

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 13<sup>th</sup> October 2023**

**Broadcasting Petition No. 229 of 2016**

Intermedia Cable Communication Pvt. Ltd. ...Petitioner

Vs.

Pioneer Channel Factory Pvt. Ltd. ...Respondent(s)

**BEFORE:**

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

For Petitioner : Mr. Aditya Vaibhav Singh, Advocate

For Respondent : None

**JUDGMENT**

1. This Petition, by Petitioner - Intermedia Cable Communication Pvt. Ltd. against respondent - Pioneer Channel Factory Pvt. Ltd. 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 with a prayer for decree of Rs. 1,01,20,082/- (Rupees One Crore One Lac Twenty Thousand

Eighty Two Only) for outstanding carriage amount as on 26.03.2016 alongwith pendentelite and future interest for above amount @ 18% p.a.

2. In brief, the petition contends that Petitioner-Company is a Multi-System Operator (MSO) engaged in business of retransmitting channels to multiple subscribers through its Digital Addressable System (DAS) in Pune city directly or through Local Cable Operators affiliated with it. Mr. Shyam Sundar Pappu is a person authorized by petitioner vide its Board Resolution dated 18.12.2014 for filing and prosecuting present petition. A copy of Board Resolution dated 18.12.2014 is Annexure P-1 to Petition.

Respondent is a broadcaster of the satellite television channels viz. "MTunes HD", "Music Xpress". Respondent, being desirous of entering into the agreement with the Petitioner Company for continuing the carriage of these channels "MTunes HD" and "Music Xpress" on Petitioner's network, in the territory of Pune, entered into a Channel Placement Agreement (CPA) dated 31<sup>st</sup> March 2014 with petitioner, for the period 01.04.2013 to 31.03.2014 for a carriage fee of Rupees Forty Lakhs per channel plus Service tax and all applicable taxes and levies. This carriage arrangement was, however confirmed by the Respondent vide emails dated 30.03.2013 as well as 06.08.2013 and this Channel Placement Agreement was renewed

mutually, on agreed terms, vide subscriber agreement, from time to time. Petitioner always complied with its obligations as per above Agreement. Channel Placement Agreement is Annexure P-2 to the Petition and Annexure P-3 is copy of emails.

3. Petitioner, vide email and letter both, both of dated 04.03.2014 apprised Respondent with regard to expiry by efflux of time of Carriage arrangement, which was effective for a period April 1, 2013 to March 31, 2014, with a further action in the matter. This email and letter both dated 04.03.2014 are Annexure P-4 (Colly) to petition.

Respondent, vide email dated 16.04.2014, requested the Petitioner to keep carrying both the channels of the Respondent, with assurance that his representative shall visit the Petitioner for finalising the new arrangement. The email dated 16.04.2014 is Annexure P-5 to petition.

4. Vide email, dated 03.06.2014, the carriage arrangement for both the channels at Rs 60 lakhs (i.e. 30 lakhs per channel per annum plus service tax plus levies as applicable from April 1, 2014 to March 31, 2015) was confirmed by Respondent. There was assurance for payment of outstanding

dues vide post-dated cheques. This is Annexure P-6 to petition. Initially the Petitioner was not comfortable with the modalities set forth by the Respondent for the payment of the outstanding dues and a notice of termination by email dated 09.06.2014 was issued and it was replied by Respondent vide its email dated 06.08.2014 for renewal of the Agreement. Hence, this was acted upon. Whereas lack of payment of Rs 6,00,440 for the FY 2013-14 was apprised and requested to be paid vide email dated 09.06.2014 i.e. Annexure P-7, P-8 and P-9 to the Petition. It was not complied with. Hence, invoices for the Financial Year 2014 – 2015 were held up. The Petitioner requested the Respondent to forward a copy of Agreement for placement of channel on the network of Petitioner for FY 2014 to 2015. But both of channels were continued to be transmitted at desired frequencies. But vide email dated March 31, 2015, Respondent informed the Petitioner that the Respondent's channel "Music Express" was unable to generate the desired revenue since its inception and hence, it was decided to discontinue the said channel w.e.f. April 1,2015 for renewal of agreement only for "M Tunes" channel, for the new financial year, at a revised rate, to be discussed mutually. A copy of this email dated 31.03.2015 is Annexure P-11 to the Petition.

