(2008) 09 DEL CK 0004

In the Delhi High Court

Case No : LPA No. 562 of 2008

Prasar Bharti APPELLANT

Vs

Total Telefilms Pvt. Ltd. and Others RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:
Telecom Regulatory Authority of India Act, 1997 — Section 14

Citation : (2008) 09 DEL CK 0004

Hon'ble Judges : A.P. Shah, C.J;Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Goolam E. Vahanvati, Solicitor General of India, Rajiv Talwar, Parmanand, Tejvir Bhatia, Gagan Deep and Dinkar Kalra, Sanjeev Puri, Sanjay Sarin, Abhinav Ramkrishnan and Samina Shoikh, Sanjay Sarin and Abhinav Ramkrishna, for the Appellant;

Judgement

CM APPL No. 13376/2008

Exemption allowed subject to all just exceptions.

The application is disposed of.

LPA No. 562/2008, CM APPL Nos. 13375, 13374, 13793, 13897/2008 and CM APPL No_________/2008 (to be numbered)

1. This appeal is directed against the impugned order dated 12th September 2008 passed by the learned Single Judge disposing of WP(C) No. 6721 of 2008 filed by the appellant Prasar Bharti.

2. The background to the filing of the present appeal is that the appellant Prasar Bharti, which is a body incorporated under Prasar Bharti (Broadcasting Corporation of India) Act 1990, is carrying on the business of telecasting and broadcasting through its units Doordarshan and All India Radio. The appellant was, by a Sanction Order dated 19th November 2003 of the Government of India in the Ministry of Information and Broadcasting, granted approval to expand its

television coverage by providing Direct-to-home (DTH) broadcasting service using Satellite Distribution Technology in Ku-band frequency for Doordarshan''s bouquet of 20 channels and 10 channels of private broadcasters in free-to-air mode. The appellant was required to "make every effort to recover carriage fees from private broadcasters whose channels will be carried in the bouquet." The appellant formally launched its Satellite ''DD Direct+'' on 16th December 2004 with a capacity of 30 channels. This was later expanded to 50 channels. Of these, 19 slots were used by the appellant for its own TV channels and 31 slots were kept available for the private broadcasters. The appellant claims that it incurred an expense of Rs. 30 crores towards transponder charges, cost of equipment and incidental costs for setting up the requisite technology.

3. The appellant executed separate agreements with respondent No. 1 Total Telefilms Limited (''Total''), respondent No. 2 Charhdikala Publications Pvt. Ltd (''Charhdikala'') and respondent No. 3 Zee Turner Limited (''Zee Turner'') agreeing to carry their channels on its DTH platform for a consideration of Rs. 25 lakhs each, had agreed to carry those private channels on its platform. Similar agreements were entered into with six other private channels. Each of the said agreements was valid for a period of one year, i.e till 6th September 2008. One of the clauses in the agreement stipulated that:

The agreement could be extended for such further period and on such terms as may be mutually agreed upon. However fresh agreement shall have to be executed in case of any variance in terms of this agreement. ''The Channel Provider'' must convey his intention for extension at least 90 days before the expiry of this agreement.

By separate agreements the appellant agreed to carry, for the same consideration of Rs. 25 lakhs, other private channels. The appellant had, as on September 5, 2008 three free slots of the 31 on which it could carry the channels of private broadcasters.

4. For the period after 6th September 2008, the appellant decided to raise the carriage fee to Rs. 60 lakhs. Accordingly, by a letter dated 1st August 2008 it informed each of the three respondents herein that the existing agreement was going to expire on 6th September 2008 and could be renewed on payment of the enhanced carriage fee. The relevant portion of the said letter reads as under:

It has been decided at the DTH core group meeting held on 2.6.2008 to increase the carriage fee from Rs. 25 lakhs to Rs. 60 lakhs and service tax thereon @ 12.36%.

Prasar Bharti DTH agreement in this regard has now a clause that during the currency of agreement, if Prasar Bharti revises the carriage fee, the other party will have to pay that during the remaining period of agreement. Prasar Bharti reserves the right to renew or not to renew the agreement for continuation of the channel.

You are therefore requested to renew the agreement at new rates of carriage fee i.e. Rs. 60 lakhs and service tax thereon @ 12.36% amounting to Rs. 7,41,600/-.

