

M/S Bala Cable Network M/S Bala Cable Network Vs. Channel Plus-tn

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Court : Telecom Disputes Settlement and Appellate Tribunal TDSAT

Decided On : Jan-05-2011

Judge : S.B. Sinha, Chairperson, the Honourable Mr. G.D. Gaiha, Member & the Honourable Mr. P.K. Rastogi, Member

Appeal No. : Petition No.267(C) of 2009 (With M.A. Nos. 112, 115 & 151 of 2010)

Appellant : M/S Bala Cable Network M/S Bala Cable Network

Respondent : Channel Plus-tn

Advocate for Pet/Ap. : For Petitioner: Mr. J.K.Mehta, Mr. Yogesh Tiwari, Advocates. For Respondent: Mrs. N.K.Sibal, Advocate.

Judgement :

S.B.Sinha

The petitioner is a Local Cable Operator. It is a proprietary concern of one Shri M. Muthugal. Its area of operation is Settur, Rajapalayam Taluk, District Virudhu Nagar in the State of Tamil Nadu.

The respondent is a content aggregator. It, in the aforementioned capacity entered into contracts with various Local Cable Operators and Multi System Operators for supply of signals of various channels including Sun TV, KTV, UTV etc.

Admittedly, there existed a contractual relationship between the parties hereto, in terms whereof the respondent had been supplying signals of the aforementioned channels since January 2003, which is said to have been continued till 2005.

However, interalia on the premise that the respondent had been switching off the signals quite often, the petitioner joined another Multi Service Operator, which, however, later on merged with the 'distributor' of the respondent and in that view of the matter, the petitioner had once again sought for supply of decoders from it.

Indisputably, the decoders earlier supplied by the respondent to the petitioner were on MPEG2 platform. The respondent started supply of signals on a new platform known as MPEG4. The petitioner asked for and was supplied with the decoders for certain channels and the same was reactivated.

There exists a dispute as to whether the parties hereto had entered into any formal agreement or not. Whereas according to the petitioner the agreement was an oral one, the witness of the respondent Shri Samuel Rajan, however, stated in his deposition that an agreement in writing had been entered into by and between the parties hereto.

It is also not in dispute that sometimes in December 2006, one of the principal channels of the respondent namely Sun TV became a pay channel. Admittedly, a decoder was supplied, for which, the petitioner had opted.

According to the petitioner, the respondent had not been serving invoices upon it on a regular basis. The petitioner, however, received two invoices which are for the period 01.09.2006 to 30.09.2006 and 01.10.2006 to 31.10.2006. The said invoices are marked as Annexure P-2 and P-3 to the petition.

The number of subscribers were shown in the said invoice as 2483, wherefor the subscription fee payable was Rs. 37,245/-. According to the parties, however, when the Sun TV became a 'pay channel', invoices started being sent to the petitioner herein showing the number of subscribers for KTV, SCV and Sun news at 3000 and for Sun TV at 5625. Signals of some other channels were also being supplied namely Uday movies, News and Bharta Gulu, General News, Movies and

GCV in local language of Tamil for which, however, no charge was being levied.

According to the petitioner, it had 11 operators but after one Mr. Balu became the distributor of the respondent in respect of the aforementioned villages which was also an MSO, 9 left its network.

Pursuant to a representation made for down-gradation of its subscriber base by the petitioner, a meeting was held by and between the parties hereto sometimes in June 2009.

The petitioner contends that keeping in view the difficulties faced by it, an 'Affiliation Registration Form' was signed, wherein the subscriber number as also the number of decoders were not mentioned. It is furthermore the case of the petitioner that a copy of the agreement was not supplied to it, which, however, having been called for, the respondent has produced before this Tribunal.

We may notice at the outset that in the said 'Affiliation Registration Form', although the bouquets containing the respective channels have been mentioned, but the column, 'decoders required and the number of subscribers' was left blank.

It has been brought to our notice that although a service contract upon which the respondent places reliance is dated 11.06.2009, at some places the respondent had been claiming that the date of the said agreement was 06.05.2009.

The petitioner contends that the terms and conditions of the said agreement were not in the knowledge of the petitioner, as a copy thereof had not been supplied to it.

It furthermore contends that the blanks in the said agreement had been filled up by an officer of the respondent itself.

It has been asserted that in terms of the said agreement, only signals of two channels were to be supplied namely, Sun TV with a subscriber base of 5625 and KTV for a subscriber base of 3000, and no agreement was entered into for Sun Music and Sun News which, however as it transpires now, was part of KTV Bouquet.

The respondent, however, submits that the petitioner was bound to pay the subscription fees in terms of the agreement on the aforementioned subscriber base whereby and whereunder the subscription fees payable by it was Rs. 1,28,554.65 per month. The respondent denies and disputes that there had been intermittent disruptions of supply of signals and / or after the new distributor was appointed, any attempt was made for total stoppage of the business of the petitioner as alleged.

The respondent in its reply has furthermore contended that the parties had met on or about on 19.01.2009 in respect whereof the following minutes were drawn:

“Minutes of Meeting between Channel Plus - TN and Bala Cable (Virudhunagar) held on 19.01.2009 in connection with the overdue for Sun and KTV

Venue : Channel Plus Office - Chennai

Operator account ID : 10003383

Participants :

1. Mrs. Sarojini Vijayan Nair - Sun TV
2. Samuel Rajan - Channel Plus - TN
3. Mr. Muthuvel - Bala Cable
4. Mr. A. Azarudeen - Field Executive

Mr. Muthuvel of Bala Cable (Virudhnagar) accepted to pay a sum of Rs. 19,82,722/- overdue subscription for SUN TV and KTV as per the below schedule :

On 20th January 2009 - Rs. 1,10,000/-

Before 31st Jan 2009 - Rs. 5,00,000/-

20.02.2009 - Rs. 4,57,574/- + monthly billing

20.03.2009 - Rs. 4,57,574/- + monthly billing

20.04.2009 - Rs. 4,57,574/- + monthly billing

The meeting ended with both the parties agreed as above.”

The petitioner does not deny or dispute his signatures on the said Minutes of Meeting. According to it, however, Shri Muthuvel was compelled to sign the MOM interalia on the plea that unless he did so, he was not be supplied with any decoder.