5. Hence, this channel "M Tunes" was continued to be carried by the petitioner at desired frequency, including petitioner for carriage fees Rs. 30 lakhs per annum plus service tax and applicable levies for above channel from respondent. A copy of the Agreement for the period 01.04.2014 to 31.03.2015 was received by the Petitioner on 11.04.2015. This was duly executed by the petitioner on 11.04.2015 and it was forwarded to the Respondent for their execution at their end, under the cover of a letter dated 16.04.2015.

Two invoices, one dated 31-03-2015 for Rs. 33,70,800/- (Rupees Thirty-Three Lacs Seventy Thousand Eight Hundred Only) raised for the Channel "M Tunes" for the Financial Year 2014-15 and other Invoice dated 31.03.2015 for Rs. 33,70,800/- (Rupees Thirty-Three Lacs Seventy Thousand Eight Hundred Only) raised for the channel "Music Xpress" for the Financial Year 2014-15 was also served to respondent but no payment was received.

6. Hence, Petitioner vide letter dated 20.05.2015 issued a reminder about the outstanding invoices for the Financial Year 2014-2015. In letter dated 04.08.2015 respondent was requested to pay the petitioner the outstanding dues of Rs. 81,96,600/- (Rupees Eighty One Lacs Ninety Six

Thousand Six Hundred Only), as on 30.06.2015. In spite of repeated requests, follow-up reminders, no payment was made.

7. A cause of action within limitation period and territorial jurisdiction of this Tribunal had arisen. Hence, this petition with above prayer.

8. Respondent, in its reply, denied the contention of the petition with preliminary objection that no dues are there with regard to FY 2013-14. No agreement was there for the FY 2015-16. In absence of agreement, there is no liability to pay as above. Terms of agreement there for FY 2013-14 were confirmed by respondent vide its email dated 30.3.2013. Notice apprising expiry of above agreement by efflux of time on 31.3.2014 was communicated vide email of petitioner. The interconnect agreement was entered for a period of 1.4.2013 to 31.3.2014 for carriage fees of Rs. 40 lakhs per annum per channel for two channels "M Tunes" and Music Xpress". Rs. 6,00,000/-, communicated to be due for FY 2013-14, was TDS amount, for which petitioner had received benefit. Hence, it was not said to be due one. Respondent had ultimately informed the petitioner that channel "Music Xpress" was unable to generate the desired revenue since its inception and

it was decided to discontinue wef 1.4.2015 of on a PAN India basis. Respondent had expressed its inclination to renew the agreement only for "M Tunes" for FY 2015-16. But at revised rate, which was to be discussed mutually and finalised. However, this discussion never finalised and it was owing to petitioner itself. Petitioner, vide its email, had acknowledged in response to respondent's email dated 31.3.2015 that owing to non-finalisation of agreement for the FY 2015 – 16, balance dues of Rs. 60 lakhs was never finalised. No agreement was finalised between the petitioner and respondent FY 2015-16. Hence, no question of alleged payment of Rs. 1,01,20,082/-. Hence, a request for dismissal of this petition.

9. A rejoinder-cum-replication, by petitioner, with reiteration of the contents of petition and denial of contention of reply, was filed.

10. On the basis of pleadings of both sides, Court of Registrar vide order dated 19.1.2018, framed the following issues :

(1) Whether the petitioner is entitled for amount alongwith interest as claimed in the petition?

(2) Whether the petitioner has taken into account the unaccounted invoices?

(3) Whether any fact has been concealed by the petitioner in the present petition?

11. Petitioner filed its evidence by way of affidavit of Shyam Sundar Pappu. Whereas respondent filed its affidavit in evidence is of Vikas Rai on record. Another affidavit under Section 65 B of Indian Evidence Act was also filed by respondent.

12. Even after sufficient service of notice to counsel for respondent, none appeared to place its argument.

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

14. 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 cast 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.

15. 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.

