

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 15th May 2024

Broadcasting Petition No. 359 of 2014

Biswajit Mallick

...Petitioner

Vs.

M/s DigiCablecomm Services Private Ltd.

...Respondent

Broadcasting Petition No. 510 of 2014

M/s DigiCablecomm Services Private Ltd.

...Petitioner

Vs.

Biswajit Mallick

...Respondent

BEFORE:

HON'BLE MR. JUSTICE RAM KRISHNA GAUTAM, MEMBER

For Petitioner

: Mr.Tushar Singh, Advocate
Ms.Akshra Arshi, Advocate
Ms.Khyati Jain, Advocate

For Respondent : Mr.Diggaj Pathak, Advocate
Ms.Shweta Sharma, Advocate
Mr.Kushagra Goyal, Advocate

JUDGEMENT

1. Broadcasting Petition No. 359 of 2014, Biswajit Mallick Vs. Digi Cablecomm Services Pvt. Ltd., has been filed with a prayer for a decree in favour Petitioner, Mr Biswajit Mallick, against Respondent, Digi Cablecomm Services Pvt. Ltd., for an amount of Rs. 13,44,950/-, being the refundable security deposit, paid by Petitioner to the Respondent, for supply of 3965 Set Top Boxes, with a further amount of Rs. 1,02,75,500/-, towards compensation for the losses suffered by Petitioner due to actions/inaction of Respondent. An interest, pendentelite and future @ 24 %, over both of above amount, till actual realization of the amount, has also been prayed.

2. In brief, it was contended that Petitioner is a Local Cable Operator(LCO), re-distributing signals, both DAS as well as Non- DAS, of various Broadcasters, received from the Multi System Operator (MSO) to its consumers in various parts of North 24 Parganas of West Bengal. Petitioner, along with 7 other Cable Operators, were earlier taking signals in analogue

mode from Respondent, under the name and style of 'Relation Cable Network'. However, with the implementation of DAS in the area of operation of Petitioner, all the cable operators, under the common name of 'Relation Cable Network', started having individual dealings with the Respondent in terms of receiving and seeding of Set Top Boxes, in their respective areas, and payments of subscription amounts to the Respondent, individually for their respective areas of operation. The same was done on the behest of the Respondent itself, as it would be easier for it to keep track off the dealings with the Cable Operators.

3. Respondent, DigiCablecomm Services Pvt. Ltd., is a Multi System Operator, operating in the DAS and Non – DAS areas of West Bengal and is a service provider in terms of Interconnect Regulations. Prior to DAS being implemented in the area of operation of Petitioner, the Respondent, sometime in the month of August 2011, entered into an agreement with the Petitioner for providing Set Top Boxes free of cost to the Petitioner, who was to in turn seed them in the premises of customers. Although this agreement was signed by Petitioner, but it was not counter signed, by other side, nor was copy of same given to Petitioner, till date. Respondent, initially provided the Petitioner, approximately 1400 Set Top Boxes, free of cost,

under the aforesaid agreement. Copies of challans issued by the Respondent for the free Set Top Boxes, are annexed as Annexure - A (Colly) to Petition. Then after, a demand of Refundable Security Deposit, in advance for remaining boxes, to be issued were raised and it ranged from Rs. 499/- to Rs. 799/-, per boxes, depending on the rate of the dollar, as communicated to the Petitioner by the Respondent. It was objected by Petitioner, but Respondent over ruled the Petitioner, by assurance to refund security deposit simultaneously with return of Set Top Boxes. This was requested to be written in an agreement but was never conceded. Petitioner was receiving Set Top Boxes from Respondent on the basis of delivery challans issued by it, after making payments of security deposits for the same and these challans are Annexure – B (Colly) to Petition.

4. In the month of February, 2013, a problem had arisen when Respondent, in its software of Subscriber Management System, showed its inability for timely activation of channels and bouquet of channels, as per Customer Requisition Form, submitted by Petitioner, in the boxes seeded by Petitioner, in its area of operation. As a result of which, the competitive MSO of the Respondent, started encroaching into the area of operation of Petitioner. This was complained to Respondent that due to the problem of

activation of STBs and content being placed by Respondent, the customers of Petitioner were not paying and in fact the Petitioner had been giving his services free of cost to his customers to retain them, as the competitor MSOs were threatening the business of Petitioner. This Letter cum complaint dated 31.07.2014 is **Annexure – C (Colly)** to Petition.

5. The services of Respondent continued to deteriorate, in quality as well as content, from February, 2013 onward. Ten Sports bouquet of channels in February, 2013, ESPN & Star Sports bouquet of channels in August, 2013 and the entire Media Pro bouquet of channels in between September – October 2013 became discontinued. Thus, Petitioner was constrained to write various letters to Respondent with persuasion to improve services, but of no avail. These letters dated 16.08.2013, email dated 03.10.2013 are **Annexure – D (Colly)** to Petition. Owing to failure, to improve condition of services provided by Respondent, rather being bad to worse, customers of Petitioner were moving to other MSO. Hence, Petitioner was with no option, but to disconnect the signals of Respondent, w.e.f. 30.10.2013 and shift to other MSO w.e.f. 01.11.2013. Hence, he migrated to competitive MSO on 01.11.2013. Letter dated 13.11.2013 and email dated 14.11.2013 with

regard to this disconnection and migration was written to Respondent. The same is **Annexure – E (Colly)** to Petition.