Keeping in view of the pleadings of the parties, this Tribunal by an order dated 23.02.2009 framed the following issues :

1. Whether the petition is maintainable as the petitioner has already approached the TRAI on the same cause of action as it is seized of the matter?
2. Whether there is an agreement between the parties for the subscriber base of 3000 (for KTV Bouquet) and 5625 (for Sun TV)?
3. Whether the respondent had been issuing and delivering the monthly invoices towards subscription charges to the petitioner?
4. Whether the respondent has maintained a true and correct account of the subscription charges payable by the petitioner to the respondent towards monthly subscription charges If so, to what effect and for what period?
5. Whether the agreement dated 11.06.2009 is valid and subsisting?
6. Whether the respondent had provided a copy of the agreement dated 11.06.2009 to the petitioner?
7. Whether the agreement dated 11.06.2009 records the true and correct subscriber base of the petitioner? If not, what is the true and correct subscriber base of the petitioner ?
8. Whether the action of the respondent in charging the subscription for SUN music and SUN news channels without providing decoders thereof to the petitioner is illegal?

9. To what relief, if any, the petitioner is entitled to ?

The petitioner in support of its case has examined two witnesses.

PW1 is its proprietor, whereas PW2 Shri Dakhinamorthy was one of its affiliates.

Mr. Jayant K. Mehta, the learned counsel appearing on behalf of the petitioner in support of the petition interalia contended:

1. The purported agreement dated 11.06.2009 filed by the respondent is not a genuine document as the petitioner's signature appears only at page four and two other pages.
2. Admittedly, the blanks having been filled up by an officer of the respondent and having regard to the fact that the Affiliation Registration Form also contained blanks in so far as the number of decoders and number of subscribers are concerned, no reliance can be placed thereupon.
3. Although the parties met in June 2009 and an agreement was signed, a copy thereof was not served upon the petitioner, and thus, it was not aware of the terms and the conditions thereof although in the said meeting it was agreed that the petitioner shall only pay a sum of Rs. 36,000/- per month.
4. By reason of intermittent disconnection of supply of signal, the petitioner had suffered business loss which was encouraged by the respondent through its distributor and in that view of the matter, this petition should be allowed.
5. The petitioner had 10 affiliates out of which 9 having left, a legal notice was sent by speed post on or about 31.10.2009, in response where to only the respondent in terms of its letter dated 14.10.2009 had claimed a sum of Rs. 22,29,827/- to be outstanding.
6. The respondent committed an illegality in switching off the signals on various occasions for which the petitioner is entitled to be suitably compensated on monetary terms.

7. The purported notice issued by the respondent under Regulation 4.1 of the Telecommunication (Broadcasting and Cable services) Interconnection Regulations, 2004(The Regulations) being dated 28.10.2009, in view of the fact the petitioner was not a defaulter, was illegal.

8. In view of the fact that decoders in respect of Sun Music and Sun TV were not issued and furthermore in view of the fact that respondent utterly failed to prove the basis for alleged outstanding amount and as it has admittedly not filed any proof of service of invoices, the purported minutes of meeting as also the claim of the respondent in regard to the outstanding dues should be rejected.

9. The falsity of the contents of the said minutes of meeting dated 19.1.2010 would also be evident from the fact that no reference had been made thereto by the respondent in any of the subsequent communications made by it to the petitioner.

10. The said purported minutes of meeting dated 19.01.2009 is merely an acknowledgment within the meaning of the provisions of Section 18 of the Indian Limitation Act, 1963, which even if given face value and taken to be correct in its entirety, would not give rise to any admission on the part of the petitioner with regard to the dues mentioned therein in as much as the respondent has failed to prove that the dues referred to therein has arisen within a period of 3 years from the date of making demand thereof and, thus, no liability can be created by way of an acknowledgment.

11. Service of invoice having not been proved, contents of the said minutes of meeting cannot be relied upon. In any event, the purported admission contained therein having regard to the pleadings of the parties as also the proof filed by the petitioner, must be held to be vitiated in law.

Mrs. N.K. Sibal, the learned counsel appearing on behalf of the respondent, on the other hand, urged :

A. The petition being full of discrepancies and mis-statements, no equitable relief should be granted to the petitioner.

B. The petitioner having complained of the alleged interruptions in supply of the signals before the Telecom Regulatory Authority of India (TRAI) in a proceeding initiated by it, wherein the respondent filed the SMS report wherefrom it would appear that all the channels were active on the relevant day, and, thus, the petitioner must be held to have failed to prove its case.

C. The petitioner having signed the agreement dated 11.06.2009 which was valid till 10.05.2010, has created a bogey of signing only 3 pages of the documents which infact are merely Affiliation Registration Form.

D. Even assuming the contention of the petitioner is correct namely its subscriber base for direct supply was 750 and through its link operator 735, the total number of subscribers being 1465, admittedly, a sum of Rs. 4,32,900/- was payable by it and as such the story set up by the petitioner that the subscription fees payable was a sum of Rs. 36,000/- only must to be held to be wholly imaginary.

E. Even it be held that the petitioner had not signed any agreement in respect of Sun Music and Sun News, as the same form part and KTV Bouquet for which the subscription fee was Rs. 15.41 per month per subscriber, and the subscription fee for KTV alone makes Rs. 16.06, the financial loss, if any, has been suffered by the respondent and not by the petitioner.

F. The petitioner's complaint having not been found to be correct by TRAI, the petitioner must not be held to have failed to prove its case.

From what has been noticed heretobefore it is evident that the basic fact of the matter is not in dispute.

The petitioner, admittedly, had been served with some invoices.

Mr. Samuel Rajan, the witness examined on behalf of the respondent contended that as per industry practice the same used to be served on the Local Cable Operators by hand. It is true that no documentary evidence had been filed in support of the said plea.

We may notice that admittedly, for one reason or the other the parties have met in January 2009, the minutes of meeting whereof read thus:

“Minutes of Meeting between Channel Plus - TN and Bala Cable (Virudhunagar) held on 19.01.2009 in connection with the overdue for Sun and KTV

Venue : Channel Plus Office - Chennai

Operator account ID : 10003383

Participants : 1. Mrs. Sarojini Vijayan Nair - Sun TV

5. Samuel Rajan - Channel Plus - TN

6. Mr. Muthuvel - Bala Cable

7. Mr. A. Azarudeen - Field Executive

Mr. Muthuvel of Bala Cable (Virudhnagar) accepted to pay a sum of Rs. 19,82,722/- overdue subscription for SUN TV and KTV as per the below schedule :

On 20th January 2009 - Rs. 1,10,000/-

Before 31st Jan 2009 - Rs. 5,00,000/-

20.02.2009 - Rs. 4,57,574/- + monthly billing

20.03.2009 - Rs. 4,57,574/- + monthly billing

20.04.2009 - Rs. 4,57,574/- + monthly billing

The meeting ended with both the parties agreed as above.”

