
(2011) 10 AHC CK 0042

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 702 of 2011

Sharad Traders and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 21-10-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226, 246, 246(1)
Telegraph Act, 1885 — Section 3, 3(1AA), 4, 5, 7
Uttar Pradesh Cinemas (Regulation) Act, 1955 — Section 13
Wireless Telegraphy Act, 1933 — Section 10

Citation : (2011) 11 ADJ 732

Hon'ble Judges : Sunil Ambwani, J;K.N. Pandey, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The petitioners are distributors of Set Top Boxes, Dish Antenas, Recharge Vouchers of Direct to Home Service (DTH) of M/s Sun Direct TV Pvt. Ltd. (Writ Petition No.702 of 2011); M/s Bharti Telemedia Ltd. (Writ Petition No.755 of 2011) and M/s Tata Sky Ltd. (Writ Petition No.676 of 2011), under the distributorship agreements.

2. By these writ petitions the petitioners have sought for declaration of Section 2 (f-1); (f-2); 3 (d) and 13 (2) of the Uttar Pradesh Cinemas (Regulation of Exhibition by means of Video) (Fourth Amendment) Rules, 2011 as ultra vires to the provisions of Indian Telegraph Act, 1885, and Art.14, 19 (1) (g), 246 and 265 of the Constitution of India. They have also prayed for quashing the notices dated 19.4.2011 and 26.4.2011 (in Writ Petition No.702 of 2011); notice dated 19.4.2011 (in Writ Petition No.755 of 2011) and notice dated 12.4.2011 (in Writ Petition No.676 of 2011) issued by the District Entertainment Tax Officer (Licensing Authority), Distt. Ghazipur directing them to obtain licenses as "Television Signal Receiver Agency".

3. We have heard Shri D.K. Singh assisted by Shri R.M. Saggi for the petitioner in

Writ Petition No.702 of 2011, and Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri Ashish Misra in Writ Petition No.755 of 2011 and 676 of 2011. Shri Satish Chaturvedi, Additional Advocate General assisted by Shri A.C. Tripathi, Standing Counsel appears for the State respondents.

4. The Indian Telegraph Act, 1885, is the law relating to telegraph in India. It is an Act of ancient vintage enacted in the end of nineteenth century to regulate telegraph, when the signals were transmitted by mores code (the codes consisting of dots and dashes, or long or short sounds, used for transmitting messages by audible or visual signals on wires. With the rapid advance of science and technology in the field of telecommunications, the Act has been amended from time to time. The word "telegraph" was amended in the year 1961, by Telegraph Laws (Amendment) Act, 1961, and thereafter in the year 2004 by Indian Telegraph (Amendment) Act, No.8 of 2004, with retrospective effect from 1.4.2002. The amended definition of "telegraph", in the Indian Telegraph Act, 1985 reads as follows:

(1AA) "telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.

Explanation-"Radio waves" or "Hertzian waves" means electro-magnetic waves of frequencies lower than 3000 giga-cycles per second propagated in space without artificial guide.

5. The Central Government in exercise of powers conferred in Sections 4 and 7 of the Indian Telegraph Act, 1885 and Section 10 of the Indian Wireless Telegraphy Act, 1933, made Radio Television and Video Cassettes Recorder Sets (Exemption from Licensing Requirements) Rules, 1985. These Rules were amended in the year 1986 by Notification dated 1st October, 1986; in 1989 by the Notification dated 17th July, 1989, and thereafter in 1997 by notification dated 16th July, 1997. By the last amendment vide notification dated 16th July, 1997, exemption was given from license to establish, maintain, work, possess or deal in radio television and video cassette recorder sets as well as special antenna, including dish antenna, satellite decoder and associated front-end converter, used or capable of being used for reception of transient images of fixed and moving objects direct from satellites operating in Broadcasting Satellite Service or Fixed Satellite Service, in frequency bands below 4800 MHz. This exemption was, however, not available for the Northeastern States, State of Jammu and Kashmir and Union Territories of Andaman and Nicobar, and Lakshdweep and Minicoy Islands. The reasons for bringing in these amendments was the advancement of technology of transmitting signals in the frequency band above 4800 MHz (commonly called Direct to Home Broadcasting Service). The Explanatory Memorandum to the amendment, for making it necessary for licensing of DTH Services is quoted as below:

