

(2023) 08 TDSAT CK 0005

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Broadcasting Petition No. 35 Of 2018

Union Of India

APPELLANT

Vs

Mahuaa Media Private Limited

RESPONDENT

Date of Decision : 11-08-2023

Acts Referred:

Telecom Regulatory Authority Act, 1997 — Section 14, 14(A)
Evidence Act, 1872 — Section 62B, 102
Companies Act, 2013 — Section 279
Companies Act 1956 — Section 446, 446(1)

Citation : (2023) 08 TDSAT CK 0005

Hon'ble Judges : Ram Krishna Gautam, Member

Bench : Single Bench

Advocate : Ankur Singh, Abhijeet Singh, Shubhendu Bhattacharyya

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 by, Petitioner, UNION OF INDIA, through Secretary, Department of Space, Government of India, Antariksh Bhavan, Bengaluru, Karnataka, filed by authorized signatory Sh. M.S. Krishnan, Sr. Head (Legal) Antrix Corporation Ltd., against MAHUAA MEDIA PRIVATE LIMITED, Respondent, company being under liquidation, Hence, through Official Liquidator, attached to the High Court, At Lok Nayak Bhawan, Khan Market, New Delhi, with a prayer for a decree for recovery of dues/ outstanding amount of Rs. 6,19,67,364/- (Rupees Six Crore Nineteen Lakhs Sixty Seven Thousand Three Hundred Sixty Four Only), apart from pendentelite and future interest, due against Respondent, in favour of Petitioner, under and in relation to the Agreement No. INSAT-Lease-4G-26-2008 dated 30.03.2009, (subsequently amended and renamed as INSAT-NSS12-Ku-DSNG-26-2008); and agreement No. INSAT-Asiasat5- DSNG-Ku-[02]-2010,

entered, in between, Petitioner and Respondent, as amended from time to time. This outstanding claim is excluding the foreign exchange rate variation, which is payable by / reimbursed by the Respondent, herein in relation to the agreement dated 30.03.2019, with its subsequent amendment. Hence, claim for differential sum, if any, is also being made against Respondent, for foreign exchange rate variation at.

2. In brief, the petition contends that Respondent is a broadcaster, having Broadcaster License, a service provider, requested Petitioner i.e. Department of Space, Government of India, a service provider, for providing the service of use of transponder capacity, of its satellite for the purpose of broadcasting of signals, inter-alia broadcaster, licensee, a service provider a Broadcaster, to provide capacity of its satellite for the purpose of meeting its Digital Satellite New Gathering ("DSNG") service requirements.

3. Petitioner and Respondent entered into agreement No. INSAT-Lease-4G-26-2008 dated 30.03.2009, whereby transponder capacity (MHz of Ku-band capacity initially on Insat-3B subsequently on NSS-12) was leased for broadcasting of the Respondent's satellite channel, initially for three years, from the commencement date under the subject agreement.

4. Transponder capacity, provided on NSS-12, is in terms of the back to back arrangement between SES world Skies.

5. Another agreement No. INSAT-Asiasat5-DSNG-Ku-[02]-2010 dated 14.12.2010 , entered, in between, was for transponder capacity (3MHz of Ku-band capacity on INSAT- Asiasat5), and it was for lease for broadcasting of Respondent's Satellite channel, till 30.06.2013.

6. Under both of the above agreements, the invoices were, to be raised in advance, payable before the 1st day of every month. In the event of default or delayed payment, interest was chargeable at 3% over and above the prime, lending rate of a public sector bank.

7. Respondent was to maintain a 'security deposit' of Rs.13,12,750/-(Rupees Thirteen Lakh Twelve Thousand Seven Hundred Fifty only), and Rs.16,82,676/-(Rupees Sixteen Lakh Eighty Two Thousand Six Hundred Seventy Six only), representing 25% of the annual charges for the transponder capacity, under agreement dated 30.03.2009, as well as 14.12.2010, respectively. Its security deposit was interest free and was adjustable with the charges/ invoices of last quarter of the lease period in question.