As noticed heretobefore, the signature of the proprietor of the petitioner is not disputed. What is contented is that he was coerced to sign the same.

Before, however, we consider the legal effect thereof, we may notice that the petitioner despite knowledge of the existence of the said Minutes of Meeting did not question the validity thereof in the petition or at any time prior to the filing

thereof.

When the respondent brought the same on record in its reply, only in the rejoinder the said plea has been taken.

We may notice the said plea of the petitioner:

“9. The contents of paragraph 9 of the reply are wrong and denied. It is submitted that in January 2009, the petitioner had approached the respondent seeking clarification. This was for the reason that since June 2008, the respondent had switched off its signals. Despite requests and personal visits of the petitioner, the respondent was not switching on the signals. In January 2009, when the petitioner approached the respondent, the petitioner was told that the accounts are not finalised and as such could not be provided. The petitioner was completely kept in the dark. The respondent insisted that if the petitioner wants the signals to be switched on, it had to sign the paper. There was no formal meeting. The respondent made the petitioner to sign on the document called minutes of the meeting of 19.01.2009. The petitioner protested but had no option except to sign the papers since the petitioner was losing its connectivity for want of the sun TV signals. As stated in the petition and the previous rejoinder, in February 2009, owing to the illegal demands and arbitrary disconnections by the respondent, 9 of the 10 link operators of the petitioner migrated to another operator. This fact was well within the knowledge of the respondent as the other operator is none other than its distributor in the area. The respondent is now relying on the document dated 19.01.2009 as if it were an acknowledgment of dues. Yet, the respondent has shown no document to prove as to how the figures stated on that document were arrived at. In fact, in June 2009 when the petitioner again approached the respondent and explained the payments made by it, the respondent agreed to set its account right and got the signatures of the petitioner on an agreement.”

Our attention has also been drawn to the statement made in para 2.22 of the petition, which reads thus:

“2.22. The Petitioner approached the Respondent in June 2009 and again explained the entire matter to the Respondent. After satisfying itself about the

explanation given by the Petitioner that there was no outstanding, the Respondent stated that the Petitioner would have to execute a fresh agreement, to which the Petitioner agreed. The Respondent agreed that there was no actual outstanding and assured the Petitioner that with the new agreement, the parties would begin on a fresh slate. The Respondent obtained the signatures of the Petitioner on a copy of the agreement in which the material particulars were left blank. At this juncture, the Petitioner was provided with decoder boxes of only Sun TV and K TV and of no other channels. As such, the Petitioner started receiving signals only of these two channels. A copy of the Affiliate Registration on which the signatures of the Petitioners were obtained is annexed herewith as ANNEXURE P-7."

We may also notice that PW 1 Mr. Muthuvel in his affidavit stated as under :

"37. I state that on 19.01.2009, a meeting was held between the petitioner and the respondent. In this meeting, I was present. This meeting was held because the respondent had arbitrarily and without any notice to the petitioner disconnected its signals in June 2008. The petitioner was repeatedly approaching the respondent for reactivation of its signals. However, the respondent had failed to reactivate the signals. I further state that in the said meeting the respondent, without showing any statement of account whatsoever claimed that there was an outstanding owed by the petitioner to it. When I asked the respondent about the details thereof, the respondent did not provide. The respondent told me that if I wanted the signals to be reactivated, I had to sign the minutes of the meeting prepared by it. I had no option except to sign whatever was prepared by the respondent. Accordingly, I signed the so-called minutes of the meeting dated 19.01.2009. I deny that there was any outstanding on that date or even today owing from the petitioner to the respondent."

Three questions of law arise for our consideration in view of the stand taken by the petitioner, which are as under:

1. Whether the said minutes of meeting may be construed to be an admission of a debt within the meaning of Section 58 of the Indian Evidence Act?

2. Whether the respondent can also rely upon the said minutes of meeting to contend that thereby the petitioner has acknowledged its liability?

3. Whether in absence of any pleading in that behalf in the original petition, the petitioner cannot be permitted to raise the contentions that he was co-erced to sign the said MOM?

A contract binds the parties thereto unless it is void or voidable at the instance of one of them.

A contract should be with free consent of the parties. In terms of Section 14 (1) of the Indian Contract Act, consent would not be free when inter-alia it is caused by coercion as defined in Section 15 thereof.

We may notice the definitions of the terms 'Free consent' and 'Coercion' :

"14. "Free consent" defined.-Consent is said to be free when it is not caused by-

(1) coercion, as defined in Section 15, or

(2) undue influence, as defined in Section 16, or

(3) fraud, as defined in Section 17, or

(4) misrepresentation, as defined in Section 18, or

(5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

Section 15 which reads as under :

"15. "Coercion" defined.-"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (XLV of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.-It is immaterial whether the Indian Penal Code (XLV of 1860), is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (XLV of 1860).

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code (XLV of 1860), was not in force at the time when or place where the act was done.”

For the purpose of proving ‘coercion’ so as to make a contract voidable as is required under Section 19 of the Indian Contract Act, in our opinion, the particulars thereof are required to be pleaded.

Except stating that the respondent had threatened that unless he signed the said Minutes of Meeting, no signal would be supplied to it, no statement has been made that by reason thereof any of the acts forbidden by the Indian Penal Code has been committed.

The petitioner is a businessman. He is engaged in the cable business since 2003. Admittedly, on his own showing, he had as many as 10 affiliates. He, therefore, presumably was aware of the nitty-gritties of cable business.

In this petition we are not concerned as to why some of its affiliates left the network of the petitioner and joined some other MSOs. It has not been also pleaded that the respondent has colluded with its distributor. The said distributor has also not been impleaded as a party herein.

The petitioner, as would appear from the verification portion of the petition as also his affidavit knows how to write in English. He has put his signatures in English on various documents including the Affiliation Registration Form. The original agreement has also been produced before us from a perusal whereof it would

appear that he had put his initials on each and every page thereof.

Only while deposing, a statement was made by Shri Muthuvel that he was not very conversant with the English language and as such his deposition was translated before us.