Explanatory Memorandum-A new technology in satellite broadcasting, not yet introduced in India, which enables a satellite broadcaster to use digital compression and KU band transponders, transmitting signals in frequency band above 4800 MHz, (commonly called Direct To Home (DTH) broadcasting service) is on the threshold of entry into India. Presently a satellite broadcaster, under the existing technology based on use of a "C" band transponder and frequencies in bands below 4800 MHz, normally distributes his programme only through a cable operator and through such cable operators, regulations of any undesirable and objectionable programme is feasible but under the new technology a satellite broadcaster can beam his programme directly from the satellite into Indian homes which can be received with the help of a very small sized dish antenna, which even defies detection if and when required and without the involvement of any intermediary like cable operator, thus establishing a direct link with households without any possibility of regulation by an intermediary or any Regulatory Authority. In a nutshell, the new technology would enable any broadcaster within or outside India to telecast or beam any programme of his choice directly to the houses and bedrooms of general public. It is apprehended that any broadcaster who decides to start the DTH service for reception in India could include a foreign entity unlinking his signals from outside the India soil without any control over either the nature or content of the programme. Therefore, it has become necessary to ensure that no person should be allowed to start such a DTH service in India by establishing, maintaining, working possessing or dealing in any equipment that enables reception and dissemination of programmes from a DTH service in India.

6. The Indian Wireless Telegraphy Act, 1933 regulates the possession of Wireless Telegraphy Apparatus. Section 3 of the Act provides that no person, save as provided by Section 4, shall possess wireless telegraphy apparatus, except under and in accordance with a license issued under this Act. u/s 4 the State Government may exempt any person or class of person from the provisions of the Act. Licenses u/s 5 are to be granted by the telegraphy authority constituted under the Indian Telegraph Act, 1885.

7. The petitioners are the distributors of M/s Sun TV Pvt. Ltd.; M/s Bharti Telemedia Ltd. and M/s Tata Sky Ltd., the companies licensed by and on behalf of the President of India acting through the Director, BPNL, Ministry of Information and Broadcasting, Government of India, New Delhi, u/s 4 of the Indian Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933, licensed to establish, maintain and operate DTH platform. The terms and conditions appended to the license, relevant for the purposes of these writ petitions, are quoted as below:

6.5 The Licensee shall not carry the signals of a broadcaster against whom any regulatory body, tribunal or court have found the following.

(i) Refused access on a non-discriminatory basis to another DTH operator contrary to the Regulations of TRAI

(ii) Violated the provisions of any law relating to competition including the Competition Act.

ARTICLE-7 TECHNICAL STANDARDS AND OTHER OBLIGATIONS

7.1 The open Architecture (non-proprietary) Set Top Box, which will ensure technical compatibility and effective interoperability among different DTH service providers shall have such specification as laid down by the Government from time to time.

7.2 The Licensee shall ensure subscribers interest through a Conditional Access System (CAS) which will be compatible with an open Architecture (non-proprietary) Set Top Box.

7.3 The Licensee shall ensure subscribers' interest through a subscriber Management System for an efficient, responsive and accurate billing and collection systems.

7.4 The licensee shall not use any equipment which is identified as unlawful.

7.5 All content provided by the DTH platform to the subscribers, irrespective of its source, shall pass through the encryption and conditional access system, located within the Earth Station, situated on Indian soil.

7.6. The Licensee shall provide access to various content providers channels on a non discriminatory basis.

7.7 The Licensee shall adhere to any guidance/ regulations which may be laid down by the Licensor in the interest of consumer such as pricing of bouquet (s) or tier (s) of channels, etc.

7.8 The Licensee shall carry channels of Prasar Bharti on the most favourable financial terms offered to any other channel.

