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Court : Telecom Disputes Settlement and Appellate Tribunal TDSAT

Decided On : Dec-18-2009

Judge : S.B.SINHA, CHAIRPERSON & HONOURABLE MR. G. D. GAIHA, MEMBER

Appeal No. : PETITION NO. 5(C) OF 2008

Advocate for Pet/Ap. : FOR THE PETITIONERS: JAYANT K. MEHTA, NASIR HUSAIN, ADVOCATES. FOR THE RESPONDENT: VINEET MEHTA, ADVOCATE.

Judgement :

S.B. Sinha

The petitioner herein is an MSO. The respondent is a cable operator. It's a proprietary concern of one Mr.Vinod T. Patil.

Concededly the respondent had been obtaining signals from the petitioner. Whereas according to the petitioner an agreement in writing was entered into, according to the respondent the agreement in question was an oral one. The petitioner contends that despite supply of signals the respondent had not been making any payments although monthly invoices were regularly raised. The respondent, however, denies and disputes the receipt of the invoices. The petitioner, therefore, has filed this petition, inter alia, praying for a decree for a sum of Rs.15,55,547/- only towards the cable TV feed signals charges upto October, 2007 with interest.

The parties hereto have filed a large number of documents.

2. They have examined one witness each in support of their respective cases. The specific contention of the respondent is that signals have been provided by the petitioner upto December, 2004 and for the months of January 2005 to May 2006 another MSO, namely, M/s Shri Sai Network Pvt.Ltd. had been supplying signals to it upto 31.12.2006. Further case of the respondent is that w.e.f. 01.01.2007 it had been taking signals from another MSO known as Wire and Wireless India Ltd. It is further the contention of the respondent that although the agreed rate of subscription fee was Rs.10,000/- per month for 100 points, the petitioner had been issuing bills for a much higher amount starting with Rs.12,000/- per month.

3. The principal issues which, therefore, arise for our consideration are:

(i) Whether the parties had entered into an agreement in writing?

(ii) Whether the respondent had been taking supply of signals from the petitioner upto October, 2007 or till December, 2004?

(iii) Whether the amount of subscription fee was fixed at Rs.10,000/- per month.

Issue No.(i)

4. The petitioner in support of its case has filed an agreement which was purported to have been entered into by and between the parties on or about 01.03.2001.

5. Indisputably, the respondent is a proprietary concern. Even in the petition it has been described as a proprietary concern of Shri Vinod T.Patil.

The witness of the petitioner, Shri Kuldeep Puri who is stated to be the Managing Director of the company and who professed knowledge in respect of all the transactions entered into by and between the parties, although in his affidavit by way of evidence, stated that the agreement bears the signature of Shri Patil; in his cross-examination he stated as under:

"I am with the petitioner company since 1999. I know Mr.Vinod T.Patil. I don't have any personal knowledge whether Mr.Vinod T.Patil is the proprietor of the respondent. The agreement Exhibit P-1 was executed in the presence of Mr.Vinod T.Patil. I saw Mr.Vinod T.Patil signing the said agreement. (Volunteered – Mr.Vinod T.Patil along with his brother Mr.Santosh Patil were present while signing the agreement). I cannot say whether the agreement Exhibit P-1 bears the signatures of Mr.Vinod T.Patil. (Volunteers – Both Mr.Vinod T.Patil and Mr.Santosh Patil were present in my cabin while signing the agreement. This matter is more than seven to eight years old and I cannot exactly recall as to which brother had signed).

Que I suggest to you that document Exhibit P1 does not bear the signatures of Mr.Vinod T.Patil.

Ans Since I cannot recall the signatures, I have to say that this was signed by a representative of the respondent."

Execution of the said agreement on the part of respondent, therefore, has not been proved.

Issue Nos.(ii) and (iii)

6. Both the issues being interconnected are taken up together for consideration.

It stands admitted by Shri Kuldeep Puri in his cross-examination that in terms of the agreement the respondent was to pay a sum of Rs.37/- per 100 points, relevant portion whereof reads as under:

"It is incorrect that it was mutually agreed between the petitioner and respondent that the respondent would pay a sum of Rs.10,000/- per month as subscription charges from April, 2003 onwards to the petitioner and that the petitioner would not enhance the subscription rate any further."

7. The said witness, however, stated that he did not remember as to whether the respondent has made a payment of Rs.10,000/- per month to the petitioner. He further could not say whether payments have been made upto August, 2004.