6. Since disconnection and migration on 30.10.2013, repeated requests by Petitioner to Respondent, for coming forward and in joint inspection to receive Set Top Boxes, given to Petitioner, with a further request of return of Security Deposit, paid by Petitioner to Respondent, against the return of STBs, was made. Petitioner was ready and willing to return all STBs, received free of cost as well as by deposit of security amount. But, owing to inaction and laxity of Respondent, it was with no relief. Petitioner was with no dues payable to Respondent till March, 2013 and from April, 2013 to October, 2013. Rather he had suffered losses, for which compensation for loss of subscription revenue, as well as loss of its consumer, was claimed. A letter dated 19.03.2014, was received by Petitioner, wherein arbitrary claim of Rs. 15,60,983/-, as due and payable, by Petitioner to Respondent, was made. This letter is **Annexure – F** to Petition. This letter was followed by another letter with a further demand of Rs. 73,449/-, towards rental of Set Top Boxes. It is **Annexure – G** to Petition.

7. A legal notice cum demand dated 09.05.2014, **Annexure – H** to Petition, was received by Petitioner. A reply to all these letters was made by Petitioner dated 17.05.2014 stating its grievance therein, which is **Annexure–I** to Petition. A press note **Annexure – J**, The Telegraph publication **Annexure – K**, was issued by Respondent.

8. Petitioner was in possession of 3965 Set Top Boxes, including 1400 free STBs of the Respondent and the others remaining, for which a sum of Rs. 13,44,950/- was paid by Petitioner, as a refundable Security Deposit. Petitioner was always ready and willing to return those Set Top Boxes, after due inspection of the same, in the presence of both the parties, and on simultaneous return of security deposit for the same. But it was Respondent, who has been delaying this process and after this legal notice, there was every apprehension of taking unpleasant action by Respondent. Hence, a cause of action had arisen, within jurisdiction of this Tribunal on 01.11.2013 and subsequently, many times. Hence, this Petition with prayers, mentioned as above.

9. Reply on behalf of Respondent was with this contention that it was a counterblast to the detailed Notice of Demand sent to Petitioner by

Respondent on 25.06.2014. In fact, the Respondent has been trying to recover its outstanding payments from the Petitioner since almost a year and had written letters dated 19.03.2014, 05.04.2014 and 09.05.2014. The Respondent was under belief that the Petitioner would clear its outstanding dues and will return Set Top Boxes belonging to Respondent, but instead this frivolous misleading Petition was filed. And in this Petition only after the intervention of this Hon'ble Tribunal, which passed order on 29.10.2014, a Local Advocate Commissioner was issued and these Set Top Boxes could be returned. However, a BP No. 510 of 2014, Digicablecomm Services Pvt. Ltd. Vs Biswajit Mallick, for the decree of outstanding subscription fee, return of STBs 3965 and payment of outstanding STBs rental money, payable by Petitioner to Respondent, was prayed for and this Tribunal vide its order had clubbed both of these Petitions together, for a consolidated hearing and disposal and as Petition No. 359 (C) of 2014 was previously instituted, hence, it was a leading Petition, whereas, Broadcasting Petition No. 510 of 2014 was a consolidated Petition. The contention of Plaintiff of Petition No. 510 of 2014 is the reply of this Petition No. 359 of 2014. However, Respondent had entered into a subscription agreement with the Petitioner and its affiliate, after the DAS implementation, upon the approach, made by Petitioner to Respondent MSO, to enter into a Digitization Agreement.

10. Based upon the terms of agreement, Respondent raised invoices upon the Petitioner, time to time for subscription fees, along with furnished detailed statement of accounts. These invoices were duly received and acknowledged by Petitioner. Those were annexed with Petition of consolidated Petition. Under subscription and Digitization Agreement, Respondent MSO, had provided 3965 STBs, along with other accessories, to Petitioner. No security was ever deposited towards STBs, nor proof of any payment, against security, nor any receipt, issued by Respondent, towards security deposit, could ever be filed or placed, by Petitioner. No such security was received by Respondent. Rather, an amount, being referred to, by the Petitioner, was in fact paid towards STB activation charges. No service to subscriber was there as free of charge. No deterioration of service of Respondent was ever there. No disconnection of Sports channel or ESPN or Star Sports Channel or Mediapro Channel was there. Rather, those channels were disconnected for a limited period of 23 days, owing to some technical glitches, but were restored swiftly. The said deterioration or poor service was said to be since February, 2013 but till August, 2013, no complaint was ever made. Rather, it was for the first time in the month of August, 2013, it was raised. No compensation towards any loss with regard to loss of subscriber base or subscription revenue, had ever arisen, nor any proof, had

ever been produced. It is denied that demand of Set Top Box rental is without any basis or agreement. Rather, a demand notice dated 19.03.2014 is with correct outstanding, amounting to Rs. 15,60,983/-. The same was there in the letter dated 05.04.2014 too. Rental for STB was very well there under Regulation.

11. No problem with regard to activation or updation of SMS was ever there. A false claim is being said to have been made in this Petition. Hence, prayer was also denied.

12. A rejoinder cum replication by Petitioner was with this contention that in consolidated Petition No. 510 of 2014, a reply as of Respondent had been filed with elaborate contention. Hence, the same is the replication of Petitioner in this leading Petition. More so, the contention of reply was negated and contention of Petition was rather reiterated.

