(2023) 07 TDSAT CK 0038

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Broadcasting Petition No. 232 Of 2019

Hathway Digital Private Limited — APPELLANT

Vs

Business Broadcast News Private Limited — RESPONDENT

Date of Decision : 20-07-2023

Acts Referred:

Telecom Regulatory Authority Act, 1997 — Section 14, 14(A)(1), 14(a)(ii)
Evidence Act, 1872 — Section 65B, 102

Citation : (2023) 07 TDSAT CK 0038

Hon'ble Judges : Ram Krishna Gautam, Member

Bench : Single Bench

Advocate : Nasir Husain

Final Decision : Allowed

Judgement

1. This Petition, under Sections 14 and 14A (1) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") read with Section 14 (a) (ii) of the TRAI Act has been filed by, Petitioner, Hathway Digital Private Limited, against Respondent, Business Broadcast News Private Limited, with a prayer for an award/ decree for a sum of Rs. 42,80,114/- (Rupees Forty Two Lacs Eighty Thousand One Hundred and Fourteen Only) along with pendentelite and future interest @18% p.a.

2. In brief, The Petition contends that Hathway Digital Private Limited is a wholly owned subsidiary company of Hathway Cable and Datacom Limited. It is registered under Companies Act, 1956 with its registered office at "805/806, "Windsor" Off C.S.T. Road, Kalina, Santacruz (E), Mumbai. It is engaged in the business of retransmitting the signal of cable Television to its various operators on PAN India Basis. The cable Television business of Hathway Cable and Datacom Limited has been assigned to Petitioner, Hathway Digital Private Limited, w.e.f. 01.04.2017, due to internal restructuring of Hathway Cable and Datacom Limited company. Respondent, namely Business Broadcast News Private Limited, is also a company incorporated under Companies Act 1956, having its registered office

at Windsor, Unit 101, Off. CST Road, Vidyanagari Marg, J P Morgan Lane, Kalina, Santacruz (E) Mumbai, and is a broadcaster/ Channel provider for distributing the channel namely "BTVI' (English Business News & Current Affairs). Respondent approached Petitioner for placing its channel and its content over Petitioner's network for getting promotion, as well as maximum coverage to its subscribers. A memorandum of understanding, having terms and conditions, written in it, and agreed in between both side was got executed on 19.12.2018. It was agreed therein that in lieu of placing the said channel, Respondent would pay an amount of Rs.1,65,60,000/- (One Crore Sixty Lakhs and Sixty Thousand Only) plus taxes as per the term of understanding. This payment was to be made by Respondent in equal monthly installments. The period of this understanding was since 01.04.2019 for one year, and this was effective for territory of Mumbai+JV's, Maharashtra, Delhi NCR+JV's, Hyderabad, Bangalore, Madhya Pradesh, Rajasthan, Kolkata, Uttar Pradesh.

3. The Memorandum of Understanding was Annexure P-1 to Petition. This was acted upon by Petitioner and as per Memorandum of Understanding, Petitioner raised invoices over Respondent, which were duly received, without any protest or demur. But Respondent made part payments only and from very inception, he was a chronic defaulter in discharging its liabilities. Copy of invoices were Annexure P-2 (colly) with Petition. The copy of Statement of Account of Petitioner's company, made and prepared under the usual and ordinary course of business, was Annexure P-3 to Petition. In spite of repeated request, as well as follow-ups and reminders, from Petitioner to Respondent, for making payment of Outstanding dues, Respondent withheld the payment of placement charges to Petitioner and as on date, he was liable to pay Rs. 42,80,114/- (Rupees Forty Two Lacs Eighty Thousand One Hundred and Fourteen Only), alongwith interest @ 21% p.a. to the Petitioner.

4. An email, dated 30.05.2019, demanding the outstanding dues was, Annexure P-4 to Petition, subsequently email dated 06.06.2019 along with invoices Annexure P-5 were issued. But of no avail. As per Interconnect Regulation, a notice, dated 13.08.2019, for making payment of Outstanding dues, amounting Rs. 42,80,114/- (Rupees Forty Two Lacs Eighty Thousand One Hundred and Fourteen Only) and closing of channel was requested. This notice dated 13.08.2019 is Annexure P-6 (Colly) to petition. Subsequent communication is Annexure P-7. But without observing the payment and compliance of Inter connect regulations, respondent discontinued the signals of its channel on 31.08.2019, Subsequent request by emails, dated 10.09.2019, (Annexure P-8), email dated 10.09.2019 (Annexure P-9), was made by Petitioner, but no payment was made. Cause of action, within period of Limitation and jurisdiction of this Tribunal, had arisen in favour of Petitioner against Respondent. Hence, this Petition with above prayer.

