
(2023) 07 TDSAT CK 0044

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Broadcasting Petition No. 354 Of 2016 with Misc Application No. 54 Of 2018

Cable Operators Welfare Association, Kerala

APPELLANT

Vs

Den Networks Limited

RESPONDENT

Date of Decision : 26-07-2023

Acts Referred:

Code of Civil Procedure, 1908 — Section 144
Telecom Regulatory Authority Act, 1997 — Section 14, 14(A)
Evidence Act, 1872 — Section 102

Citation : (2023) 07 TDSAT CK 0044

Hon'ble Judges : Ram Krishna Gautam, Member

Bench : Single Bench

Advocate : Nittin Bhatia, Vibhav Srivastava, Nitika Kumar, Aashi Arora

Final Decision : Allowed

Judgement

Ram Krishna Gautam, Member

1. Broadcasting Petition No. 354 (C) of 2016, Cable Operators Welfare Association, Kerala Vs. Den Networks Limited was filed by Cable Operator Welfare Association, having Eighty One (81) Petitioners clubbed together, by way of Association, under Section 14 read with Section 14(A) of TRAI Act, 1997, challenging disconnection notices under clauses 6.2 and 6.5 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations 2012, (hereinafter referred to as DAS Regulations), as amended, threatening to arbitrarily disconnect the signals of channels to the Networks of its members, arbitrarily increasing the monthly subscription charges, time and again harassing the members of the Petitioners by demanding arbitrary and unjustifiable amounts, failure to provide monthly invoices and any clarity on the billing done by Respondent on the affiliated LCOs, failure to hold discussions and negotiations for execution of a subscription agreement in utter defiance of DAS Regulation, provide proper

quality of set top boxes, provide rental schemes and other options for providing set top boxes to the subscribers, arbitrarily charging amounts towards repair of set top boxes and refusing to issue receipts for the set top boxes. Thereby, failing to comply with the Standards of Quality of Service (Digital Addressable Cable Television Systems) Regulations, 2012. The action of Respondent, apart from being unilateral, whimsical, arbitrary, being in direct contravention of DAS Regulations. The same disconnection notices were illegal. The notices dated 21.03.2016 and 27.04.2016 were made Annexure P-1 (Colly) to Petition. Petitioners' Association, being association of Local Cable Operators, operating the State of Kerala was the care taker for the interest of LCOs i.e. Member of this Association. Hence, this Petition was filed by signature of Mr. Suresh Kumar S., the treasurer of the Petitioners' Association, duly authorized to file, sign and institute the Petition by Power of Attorney/ Authority Letter issued by the Petitioner. In case of any direction, leave for filing separate Petition by all its 81 members at later stage. These 81 members were made Petitioners in the Annexure P-2 (Colly).

2. Respondent, being a Multi System Operator(MSO) under DAS Regulations, operating in the area of Kerala, was providing its signals to Petitioners and was receiving regular monthly charges from the members of Petitioner. Members of Petitioner have all through-out made timely payment of their monthly subscription dues, with no default. It was @ Rs.30/- per set top box, plus applicable taxes, per connection. These signals were received from Respondent, since 2009 and interconnection agreement was there with JV partner of Respondent, M/s Malayalam Telenet India Pvt. Ltd. A copy of agreement executed between Respondent and one the member LCO of Petitioner was Annexure P-3 to Petition. Respondent was continuously harassing since the inception of DAS Phase 3 regime in DAS area in Kerala. Unreasonable demand of arbitrary amount was being made. Time and again request was made to Respondent for holding a discussion and making a negotiation for execution of subscription agreement. Subsequently, the implementation of DAS Phase 3 has been stayed by various High Courts, throughout the country. But Respondent was charging unreasonable prices towards the set top boxes from the LCO's exorbitantly with high amount towards the repair of set top boxes. No receipt was ever issued. Petitioner, being aggrieved by disconnection of signals to the networks of their members, immediately filed a Writ Petition (Civil) No. 9052 of 2016 (F) before High Court of Kerala at Ernakulam, because, there was paucity of time for moving before this Tribunal. A complaint was also made before Additional District Magistrate, Ernakulam for this illegal act of Respondent. Respondent was restraint from disconnection, without issuing notices under the Regulations. High Court of Kerala, vide order dated 10.03.2016, restrained Respondent from disconnecting the signals to the Petitioners' network for a period of three months and re-notified the matter. The Petitioner undertook to withdraw the Petition before Kerala High Court on the next date after getting interim protection from this Tribunal. On 19.03.2016, an interconnection

