

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **LPA NO. 44 of 2011**

Judgment reserved on: 18th February, 2011
% **Date of Decision: 21st February, 2011**

MSM Discovery Pvt. Ltd. Appellant
Through Mr. Aman Lekhi, Sr. Advocate with
Mr. Abhishek Malhotra, Mr. A.J. Bhambhani,
Mr. Nitin Bhatia, Mr. Victor Ahanthem & Ms.
Sahana Basavapatna, Advocates.

VERSUS

New Delhi Television Ltd. & Ors. Respondents
Through Mr. Maninder Singh, Sr. Advocate with
Mr. Kaushik Mishra, Adv. for Respondent No. 1.
Mr. Ramji Srinivasan and Mr. S. Ganesh,
Sr. Advocates with Mr. Gaurav Juneja and
Mr. Zeyaul Haque and Mr. Anjum Natrajan
For respondent NO. 2.
Mr. Ruchir Mishra, Advocate for respondent 3.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

Sanjiv Khanna, J.

The appellant MSM Discovery Pvt. Ltd. has filed a petition before Telecom Disputes Settlement and Appellate Tribunal (TDSAT, for short) under the Telecommunication (Broadcasting and Cable Services) Interconnection Order 2004, against the New Delhi Television Limited and Star Den Media Services Private Limited, respondents 1 and 2 respectively, praying for the following reliefs:-

- “i. Hold and declare that the Distribution Term Sheet dated 01.04.2005 and its Amendments dated 29.08.07 and 01.04.2009 respectively (Agreement between the petitioner and the respondent No. 1 is valid, binding and subsisting between the parties;
- ii. Direct respondent No. 1 to continue to perform and discharge its obligations under the Agreement till the expiration of the term of the Agreement, i.e., till 31.03.2012;
- iii. Restrain respondent No. 1 from unlawfully terminating the Agreement;
- iv. Restrain respondent No. 1 from creating any third party interest or rights in respect of the subject matter of the Agreement, including in favour of Respondent No. 2;
- v. Restrain Respondent No. 2 from interfering with the petitioner’s rights under and during the term of the Agreement, i.e., till 31.03.2012.
- vi. Pass such further orders as this Hon’ble Tribunal deems fit and proper in the facts and circumstances of the case.”

2. The appellant had also filed an application for interim relief praying for interim injunction restraining the respondent No. 1 from terminating the agreement dated 1st April, 2005 as amended on 29th August, 2007 and 1st April, 2009 and for restraining the respondent No. 1 from creating any third party interest or rights, including rights in favour of respondent No. 2, in respect of the said agreement during the term of the agreement i.e. till 31st March, 2012.

3. Interim application came up for hearing before TDSAT on 14th December, 2010 and was rejected with reasons to follow. Thereafter reasons were incorporated in the order dated 16th December, 2010. The orders were made subject matter of challenge before the learned Single Judge in Writ Petition (C) No. 8585/2010 but without success as the writ petition and the applications have been dismissed vide order dated 22nd December, 2010. These orders have now been made subject matter of the present Intra Court Appeal.

4. The appellant is a company and is engaged in the business of aggregating content of different television channels by entering into contracts with them and it also enters into licensing and sub-licensing agreements with Multi System Operators (MOSs), Cable Operators, Direct to Home operators, etc. for distribution of the channels.

5. In 2003, the appellant and respondent No. 1 entered into an agreement and executed a Distribution Term Sheet (DTS, for short) dated 11th February, 2003 under the which the appellant agreed to distribute channels “NDTV Profit” and “NDTV 24x7” in various platforms. On 1st April, 2005, this agreement was replaced by a new DTS and the channel “NDTV India” was added. This DTS was to commence on 1st April, 2005 and to terminate on 31st March, 2009. DTS was made subject matter of two amendments dated 29th August,

2007 and 1st April, 2009. By the second amendment, the term was extended from 1st April, 2009 to 31st March, 2012.

