

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 2nd May 2023

Broadcasting Petition No. 735 of 2020

Den Networks Limited

...Petitioner

Vs.

Asgar Cable Network and Anr.

...Respondents

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner

:

Mr. Vibhav Srivastava, Advocate

Ms. Aashi Arora, Advocate

Ms. Nitika Kumar, Advocate

For Respondent No. 2

:

Mr. Himanshu Dhawan, Advocate

JUDGMENT

1. This Petition, under Section 14, read with Section 14A of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act"), has been filed by Den Networks Limited, Petitioner, against Asgar Cable

Network and Another, Respondents, with a prayer for awarding, jointly and severally, outstanding subscription dues of Rs.31,164.00 (Rupees Thirty One Thousand One Hundred Sixty Four only) as on 03.10.2020, with a further direction to Respondents to return total 726 Set Top Boxes(STBs) in good working condition, issued to Respondent No.1, and in case of failure, to make payment of Rs. 14,51,274.00 (Rupees Fourteen Lakhs Fifty One Thousand Two Hundred and Seventy Four Only) @ Rs. 1999/- per Set Top Boxes, with a further direction to Respondent No.1, to restrain from swapping the set Top Boxes issued by Petitioner for deployment at subscriber's premises, without following due process of law, with a further injunction to Respondent No.1, from receiving cable TV signals from Respondent No.2 or any other DPO, until the Set Top Boxes of Petitioner, are returned to Petitioner. Respondent No.2 be restrained from supplying signals to Respondent No.1.

2. In brief, the Petition contends that Respondent No.1, Asgar Cable Network, is LCO with code LCOALG76 in the Petitioner's system, of which Petitioner is a MSO, and the subscription fee due, as outstanding against Respondent No.1, was Rs.31,164.00 (Rupees Thirty One Thousand One Hundred and Sixty Four only) as on 03.10.2020, to be paid to Petitioner Company.

Respondent No.1 is planning to migrate to competitive DPO, Respondent No.2, Nadeem Cable Network, without giving any notice and complying with the TRAI Regulations, as well as clearing outstanding dues, payable by Respondent No.1 to Petitioner. As per Petitioner's record, 726 Set Top Boxes were issued to Respondent No.1, for deployment at subscriber's premises. Those STBs are the exclusive property of the Petitioner, as was also mentioned in the Interconnect Agreement executed, in between. The price of each Set Top Boxes was Rs. 1999.00 (Rupees One Thousand Nine Hundred Ninety Nine Only). Respondent No.1, made default in meeting its obligations, laid out, in above Interconnect Agreement, by making default in payment, towards monthly subscription charges, and swapping with Respondent No.2, without observing statutory notice of three weeks. The Respondent No.1 had entered into an Interconnect Agreement with Petitioner Company on 16.10.2019, for obtaining Cable Signals. The said agreement is **Annexure P-1** to Petition.

The Respondent No.2 is also engaged in the business of cable television service, under Cable Televisions Networks (Regulation) Act, 1995, and is working in the area of operation of Petitioner. That is why, it is also a service provider, under the Regulations of TRAI. Respondent No. 1 had taken 726 Set Top Boxes(STBs) from Petitioner, which are exclusively owned by Petitioner

Company. Those were issued to Respondent No.1 for deployment at subscriber's premises. Each of Set Top Boxes was worth Rs. 1999.00 (Rupees One Thousand Nine Hundred and Ninety Nine Only), for which Respondent No.1 was liable to return, or to make payment @ Rs. 1999.00 per STB. The outstanding subscription amount was also to be paid for the signals already received by Respondent No.1. The invoices were to be issued on monthly basis, by the Petitioner to the Respondent No.1, for the payment of subscription amount, collected from subscriber and they were being issued. Those invoices were annexed as **Annexure P-2**. The Statement of Account (SOA) made by Petitioner Company in usual course of its business, was **Annexure P-3**. Respondent No.1 failed to make payment of outstanding amount of subscription fee, for which repeated request, was made by Petitioner, but of no heed. Petitioner, subsequently, found that Respondent No.1 was involved in swapping of Petitioner's Set Top Boxes with Respondent No.2. Demand-cum-cess and desist notice dated 26.11.2020 **Annexure P-4**, was issued by Petitioner to Respondent No.1, but it was of no response. The STBs of Petitioner were being swapped with Respondent No.2, without complying with the provisions of Interconnection Regulations, by way of giving three weeks' notice, mandated by law. The total outstanding subscription fee, amounted to Rs. 31,164.00 till 03.10.2020 and total 726 STBs