Order VI Rule 4 of the Code of Civil Procedure reads, thus:

“4. Particulars to be given where necessary.-In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

A bare perusal of the aforementioned provision would clearly show that a party seeking a declaration that any contract entered into by him is void and / or voidable is not only required to plead the same, but also to furnish the particulars thereof. (See Ranganayakmma V. K.S.Prakash (2008) 15 SCC 673)

The contents of minutes of the meeting was known to the petitioner. It, being within its knowledge, should have raised a contention in regard thereto in the petition itself.

He has failed and / or neglected to do so. The statements made by him in para 2.22 of the petition, in our considered opinion, are not sufficient to show that he has raised any contention in regard its plea of ‘coercion’ on the part of the respondent in getting the said minutes of meeting dated 19.01.2009 signed by him.

Para 2.22 relates to the agreement being dated 11.06.2009 although no particular date has been disclosed in the said petition. The petitioner categorically stated that he was provided with decoder boxes of Sun Tv and KTV and no other channel which are also the contents of the said agreement. It is not in dispute that decoders of other channels have not been supplied.

Mrs. Sibal, submitted that the petitioner has by mistake been charged with the entire bouquet of KTV although there was no agreement therefor. The financial implication thereof, however, was not to be borne by the petitioner. It is the respondent which has suffered losses.

We may notice that admittedly, the petitioner had made a complaint to TRAI. It issued a notice to the respondent. The petitioner even did not disclose the said fact in the petition.

In response to the complaints made by the petitioner to TRAI, the respondent by a letter dated 18.11.2009 stated as under:

“With reference to the above subject captioned matter, we wish to inform you that the signals of the complainant have not been switched off so far. Copies of the SMS reports, which are the proof that the signals of the complainant is still going on, are enclosed herewith for your kind perusal. We kindly request you to cross check with the complainant in this regard.

We state that the complainant is liable to pay the pending subscription due amount of Rs. 24,24,935/- to us till date. Further, we have already issued 4.1 and 4.3 notices to the complainant as per TRAI Regulations for non-payment. The complainant is sending the type of false letter only to avoid disconnection of their signals. We kindly request you to pass orders directing the complainant to pay the said subscription due amount of Rs. 24,24,935/- on or before 21.11.2009 and thereby avoid disconnection of their signals. This is for your kind information.”

It also filed SMS reports from a perusal whereof it appears that the petitioner's decoder for Sun Music and Sun News as on 27.08.2008 were active. Similar status has been shown for 20.10.2009 and 30.10.2009.

A question has been raised as to whether the said SMS report should be relied upon.

The evidence of the witness of the petitioner in his deposition is as under :

“Q. The pages 80 to 88 are SMS report according to you?

A. Yes. These are correct.

Q. Is it correct that the decoders of Sun News and Sun Music are not available with the petitioner?

A. Yes.

Q. I am suggesting it to you that in June 2009, you had agreed with the petitioner that the petitioner shall pay only an amount of Rs.36,000/- per month towards subscription charges?

A. No. I deny.

(At this stage) witness states that the answer to the question with regard to the possession of the decoder boxes with the petitioner is not complete as the petitioner does not have MPEG 4 but MPEG 2 decoder boxes of those channels i.e. Sun News and Sun Music.

Q. When did you go from MPEG 2 technology to MPEG 4 for these channels?

A. In July, 2009.

Q. Is it correct that after July 2009 MPEG 2 box will not work but only MPEG 4 box will work?

A. Yes.

Volunteers - The SMS report carries two times, one is for MPEG 2 boxes and the other for MPEG 4 boxes. If a customer given MPEG 2 box and MPEG 4 box, it will be listed as active twice. Since MPEG 2 was switched off globally and not case by case and the card number of MPEG 2 and MPEG 4 boxes differs.

Mr. Mehta objected to this voluntary statement of witness. The objection would be considered at the time of hearing.

Q. Did you write to TRAI in regard to whatever you have stated above in your letter at page 79?

A. No”.

Contention of Mr. Mehta is that it is impossible for a Local Cable Operator to supply signals and / or receive signal from the decoder boxes supplied to it on MPEG2 platform when the system itself has been changed to MPEG4.

The receipt of signal at the operator's end depends upon the decoder box being compatible to what is being sent by MPEG-4 encoder. If decoder at the local cable operators end is MPEG-2, the SMS report will show as signal transmitted but not received at the local operators end. The encoder, decoder should both be MPEG-4 for receiving signals. Be that as it may, it may not be very relevant for our purpose.

We have referred to it only because two principal contentions have been raised by Mr. Mehta in support of the petitioner's case that no reliance should be placed on the agreement on the premise that :

A. The petitioner could not have been supplied any signals contrary to the agreement and / or Affiliation Registration Form.

B. No mention thereof has been made about the MOM in any of the subsequent document and furthermore it is wholly unlikely that the respondent shall enter into a fresh agreement despite such a huge balance.

Mr. Mehta has placed strong reliance on the decision of the Supreme Court of India in Nagindas Ramdas v. Dalpatram Ichharam, (1974) 1 SCC 242 to contend that the arrangement was required to be proved between the parties by filing invoices and / or other documentary evidences.

The jural relationship between the parties is not in dispute. The fact that the petitioner had been taking supply of signals from the respondent is also not in dispute.

The fact that if not all, some invoices have been raised by the respondent is also not in dispute.

What is in dispute is the subscriber base. Whether in the agreement entered into by and between the parties in June 2009 and / or from the date of entering into the new arrangement i.e. December 2006, there is nothing on the record to show that any change in the subscriber base took place. If there had been no change in the subscriber base, the things could be deemed to have continued in the same manner.

It was for the petitioner to prove that by reason of any subsequent event he was entitled to invoke the 'exception' clause contained in Clause 10.2 of the Interconnect Regulation 2004 which reads as under :

“Between Multi System Operator and Broadcaster

10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.

Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.”

The onus of proof in this regard was totally on the petitioner. It is now a well settled principle of law that if an admission is made and evidenced in a document, which is a part of the contract between the parties, no further evidence need be adduced. If, however, any exception thereto has to be considered by a Court of Law, such a plea not only has to be raised but would require to be established.

Existence of some circumstances alone will not put a party, who takes recourse to such exception, to a position to which he cannot be put, meaning thereby if an admission of a party is brought on record, be subject to proving one or the other 'exception(s)' would be bound thereby, in which event the other side is not required to adduce any evidence whatsoever.