8. Agreement dated 30.03.2009 was amended from time to time and terms of the agreement was extended from time to time, till 29.02.2016. Vide amendment No. 5 dated 01.04.2015, apart from the extension of the term, the agreement was renamed as INSAT-NSS12-Ku-DSNG-26-2008 and the clause pertaining to payment terms [Exhibit- B Term (a)] was inter-alia amended. True copies of amendment No. 1 dated 30.03.2010, amendment No. 2 dated

01.03.2013, and amendment No. 3 dated 01.04.2014, amendment No. 4 dated 01.04.2014, amendment No. 5 dated 01.04.2015 are Annexure P-4 (colly) to petition.

9. Likewise agreement date 14.12.2010, was amended vide amendment No. 1 dated 19.01.2011, which is Annexure P-5 to petition.

10. Respondent continued to avail the services of the Petitioner, and was required to make monthly payment in advance, under the said agreements, but it did not make payment for charges payable for use of transponder capacity on the Petitioner's satellite from Aril 2011 in respect of Agreement dated 14.12.2010 and October 2011 in respect of Agreement dated 20.09.2009.

11. Meanwhile, winding up/ liquidation proceedings, being Co. Petition No. 213 of 2012, was initiated by one, Harmuny Entertainment Pvt. Ltd. against the Respondent, before the Hon'ble Delhi High Court, and the order dated 11.05.2012, in above proceeding is Annexure P-6 to Petition.

12. The period of agreement, dated 14.12.2010, expired on 30.06.2013, thereby transponder capacity was discontinued from above date. There was huge outstanding liability under above agreement. Hence, a letter, dated 16.09.2014, by Antrix, was sent to Respondent, demanding payment against outstanding dues Rs.4,89,49,983/-. This letter is Annexure P-7 to Petition. A subsequent letter dated 13.03.2015 is Annexure P-8 to Petition. Then further Annexure P-9 to Petition is there.

13. On 29.05.2015, the Respondent acknowledged its liability and assured that clearing the outstanding dues under the subject agreement is its top priority. However, on the pretext that financial position of the company is poor and a certain investment deal was expected to take place, the Respondent undertook to start making payments soon. This acknowledgment letter, is Annexure P-10 to Petition.

14. Petitioner, in order to maintain cordial commercial relationship and for amicable resolution of dispute, have continuously performed its part by providing uninterrupted space segment capacity to the Respondent, even when the Respondent had entirely failed to make periodic payments in terms of subject agreement.

15. A meeting of 22.01.2016 was held between representatives of Antrix, and Respondent company. Wherein, again, the Respondent acknowledged its liability of Rs. 3.87 Crore, under the said agreement dated 30.09.2009, as well as Rs.2.34 Crore, under the agreement dated 14.12.2010, as on said date. It acknowledged an intention for clearing the same at an earliest. True copy of minutes of meeting dated 22.01.2016, is Annexure P-12 to Petition.

16. In case of failure to fulfill the promise and in making any payment, Petitioner de-allocated the bandwidth/ space segment capacity provided to Respondent under agreement dated 30.03.2009 on 01.03.2016. Thereafter, Antrix sent a

letter on 12.03.2016, notifying that any further usage of the allocated capacity in terms of the subject agreement, by Respondent be deemed as unauthorized, it is Annexure P-14 to Petition. A letter dated 16.02.2017 Annexure P-15 (colly) was sent to Respondent, for clearing cumulative amount due on above date in the tune of Rs.6,20,19,652/- (Rupees Six Crore Twenty Lakh Six Hundred Fifty Two only).

17. By order dated 27.02.2017 Hon'ble High Court of Delhi, in Co. Petition No. 213 of 2013, directed appointment of Official Liquidator, restraining from alienating, encumbering, or otherwise parting with possession of the assets of the Respondent company without leaving of Hon'ble High Court (Annexure P-6 to Petition).

18. In a subsequent meeting held, in between, on 07.03.2017, undertaking by Respondent, to deposit bank guarantee, for above outstanding dues, was requested, vide Email dated 07.03.2017, (Annexure P-17) to Petition.

