to you as per TRAI Regulation, however, without prejudice to the above this may also be treated as a notice under clause 4.2 of the Interconnection Regulation as amended till date."

14. The petitioner issued another notice on 23.2.2009 responding to aforementioned reply of respondent dated 26.4.2008.

The respondent also published a Public Notice in the newspaper 'Afternoon Dispatch & Courier' and a local newspaper published in the regional language, which reads as under:

- "NOTICE IS HEREBY GIVEN TO TE PUBLIC THAT:
- (1) City Cable, 701, Krushal Commercial Complex Above Shopper Stop, MG Road, Chembur
  - (2) In Cable Comunication; B/22, Station Plaza, Station Road, Bhandup West, Mumbai-78
  - (3) Sai Ganesh Enterprise, Prathemesh, Horizon, B Wing Ground Floor, Flat No.3 & 4, New MHB Colony, Borivali West.
  - (4) S.S. Advertising, M30, Hirnen shopping center. Opp. Ratna Hotel, MG Road Jn., Goregaon West, Mumbai 62
  - (5) Aashish Cable Network, 416/420 Shiv Centre, Sector 17, Vashi, Navi Mumbai-400705

Had a distributor/agency agreement with IndusInd Media and Communications Ltd., (hereinafter called the company) and the same has been terminated by them as there were complaints of poor quality of signals and improper invoices being raised by the Company on Cable operators.

The present notice is being issued as an abundant caution and be treated as a notice under Regulation 4 of the Interconnect Regulations, though the same is not applicable."



15. The respondent in its reply inter alia contended:
- (a) The agreement has come to an end;
  - (b) No amount is payable to petitioner. On the other hand petitioner owes some amount to it towards commission.
  - (c) This Tribunal has no jurisdiction so far as the claim in question is concerned being not a service provider.
16. The principal issues which arise for consideration of this Tribunal are:
- 1. Whether the said agreement of January, 1999 continued despite its expiry in the year 2002; and
  - 2. Whether the petitioner has been able to establish that respondent has realized any amount from the cable operators and failed and/or neglected to deposit the same in its account.
17. As the question of jurisdiction of this Tribunal has been raised, we may notice some of the clauses of the said agreement.

“04.3 Eligibility criteria for payment of commission would be minimum of 90% of the monthly billing for direct points of the company and 70% of the monthly billing of the franchisee collection. However in exceptional cases relaxation of the above may be authorized by President, CATV or Executive Director, CATV.

06. The Distributor shall not enter into any agreement of the similar kind of business contemplated herein during the currency of this Agreement within the said Area within any other person or company. IMC will not appoint any other Distributor in the said Area during the pendency of this agreement.

07. IMC has provided/installed necessary equipment mentioned in ANNEXURE-2 attached hereto at its own expense in the premises controlled by the Distributor. The description of which is given in SCHEDULE-B below, for enabling the Distributor to operate the distributorship rights granted herein. Nothing contained herein shall create any right or interest in favour of IMC over the premises.

0.71 IMC may provide /install such other apparatus and equipment from time to time as it may deem necessary for the efficient operation of the distributorship by the Distributor and get them installed and all such other apparatus and equipments shall be taken care by the Distributor. Provided that IMC shall have the right and be permitted to remove any particular items of apparatus or equipments without assigning any reason therefor with intimation to the Distributor.

0.72 IMC will ensure the maintenance of all its equipments and apparatus in proper working condition at its own expenses.

0.73 The Distributor will take care and act as the custodian of all the equipments and apparatus that may be entrusted to him by IMC.

07.5 The Distributor shall not remove the apparatus and equipments belonging to IMC or any part thereof from their position, nor deliver the same to any other person, firm or company, nor encumber nor sell the same, nor do anything whereby they may be seized or taken in execution or attached, destroyed or

injured or whereby the title of IMC thereto may in any way be affected, destroyed or prejudiced.

07.6 The said apparatus and equipments are & shall remain the absolute property of IMC.

07.10 On termination of this agreement for any reason whatsoever, IMC shall have the right and be at liberty to remove the apparatus and equipments belonging to it and entrusted to the Distributor under the provisions of this agreement as the Distributor shall cease to have any right whatsoever to use the same, and the Distributor hereby undertakes to render necessary assistance to IMC for the said purpose on settlement of Distributorship Commission.

07.11 The Distributor shall maintain the channel allocations in conformity with directions issued by IMC in writing. In exceptional cases the channel lineup may be changed/altered after prior discussions and finalization in writing by President, CATV or Executive Director, CATV. As far as possible the requirement of local areas will be kept in mind.

11. The operations of the Distributor in the said Area shall be the prerogative of the Distributor within the rules and instructions issued by IMC from time to time and any changes required by IMC during the tenure of the Agreement will be by mutual consent.

