

(2003) 09 SC CK 0083

In the Supreme Court Of India

Case No : Civil Appeal No"s. 7135 of 2003 (Arising out of SLP (C) No. 16138 of 2003) with C.A. No"s. 7136 and 7137 of 2003 (Arising out of SLP (C) No"s. 16427 and 16438/03)

Star India (P) Ltd.

APPELLANT

Vs

Siti Cable Network Ltd. and Others

RESPONDENT

Date of Decision : 09-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A
Monopolies and Restrictive Trade Practices Act, 1969 — Section 10, 12A, 12A(1), 2, 36B

Citation : AIR 2003 SC 3220 : (2003) AIRSCW 4588 : (2003) 4 ALLMR 1130 : (2003) 117 CompCas 146 : (2003) 4 ComplJ 393 : (2003) 3 CPJ 1 : (2004) 2 JCR 241 : (2003) 1 JT 68 Supp : (2003) 3 MLJ 176 : (2003) 7 SCALE 304 : (2003) 8 SCC 304 : (2003) 46 SCL 770 : (2003) 6

Hon'ble Judges : N. Santosh Hedge, J;B. P. Singh, J

Bench : Division Bench

Advocate : P. Chidambaram, Ashok H. Desai, Dushyant A. Dave and Kapil Sibal, Gopal Jain, Avantika Keswani, R.N. Karanjawala, Ankur Chawla, Saloni Gupta, Manik Karanjala, Atul Y. Chitale, Aditya Narain, Tamale Sengupta, Suchitra Atul Chitale, Lakshika Joshi, N. Ganapathy, Maninder Singh, Pratibha M. Singh, Ankur Talwar, Kirtiman Singh and Angad Mirdha, for the appearing partie, for the Appellant;

Final Decision : Allowed

Judgement

Santosh Hegde, J.—Heard learned counsel for the parties.

2. Leave granted.

3. In this judgment, we will be referring to the parties as appellants and complainants respectively. The complainants filed a complaint u/s 10 read with Section 36B of the Monopolies and Restrictive Trade Practices Act, 1969, (the Act) before, the Monopolies and Restrictive Trade Practices Commission (the Commission) against the appellants herein alleging unfair, unethical, restrictive

trade practices by the appellants in not permitting the complainants and their associates from using the latest technology in telecommunication known as 'Headend In The Sky' (HITS) which would facilitate easy distribution of television channels through a satellite to various Multiple System Operators (MSOs) and cable operators from whom the programmes reach the various television viewers. They contended that the transmission of television programmes by the said HITS system which is approved by the Government of India would provide greater benefit to the public at large. They contended, that this system is superior to the existing terrestrial distribution and is also economically cheap. They also urged that this system would ensure generation of higher revenues in terms of higher entertainment and service tax to the Government by 100 % declaration. The complainants also alleged that the denial of such facilities to them by the appellants was with a view to prevent the introduction of Conditional Access System (CAS) which the Government of India has decided to introduce compulsorily in the areas notified by it. They also alleged that the said denial is with a view to eliminate competition and secure a total monopoly over the distribution market by unfairly and illegally promoting its own affiliates, hence, the action of the appellants was in total violation of the provisions of the Act.

4. In the said complaint, the complainants also filed an application u/s 12A of the Act seeking an interim injunction against the appellants from preventing/obstructing the complainant in any manner from distributing the signals in respect of the appellants pay channels to cable operators/consumers who are desirous of obtaining complainants services.

5. The Commission by the impugned order on 27th of August 2003 directed the appellants herein by an interim order to provide signals in respect of their pay channels to the complainant including other, cable operators and consumers in the following terms :

"They shall, therefore, continue to provide and distribute the signals as an interim measure which will be subject to further orders till the next day of hearing. List on 10th September, 2003."

6. The learned counsel for the appellants contend that the Commission proceeded to make the impugned order without granting sufficient opportunity to the appellants to produce materials before the Commission to oppose the issuance of an interim order. They also contend that the Commission in the interim order has not indicated the grounds which persuaded it to pass the said order which is a basic requirement of law since the Commission could pass an interim order only on proved facts.