Consideration of other circumstantial evidences and / or any other evidence is required to be taken into consideration only when it is found that either genuineness of the document wherein such purported admission had been recorded is in question and/or the same is not otherwise reliable. But save and except those situations, in our considered opinion, no other or further evidence would be admissible.

We may now consider the attending circumstances.

The petitioner is a Local Cable Operator. He admittedly was granted supply of signals of some of the channels by the respondent herein. Indisputably, whatever be its subscriber base, after the Sun TV became a pay channel as far as back as in January 2007 it was served with an invoice showing a subscriber base of KTV for 3000 and Sun TV for 5625. The petitioner does not say that he protested thereagainst immediately. He continued to make part payments. Admittedly the parties met on or about 11.01.2009. The petitioner does not deny or dispute his signatures on the said Minutes of Meeting. No FIR was lodged ; no complaint was made ; no protest was raised. The petitioner did not mention the said fact in the petition or before TRAI. He did not question the legality thereof.

When the said fact was brought to the notice of Tribunal by the respondent in its reply, for the first time the petitioner in its rejoinder raised a plea of so called 'coercion'. In Rejoinder, the plea of coercion is raised but no particulars thereof as is required in terms of Order VI Rule 4 of the CPC were furnished. In absence of any particulars, the plea of coercion would not meet the requirements of law. Rejoinder should be a replication of the plaint and not additional pleadings within the meaning of Order VIII Rule 9 of the Code of Civil Procedure, 1908.

It has been so held in *Bishundeo Narain and Anr v. Seogeni Rai And Jagernat* AIR 1951 SC 280, stating :

“27. We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

28. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6 Rule 4 of the Civil Procedure Code.”

Recently, in *Shanti Budhiya Vesta Patel v. Nirmala Jayprakash Tiwari* 2010 (5) SCC 104, the law has been reiterated by the Apex Court.

Thus, having regard to the law laid down by the Supreme Court of India, the statutory requirements must be held have not been complied with.

What would be the effect thereof is the question? The plea of ‘coercion’ would be considered to be a relevant fact for the purpose of determining rights of the parties, and, thus, in respect thereof, no further consideration would be necessary.

The rate of subscription fee being Rs. 12/- and Rs. 15/- per month per subscriber being not disputed, the amount of subscription fees on simple arithmetic would not be Rs. 36,000/- per month but would be more than Rs. 41,000/- per month. There is, therefore, no basis for the statement made by the petitioner that the subscription fees was Rs. 36,000/- per month.

We may notice the statement of account, which is admitted and has been filed with the petition.

In August 2006 a sum of Rs. 92,000/- has been paid. In September Rs. 80177/- has been paid. In October a sum of Rs. 40000/- has been paid. In November he has paid a sum of Rs. 56805/-. In December a sum of Rs. 41804/- has been paid. In January 2007, which is a very crucial month, he has paid a sum of Rs. 1,39,000/-. In February he has paid a sum of Rs. 88426/-. In March, he has paid a sum of Rs. 90000/-. In April he has paid a sum of Rs. 2,42,000/-. In May he has paid sum of Rs. 60000/-. In June, he has paid a sum of Rs. 82000/- . In July he has paid a sum of Rs. 1,68,000/-. In August a sum of Rs. 90000/- has been paid. In January 2008 he has paid a sum of Rs. 180000/- (56000+51000+73000/-). In February 1,02,500 has been paid. In March Rs. 50000/- was paid. In April 2008 Rs. 60000/- has been paid. In May 2008, Rs. 60000/-. He did not pay for few months namely, June to December 2008 and again in January 2009 he has paid a sum of Rs. 99000/-. In February he has paid a sum of Rs. 5,00,000/-. In March Rs. 11,030/- . In May 2009 he has paid a sum of Rs. 1,00,000/-.

It is, therefore, evident that at all relevant points of time, on his own showing, the petitioner has made payments towards the subscription charges different sums each month. Sometime, if payment for subscription fees for one month was not made in the other months a higher sum has been paid.

The parties, therefore, it cannot be presumed, met only for the purpose of reconciliation of their accounts. Upon reconciliation of the accounts, if any, the minutes of meeting has been recorded, wherein the petitioner accepted that a sum of Rs. 19,82,722/- was due from him.

Apart from the legal aspect the pleas taken by him are referable only to certain circumstances which according to the petitioner militates against his admission/acknowledgment to pay the said amount of said Rs. 19 lakhs and odd.

We have noticed heretobefore the contentions of Mr. Mehta in this behalf. We would consider the same a little later.

We may also notice that according to Mr. Mehta a distinction exists between the 'evidential admission' and 'judicial admission'.

Mr. Mehta would contend that whereas 'judicial admission' is conclusive, 'evidentiary admission' is not. We may deal with this aspect of the matter at the outset.

Admission is dealt with in the Evidence Act.

The provisions of the Evidence Act provide for proof of relevant facts.

An exhaustive definition has been made in Section 3 of the Act to denote that the relevant fact would mean any fact from which, either by itself or in connection with other facts, the existence, non existence, nature, or extent of any right, or liability or disability asserted or denied in any suit or proceeding necessarily follows.

We may notice the definition of certain terms :

"Facts in issue".-The expression "facts in issue" means and includes-any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

The Explanation appended thereto states as under :

"Explanation.-Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue."

Evidence has also been defined to mean:

"Evidence".-"Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents [including electronic records] produced for the inspection of the Court; such documents are called documentary evidence.

It also provides for the definition of 'proved', 'disproved' and 'not proved' in the following terms.

"Proved".-A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved".-A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved".-A fact is said not to be proved when it is neither proved nor disproved.

We may also notice that Section 4 of the Act provides for three types of presumptions namely, 'may presume', 'shall presume' and 'conclusive proof' to the following effect :

4. "May presume".-Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

"Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

"Conclusive proof".-When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Section 5 contained in the Chapter II of the said Act states that the evidence may be given in respect of facts in issue and relevant facts.

It reads as under :

“5. Evidence may be given of facts in issue and relevant facts.-Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.-This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.”

On the aforementioned backdrop, we may notice the definition of ‘admission’ as contained in Section 17 of the Act. It reads as under :

“17. Admission defined.-An admission is a statement, oral or documentary [or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.”