13. In brief, the Petition of consolidated BP No. 510 (C) of 2014, which tantamount to reply of leading Petition No. 359 (C) of 2014, is with elaborate contention of reply in this Petition. It contends that Petitioner Digicablecomm Services Pvt. Ltd., is a Company registered under the provisions of Indian Companies Act 1956, and is a Multi System Operator,

operating in many major cities of West Bengal, having multiple placement agreements/ definitive legal Memorandum of Understandings with various Broadcasters/ Distributors for retransmitting their respective TV Channel Signals to the Local Cable Operators, affiliated to the Petitioner and/ or subscribers forming part of Petitioner's network. Respondent, Biswajit Mallick is a Local Cable Operator, affiliated to Petitioner's network at 24 North Parganas, West Bengal, who is operating its business in the name and style of Relation Cable Network, which is a duly registered under the Cable Television Network Regulation Act, 1995 and the rules framed therein. This Cable Operator operates its business in various areas of North 24 Parganas, by way of providing signals to its individual subscribers, after availing signals from Petitioner's network, by way of Set Top Boxes obtained from Petitioner. Respondent approached Petitioner to avail the signal/ services of Petitioner and facilities so extended for the purpose of providing connection through its subscribers. Respondent entered into an agreement in the month of December, 2009 authorizing Respondent to receive the signal from the Petitioner and to further retransfer the same to its subscribers. The said agreement contained the terms and conditions, upon which the Petitioner had agreed to provide the services to the Respondents. As per Clause 7 of the said Subscription agreement, the Respondent was liable to pay to the

Petitioner consideration for the grant of license on the rates as mentioned therein. The cable operator was also to pay to the Petitioner, the Set Top Box rentals received by it. The parties had also agreed that in the event of implementation of Conditional Access system or conversion to digital, the same would be subject to separate agreement. The said agreement, expired by efflux of time, the parties continued on the same terms and conditions. This subscription agreement, dated December, 2009 is Annexure P-1 to Petition. In November, 2012, there was digitization in the areas of North 24 Parganas.

14. Petitioner and Respondent entered into a Digitization Agreement dated 07.06.2011, with a specific Clause 10 and 11 written in it. Wherein, parties were of understanding that in case any of the Affiliate/Sub Operator associated with the said Network, migrates from the Petitioner to some other MSO, within a period of 02 years from the date of said agreement, he would compensate the Petitioner @ Rs 2500/- per STB, with further agreement that the Set Top Box, so provided would be liable to be return back immediately. And in case of migration, after expiry of 02 years, the Set Top Boxes were liable to be returned immediately. The copy of the

Digitization Agreement dated 07.06.2011, executed in between Petitioner and Respondent, is **Annexure P-2** to Petition.

15. In terms of above agreement, the Respondent was enjoying the signals of the Petitioner and retransmitting the same to subscribers. Petitioner was fully complying its obligations under above agreement, in fair and transparent manner. But Respondent was utilizing its benefits but avoiding its obligations. No timely payment of the consideration was made by it. In compliance of Digitization Agreement, the Petitioner duly supplied to the Respondent Set Top Boxes in such quantity as and when demanded at various points of time. But Respondent was very irregular in making the payments of the subscription fee. Petitioner had supplied total of 3965 Set Top Boxes to Respondent. Other necessary accessories like Cables, Node etc., were also supplied free of cost on its demand. They are also to be returned back in case of migration. Delivery Cum Road Challan for the delivery of said 3965 Set Top Boxes along with other accessories are **Annexure P-3 (Colly) and P-4 (Colly)** to Petition.

16. Based upon terms of the agreement, invoices were raised from time to time, by Petitioner for subscription fees along with furnishing statements of accounts. These invoices were duly received and acknowledged by

Respondent. The invoices raised, and received by Respondent, for the period February, 2013 to October, 2013, are **Annexure P-5 (Colly)** to Petition. Those invoices were of cumulative amount of Rs. 16,00,983/-, which was due and payable from Respondent to Petitioner towards subscription dues. But out of those invoices, a payment of Rs. 1,40,000/- only was made by Respondent. Accordingly, the remaining amount of Rs. 14,60,983/- remained as due. Abruptly, Respondent migrated to other competitive MSO, and a communication in the month of November, 2013 was received by Respondent from Petitioner, with regard to said migration. Neither outstanding subscription dues, as well as rental value was paid, nor no objection was taken, nor statutory notice of three weeks, was given nor rules were complied with. Illegal dishonest migration, resulted huge loss to Petition and Respondent discontinued supply of signal to Cable Operator.

17. Petitioner, thereafter wrote many letters, which are **Annexure P-7 (Colly)**. Detailed statement containing outstanding payable to Petitioner was also sent, which is **Annexure P-8** to Petition. But false Petition as Petition No. 359 of 2014, was filed by Biswajit Mallick. A prayer was made for return of 3965 STBs, though it was got returned, after the intervention and order of this Tribunal, by way of Advocate Commissioner. But the rental value in tune of Rs. 54,55,327/- calculated @ Rs. 55.66 plus Service Tax @ 12.36% per STB,

for 3965 STBs for period from February, 2013 to November, 2014 and interest, pendentelite and future @ 18%, for above amount was also payable.

18. Hence, cause of action for this Petition had arisen within the jurisdiction of this Tribunal. Hence, this Petition was filed with prayer for a decree of Rs 14,60,983/- with pendentelite and future interest, @ 18% over it towards outstanding subscription fee, Rs. 54,55,327/-, with interest pendentelite and future, @ 18% per annum towards rental of STBs, and Rs. 18,04,075/- towards damages, caused to Petitioner, due to illegal withholding of Set Top Boxes, with a direction for return of 3965 STBs, along with other accessories, and in case of failure, Rs. 1,16,380/-, as a cost of said material with award of cost of Petition, was prayed for.

19. The reply is the same as is the contention of Petition of 359 (C) of 2014. The Rejoinder and replication is same, as is the reply of Petition No. 359 (C) of 2014.