7. The appellants further contend that the large number of legal, technical and factual issues arise for consideration of the Commission but the Commission has not applied its mind to any one of those issues while passing the impugned order. They also contend that by the impugned order the Commission has changed the status quo which was prevailing on the date of the said order which status quo

was pursuant to certain agreements and entered into between the parties concerned, the conditions of which prevented the parties to the agreement from changing the manner of distribution of the appellants signals during the currency of the agreement. They also contend that the permission granted by the Government of India for up linking signals to HITS itself is conditioned by requiring the applicants who wanted to install HITS to obtain prior permission for turnaround from the owners of the channels by entering into agreements clearly laying down terms and conditions permitting such turnaround of the channels. The appellants contend no such agreements have been entered into by the complainants and without doing so the said respondents are trying to take an undue advantage which amounts to misuse of the appellants proprietary right over the programmes owned by them. They also contend by using the technology of HITS, the said respondents are taking over the entire control over the telecast system which includes distribution to other MSOs. and cable operators without accounting for the same to the appellants thereby causing huge financial loss to the appellants. They also contend that the CAS has not yet been introduced throughout India except may be in the city of Chennai, therefore, there was no mortal hurry for the complainants to use the HITS when the existing terrestrial system could have very well meet the needs of television viewers in the country. therefore, there was neither a prima facie case nor any balance of convenience or any sort of urgency to make the impugned interim order in favour of the complainants.

8. The learned counsel appearing for the complainants contended that after the decision of the Government of India to introduce the CAS in India, KITS has become the most efficient and cost effective system of distribution of television signals because of which the said complainants have invested crores of rupees and have installed the said system which is not only beneficial for efficient distribution of television signals but also cost effective, benefit of which would go both to the viewers as well as to the Government. They also contend that they had initiated negotiations with the appellants long time back and as a matter of fact such negotiations have reached a final stage but with a collateral object of creating a monopoly with its associates the appellants in the last minute after knowing that these respondents have invested huge sums of money are avoiding to enter into contracts which by itself would amount to a monopolistic and restrictive trade practice and the Commission was justified in taking cognizance of the complaint filed by it and also in making the interim order. They contend that the Commission has heard the parties at length and perused the record available while making the impugned order and the said order being only interim in nature, this Court should not interfere with the same.

9. We are aware that the order impugned before us is only an interim order which may or may not be continued beyond 10th of September, 2003. Since the argument advanced on behalf of the appellants goes to the root of the jurisdiction of the Commission to grant an interim order, we intend to examine this question keeping in mind the fact that the impugned order is only interim in

nature. While doing so, we would not like to pre-empt any argument available to the parties before the Commission by giving any conclusive finding on the various points urged before us. We also consider it prudent to make only such order as is absolutely necessary to protect the interest of all parties concerned till such time as the Commission takes up the matter for further consideration.

10. At the cost of repetition, it is necessary for us to reproduce some of the arguments of the parties once again.

11. As stated above, the first contention of the appellants before us is in regard to the scope of the Commission's power u/s 12A of the Act which enables the Commission to issue interim orders. The appellants contend that the Commission has a conditional power to grant an interlocutory order as could be seen from the language of Section 12A of the Act. In this regard, the appellants place reliance on the following words in Section 12A of the Act:

"Where, during an inquiry before the Commission, it is proved.....by order, grant a temporary injunction restraining such undertaking or person from carrying on any monopolistic or restrictive, or unfair trade practice until the conclusion of such inquiry or until further order".

12. From the said language of Section 12A of the Act, the appellants contend that the Commission cannot grant an interlocutory order until the allegations made in the complaint are proved. It is argued that in the instant case the order of the Commission does not indicate what is the nature of violation which is proved even prima facie by the complainant which calls for the grant of an interim order. It is also submitted that from the material that was produced by the complainants themselves, it was clear that negotiations were in progress in regard to the request of the respondents and there was no immediate threat to their right to distribute the appellants programme. That apart there were existing distribution agreements with various distributors including the respondents which have not been terminated by either of the parties. In such a situation the Commission could not have made an order which had the effect of changing the existing status quo and in effect altering the terms of the existing agreement that too by an interim mandatory order.