6. Relying upon the clauses of DTS dated 1st April, 2005 and the second amendment dated 1st April, 2009, it has been submitted on behalf of the appellant that the agreement envisaged principal-to-principal relationship on a fixed annual fee for the period upto 31st March, 2012. This relationship could be terminated by the parties only in terms of clause 21 of the DTS dated 1st April, 2005. Otherwise, DTS cannot be prematurely terminated. It was urged that the respondent No. 1 wanted to renegotiate the annual fee amount payable as per the amended DTS and there were negotiations and e-mails were exchanged. As the appellant became suspicious and suspected foul play by the respondent No. 1, the aforesaid petition was filed before TDSAT on 13th December, 2010 in the morning hours. In the evening, on the same day an undated letter from the respondent No. 1 was received terminating the DTS. It is alleged that the reasons given for termination are beyond clause 21 of DTS dated 1st April, 2005 and, therefore, the termination is bad and illegal.

7. On the other hand, the contention of the respondent Nos. 1 and 2 is that the migration of channels from one content aggregator to another is not an unusual or a new phenomenon. In the present case the respondent No. 1 has validly terminated the TDS for lack of trust as

the appellant had added other channels to the bouquet and was subsidizing/pushing growth of the added channels, with a result there was a declining trend in the annual fee, though the industry was constantly growing. It is alleged that the appellant had given step motherly treatment to the respondent No. 1's channels to promote their own interest and to enhance revenues from the appellant's own channels.

8. At the outset, it may be stated that the appellant has argued the matter as if we are the first appellate court and have widest jurisdiction to re-examine the issues and contentions on both facts and law. Under Article 226 of the Constitution, the High Courts have power of judicial review which is limited and circumscribed and cannot be equated with the appellate power of a Court/forum, which subject to statutory provisions, can go into both issues of law and fact. A writ court is primarily concerned with the decision making process, rather than the merits of the decision itself. Jurisdiction under Article 227 of the Constitution may be somewhat wider, but a Writ Court seldom interferes with the orders passed by the tribunals constituted under the special acts, unless there is procedural illegality or irregularity or they have acted in excess of their jurisdiction. While exercising jurisdiction under Article 227, the Writ Court does not convert itself to a court of appeal.

9. In the present case, TDSAT has passed a detailed order giving reasoning why it is not inclined to grant interim injunction. The contentions of the parties as raised before the TDSAT have been considered and dealt with objectively and lucidly. A perusal of the order dated 16th December, 2010, shows that the appellant had contended before the TDSAT that they being an exclusive agent of respondent No. 1, purported implied negative covenant in the TDS was enforceable. It was further alleged that the agency of the appellant was coupled with interest, as the appellant had entered into further contracts with MSOs/link operators. Reliance was placed on Sections 202 and 204 of the Contract Act. The TDSAT, in this connection has referred to their earlier decision in the case of Viacom 18 India Limited vs. MSN Discovery Pvt. Ltd., Mumbai, dated 11th August, 2010, whereby the prayer for interim injunction on similar pleas was rejected. This order has been upheld by a Single Judge of the Delhi High Court in MSM Discovery Pvt. Ltd. vs. Viacom 18 Media Pvt. Ltd., 2010 VII AD (Delhi) 45. Before us, the appellant has contended that the TDS agreement was entered into on principal-to-principal basis. Thus, it is apparent that there is a change of stand before us and what was urged and argued before the TDSAT. We do think that it is proper and correct for the appellant to make a challenge and to argue the appeal in terms of the changed stand.

10. The TDSAT on the question whether the termination of TDS agreement is valid or not, has observed that this is a matter of trial and evidence. What mattered and tilted the decision in favour of respondent Nos. 1 and 2 is the question of balance of convenience and whether it justifies grant of interim injunction. It has been observed by the TDSAT as under:-

“The petitioner in the event of success can sufficiently be compensated on monetary terms. Even if there are gross breaches of contract on the part of respondent No. 1, the petitioner may claim not only general damages but also special damages. The balance of convenience also, in our opinion, thus, does not lie in favour of grant of injunction. The petitioner, in our opinion, having regard to the observations made hereinbefore shall also not suffer substantial injury far less an irreparable injury, if the prayer for interim injunction is refused.”