8. He further denied the suggestion that no invoice was raised for the period December, 2003 to August, 2004.

To a question as to whether the parties agreed that the subscription charges would not be raised but the same had been raised from September, 2004, the said witness answered as under:

"The invoices were prepared as per the terms of the written agreement (Exhibit P1)."

9. The respondent in support of its case has brought on record the first invoice dated 01.11.2003 which shows that the same was for a sum of Rs.10,000/-. It, however, appears that for the month of October, 2004 not only a bill was raised on the basis of 120 points at Rs.12,000/- per month, an outstanding of Rs.36,000/- was also shown.

According to the respondent the dispute between the parties started from thereto as also, it appears to be so.

The respondent furthermore has brought on record an invoice dated 01.11.2004 wherein the number of points was shown to be 500 and the monthly input charges were shown to be Rs.50,000/-. In the said invoice an outstanding amount of Rs.21,081/- has been shown. However, in the invoice for the month of December 2004 the number of points were reduced to 120 and a bill for a sum of Rs.12,000/- was raised. The petitioner, therefore, on its own showing has taken contradictory and/or inconsistent stand.

Why different number of points was shown in different invoices has not been explained.

No basis for raising the invoices has been proved.

Shri Kuldeep Puri although professed himself to be conversant with all the transactions between the parties failed and/or neglected to prove the same.

10. The respondent furthermore has brought on records sufficient materials to show that it had been taking signals from one M/s Shri Sai Network Pvt. Ltd.

11. Mr. Jayant Mehta, learned counsel appearing on behalf of the petitioner would, however, contend that the materials produced before this Tribunal would clearly show that a large number of invoices beginning from 31.10.2006 had been sent to the respondent and he had been refusing to accept the same as would appear from the notings made in the courier services. Our attention in this behalf has also been drawn to, series of different invoices raised by the petitioner on the respondent being from October 2006 to October, 2007 as also Exhibit P-4 annexed to the affidavit of Shri Puri by way evidence wherein copies of invoices raised upto 30.06.2008 have been annexed.

Some of the invoices, the learned counsel would contend had also been sent under registered cover with acknowledge due.

12. We may, by way of example, notice that the invoice dated 01.06.2008 would show that input charges have been raised on the basis of 500 points and the monthly subscription fee has been raised to Rs.65,000/- per month and an outstanding amount was shown to be Rs.2,66,784/-. Again in another invoice the number of points has been show as 500 although the rate per point is shown ranging from Rs.80/- to Rs.130/- per point.

13. In a case of this nature where the petitioner for all intent and purport has filed a suit for recovery of money allegedly payable to it towards subscription charge for a large period, it was for it to prove its case thoroughly.

As indicated hereinbefore the petitioner has examined only Mr. Kuldeep Puri. He has not even proved the receipts, endorsements of refusal thereon as recorded by the postal authorities/courier services.

14. The respondent not only in its pleadings but also through its proprietor Shri Vinod T. Patil categorically denied and disputed receipt of those invoices. It is true that a presumption in terms of Section 114 of the Evidence Act may be raised in favour of the petitioner as it has been brought on record that the invoices have been sent through courier services and/or under registered cover acknowledgment due to the respondent. But the respondent not only has affirmed on oath but also having categorically stated that it has not received the said invoices; the onus placed on him was discharged. It is now a well settled principle of law that onus upon a person in regard to non-receipt of a letter may be discharge by making a mere statement that he had not received. The burden of proof, thereafter, shifts on the petitioner to prove the endorsement of refusal of examining the person who had tendered the same to the addressee. In Sarkar's Law of Evidence (Sixteenth Edition 2006) Vol.2, page 1586, it is stated:-

"A Party Asserting the Affirmative Must Prove it. - It has been stated earlier that the ordinary rule is that the burden is upon the person making the affirmative allegation. Onus of proof is not discharged by showing facts consistent with the case of both parties [Gopinath v. Ajharrul, A 1927 P225]."

15. Furthermore PW-I has not been able to either to prove the basis for raising the invoices and/or the basis for showing different points in different invoices as also the rate therefor.

The petitioner has brought on record of evidences to show that he had been tendering payments monthwise at the rate of Rs.10,000/- per month to the petitioner, but correct thereof is in dispute.

