

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 9th January 2023

Broadcasting Petition No. 739 of 2020

Den Networks Limited

...Petitioner

Vs.

Lakshmi Gold Khazaana Pvt. Ltd.

...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner : Mr. Vibhav Srivastava, Advocate

For Respondent : Mr. Anil C. Nishani, Advocate

JUDGMENT

1. This Petition, under section 14 read with 14A of Telecom Regulatory Authority Act, 1997 (hereinafter called as 'TRAI Act'), has been filed by Petitioner- DEN Networks Ltd. against Respondent- Lakshmi Gold Khazaana Pvt. Ltd. with a prayer for order to Respondent to make the payment for a sum of Rs. 4587591/- (Rupees Forty Five Lacs Eighty Seven Thousand Five Hundred and Ninety One only), due as on 31.01.2019, towards placement

charges, along with pendentelite and future interest at the rate of 18% per annum, from the date of invoices, till the actual realization and other relief, which this Tribunal deems fit.

2. In brief, the contention of Petition is that Respondent-Lakshmi Gold Khazaana Pvt. Ltd. is a broadcaster and it entered in an agreement with regard to placement of their Channel 'TV1 News', from 04.04.2018 till 03.04.2019, with Petitioner-Multi System Operator (MSO), carrying on its business of Multi System Operation, for a consideration, written in agreement, annexed as Annexure P-1 to the petition. This Channel was placed by Petitioner in its compliance of above agreement, Annexure P-1. But Respondent had defaulted in meeting with their obligations, towards the Petitioner, resulting in dues of Rs. 4587591/- (Rupees Forty Five Lacs Eighty Seven Thousand Five Hundred and Ninety One), as on 31.01.2019. Respondent had illegally enriched itself at the cost of Petitioner, whereas Petitioner had fulfilled its obligation under above Agreement. Channel Placement Agreement was fully complied by Petitioner, but the payment was withheld for placement fees of "TV1 News" Channel by Respondent, resulting in financial loss, due to act of omission and commission, for and on behalf of Respondent. A demand notice was issued and it was served in accordance

with invoices, raised before it, to Respondent for making payment of placement charges. Respondent used to make off and on payment to the Petitioner. The copy of invoices, along with statement of account, maintained by Petitioner Company, were annexed as Annexure P-2 (Colly) and Annexure P-3 respectively to the Petition. The Petitioner raised invoices regularly, for which Respondent promised that the dues will be cleared soon, but default was continued. Hence, a demand notice, dated 27.11.2020, for outstanding dues, to be paid by Respondent, was issued and it is Annexure P-4 to the Petition. The total outstanding liability of the Respondent, under agreement, is Rs. 4587591/- only as on 31.01.2019, for which, repeated demand and request was made with the Respondent. But it was of no avail. Hence, this cause of action had arisen and as per provisions of TRAI Act 1997, this Tribunal is with due jurisdiction for deciding this dispute.

Hence, this Petition with above prayer.

3. The written statement by Respondent was with specific mention of denial with regard to dues of Rs. 4587591/-, said to be due as on 31.01.2019, against Respondent and no cause of action had ever arisen. The contention of Para 6(a) was admitted to be true. But Para 6(b) was a matter of document. The contention of Para 6(c) of Petition was true to the extent that Respondent is a broadcaster as per Telecom Regulatory Authority of India Regulation and

was distributing satellite Channel 'TV1 News' and an agreement for the period of 04.04.2018 to 03.04.2019 was executed in between and this agreement is Annexure P-1. But the Petitioner failed to give proper services as agreed upon, resulting in the deficiency of service. The placement of Channel of Respondent's "TV1 News", as per agreement executed in between by Petitioner, is corrected one, but no dispute regarding placement of channel was ever raised by the Respondent, rather it was a poor service, given by the Petitioner, for which objection was raised. Raising of invoices on the Respondent and the Annexures P-2 and P-3 were disputed. Paras 6(f) and 6(g) of Petition were also denied, with this contention that at no point of time, the service of those notices, were ever made over Respondent. The Demand notice dated 27.11.2020, was also not served over Respondent. The strict proof of the same is burdened over Petitioner. The rest of the contention of Para 6 (i), (j), (k), (l), (n) and (m) were also to be proved by Petitioner.

4. Petitioner started placing Channel "TV1 News" on the digital platform in the territory of Karnataka, but the services were very poor and it failed to perform its contractual obligation in the form of not properly placing "TV1 News" on their digital platform. Rather there were so many technical issues in the service of Petitioner, as such the placement of the Petitioner through digital platform, was not successful and because of that poor service, the

Respondent had suffered a huge loss. No dues of Rs. 4587591/- was there, as on 31.01.2019.

Petition was liable to be dismissed.

