

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****Dated 16th May 2023****Broadcasting Petition No. 559 of 2017**

M/s NXTDIGITAL LIMITED

...Petitioner

Vs.

Shiva Cable Network & Anr.

...Respondents

BEFORE:**HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER**

For Petitioner : Ms. Vandana D. Jaisingh, Advocate
Ms. Kanupriya Gupta, Advocate

For Respondent No. 2 : Mr. Nasir Husain, 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 NXTDIGITAL LIMITED (formerly known as IndusInd Media and Communication Ltd. (IMCL), petitioner against Shiva Cable Network & Hathway Digital Pvt. Ltd. respondents, with a prayer for direction to

respondents, jointly and severally, to pay the amount of outstanding subscription fees, in the tune of Rs.1,76,951/- (Rupees One Lac Seventy Six Thousand Nine Hundred Fifty One only) as on 14.12.2017, with a further interest *pendentelite* and future @18% p.a., till date of actual realization, with a further direction to the Respondents to pay Rs.9,00,000/- (Rupees Nine Lac only) towards double the cost of 250 STBs, with further interest @18% p.a., till realization. In total Rs.10,76,951/- (Rupees Ten Lac Seventy Six Thousand Nine Hundred and Fifty One) with interest @ 18% p.a., from the date of default, till actual realization.

2. In brief, the petition contends that petitioner is a company, registered under the Companies Act, and involved in business, including receiving of signal from broadcasters of various television channels and re-distributing such channel, by means of co-axial cable and / or optical fiber cable for reception by multiple subscribers. The Petitioner is a Multi System Operator (MSO) operating pan India, having one of its networks, in the city of Bangalore, with Local Cable Operators (LCO). Mr. Devender Singh Thakur, is person authorized to file petition, for and on behalf of petitioner company, by Resolution of Board dated 12.5.2017, **Annexure P-1** to petition.

Respondent No.1 is running a cable business in Bangalore City. It is a Local Cable Operator (LCO) of the Petitioner re-transmitting the signals to subscribers.

The Respondent No. 2 is a competitive Multi System Operator (MSO), running cable business in the city of Bangalore, having DAS license with it.

3. Respondent No. 1 entered in swapping the STBs of the Petitioner with respondent No. 2 in an illegal manner, without giving notice required under clause 6.4 and 6.5 of the DAS Regulation, 2012, as well as without clearing outstanding subscription dues of petitioner, that too without returning STBs, owned by petitioner. The Petitioner had issued 250 Set Top Boxes (STBs) to Respondent No.1, for installing the same with its subscribers on digitization. Cost of each set top boxes was @ Rs.1800/- (One thousand Eight Hundred only). Standard Technical and Commercial Interconnect Agreement was executed, in between, petitioner and respondent No. 1, on dated 3.12.2015 on portal with the Petitioner, which is **Annexure P-2** to petition.

4. Outstanding subscription fees against respondent No.1 was Rs.1,76,951/- (Rupees One Lac Seventy Six Thousand Nine Hundred Fifty One only) as on 14.12.2017, towards petitioner. Invoices issued by the Petitioner

to the Respondent No.1 are **Annexure P-3 (colly)**. In spite of repeated requests, it was not paid. Statement of Account of the petitioner having such detail of outstanding is **Annexure P-4** to petition. Respondent No. 1 swapped with respondent No. 2, without observing provisions of 6.4 and 6.5 of DAS Regulations 2012, as well as return of STBs and making payment of outstanding subscription dues. Hence, in all Rs.10,76,951/- (Rupees Ten Lac Seventy Six Thousand Nine Hundred and Fifty One), was due against them and interest @ 18% p.a., was also payable over it. This cause of action, in limitation period, had arisen within jurisdiction of this Tribunal. Hence, this petition with above prayer, wherein interim prayer, with same effect was also claimed.

5. Respondent No. 1 though appeared initially and admitted to return STBs to petitioner, as was mentioned in order dated 20.2.2018, repeated time was given for making reply specifying the number of STBs returned and number of STBs unreturned. But even after grant of so many dates, no reply by respondent No. 1 got filed. Rather opportunity to file reply was closed and order dated 3.2.2021 specifies that there was no instruction by respondent No. 1 to his advocate. Hence, the proceeding against respondent No.1 was ex parte.

6. Respondent No. 2 had filed, its reply. Reply by way of an application dated 13.1.2022, with this contention that no cause of action against respondent No. 2 had ever arisen. Respondent No. 2 is, neither a proper nor a necessary party to present proceeding. Either respondent No. 2 be deleted from array of parties or petition against respondent No. 2 be got dismissed. Respondent No. 2 has been providing services to respondent No. 1, w.e.f. November 2017. As Multi system operator (MSO), it is of no concern with Interconnect Agreement entered, in between, respondent No. 1 and petitioner. There is no swapping by respondent No. 1 with respondent No. 2. The cause of action has been said to have arisen against respondent No. 1.

7. On the basis of pleadings of both sides, following issues were framed by Court of Registrar, on 2.8.2021 :

(1) Whether the respondents have committed any breach of agreement and/or TRAI Regulations, passed from time to time, and have acted in contravention to the Interconnect Agreement executed between the petitioner and R-1?