20. On the basis of pleadings of both side, Court of Registrar, vide its order dated 22.11.2016, framed following issues, in both of consolidated Petitions:

Issues in BP No. 359/2014

1. Whether the Respondent is liable to refund an amount of Rs.13,44,950/- being the refundable security deposit paid by the Petitioner to the Respondent for supply of 3965 Set Top Boxes?
2. Whether the respondent is liable to pay an amount of Rs.1,02,75,500/- being compensation for the losses suffered by the Petitioner due to the actions/inactions of the Respondent?
3. If issue numbers 1 and 2 are held in the affirmative, then to what rate of interest is the Petitioner entitled to?
4. Whether the Petitioner migrated from the Respondent's network in violation of the TRAI interconnect Regulations, 2012?

Issues in BP No. 510 of 2014

1. Whether the Petitioner is entitled to an amount of Rs.14,60,983/- (Rupees Fourteen Lakhs Sixty Thousand Nine Hundred and Eighty Three only) towards the outstanding subscription fee?
2. Whether the invoices filed by the Petitioner are false and fabricated?

3. Whether the Petitioner is entitled to a sum of Rs. 54,55,327/-(Rupees Fifty Four Lakhs Fifty Five Thousand Three Hundred and Twenty Seven only) towards STB's rentals?

4. Whether the Petitioner is entitled to a sum of Rs.18,04,075/-(Rupees Eighteen Lakhs Four Thousand and Seventy Five only) towards damages caused to the Petitioner due to the illegal withholding of the Set Top Boxes belonging to the Petitioner and a further amount till the STB's were returned to it?

5. Whether the Petitioner has supplied any materials such as transmitters etc?

6. Whether the Respondent is liable to return the materials namely transmitter etc. given by the Petitioner and in case of failure, pay to the Petitioner an amount of Rs.1,16,380/- being the cost of the said materials supplied free of cost?

21. Beside documentary evidences, filed as Annexures to affidavit, filed in examination in chief, Mr Biswajit Mallick as PW-1, Mr. Anirban Ghosh as PW-2 and Mr Kaushik Mitra as Respondent Witness No. 1 were got cross examined by both side. Wherein, there is no cross examination of PW-2,

whereas, Biswajit Mallick as PW-1 and Koushik Mitra as RW-1 has been cross examined by their respective counter Counsels. The oral testimony of both side have been examined in chief and cross examined by other side.

22. Heard arguments of Learned Counsel for both side and gone through material placed on record.

23. 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 PremlataVs. 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 LakshmanVs. 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.

24. In all civil cases, required degree of proof is preponderance of probabilities.

25. Issue no. 4 of Leading Broadcasting Petition No. 359 of 2014

In para 10 of the Petition, it has been specifically pleaded by Mr. Biswajit Mallick that the condition of service mentioned by Respondent got bad to worse, with no respite and customer for Petitioner, moving to other

MSOs, due to lack of channels on network of the respondent. The Petitioner had no option, but to disconnect the signals of Respondent w.e.f. 31.10.2013 and started taking signals from a competitive MSO w.e.f. 01.11.2013. The Petitioner although informed the respondent before migrating to the competitive MSO, however, vide its letters dated 13.11.2013 and e-mail dated 14.11.2013 while reiterating the fact that it had disconnected from the network of the respondent once again he expressed his disappointment. Meaning thereby, Annexure E (colly) to Petition, reveals that migration to other competitive MSO, was from 01.11.2013 and disconnection from Respondent signal, was on 30.10.2013. The alleged written information was of date 13.11.2013 and email dated 14.11.2013, i.e., later to disconnection and migration. This is the contention on oath of Biswajit Mallick, in his cross examination, recorded on 23.08.2017, wherein, specific mention was that "I started to do business with Digicablecomm in and around the year 2010 and I migrated from Digicablecomm to another MSO on 1.11.2013. "It is correct to state that I was availing signals from Digicablecomm upto 31st October, 2013." "I migrated to Den & Hathway after leaving Digicablecomm. I migrated because somewhere around mid-October, 2013 the Mediapro bouquet of channel had been disconnected. (Again said) August 2013." "Currently I am availing signals from M/s Den and Hathway and M/s

Meghbala.” It was specifically asked to this witness as to whether a public notice, required to be given of three weeks prior to disconnection and migration to another MSO, was given by this witness or not? and in his reply it was specifically said that “It is correct to state that I did not get any public notices published before migrating from Digicablecomm to another MSOs”

26. Meaning thereby, no statutory notice was published by Mr. Biswajit Mallick before disconnection from Respondents signal or before migration to competitive MSOs, M/s Den and M/s Hathway. Whereas, Petitioner abruptly disconnected from the network of the Respondent and migrated to a competitive MSO, without following the due process in the law, only in November 2013. Thus, the Petitioner disconnected from the network of the Respondent on 30.10.2013 and joined the network of another rival MSO w.e.f. 01.11.2013 without any prior intimation to the Respondent.

27. The Telecommunication (Broadcasting And Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (hereinafter the “TRAI Interconnection Regulation, 2012”) mandates that a three weeks’ prior notice must be given by a LCO to MSO, before disconnection of re-transmission of any TV channels specifying the reasons

for such disconnection. Regulation 6 (4), (5), (6) of above Regulation, provides that :

“(4) No local cable operator shall disconnect the re-transmission of any TV channel without giving three weeks’ notice to the multi system operator, clearly specifying the reasons for the proposed disconnection.

(5) Every notice of disconnection of signals of TV channel under sub-regulation (1), (2), (3) and (4) and every notice of disconnection of re-transmission of TV channel under sub regulation (2), (3) and (4) shall be published in two leading local newspapers of the State in which the service provider is providing the services, out of which one notice shall be published in the newspaper in local language.

