
(2021) 02 TDSAT CK 0058

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Broadcasting Petition No.629 Of 2020

9X Media Pvt. Ltd

APPELLANT

Vs

Prasar Bharti

RESPONDENT

Date of Decision : 03-02-2021

Acts Referred:

Contract Act, 1872 — Section 56

Citation : (2021) 02 TDSAT CK 0058

Hon'ble Judges : Shiva Kirti Singh, CP

Bench : Single Bench

Advocate : Kunal Tandon, Rajcev Shanna

Judgement

S.K. Singh, Chairperson

1. Â This petition has been heard in detail for the purpose of final disposal because of urgency on account of peculiar facts of the case.

2. The petitioner is a broadcaster who owns and operates various television channels namely, 9XM, 9X Jalwa and 9X Jhakaas. Through a subsidiary

company it operates another channel namely, 9X Tashan. These channels, as claimed, oITcr exclusive music content through cable operators, DTH

operators.

3. The respondent Prasar Bharti is successor-in interest of Government of Indiaâ??s broadcasting services - â??Doordarshanâ?. It has been

constituted in terms of Prasar Bharti (Broadcasting Corporation of India) Act, 1990. It also owns and operates the DTH sendees DD Free Dish. This

statutory authority organizes and conducts public broadcasting services for the benefit of the public and to ensure development of broadcasting on

radio and television. It conducts online E- auctions, executes agreement with

successful broadcasters and thus licences them to use its DD Free Dish

Platform. There is no dispute that both the parties are service providers in terms of Section 2(j) of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act).

4. Before proceeding with the facts of the case it will be useful to note the prayers made in this petition which are as follows:

INTERIM PRAYER

a) Pass an ad interim ex parte order allowing the Respondent to not pay installment amounts to the tune of Rs. 1,50,00,000/- (Rupees One Crores Fifty Lacs Only)

for its channel 9XM which is currently available on the Respondent's network till 31.03.2021; and/or

b) Pass an ad interim ex parte order allowing the Respondent to deposit an amount of Rs. 1,50,00,000/- (Rupees One Crores Fifty Lacs Only) before this Hon'ble

Tribunal till the final adjudication of the present petition; and/or

c) Pass such other and further order/s as this Hon'ble Court may deem fit and proper in the nature and circumstances of the present case.

MAIN PRAYER

a) Pass an order directing the Respondent to refund an amount of Rs. 1,50,00,000/- to the Petitioner, collected by the Respondent

towards participation fee/EMD for the channel 9X Jaiwa; and/or

b) Pass an order directing the Respondent to adjust the installment amounts to the tune of Rs. 1,50,00,000/- (Rupees One Crores Fifty Lacs Only) for the

Petitioner's channel 9XM which is currently available on the Respondent's network till 31.03.2021; and/or

c) Pass such other orders or further orders in favour of the Petitioner and against the Respondent as this Hon'ble Tribunal may deem fit and proper in the facts

and circumstances of the case.

5. On 28.01.2020 the respondent issued a Notice for allotment of MPEG-2 slots of DD Free Dish for a period of one year from 01.04.2020. For

participation in this 44th E-auction process the applicants were required to furnish along with Bidder Registration Form, (i) non-refundable processing

fee of Rs.25,000/- and (ii) demand draft of Rs. 1.50 crores towards participation

fee/EMD.

6. The E-auction process is governed by the DD Free Dish FDR Revised Policy Guidelines (the Guidelines). A copy of the Guidelines along with

Notice dated 28.01.2020 is available on record as Annexure P-I(Colly.). It is mentioned in the Guidelines as well as in the notice that for

unsuccessful bidders, participation fee will be refunded within three weeks of declaration of the results of the auction. For successful bidders,

participation fee will be adjusted in the final instalment of the carriage fee/bid amount. The clause (10) in the Notice stipulates that successful bidders

shall be required to make the payments as per payment schedule prescribed under clause (5) of the Policy Guidelines for allotment of DD Free Dish

slots. Clause (2) of the Notice clarifies that slots will be allotted as per the Guidelines.

