

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Date 14th February 2023

Broadcasting Petition No. 223 of 2021

Den Networks Ltd. ...Petitioner

Vs.

Husniyam Cable Network and Anr ...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Vibhav Srivastava, Advocate

For Respondent : Mr. M A Abdul Hakim, Advocate

JUDGMENT

1. This Broadcasting Petition was filed by Den Networks Ltd., against Husniyam Cable Network, under Section 14 read with 14A of the Telecom Regulatory Authority of India Act, 1997 ("TRAI Act"), with a prayer for a decree of Rs. 19,727/- (Rupees Nineteen Thousand Seven Hundred and Twenty Seven only) as outstanding subscription charges as on 31.12.2020, and return of 1120 STBs in good working condition, which were issued by

the petitioner to respondent no. 1 or to make payment of amount of Rs. 22,38,880/- (Rupees Twenty two lakhs Thirty Eight Thousand and Eight Hundred Eighty Only) @ Rs. 1999/- per STB with a mandamus for restoring the STBs of the petitioner at subscribers' premises, if any, which were swapped by the respondents. In further prohibition to respondent no. 1 for not receiving cable TV signals from respondent no. 2 or any other DPO until the STBs of petitioner, in good working condition, or payment in lieu thereof not made.

2. In brief, the contention of the petition is that petitioner is carrying on Distribution Platform Operator (hereinafter referred as 'DPO') business. Hence, is a cable TV service provider, duly registered under the provisions of Cable Television Networks (Regulation) Act, 1995, and respondent No. 1 is a Local Cable Operator (LCO) receiving encrypted cable signal feeds of TV channels from the addressable system of the petitioner to retransmit the same through its cable TV network to the subscribers.
3. An interconnect agreement, dated 14.10.2019, was entered in between petitioner and respondent no. 1 for obtaining cable signal feed from 14.10.2019 onward. Agreement dated 14.10.2019 is Annexure P-1 to the petition.

4. Respondent no. 2 is also engaged in the business of cable TV service under the provisions of Cable Television Networks (Regulation) Act, 1995 working in the area of operation of the petitioner, hence, a service provider under TRAI Act, 1997.
5. As per petitioner's record, respondent no. 1 has taken a number of 1120 STBs for deployment at subscriber's premises. Each of the STB was worth Rs. 1999/- and respondent no. 1 was to return those STBs to the petitioner and in case of its failure, to make the payment in the tune of Rs. 1999/- per STB. Petitioner is the sole owner of those STBs.
6. As per terms of the agreement, invoices were raised from time to time for monthly subscription amount by the petitioner to the respondent no. 1. Few of the invoices, raised by the petitioner, towards monthly subscription charges, were annexed as Annexure P-2 to the petition.
7. The statement of Accounts of petitioner was also annexed as Annexure P-3. An oral request was made for payment of outstanding amount but of no heed by respondent. Respondent no. 1 swapped with respondent no. 2, without making compliance of the terms of the agreement as well as notifications of TRAI i.e. issuing of three weeks' notice to the petitioner. Respondent no. 1 did not clear outstanding dues towards subscription charges. A demand – cum – desist notice, dated 23.10.2020, was issued

by the petitioner to respondent no. 1 and the same is Annexure P-4. But respondent no. 1 did not come forward to clear outstanding dues or return of STBs. Rather migration to respondent no. 2 was detected by the petitioner and it was without issuing three weeks' notice, a mandatory requirement under the statute. Hence, the total outstanding liability of respondent no. 1, as per agreement, executed in between, was only Rs. 19,727/- (Rupees Nineteen Thousand Seven Hundred and Twenty Seven only) towards subscription charges till 31.12.2020 and Rs. 22,38,880/- (Rupees Twenty two lakhs Thirty Eight Thousand and Eight Hundred Eighty Only) for 1120 STBs @ Rs. 1999/- per STB. Interest @ 18% p.a, was to be payable for the same. Even after repeated notice, no payment was made, resulting a cause of action, within the jurisdiction of this Tribunal. Hence, this petition with above prayers was got filed.

