

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****Dated 30th August 2024****Broadcasting Petition No. 267 of 2019**

Hathway Digital Private Limited

...Petitioner(s)

Vs.

Jaipur Cable Network

...Respondent(s)

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

For Petitioner : Mr. Nasir Husain, Advocate

For Respondent : None

JUDGMENT

1. This Petition, under Section 14(A) (1) read with Section 14 (a) (ii) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed by, Hathway Digital Private Limited, petitioner, against Jaipur Cable Network, with a prayer for a direction against respondent, to pay an amount of Rs. 1,09,721/- (Rupees

One Lac Nine Thousand Seven Hundred Twenty one Only), and interest at the rate of 18% per annum, towards outstanding subscription dues of the Petitioner, with a direction to return of 1244 STBs or in the alternative, pay its cost, amounting to Rs. 15,92,320/- (Rupees Fifteen Lacs Ninety Two Thousand and Three Hundred Twenty Only), @ Rs. 1280/- per STB, to the Petitioners. A further relief was also claimed for grant of permanent injunction against respondent No. 2, a competitive MSO, for not providing signal to respondent No. 1, until the liability, written as above, are being cleared by respondent No. 1 that too, in accordance with a notice, required in Clauses 6.4 and 6.5 of the TRAI Regulations i.e, 21 days' notice.

2. In brief, the petition contends that Petitioner, namely, Hathway Digital Private Limited is a company, incorporated under the Companies Act, 1956, having its office at 805/806, "Windsor" Off C.S.T. Road, Kalina, Santacruz (E), Mumbai-400098, which is engaged in retransmitting the signals of Cable TV to its various operators on Pan India basis. It has further been stated

that the Petitioner has changed its name from Hathway Digital Private Limited to Hathway Digital Limited w.e.f. 03.06.2020.

3. The Respondent, namely, Jaipur Cable Network, is a local cable operator, represented, through its proprietor, namely, Mr. Gopal Singh Shekhawat having its office at 21, Marudhar Vihar, Khatipura, Jaipur – 302012, who had been retransmitting the signals / services to the subscribers, obtained from the Petitioner and thereby distributing the same in the area of Jaipur City.

The Respondent No.2, namely, M/s Home TV Network Pvt. Limited, is a competitor MSO of the Petitioner, having its registered office at B-94, Tulsi Marg Bani Marg Jaipur – 302016, Rajasthan.

4. On the request, made by the Respondent No.1, the Petitioner agreed to provide its signals / services, to be further retransmitted to the subscribers, in the area of Jaipur City. The Petitioner had issued approximately 1244 set top boxes and viewing cards to the Respondent No.1. It is submitted that all the LCOs, across India, availing

signals from the Petitioner, have been given access to Hathway Connect Portal. It was the similar to the case of all major MSOs operating pan-India. In the case of Petitioner, each LCO is provided a unique user ID, and once they are registered, the same can only be accessed by them, as it can only be operated by using a password. The LCOs have all the rights through portal to activate, deactivate services of the consumers, change the packaging and provide channels as per choice of consumers. Respondent was making payments to the Petitioner online through Portal. The said system was working in view of the provisions of TRAI guidelines. The Digital MIA, with financial sharing clause is uploaded on the Petitioner's Portal and the LCO after perusing and going through the terms of the MIA, accepts the same and then it further logs in, to conduct its business, in its usual course. The terms contained in the MIA, are as prescribed by the TRAI and the Petitioner is sharing the revenue with the LCOs at one of the lowest rates in the Industry, which is known to all. At the particular time when the LCO

accepts the terms of the MIA the date, time and IP address from where they agreed to the terms and accepted the MIA gets captured in the digital copy stored with the Petitioner. The LCO's login, acceptance and doing business through Portal post acceptance without any protest or demur does prove that LCOs have agreed to the terms and conditions of the MIA. The said MIA was valid for a period commencing from 01.02.2019 to 31.08.2020. Copy of the Interconnect Agreement through Portal entered, in between, the Petitioner and Respondent No.1 is annexed and marked as **Exhibit PW1/1** at Pages 11 to Pages 31 of the Paper book.

5. The Petitioner had raised invoices on the Respondent No.1 in terms of the said agreement, which were duly received by the Respondent No.1, without any protest or demur. However, against the invoices raised the Respondent No.1 made part payments only, and from the very inception the Respondent, has been a regular and chronic defaulter in discharging its liabilities. Copies of some of the invoices sent to the Respondent No.1 are annexed and marked as

Exhibit PW1/2(Colly) at pages 32 to Pages 47 of the Paper book.