7. The petitioner was successful in the said E-auction for two of its channels - 9XM and 9X Jalwa for Bouquet B slots of DD Free Dish on the basis

of its bid amounts of Rs.1 1.55 crores and Rs. 10.85 crores respectively as the annual fee. The allotment letters dated 04.03.2020 confirm the fact that

petitioner's channels named above will be carried on the DD Free Dish Platform for the period of one year from 01.04.2020. Besides conveying

the payment schedule the allotment letter warned of the two situations in which the participation fee may be forfeited by the respondent as per Paras

6 and 7 which are as follows:

6. If at any stage it is found that the information furnished by you is incorrect, the channel shall be summarily discontinued from the DD Free Dish platform. The

participation fee and the carriage fee deposited shall be forfeited and you shall have no rights for carriage on DD Free Dish.

7. If you fail to place the channel on the allocated slot even after one month from the date of allotment, your allocation shall be treated as cancelled and the fee deposited shall be forfeited.

8. Para 6 of the allotment letter extracted above is same as clause 3.2.2 of the Guidelines. Para 7 is similar to clause 4.6 but with a variation in as

much as the words "the fee deposited shall be forfeited" as appearing in Para 7 stand changed to - "the participation fee shall be forfeited".

It would be useful to extract clause 5.4 of the Guidelines also which is as follows:

5.4 In case of instalment due along with the penal interest is not paid within seven days from its scheduled due date, the Participation Fee along with any instalment already deposited by the Broadcaster/Channel till date, will be forfeited and the channel will be discontinued from DD Free Dish Platform without any

further notice and the channel will have no right to be carried on DD Free Dish on vacated slot.

9. The aforesaid facts are not under dispute. It is also not in dispute that during the month of March 2020 India also faced the outbreak of a

pandemic due to COVID-19 virus leading to lockdown in the entire country with effect from 25.04.2020. Petitioner has pleaded in Para 9 that "Due to

sudden closure of the entire economy, the business all over the country, including that of the Petitioner were hurt. The unprecedented

COVID 19 pandemic compelled the Petitioner's advertisers to drastically cut their advertising spends, as a result of which, the

Petitioner's very existence came under immediate threat. As a consequence thereto, the Petitioner was constrained to request the

respondent for relief by way of a waiver of at least 3 months payment of dues for the use of the Respondent's Platform. The respondent was

therefore, requested to take a sympathetic view of the Petitioner's financial conditions. This request was made by the Petitioner vide its email

dated 30.03.2020 which highlighted the Petitioner's plight and the crisis it was undergoing at that time. Copy of the Petitioner's email

dated 30.03.2020 is annexed herewith and marked as Annexure P-3.

10. Through Annexure P-3 the petitioner communicated its difficulties caused due to the pandemic. It pointed out that being a free-to-air broadcaster,

its revenues are solely from advertisements; there was already a general business slowdown but the sharp drop in advertising was aggravated due to

the pandemic; more than 50%-60% of the advertisements received by the petitioner had been cancelled without any indication of possible return and

the petitioner was staring at a potential loss of jobs and/or even closure of the company. On these grounds petitioner requested for relief by way of

waiver of at least three months fees. The respondent gave a reply on 07.04.2020 (Annexure P-4). Though the request for waiver of three months

fees was rejected but it communicated that amid spread of COVID-19 and announcement of complete lockdown by Government several requests for

grant of relief were received from many TV channels, Prasar Bharti considered the matter and had decided to offer only an alternative payment

schedule by way of relief. For such limited relief, the channels were required to sign the proforma agreement communicated with the Email and were

also required to submit bank guarantees. It was also intimated that if the first instalment or the bank guarantee as provided in the alternate payment

schedule (Annexure A of the agreement) was not made available by 14.04.2020, action will be taken in accordance with the provisions in the policy

guidelines.

11. The copy of agreement is part of Annexure P-4(colly.). On behalf of petitioner clauses (10) and (15) have been highlighted because as per

Clause (10) the agreement shall stand terminated automatically if the channel provider discontinues its channel. In such an event the channel provider

shall not be entitled to refund of the carriage fee paid or any part thereof. The point highlighted by the petitioner is that denial of refund is restricted to

carriage fee paid and not to the participation fee retained for future adjustment. Clause (15) relates to Force Majeure and clearly provides that neither

party shall be liable for its inability or delay in performing any of its obligations if such inability or delay is caused by circumstances beyond its

reasonable control including inability or delay caused through accident, fire, explosion, casualty, pandemic, act of God etc. Clause (16) also is under the

same head of Force Majeure and protects Prasar Bharti from liability to pay any amount by way of damages or compensation for its failure to carry

the channel for any reason or as a consequence of Force Majeure as illustrated earlier.