(6) The period of three weeks specified under sub-regulation (1), (2), (3) and sub regulation (4) shall start from the date of publication of the notice in newspapers or the date of service of the notice on service provider, whichever is later and in case the notices are published in newspaper on different dates, the period of three weeks shall be counted from the later of the two dates.”

28. Therefore, it is proved that Petitioner, in violation of Regulation 6 of TRAI Interconnection Regulation, 2012, disconnected abruptly and migrated to other MSO, without giving any notice, against above statutory requirement. Hence, this issue is being decided in affirmative i.e., in favour of DigiCablecomm Services Pvt. Ltd.

29. **Issue no. 1 of BP No. 359 of 2014**

Admitted fact in pleadings of both side in Broadcasting Petition No. 359/2014 is that the Petitioner, Biswajit Mallick, is a local cable operator

with area of operation in North 24 Pargana West Bengal. Digicablecomm Services Pvt. Ltd. is Multi System Operator, operating in DAS and non DAS areas of West Bengal and as per Interconnection Regulations, 2012, is a service provider. Parties entered into an agreement in 09.08.2011 for providing service for retransmission by LCO. This agreement was acted upon and 1400 STBs were issued by way of challan, Annexure A (colly) to petition, free of cost for seeding by Biswajit Mallick. The rest of STBs, along with accessories, in total including 1400, counts to 3965 STBs and the relationship continued. Then after, disconnection occurred since 30.10.2013 and migration occurred on 01.11.2013. The STBs were not returned. Though, this Petition No. 359/2014 was filed by Mr. Biswajit Mallick with the contention that Respondent is not intending to receive any STBs, whereas, consolidated Petition No. 510/2014 was filed by Digicablecomm with contention that STBs were withheld deliberately causing damages. But one thing is undisputed that STBs 3965 were got returned with intervention of this Tribunal and appointment of Advocate Commissioner, who got 3965 STBs and returned in view of order dated 29.10.2014. There is specific mention in Digitisation Agreement dated 07.06.2011, entered in between, Mr. Biswajit Mallick and Digicablecomm, that STBs are to be supplied free of cost along with other

materials such as cables, remotes etc. as and when demanded by Mr. Biswajit Mallick.

30. The Burden of Proof for proving the fact that security deposit of Rs. 13,44,950/, being the refundable security deposit, was paid by Mr. Biswajit Mallick to Digicablecomm for supply of 3965 Set-Top Boxes, lied upon Mr Biswajit Mallick. But except his oral testimony, no receipt for such deposit is there on record. The petitioner Mr Biswajit Mallick had not been able to place on record any proof of Deposit or payment, towards Security Deposit, allegedly paid by it to the Respondent or any acknowledgement of such from the Respondent, receiving the alleged Security Deposit. The documentary evidence said to be filed by Biswajit Mallick is the passbook receipts produced by him is with no specific mention that it was towards any security deposit against STBs. Rather, it was said to be amount paid as subscription fee, and activation charges and not towards any security deposit. In oral testimony Biswajit Mallick in his examination in chief, reiterated the contention of its Petition and has said that supply of initial 1400 STBs was free of charge under aforesaid agreement, which in turn was seeded in the premises of the customers. These were issued through challans issued by the Respondent for free Set Top Boxes and those were exhibited as Exhibit PW-

1/1(colly), page nos. 17 to 74 of the paper book. After the supply of 1400 free STBs, demand of refundable security deposit, in advance, for the Boxes to be issued was raised and this security deposit was raised from Rs. 499/- to Rs. 799/-, per box, depending on the rate of the dollar, as communicated by Respondent. This was questioned by Mr. Biswajit Mallick and there was a promise that security deposit will be refunded after the return of Set Top Boxes. A request was made for making an agreement with regard to it, but no such agreement was ever effected. Exhibit PW-1/2 (colly) Page No. 75 to 153 are the challans for receiving of remaining STBs and the payment said to be towards security deposit made by the Biswajit Mallick. But these challans are admitted one, but payment is being disputed. Nowhere payment towards security deposit has been written in it. Whereas in cross examination, a specific question, "Q. Why didn't you return the said 1400 STBs, which was admittedly supplied to you free of cost? A. I had gone to return all the STBs but they asked me to wait and asked me to keep the STBs till the time the problem is resolved. Q. When did you go there to return the STBs as stated by you? A. In December 2013. Q. I put it to you that in spite of written demand from DigiCablecommon 19.03.2014, you still did not return the STBs. A. Yes, because I had written a letter to them asking them to refund the security deposit and take back the STBs and I had to spend out of

my pocket to get the new STBs from other Company to retain my customers.” With regard to security deposit receipt, a specific question has been asked that “Q. Did you ever ask Digicablecomm Services for the receipt for the security deposit allegedly paid by you? The answer is yes, I asked for the receipts for the security deposit after my disassociation with Digicablecomm Services. Q. Is it correct to say that you did not ask for any receipt towards the alleged security deposit when the said payment was actually made by you. The answer is that it is incorrect. I had asked them but they said the same would be provided later. For more specification, a specific question with regard to rate at which STBs were provided, it was asked to tell how many boxes were provided to you by charging alleged security deposit of Rs. 499/-.The reply was that maximum STBs were given @ Rs.499/-. I am not aware of the exact number as receipt was not provided to me. I am also not aware as to how many STBs that were given at the rate of Rs. 799/- and Rs. 999/-.” Meaning thereby, neither any receipt of any deposit, nor any awareness as to how many of STBs at how many Rupees of security deposit were taken by Mr. Biswajit Mallick. Whereas agreement was with specific mention that STBs were free of charge and the Respondent’s witness in its testimony has specifically said that Biswajit Mallick were given STBs free of charge. Hence, Mr Biswajit Mallick categorically failed to prove

its burden with regard to deposit of security amount towards STBs. Hence, no question of refund of Rs 13,44,950/-, could be proved by. Accordingly, this issue is being decided negatively.