agreement was sent by Respondent, to one of the Member of Petitioner Association for its acceptance. The same was with those coercive terms. The protest, by way of email dated 19.03.2016, with making a request for reasonable terms and conditions, was made, and then after, many requests, through emails, were made. One of the member, Sat Vision Network, was asked to make payment @ Rs.34.35 per set top box, inclusive of taxes, but the other members were being pressurized to make payment @ Rs. 50/- plus taxes and in case of non-acceptance, threat of disconnection was there. Few of the Members were not being given proper channels, ultimately, unilaterally, notice of disconnection were issued against Members of Petitioners' Association, which were challenged, by way of this Petition, with a prayer for restraining the Respondent from giving effect to its impugned disconnection notice dated 27.04.2016 or in any manner interfering/disrupting or discontinue the signals services being provided to the areas of operation of the members of Petitioners' Association. Further relief was sought that Respondent be directed not to arbitrarily increase the monthly subscription charges payable by the members of the Petitioners' Association. Respondent be also directed to replace the faulty set top boxes of the subscribers of members of Petitioner, so that quality of signal transmitted be updated. Respondent be further directed to hold negotiations for execution of subscription agreement with the members of Petitioners' Association strictly with adherence of DAS Regulations. An interim ex-parte order, with respect to giving no effect to disconnection notice and realizing arbitrary charges, was prayed. This Petition was filed before this Tribunal, wherein an oral direction to Respondent 'Den Network Limited' on 16.05.2016, for not disconnecting the signals, provided to Members of Petitioners' Association, was given by the then presiding Tribunal. This oral direction was made written direction of this Tribunal, vide order 26.07.2016, whereby Tribunal formally ordered Respondent not to disconnect signals. Vide order dated 30.09.2016, Tribunal directed the member LCOs of the Petitioners' Association for not migrating to any other MSO and any other MSO was directed not to supply signals to impugned service areas. Vide order dated 25.10.2016 further rider was imposed that correct subscription fee by the Members of Association shall continue to be paid as per invoices, raised by Respondent. Vide order dated 21.12.2016, Counsel for Respondent submitted that the Respondent be permitted to disconnect those LCOs, who have not made any payment, from the date of interim order, and Tribunal directed that this matter shall also be considered on the next date of hearing. Vide order dated 15.12.2017, Tribunal made observations that in several matters, the Tribunal has been taking consistent stand that when matter related to individual agreement and separate accounts of local cable operators, it is not proper to entertain a joint application, at the instance of an application. That on account of admitted fact, that there is no written agreement, between the parties since long, in such scenario, the interim arrangement requiring to respondent to continue to supply signals, without the agreement, must be brought to an end, without any further delay. Therefore, this Tribunal have ordinarily proceeded to dispose of the Broadcasting Petition by directing LCO, who are members of petitioners'

association, to approach to the respondent forthwith, if they desire of entering into a fresh agreement. The petitioner had challenged the tariff order through a Writ Petition No. 21901/ 2016 before Kerala High Court and this was disposed of, vide order dated 30.10.2018. As signals were being provided uninterruptedly, as per oral, subsequently, written interim direction, to the members of Petitioners' Association, hence, for the restoration-cum-restitution of benefits availed under the garb of interim order of this Tribunal, was considered by this Tribunal and respondent was given an opportunity to file an application for restitution to verify the facts. The petitioners' members were not permitted to migrate, unless they undertake to clear the dues, as settled in accordance with the law. Tribunal also directed members of petitioners' association to approach the respondent for due negotiations, and opt for either MIA or SIA agreement, within a month and for this one month, supply of signals should not be dis-continued in the absence of agreement, in respect of any LCO. Respondent was directed not to take any precipitate action, till above next date. On 19.02.2018, Tribunal disposed of petition, filed by association, with a direction that if the concerned LCO of the Petitioner's association gives an undertaking to clear all dues, the permission to migrate to some other MSO, may be granted. But, if no agreement is entered into by the date 28.02.2018, there shall be no further supply of signals by respondent to any LCO, i.e. member of petitioners' association. But the petition was withdrawn by Cable Operators Welfare Association, Kerala. Hence, vide order dated 17.05.2018, Tribunal ordered that since Cable Operators Welfare Association, Kerala, the original Petitioner, has already withdrawn the petition, and the petitioner were not present, in above circumstances. Hence, time for filing objection, if any, over Restitution application, if any, was given.