19. Though Respondent had never disputed, its liability and obligation towards Petitioner, Rather had also acknowledge its liabilities towards Petitioner. But entirely failed to honor its legal obligation by making payment of outstanding dues, as above.

20. Security deposit of Rs. 13,12,750/- (Rupees Thirteen Lakhs Twelve Thousand Seven Hundred fifty Only), related with agreement dated 30.09.2009 had been adjusted against the dues of November 2011 to January 2012. Security deposit of Rs. 16,82,676/- (Rupees Sixteen Lakh Eighty Two Thousand Six Hundred Seventy Six only), related with agreement dated 14.12.2010, had been adjusted against the dues of May, June & July 2011.

21. A cause of action had arisen within the territorial jurisdiction, of this Tribunal, within limitation period.

22. Under clause "h" of exhibit B (payment schedule), agreement dated 30.03.2009, Antrix Corporation Ltd. (Antrix) was appointed as to contract manager, and they vested with all power, on behalf of claimant Petitioner, including initiation of legal proceeding. Likewise Similar provision is contained under clause "11" of Exhibit-B (Payment Schedule) to the agreement dated 14.12.2010. Hence, Mr. Arjun Krishnan, Sr. Head (Legal) had been authorized by the Board of Directors, of M/s Antrix Corporation Ltd., to take all necessary steps including institution of present proceedings, before this Hon'ble Tribunal. Hence, this Petition with above prayer.

23. Official liquidator appeared for Respondent company, and in spite of repeated grant of time for filing reply of petition, The same was not filed, as is apparent in order dated 24.07.2018, as well as 04.09.2018, on order sheet. Registrar of this Tribunal vide order dated 24.09.2018, proceeded ex-parte, against Respondent company. Evidence by Petitioner company was filed by way of filing affidavit, under order 19 of CPC. Neither witness was requested to be cross-examined by

counsel for Respondent, nor in evidence any reply was filed, by Respondent. In utter precaution a notice was issued, through Police Mode, to Directors as well as Official Liquidator of Respondent company and Official Liquidator appeared. Opportunity for written submissions for and on behalf of both side were given. But it was availed by Petitioner only. Whereas, written arguments by counsel for Official Liquidator as well as counsel for Petitioner was made before this Tribunal. Arguments of Learned Counsel for both sides were heard at length.

24. 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.

25. 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.

26. These two legal issues were raised and argued by Learned Counsel for Respondent company i.e., Official Liquidator, in its oral arguments, saying it be legal issues, requiring no pleading. Hence, these two issues are to be firstly looked in.

27. Learned Counsel for Petitioner, while replying the arguments of Learned counsel for Respondent i.e., Official Liquidator has vehemently argued that at the

time for filing of present Petition, the Respondent was already undergoing the process of winding up/ liquidation under Companies Act 1956, before Hon'ble High Court, Delhi. Hence, the Respondent has been represented through the Official Liquidator, appointed by Hon'ble High Court of Delhi, in Co. Petition No. 213 of 2012. The jurisdiction of this Tribunal is absolute and exclusive, under Section 14 of Telecom Regulatory Authority of India Act, 1997, As has been propounded by this Tribunal in Dishnet Wireless Ltd. Vs S. Tel Pvt. Ltd. 2017 SCC Online TDSAT 332, wherein this Hon'ble Tribunal at Para 12, 13 & 14 had clearly held that the jurisdiction of Tribunal is absolute under Section 14 of the Act, even in cases where winding up/ liquidation proceedings, against the parties is pending, before a Court, including a High Court. Hence, This Tribunal is fully competent to adjudicate, the present Petition.

28. Learned Counsel for Respondent i.e., Official liquidator had no objection with, this proposition of law that this TDSAT, is having specific and exclusive jurisdiction with regard to Petitions, under Section 14 of the TRAI, Act. But the dispute is with regard to leave, required to be taken from the Court in Companies Act, 1956, under Section 446, of the Companies Act, 1956, for filing or continuing this proceeding and it was not taken so.