31. **Issue 2 of BP No. 359 of 2014**

The compensation is being claimed against Digicomm for the loss suffered by Mr Biswajit Mallick due to action / inaction of MSO in the tune of Rs. 27,75,500/-, Petitioner in the tune of Rs. 27,75,500/- [3965 subscribers x Rs.100 x7 months], for loss of subscription amount and Rs.75,00,000/- [1500 subscribers * Rs. 5000 per subscriber), towards loss of subscribers for period April-October 2013, alleging that due to the inaction on part of the Respondent, rectifying certain technical issues, the subscribers left the network of the Biswajit Mallick and joined a rival MSO network. Except oral testimony of Biswajit Mallick nothing has been there on record to prove the alleged damages. Petition of Biswajit Mallick is with specific mention of entering into agreement in the month of August 2011 and issuance of 3965 STBs for seeding in the operational area as LCO. In para 8 of the Petition, it has been specifically written that troubles of petitioner started sometime in the month of February 2013 with the problems being faced by the respondent in its software of the Subscriber Management System (SMS). The Boxes seeded by the Petitioner in its area were almost redundant due to

inability of the Respondent in timely activation of the channels and bouquets as per Customer Requisition Form submitted by the petitioner and this was complained to MSO. Copies of letter dated 31.07.2014 are Annexure C (colly) to Petition and this trouble is being said to there since February 2013 to October 2013. Then after on 30.10.2013 disconnection took place, and Biswajit Mallick migrated to another MSO w.e.f. 1.11.2013.

32. Whereas, in case of any complaint and no heed over it by MSO or in case of complaint by MSO to LCO, there was every option open to either side to get the contract descended with a three weeks' notice. But no such notice was ever given. Rather, disconnection and migration was taken by LCO itself. As witness Mr Biswajit Mallick in his testimony has reiterated the same contention, but while being cross examined has said that "I migrated from Digicablecomm to other MSO on 01 November 2013. It is correct to state I was availing signals on Digicablecomm upto 31 October 2013. It is correct to state that the said subscriber's network was around September-October 2013. In written submission, it has been argued that inaction eventually led to cause huge losses to Petitioner and loss of its customers, wherein 1500 subscribers were permanently shifted to another MSO. Hence, above claim has been made. But no such complaint or disconnection option,

was taken by Mr Biswajit Mallick. Rather Biswajit Mallick in his testimony in cross examination has admitted of having 3500 subscribers on the ground as on August 2017. He has admitted in his cross examination, recorded on 23.8.2017, that he had around 3300 to 3500 subscribers, as on date. No specific pleading, nor any specific proof of any alleged damages, or compensation for same could be proved by Petitioner Mr. Biswajit Mallick. Hence, this issue is being decided against him.

33. **Issue No. 3 of BP No. 359 of 2014**

As both of above issues has been decided against Petitioner. Hence, no question of any interest arises. Accordingly, the case of Petitioner in leading Petition No. 359 of 2014 fails, and is to be dismissed with cost.

34. **Issue Nos. 1 and 2 of BP No. 510 of 2014**

Both of these two issues supra are connected with each other and are being decided together. The admitted fact is of entering into the subscription agreement with many LCOs under the umbrella of Regulation Cable wherein Biswajit Mallick was also one LCO in the month of December 2009, for retransmitting the signals of Digicablecomm, in accordance with agreed terms and conditions of agreement, Annexure P-1 to Petition, BP No. 510/2014. This agreement was for a period of 12 months and it expired by

efflux of time. But parties remained in continuation. A Digitisation Agreement, dated 07.06.2011, as a supplementary Subscription Agreement dated December 2009 and by November 2012, was entered therein. The agreement is there on record and signature of Mr. Biswajit Mallick has been admitted in witness box, by Mr. Biswajit Mallick in his testimony. The Digitization work in North 24 Pargana, i.e. in operation area was completed by November 2012. 3965 STBs, under above Digitization agreement, along with other material were supplied, as and when demanded by Respondent. The matter was running smoothly till February 2013. It has been admitted by Respondent in his testimony that the problem is said to have arisen in the month of February 2013, which continued till October 2013. But, signals of Digicablecomm Services, was admitted to have been availed, till October 2013. But he failed to pay subscription fee to the Petitioner for the said period in contravention of the signed agreements, between the Parties. Invoices were raised and served over Mr. Biswajit Mallick, but remained under payments towards them. Invoices raised by Respondent are annexure P-5 colly to petition. Rs. 16,00,983/-, was due and payable from the respondent, towards subscription dues and as Rs.1,40,000/- were paid, resulting Rs. 14,60,983/- as due and payable. The recital 1 of this agreement is with specific mention of subscription agreement and this has been signed

by Mr. Biswajit Mallick and this agreement is supplementary agreement to the original subscription agreement executed, in between, and subscription amount was to be paid by Mr. Biswajit Mallick to this MSO. Whereas, in reply in Para C this Biswajit Mallick, LCO has specifically said that Petitioner had claimed amount towards subscription fee without producing any agreement for the same. "It is most respectfully submitted that in the absence of subscription agreement in between Parties, the Petitioner cannot seek any recovery of the dues in the respect of the alleged subscription / charges." Hence, the very contest is with regard to existence of agreement. Whereas it has been admitted in the pleading that Digitization agreement and prior to it in the month of August 2009, Agreement, in between was got signed by Mr. Biswajit Mallick and in his cross examination, he had admitted his signatures over this agreement, annexed with this Petition. Hence, the agreement is very well there and the same has been said to be the subscription agreement and payment of Rs. 1,40,000/-, after the notice has been admitted by Mr. Biswajit Mallick and this has been showed in the statement of account filed by MSO, which is duly proved by it. Petitioner's witness, Mr. Koushik Mitra had filed his affidavit of evidence dated 31.10.2018.