12. On 11.04.2020 petitioner immediately replied that the relief contemplated by the Email of 07.04.2020 would not serve the purpose at the present

juncture rather it shall put additional hardship by way of bank guarantee charges, interest payments etc. particularly, when the only source of income

for free-to-air channels, i.e. advertisement revenue has been significantly reduced. It was highlighted that petitioner had already paid for the month of

April 2020 as per original stipulation and it would gain no benefits by the scheme offered. By its reply dated 13.04.2020 the respondent made it clear

that it would not provide any further relief. In that view of the matter, petitioner through Email dated 25.04.2020 conveyed its request that its 9X Jalwa

channel be discontinued from the Platform with effect from 01.05.2020 and the participation fee paid as HMD amount to Rs.1.50 crores be refunded.

In alternative petitioner suggested that if the refund could not be made immediately for any reason, then the amount be adjusted against the May and part of June, 2020 instalments for the other channel, 9XM.

13. The respondent through its Email dated 30.04.2020 (Annexure P-9) replied that as per request of the petitioner, 9X Jalwa channel will be

discontinued with effect from 01.05.2020. It also conveyed that the matter regarding refund of participation fee is under examination and the decision

taken will be intimated. Respondent requested to make payments due towards 9X.V1 channel. Through Email dated 30.04.2020 petitioner expressed

its gratitude and reiterated its request for adjusting the participation fee as payment towards 9XM channel as second instalment.

14. The petitioner through its Email dated 08.05.2020 and 06.06.2020 communicated its acute financial hardship due to the prevailing situation and

dropping of advertisement revenues and reiterated its request for refund of the amount of Rs.1.50 crores, describing the same as EMD. The ill-effects

of the COVID-19 pandemic on the petitioner's business have been pleaded further in Para 17 in the context of the aforesaid Emails of May and

June, 2020.

15. The respondent made its stand finally clear through its Email dated 21.09.2020(Annexure P-15) that petitioner's request for refund of

participation fee has been examined and it was decided to inform the petitioner that "as per (the existing policy guidelines of DD Free Dish there is

no provision for any refund of the participation fee as requested by the channel".

16. In the factual background noted earlier, learned counsel for the petitioner, Mr.Tandon has referred to Clause (15) of the draft agreement which

describes the protection available to the parties in the event of an inability or delay caused by circumstances beyond reasonable control of the party,

including on account of epidemic and several other unfortunate events. No difference is shown to exist in the understanding of the above Force

Majeure clause by either of the parties. The unexpected emergence of an epidemic due to COVID-19 virus is also not in dispute. According to

learned counsel, the pleadings which are duly supported by letters and

communications of the petitioner make out a case that petitioner was unable to run one of its channels on the Platform of the respondent because of lack of sustainable revenue from advertisements which dropped significantly at the very onset of the pandemic. In order to ensure that the company does not close and to provide sustenance to the maximum number of employees the petitioner had to take the prudent decision of discontinuing one of the two channels although it intended to do business with both the channels and initially it had offered good terms to the respondent so as to succeed in the e-Auction.

17. Â Learned counsel for the petitioner has placed reliance upon judgment of the Hon'ble Supreme Court in Delhi Development Authority(DDA) Vs.

Kenneth Builders & Anr.; (2016) 13 SCC 561. He has shown that after considering the relevant facts and the case laws, in Para 36 the court held

that since certain circumstances had intervened to make it impracticable for the Kenneth Builders to commence the construction activity, it could be

said that the contract between the parties was impossible to perform within the meaning of Section 56 of the Contract Act. The court accepted that

the contract stood frustrated and not violated so as to entitle DDA to any money.

18. Â Learned counsel for the petitioner has also placed reliance upon the case Jamshed Hurmosji Wadia Vs. Board of Trustees, Port of Mumbai &

Anr., (2004) 3 SCC 214 on the oft repeated proposition that the State and its authorities including instrumentalities are constitutionally required to be

just, fair and reasonable.