13. This agreement shall remain in force for a period of three years from 20<sup>th</sup> day of February, 1999 unless terminated by either party at any time during the currency of this agreement by giving three month's notice in writing to the other of its intention to terminate this agreement and upon the expiration of any such notice this agreement shall stand cancelled and revoked. The termination of this agreement for any reason whatsoever shall be without prejudice to the rights of either party against the other in respect of any matter or thing antecedent to such termination. The agreement shall

be renewed for a further period three years by mutual consent."

18. According to the petitioner:

(i) the respondent had been distributing the 'incable' signals generated and distributed by it to its subscribers in its network in the aforementioned areas;

(ii) the respondent was to ensure that the subscriber base of petitioner increases as respondent had represented that it would use its local influence which it claimed to have in plenty;

(iii) the respondent was to collect subscription charges from the subscribers (local cable operators) and the amounts collected were to be paid and/or deposited with its bankers; and

(v) the petitioner was to pay the respondent commission and costs as agreed to between the parties.

19. Mr. Kailash Vasudev, learned senior counsel appearing on behalf of the petitioner, submitted that having regard to the fact that the respondent has also been shown as carrying on incable business in the said agreement and respondent having accepted that in fact it had been doing so and furthermore having regard to the fact that respondent itself has issued notice both under Regulation 4.2 and

published a Public Notice, there cannot be any doubt or dispute that the respondent is a service provider.

20. A little background to the factual matrix involved herein may be noticed by us. The petitioner entered into five different distributorship agreement in the month of June 1999.

The petitioner, however, alleged that the said distributors formed a company along with others known as SCOD Networking Pvt. Ltd. and latter SCOD 18 Networking Pvt. Ltd. and hijacked the entire network of the petitioner.

21. The petitioner filed four petitions against the said four distributors operating in the areas of Goregaon, Chembur, Boriville and Bhandup. The lead petition was registered as Petition No.67(C) of 2008. In the said petition an interim order was passed in terms whereof the network of the petitioner was directed to be restored. The said interim order was passed on the premise that the said distributors had not served any notice in terms of Clauses 4.2 and 4.3 of the Regulations.

22. The said distributors along with respondent herein thereafter served the aforementioned notice taking similar plea whereafter four other petitions were filed being Petition No.96(C) of 2008.

Whereas in those cases the petitioner had not sought for recovery of any amount, in this case it had.

23. It is on the aforementioned backdrop of events we may place on record that the respondent was a local cable operator. In that view of the matter and also from a perusal of the various clauses of the agreement which have been noticed by us heretofore as also the conduct of the parties, it is difficult for us to hold that respondent at no point of time was in cable business as has been contended.

24. The notices issued under Regulation 4.2 issued by the respondent would clearly go to show that apart from management of the channel and the network, it alleged that petitioner had disconnected the signals on 6.4.2008 as a result whereof it had to migrate to another MSO of the area.

The purported notice under Clause 4.2 of the Regulations had been issued inter alia on the premise that the petitioner has committed an illegality in disconnecting its signals without due compliance of law.

The respondent joined hands with the other distributors in issuing the public notice in terms of Clause 4.3 of the Regulations, although it was not a party to the said petitions.

25. The reasons for issuance of said public notice is said to be supply of poor quality of signals and raising of improper invoices by the petitioner.

26. The said public notice was not issued 'without prejudice'. If the contention of respondent is correct that it had been receiving signals from petitioner, it is difficult to comprehend as to how this Tribunal will have no jurisdiction to entertain this petition.

We, therefore, are of the opinion that this petition is maintainable before this Tribunal.

27. This petition, however, is filed only on the basis of a statement of account. It is also not a case where the petitioner had sued respondent as its agent in terms of an agreement for agency requiring it to furnish accounts to it.

We have noticed heretobefore that the distributorship agreement came to an end in the year 2002.

There is nothing on record to show except a stray sentence in the reply of the respondent that the petitioner requested all the distributors to enter into fresh agreements on or about 23.5.2006.

28. We have noticed heretobefore that no transaction has taken place although some arrangements between the parties might have

continued. The petitioner in its letter dated 1.9.2007 did not say that the agreement subsisted. It used the word `arrangement' for ensuring collection of subscription charges in Washi (Navi Mumbai).

Why out of nine areas only one area was named and not others is difficult to understand.

29. By reason of the said notice petitioner had been called upon to deposit the amount collected by it from December, 2006 till date. It is, therefore, implied that there was no dispute between the parties upto November, 2006.

30. In the legal notice issued by petitioner being dated 14.4.2008, respondent has been described to be a cable operator as also a distributor. The said notice also refers to the statement of account. By reason of the said notice respondent had been called upon to pay the amounts mentioned therein which is said to be the outstanding dues.