13. In support of the above contention the appellants relied on a judgment of this Court in the case of Haridas Exports Vs. All India Float Glass Mfrs. Association and Others, wherein this Court while considering the scope of Section 12A of the Act held that:

"It is while dealing with a complaint relating to restrictive trade practice that the MRTP Commission has the jurisdiction to grant temporary injunction u/s 12A(1). The power of the Commission to grant temporary injunction arises only after it is satisfied that a restrictive trade practice or unfair trade practice is being carried on which is likely to affect prejudicially the public interest or the interest of trader or class of traders etc. It is only with a view to prevent the causing of a prejudicial effect that an interim order can be passed by the Commission u/s

12A. It is only on the basis of proof, and not mere allegation, and on the basis of an inquiry before the Commission that any trader or class of traders is carrying on a restrictive trade practice which is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of consumers that the Commission would have jurisdiction to grant a temporary injunction restraining any undertaking or person from carrying on any restrictive trade practice. While the Commission has power to grant ex parte temporary injunction, but in view of Explanation II to Section 12A, whereby the provisions of Rule 2-A of Order 39 CPC are made applicable, for the grant of temporary injunction the Commission normally ought to give notice and hear the respondents before passing an order of injunction. What is, however, important is that the conditions stipulated in Section 12A(1) have to be satisfied before an order for injunction can be passed. In other words, it has to be proved that the respondents before the Commission are carrying on or about to carry on a restrictive trade practice which will be prejudicial to the public interest or to the interest of traders etc. before an order for injunction can be issued. It is only if the trade practice which is being impugned is such that it would fall within the four corners of Section 2(o), which defines restrictive trade practice, can the Commission grant an injunction."

14. A perusal of the above judgment shows that the power of the Commission to grant temporary injunction arises only after it is satisfied that a restrictive trade practice or unfair trade practice is being carried on. The emphasis on the words 'commission being satisfied' shows same to be a condition precedent for grant of an interim order which satisfaction according to the judgment in Haridas Exports (supra) should be on proved facts.

15. From the perusal of the impugned order, we are unable to come to the conclusion that the Commission has addressed itself to the various issues which arise for its consideration even at an interim stage before making the impugned order. As noticed above, any conclusive opinion expressed by us in this regard in these appeals is likely to pre-empt the arguments that may be addressed before the Commission in its future proceedings, therefore, we do not intend to discuss any further the correctness or otherwise of those contentions except to state that there is some justification in the argument addressed on behalf of the appellants that as a matter of tact, the Commission by the impugned order without assigning any reason has changed the existing system distribution system contrary to the principles laid down by this Court in the case of Haridas Exports (supra).

16. It is also to be noted that the Commission is yet to decide the question whether the policy of the Government of India to introduce CAS has really come into force in this country if so whether the said CAS requires the distribution only through HITS or not. therefore, we are of the opinion, many of the issues which require a considered finding, even if it is prima facie, is required to be given by the Commission before making the impugned order. This is the ratio of the

judgment of this Court in Haridas Exports (supra).

17. That apart the order of the Commission being appealable the appellate court has every right to know the reasons and basis of the impugned order. The order of the Commission impugned herein having not disclosed any such reasons the same is liable to be quashed on this preliminary ground alone.

18. Having come to the said conclusion, we have also given serious thought to the fact that the Commission has now posted the matter to 10th September, 2003, hence, whether we should permit the continuation of the impugned order or not, till such time as the Commission passes any further order on or after 10th of September, 2003. Having done so, we are of the opinion that the impugned order to the extent stated hereinabove, being contrary to the judgment of this Court in Haridas Exports (supra), falls outside the scope of Section 12A. Firstly, because the Commission has not assigned any reason for exercise of its power u/s 12A of the Act, secondly because there is no indication in the impugned order that the same is being made on the basis of proved facts, and thirdly, it so, what is the basis for such conclusion. therefore, same being contrary to law in our opinion in spite of the fact that the matter is listed on 10th September; 2003, the same has to be quashed.

19. therefore, we set aside the impugned order on the above limited grounds without expressing any conclusive opinion on the various points raised in these appeals. It will be open to the parties to raise all these issues before the Commission which will consider these issues on their merit and decide the application for injunction filed u/s 12A of the Act or the main complaint as the case may be in accordance with law.

20. After the pronouncement of the judgment, today, the learned counsel appearing for the complainant submitted that there is every possibility that the appellants herein may stop distribution of their signals of their programmes because of the impugned order. We have noted in the impugned order that one of the arguments of the appellants was that they have continued to distribute their programmes through terrestrial system pursuant to the agreement with the various MSO/Cable Operators which we think should be directed to be continued as an interim measure because the same is in public interest. However, we make it clear that none of the complainants, MSOs and Cable Operators have any right to use the facilities of HITS for distribution of such signals until further orders from the Commission. Even the right to receive signals from the appellants during this interregnum will be subject to terms and conditions of the agreement that the complainants and their associates have with the appellants.

21. The appeals are disposed of accordingly.