The agreement should be typed on Rs. 100/- stamp paper in duplicate and signed by authorized signatory (signatory name should be clearly mentioned as place of signature and notarized). The agreement completed with notarization may be sent to the undersigned.

5. Respondent No. 1 Total filed a Petition No. 183 (C) of 2008 against the appellant before the Telecom Disputes Settlement & Appellate Tribunal (''TDSAT'') New Delhi u/s 14(a)(ii) of the Telecom Regulatory Authority of India Act, 1997 (''TRAI Act'') praying that the letter dated 1st August 2008 should be quashed. Total contended that since it broadcast its channels free to air and was a satellite news channel, no carriage fee ought to be charged by Prasar Bharti. Alternatively it was contended that the increase of the carriage fee from Rs. 25 lakhs to Rs. 60 lakhs was wholly arbitrary and unreasonable.

6. On 28th August 2008 the TDSAT passed the following ex parte order on Total''s petition:

On oral request made by the counsel for the petitioner, TRAI is ordered to be impleaded as a party. The petitioner is permitted to suitably amend the prayer clause in the petition and file an amended petition containing amended memo of parties, within three days.

The learned Counsel for the petitioner submits that the carriage fee amounting to Rs. 25 lakhs paid by petitioner for the last year is expiring on 5.9.2008 and for the next year the respondent is demanding Rs. 60 lakhs towards carriage fee. He seeks an interim order staying this demand.

In view of the facts of the case, we permit the petitioner to deposit a sum of Rs. 25 lakhs with the respondent towards the carriage fee on a provisional basis for the next year and on the said amount being deposited, the respondent will continue to carry the channel of the petitioner.

This order is without prejudice to the contentions of the petitioner that the petitioner is not liable to pay any carriage fee at all.

List on 17th October 2008.

7. As far as the Respondent No. 2 Charhdikala is concerned, its channel ''Time TV'' was part of the Bouquet of private channels carried by the appellant Prasar Bharti on its DTH platform. Charhdikala filed Petition No. 186 (C) of 2008 before the TDSAT claiming the same relief as Total. On 5th September 2008 the TDSAT has passed the following ex parte interim order on Charhdikala''s petition:

Let notice of this application be issued to the respondent for 17th October 2008. Dasti as well.

In the meanwhile, we permit the petitioner to deposit a sum of Rs. 25 lakhs with the respondent towards the carriage fee on a provisional basis for the next year and on the said amount being deposited, the respondent will continue to carry the channel of the petitioner. This order is without prejudice to the contentions of the petitioner that the petitioner is not liable to pay any carriage fee at all.

8. As far as Respondent No. 3 Zee Turner was concerned, three of its channels, Smile TV, Zee Jagran and ETC Music were being carried as part of the bouquet of private channels on the appellant''s DTH platform. According to Zee Turner, it never received the letter dated 1st August 2008 and in any event that letter was addressed to its old address despite the appellant being informed by it of the changed address letter dated 30th July 2008. It is claimed by Zee Turner that on 7th September 2008 without any prior information the appellant Prasar Bharti discontinued two of its channels viz. Smile TV and Zee Jagran. Zee Turner wrote to the appellant on 8th September 2008 pointing out that it had already agreed to pay the enhanced carriage fee by its earlier letter dated 30th July 2008 without prejudice to its rights and contentions and that the two channels should therefore be immediately restored. On 9th September 2008 Zee Turner filed Petition No. 195 (C) of 2008 before the TDSAT seeking a direction to the appellant to execute agreements for carrying Smile TV, Zee Jagran and ETC Music on the DTH platform of DD Direct+. It is stated that an advance notice of the filing of the said petition by Zee Turner was sent by the TDSAT by fax to the appellant on 9th September 2008 informing it that the petition would be listed for hearing before the TDSAT on 10th September 2008 at 11.00 am.

9. Despite the aforementioned notice by Fax none appeared for the appellant when the matter was taken up before the TDSAT on 10th September, 2008. The following ex parte order was passed by the TDSAT on 10th September 2008 in Zee Turner''s Petition No. 195 (C) of 2008:

Issue notice to the respondent for 13th October 2008. Dasti as well. In the meanwhile the respondent is directed to restore the signals of petitioner''s channels namely Zee Smile and Zee Jagran on DD Direct + within 24 hours of service of notice.