Strangely enough the said notice suggests that only upto 31.3.2008 respondent has not paid a sum of Rs.97,72,081/-. The relationship between the parties according to the said notice are twofold namely, under the distributorship agreement as also for supply of signal of TV channel of bouquets thereof, respondent was



liable to pay subscription fees every month before 10<sup>th</sup> of every subsequent month.

31. Only in paragraph 3 of the agreement the respondent was called upon to pay the advertisement guarantee. Paragraph 4 of the said notice speaks of an agreement between the parties without disclosing which agreement has been referred to therein as concedingly the agreement of year 1999 has nothing to do with supply of signals to the petitioner as a local cable operator.

32. The petitioner in support of its case has examined two witnesses; one of them Shri S. Satish Kumar, it's Senior Vice President (Finance) who has been working with the petitioner company since the year 1997 and thus is an experienced officer.

33. In his affidavit Shri Satish Kumar stated that as on April 2008 a sum of Rs.1,26,42,897/- was due from respondent. He, however, in his cross-examination in answer to most of the questions expressed his ignorance; being not connected with the operation at the ground level or having been dealing with the cable operators.

34. Strangely enough in answer to a question as to whether the entire outstanding claimed by the petitioner is towards collections to be made from the cable operators, he answered in the negative.

35. Mr. Vasudev would submit that the amount mentioned in the notice namely Rs.1,73,33,916/- being not the entire amount of the principal amount, his answer must be considered to be meaning that it did not constitute both principal and interest.

We do not think that the said contention is correct. We cannot read something in his statement.

36. Curiously enough, the said witness even could not say as to whether any action against the cable operators had been taken. He, however, conceded that beyond the statement of account no other document has been filed. He even was not aware as to whether respondent was a distributor of TV channels. Even otherwise, he did not appear to be conversant with the discontinuity of the services by respondent by issuing a notice or as to whether there were any other distributor in the area of Navi Mumbai at the relevant time.

37. The petitioner also examined one Shri Sanjeev Ahuja, Head (Legal) of the petitioner company.

38. He in his deposition for all intent and purport repeated the statements made in the petition, in support whereof he had affirmed an affidavit.

39 Despite the same, in his cross-examination, he categorically stated that his evidence by and large was hearsay in nature. He even was not aware as to whether any proof of payment by way of commission has been filed on the record.

40. Interestingly, So far as the continuation of the distributorship agreement dated 20.2.1999 is concerned, he stated as under:

“Q.Was the distributor agreement dated 20.02.1999 renewed between the parties by way of written documents?

A. No.

Vol. The parties continued to act on the agreement of 20.02.1999.

Q. Is there any written record of this continuation?

A. Yes. They continued to take signals from company and distribute them to customers both direct and through LCOs. They continued to receive Commission on the collection made by them and they continued to maintain the Headend which was set up by the company until the service of notice by the company for recovering dues from the respondent.”

41. It is surprising that he even had no knowledge as to who had been maintaining the headend, although he accepted that it had been maintained by the company in 2008. The respondent, therefore, had not admittedly been maintaining the same.

42. With regard to raising and service of the invoices, payment of entertainment tax, assignment of subscription/affiliation agreement, payment of subscription fee to petitioner company, the number of subscribers, the location of the headend, he expressed his ignorance being not concerned either with finance or the operation wings of the company.

He even could not state as to what was the quantum of losses sustained by the petitioner due to migration of cable operators to the network of SCOD 18. He accepted that the relationship between the parties came to an end after service of notice by the respondent under Clause 4.2 on 26.4.2006.

43. We may notice the following statements made by him in his cross examination with regard to the continuity of the arrangement despite the expiry of the agreement of 1999:

“Q. So, will it be correct that there was no dealing between the petitioner and respondent after 14.4.2008?

A. This will have to be answered by the Operations Department of the petitioner company.

Q. Please see para 3. Is it correct to say that the alleged supply of signals by the petitioner company had ended in April, 2008?

A. I am not in position to answer this question.

Q. Have you filed a list of cable operators along with the petition?

A. No.

Q. Have you filed a list of direct subscribers along with the petition?

(Objected to by the counsel for the petitioner)

A. No.

Q. Under what head are you seeking recovery from the respondent?

A. For all outstanding dues of the respondent to the company.

Q. For what purpose the respondent had to make payment to the petitioner?

A. For receiving signals and re-transmitting them to LCOs and others."

44. We have noticed heretobefore that the entire claim is made on the basis of the statement of account including the advertisement minimum guarantee. The said witness was also not even aware of that. He also expressed his ignorance so far as dealings of petitioner-company with the cable operators are concerned.

45. Mr. Vasudev would urge that the statement of account fulfils the criteria laid down in Section 34 of Indian Evidence Act. We do not think so.

