

(2023) 09 TDSAT CK 0030

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Broadcasting Petition No. 505 Of 2014

GTPL Hathway Private Limited

APPELLANT

Vs

Pearls Broadcasting Corporation Limited

RESPONDENT

Date of Decision : 15-09-2023

Acts Referred:

Code of Civil Procedure, 1908 — Order 19
Telecom Regulatory Authority Act, 1997 — Section 14, 14A
Evidence Act, 1872 — Section 65B, 102

Citation : (2023) 09 TDSAT CK 0030

Hon'ble Judges : Ram Krishna Gautam, Member

Bench : Single Bench

Advocate : Nasir Husain

Final Decision : Allowed

Judgement

Ram Krishna Gautam, Member

1. This Petition, under Section 14, read with Section 14 A, of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") has been filed, for and on behalf of, Petitioner, GTPL HATHWAY PRIVATE LIMITED, against Respondent, PEARLS BROADCASTING CORPORATION LIMITED, with a prayer for a direction to Respondent for making payment of Rs. 2,61,97,882 (Rupees Two Crores Sixty One Lacs Ninety Seven Thousand Eight Hundred Eighty Two only) outstanding as on June 2014, towards the carriage/ placement charges with an interest pendentelite and future @ 21% p.a. to Petitioner.

2. In brief, petition contends that GTPL HATHWAY PRIVATE LIMITED (earlier Gujarat Telelink Pvt. Ltd) ,is a private limited company incorporated under the provision of Companies Act, 1956, having its Registered Office at C-202, 2nd Floor Sahajanand Shopping Centre, Opposite Swaminarayan Temple, Shahibaug, Ahmedabad, 380 004 Gujarat. It is an Multi System Operator (MSO)/ cable operator engaged in the business of distribution of TV channels including through analog / digital mode, having license to operate as a cable operator under the

Cable Television Network (Regulations) Act, 1995.

3. The Respondent, namely Pearls Broadcasting Corporation Limited, is a company incorporated under Indian Companies Act. Its registered office is at B-1401, 14th Floor, Statesman House, Barakhamba Road, New Delhi-110001 with a corporate office at C-55, Sector 57, Noida (U.P.). It is engaged in the broadcasting of news and current affair channels through its TV news channel in the name of "P7 News". It is engaged in the business of producing / acquiring various Television programmes etc., sale and assignment thereof for use and exploitation by any means, including the satellite delivered television broadcast services and also the transmission and various affiliated activities, including their promotion, marketing and distribution through itself or through other networks. Petitioner on 08.11.2012 entered into a Channel Placement Agreement with the Respondent, for placing the channel namely "P7 News" on the agreed frequencies, desired by Respondent, under the terms agreed, in between, and the Respondent in lieu of placing the channel was to pay the placement fee amounting to Rs. 2,88,00,000/- (Rupees Two Crores Eighty Eight Lacs Only) on half yearly advance basis during the entire terms of the said agreement, which was valid from 19.09.2012 to 18.09.2013. This agreement dated 08.11.2012 was Annexure P-1, to Petition.

4. Petitioner raised invoices on the Respondents, which were duly received by the Respondent without any protest or demur. But the Respondent made part payments only. From the very inception the Respondent has been a regular and chronic defaulter in discharging its liabilities. Copies of the invoices sent to Respondent are Annexure P-2 (colly), to Petition. Statement of account, being maintained by Petitioner's company, in its usual and ordinary course of business was appended as Annexure P-3, to Petition.

5. Petitioner had written an Email to Respondent's representative on 26.08.2013, requesting the Respondent to furnish the TDS certificates amounting to Rs. 6,47,194/- (Rupees Six lacs Forty Seven Thousand One Hundred Ninety Four only), which has already been paid by Petitioner to the concerned Government authorities. This Email was Annexure P-4, to petition.

6. On 24.10.2013, an Email was sent by Petitioner to Respondent enclosing the copy of the confirmation certificate from ROC for change of name of the company as requested by the Respondent, which is Annexure P-5 to Petition.

7. Respondent had violated the terms and conditions of the Channel Placement Agreement and despite repeated request with follow-up reminders, payment was not made by Respondent. Rather false assurance was being made, channel placement was continued by Petitioner. On 24.12.2013, an Email was sent by Respondent to Petitioner stating that the payment of Rs. 35,00,000 (Rupees Thirty Five Lacs only) is being made as a part payment out of an amount of Rs. 2,61,97,882/- (Rupees Two Crores Sixty One Lacs Ninety Seven Thousand Eight Hundred and Eighty Two Only), stipulated value of Channel Placement

Agreement. This Email is Annexure P-7, to Petition.