Learned Counsel for the petitioner states that petitioner is willing to deposit a sum of Rs. 60 lakhs for each of its three channels with the Prasar Bharti which should be subject to final orders to be passed in the petition. In view of this statement, we allow the petitioner to deposit the amount within two days. This deposit will be subject to final orders to be passed in this matter. It is made clear that the respondent will not in the meanwhile disconnect the third channel of the petitioner i.e. ETC Music which the petitioner is also running on their network.

List on 13th October 2008.

10. On 12th September 2008 the appellant filed a writ petition being WP(C) No. 6721 of 2008 in this Court seeking the quashing of the orders dated 28th August, 5th September and 10th September 2008 passed by the TDSAT in the petitions filed by Respondents 1, 2 and 3 respectively. One of the principal contentions

raised by the appellant in the writ petition was that it was not a ''licencee'' within the meaning of the TRAI Act and therefore, was not amenable to the jurisdiction of the TDSAT. It was contended that without deciding the issue of jurisdiction, TDSAT could not have passed an ex parte order containing a mandatory direction to the appellant to continue to carry the channels of the respondents on its platform. It was claimed that by virtue of letter dated 19th November 2003 special sanction had been granted to the appellant by the I & B Ministry. Further the appellant had been permitted to recover carriage fee from private broadcasters for carrying their channels in its bouquet. Since the appellant was not within the purview of the TRAI Act, the TRAI could not possibly fix the carriage fee to be charged by the appellant.

11. The aforementioned writ petition was taken up for hearing by the learned Single Judge of this Court on 12th September 2008 and was disposed of on that day itself, after hearing learned Counsel for the appellant as well as the respondents. The order of the learned Single Judge, which is challenged in this appeal, reads as under:

1. It is contended by learned Additional Solicitor General of India that the orders passed by Telecom Disputes Settlement & Appellate Tribunal, New Delhi are without jurisdiction, it is also contended that petitioners herein were not heard when the orders were passed and the orders effect the discharge of the statutory duties of the petitioners under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990.

2. Admittedly, no application for variation of stay has been filed before the Telecom Disputes Settlement and Appellate Tribunal, New Delhi, it would thus be appropriate for the petitioners to approach the Telecom Disputes Settlement & Appellate Tribunal for suitable relief.

3. Learned Counsel for the petitioners submits that Telecom Disputes Settlement & Appellate Tribunal, New Delhi has directed the petitioners herein to restore signals of the petitioner''s (respondents'' herein) channels namely, Zee Smile and Zee Jagran on DD Direct + within 24 hours of service of notice. However, in the meanwhile, petitioners herein have already negotiated with some other channels on 5.9.2008 for up-linking and carrying their channels and thus there are no vacant slots available for which he wishes to place on record an affidavit. The affidavit is taken on record.

4. It will be open for the petitioners herein to make appropriate submissions before the learned Telecom Disputes Settlement & Appellate Tribunal, New Delhi.

5. Learned Counsel for the respondent, however, submits that an advance copy of the petition was served on the petitioners herein and subsequently the order passed by the Telecom Disputes Settlement & Appellate Tribunal, New Delhi was also served on them, thus the petitioners should not have negotiated with any other party.

6. The present petition is accordingly disposed of with the directions that: (i) petitioner is granted liberty to approach the Telecom Disputes Settlement & Appellate Tribunal, New Delhi for vacation or variation of the orders and/or such other reliefs which the petitioner may be entitled to; and (ii) the present order has been passed without prejudice to the rights and contentions of the parties and with liberty to the petitioner to raise all grounds as raised in the present writ petition and such other grounds as may be available to the petitioner, in accordance with law.

7. Copy of this order be given DASTI to counsel for the parties.

12. At the hearing of this appeal on 16th September 2008, this Court directed that "the appellant Prasar Bharti shall maintain status quo as on date."

13. Mr. Goolam E. Vahanvati, learned Solicitor General of India appearing for the appellant submits that while the appellant is prepared to go before the TDSAT to argue the question of maintainability of the respondents'' petitions before it as well as the amenability of the appellant to the jurisdiction of the TDSAT as a preliminary issue, the impugned ex parte interim orders passed by the TDSAT could not be allow to operate till such time the preliminary issue was not decided. It is further submitted that the contractual agreements with each of the respondents came to an end on 6th September 2008 and the renewal of the agreement in favour of the respondents was not a matter of right. The contracts themselves stated that renewal would be subject to the terms and conditions and it was entirely in the discretion of the appellant not to renew the contract for various reasons not limited to the question of enhancement of carriage fee. He accordingly submits that the TDSAT could not have by an ex parte ad interim order directed the continuation of the agreement without first deciding the issue of jurisdiction. The learned Solicitor General of India further submits that the decision not to continue the channels, including those of the respondents herein, had been taken not only because of their refusal to pay enhanced carriage fee but on account of a variety of factors including Television Audience Measurement (TAM).