8. In written statement, the petition was said to be non-maintainable either in law or on fact. Rather it was filed with misleading facts and with no cause of action. The amount claimed by the petitioner was vehemently opposed. No such invoices were ever issued, nor filed, nor proved. Rather, system was changed to Prepaid by the petitioner with effect from February 2019. Even if there was any arrear on the part of this

respondent, the petitioner would have shown negative balance in the Prepaid Wallet of this respondent. But no negative balance was ever shown at the time of its starting in February 2019. Statement of Account is Annexure P-3. It is a prepared document of the petitioner, which is illegal in law and not admissible as evidence, neither it is properly certified by the petitioner, nor is of any evidentiary value. More so, it covers the period beyond three years, prior to the date of initiation of interconnect agreement, hence, alleged outstanding dues, if any, was time barred. The petitioner had never given this statement of account to the respondent for its authentication and verification by the respondent.

9. This Petition is based on the interconnect agreement, which is Annexure-P-1. But Statement of Account covers period before the initiation of interconnect agreement, Annexure P-1. No such outstanding is there from the date of initiation of the Agreement. The alleged demand of outstanding arrears is for the period prior to Annexure P-1, which is time barred. The number of the Set Top Boxes and its delivery to respondent no. 1 is not there in interconnect agreement, Annexure-P-1. No such STB was ever given to respondent no. 1. No cause of action had ever arisen. The said STBs were straightway given to the subscribers on their

execution of Customer Activation Form/Subscriber Activation Form, provided by the petitioner. The respondent has acted only as a link between the petitioner and the subscriber. The said Set Top Boxes were not in possession of Respondent no. 1. The petitioner had to initiate proceeding against the subscribers. More so, no details of Set Top Boxes, nor their depreciated value qua the date of migration has been given by the petitioner. For the sake of argument, if the STBs are admitted to be property of petitioner, as per MIA, the money recoverable is the depreciated value and not the cost of STBs at the time of its purchase. But no such fact has been pleaded or proved by the petitioner. More so, the boxes given were of value less than Rs. 800/- per STB and those were collected from the subscriber. Petitioner had actually replaced several STBs issued to the subscribers after obtaining full value. Hence, as per law, existing as on date of broadcasting petition, the petitioner has right to claim only the depreciated value of the Set Top Boxes, even assuming without admitting that the Set Top Boxes are the property of the petitioner. But was to be proved the value of each of the Set Top Boxes at the time of installation and the depreciated value of the same, which has not been proved at all. Hence, the petition is to be dismissed.

10. The contention of the written statement was further denied in replication filed by the petitioner and the contention of the petition was reiterated by the petitioner. Respondent no. 2 has also filed written statement with the same contention as of respondent no. 1 and mention that respondent no. 2 is a Limited Liability Partnership, formed by LCOs, including respondent no. 1. It does not provide cable signals to any other LCOs other than its partners, including respondent no. 1. No such migration was there nor swapping was there nor any privity of contract, in between respondent no. 2 and petitioner, was there.
11. The Court of Registrar, vide order dated 18.1.2022, framed following issues:
1. Whether the Petitioner is entitled to the relief as prayed against the Respondents in the Petition?
 2. Whether the Petitioner is entitled for return of STBs from the Respondents as claimed in the Petition or in the alternative for recovery of the cost thereof?
 3. Whether the Petition is barred by limitations?
 4. To what other relief / reliefs the Petitioner is entitled for?
12. The petitioner filed evidence by way of affidavit of Mr. Siddharth Priya Srivastava.

13. Heard learned counsel for both sides and gone through the material placed on record.

14. **Issue No. 3.**

Annexure P-1 is the basis of this Petition and this is said to be executed in between on 14.10.2019 for onwards, and the para 11.1.1 of Chapter 11, "Billing", provides that "the MSO shall provide services to the LCO on prepaid basis" i.e. this agreement itself provides for prepaid basis. Then how an outstanding subscription charge may be there? More so, statement of account and Annexure P-3 filed by Petitioner, though not duly proved nor made it admissible in evidence, is apparent that no specific date of this outstanding arear is there. At the time of argument, learned Counsel for Petitioner argued that it was a pre-standing arear and as subsequent payment was made, hence, limitation will continue. But being asked with regard to existence of interconnect agreement for above period and mention of same in pleading, he couldn't make reply for it. Meaning thereby, the basis of this Petition, Exhibit P-1 is in regard to outstanding subscription charges and it was for - "by way of prepaid" mode and the outstanding subscription being claimed is of previous years, neither pleaded, nor specified, nor proved. For this, being beyond three years of limitation, apparently the cause of action was time barred.