8. On 17.01.2014, an Email was sent by Respondent to the Petitioner where it was stated that the Channel Placement Agreement, executed earlier shall be renewed on the same terms and conditions for amount of Rs. 2,88,00,000/- (Two Crores and Eighty Eight Lacs only), and it will be effective, from 19.09.2012 till 18.09.2014. This Email is Annexure P-8, to Petition. On 07.02.2014 An Email was sent by Petitioner to Respondent stating that the Channel Placement Agreement has been executed between the parties and also requested the Respondent to share the signed copy of the said understanding with the Petitioner, with a further prayer by another Email, for making clear of outstanding dues payable, by Respondent to Petitioner. These Emails are Annexure P-9 (Colly) to petition. Repeated Emails Annexure P-11 (colly) and Annexure P-12 (colly) and Annexure P-13 (colly), were sent but of no avail, payment of TDS and Email with regard to it was Annexure P-15, to Petition. But even after writing repeated Emails Annexed as P-16 (colly). Respondent failed to fulfill this obligation. A legal notice, dated 17.09.2014, claiming Rs. 2,61,97,882/- (Rupees Two Crores Sixty One Lacs Ninety Seven Thousand Eight Hundred and Eighty Two Only), with interest @ 21% was issued, which is Annexure P-17 (colly), but no payment was ever made. Hence, a cause of action, within limitation period and under jurisdiction of this Tribunal for this Petition had arisen. Hence, this Petition with above prayer.

9. In reply, Respondent Company said that Petitioner had, in absolute contravention of the telecommunication (Broadcasting and Cable Service) Interconnection Regulations, 2004, as notified on 10.12.2004, removed the Respondent's channel, i.e., "P7 News" from the network of Petitioner company, without giving any advance notice to the Respondent or to the various subscribers, who were viewing the Respondent's channel, in terms of and as mandated by clause 4.2 and 4.3 of the Interconnect Regulations. Petitioner had not carried the Respondent's channel on its network in the form and manner as was understood and agreed in between the parties. Rather carriage of the Respondent's channel by the Petitioner was intermittent and prone to disconnections. In fact, the agreement for placement as agreed by the parties, was for placing, the channel of Respondent on all the analog networks of the Petitioner in Gujarat, Pune, Patna, Ranchi And Indore.

10. Email of Respondent, dated 24.12.2013, written to Petitioner, placed on record by Petitioner itself, referred to the territory of the earlier agreement between the parties which was to be renewed for a further period of time, but this Email also clearly shows that on the date of writing of the said Email i.e., on 24.12.2013, the Respondents channel had been disconnected by the Petitioner and a request was made to activate its channel. Hence, there was no outstanding due of above date. Though payment has been made by Respondent for closing the chapter, even then this Petition, has been filed. The channel mapping report with respect of the carriage of "P7 News" by the Petitioner, during the term of

agreement, between the parties, shows that the Petitioner had not appropriately carried the channel of Respondent. But this channel mapping report could not be located. No cause of action had ever arisen. Respondent has cleared and made all the payments to the Petitioner for the Petitioner's incorrect, improper and limited carriage of Respondent's channel in the matter under dispute. Hence, prayer is for dismissal of this Petition.

11. Replication cum rejoinder by Petitioner is reiteration of content of Petition. It was submitted that Petitioner is not in contravention of the Telecommunication Regulations. The agreement was Channel Placement Agreement dated 08.11.2012, for placing channel namely "P7 News" on the agreed frequencies, as desired by the Respondent. This agreement was valid for a period of 19.09.2012 to 18.09.2013. It was further renewed vide Email dated 17.01.2014, sent by Respondent and this channel was removed from the network of Petitioner in the month of June 2014 at the request of Respondent. The outstanding dues against Respondent was there. At no point of time, any objection was ever raised by Respondent, with regard to alleged non satisfactory placement of channel by Petitioner. Rather Respondent enjoyed service of Petitioner without any disruption, interruption and making payment for the same.

12. On the basis of pleadings of both sides Court of Registrar, vide its order dated 21.04.2015 framed following issues:-

1. Whether Petitioner is entitled to an amount along with interest as prayed in the Petition?

2 Whether the placement agreement executed between the parties was valid from 19.9.2012?

3. Whether there has been a material breach of terms and conditions of the placement agreement by the Petitioner?

4. Whether the disconnection of the channel of the Respondent by the Petitioner was in violation of the Telecommunication (Broadcasting and Cable Services) Interconnections Regulations, 2004 and therefore illegal?