Section 18 makes the statement by a party to a proceeding or his agent to be treated as admissions. It reads as under :

“18. Admission by party to proceeding or his agent; by suitor in representative character; by party interested in subject-matter; by person from whom interest derived.-Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by-

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Section 21 provides that proof of admissions against persons making them and by or their behalf is relevant and may be proved not only against them but also against their representatives in interest. But the same cannot be made except on the grounds enumerated therein.

We may notice that the illustrations contained in Section 21 are not exhaustive.

In *CBI v. V.C. Shukla*, (1998) 3 SCC 410, at page 436, the Apex Court made the distinction between 'admission' and 'confession' stating:

"44. Lastly, comes the question whether the entries are "admissions" within the meaning of Section 17 of the Act so as to be admissible as relevant evidence under Section 21; and if so, as against whom can the entries be proved. In Section 17 admission has been defined to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons, and under the circumstances, mentioned in the subsequent sections (Sections 18 to 21). Section 18, so far as it is relevant for our present purposes, provides that statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions."

Admission in civil cases when relevant is stated in Section 23 of the Act.

Section 31 of the Act, however, states that admissions are not conclusive proof of the matter admitted, but they may operate as 'estoppel' under the provisions thereafter contained.

The word conclusive proof, in view of the provisions contained in the Evidence Act must be held to be as contra- distinguished from 'may presume' and 'shall presume' as also the definition of 'proved' and 'not proved' and 'disproved' and for

no other purpose.

Section 58 of the Indian Evidence Act reads as under :

“58. Facts admitted need not be proved.-No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

Section 58 is in two parts. The first part being what is known as ‘judicial admission’ and the second as ‘evidentiary admission’.

Section 58, therefore, provides that wherever a fact is admitted, the same need not be proved. Mr. Mehta, however, would submit that Section 58 is not attracted in the instant case as the same refers to judicial admission alone.

We do not entirely agree. There cannot be any doubt or dispute that Section 58 also refers to a judicial admission. However, it is in two parts. The first part be the admission made in the pleadings or during the course of the proceedings. But the second part refers to an admission made in writing even before the hearing. Admission is of two parts. It may be oral; it may also be in writing. An admission may be made to a party to the proceedings. It may be made to a third party. Several rules of evidence have, therefore, been laid down to consider all aspects of the matter. An admission in writing may be by way of a separate or independent contract, it may be a part of a transaction. It may be although in respect of a transaction but may not necessarily be a part of a contract.

The Supreme Court of India in various decisions considered the same.

We may, however, notice some of them :

In Sangramsinh P. Gaekwad and others versus Shantadevi P. Gaekwad (Dead) through LRS. and others (2005) 11 SCC 314, the Apex Court stated the law as

under :

“214. In terms of the aforementioned provision, things admitted need not be proved. In view of the admission of Respondent No. 1 alone, the issue as regards allotment of 6475 shares should have been answered in favour of the appellants. The company petitioner at a much later stage could not be permitted to take a stand which was contrary to or inconsistent with the original pleadings nor could she be permitted to resile from her admissions contained therein.

215. Admissions made by Respondent 1 were admissible against her proprio vigore.

216. In Nagindas Ramdas v. Dalpatram Ichharam this Court held: (SCC p.252)

“27. ... Admissions if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.”

(See also Bishwanath Prasad v. Dwarka Prasad.)

217. In Viswalakshmi Sasidharan v. Branch Manager, Syndicate Bank, this Court held: (SCC p. 174, para 2)

“On the other hand, it is admitted that due to slump in the market they could not sell the goods, realise the price of the finished product and pay back the loan to the Bank. That admission stands in their way to plead at the later stage that they suffered loss on account of the deficiency in service.”

218. Judicial admissions by themselves can be made the foundations of the rights of the parties.”

219. In Modi Spg. and Wvg. Mills Co. Ltd. v. Ladha Ram and Co. the law is stated in the following terms: (SCC p. 321, para 10)

“10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court.”

(See also Vimal Chand Gherarchand Jain Vs Ramakant Eknath Jadoo (2009) 5 SCC 713)

In Avtar Singh And Others Versus Gurdial Singh And Others (2006) 12 SCC 552 at page 554, it is stated :

“9. Section 58 of the Evidence Act postulates that things admitted need not be proved.”

In L.K. Verma v. HMT Ltd.,(2006) 2 SCC 269, at page 275, the Apex Court laid down the law in the following terms :

“15. The Labour Commissioner, in our considered opinion, misdirected himself in passing the said order. Whereas, on the one hand, he noticed that the appellant herein had stated that during the preliminary enquiry he made those utterances owing to tension in his mind, he opined that no evidence had been produced against him for which he has been dismissed from service. It is now well settled that things admitted need not be proved. (See Vice-Chairman, Kendriya Vidyalaya Sangathan v. Girdharilal Yadav.”

See also

(i) 2005 5 SCC 100 (Manager, Reserve Bank of India Vs. S. Mani)

(ii) 2006 13 SCC 481(Sreedhar Govind Karmekar Vs. Yesahwant Govind Karmekar)

(iii) 2007 13 SCC 476 (Oriental Insurance Co. V. Premlatha Shukla)

There cannot be any doubt or dispute that whereas judicial admissions would be conclusive, the evidentiary admissions may not be. They are not because the same are excluded by Section 58 of the Evidence Act but are subject to the provisions of Indian Contract Act to which we have referred to.

Section 58 is required to be construed accordingly.

The said legal position would appear from a judgment of a Rajasthan High Court in Shantiman Vs Savitri Devi reported in 2003 Weekly Law Notes page 532.

(See also Jeevan Ram Shiv Datt Rai 2005 (199) CTR (Calcutta) page 98 : 279 ITR 512)

Such a stand if taken by the defendant or a person who has made an admission, he is required to plead and prove the same. The provisions of Order VI Rule 4 governs the rule of pleadings. The petitioner admittedly, has not raised any such plea. It took such a stand for the first time in its rejoinder only.

It is not in dispute that onus of proof was on the petitioner to establish that he was coerced to sign the aforementioned Memorandum of Meeting dated 19.01.2009. We have noticed heretobefore the language used therein. A plain reading of the said MOM would clearly go to show that for all intent and purport the petitioner has admitted that the sums specified therein was owing and due from him. He without any demur whatsoever has pledged to repay the said amount in instalments.

The legal effect of the said MOM is that he had admitted and / or acknowledged the dues and is bound thereby and/or is otherwise estopped from pleading otherwise, was it in the aforementioned situation, necessary for the respondent to bring on records other or further material to establish that atleast at that point of time a sum of Rs. 19 lakhs was owing and due from him?