14. It is further submitted by the learned Solicitor General of India that the appellant had in the meanwhile and after the expiry of the agreements with the respondents herein, decided to allot the vacant slots to other private channels. He handed over a chart to this Court which showed that of the nine private channels in respect of whom the agreements expired on 6th September 2008, three were continued. These were Total, which was continued by virtue of the interim ex parte order dated 28th August 2008 passed by the TDSAT, PTC News-Punjab and IGNOU-I. The remaining six channels, viz., Smile TV, Time TV, Win TV, Zee Jagran, Live TV and TV 5 were discontinued since they did not pay the enhanced carriage fee within the prescribed time. In respect of the six vacant slots created thereby and three existing vacant slots, nine new private parties had been selected for carriage of their channels. It is fairly stated by the learned Solicitor General of India that the decision to allot the slots to nine new channels

was taken only on 5th September 2008. The agreements with some of them were entered into only after the impugned orders of the TDSAT. He states that transponders used by the appellant can at present carry only 50 channels. Since no vacant slots were available as on date, the appellant could accommodate only Total and not Smile TV, Zee Jagran and Time TV. He states on instructions that the permission has been sought by the appellant from the I & B Ministry to increase the number of channels from 50 to 59 and this was expected to be granted within four weeks. The equipment for facilitating this exercise was expected to arrive shortly and in any event within a period of four weeks from today. According to him, the interim order, therefore, should be that till such time the TDSAT decided the issue of jurisdiction, its ex parte orders directing the continuation of the three channels should be stayed. Else, it would cause severe prejudice to the new parties whose channels had been agreed to be carried by the appellant. He further submits that Total should be asked to pay the entire enhanced the carriage fee of Rs. 60 lakhs without prejudice to its rights and contentions as a condition for continuation of the interim order in its favour.

15. Mr. Maninder Singh, learned Counsel appearing for Zee Turner reiterates their willingness to pay a sum of Rs. 60 lakhs towards carriage fee for each channel. He points out that this was already communicated to the appellant by their letter dated 30th July 2008. He submits that despite the change of address being communicated by that letter to the appellant, the letter dated 1st August 2008 was sent to the old address as a result of which the Respondent No. 3 could not make the payment of the enhanced carriage fee in time. This was first noticed by his client only when the copy of the said letter was annexed by the appellant to the present LPA. Thereafter the letter was collected from the old address. He refers to the letter dated 6th September 2008 written by Zee Turner to the appellant reiterating its offer to pay a sum of Rs. 60 lakhs for the renewal of the carriage of each of the two channels that were discontinued without notice. Learned Counsel further states that no equity could be claimed in favour of the new channels that had been selected since those parties came into the picture admittedly only after 10th September 2008, whereas the offer by Zee Turner to pay the enhanced carriage fee was made much earlier. He further submits that the appellant took its decision to allot the channels to nine new parties fully conscious of the interim order of the TDSAT in respect of Total and if without seeking to vacate the said order it chose to proceed with such decision then it cannot present the court with a fait accompli and claim equities. He states that since his clients had at all times offered to pay the enhanced carriage fee and their channels had been carried to the appellant''s DTH platform for more than one year, the balance of convenience was is in their favour. He further submits that his clients will not claim any equity by virtue of the interim order of continuation of the carriage of their channels by the appellant and will abide by the decision that maybe ultimately taken in the matter.

16. Mr. Mukul Rohtagi, learned Senior counsel appeared for Charhdikala and Total. He stated on instructions that both Total and Time TV are willing to pay the

enhanced carriage fee of Rs. 60 lakhs without prejudice to their respective rights and contentions in the petitions before the TDSAT. Since these channels had been carried for one year without any interruption their carriage by the appellant on its DTH platform should be continued subject to the outcome of the proceedings. He too submits that his clients will not claim any equity in the event of their not succeeding in the petitions.