5. If the answer to issue number 4 is in the affirmative, what is its effect?

6. Any other issue/relief as deemed fit by the Hon'ble Tribunal.

13. Evidence, by way of affidavit under Order 19 of CPC, was filed, as of Mr. Rupesh Shah, and this witness was cross-examined by other side. Respondent filed evidence by way of affidavit of Mr. Chandra Bhan Jaiswal, and it was cross-examined by counsel for Petitioner. Subsequently, owing to failure of appearance of Respondent, an order for proceeding ex-parte was made on 09.02.2023. Learned Counsel for Petitioner filed, its written submissions and he was heard.

14. 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.

15. Hon'ble Apex Court in *Anil Rishi Vs. Gurbaksh Singh* – AIR 2006 SC 1971 has propounded that onus to prove a fact is on the person who asserts it. Under Section 102 of The Indian Evidence Act, initial onus is always on the plaintiff to prove his case and if he discharges, the onus shifts to defendant. It has further been propounded in *Premlata Vs. Arhant Kumar Jain*- AIR 1976 SC 626 that where both parties have already produced whatever evidence they had, the question of burden of proof ceases to have any importance. But while appreciating the question of burden of proof and misplacing the burden of proof on a particular party and recording of findings in a particular way will definitely vitiate the judgment. The old principle propounded by Privy Council in *Lakshman Vs. Venkateswarloo* – AIR 1949 PC 278 still holds good that burden of proof on the pleadings never shifts, it always remains constant. Factually proving of a case in his favour is cost upon plaintiff when he fulfils, onus shifts over defendants to adduce rebutting evidence to meet the case made out by plaintiff. Onus may again shift to plaintiff. Hon'ble Apex Court in *State of J& K Vs Hindustan Forest Co.* (2006) 12 SCC 198 has propounded that the plaintiff cannot obviously take advantage of the weakness of defendant. The plaintiff must stand upon evidence adduced by him. Though unlike a criminal case, in civil cases there is no mandate for proving fact beyond reasonable doubt, but even preponderance of probabilities may serve as a good basis of decision, as was propounded in *M Krishnan Vs Vijay Singh*- 2001 CrLJ 4705. Hon'ble Apex Court in *Raghvamma Vs. A Cherry Chamma* – AIR 1964 SC 136 has propounded that burden and 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.

16. Issue No. 1

Channel Placement Agreement Annexure P-1, dated 08.11.2012 valid from 19.02.2012 to 18.09.2013 was not disputed by Respondent. Rather in reply, this was admitted one, the request for its renewal for another period for placement charge amounting Rs. 2,88,00,000/-(Two Crores Eighty Eight Lacs only), vide an Email dated 17.01.2014, effective from 19.02.2013 to 18.09.2014 Annexure P-8, was also not disputed in pleading. Rather it was written in para 4 (d) reply that "It is humbly submitted that the Respondent has cleared and made all the payments to the Petitioner for the Petitioner's incorrect improper and limited carriage of the Respondent's channel in the manner mentioned above". The agreed area of the placement was also not disputed, payment of Rs. 35,00,000/- (Rupees Thirty Five Lacs only) reply in para 4(j) was also not disputed. The Email dated 24.12.2013, was pressed and it was admitted to be written by Respondent to Petitioner. Hence, the execution of agreement for placement of "P7 News" channel of Respondent, by Petitioner for given amount of Rs. 2,88,00,000/- (Two Crores and Eighty Eight Lacs only), for a period of 19.09.2012 to 18.09.2013, vide agreement dated 08.11.2012, and its renewal for another