In our considered opinion the answer to the said question must be rendered in the negative.

Mr. Mehta however, would submit that in *Nagindas Ramdas v. Dalpatram Ichharam*, (1974) 1 SCC 242, the Supreme Court of India has held that Section 58 refers to Judicial admission alone.

We may notice the relevant paragraph of the said decision :

“27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be *prima facie* satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.”

A bare perusal of the law laid down by the Supreme Court of India would clearly go to show that it was considering two aspects of the matter. One is ‘judicial admission’ is on a higher footing than ‘evidentiary admission’, but the same would not mean that evidentiary admission is not covered under Section 58 of the Evidence Act or the ‘evidentiary admissions’ are not admissible in evidence.

We would, for the purpose of this petition assume to be so. But then as noticed hereinbefore Section 31 clearly speaks of an estoppel. Both waiver and estoppel are procedural laws. If the rule of estoppel is to apply, indisputably, the party will be estopped from pleading contrary to or inconsistent with anything which he has admitted. He has to establish that the admissions made by him are wrong and capable of being explained. The onus on him would be heavy in this behalf.

See also

AIR 1932 Madras 693(Alimana Sahiba V Subbarayudee)

AIR 1957 Andhra Pradesh 754(Vishram Arjun V. I. Shankaraiah)

AIR 1977 JandK 61(Dewan Chand Barbar Vs. M/s Jay Pee Finance)

We, therefore, are of the opinion that both 'evidentiary admission' and 'judicial admission' would come within the purview of the Evidence Act in terms of its provisions, as noticed heretobefore.

In regard to the filling of proof, the Allahabad High Court in Manikant Tiwari Vs. Babu Ram Dixit AIR 1978 All 144, stated the law in the following terms :

“10. However, since the questions have been raised, it is necessary that they should be dealt with. So far as the second contention is concerned, it will be seen that a notice was admittedly served on the defendant. However he challenged its validity. A copy of the said notice was filed by the plaintiff in the trial court but the same was held to be inadmissible by the courts below on the ground that the said copy of the notice was a copy made out from a copy and not from the original. Hence, it was not secondary evidence as the said term is denned in Section 63 of the Indian Evidence Act. However, the said courts held that as the defendant had admitted the receipt of the notice, it was for him to have filed the original notice which was claimed by him to be defective. The burden lay on the defendant to prove the invalidity of the notice once he admitted the receipt of the same. In my view, the courts below were right in laying down to the aforesaid effect. Under Section 58 of the Evidence Act, a fact which is admitted need not be proved. Here, the defendant had admitted the receipt of the notice but wanted to contend that the same was not valid in law. In such a situation, it was for him to have filed the original notice which he had received to substantiate his point that the notice was bad in law.”

We may, however, observe that although there exists a distinction between a 'judicial admission' and 'evidentiary admission', the same having regard to the decisions of the Supreme Court of India is marginal. The distinction is evident

although is fine. The first part of Section 58 deals with an admission made in the proceeding but another part is admission in writing before hearing and the third part refers to provisions of Order VIII Rule 5 of the Code of Civil Procedure or the provisions analogous thereto.

The proviso appended to Section 58 confers a discretion on the part of the Court, if, however, such a discretion is not exercised, the main part shall take effect. The proviso would not apply where a party makes an admission in Court or before the Judge concerned. So far as an admission made in terms of Order VIII Rule 5 of the Civil Procedure Code is concerned, the same also contains a proviso in terms whereof despite such admission, the Court in its discretion may ask a party to prove the said fact. The languages used in provisos appended to Order VIII Rule 5 and Section 58 is identical.

The second part of Section 58 also, having regard to the provisions contained in Section 31 of the Indian Evidence Act would not be conclusive in nature. We, therefore, are of the opinion and if the proviso is not applied, and no plea on the part of the petitioner having been raised before this Tribunal nor any such order has been passed, we are of the opinion that an admission made by the petitioner in the MOM dated 19.01.2009 is binding on it and he is estopped and precluded from raising any other plea.

We, however, are not oblivious of the legal position that an admission does not always bind a party. No admission can be made contrary to law. No admission can be made where the same is not permissible as for example, conferring a jurisdiction upon a Court of Law where it has none or where a contracting out is forbidden in law. Such an admission also cannot be made where it is made by a person who is otherwise disabled or in whose favour a presumption may be raised that there might made an admission a weaker section, but in relation thereto the law must be operating in the field.

Another aspect of the matter also cannot be lost sight of. Where an admission has been made either by way of acknowledgment of debt or otherwise, the same must conform to the provisions of the Indian Limitation Act, 1963. An admission made must also be held to be within the purview of the provision of the Indian Contract

Act to which we have made a reference heretobefore.

Reliance has also been placed on Avadh Kishore Das Vs. Ram Gopal (1979) 4 SCC 790 by Mr. Mehta. A bare perusal of the said decision will clearly go to show that the same is not applicable to the fact of the instant case. In that decision it has been held :

“24. Further, what is more important, in cross-examination, the defendant was confronted with this declaration in the Will. He unreservedly admitted that what was stated in the Will, was correct. It is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to the wrong; but they do raise an estoppel and shift the burden of proof on to the person making them or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Here, the defendant, far from explaining the admission or declaration made by the deceased Mahant, under whom he (defendant) claims, has affirmed it, that the entire property in suit is the absolute property of the God, Thakurji as a juristic person. It is, therefore, too late in the day for the defendant to wriggle out of the same. It cannot be said that the defendant had inadvertently affirmed the correctness of the admission/declaration made in the aforesaid Will by the deceased Mahant. It was a conscious admission. The defendant himself repeatedly admitted this position with regard to the ownership of the land being exclusively of the idol, Thakurji Maharaj, in the applications filed for receiving annuity under the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1952, which was granted to the idol, in respect of the Trust property.” (underlining is ours)

Has the petitioner been able to discharge the burden of proof is the question? The answer thereto must be rendered in negative.

The petitioner had not been able to explain the admission made by him. No case has been made out by him to resile therefrom. No ground has been made out by it therefor. He is not able to show that the same was procured by coercion or fraud.

Whenever a coercion or fraud is to be proved within the meaning of the provisions of Section 17 of the Indian Contract Act, the same requires specific pleading. In

this case, there is none.