accounted for the value of Rs. 14,51,274.00 (Rupees Fourteen Lakhs Fifty One Thousand Two Hundred and Seventy Four Only) @ Rs. 1999/- per Set Top Box, was liability of Respondent No.1. Apart from above rate, @ 18% interest, towards those amount, was also to be realized by Petitioner. But because of no response from Respondent No.1, this Petition, for above cause of action, arisen within the jurisdiction of this Tribunal, within limitation period, was filed with above prayers, wherein interim relief was also claimed correspondent to relief prayed for.

3. Even after sufficient service of notice, none is for Respondent No.1 nor any reply was got filed. Order to proceed ex-parte was there. Whereas, Respondent No.2 filed its reply with a specific denial of the contention of Petitioner with allegation of *Supressio veri and suggestio falsi*. The existence of Interconnect Agreement, in between, Respondent No. 2 with Respondent No.1 and giving of signals, in accordance with above agreement, was admitted by Respondent No.2, but it was said that the same was with no reference and no connection with regard to claim of Petitioner. More so, this Tribunal had oftenly propounded that because of no privity of contract with competitive MSO, no liability of competitive MSO may be there with Petitioner, who is also a competitive MSO, and placing its claim on the basis of Interconnection Agreement entered with LCO, i.e. Respondent No.1. There is no evidence of

swapping, in between, respondents, nor any liability of Respondent No.2, with regard to alleged claim, is there. The Respondent No. 2 is uninterruptedly supplying its signal to Respondent No.1 since June'2018. Hence, it cannot be said that the Respondent No.2 is swapping the boxes of Petitioner. There is no documentary evidence placed by Petitioner to show that Petitioner's subscribers had been swapped with Respondent No.2. The subsisting Interconnection Agreement between Respondent No.1 and Respondent No.2 is dated 01.03.2020, which has been annexed as **Annexure R-1**. Invoices were raised by answering Respondent No. 2 to Respondent No.1 and those are **Annexure R-2**. The copy of Ledger Accounts of Respondent No.2 is **Annexure R-3**.

4. The Petitioner is running its business on a pre-paid model, wherein, customer has to recharge the STBs at its will / choice. Hence, the allegation pertaining to swapping of STBs with STBs of Respondent No. 2, is not of any force. More so, the relief claimed, may be against Respondent No.1, with whom there is a contract of Petitioner and Respondent No.2, is of no Privity of Contract, with regard to above Interconnection Agreement entered, in between, Petitioner and Respondent No.1. No relief with regard to joint

liability may be granted. The defence of Respondent No.2 is limited to the liability of Respondent No.2 only.

5. The Court of Registrar, after perusing the pleadings of both sides, vide order dated 18.11.2021, framed following issues :

- (i) Whether the Petitioner is entitled to the dues claimed in the Petition along with the STBs or cost in lieu of the said STBs from the Respondent?
- (ii) Whether Respondent No1 has migrated to Respondent No.2 in violation of the TRAI Regulations?
- (iii) To what other relief/ reliefs the Petitioner is entitled for?

6. Evidence by way of Affidavit of Mr. Siddharth Priya Srivastava, for and behalf of petitioner, was filed under Order 19 of CPC. Evidence of Respondent no. 2 is not there. Proceeding against respondent no. 1 is ex-parte.

7. Heard learned counsel, Mr. Vibhav Srivastava for the petitioner and Mr. Himanshu Dhawan for respondent no. 2 and gone through the material placed on record.

8. 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.