period of one year is not categorically denied, or disputed by Respondent. The dispute is merely with regard to, defiance of terms by Petitioner itself i.e., not proper placing and carriage of above channel on agreed frequencies and agreed areas. Rather disconnection of same without observing Clause 4.2 and 4.3 of Interconnect Regulations. Hence, the burden of proof, proving the payment, by Respondent shifts upon Respondent company. The burden of proof for proving that the placement was intermittent, irregular, not in the proper areas, during the period of operation of agreement, by the Petitioner company itself, and disconnecting the placement agreement otherwise than clause 4.2 and 4.3 was over the Respondent and for proving this burden. Statements of account, duly proved by way of required affidavit, under Section 65 B, of the Indian Evidence Act, or under Bankers' Book of Evidence Act, i.e., Statements of account being maintained in ordinary course of business and the copy of same being true and in accordance with above account ought to have been filed, on record and was to be proved, by Respondent for meeting this requirement of burden of proof. But the witness examined by Respondent for making this burden in its reply in cross-examination, in question "Does the Respondent company maintained the statement of account in the usual course of its business? Answer was yes." Further question was "Have you filed on the Tribunal's record a copy of Statement of account maintained by Respondent? The answer was No". Hence, the Statements of account have not been filed, by Respondent company to show and prove the alleged fact of pleading that he had complied with, the payment accruing under above agreement. Whereas, the statement of account of Petitioner company has been filed, with specific mention of the payments and invoices raised for the accrued account through Email as well as invoices. This fact has been very well proved by Petitioner company. For proving the irregular supply, no channel mapping report was there, in the pleading i.e., reply filed, in response to Petition. Rather it was said that channel mapping report, though it is there, but is not available. Whereas, at the time of recording of evidence of Respondent's witness Mr. Chandra Bhan Jaiswal, this compact dish, have been filed by this witness itself. Though it was very well objected at that time that it was neither supplied nor given for rebuttal by Petitioner. Rather a private third party Chrome Data Analytics & Media Pvt. Ltd., had submitted its channel mapping report, to Respondent and this compact dish has been proved, by this Respondent witness itself i.e., it was not a part of pleading at all nor a previous opportunity was given for verifying the veracity of this report nor it was with any certificate of its being authority or expert in above regard. Even Respondent witness, in his cross-examination, Mr. Paras Mohan, could not tell the period of agreement entered, in between Chrome Data Analytics & Media Pvt. Ltd., with Respondent except of this fact that agreement expired of July 2014. This witness was not in remember in the period of the agreement but it was said to be written in the contract. Hence, this burden could not be appropriately proved by Respondent. More so, there is no documentary evidence suggesting any objection, with regard to any intermittent, irregular, abrupt placement of Respondent's channel by Petitioner company. Though in cross-examination

voluntarily it was said by Respondent witness "1 that verbally it was objected. But it is not probably at all because of the fact that in spite of repeated Emails filed in colly with petition and proved by way of affidavit in evidence, at no point of time there was ever any reply having mention of this irregular supply or placement of channel of Respondent by Petitioner. Hence, the burden casted upon Respondent could not be exhausted. Whereas, Petitioner by his documentary and oral evidence, has proved the outstanding dues raising cause of action for above placement charges i.e., Rs. 2,61,97,882/- (Rupees Two Crores Sixty One Lacs Ninety Seven Thousand Eight Hundred Eighty Two only), as on June 2014. Hence, this issue is being decided in favor of Petitioner.

17. Issue No. 2

Nowhere it was disputed in reply, to Petition that the agreement valid from 19.09.2012 was in valid. Hence, as per discussions made in issued No. 1, it is being decided in favor of Petitioner.

18. Issue No. 3

As has been discussed in issue No.1, this burden of proof that there had been material breach of terms and conditions of the placement agreement by the Petitioner could not be exhausted by Respondent. Hence, this issue is being decided in favor of Petitioner.

19. Issue No. 4

Even after sufficient notice, none appeared for Respondent, to press this reply as a result of which proceeding became ex-parte against Respondent. More so, Petitioner's witness had categorically proved the disconnection owing to failure to make payment of dues accrued and specific legal notice for it. Hence, this issue could not be proved by Respondent. Hence, decided negatively.

20. Issue No. 5

Issue No. 4 has been decided in Negative. Hence, this issue does not arise.

21. Issue No. 6

On the basis of discussions made above, this Petition merits to be allowed, with cost.

22. So far as interest rate is concerned, considering the fiscal scenario and the precedents of this Tribunal awarding interest @ Simple interest of 9% p.a. pendente lite and future interest over above principle amount of outstanding dues. It is just and reasonable, to be awarded @ simple interest of 9% p.a.

Order

Accordingly, on the basis of discussions made above, Petition is being allowed with cost. Respondent is being directed, to make payment, within two month from the date of judgment, amount of Rs. 2,61,97,882/- (Rupees Two Crores

Sixty One Lacs Ninety Seven Thousand Eight Hundred Eighty Two only), due as principle on June 2014 with pendente lite and future interest, till actual date of payment @ simple interest 9% p.a., in the Tribunal, for making payment to Petitioner.

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