46. Mr. Satish Kumar has stated about the accounts in paragraphs 3 & 4 of his affidavit. He verified the said paragraphs to be 'believed to be true on legal advice.'

47. He even did not say that he had prepared the statement of accounts or somebody else did so on the basis of the books of account maintained by the petitioner in ordinary course of business.

48. It is in the aforementioned context we may notice Articles I & II of the Schedule appended to the Limitation Act.

49. At one stage, Mr. Vasudev submitted that the agreement is a running and continuous one; later, however, the learned counsel also invoked Article II.

50. Article I of the Limitation Act would be attracted when the account is mutual, open and current. There must also be reciprocity of demands. The petitioner having not sued for accounts and/or on the premise that the respondent was its agent and, thus, are bound to

render accounts, in our considered opinion neither Article I nor Article II of the Schedule appended to the Limitation Act would apply.

51. The relationship between a principal and an agent would be governed by Chapter X of Indian Contract Act. In terms of the agreement of 1999, the respondent could only accept cheques drawn in the name of petitioner. If that be so, petitioner was required to plead and establish (apart from continuity of the said agreement) that respondent has acted in breach thereof.

In this connection we may notice the following statements made in paragraph 10 of the petition:

10.....The non-payment of the subscription fees by the respondent to the petitioner (which it had collected on the petitioner's behalf fro the petitioner's subscribers) became a very huge commercial hurdle as the petitioner was not receiving any money from the respondent for the area under its charge but at the same time it was incumbent upon the petitioner to pay the broadcaster as per the various agreements that the petitioner had signed with them."

52. The respondent was, therefore, required to pay subscription fee collected from the local cable operators. The petitioner, however, does not state how many local cable operators it had. It failed and/or neglected to disclose as to how much amount became payable to it in terms of the agreement.

53. It is expected that in a business of this nature, there would be a variance in the number of subscribers. Some cable operators might also have joined the network of petitioner.

From the statement of account filed with the petition as also the evidence of Shri Satish Kumar it would appear that whereas in respect of agreement, the term 'royalty' has been claimed; in the later 'operation fee' has been claimed.

From March, 2008 to March, 2009, only an amount of interest has been claimed.

For each month a specific sum has been claimed which would mean that respondent must have realized the said amount from the cable operators.

54. It is difficult to accept that whereas in the month of January, 2005, the account started with Rs.1,96,893/-, in the month of February it will come down to Rs.1,90,095, and from March, 2005 to March, 2006 a sum of Rs.2,81,144/- would be claimed for each month. No explanation in that regard has been furnished. Even if variance in the amount of collection is accepted, petitioner was required to file the primary document.



55. Similarly from the months of May, 2006 to April, 2007 a sum of Rs.2,32,337 will be claimed, whereas from May, 2007 to March, 2008 a sum of 1,32,585/- would be claimed.

56. The respondent in terms of the distributorship agreement was required to collect the amount. A minimum amount had been provided for in the agreement being the 70% of the amount to be collected.

57. However, in absence of any other proof, it is difficult for us to agree with the contention of Mr. Kailash Vasudev that the entire case can be said to have been established on the basis of the statement of account alone.

58. The said statement of account apart from the fact has not been proved, also does not bear the signature of Mr. Satish Kumar. It even otherwise, does not satisfy the requirements of Section 34 of the Indian Evidence Act as having not been proved to have been regularly kept and maintained in due course of business.

59. Section 34 clearly states that statement of account alone shall not be sufficient evidence to charge any person with any liability.

60. We, therefore, are of the opinion that petitioner having made inconsistent claim as also having failed to prove the continuity of the old agreement, the petition is liable to be dismissed.

61. We are, however, not oblivious of the fact that respondent has also acted irresponsibly inasmuch as it had taken different stands.

It specifically did not deny or dispute that a statement of accounts had been sent to it. It also failed to point out as to how and in what manner the amount of commission has not been paid to him. It is also curious to notice that in his cross examination the witness categorically stated that it had merely been assisting the petitioner's representative in collection of the account and nothing else.

62. It is, however, not a case where the onus of proof was on the respondent; the primary onus of proof, having regard to the provisions contained in Section 102 and 103 of the Indian Evidence Act, 1872, being on petitioner, this petition must fail as having not been established.

63. Moreover, this petition having been filed only on 24.4.2009, the claim could have been considered only within the period of limitation i.e. from April, 2006 only and not from January, 2005.

64. A part of the claim is, thus, barred by limitation. This petition is dismissed. However, in the facts and circumstance of this case, there shall be no order as to costs.

**(S.B. Sinha)**  
**Chairperson**

**(G.D. Gaiha)**  
**Member**

**(P.K. Rastogi)**  
**Member**

**July 27, 2011**  
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