It may be true that the respondent had not made any reference to the said Minutes of Meeting in its subsequent correspondences but it was not necessary for it to do so.

On the other hand, the petitioner had also not made any protest thereagainst. It despite knowledge did not think it fit to question the validity thereof in this petition. The plea taken in the rejoinder for the first time in our opinion is by way of after thought.

We would have expected a businessman of the standing of the petitioner to question the same at the earliest opportunity. It having failed to do so, its plea raised for the first time in the rejoinder should not be accepted.

It is true that a petitioner has not made any payment in terms of the said MoM stricto sensu as it did not say so explicitly, but PW1 accepted the same. It was not necessary to do so, as the respondent has shown the same in its books of accounts.

The petitioner had been making some payments and, therefore, only because ordinarily a person would not have entered into a contract when an amount is outstanding may be correct but the same may not be conclusive in these types of businesses.

The question as to whether the aforementioned Minutes of Meeting would constitute an acknowledgement of liability and / or an admission must also be considered having regard to the provisions contained in the Section 18 of the Indian Limitation Act, 1963.

The said provision reads thus :

“18. Effect of fraud.-Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application-

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.”

There cannot be any doubt or dispute that such an acknowledgment must be made in regard to an existing liability. A liability created beyond the period of limitation would not constitute an acknowledgment within the meaning of provision of section 18 of the Limitation Act.

This aspect of the matter has been considered by the Supreme Court of India in Food Corporation of India Vs. Assam State Cooperative Marketing and Consumer Federation (2004) 12 SCC 360. In that decision as well the acknowledgment on the part of a debtor of its existing debt was made in a meeting. The Supreme Court in no uncertain terms opined the Court shall lean in favour of the validity of the Minutes in absence of any proof to the contrary.

The petitioner alleged frequent disconnections in supply of signals on various occasions. It has given three dates. In respect of the first of the said disconnections it wrongly stated only to show to the place sometimes in 2005. Neither any period of disconnection was given nor any date of disconnection was given nor even the month thereof was mentioned.

So far as intermittent disconnection is concerned allegations have been made that signals remained disconnected from September 2007 to December 2007.

Apart from the self serving statements made in the petition and /or affidavits, no proof thereof has been filed.

The second disconnection was allegedly effected during the period June 2008 and January 2009 and third was on 29.10.2009.

The petitioner apart from examining PW2 namely Dakshmuma Mausth, has not brought on record any reliable or cogent material.

We have noticed heretobefore that the petitioner has failed even to show that any decoder boxes for KTV had been given to it in July 2009.

We have also noticed heretobefore that despite the fact that petitioner has received invoice for the month of August 2009 pursuant to and in furtherance of the agreement entered into by and between them in June 2009, it has failed to prove the basis on which an assertion has been made by it that the subscription fee only payable by it was a sum of Rs. 36000/- p.m. in as much as Mrs. Sibal has rightly pointed out that even if the assertions of the petitioner with regard to its subscriber base be taken into consideration then also, the subscription fee would be more than Rs. 41,000/-.

Another aspect of the matter must also be placed on record. The subscriber base in respect of KTV and Sun TV was specifically mentioned in the invoices.

The petitioner admits receipt of the invoice for the month of August 2009. It was expected, if the subscriber base is shown to be much more than shown in the SLR of the petitioner, some protests would be made. No such protest was made.

The respondent made a demand of its dues by a letter dated 14.10.2009. It also issued a notice under Regulation 4.1 on 28.10.2009, stating :

“Sub: 4.1 notice issued as per TRAI regulations, 2006 - reg.

We would like to inform you that you have a subscription due amount of Rs. 2,332,381.25/- till date. You have not settled the said due amount even after several reminders made by us. We hereby call upon you to pay the above said due amount immediately on receipt of this notice, failing which we will be constrained to disconnect the signals presently being provided to you.

This notice may be treated as notice issued under section 4.1 of the Telecommunication (Broadcasting and cable services) interconnection (Third Amendment) Regulation, 2006.”

The petitioner for the first time through a notice of its Advocate dated 31.10.2009 replied to the said letter dated 14.10.2009.

We fail to understand as to why the petitioner did not take any step to protest against such demand of the respondent at the first opportunity and to wait for the letter of the respondent as also notice under Regulation 4.1. It is only after the said notice of the Advocate dated 31.10.2009 the petitioner had issued a further letter on 10.11.2009, 11.11.2009 and 14.11.2009, i.e. in quick succession.

The respondent, however, by its lawyer’s letter dated 12.11.2009 replied to the petitioner’s letter dated 31.10.2009 stating, as under :

“With reference to the above, we wish to inform you that your client have entered into an agreement with us on 11.06.2009 for 3000 connectivity and the copy of the same was provided to your client on the same day. On the same day your client has received the new technology decoder boxes of Sun TV and KTV from us. Further, we have requested your client to clear the old outstanding dues of s. 18,51,902/- as on June 2009 and they assured to clear the said subscription due amount and collect the decoder boxes of Sun Music and Sun News shortly, but your client did not turn up. Further we have not received the letter dated 28.08.2008 from your client, requesting to bear the future invoices in the names of your clients nine link operators. Further, we came to know that your client have collected all the subscription due amount from their link operators and the same was not paid to us.”

Mr. Mehta would contend that in the aforementioned letter the respondent failed to point out as to on what basis the connectivity was claimed to be 3000 subscribers in respect of KTV and 5620 for Sun TV. The converse is also true. The number of subscribers is a matter which was within the special knowledge of the petitioner. It was for it to prove the same having regard to the provisions contained in Section 106 of the Indian Evidence Act. The number of subscribers to the aforementioned

extent had been disclosed in the January 2007. The same numbers continued and even in the agreement of June 2009 no further increase in the subscriber base was mentioned. The petitioner admittedly signed the said agreement. The onus, therefore, shifted on to him to show as to how the contents of the agreement were untrue as he had signed the same.

At least some basis have been furnished by the respondent namely, the popularity of Sun channel viz a viz KTV. Such popularity of the Sun TV is based on TAM Report, which shows that its popularity is about 185% over the connectivity for KTV.

The subscriber base depends upon the negotiations held by and between the parties.

For the aforementioned purpose, no other or further document need be proved and as such the question as to whether the parties have entered into any other agreement or not, in our opinion, shall take a back seat.

For the reasons aforementioned, there is no merit in this petition. It is accordingly dismissed.

There shall, however, be no order as to costs.

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