8. In the State of U.P., entertainment by cinema, video cinema, cable television network, and the levy of entertainment tax is regulated by U.P. Cinemas Regulation Act, 1955; U.P. cinema (Regulation of Exhibition by means of Video) Rules, 1988; U.P. Entertainment and Betting Tax Act, 1979 and the U.P. Entertainment and Betting Tax Rules.

9. The U.P. Cinemas (Regulation) Act, 1955 (in short U.P. Act, 1955) makes provisions for regulating exhibitions by means of cinematograph, in the State of U.P. The Act No.1955 was amended by U.P. Act No.21 of 1986; U.P. Act No.12 of 1989; U.P. Act No.28 of 1995; U.P. Act No.15 of 2011 and lastly by U.P. Act No.25 of 2009 w.e.f. 16.6.2009. By these amendments the activities of entertainment such as video and cable services (in the year 1995), cable operators including proprietor of a hotel (in the year 2001), and DTH services (in the year 2009) were brought within the regulation of the U.P. Act of 1955.

10. The U.P. Entertainment and Betting Tax Act, 1937, enacted with reference to Entry No.35, 36 and 50 of the Provincial List of Government of India Act, 1935,

was repealed, by the U.P. Entertainment and Betting Tax Act, 1979 enacted with reference to Entry 33, 54 and 62 of List II-State List, of the Seventh Schedule of the Constitution of India. The Act was amended by U.P. Act No.1 of 1982, U.P. Act No.29 of 1985, U.P. Act No.12 of 1989 and U.P. Act No.14 of 1990.

11. By an amendment by insertion of new Clause (aa) by Section 2 of U.P. Act No.21 of 1986, to the U.P. Cinemas Regulation Act, 1955, the expression "exhibition by means of video" was defined and a comprehensive set of rules known as U.P. Cinema (Regulation of Exhibition by means of Video) Rules, 1988 were framed. The U.P. Entertainment and Betting Tax Act, 1979 was also consequently amended by U.P. Act No.12 of 1989, adding Section 4A and 4B for levying entertainment tax on video cinema, and video shows in public service vehicles and hotels.

12. In order to exercise some kind of control and regulate the activity, carried on by the cable TV operators, the Cable Television Networks (Regulation) Act, 1995 was enacted. The Central Government also made the Cable Television Networks Rules, 1994 under this Act. The Cable T.V. Operators challenged the notices issued for demand of entertainment tax under the amended provisions of the U.P. Entertainment and Betting Tax Act, 1979. In Universal Communication System & Ors. V. State of U.P. & Anr., 1995 (2) LBESR 123 the High Court dismissed all the writ petitions holding that the nature of activity carried on by cable TV operators is fully covered by the provisions of amended U.P. Entertainment and Betting Tax Act, 1979. The Court held in para 12 as follows:

12. Sub-clause (iii) of Section 2 (1) defines " payment for admission" as any payment made for the loan or use of any instrument or contrivance which enables a person to get normal or better view or hearing or enjoyment of the entertainment which without aid of such instrument of contrivance, such person would not get. Therefore, if any person charges any money for enabling any person to use any instrument or mechanical device which enables such person to get a normal view of the entertainment which without aid of such device, he would not get, it will come fully within the clutches of Section 3 of the Act. The programmes being broadcast by foreign media like B.B.C. Star T.V. and M.T.V. or by D.D. Metro cannot be received directly on television sets. The Cable T.V. operators receive the wireless signals on their dish-antennas and after processing them through electronic equipments, they are transmitted to television sets of the subscribers through the conducting metal wires. The role played by them will be clear from paras 2 and 8 of Writ Petition No.1353 of 1993- (Universal Communications System v. State of U.P. which are quoted below:

Para 2

That several such satellites are visible in the sky over the Indian Sub Continent. The signals emitted and sprayed by any such satellite can be directly received and collected on an appropriately designed dish-shaped receptacle known as dish-antenna, aligned to face that satellite in the direct line of vision. The signals so

received, can be fed to a television set by means of a conducting metal wire to recreate an audio-visual effect on the television screen.

