

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: October 24, 2016*

+ **FAO(OS) 271/2016**

DISH TV INDIA LTD. Appellant

Represented by: Mr.Arvind Nigam, Mrs.Pratibha
M.Singh, Senior Advocates
instructed by Mr.Tejveer Bhatia,
Mr.Saket Sikri, Ms.Kanika Singh,
Mr.Rohan Swarup & Ms.Heena
Khan, Advocates

versus

GULF DTH FZ LLC Respondent

Represented by: Mr.P.Chidambaram, Mr.Amit
Sibal, Mr.Arun Katpalia, Senior
Advocates instructed by Mr.Rishi
Agrawala, Ms.Niyati Kohli,
Mrs.Aayushi S.Khazanchi,
Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The appellant is the first defendant in the suit; plaintiff whereof is respondent No.1. As per respondent No.1, it has broadcast rights under licenses from different content owners in Middle-East and North America (MENA) Region comprising : Afghanistan, Algeria, Bahrain, Chad, Djibouti, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, South Sudan,

Sudan, Syria, Tunisia, United Arab Emirates and Yemen (hereinafter referred 'OSN Territory'). The exclusive licence to broadcast is by means of DTH, Cable Network and IP TV Networks. The appellant has similar right in India and Sri Lanka. Meaning thereby, same content providers are making available the feed to the appellant and respondent No.1, but in mutually exclusive territories. The territory being defined in the licenses obtained by the appellant and the respondent No.1, the two are bound to provide the services to end consumers in their respective territories. As per the plaint, the appellant set up a subsidiary in Singapore under the name and style Dish TV Singapore Pt.Ltd. with the object to enable the appellant to deceptively expand illegal activities in OSN Territories by using Dish TV Singapore Pt.Ltd. as a conduit. Pleading that taking advantage of the fact that the footprint of the three satellites : SES-8, NSS-6 and ASIASEAT-5 has a spillover in the OSN Territories, the grievance in the plaint is that the appellant is selling set-up boxes and Smart Cards in countries in OSN Territories and revenue is collected by Dish TV Singapore Pt.Ltd. and then transmitted to the appellant. Explaining in the plaint that the satellites are owned by the Government of India and conceding to the point that footprint of the satellites cannot be confined to geographical boundaries by the appellant, it is pleaded that the appellant cannot take advantage of the same by selling set-up boxes and Smart Cards in territories beyond the licensed territories under the licence with the content owner. In paras 23 to 25 of the plaint it is pleaded:-

“23. In line with the above and to prove the ongoing control by Defendant No.1 of Defendant No.2, regardless of the divestment above mentioned, and to further corroborate the scheme maintained by Defendant No.1, it is submitted that the Defendant No.1 owns and/or

controls the domain name <http://dthworld.sg> (IP address 180.179.201.167) in Singapore which was and is currently used as a B2B portal to provide recharge and subscription services for Defendant No.1 pay-TV services and is available to the illicit dealer network operating in the OSN Territory. The logical assumption is that if Defendant No.1 had proceeded with the divestment of Defendant No.2 for licit purposes and reasons, there should be no need to maintain recharge and subscription services in Singapore for Defendant No.1 services. Screenshots of recharge and subscription services available at <http://dthworld.sg> are attached with the List of Documents. Plaintiff believes this is a clear indication of the ongoing control and direct involvement of Defendant No.1 in the illicit activities mentioned throughout this plaint.

24. It is noteworthy that the B2B portal <http://dthworld.sg> (IP address 180.179.201.167) is not accessible from India and can only be operated by systems outside India. This is reflected in the screenshots of the B2B portal <http://dthworld.sg> taken in Gurgaon, India and Dubai, UAE on the same day and at the same time, which are attached with the List of Documents. This establishes that the B2B portal <http://dthworld.sg> was set up only for use by overseas dealers and distributors. This is yet another sign of the Defendant No.1 illicit activities in the OSN Territory.

25. It is pertinent to note that Defendant No.1's main (legitimate) website-<http://dishtv.in> and that which is used to support its improper dealer network-<http://dthworld.sg>-have multiple elements that run in tandem to reveal that they are in fact, operated and/or controlled by the same entity i.e. by Defendant No.1. The aforementioned websites bear similar IP addresses i.e., the IP address of <http://dishtv.in> is 180.179.201.170 and the IP address of <http://dthworld.sg> is 180.179.201.167. Both domains also resolve to the same server i.e. Net

Magic Data Centre which is based in Mumbai, India. The mail server of both domains is hosted by Pan India Network Infravest Private Limited, India, which is a company belonging to the Essel Group of Companies, as per list included in Defendant No.1-2011 Financial Statement, p.18. A copy of Defendant No.1-2011 financial statement report is attached with the List of Documents.”