Hence, for claimed outstanding subscription charge, this Petition was time barred. Hence, this issue is being decided accordingly.

15. Issue No. 2

Set Top Boxes are admitted to be property of MSO and it is very well there in the Standard Form of Agreement (SFA) and in its Model Form of Contract and this has been admitted by Respondent No.1 in its written statement at Para No. 18 at Page No.62 as below that “As per the law existing as on the date of Broadcasting Petition, the Petitioner has right to claim only the depreciated value of Set Top Boxes even assuming without admitting that the Set Top Boxes are the property of the Petitioner. For this, Petitioner has to prove the value of each of the Set Top Boxes at the time of installation, the date of installation of each Set Top Boxes, depreciated value of each of Set Top Boxes in the Books of Accounts of the Petitioner.”

16. Model Interconnect Agreement as well as Standard Interconnect Contract, promulgated by Statutory Regulation, specifically provides this term that Set Top Boxes and accessories belongs to MSO. Hence, anything against this Statutory Provision will not be acceptable. More so, this was

pleading made by Respondent No.1 that those Set Top Boxes were sold to subscriber for their cost, previously realized by Petitioner. This specific fact, pleaded by Respondent No.1, ought to be proved by Respondent No.1. For this, onus to prove lies upon Respondent No.1 because 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.

17. This Petition, before this Tribunal, is a civil proceeding and in civil proceeding, the preponderance of probabilities, is the touchstone for making a decision, as against strict burden of proof, required in criminal proceeding.
18. But no such evidence could be given by Respondent No. 1 for proving this fact viz-a-viz Petitioner by its un-controverted Affidavit has corroborated

the contention of Petition. But the factum of issuing 1120 STBs to Respondent No.1 and its purchase money along with its depreciated value had not been pleaded or proved by any documentary evidence i.e. cash receipt, purchase invoice or delivery invoices. Hence, this fact couldn't be proved by Petitioner. However, the delivery of Set Top Boxes for installing at subscriber's premises and its installation and payment of money on oral demand has been admitted in written statement by Respondent No.1 and the Statement of Account reveals the numbers which were in operation in October 2019, when this Interconnect Agreement came in effect, were 778 and the same remained the highest, till date of this Petition. Cost of one STB has been written to be of Rs.800/- in written statement and Rs. 1999/- in the petition. Hence, the less one, which was written in written statement was to be admitted.

19. Accordingly, Respondent No. 1 is bound to make the return of 778 STBs in working order to Petitioner or to make payment at the rate of Rs. 800 per STB ($778 \times 800 = \text{Rs. } 6,22,400/-$). For this issue No. 2, it is decided accordingly.

20. Issue No.1 and Issue No. 4

Both the issues are one and same issue. Upon the discussions made above, the petition is liable to be allowed for a decree/ award of Rs. 6,22,400/- towards price of STBs not returned, against Respondent No. 1 in favour of the Petitioner, along with usually granted 9% per annum interest on above amount from the date of Petition, pendentilite and till actual payment by Respondent No.1. These two issues are being decided accordingly.

On the above discussion, the petition merits to be allowed in part, written as above.

ORDER

Petition is being allowed and Respondent No.1 is being directed to make payment within two months, from the date of judgment, Rs. 6,22,400/- (Rupees Six Lakhs Twenty Two Thousand and Four Hundred only), as cost of STBs and other hardware of 778 numbers, alongwith pendentilite interest @ 9% p.a., till actual payment, in Tribunal, for making payment towards petitioner.

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

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(Justice Ram Krishna Gautam)
Member

14.02.2023
/NC/