6. It is mentioned that the Petitioner maintains a Statement of Account in the usual and ordinary course of its business. Copy of statement of account is annexed and marked as **Exhibit PW1/3** at Pages 48 to Pages 51 of the Paper book.
7. That the Respondent No.1 had violated the terms and conditions of the Agreement and always avoided to pay the outstanding dues of the Petitioner towards subscription charges despite requests, follow-ups and reminders from the Petitioner. But the Respondent No.1, instead of making the payments to the Petitioner, only provided false assurances to the Petitioner with regard to payments. That the Petitioner had been acting in a bonafide manner with a hope that Respondent No.1 shall honour its contractual commitments in terms of the Agreement entered, in between, the parties.
8. The intention of the Respondent No.1 from the very inception was to play fraud upon the Petitioner and the Petitioner received information from the market sources

that the Respondent No.2 had provided supply of its signals to Respondent No.1 in utter disregard of the TRAI Regulations and has started illegally swapping the set top boxes (STBs) belonging to the Petitioner with the STBs of Respondent No. 2 / competing MSO of the Petitioner, without following due process of law, and without clearing the outstanding subscription dues of the Petitioner and also without returning the set top boxes, which are the exclusive property of the Petitioner.

9. That the Respondent No. 1 has violated the Interconnect Regulations and also the terms of the Agreement executed between the parties and in connivance and collusion with the Respondent No.2, migrated to the Respondent No.2 and swapped the set top boxes issued by the Petitioner with that of the Respondent No.2. It is stated that it was mandatory on the part of Respondent No.1 to issue requisite notices in terms of Clause 17 of the Interconnection Regulation 2017 before disconnecting the services of the Petitioner, but the Respondent No.1 had illegally migrated to the network of the Respondent No.2

without following due process of law and without complying with the Interconnect Regulations, thereby causing huge financial losses to the business of the Petitioner, which cannot be compensated easily.

10. That till date the Respondents have not paid an amount of Rs. 1,09,721 /- (Rupees One Lakh Nine Thousand Seven Hundred and Twenty One Only) towards outstanding dues with interest due thereon at the rate of 18% per annum towards subscription charges to the Petitioner and not returned the 1244 STBs to the petitioner or in alternate have not paid the amount of Rs. 15,92,320/- (Rupees Fifteen Lakhs Ninety Two Thousand Three Hundred and Twenty only) @ Rs. 1280 /- towards the cost per STB to the Petitioner and also the Respondents have deliberately not followed the due process of law as mandated under the Interconnect Regulations.
11. Respondent No. 1 was absent and matter was proceeded ex-parte against him. Court of Registrar, vide order dated

20.12.2021, framed following issues on the basis of pleadings, for and on behalf of parties :

1. Whether the instant petition is maintainable in its present form?
2. Whether Respondent No.1 has illegally migrated to Respondent No.2 in violation of the Interconnect Regulations as well as the Agreement between the parties?
3. Whether the Petitioner is entitled to the outstanding dues towards the subscription charges from Respondent No.1 along with interest thereupon as claimed in the petition?
4. Whether the Petitioner is entitled for recovery of the STBs and viewing cards from the Respondents in good working condition or in the alternative the cost of the STBs as claimed in the petition?
5. To what other relief / reliefs the Petitioner is entitled for?

12. Evidence by way of affidavit of petitioner, along with a certificate under Section 65B of Indian Evidence Act, and Resolution of Board was filed, by petitioner.
13. Written submission by petitioner also got filed.
14. Heard learned counsel at length and gone through the material placed on record.
15. 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.
16. 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 seizes 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.

17. **Issue No. 4**

Petitioner's evidence i.e. Affidavit of Mr. Kuldeep Singh Rathore is with reiteration and the contention of the petition, wherein the interconnect agreement has been made Annexure to affidavit, and it was not controverted by respondents. Issuance of 1244 STBs, along with VCs, in compliance of interconnect agreement, in between, petitioner and respondent no. 1, has been stated in this uncontroverted affidavit. The price per STB, is given as Rs. 1280/-, and total amount, as a cost of these STBs as well as VC has been calculated to be Rs.15,92,320/-. Whereas, as per Model Interconnect Agreement (MIA) and the agreement entered, in between, the compensation for

STBs, ought to be the depreciated value of STB and this Tribunal, very often has decided depreciation of 15% p.a. for the value of purchase. Hence, Rs.1280/- has been claimed as the value of per STBs, and with depreciated value, it will come to Rs. 1088/- per STB. Hence, the amount payable in case of failure to restore the STBs and VCs, will come to Rs. Rs.13,53,472/- (Rs.1088*1244 STBs). The written submissions filed by the petitioner and arguments advanced is of this fact too. Hence, the total amount comes to Rs. 14,63,193/-, for which petitioner is entitled. Hence, this issue is being decided, accordingly.

18. **Issue No.2**

In view of decision made on Issue No. 1, this issue is being decided against respondents.