3. This M.A. No. 54 of 2018 related with BP No. 354 of 2016 is the Restitution application, over which Respondent Nos. 37, 38, 40, 47, 49, 51, 60, 66, 79, 75, 76 and 78 appeared, and objected to. For rest of the LCOs, proceeding was ex-parte. Application, in brief, contends that this MA, under Section 144 of Code of Civil Procedure (CPC) read with Section 14 of TRAI act 1997, by respondent, against members of association, petitioner, has been filed by Den Networks Ltd. with contention that chart depicting the outstanding dues of the members of the petitioners' association along with latest invoices raised by respondent is Annexure-D (colly) to this M.A. Respondent provided uninterrupted supply of signals to petitioner since 18.05.2016, in compliance with the orders passed by this Tribunal, as an interim measure, but LCOs i.e. Members of petitioners' association, consistently defaulted in making payment, as per the invoices raised by the respondent, as well as directions given by this Tribunal, in interim order. This resulted heavy financial loss to the respondent. Hence, this M.A. with a prayer for directing the Member LCOs of the Petitioners' association, to make payment towards the outstanding dues and till payment of dues, they will not take signals from any other competitive MSOs.

4. This M.A. was replied by way of objection, by members of Petitioners' association, who are presently the other side, for this MA purpose, Nos. 2, 9, 14,

16, 37, 38, 40, 47, 49, 51, 60, 66, 71 and 78 with this contention that present application is gross abuse of legal process. Chart filed by respondent with this application, is incorrect, with no correct amounts. There is failure to file statement of accounts, pertaining to these objectors. Respondent has not provided invoices before this application, rather it was for the first time, filed with this application. The STBs enumerated were incorrect. In the month of February 2018, disconnection of signals was made by respondent and this was for a period of four days for non-execution of interconnect agreement with the respondent. Whereas bills for those four days were also given in the application. Various Emails were also written, but no mention of those nor any adherence over it, particularly with regard to applicant No. 40 was there. Apart from filing a chart, owing alleged outstanding dues, no invoices or bills actually raised, sent and received by objectors, were there. The outstanding dues, shown in the invoices, annexed as Annexure B2 (Colly), are not in consonance with each other. Members of petitioner have all through made timely payment to the Respondent, in terms of invoices raised by the Respondent, and also in terms of order passed by Hon'ble High Court of Kerala directing the Respondent herein, to maintain status quo with regard to rates charged by it on the basis of its last invoices, attached to the Writ Petition. The forced execution of Interconnection Agreement was also made by Respondent but copy of same was not served over objectors. There is no default nor any liability. Hence, this application be rejected.

5. This application was further reiterated in rejoinder filed by Respondent-Applicant, rebutting the objection raised by objectors and reiterating the contention of application.

6. Written argument by Counsel for Applicant i.e. Respondent has been filed. But in spite of repeated opportunity and repeated direction, as well as imposition of cost, no written argument by Counsel for objector is there.

7. Heard Learned Counsel for both side at length and gone through material based on record.

8. The proceeding before this Tribunal is a civil proceeding, as has been given in the TRAI Act, itself. In a civil proceeding, the preponderance of probabilities, is the touchstone for making a decision, as against strict burden of proof, required in criminal proceeding.