2. With reference to the extent of piracy in paragraph 83, 86 to 89 of the plaint it is pleaded as under:-

“83. Extensive, costly and time-consuming efforts have been made by the plaintiff over the last several years to curb the instance of piracy and copyright infringement by the defendant No.1 in the OSN Territory. Anti-piracy efforts have been initiated and undertaken by the plaintiff for an extended period of time (including its predecessor in interest). The plaintiff began its efforts by explaining to the Public Prosecutor in Dubai that there were no free channels on the NSS6 satellite, and therefore, the import of a Dish TV STB into the UAE from India was tantamount to an intention to steal. The Public Prosecutor tested the decoders, and agreed with the plaintiff’s interpretation. Dubai customs stopped STBs at the border, and the Public Prosecutor, through the Criminal Investigation Department, Dubai (hereinafter referred to as “CID”) raided shops where the illegal STBs were sold as well as end users. In addition, several homes were raided, with the view to warn/deter end-users and spread the word that the use of STBs from India was illegal. The plaintiff, through their attorneys Hikmat Fayad and Associates, also issued cease and desist orders to various landlords, the tenants whereof had engaged in installation of illegal dishes and receivers, thereby illegally receiving satellite television channels on which the plaintiff has exclusive broadcasting and distribution rights. A copy of the cease and desist orders issued by Hikmat Fayad and Associates to various landlords and

the replies given by such landlords are attached with the List of Documents. While individuals were charged, the plaintiff agreed to provide releases in exchange for an undertaking. Copies of the waiver & release statements are attached with the List of Documents.

x x x x

86. Over the years the plaintiff has filed several complaints with the CID in the UAE who have then carried out several raids and seizures in order to crack down on illegitimate sale of Dish TV STBs, Smart Cards as well as recharge services by the re-sellers/dealers. Ledgers and Smart Card numbers for 22,000 customers from one shop alone were obtained. It is pertinent to note that:

(a) The ledgers showed local cash payments.

(b) The raids also turned up dealer agreements between the local dealers and the defendant No.2. The direct points of contact through which defendant No.1 effectuated piracy were all at defendant No.2.

(c) “Dish TV” branded STBs, Smart Cards and recharge cards were seized.”

87. The plaintiff submits that one such raid was conducted by the plaintiff and the CID on Dish Network Ras Al Khaimah FZE (UAE) – a major dealer of defendant No.1 (selling STBs, Smart Cards and recharging subscription) on 29 October 2014. The raid was conducted by CID and armed police force. It was found that the company was engaged in all types of Dish TV recharge services – online, walk in customers as well as through a sub dealer network. They were using 4 different e-mail IDs for business and in one such inbox there were 61,843 Dish TV requests pending for

activation. They were using the B2B portal mentioned above under Para 23. The police confiscated one laptop which was used to access the B2B and recharge website; as well as 70-80 box type folders. Each box had thousands of payment receipts dating back to 2002. Each receipt has a copy of the bank transfer, along with the customer details and card number, which are presently in the custody of the police.

88. At another such raid conducted by Ras Al-Khaimah's Mamoura Police Station and the CID on Al Jisr Electronics, a sub-dealer of defendant No.1, the police arrested the sales person-in-charge of Al Jisr Electronics – one Puthenveetil Zainudheen Abdul Wahid along with a number of decoders which were being used for accessing and watching the Channels. The Police also seized a laptop which was being used to activate defendant No.1's STBs in the UAE as well as to recharge the subscription for defendant No.1 in the UAE. It was also found that the said sub-dealer was registered with defendant No.1's illegal B2B website – <http://www.dthworld.sg>. The case was referred to the Public Prosecution Office under complaint No.2835/2015 criminal. The sub-dealer confessed to trading in the illegitimate STBs, processing the subscription applications with defendant No.1 from the UAE and re-charging the subscription of defendant No.1 for use in the UAE and using defendant No.1 B2B website. Upon the dealer agreeing to assist with the investigation, the plaintiff and the dealer entered into a Settlement Agreement dated 3 September 2015. Subsequently, the Ras Al Khaima Court of First Instance, Criminal Department vide judgment dated 14 September 2015, held that there was enough evidence to prove that the sub-dealer was illegally importing and selling receivers and smart cards which were available for sale only in India (according to the terms of contracts for selling the defendant No.1's receivers) and was unauthorizedly broadcasting channels, the license whereof vested

exclusively with the plaintiff herein, thereby violating the intellectual property, literary and financial rights of the plaintiff. A copy of the settlement agreement dated 3 September 2015 and judgment dated 14 September 2015 passed by the Ras Al Khaima Court of First Instance, Criminal Department are attached with the List of Documents.