9. 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. **Issue No. 1**

Petition is with specific mention of execution of Interconnection Agreement, in between, petitioner and respondent No. 1. The same, dated 16.10.2019, is **Annexure P-1** with petition. This fact has not been disputed by respondent No. 1, who had not appeared or filed any reply, or by respondent No. 2, in its reply. The petitioner and respondent No. 1, being party to this agreement, are MSO and LCO, that is, service providers under TRAI Act and Regulations, made therein. The subscription fee, due till 03.10.2020, Rs.

31,164/-, has been said in affidavit filed, in support of petition and which has been taken as evidence, for and on behalf of petitioner. The same is with no rebuttal. The same is supported with the Statement of Account too. Hence, as this amount of subscription due, is with no rebuttal, rather the statement on oath had proved it. Hence, the same is with full proof. The STBs, being said to be taken for deployment at subscriber's premises, by respondent No. 1, in continuation of Interconnect Agreement at **Annexure P-1** were said to be 726, with a worth of Rs. 14,51,274/-. The same is with no rebuttal by respondent No. 1. Whereas, this fact has been averred in evidence by petitioner, by way of its affidavit, filed on record. This fact is with uncontroverted and un-rebutted contention. Hence, the same is with no controversy. The worth price @ 1,999/- was said at the time of its purchase and the agreement was of 2019 and the petition was of 2020. The depreciation value had not been specified. Whereas, law on this point is settled, as well as the legal provision, is also in TRAI Regulations, with regard to restoration, on the basis of depreciation value of STBs. The same is frankly being admitted with depreciation @ 15%. Hence, as there is no evidence or lota of evidence, for and on behalf of respondent No. 1, against the petitioner with regard to number of STBs and worth of the STBs, written as above. Hence, this is to be restored and paid by respondent No. 1. So far as respondent No. 2 liability, as jointly or severally,

is concerned, admittedly, there is no privity of contract with respondent No. 2, and respondent No. 2 is also a service provider, operating in the same area and having relations with respondent No. 1, as was with petitioner. Hence, it can never be said to be responsible for making payment, which is due against respondent No. 1. Hence, this issue is being decided in favour of petitioner, with regard to subscription amount of Rs. 31,164/- and the depreciated value @ 15% less than Rs. 1,999/- per STB, for total 726 STBs, which comes to Rs. 12,33,474/-. Hence, this issue is being decided in favour of Plaintiff/ Petitioner, against respondent No. 1.

11. **Issue No.2**

This has been specifically given in pleading i.e, petition, as well as affidavit filed, in support as evidence, by petitioner and there is no rebuttal by respondent No. 1. Thus, unrebutted and un-controverted statement of affidavit, is being accepted, as it is. Hence, this issue is being decided against respondent No. 1.

12. Issue No.3

On the basis of discussions made above, this petition is to be allowed against respondent No.1, for payment of Rs. 31,164/- outstanding subscription due, till 03.10.2020 and restoration of 726 STBs to petitioner, within two months of judgment and in case of failure, by respondent No. 1, to make payment, for those 726 STBs, in the tune of 15% less depreciation value i.e, @ Rs.1,699/- per STB, in all amounting to Rs. 12,33,474/-, within two months in the Tribunal, for making payment to petitioner.

So far as interest is concerned, the fiscal scenario and the interest, being paid by this Tribunal, in various petitions, already decided, is payable and seems to be reasonable @ 9% simple interest per annum, on above principle amount by respondent No. 1, to petitioner. This issue is being decided accordingly.

ORDER

The petition is being allowed, against respondent No. 1. Respondent No. 1- ASGAR CABLE NETWORK LTD., is being directed to make payment of Rs.31,164/-(Rupees Thirty one thousand and one hundred sixty four only), within two month of judgment, in the Tribunal for making payment to petitioner and also directed to restore/ deliver 726 STBs in working order to

petitioner, or to make payment of Rs. 12,33,474/- (Rupees Twelve lakhs thirty three thousand and four hundred and seventy four only), within two months from the date of judgment, in the Tribunal for making payment to petitioner. Respondent No. 1 is further being directed to make payment *pendentelite* and future interest simple interest @ 9% per annum, for the above principle amount i.e., subscription dues as well as cost of STBs, written as above, within two months from the date of judgment, for making payment to petitioner.

No relief against Respondent No. 2

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

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

02.05.2023
/NC/