29. In Dishnet Wireless Ltd. Vs S. Tel Pvt. Ltd. 2017 SCC Online TDSAT 332, full bench by this Hon'ble Tribunal TDSAT, had specifically dealt, the issue being raise in present Petition. In first Paragraph it was written:-

".....whether the Petitioners were required to take permission of the High Court in the pending liquidation proceedings for proceeding with the present matters in the Tribunal in the light of Section 446 of the erstwhile Companies Act and Section 279 of the Companies Act, 2013?"

In Para 2, it has further been written that:-

"After affording opportunity to the petitioners/applicants as well as the concerned Official Liquidator to file their pleadings to make their stand clear on the preliminary issue, learned counsel for the parties concerned have been heard at quite some length on the afore noted issue. The stand of the Official Liquidator in these matters by way of preliminary objection has already been noted. Learned counsel appearing for the other side in all these matters have taken a contrary stand. According to them, Section 279 of the Companies Act 2013 (Companies Act) will not have any effect on matters which lie within the exclusive jurisdiction of this Tribunal which has been constituted for a special purpose by a special Act i.e. the Telecom Regulatory Authority of India Act, 1997 (the Act)."

This Tribunal, while answering above question in judgment at Para 7 has propounded

"Coming to the other relevant statute, the Companies Act, it is worth noting that in the erstwhile Companies Act 1956, Section 446(1) mandated that upon making of a winding-up order or appointment of a provisional liquidator, no suit

or other legal proceedings shall be commenced or if pending, shall be proceeded with, against the company, except by leave of the court. As per sub- section (2), the winding-up court, notwithstanding anything contained in any other law for the time being in force, shall have jurisdiction to entertain or dispose of any suit or proceeding in respect of the company, whether such suit or proceeding has been instituted before or after the order for winding-up.....”

The conclusion has been propounded in Para 14 of the judgment written as below

“In view of aforesaid discussions, we hold that the adjudicatory jurisdiction of this Tribunal is exclusive and special under the Act whose provisions conferring such power over the Tribunal must be construed as parts of a special statute. On the other hand, the relevant provisions of the Companies Act are clearly general part of a general statute governing the companies in general. Hence, it is held that the adjudicatory proceedings before this Tribunal will not be affected by the provisions in the Companies Act. As a consequence, these will be heard and decided by the Tribunal and the petitioners are not required to approach the Winding-up Court for seeking any permission for that purpose.”

Hence, in view of above settled proposition of this Tribunal, argument with regard to Section 446(1), of Companies Act 1956, by Learned Counsel for Official Liquidator is not tenable and is devoid of any merit.

30. The next legal argument, with regard to Arbitration Clause in the agreement, it is a settled proposition of law, laid down by this Hon’ble Tribunal, in case of Aircell Digilink India Ltd. Vs. Union of India, and another related matters, decided on 06.01.2005 that TRAI, Act, is a complete code wherein this Hon’ble Tribunal has been provided with exclusive jurisdiction, to adjudicate any dispute between the parties, and exercise appellate jurisdiction, against any directions decision or order of TRAI. The Arbitration Act, being a general act, applied to all the arbitration agreement, but not the TRAI Act, being a special Act, which will overtake the general law. It was held that the arbitration is barred in respect of matters which come within the exclusive jurisdiction of this Hon’ble Tribunal TDSAT, under the TRAI Act, 1997. This law has been followed subsequently in BP No. 548 of 2017 Digicable Network India Ltd Vs Disha Media Pvt Ltd. Decided on 24.04.2018, and many other Petitions. Hence, this Preliminary objection, with regard to Arbitration Clause, raised by Official Liquidator, is of no avail.