89. In another raid in Abu Dhabi, UAE the CID recorded evidence on how defendant No.1's illegitimate dealers log into the B2B system and the website <http://dthworld.sg> to activate subscriptions. This evidence was produced in legal proceedings against the raided shop as the shop manager. The Court passed judgment in the plaintiff's favour and imposed a fine of AED 200,000; deportation of the shop manager and closure of the shop for one year. Based on this judgment, the plaintiff has also initiated a civil claim against the shop Manager. A copy of the judgment dated 27 May 2015 passed by the Abu Dhabi Court of First Instance and order dated 28 May 2015 and several media reports and newspaper articles in respect thereof are attached with the List of Documents."

3. Documents in support of the facts pleaded in the plaint and in particular facts pleaded in paragraphs 83, 86 to 89 of the plaint were filed by the first respondent.

4. The suit came up for preliminary hearing before the learned Single Judge on November 16, 2015 when summons in the suit and notice in the application seeking interim relief was issued returnable for December 19, 2015. No written statement having been filed till when the impugned order dated August 30, 2016 was passed, the learned Single Judge has firstly upheld the order dated April 19, 2016 closing right of the appellant to file the written statement, against which part of the order a separate appeal has

been filed. Application seeking rejection of the plaint has also been dismissed, against which part of the order a separate appeal has been filed. The third distinct conceptual part of the order deals with the prayer in IA No.23637/2015 seeking interim relief. An interim injunction has been issued against the appellant and Dish TV Singapore Pt.Ltd. restraining the two, their associates, affiliates, officers, employees, agents and representatives:-

(a) from distributing STBs and smart cards in the OSN Territory;

(b) from in, any manner dealing with dealers, distributors, agents, or any entity which directly and/or indirectly sells Defendants No.1 STBs and smart cards and/or recharges Defendant No.1 pay-TV services in the OSN Territory;

(c) from in any manner, receiving subscription revenue from overseas except legitimate subscription revenues from Sri Lanka;

(d) from activating any smart cards for use by consumers in the OSN Territory.

5. The learned Single Judge obviously did not have the benefit of a written stand taken by the appellant for the reason neither was a written statement nor was a reply filed to IA No.23637/2015.

6. Faced with the facts staring in its face, and in respect of which the first respondent has ample evidence, the appellant, rightly advised, took a limited stand in the appeal evidenced by an affidavit filed on behalf of the appellant by its Chief Operating Officer on September 27, 2016. Highlighting that as of the date of the affidavit the first respondent had exclusive right under 24 channels, it has been affirmed in the affidavit

that the appellant would bundle said channels in a separate package and will not accept any foreign remittance for those channels. Of course, this is expressly made without right of the appellant as finally determined in the suit.

7. Sh.Arvind Nigam, learned Senior Counsel urged that for the moment the appellant had no grievance qua injunction granted vide sub- paras (a) and (b) but urged that injunction granted vide sub-para (c) was beyond the claim in the plaint inasmuch as the sweep of the injunction was to restrain the appellant from receiving remittance from any country abroad save and except Sri Lanka. Qua sub-para (d) of the injunction granted, counsel urged that as long as the appellant packaged the channels in respect of which respondent No.1 had a licence to operate in the OSN Territories and prohibited reception thereof in set-up boxes in OSN Territories the right of the respondent No.1 being protected, the sweep of the injunction vide sub-para needed to be cut down.

8. Pithily put, the argument was that as long as rights of respondent No.1, which had the element of a license from a content holder in relation to its time period and the geographical territory was protected, the sweep of the injunction could not go beyond protection of said right.

9. With reference to the averments made in the plaint wherein respondent No.1 had tabulated licenses held by it from different content holders, learned Senior Counsel urged that for quite a few the period of the license had expired. Learned Senior Counsel urged that qua said channels the respondent No.1 was left with no right and thus the question of protecting a non-existing right did not arise.

10. Making a feeble attempt to urge that the appellant could not prevent a customer from purchasing a set-up box and a Smart Card in India and then take it abroad where footprints of the three satellites were available and then download the signals, learned Senior Counsel did not forcefully hammer down the point inasmuch as the averments made in paragraphs 83 and 86 to 89 of the plaint evinces that, not in thousands but in lacs, set-up boxes were detected being illegally used in the OSN Territories. To wit, from one dealer alone 22000 customers were detected. With respect to another operator, 61843 requests for activation pending were detected. Record shows that the number of the set-up boxes was not random but was in a series, meaning thereby, it was not a case where somebody purchased a set-up box in India and took it to an OSN Territory, for if this was so the number of the set-up boxes would be random and not in a sequence. Therefore, the watered down argument as aforementioned was advanced.

11. As regards the number of channels in respect whereof the first respondent has a right to broadcast, under the license granted by the content holder, the position would shift from time to time for the reason licenses would expire and some would be renewed and some not. Licenses would be obtained for additional channels as well.