(2) Whether the petitioner is entitled for outstanding dues, cost of STBs alongwith interest from the respondents, as claimed in the petition?

(3) Whether the petition is maintainable against R-2 in the absence of any cause of action against it?

(4) To what further relief(s), if any, the petitioner is entitled for?

8. Evidence, by way of affidavit, has been filed, as of Mr. Abhishek Goel, for and on behalf of petitioner, and the evidence by way of affidavit, for and on behalf of respondent No. 2, as of Mr. Raghupathi C. has been filed, by respondent No. 2

9. Written submissions, by learned counsel for petitioner has been filed. Heard learned counsel for both side and gone through material placed on record.

10. 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.

11. 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.

12. **Issue No. 1**

Order-sheet dated 20.2.2018 reveals that learned counsel for respondent No. 1, Mr. Sharath Sampath had specifically agreed to return the STBs of the petitioner and for this, time was given. It was said to have been returned and the Tribunal, vide order dated 9.4.2018 had directed respondent No. 1 to file reply, specifying the fact with regard to return the STBs, as to how much have been returned and how much are remaining? But even after grant of sufficient time, no reply was filed. Rather, a mention was there that respondent No. 1 is not giving instructions to his counsel. Ultimately, matter was taken ex-parte against respondent No. 1 and the reply and then after, rejoinder was filed, by respondent No. 2 only. Hence, whatever was said in petition with regard to issue of 250 STBs, in accordance with Interconnect agreement, annexed with petition, and not return of the same, by respondent

No. 1, rather swapping with respondent No. 2, without observing mandatory provision of three weeks' notice, and final payment of subscription dues, if any, as well as return of STBs and viewing cards, had been reiterated in uncontroverted affidavit filed, in ex-parte evidence. Hence, whatever was said in petition have been supported by statement on oath, which has been uncontroverted by respondent No. 1. Hence, it is fully proved with no iota of evidence of contradiction, for and on behalf of respondent No. 1. Hence, this issue has been decided in favor of petitioner.

13. **Issue No. 2**

The invoices and statement of account annexed with the petition reveals the outstanding subscription dues in the tune of Rs.1,76,951/-. The same is with further reiteration, in evidence filed, by way of affidavit, which had been uncontroverted by respondent No. 1. Hence, this issue is being decided in favor of petitioner.

14. **Issue No. 3**

Respondent No. 2 is a competitive MSO. This fact has not been disputed in petition. The respondent No. 1 is a LCO. Respondent No. 2, in its affidavit of evidence, had reiterated the contention of reply that transmission of signal

was being made in accordance with Interconnect Agreement entered between respondent No. 2 i.e. MSO with respondent No. 1- LCO. Hence, the swapping or the outstanding subscription dues or non-return of STBs have been alleged to be defaulted by respondent No. 1 only. It has not been said against respondent No. 2. More so, there is a settled proposition of this Tribunal that owing to no privity of contract, between competitive MSO and petitioner MSO, the petition against competitive MSO for default made by LCO, is of no avail. Hence, this issue is being decided in favor of respondent No. 2.

15. **Issue No. 4**

Number of STBs being said to be unreturned are 250. The cost price was said to be Rs. 1800/- per STB. They were said to be issued in compliance of Interconnect Agreement dated 3.12.2015. The petition was filed, in year 2017. Hence, the Interconnect Regulation mandates return of STBs and in case of its default, the depreciated value of STBs. But specific fact with regard to depreciation has not been given in evidence. Considering the depreciation @15%, which is just and reasonable, the depreciated value of each of STBs will amount to Rs. 1200/-. Hence, the failure to return those STBs will entail award of depreciated cost of 250 STBs @ Rs. 1200/- STBs i.e, Rs.3,00,000/-

(Rs. 1200* 250 STB). Considering the interest being awarded by this Tribunal in other petitions and the fiscal scenario with regard to interest, an interest for *pendentelite* and future, till actual payment, simple interest @ 9% p.a. will be just and reasonable interest to be awarded, on above amount.

The petition against respondent No. 1 is liable to be allowed for above amount of dues and STBs. This issue is being decided, accordingly.

On the basis of discussions made above, this petition is being allowed against respondent No. 1.

ORDER

This petition is being allowed against respondent No. 1. Respondent No. 1 is being directed to make the payment of subscription amount as on 14.12.2017, Rs. 1,76,951/- with simple interest @ 9% p.a. *pendentelite* and future, till actual payment, within two months from date of judgment, in Tribunal, for making payment to petitioner. Respondent No.1 is further being directed to return 250 STBs in good and working order to petitioner within two months from the date of judgment and in case of its failure, to make payment of Rs. 3,00,000/- @ Rs.1200/- per STB, with a further simple interest @ 9% per annum *pendentelite* and future, within two months, from date of judgment, for making payment to petitioner.

No relief against respondent No. 2. Pending MAs, if any, are also disposed of.

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

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(Justice Ram Krishna Gautam)
Member

16.05.2023
/NC/