31. Plea with regard to limitation, as raised by Learned Counsel for Official Liquidator has already been decided, and propounded by this very Tribunal, in Union of India Vs. Seashore Security Ltd. 2020 SCC online TDSAT 3, wherein it was held that limitation for Antrix Corporation Ltd. is of 30 years under Article 112 of Limitation Act 1963. Para 9 of this judgment contends “this Petition was filed on 13.03.2018. While admitting the petition on 22.03.2018, the Tribunal flagged the issue of limitation and, hence, learned counsel or the Petitioner, in spite of no opposition by the Respondent, has first addressed the issue of limitation. According to him, the agreement shows that the parties are the

President of India, through Secretary of Space, Government of India and the Respondent. Hence, the Petition is rightly filed on behalf of Union of India. In such a situation, limitation would be governed by Article 112 of the Limitation Act, 1963. As per the said Article a suit of the present nature by or on behalf of Central Government or in State Government would have 30 years as a period of limitation. Whereas, for a private person the limitation in such a matter, would have been only of three years.

This view is supported by the judgement of Hon'ble Supreme Court, reported in (2004) 13 SCC 13 (Accountant General)(A&E) Vs. V. Sethu Madhwan Nayyer" Hence, the present petition being by Union of India, filed by Antrix, is alike to petition filed, in above proceeding. Wherein above judgment is there. Hence, it is settled that limitation, available under Article 112, of Limitation Act 1963, is of 30 years. A very judgment of Bharat Sanchar Nigam Limited, being pressed by Counsel for Official Liquidator, is not a petition, by Union of India. More so, it was a judgment of year 2016 and the above precedent discussed above is of year 2020 and is of this Tribunal itself. Hence, the argument by Learned Counsel for Official Liquidator is of no avail.

32. Legal arguments advanced by Learned Counsel for Official Liquidator, discussed as above, are not being accepted.

33. The facts arising out of factual matrix in Petition, is with no contradiction by pleading and fact pleaded by Petitioner has been proved by its affidavit, filed in evidence, having no contravention. Uncontroverted affidavit of PW 1 has fully reiterated the contention of pleading. Hence, the averments made in pleading have been fully proved by Petitioner. Hence, the outstanding dues of Rs. 6,19,67,364/-being a principal, dues up to 11.12.2017, inclusive of delayed payment interest and taxes liable to be paid by Respondent up to the said date, is fully proved.

34. All the relevant materials and claims are supported by affidavit, filled by Petitioner. A certificate under Section 62B, of Indian Evidence Act, duly supported by an affidavit, is also available on record, to support the documents those are uncontroverted there is no reply by Respondent. Rather it has chosen not to contest the claim. Official Liquidator too had not filed, any written statement i.e., pleading in response to plaint. This amounts to admitting the claim. Hence, there is no difficulty in allowing the Petition.

35. Petition is liable to be allowed the Principal amount Rs.6,19,67,364/-(Rupees Six Crore Nineteen Lakhs Sixty Seven Thousand Three Hundred Sixty Four Only), dues as on date 11.12.2017, inclusive of delayed payment, interest and taxes liable to be paid by the Respondent, up to the said date, is liable to be allowed. So far as claim for interest @ 18% p.a., is concerned, following several other judgments and orders of this Tribunal in similar other matters, The interest for the period pendente lite and future is to be allowed. @9% p.a. This shall be payable since the date 11.12.2012, up till actual payment. The claim for foreign

exchange variation is also allowed, but this calculation will depend upon the date of payment or realisation of decretal amount. Hence it is left to be calculated, on the basis of reliable materials to show the rate at the relevant time which may be furnished by the Petitioner at the relevant time.

ORDER

Accordingly, this Petition is being allowed. Respondent is being directed to make payment by way of deposit, before this Tribunal Rs.6,19,67,364/- (Rupees Six Crore Nineteen Lakhs Sixty Seven Thousand Three Hundred Sixty Four Only), inclusive of delayed payment taxes liable to be paid by Respondent up to said date 11.12.2017, with pendente lite and future interest over above amount @ Simple interest of 9% p.a., from 11.12.2017 till actual payment, within two months of the judgment, for making payment to Petitioner. The foreign exchange variation claim is also allowed, and is to be calculated as per agreement on the date of actual payment made by Respondent, calculated and given by Petitioner at that stage.

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