12. Therefore, in our opinion the issue has to be discussed with reference to the fact that the appellant has been given a right by content right owners to broadcast their channels only in India and Sri Lanka and unless the appellant obtains a license to broadcast the content in another country whether it can take advantage of footprints of the satellites falling in foreign territories; apart from Sri Lanka.

13. Now, the satellites are neither owned by the appellant nor the respondent No.1. The Government of India owns the satellites and as per the policy of the Government of India since ample bandwidth is available with the Government of India the up linking and down linking of satellites signals in India has to be through said satellites. That footprint of said satellites falls in the OSN Territories, is beyond the control of either the appellant or respondent No.1.

14. But it is not a case of a traffic signal not functioning and therefore a situation of free for all : he who can noose his vehicle ahead would pass by.

15. The ownership in the content of what is ultimately broadcasted is with the content provider and the content provider has the right to restrict the territory in which the broadcaster can broadcast the content under the license. Thus, the appellant would be obliged to ensure that foot prints of the satellites falling in foreign territory is not misused. Good faith would enjoin said obligation to be cast upon the appellant. It is the duty of every person to so carry on his business that right of none is infringed. A broken fence is not a licence to trespass. The law of each municipal jurisdiction has to be respected.

16. The appellant has to answer the question : (i) why has it created Dish TV Singapore Pt.Ltd. as its subsidiary to collect remittance from OSN Territories and then transfer the money to it; (ii) why is a dedicated website created for activating Smart Cards and making e-payment to an account through the website.

17. No answer was forthcoming. Indeed, none can exist.

18. The accounts of the appellant show that in the previous year revenue worth ₹157 crores was generated through remittances from OSN Territories. The amount is not small.

19. Prima-facie there is very strong evidence that the appellant has taken advantage of satellites foot prints falling in the OSN Territories and it is not a case where a few unscrupulous end consumers have purchased set-up boxes and Smart Card in India and taken them to OSN Territories. There is prima-facie evidence that through a network of dealers and distributors in OSN Territories set-up boxes and Smart Cards of the appellant are used. A dedicated website has been created through which request for activation in OSN Territories is received and Smart Card activated. Remittance to the account of Dish TV Singapore Pt.Ltd. is being facilitated online through a dedicated website and also through the dealers and distributors in OSN Territories.

20. Mr.P.Chidambaram, learned Senior Counsel correctly urged that in every service there is an element of supply and a demand. Sub-para (a) and (b) of the injunction granted deals with the supply side and sub-para (c) with the demand; for inherent in receipt of payment is the demand.

21. The so called concession made by learned Senior Counsel for the appellant may appear to be attractive but the concession is not gratuitous for the reason it is worthless for the appellant to admit that it has no right in the OSN Territory and then make a concession that it would ensure that the channels in which the first respondent has a right are not downloaded by the purchasers of its set-up box and Smart Card in OSN Territories.

22. Whilst it may be true that the sweep of an injunction order must be commensurate to the right which requires to be protected and if the issue

relates to trade and business, it should not throttle the business of the defendant. But where there is prima-facie strong evidence of the defendant misusing a broken fence, the sweep of the injunction must be complete and by this we mean the peripheral boundary to be properly secured.

23. The first respondent would obviously have a fluctuating number of channels in which it has a broadcast right in OSN Territories. The appellant has no such right in any OSN Territory. Therefore the focus would obviously be to bind the appellant within its territories and as long as the sweep of the injunction does not enter the geographical territory of the appellant, that should suffice. Meaning thereby, the issue has to be approached not with reference to the span of the right of the respondent No.1 with reference to the number of channels but with reference to the appellant having no right in the OSN Territories.

24. We are fully satisfied that the learned Single Judge has correctly noted the relevant facts and has applied the right principles of law and therefore has reached the right conclusion. We agree with the same.

25. Before bringing the curtains down, we must recite a mantra. Against the part of the impugned order declining right to file a written statement a separate appeal has been filed and should the appeal succeed and the appellant is able to plead a defence it may require a re-look at the injunction granted and for which we declare that the appellant would have a right to move an application under Order 39 Rule 4 of the Code of Civil Procedure. The cue to the possible defence was that the content holder provides signals of the broadcast to the respondent No.1 with advertisements, breaks etc. for the OSN Territories and the same content

holder provides signal of the broadcast to the appellant with advertisements, breaks etc. for the territories in India and Sri Lanka and thus what is down loaded by the consumers of set-up boxes and Smart Cards of the appellant in OSN Territories is not the broadcast which the first respondent receives and hence there is no copy right violation. Whether mere insertion of different advertisement in the content results in two copyrightable contents would then become a matter of debate. In the absence of a written statement as of now, the appellant cannot even open up the debate.

26. The appeal is accordingly dismissed but without any order as to costs. The mantra above shall remain.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

OCTOBER 24, 2016

skb