5. In replication-cum-rejoinder, the reiteration of contentions of Petition was there.

6. On the basis of pleadings of both sides, the Court of Registrar of this Tribunal, by order dated 12.05.2022, framed the following issues –

- (1) Whether the Petitioner is entitled to recover an amount of Rs. 45,87,591/- towards the placement charges, as claimed in the Petition?
- (2) Is the Petitioner entitled to payment of interest @ 18% p.a. on the above amount from the date it became due and payable till its actual realization?
- (3) Whether the Petitioner has fulfilled its obligations towards the Respondent as mentioned under the agreement executed between the parties?
- (4) To what other relief/ reliefs the Petitioner is entitled to?

7. PW-1, Mr Mayank Jain, filed its testimony as of PW-1 for and on behalf of Petitioner Company and the Respondent filed its evidence by way of affidavit of Mr. K.P. Nanjundi Viswakarma, RW-1.

8. Heard Learned Counsels for both sides as well as and gone through the materials placed on record.

9. **Burden of proof:**

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.

10. 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. The very contention of execution of placement agreement, effective for a particular period is an undisputed fact and a fact not being disputed in pleadings, requires no proof. The simple question involved in this petition is with regard to invoices raised and a demand notice, annexed as Annexures P-2 and P-3 with Petition. The service of same has been denied by Respondent.

11. **Issue No.1 and Issue No. 3**

Issue no. 1 and Issue no.3 are connected with each other, and their joint discussion is necessary for adjudication of real lis, in between. The affidavit filed by Petitioner is the reiteration of contention of Petition, with a specific mention of raising of invoices and issuing of same with a service over Respondent. The Demand notice filed with Petition as of Rs. 4587591/- for dues as on 31.01.2019, has been annexed with Petition as well as with this testimony of the same and said to have been served over Respondent. Learned Counsel of Respondent agreed that for half of the period of agreement, payment was made by Respondent. Once, it is being disputed that no invoices were ever raised, on the other side, half of the payment is being agreed, then this was a matter to be proved by Respondent and the onus to prove this fact shifted over Respondent.

Burden of Proof as well as Onus of Proof are two different things. Burden of Proof is over the Petitioner/ Plaintiff to prove its case. But once some fact being said in Petition and is being admitted in written statement, then the additional fact mentioned in written statement by defendant, is to be proved by defendant itself. Whereas in affidavit filed in the testimony of defendant, there is no contention with regard to poor services rendered by

Petitioner or the objection ever raised with regard to poor services given by Petitioner.

12. What was the poor services and what was degree of deficiency and with regard to which sphere? was to be specifically written by defendant and to be proved by defendant, showing the non- payment with regard to the above deficiency in service. But no such contention is there either in written statement or in affidavit, filed as testimony for and on behalf of Respondent. Hence, certainly, the contention raised in written statement couldn't be proved.

13. Agreement Annexure P-1, its period of effect and placement of Channel on digital platform by Petitioner, is undisputed fact. Now, the invoices were partly paid, as is being argued. Hence, the raising of invoices is also undisputed. The Demand notice was with proper address and it was said to be issued and served. Hence, it is with presumption of its service in due course. More so, anything other than that is being said by the defendant, is to be proved by defendant. But no such iota of evidence, is there. The statement of accounts has been annexed with Petition, whereas no such statement of account with regard to payment, has been filed by Respondent. And the statement of account, duly prepared in course of business, filed with

Petition as well as with evidence with specific mention of preparation of same by authorized person in its ordinary course of business, is admissible as such and this statement very well reveals the dues of Rs. 4587591/- as on 31.01.2019.

14. The termination of agreement and non-placement of channel for last quarter in above period of its effect is an undisputed fact. Hence, for that quarter, there is no raising of an amount. Hence, on the very perusal of these documentary as well as oral testimony, it is very well established that the Respondent was in arrear of dues towards Petitioner as on 31.01.2019 in the tune of Rs. 4587591/-. Hence, Petitioner is entitled to have the same received, as against Respondent.

These two issues are, accordingly, decided in favour of Petitioner.

15. **Issue no. 2 :**

This Tribunal, in many Petitions have previously decided and granted interest for pendentelite and future interest @ 9% per annum, as a simple interest. Hence, it seems to be proper, in the present scenario of interest, being paid by Nationalized Bank. Accordingly, Petitioner is entitled for interest @ 9% per annum on above amount of Rs. 4587591/- from the date of this

Petition, till actual realization of the dues. This issue is being decided accordingly.

On appreciation of these issues, this Petition merits to be allowed with cost.

ORDER

Accordingly, petition is being allowed with interest and cost. Respondent is being directed to make a deposit of Rs. 4587591/- (Rupees Forty Five Lacs Eighty Seven Thousand Five Hundred and Ninety One only) as a principle, along with interest pendentlite and future @ 9% per annum, till actual payment, within two months from today, in the Tribunal for making payment to Petitioner. Failing which, action may be taken as per Code.

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

.....
(Justice Ram Krishna Gautam)
Member

09.01.2023
/NC/