Para 8

That as already stated earlier, the signals are first collected and received by dish antenna. They are then processed and amplified in the control room of the petitioners and connected through special cables to the television sets of people, willing to pay a monthly maintenance charge. The number of channels transmitted through the cable varies from petitioner to petitioner depending upon the range of the equipment and facilities possessed by them. The entire set up is generally called Cable T.V. Network. The petitioners generally have upto a hundred customers each.

There cannot be slightest doubt that a subscriber gets a normal view of the programmes only with the use of instruments which are provided by the cable T.V. operator and without the aid of such instruments, these programmes cannot be viewed. For making use of those instruments the subscriber makes payment to the cable T.V. operator. The money paid by the subscriber is thus clearly a payment for admission to an entertainment. The activity carried on by the petitioners is thus fully covered by the provisions of Section 3 of the Act and they are liable to pay entertainment tax.

13. In order to cover modern means of entertainment, achieved due to advancement of technology including DTH services, the U.P. Cinema Regulation 1955 was amended in the year 2009, with the following statement of object and reasons:

STATEMENT OF OBJECTS AND REASONS

The Uttar Pradesh Cinema (Regulation) Act, 1955 has been enacted to regulate public exhibition of film through cinematography or video.

2. With a view to covering modern means of entertainment achieved due to advancement of technology, as bringing them in the purview of license, and to prevent illegal activities of film/ video, it has been decided to amend the Uttar Pradesh Cinema (Regulation) Act, 1955 (U.P. Act No.3 of 1955 to provide for,

(a) introducing provision for adopting new electronic projection systems in the cinema halls of the State.

(b) defining the words multiplex, television signal receiver, television signal receiver agency and video;

(c) covering DTH service by bringing television signal receiver agencies under the purview of license;

(d) inspection of television signal receiver agencies;

(e) enhancing penalty on copyright offenders in relation to cinematograph or video exhibition and the punishment for the breach of laws and rules made under

the said Act.

The Uttar Pradesh Cinema (Regulation) (Amendment) Bill, 2009 is introduced accordingly.

By order, P.V. Kushwaha, Sachiv.

14. The amendments carried out by the UP Act No.27 of 2009, in the U.P. Cinemas Regulation Act, 1955 relevant for the purposes of deciding these writ petitions, are quoted as below :

2(aa) "Cinematograph" includes any apparatus or electronic digital projection system or any other emerging analogous technology other than video for the representation of moving pictures or series of pictures;

Explanation-Digital projection system is a set of electronic apparatus used for digital cinema exhibition receiving digital print delivery through hard disc or through satellite or otherwise.

(a-2) "Multiplex" means a group or conglomeration of two or more than two cinema halls within the same premises with commercial, cultural and other entertainment related facilities,

(f-1) "television signal receiver" means any device, by whatever name called, used to receive and/ or decode the transmission programme of particular channel and without which no person is able to see a particular channel programme;

(f-2) "television signal receiver agency" means a place by whatever name called, where business of selling or letting on hire or distribution or exchange or putting into circulation in any manner whatsoever of television signal receiver."

(g) "Video" means any system, by whatever name called, or recording on, or reproducing from video cassette or any other device by whatever name called or transmitting through any recording medium or directly the moving visual images with or without sound.

(i) Words and expression not defined in this Act but defined in the Uttar Pradesh Entertainments and the Betting Tax Act, 1979 or the Cable Television Network (Regulation) Act, 1995 shall have the meaning assigned to them in the said Acts.

3. Save as otherwise provided in this Act, no person shall

(a) give an exhibition by means of cinematograph, or

(b) given an exhibition by means of video, or

(c) keep a video library, or

(d) keep television signal receiver agency. other than in a place licensed under this Act or otherwise than in compliance, with conditions and restrictions imposed by such licence.

6-A (1) The Licensing authority or any other officer authorised by him in this behalf may, with such assistance as may be necessary, enter, inspect and search at any reasonable time, any place ordinarily used or suspected to be used, for exhibition by means of cinematograph or video, or for keeping video library or television signal receiver agency, with a view to securing compliance of the provisions of this Act or the rules made thereunder and may seize such film and video cassettes as are found being exhibited or kept in contravention thereof.