Mr. Anirban Ghosh has also filed its affidavit of evidence, wherein, Mr. Koushik Mitra was cross examined at detail for Respondent Mr. Biswajit Mallick himself had given his testimony. Raising of the invoices upon the Respondent for subscription fee along with detailed statement of the account, for the period from February 2013 to October 2013, has been proved by this witness of the Petitioner. Respondent Mr. Biswajit Mallick in his testimony, in cross examination, has admitted that he had availed signals of petitioner till October 2013. Though he had denied to have any subscription agreement. Rather charges for this availing of benefit was said to have been paid, by way of adhoc payment. But, what was the term? How adhoc invoices were raised? How were this decided to be paid were not proved by Mr. Biswajit Mallick. Whereas, Petitioner, by way of his statement of account has proved that payment made by Mr. Biswajit Mallick on 31.7.2013, 28.10.2013, 16.12.2013 and 10.2.2014 in the tune of 1,40,000/-, against the total outstanding subscription charges of Rs. 16,00,983/- resulting the balance of Rs. 14,60,983/-. Hence, it has been proved by all preponderance of probabilities by petitioner that amount of Rs. 14,60,983/-, towards subscription charges, were due since February 2013 to October 2013, against Mr. Biswajit Mallick, LCO and is to be paid by him. Invoices

raised and proved were good and valid. Hence, both of these two issues, Issue Nos. 1 and 2 are decided in favour of petitioner.

35. **Issue No. 3 of BP No. 510 of 2014**

Admitted fact is that total number of 3965 STBs were given by MSO Digicablecomm to LCO, Mr. Biswajit Mallick, under the terms of subscription agreement dated December 2009 and this was further continued by way of supplementary Digitisation Agreement dated 7.6.2011 wherein, as per clause 8.4 of subscription agreement that - 8.4. Set Top Box - The Set Top Box payment by way of Lease Rental / finance schemes payable by the ultimate subscriber / viewer and the security money collected from the subscribers shall be deposited with the MSO, for onward submission of CFA etc. As per clause 11, LCO was liable to return the Set Top Boxes unconditionally immediately upon the termination of association with MSO. Hence, rental for STBs are to be paid and it was not paid for the period from February 2013 to date of return of the STBs to Petitioner. The oral testimony of Mr. Biswajit Mallick is with specific contention that he did not return Set Top Boxes because of non-payment of security deposit towards it. The due statutory provision is for return of STBs was without any condition immediately after disconnection. Unconditionally the same is to be returned.

Whereas, it has been admitted to retain the same, with a condition to give the security first, then to have the STBs. Even after migration since 01.11.2013 retention was there till the legal notice. The failure to receive the subscription money from the subscribers and making it free with a view to retain them at its signals has been admitted by Mr. Biswajit Mallick in his testimony. Whereas, no disconnection was opted, nor such complaint was made, or proved to have been made. Rather, it was admitted that signals were availed till 31.10.2013. Hence, once the signals have been availed, then the subscription charges, as well as rental for STBs, are to be paid and this has been proved by witness of petitioner. Mr. Koushik Mitra. But the rate for claim of this rental has been said to be @ Rs. 55.66/- per STB, plus service tax @ 12.36% p.a, along with interest, totaling to the tune of Rs. 54,55,327/-. Whereas, the invoices raised on the Respondent was only with sum of Rs. 25 per STB for the period upto March 2013 and a sum of Rs.35/- per STB, from April 2013. The oral testimony of Mr. Biswajit Mallick has been pressed wherein, he had admitted to Rs. 116 per customer per month to M/s Den wherein, payment of Rs. 20-25 per customer per month is being said, but the claim is of Rs. 54,55,327/-. Hence, for this claim, no basis could be proved by the petitioner, nor the rental amount has been given in the Digitization Agreement. The TRAI has notified a press release No. 37 of 2013,

filed at page No. 106 of the paper book, has been shown. But monthly rent, excluding taxes has been shown to Rs. 55.66/-, but in the same Regulation, deposit of security of Rs. 400/-, is there. Whereas, this security deposit is being denied. Hence, this Regulation is not being complied with by Petitioner himself. Rather, STBs are being said to have been given without any security deposit. Then how this rental amount is to be taken to be enforced? Hence, considering such circumstances, the rental of Rs.35/- per STBs said to till April 2013 is to be taken as appropriate. Hence, on this basis the Petitioner MSO is entitled for rental of STBs @ 35/- per STB from March 2013 to October 2013. Then after, to actual return of same, by order of this Tribunal, dated 29.10.2014 on 8.1.2015 i.e. Report of Advocate Commissioner dated 8.1.2015 i.e. March 2013 to October 2014 (19 months). (Rs. 35 * 3965 STBs * 19 months = Rs. 26,36,725). Accordingly, petitioner is entitled against respondent for Rs. 26,36,725/- towards STBs rental.