19. **Issue No. 3**

Respondent No. 2, is a competitive MSO, written in petition itself and transmission of signals to LCO, respondent no. 1 is being stated to be by competitive MSO, respondent no. 2. Hence, admittedly, there is no privity of contract, in between, petitioner and respondent

no. 2 and proposition of law laid down by this Tribunal, in many cases is of this effect, as competitive MSO, having no privity of contract, be not held liable for any default made by LCO. In view of decision made in Issue No. 2, petitioner is entitled for amount of Rs. 1,09,721/-, with *pendentelite* and future interest over it, @ simple interest 9% p.a., being very often provided by this Tribunal in petitions, decided by this Tribunal. Hence, this issue is being decided, accordingly in favour of petitioner.

20. **Issue No. 1**

Proof of fact made by testimony of petitioner, ought to be rebutted by respondent no. 1. But owing to its failure to appear and contest, the same burden could not be exhausted by respondent no. 1. However, petitioner, in its evidence, by way of uncontroverted affidavit, had proved this fact. Hence, this issue is being decided in favour of petitioner.

21. **Issue No. 5**

On the basis of discussion made above, the petition is liable to be allowed against respondent no. 1, for total

amount of Rs. Rs. 1,09,721/-, alongwith *pendentelite* and future interest over it @ simple interest of 9% p.a., till date of actual payment and a direction for restoration of 1244 STBs alongwith VCs, in good working condition to petitioner by respondent No. 1 and in case of failure to make the payment, a compensation in the tune of Rs.13,53,472/- (Rs.1088*1244 STBs) for 1244 STBs and VCs @ Rs. 1088/-, depreciated value per STB.

No relief against respondent no. 2 is to be awarded. This issue is being decided accordingly.

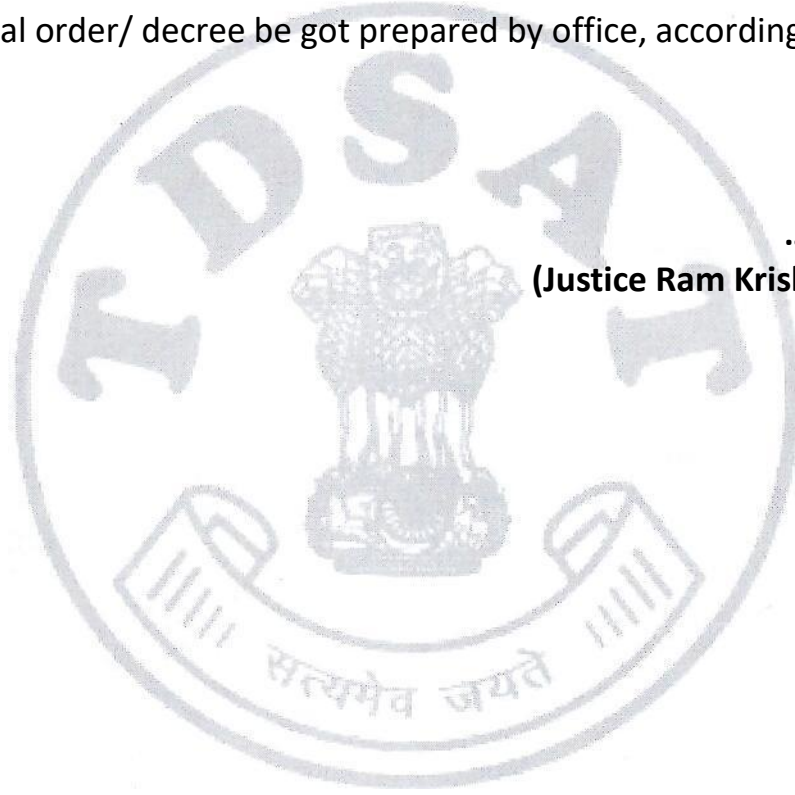
ORDER

The petition is allowed. Respondent No. 1 – Jaipur Cable Network, is being directed to make deposit of 1,09,721/- (Rupees One Lac Nine Thousand Seven Hundred Twenty one Only), towards outstanding subscription amount, alongwith *pendentelite* and future interest over it @ simple interest of 9% p.a., till date of actual payment in the Tribunal, for making payment to petitioner, within two months of date of judgment with a further direction for restore/return of 1244 STBs alongwith VCs, in good working condition, to petitioner by

respondent no. 1, within two months of judgment and in case of failure, to make the payment, a compensation in the tune of Rs.13,53,472/- (Rs.1088*1244 STBs) for 1244 STBs and VCs @ Rs. 1088/-, depreciated value per STB, alongwith *pendentelite* and future, simple interest @ 9% p.a., till date of actual payment, in the Tribunal for making payment to the petitioner.

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

30.8.2024
/NC/



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