17. Having considered the submissions of learned Counsel for the parties, it is clear to this Court that the parties are willing to have the question of jurisdiction of TDSAT over the appellant Prasar Bharti and the maintainability of the respondents'' petitions before it be decided by the TDSAT as a preliminary issue. The dispute is about the interim arrangement that should be put in place till such time TDSAT decides the preliminary issue.

18. From the facts that have emerged from the above narration, it appears that when it wrote to each of the respondents on 1st August 2008, the appellant was prepared to renew their agreements subject to their paying the enhanced carriage fee. The wording of that letter does not indicate that the appellant would have, even after receiving the enhanced fee, decided to discontinue the channels on account of TAM rating or any other reason. In any event this is only a prima facie view and will have to be examined on merits by the TDSAT or any other appropriate forum in the vent of the question of jurisdiction being decided against the respondents. Zee Turner appears to have always been willing to pay the enhanced fee. Prima facie, there is some merit in its contention that its failure to make payment before 6th September 2008 was on account of the letter dated 1st August 2008 being sent to its old address despite the appellant being informed of the changed address. Further, the other two respondents, Total and Charhdikala, have agreed to pay the enhanced carriage fee without prejudice to their rights and contentions.

19. As regards the equities in favour of the nine new channels the fact remains that the appellant did not actually begin entering into agreements with some of them till 10th September 2008 by which time the TDSAT had passed ex parte interim orders in favour of Total and Time TV. The appellant did not go before the TDSAT to have the said orders vacated and till 12th September 2008 did not take any steps to challenges those interim orders before this Court. Even if as contended by the learned Solicitor General the notice received by it through fax from the TDSAT on 9th September 2008 in respect of Petition No. 195 (C) of 2008 filed by Zee Turner gave it very little time to respond, the appellant could still have gone back to the TDSAT immediately thereafter. In any event it was aware that there were disputes pending in relation to the contracts which had expired on 6th September 2008. The appellant nevertheless proceeded to accept payments from some of the new parties (three of whom have sought intervention in these proceedings) and enter into agreements with some of them after 10th September 2008. In this background it is difficult to accept the plea of equities having been created in favour of the new parties. Further, the respondents

channels have been carried by the appellant for a year without interruption and the new channels are yet to be carried by it.

20. In light of the above factors, it appears to this Court that the balance of convenience is clearly in favour of the continuation of the channels of the respondents i.e. Total, Smile TV, Zee Jagran and Time TV subject to of course each of the respondents paying the revised fee of Rs. 60 lakhs towards Smile TV, Zee Jagran and Time TV. They will be continued to be carried by the appellant on its platform during the pendency of their petitions before the TDSAT. The respondents will pay the appellant enhanced carriage fee of Rs. 60 lakhs for each channel, without prejudice to their rights and contentions, within a period of two weeks from today. It is clear that this interim order will not create any equities in favour of the respondents in the event of their not succeeding in their petitions before the TDSAT. If the TDSAT rejects the petitions either on the ground of maintainability or lack of jurisdiction or merits the interim order will stand vacated forthwith. The interim orders dated 28th August, 5th September and 10th September 2008 passed by the TDSAT will stand modified accordingly.

21. As regards the nine new parties, while six of them can be fitted in the vacant slots available, three of them will have to await the enhancement of the carrying capacity of the appellant from 50 to 59 channels. It is open to the appellant to decide the basis on which six of the nine new channels will be carried now and three later, subject of course to vacant slots being available.

22. In that view of the matter, this order will dispose of the three intervention applications i.e. CM No. 13897/2008 filed by BAG Glamour Private Limited which has entered into the agreement in respect of E24 channel, CM No. 13973 of 2008 filed by Shakti TV and a third application by Live India TV which has been taken on board today. The Registry is directed to give a number to this application. These three applicants will be permitted to be heard before the learned TDSAT in the pending petitions.

23. The parties are directed to appear before the TDSAT on 29th September 2008. The TDSAT will first decide the question of its jurisdiction vis-a-vis the appellant and the maintainability of the respondents'' petitions as a preliminary issue. It is made clear that the observations in this order are not intended to influence the decision of the TDSAT hereafter. The TDSAT is requested to dispose of the petitions within a period of three months from today.

24. The appeal and the pending applications are disposed of in terms of the above directions with no order as to costs. A certified copy of this order be delivered to the TDSAT immediately. Order dasti to the parties.