36. **Issue No. 4 of BP No. 510 of 2014**

The petitioner has claimed loss of business due to illegal holding of STBs since 01.11.2013 till October 2014, the date of intervention of this Tribunal and return of STBs and report dated 08.01.2015 of Advocate Commissioner. Hence, loss of business caused to petitioner by illegal holding of these STBs has been claimed. The basis has been said to be the clause 11

of the Digitization Agreement dated 07.06.2011, which mandated that the Respondent LCO was liable to unconditionally return all the STBs to MSO, in case the Respondent migrates from the network of the Petitioner, within 2 years from the date of the said Agreement or from the date of disconnection of the signals of the Petitioner. Admittedly, Respondent has received signals till October 2013 and this was discontinued on 30.10.2013. STBs belonging to the Petitioner were illegally withheld for a Period of almost 13 months, without paying any subscription fee for them. As no signals were availed since 1.11.2013, the Respondent is liable to pay to the Petitioner a sum of Rs. 18,04,075/-, calculated as (13 months *3965 STBs *Rs. 35/- per STB) for this illegal and unjust retention of STBs.

37. The STBs were to be returned after the disconnection or migration. No doubt those STBs could be returned by intervention of this Tribunal in month of October 2014 and the report of Advocate Commissioner is of 8.1.2015. The retention of 19 months is very well there. But, non taking of signal was admitted to be from 30.10.2013. Hence, once signals were not taken, rather migration was there, then how far the loss to business is to be claimed ? The option for terminating or migrated, by way of a public notice of three weeks' statutory period is provisioned in Regulation. Hence, the claim for business loss is neither proved nor substantiated. The grievance is only that STBs

were retained. Hence, the rental of these STBs for those period of actual return, had already been given in above issue. Hence, no ground for grant of any business loss could be proved. Accordingly, this issue is being decided against Petitioner.

38. **Issue Nos. 5 and 6 of BP No. 510 of 2014**

The Digitization Agreement dated 07.06.2011, which is supplementary agreement to December 2009 agreement, supply by way of challans, are in petitions of both side. Delivery challans shows the material/equipment such as cables, nodes, transmitters, etc. were duly supplied to the Respondent. These are very well there in Annexure P-4 (colly) to petition BP No. 510/2014. These challans were with signature of Respondent Biswajit Mallick. The recipient had admitted to return the same back in case of discontinuation of association with Petitioner. The same were admitted to be returned and in the Petition of BP No. 359/2014, a request of this effect was made by Mr. Biswajit Mallick. The return of STBs by intervention of this Tribunal through Advocate Commissioner is admitted fact. But the accessories were returned, had not been proved by Mr. Biswajit Mallick. Hence, these articles, which were supplied, but were not returned, were said to be of value of Rs. 1,16,380/-, but after use of them depreciation must

have occurred and these being electronics items, depreciates fastly. Hence, considering above scenario and evidences led on record, it will be just and proper to award Rs. 50,000/- towards this head. Hence, these two issues are being decided in favour of petitioner.

39. This Tribunal in many Petitions has awarded simple interest at the rate of 9% p.a. considering the fiscal scenario and prevailing financial circumstances. Hence, a simple interest at the rate of 9% p.a. from the date of cause of action i.e. 1.11.2013 to actual date of payment over above amount of Rs. 59,51,783/- (Rs.14,60,983 + 26,36,725 + 18,04,075+ 50,000/-) (Rupees Fifty Nine Lakh Fifty One Thousand Seven Hundred and Eighty Three only) is to be awarded in favour of Petitioner.

40. Accordingly, Broadcasting Petition No. 359/2014 is to be dismissed and Broadcasting Petition No. 510/2014 is to be decreed for above awarded amount.

ORDER

Broadcasting Petition No. 359/2014 is being dismissed with cost.

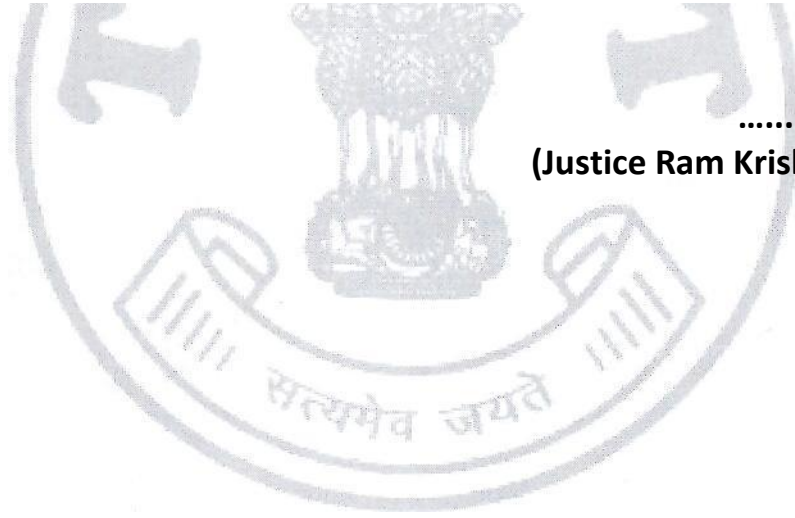
Broadcasting Petition No. 510 of 2014 is being decreed with cost.

Respondent Mr. Biswajit Mallick is being ordered to make deposit of Rs. 59,51,783/- (Rs.14,60,983 + 26,36,725 + 18,04,075+ 50,000/-) (Rupees Fifty Nine Lakh Fifty One Thousand Seven Hundred and Eighty Three only), along with pendentelite and future, simple interest, at the rate of 9% p.a., within two months of date of Judgment, in Tribunal, for making payment to Petitioner, Digicablecomm.

Copy of this judgment be kept on both of these Petitions, decided consolidately together.

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

15.05.2024
/NC/



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(Justice Ram Krishna Gautam)
Member