5. In spite of sufficient service of notice, as written in order dated 22. 11.2019, none appeared for Respondent. In utter precaution, further opportunity was

given and one counsel Mr. Jatin, appeared for Respondent, but he refused to have any instruction for filing any written submission. Rather a request was there was closing opportunity to contest. Even after sufficient opportunity and notice, none appeared for respondent. Hence, an order to proceed ex-parte was passed on 25.11.2022.

6. Learned Counsel for Petitioner, filed its evidence, by way of affidavit, for and on behalf of Petitioner, as of Mr. Kunal Ashish C Goyal, along with certificate under Section 65 (B) of Indian Evidence Act, as well as authority of Company dated 12.10.2020, for filing evidence by above witness, for and on behalf of Petitioner Company. Memorandum of Understanding dated 19. 12.2018, exhibit PW1/1, copies of the invoices sent by Petitioner to Respondent, exhibit PW1/2 (colly), copy of statement of account of Petitioner company exhibit PW1/3, copy of email dated 30.05.2019, exhibit PW1/4, email dated 06.06.2019, exhibit PW1/5, copy of notice dated 13.08.2019 exhibit PW1/6, copy of email dated 27.08.2019 exhibit PW1/7, email dated 10. 09.2019, exhibit PW1/8, copy of email dated 16.09.2019, exhibit PW1/9, has been filed on record.

7. No evidence, either oral or documentary, for and on behalf of Respondent, could be filed, by Respondent.

8. Written Submission, by learned Counsel for Petitioner, was also placed on record.

9. 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.

10. 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.

11. Unrebutted affidavit of Petitioner's witness PW1 is in fully reiteration and corroboration of Petition. The Petitioner is MSO, engaged in the business of television channels. It is a company registered under the Companies Act 1956, engaged in business of retransmitting the signals of cable TV, to its various operators on pan India basis. Respondent is a Company incorporated under the Companies Act, 1956 and it was in the business of broadcasting. It was a broadcaster/ channel provider, distributing the channel namely "BTVI' (an English business news and current affairs). For promotion of this channel and getting maximum coverage to its subscribers, Respondent entered into an agreement with Petitioner Company, by way of Memorandum of Understanding dated 19.12.2018, having terms and conditions written in it. A payment of Rs.1,65,60,000/- (One Crore Sixty five Lakhs and Sixty Thousand Only), exclusive of taxes to be levied at relevant time, was to be paid by Respondent to Petitioner Company for placing its above channel over the Petitioner's transmission. This Memorandum of Understanding was valid for a period of one year, commencing from 01.04.2019, but the terms and conditions were not complied with by Respondent Company, resulting an outstanding dues in the tune Rs. 42,80,114/- (Forty Two Lacs Eighty Thousand One Hundred and Fourteen Only). For which various communications, proved as above, were issued by Petitioner to Respondent. But it was not complied with. Rather, unilaterally relations were discontinued. These facts have been fully proved by Petitioner, by way of uncontroverted affidavit. Hence, Petitioner had proved its case with all precise and cogent evidence. The Petition is to be decreed for an amount of Rs. 42,80,114/- (Rupees Forty Two Lacs Eighty Thousand One Hundred and Fourteen Only) along with pendentelite and future interest @ 9% p.a., an interest, which is being very often awarded in present fiscal scenario, by this Tribunal in other decided Petitions.

Order

Petition is being allowed with cost. Respondent is being directed to make payment, by way of deposit before this Tribunal, within two months from the date of Judgment an amount of Rs. 42,80,114/- (Rupees Forty Two Lacs Eighty Thousand One Hundred and Fourteen Only) along with pendentelite and future interest @ rate of 9% per annum, over above outstanding dues, for making payment to Petitioner.

Formal award/ decree be got prepared by office, at an earliest.