16. As has rightly been contended by Mr.Vineet Mehta, that the subscription fee for the month of August 2004 was paid on 30.09.2004, for September, 2004 it was paid on 23.11.2004, for October, 2004 it was paid on 11.02.2005, for November, 2004 it was paid on 20.06.2005 and for December, 2004 it was paid on 05.07.2005. Those payments have been received by the petitioner without any demur. Payments have been made through cheques

Only because such payments have been made even after December, 2004 from which date the respondent contends to have discontinued obtaining signals from the petitioner would not be of any assistance as the payments have been made by cheques, thus, the petitioner cannot deny and dispute the receipt thereof.

17. Our attention has been drawn to the notices which the respondent admitted to have accepted being dated 28.07.2006 and 11.04.2007.

By reason of the said notices, the amounts allegedly due has been demanded. Mere demand of payment by a notice by itself, in our opinion, is not sufficient to prove the claim of the petitioner in view of the fact that it had not been able to prove the basis therefor.

18. Mr.Jayant Mehta has drawn our attention to the following statements made in the reply of the respondent:-

"The Respondent objected the same with the Petitioner and raised his voice against the arbitrary enhancing of points without any justification. Even when the Respondent was in talks with the Petitioner, the Petitioner in a most unprofessional manner again raised the points from 120 to 500 and added a sum of Rs.52081/- as arrears in the invoice for the month of November 2004, and when the Respondent strongly objected to the same the Petitioner admitted his fault and assured to rectify and send the correct invoice to the Respondent. However despite the assurances the Petitioner again raised the invoice for the month of December 2004 with 120 points and added a sum of Rs.97181/- as arrears. The respondent requested the Petitioner to justify and cancel the arrears and to further lower the points from 120 to 100 as was there originally but the Petitioner refused to listen to the Respondent."

According to Mr.Mehta that as the respondent has accepted receipt of the said invoices it must be held to have admitted the dues contained therein. Mr.Vineet Mehta, learned counsel for respondent in our opinion has rightly submitted that he has brought it on the record of this proceeding only to show how inconsistent the stand of the petitioner had been and only he has admitted the receipt of the same, ipso facto would not mean that the amount claimed thereunder was also admitted. In our opinion, the statements made in the reply do not amount to admission of the dues on the part of the respondent.

19. So far as the migration of the respondent to other of MSOs are concerned, our attention has been drawn to a few documents and in particular, the letter of the respondent dated 11.01.2005 to contend that the same is a fabricated document as from the telephone number mentioned therein the figure "2" is missing.

Mr.Vineet Mehta, learned counsel for the respondent contends that the small cable operators cannot be expected to change their letter heads very often and on that ground alone the letter cannot be said to be fabricated.

20. Our attention has further been drawn to a receipt bearing CSR No.625 by Mr.Jayant Mehta to contend that if the same is compared with the one at page 104, it will appear that the words "for the month of November, 2004" are missing from the later. The fact that such a receipt had been given to the respondent is not denied.

It is the official receipt of the petitioner. It is possible that while granting receipt, that representative of the petitioner stating that the said payment is for the month of November need not necessarily be reflected in the office copies maintained by the petitioner. It is also difficult to accept that the practice is to grant receipts not monthwise but for part-payments. Shri Kuldeep Puri did not say so. Even in the petition, no such averment has been made.

21. So far as the respondent's case of migration to other MSOs are concerned, our attention has been drawn to various documents to contend that the same are not correct.

We would assume for the purpose of this some certificate granted by M/s Wire and Wireless India Ltd. or M/s Shri Sai Network Pvt.Ltd. were not necessary to be given but then the attention of the witness examined on behalf of the respondent, namely, Shri Vinod T.Patil was not drawn thereto. Mr.Patil in his evidence categorically stated that he had filed invoices granted by M/s Wire and Wireless India Ltd. dated 21.01.2008, 16.10.2007 and 29.05.2007. Mr.Patil in his cross-examination although said that he had not filed any document to show that M/s Shri Sai Network Pvt.Ltd. was an MSO or a distributor; the same in our opinion is wholly irrelevant. The petitioner being a competitor of the said MSOs and/or in any event being in the business of transmission of signals should have known as to whether there exists any MSO in the name of M/s Sai Network or not. The petitioner's witness, Shri Kuldeep Puri has not uttered a single word in relation thereto.

Even assuming that the respondent has not been able to prove the documents that he had been taking supply of signals during the period in question, the same by itself would not advance the case of the petitioner.

