

(2015) 05 DEL CK 0119

In the Delhi High Court

Case No : Writ Petition (C) 4754 of 2015

Home Cable Network Pvt. Ltd.

APPELLANT

Vs

Media Pro Enterprise India Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 15-05-2015

Acts Referred:

Telecom Regulatory Authority of India Act, 1997 — Section 20

Citation : (2015) 05 DEL CK 0119

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Varun Mathur and Lalit Valecha, for the Appellant

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.

CM No. 8602/2015 Exemption

1. Allowed subject to just exceptions.

WP(C) 4754/2015 and CM No. 8601/2015 (Stay)

2. This is a petition by which challenge is laid to the order dated 01.05.2015, passed by the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

2.1 The principal grievance of the petitioner is that, the TDSAT relied upon the report of an expert authority, i.e., Broadcasting Engineering Consultants India Ltd. (in short BECIL) dated 15.04.2015; albeit erroneously. To be noted, BECIL was appointed by TDSAT to conduct an audit of the petitioner's network and submit a report to it, in respect of CDs provided by both, the petitioner as well as respondent no. 2 and 3.

3. Briefly, the allegation against the petitioner was that it was unauthorizedly and illegally re-transmitting the signals in unencrypted mode in DAS notified area in the NCT of Delhi and in the area outside the NCT of Delhi, by taking a feed from

DAS notified area, in violation of Memorandum of Understanding (MOU), it had with entity by the name of Media Pro Enterprises India Pvt. Ltd. (hereafter referred as Media Pro). To be noted, this MOU was executed between the petitioner and Media Pro, on 23.10.2012.

3.1 It appears that in compliance with the Telecom Regulatory Authority of India's (TRAI) Regulations, dated 10.02.2014, Media Pro was dissolved and respondent no.2 and 3 started distributing signals qua the channels, in respect of which, obligation was undertaken by Media Pro.

3.2 It was in connection with the aforesaid allegation of unauthorized transmission of signals (to which I have made a reference hereinabove), that on 09.12.2013 (prior to respondent no. 2 and 3 taking over business of Media Pro), Media Pro had issued a notice to the petitioner under clause 6.1 of the TRAI Regulations.

3.3 In view of the aforesaid circumstances, the petitioner approached the TDSAT, on 20.12.2013, whereupon the TDSAT was pleased to stay the impugned notice dated 09.12.2013. By an order of even date, i.e., on 20.12.2013, the TDSAT, granted interim protection, the continuation of which was made dependent on the petitioner filing an undertaking, stating therein, that it will restrain its area of operation to the NCT of Delhi, as defined in the notification of the Ministry of Information and Broadcasting, dated 11.11.2011. The undertaking was, further required to provide, that the petitioner, will transmit the signals in encrypted mode.

3.4 It is in these proceedings that respondent no.2 and 3, in February, 2015 filed an interlocutory application, being: MA No. 52/2015, under Section 20 of the TRAI Act, 1997. In the said application it was inter alia averred that petitioner had breached its undertaking furnished to TDSAT pursuant to its order dated 20.12.2013. A prayer was also made for initiation of contempt proceedings.

3.5 It appears that both sides supplied CDs to the TDSAT seeking to prop-up their respective stands. Respondent no.2 and 3, by virtue of their CDs, sought to portray that the petitioner was in breach of the undertaking, and that, piracy of its signals had taken place and continued to take place. The petitioner sought to demonstrate otherwise. It was the petitioner's stand that the piracy was not being conducted at its behest and that it was technically possible to morph the signals in a fashion which could falsely implicate the petitioner.

3.6 It is in these circumstances that vide order dated 02.03.2015, the TDSAT directed the BECIL to examine the CDs submitted by both sides. Pursuant to the said direction of the TDSAT, BECIL submitted its report. The TDSAT, in its impugned order has culled out the summary of findings returned by BECIL. For the sake of convenience, the same are extracted hereinbelow:

"...(a) The petitioner's systems does not comply with the security provisions mandated by the Regulations.

(b) There are serious deficiencies in the system of the petitioner, as specified in paragraph 17, that have implications in terms of piracy detection and the same compromise the security features of the petitioner's system.

(c) There is high probability of the petitioner's system being used for taking the broadcaster's signals outside the DAS area of Delhi for the reasons specified in paragraph 14.