11. The appellant herein is not a cable operator or a small time distributor. As per the appeal itself, the appellant's distribution network platform "TheOneAlliance" has become an industrial leader and currently carries 21 TV channels. The appellant had entered into license and sub-licenses with cable operators, MSOs, etc. The appellant in paragraph 15 of the appeal has stated that these agreements i.e. license/sub licenses were for fixed period with mutual covenants, duties and responsibilities. However, dates and periods when these contracts i.e. licenses/sub-licenses were/are to expire is not averred. It

is apparent that in case the appellant succeeds and is able to show that the contract, i.e. DTS, was illegally and wrongfully terminated and that there was a breach of contract, they can be adequately compensated. The conclusion and finding of the TDSAT in this regard is based upon relevant considerations which does not warrant interference in exercise of jurisdiction under Articles 226 and 227 of the Constitution. We may, at this stage, notice that the appellant has submitted that the decisions in ***Percept D'mark India (Pvt.) Ltd. vs. Zaheer Khan***, AIR 2006 SC 3426 and ***Indian Oil Corporation vs. Amritsar Gas Service*** (1991) 1 SCC 533 are distinguishable. It is stated that in *Percept D'mark India (Pvt.) Ltd.* (supra), the Supreme Court was considering post contractual covenants and restrictions after a contract had come to an end. Further in the case of ***Indian Oil Corporation Ltd.*** (surpa), the Supreme Court had applied clause 28 of the agreement therein, wherein either party could revoke/terminate the contract by 30 days' notice. It is submitted that there is no such term in the DTS and clause 21 is to the contrary. Further in the present case, we are not concerned with the post contractual covenants and restrictions. We are not inclined to interfere with the order passed by the TDSAT rejecting the interim application for the distinctions and differences pointed out above. These aspects can be examined in detail by the TDSAT while dealing with the main petition. At this stage, we are not inclined to interfere

and exercise our discretionary jurisdiction in view of the finding of the TDSAT that if the appellant succeeds it can be compensated in monetary terms. As noticed above, it has been observed that in case of gross breach of the contract on the part of the respondent No. 1, the appellant can claim general damages and also special damages. We are not satisfied that the facts of the present case show and establish any irreparable harm or injury that cannot be compensated in monetary terms. As noticed above, the original DTS dated 1st April, 2005 was valid upto March 2009 and by the second amendment it was extended upto 31st March, 2012. The end period was stipulated and there was also a termination clause. The appellant continues and remains in business and is distributing other TV channels. The questions as raised ex facie relates to loss of revenue/earning of the appellant because of the alleged wrongful and illegal termination.

12. Learned counsel for the appellant has relied upon Treatise on Specific Performance of Contracts by Edward Fry and Specific Performance by Gareth Jones and William Goodhart. A reference was also made to Law of Specific Relief by Prof. G.C. Venkata Subbarao.

13. We have examined and gone through the said treatise but do not find any reason and cause to interfere. Balance of convenience and whether or not irreparable harm or loss will be caused depends upon the facts of each case. In the present case, TDSAT has applied its mind

to the relevant considerations and given cogent and clear findings. Similarly, reliance placed by the learned counsel for the appellant on ***Mrutunjay Pani and anr. vs. Narmada Bala Sasmal and Another***, (1962) 1 SCR 290, does not merit interference. In the said case, the Supreme Court was dealing with the concept of trust and accordingly observations have been made. The said observations are not relevant for the dispute/issue raised in the present appeal. It is noticed that the TDSAT itself has fast tracked the entire matter and issues have been framed and the matter has now been fixed for examination of witnesses. In the order dated 31st January, 2011, the TDSAT has noticed that they were required to make all endeavors to dispose of the matter in 90 days and the said period is over. The case is now fixed before the TDSAT on 21st February, 2011. As we have dismissed the present appeal, it will be open to the appellant to request the TDSAT for amendment of the petition, if they are so advised.

14. With the aforesaid observations, the present appeal is dismissed without any orders to costs. The observations made above

are for disposal of the present appeal and will not be constructed as binding findings before the TDSAT.

SANJIV KHANNA, J.

CHIEF JUSTICE

FEBRUARY 21st, 2011
KKB