**16. Issue Nos. 1 and 2**

These two issues are related to each other and even after grant of sufficient time that too after due notice, none availed opportunity for arguing its case for and on behalf of respondent. Hence, the argument of learned counsel for petitioner had been heard. These two issues are related with each other, hence, being decided jointly.

This petition is for a claim of Rs. 1,01,20,082/- (Rupees One Crore One Lac Twenty Thousand Eighty Two Only), alleged to be due, towards carriage charge, as on 26.3.2016, in favour of the petitioner, against respondent, for a period of 1.4.2014 to 26.3.2016, alongwith interest, @ 18% p.a. But admittedly, the agreement was entered, in between, for placement of two channels of respondent company, over the system of petitioner company, on 31.3.2014, for a period of 1.4.2013 to 31.3.2014, i.e the period in operation was from 1.4.2013 to 31.3.2014, for which, Annexure P-1 to the petition, has been filed. This was for agreed rate written in it and for this period, admittedly, there is no dispute, except an amount of Rs. 6,00,000/-, which is being said by respondent, to have been deducted as TDS, for which,

petitioner had taken benefits. Meaning thereby, for this period of 1.4.2013 to 31.3.2014, there is no dispute at all.

Subsequent to it, next period is from 1.4.2014 to 31.3.2015, for which there had been exchange of emails, in between, mentioning the request made by respondent, for continuing carriage of both of the channels of the respondent, as was being continued previously. Though, finalisation of agreement was assured to be there, in very near future. This email, dated 16.4.2014, of respondent, in response to email, dated 4.3.2014 of petitioner, apprising the end of operating period on 31.3.2014, by efflux of time, was of this request for carrying both of channel of respondent, and this email has been filed as Exhibit PW 1/6. The rate was agreed to be Rs. 60 lakhs vide email dated 3.6.2014, i.e Rs. 30 lakhs per channel per annum + service Taxes and levies, as applicable, for the period payable upto 1.4.2014 to 31.3.2015. This email dated 3.6.2014, has been placed in evidence, as Exhibit PW 1/7 and this has not been challenged or rebutted by respondent in its evidence. Though there is a notice of termination, vide email dated 9.6.2014, issued by petitioner, but this was not acted upon. Rather, continuation of service was pleaded by petitioner. Rather, a copy of the email dated 9.6.2014, which was already annexed with petition, and marked as Exhibit PW 1/8 with

affidavit, filed in evidence alongwith another email dated 25.11.2014 i.e. Exhibit PW 1/10.

Hence, agreement for this FY, signed by petitioner and witnessed by its witness, was said to be sent to respondent for its agreeing and signatures for the period of 1.4.2014 to 31.3.2015, for which a separate request was also made, but this was said to be not signed and not returned back. But nowhere in reply or any evidence of respondent or in other defence, it was pleaded by respondent that both of these two channels of respondent, were not placed by petitioner for this FY, or rate as of Rs. 60 lakhs plus taxes and levies, as applicable, were not agreed for it. Rather, petitioner in its affidavit un-controvertedly, had proved it and for this period, two of the invoices, i.e. Invoice No. CU/148/2014-15 dated 31-03-2015 for Rs. 33,70,800/- (Rupees Thirty-Three Lacs Seventy Thousand Eight Hundred Only) raised for the Channels "M Tunes" for the Financial Year 2014-15 and Invoice No. CU/149/2014-15 dated 31.03.2015 for Rs. 33,70,800/- (Rupees Thirty-Three Lacs Seventy Thousand Eight Hundred Only), raised for the channel "Music Xpress" for the Financial Year 2014-15, was said to be due and to be paid by respondent, in email issued by petitioner to respondent, filed as Annexure P-13 to petition. This email was with no rebuttal. Hence, for this FY it has been fully proved by exchange of this email, the agreement, the relationship was

there and these channels were carried by petitioner for above unpaid amount. Hence, for this amount of Rs. 67,41,600/- (Rs.33,70,800 x 2), the claim of the petitioner had been fully proved, beyond doubt.