19. Â In reply to the reliance of the petitioner upon frustration of the agreement due to ill-effects of the epidemic on the petitioner, learned counsel for

the respondent, Mr.Rajcev Sharma has taken a stand that for such defence the petitioner has not pleaded the foundational facts and also not led

sufficient evidence to make out a case that it had become impractical or improbable for the petitioner to continue with the contract beyond one month.

20. As has been rightly argued by Mr.Tandon, there is no dispute between the parties that after entering into the contract for two channels, petitioner

paid the first instalment for the month of April, 2020 and ran both its channels and at the same time also asked for waiver of three monthsâ??

carriage fees due to the lockdown which was direct result of the pandemic. The respondent never disputed the dire situation of pandemic and

lockdown. It took a policy decision and offered some concessions which some persons availed but since the petitioner had to pay for two channels

during difficult times when the only source of revenue, the advertisements was getting depleted, it suffered inability to run both the channels and

therefore, ultimately sought withdrawal of one of the channels before the liability could arise for the next month of May, 2020. According to learned

counsel, the petitioner has successfully pleaded the ill-effects of the pandemic and lockdown on the business activity of the petitioner. Like a prudent

business it avoided irreversible damage to the company by opting to continue with one channel so that the liability could be manageable and all

employees may not suffer dire consequences. He has shown the relevant pleadings in respect of hardship/inability caused due to the pandemic and the

lockdown in Paras 9, 11 and 13 and at several other places including Para 22. It was shown that there was no denial of the relevant statements in

Paras 9 and 13 of the reply. It was also shown from letters of 31.03.2020 as well as 05.04.2020 that the stand taken in the pleadings are supported by

the facts mentioned by the petitioner in those letters. Assertions in the letters were not controverted by the respondents in their reply.

21. In the background of the facts noticed in this case, this Tribunal finds merit in the case of the petitioner that it was rendered helpless and incurred

inability to continue with the contract for one of the channels because of ill-effects on the advertisement revenue caused by the pandemic and the

consequent lockdown. No doubt, different business ventures will face different challenges and some businesses may even flourish due to a pandemic

such as in medicines and healthcare. But so far as the present case is concerned the pleadings and the materials by way of documents and letters

clearly show that petitioner, though desirous of running two channels for which it was successful, even after paying for one month, was compelled to

seek withdrawal of one of the channels from the Platform of the respondent. The situation in all probability was not within the control of the petitioner

and made it impracticable for the petitioner, who had to act prudently to protect the company from maximum damage, to continue with the contract for

telecast of its second channel. The improbability or impracticability leading to decision by the petitioner to withdraw one of the channels is writ large

on the face of things. The basic pleadings and facts relating to such inability have not been disputed. It must be held that petitioner has proved its case

on this issue beyond doubt. The rival contention that the petitioner has not come forward with accounts etc. by way of evidence and therefore, it must

be held that petitioner has withdrawn one of the channels for other reasons does not deserve acceptance. In the circumstances, preponderance of

probability favours the case of petitioner that the contract for the withdrawn channel became impossible of performance within the meaning of Section

56 of the Contract Act and therefore, it got frustrated.

22. In view of aforesaid findings, the contention of the respondent that the petitioner is liable to make good some loss caused to the respondent on

account of premature withdrawal of one of the channels and is therefore liable to lose Rs.1.50 crores deposited by way of performance fee/HMD

does not merit acceptance, in the situation of inability caused to petitioner due to the pandemic/epidemic and as per the understanding of Force

Majeure clause between the parties, the petitioner is not liable for its inability in performing its obligations under the contract. The protection from any

liability available to the petitioner will also protect its deposit of Rs.1.50 crores which could be appropriated by the respondent only if the contract could

last for the whole term of 12 months, by way of last instalment. That situation could not be reached because of the intervening pandemic/epidemic and

the consequent lockdown creating ill-effects on the business of the petitioner. As a result of above findings on the issue of Force Majeure, the

petitioner is found entitled to the reliefs claimed.

23. Â Since both the parties have been heard even on another issue in detail, it would be just and proper to decide that as well.