(d) In so far as the CDs are concerned, the time of the recording as evident from the CDs matches the time of the live telecast of the programmes featuring in the CDs. This is evident from the electronic programme guide and the timings appearing in the telecast. This would prima facie be indicative of the recordings being made of live transmissions and not a pre-recorded transmissions.

(e) However, this circumstance cannot be considered to be conclusive since technically it is possible to change/ tamper with the identification label number on the mobile phone and/or while transferring the content to a CD. Whether in this case such tampering/ change has taken place or not can only be determined after the forensic examination of the mobile phone and the device on which the CD was created. Therefore a conclusive finding cannot be recorded in the absence of examination by a forensic lab/ agency.

(f) It appears that the petitioner's system was being used for taking the Broadcaster's signals beyond the DAS areas of NCT of Delhi. Whether the same was with the consent of the petitioner is a matter that can only be determined after a forensic examination of the mobile phone and the system that has been used to create the CD. Since Home Cable does not have any agreement for distribution of sports channels of Respondent No. 2 either in Delhi or in Gurgaon, the availability of these records in the SMD and CAS of Home Cable indicates the piracy of sports channels of Respondent no.2 on the Home Cable Network which, though not conclusive, is indicative of the petitioner's consent.

(g) The fact that the STB/ VC of the petitioner, involved in the piracy was active till the last date of the audit is also indicative of the petitioner's system being willingly used for taking the broadcaster's signals beyond the DAS area of NCT of Delhi.

(h) None of the above circumstances is conclusive by itself but considered in conjunction with each other are indicative of the knowledge and consent of the petitioner...."

4. Based on the BECIL's report and the perusal of the record as also the arguments advanced by both sides, the TDSAT, has come to a conclusion that:

(i) The petitioner did not comply with the security provisions mandated by the regulations.

(ii) There were serious deficiencies, which had implications in terms of piracy detection, and that, these deficiencies had seriously compromised the security

features.

(iii) The petitioner's system did not comply with the DAS Regulations, 2012, specifically those set out in Schedule I of these regulations.

(iv) While the BECIL report indicated that none of the circumstances set out in its report, technically, on their own, would conclusively establish piracy, but the incidents set out there, cumulatively, were indicative of the knowledge and consent of the petitioner, in the occurrence of piracy.

(v) That even after the petitioner had given an undertaking to the TDSAT, the signals were unauthorizedly, abstracted and the petitioner did next-to- nothing to prevent the same. In other words, the petitioner failed to take even basic precautions for blocking the unused frequencies and the Set Top Box (STB) which was being used.

5. I have heard the learned counsel for the petitioner. There is no case made out of any error either on facts or in law. Having regard to the aforesaid findings, I am of the view that TDSAT's order cannot be interfered with.

6. I must, however, note before I conclude that it is the submission of the learned counsel for the petitioner that the TDSAT did not give an opportunity to the petitioner to rebut the contents of the report of the BECIL.

6.1 In this context, I put to the learned counsel for the petitioner as to whether a formal application was moved in that behalf.

6.2 Mr. Mathur, learned counsel for the petitioner, has not been able to show from the record, any such application, that was placed before the TDSAT.

6.3 I have also put to the learned counsel for the petitioner whether any such assertion had been made in the instant writ petition. Mr. Mathur could not point to any such averment made in the petition. Clearly, therefore, this stance taken by the learned counsel for the petitioner, is an after-thought.

7. That apart, learned counsel for the petitioner says that forensic examination of the mobile phone and the device by which the CD was prepared, should have been ordered by the TDSAT.

8. According to me, the TDSAT has done what was best in the circumstances. In my opinion, in such like cases, the TDSAT is required to apply the standard of proof of preponderance of probability. The standard of proof in these proceedings cannot be one, which is applied to criminal proceedings, that is, proof beyond reasonable doubt. According to me, if that test is applied, the TDSAT has come to a plausible conclusion, contrary to what is contended by the petitioner. There is nothing put on record before me to come to a conclusion other than that which TDSAT has reached.

9. It must be remembered that this court is not a court of appeal. As long as the conclusion is plausible, this court will not interfere with the decision reached by a

statutory authority. There is no flaw in the exercise of jurisdiction or in the decision making process. The observations of the Supreme Court in the case of H.B. Gandhi vs. Gopi Nath and Sons and Ors. 1992 Supp. (2) SCC 312 are clearly applicable in the instant case. The relevant observations are extracted hereinbelow:

".... Judicial review is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself...."

10. The writ petition is, accordingly, dismissed.