Now, comes the period for FY 2015-16. Admittedly, for this period, there is no agreement. The emails, being agreed and accepted by petitioner, in its pleadings as well as evidence of respondent, is of this fact that it was apprised by respondent to the petitioner that one channel was not gaining revenue and it was in persistent loss, hence, the agreement, if any, is to be entered after mutual settlement for the other one channel for this financial year and there is a communication made by petitioner that he was not agreed for that given commercial terms. Meaning thereby, there was no agreement nor any request for continuation of both of channels, nor there was any relationship, in between. Rather, petitioner was requested to discontinuing the other channel, for which there was not agreement. Hence, for this financial year, any amount due or to be paid, could not be legally proved by the petitioner. Hence, the very email written by petitioner with regard to non-amenability of terms, suggested by respondent, was not placed in correct perspective by the petitioner. Hence, for this financial year, there was no agreement nor any request nor any understanding of any

payment, nor equity in favour of petitioner. Hence, for the claim of this period of petitioner, fails.

Accordingly, these issues are being decided in favour of the petitioner for an amount arising out of carriage placement for FY 2014-15 only, for which the total amount comes to Rs. 67,41,600/-(Rupees Sixty Seven lakhs forty one thousand six hundred only).

**17. Issue No. 3**

This was issue of the respondent. But none availed opportunity for pressing this issue nor it was pressed. Accordingly, this is being decided in negative.

18. Considering the findings written above, this petition merits for its allowance for principal amount, Rs. 67,41,600/-(Rupees Sixty Seven lakhs forty one thousand six hundred only), as on date of filing of this petition, alongwith SI @ 9% p.a. from above date of filing of petition, till actual date of payment, considering the present financial and fiscal scenario, and the rate of interest, being awarded by this Tribunal, in other cases, at present.

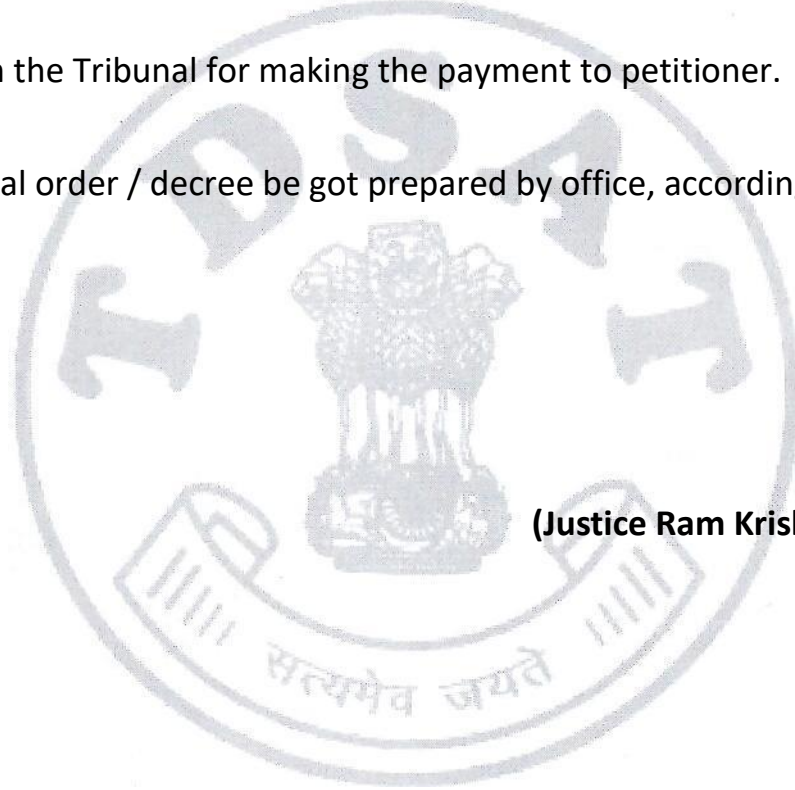
**Order**

Accordingly, petition is being allowed.

Respondent is being directed to make deposit within two months, from the date of judgment, Rs. 67,41,600/- (Rupees Sixty Seven lakhs forty one thousand six hundred only), alongwith SI @ 9% p.a., till actual date of payment, payable from the date of filing of this petition till actual date of payment, in the Tribunal for making the payment to petitioner.

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

13.10.2023  
/NC/



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(Justice Ram Krishna Gautam)  
Member