9. Hon'ble Apex Court in Anil Rishi Vs. Gurbaksh Singh – AIR 2006 SC 1971 has propounded that onus to prove a fact is on the person who asserts it. Under Section 102 of The Indian Evidence Act, initial onus is always on the plaintiff to prove his case and if he discharges, the onus shifts to defendant. It has further been propounded in Premlata Vs. Arhant Kumar Jain- AIR 1976 SC 626 that where both parties have already produced whatever evidence they had, the question of burden of proof ceases to have any importance. But while appreciating the question of burden of proof and misplacing the burden of proof on a particular party and recording of findings in a particular way will definitely

vitiating 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.

10. Un-rebutted fact is that this Petition was filed by Association of LCOs, for and on behalf of its 81 Members, with a prayer of mandatory injunction, detailed as above, for not giving effect to disconnection notice, issued by Respondent and vide order dated 26.07.2016, an interim relief was granted to Petitioner against Respondent, whereby the disconnection notices under dispute were not given effect and Respondent was directed to supply signals to member LCOs. Subsequently, the Civil Writ Petition, filed before Kerala High Court and this Broadcasting Petition, filed before this Tribunal, were disposed of, as withdrawn. There was an order of this Tribunal, dated 15. 12.2017, for filing application for restitution of the benefits availed under the garb of Interim order, passed by this Tribunal by Petitioner Association and its Members. And in compliance of above direction, this M.A. No 54 of 2018, u/s Section 144 of Code of Civil Procedure 1908 has been filed for direction for making payment of outstanding subscription dues for the period, till this interim order was in operation, and benefits were enjoyed by LCOs. These facts are undisputed facts. Now, the disputed facts are that there are dues, as per chart, filed with application and these were dues, as per invoices, issued, but not complied and paid by LCOs. Though, at the time of final argument, a chart has been filed and an oral argument has been made that barring these 67 given in this chart, others out of 81, have made their payment. Hence, nothing remains for adjudication against those rests. Now, the dispute is with regard to contention raised by LCOs, who have filed their objection and are still remaining in this chart that they have made their payment. Now, the burden of proof with regard to payment shifts over these objectors. Now, they are expected to give the details, as to how much remains for payment for this interim relief availed by them, and how much has been paid by him? For this, there is no iota of evidence, except a bald denial. Whereas, the application is with the statement of accounts, the invoices raised, for the period of interim relief availed, and the demand made, but not paid. This burden, which was over

applicant, have been fully obeyed, but the payment being said to be made by objectors, have not been proved, by objectors. Annexure- D (Colly) to Miscellaneous Application No. 54 of 2018 at page No. 28 to 126, is with full details, with regard to outstanding against objectors and the same remained unpaid, due to wilful default of the LCOs is there. This Tribunal too vide its order dated 15.12.2017 had directed for entering into a written agreement, as per DAS Regulations and without written agreement, this interim relief may not be continued. LCOs were directed to approach Respondent within a period of one month for getting their interconnect agreements executed. The payment for the benefit used was always directed to be made, but it is very well apparent and proved that the LCOs were now 67, as per chart, for whom the relief is being pressed, didn't pay for the benefit availed under the garb of interim relief. Hence, as per law of equity, the relevant statutory law under Contract Act, the unlawful benefits availed under the garb of interim relief, in case of dismissal of Petition, being not maintainable or devoid of any merit, or withdrawn by Petitioner, is to be restituted to other side, who was bound to give at its cost, under the compliance of interim order of interim relief. Hence, this application merits to be allowed with costs.

Order

This Miscellaneous Application No. 54 of 2018 is being allowed with cost. Members/ LCOs/Members of the Petitioners' Association, enumerated from 1 to 67 in the given chart, at the time of argument, by Counsel for Applicant, are being directed to make deposit of money, as per their dues, detailed in above chart, total amounting Rs. 29,14,264/- (Rupees Twenty Nine Lakhs Fourteen Thousand Two Hundred and Sixty Four only), as principle, along with simple interest @ 9% p.a. pendente lite and future, over above dues/liabilities individually, in accordance with their liability, within two months, from the date of order, in this Tribunal, for making payment to Applicant/ Respondent-Den Network Limited. This chart shall be the part of this order.

Formal order/decreed be got prepared by the office, accordingly.