24. Â As has been noted earlier, the respondent did not object to petitioner's request for withdrawal of one of the channels from the Platform but

after removing the channel, it took some time to answer the other request made in the same letter of the petitioner dated 25.04.2020, to refund Rs.1.50

crores paid as EMD or in the alternative to adjust the same against instalment payable for the other channel. In its reply dated 30.04.2020, it informed

the petitioner about discontinuation of the channel with effect from 01.05.2020 but the matter regarding refund of the participation fee was said to be

under examination. Ultimately on 21.09.2020 the petitioner was informed through Annexure P-15 that his request for refund had been examined and

it was found that - "as per the existing policy guidelines of DD Free Dish there is

no provision for any refund of the participation fee as requested by the channel. â??

25. Â But the point urged by the learned counsel for the petitioner is that even if the aforesaid stand be taken as correct that there is no provision in the guidelines for refund, the respondent in order to keep or forfeit the amount of Rs. 1.50 crores must show that there is an enabling provision for forfeiture which can be permitted only if parties had contracted for such consequences or by way of a claim allowed as per law. Learned counsel has referred to Paras 4.6, 5.4 and 3.6.2 and other relevant provisions in the guidelines and accompanying documents to show that there are some provisions entitling the respondent to forfeit in different situations but not presently when admittedly petitioner is not a defaulter in payment of any of the instalments or penalty etc.

26. Â Learned counsel for the respondent on the other hand has submitted that if there is no provision for refund of the last instalment then even if there is no explicit provision for forfeiture, the respondent is entitled to appropriate the money if the successful bidder does not run the channel for the whole term of one year so as to enable the respondent to adjust the amount as a final instalment as per payment schedule of the contract. This submission requires reading something more into the contract which is not warranted, in facts or in law.

After careful scrutiny of the relevant provisions in the guidelines and other terms of contract, it is found that petitioner has rightly contended that no provision is attracted to entitle the respondent to forfeit the deposit of Rs. 1.50 crores. In the Bidder Registration Form which is Annexure-I to the guidelines there is a list of documents required to be enclosed with the Form. Item (v) refers to Rs. 1.50 crores which has been described as participation amount and also as EMD (Earnest Money Deposit). Whereas the amount of Rs. 25,000/- charged as processing fee has been shown to be non-refundable, the same is not the case with the participation amount (EMD).

28. Â The contract between the petitioner and a statutory body, Prasar Bharti is not a contract between two equals. The statutory authority being an instrumentality of State is definitely the stronger and dominating party. It is required to act fairly and hence, instead of leaving the scope for arguments and inference that the participation fee must also be treated as non-refundable

and liable to forfeiture in case of early exit of any channel, it ought to have been mentioned clearly in the guidelines and other relevant documents including the agreement. Having not done so, the respondent permitted a party like the petitioner to select its course of action in difficult times by withdrawing a channel after it was placed for one month. Had the petitioner been warned that his participation fee/EMD is also non-refundable and shall be forfeited, the petitioner or any other party in its shoes would have weighed other options more carefully. But by not doing so the respondent may have led the petitioner to withdraw its channel so as not to become a defaulter. The contract ought to be clear so as to convey to the parties their entitlements and obligations. The State or its instrumentalities as dominant party cannot be permitted to take advantage of such lacunae or vagueness. Clause 16 of the Draft agreement protects Prasar Bharti for its failure for any reasons but petitioner is being penalized for early exit under compelling circumstances. This is not fair. The contract based upon the guidelines and other materials is found to support the case of the petitioner that respondent is not authorized to forfeit the participation fee deposited by the petitioner and it cannot now turn around and say that such fee is non-refundable in case of early exit before the term of 1 year. Hence, on this score also the petitioner is found entitled to the relief claimed.

27. The petition is accordingly allowed and disposed of with M.As., if any. The petitioner is held entitled to receive the aforesaid amount of Rs. 1.50 crores from the respondent as claimed in this petition and in the alternative it is held entitled to adjust that amount towards instalment payable for its other channel, 9XM by writing to that effect to the respondent. The respondent is directed to refund or adjust the amount of Rs.1,50,00,000/-(Rupees One Crore Fifty Lakhs only) forthwith and in any case within two weeks from today. In the facts of the case there shall be no order as to costs.