22. We may point out that Mr.Mehta pointed out that the agreement purported to have been entered into by and between the respondent and M/s Wire and Wireless India Ltd. contained many blanks. It is, however, well known that ordinarily the MSO/broadcaster take signatures of the small operators in blank forms and fill up the blanks at a later date. The respondent being a small operator, it is possible that the copy of the original of the filling up of the blank had been supplied to the petitioner. No exception to the stand taken by Mr.Vineet Mehta in that behalf, thus, can be taken.

23. We may further notice that the petitioner had filed a ledger account with the petition but for reasons best known to it has not relied upon the same. Whyeven after filing such a document, the petitioner did not bring the same on record is different to conceive.

24. We may furthermore notice that the petitioner has relied upon a letter dated 26.07.2006, on a perusal whereof it appears that a sum of Rs.33,044/- was demanded from the respondent. The said document was not filed along with the petition. No leave of this Tribunal was obtained to bring on records as an additional document. It is only with the affidavit of Shri Kuldeep Puri that the said document has been annexed which cannot be accepted in evidence.

25. It has furthermore been accepted that one Shri Sachin Khupse and Shri Sunil Nandoskar were the employees of the petitioner. The respondent herein has brought out a large number of documents to show that whenever any payment was made after the disconnection of signals, an endorsement had been made to the effect that discontinuation of signal has already taken place.

We may notice, by way of example, such endorsements on the receipt dated 08.02.2005 for the month of October, 2004 and the receipt dated 18.06.2005 for the month of November, 2004.

26. Contention of the petitioner is that Shri Sachin Khupse and Shri Sunil Nandoskar were not authorized therefor. It is difficult to accept this submission. If some endorsements have been made in the documents which were the receipts granted by the employees of the petitioner only and as the genuineness whereof has not been denied or disputed, we must presume that the said endorsements are correct. The petitioner's

witness did not say that the such receipts had not been handed over to his company. When some employees of the petitioner have admittedly been dealing with a local cable operator, it would be too much to expect that he would also enquire at every stage as to whether they have the authority to accept a letter or a receipt or not; particularly when Shri Vinod T. Patil in answer to a question put to him categorically stated that his dealings have been through Shri Sachin Khupse and Shri Sunil Nandoskar only.

27. We may notice that even the petitioner denies and disputes the receipt dated 11.01.2005 which has been handed over to Mr.Sachin Khupse wherein the petitioner stated as under:

“We had mutually agreed upon and exchanged our cable points from my area i.e. Chunabhati (MHB Colony-trimurti society), Swastik Park in lieu of points at Kamgar Nagar, Shriram Kapus, Siddeshwar Society and Alidada Estate at that time. This was done for convenience of customer service for both of us.

By appointing Mr.Uday Pingle one of your staff as dummy operator in my area. You have failed to keep the commitment and promises as agreed upon between us.

I wish to keep you informed vide this letter that from January 2005 henceforth we have no oral or legal binding of whatsoever in the above subject matter.

In case you have to state anything in the above subject matter you may write to us within fifteen days or else it will be treated that the subject matter is accepted and settled at your end.

You may please collect the balance pmt if any upto Dec.2004.”

28. It is the consistent case of the respondent that Mr.Sunil Khupse had been accepting the cheques on behalf of the respondent. Such a statement had not been denied or disputed.

29. The burden to prove its case having regard to Section 101 of the Evidence Act was on the petitioner. It has failed to discharge the said onus. In terms of Section 101 of the Evidence Act if the petitioner has not been able to prove its case, it would not succeed on the weakness of the defence. In Justice Y.V. Chandrachud’s Law of Evidence, it is stated:-

“The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure.

The party on whom the onus of proof lies must, in order to succeed, establish a prima facie case. He cannot, on failure to do so, take advantage of the weakness of his adversary’s case. He must succeed by the strength of his own right and the clearness of his own proof.

This expression means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance where by reason of not discharging the burden which was put upon it, a party must eventually fail.”

In Anil Rishi Vs. Gurbaksh Singh – 2006(5) SCC 558 para 19-20, the Supreme Court of India held as under:-

“19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to

begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

20. In *R.V.E. Venkatachala Gounder v. Arulmigu Viswesarawami and V.P. Temple* the law is stated in the following terms:

29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *Addagada Raghavamma v. Addagada Chenamma* there is essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying in the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

30. Keeping in view the facts and circumstances of this case, the petitioner has miserably failed to prove its case. Only because the petitioner had been sending invoices which might have been prepared mechanically, the same by itself does not advance the case of the petitioner. This petition is dismissed with costs.

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