8-(1) If the owner or person in charge of a cinematograph uses or allows it to be used, or if the owner or occupier of a place permits that place to be used for exhibition by means of cinematograph, or if a person gives exhibition by means of video or keeps a video library or television signal receiver agency, in contravention of the provisions of this Act or of the rules made thereunder, and of the conditions and restrictions upon or subject to which licence has been granted under this Act, he shall be punishable [with simple imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees, or with both] and in the case of continuing offence with a further fine which may extend to two thousand rupees for each day during which be offence continues.

(2) If any person prevents the entry of any officer duly authorised in this behalf, or otherwise obstructs such officer in the discharge of his duties imposed by or under this Act or the rules made thereunder, he shall be punishable with a fine which may extend to five thousand rupees.

(3) If any person commits or attempts to commit or abets the commission of offence of infringement of copyright in relation to a cinematograph or video film or a record embodying in part of sound track associated with the film, punishable under the Copyright Act, 1957 or exhibit or permits to be exhibited or sale, store, let on hire, distribute, exchange or put into circulation any infringed copy of cinematograph film or video cassette or any other device by whatever name called shall be punishable with imprisonment for a term which may extend to two years or with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees or with both.

(4) If a person, having been convicted of an offence punishable under sub-section (3) is again guilty of an offence punishable under that sub-section, he shall be punishable for the second or subsequent offence for a term of imprisonment which shall not be less than one year which may extend to two years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

13. (1) The State Government may make rules for purpose of carrying the provisions of this Act into effect.

(2) In particular and without prejudice to the generally of the foregoing power, rules made under this Act may provide

(a) for the situation and regulation of the places at which and the conditions subject to which (exhibitions by means of cinematograph or video may be made or video libraries or television signal receiver agency, may be kept)

(aa) for the imposition of composing charges not exceeding fifty thousand rupees, on payment whereof exemption u/s 10 may be granted from the provisions of the rules relating to the site or building to be used for exhibition by means of cinematograph or video.

15. The State Government also correspondingly amended UP Entertainment and Betting Tax Act, 1979, to bring within its ambit DTH Services. The amendments made in the U.P. Entertainments and Betting Tax Act, 1979 relevant for the purposes of this case are quoted as below:

2. (a) "admission to an entertainment" includes admission to any place in which [the entertainment is held or any place wherefrom entertainment is provided by means of the cable television network or Direct to Home service or any other emerging transmission by whatever name called;

(a-1) "amusement park" means a place wherein various type of amusements, which includes games or rides or water sports, water park, splash pool etc. but does not include exhibition by means of cinematograph and video, are provided on payment for admission;

(f-1) "Direct-to-Home service" means a system of distribution of multichannel television programmes in Ku band by using a satellite system, by providing television signals direct to the subscriber's premises without passing through an intermediary such as cable operator;

(g) "entertainment" includes any exhibition, performance, amusement, game, sport or race (including horse race) to which persons are admitted for payment and in the case of cinematography exhibitions, includes exhibition of news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately. (It also includes any activity notified as entertainment by the State Government from time to time;

(i-1) "Ku Band" ordinarily means the 11.7 to 12.7 Gigahertz frequency band which splits into two segments namely Fix satellite Service having the frequency of the 11.7 to 12.2 Gigahertz and Broadcasting Satellite service having the frequency of 12.2 to 12.7 Gigahertz, or any other band of width as may be approved by the Government of India from time to time;)

(k-1) "Multi System Operator" means a cable operator who receives a programming service from a broadcaster or his authorized agencies and retransmits the same or transmits his own programming service for simultaneous reception either by multiple subscribers directly or through one or more local cable operators, and includes his authorized distribution agencies by whatever name called;

(vi) any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges collected in any manner whatsoever, by whatever named called, for television exhibition through cable television network or any other such network by whatever name called, attached to television