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

+ **W.P.(C) 1029/2019**

9X MEDIA PVT. LTD. AND ORS.

..... Petitioners

Through: Mr Amit Sibal, Sr. Advocate with  
Mr Kunal Tandon, Mr Shashank  
Shekhar and Mr Prateek Jain,  
Advocates.

versus

PRASAR BHARTI

..... Respondent

Through: Mr Rajeev Sharma, Mr Saket  
Chandra and Mr Anmol Nag,  
Advocates.

WITH

22.

+ **W.P.(C) 1030/2019**

B4U BROADBAND (INDIA) PVT. LTD. AND  
ANR.

..... Petitioners

Through: Mr Neeraj Kishan Kaul, Sr.  
Advocate with Mr Kunal Tandon,  
Mr Shashank Shekhar, Mr Prateek  
Jain and Ms Chanav, Advocates.

versus

PRASAR BHARTI

..... Respondent

Through: Mr Rajeev Sharma, Mr Saket  
Chandra and Mr Anmol Nag,  
Advocates.

AND

23.

+ **W.P.(C) 1032/2019**

M/S TV VISION LTD. AND ORS.

..... Petitioners

Through: Mr Amit Sibal, Sr. Advocate with  
Mr Kunal Tandon, Mr Shashank  
Shekhar and Mr Prateek Jain,  
Advocates.

versus

PRASAR BHARTI

..... Respondent

Through: Mr Rajeev Sharma, Mr Saket  
Chandra and Mr Anmol Nag,  
Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER**

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**04.02.2019**

**CM No.4662/2019 in W.P.(C) 1029/2019**

**CM No.4666/2019 in W.P.(C) 1030/2019**

**CM No.4671/2019 in W.P.(C) 1032/2019**

1. Allowed, subject to all just exceptions.
2. The applications are disposed of.

**W.P.(C) 1029/2019 & CM No.4661/2019**

**W.P.(C) 1030/2019 & CM No.4665/2019**

**W.P.(C) 1032/2019 & CM No.4670/2019**

3. The petitioners have filed the present petitions, *inter alia*, impugning the “*Policy Guidelines for Allotment of Slots of DD Free Dish Direct-To-Home Platform to Satellite TV Channels*” dated 15.01.2019 (hereafter ‘the Impugned Guidelines’) and the respective disconnection notices dated 18.01.2019 sent to the petitioners informing them that the respondent would conduct the 38<sup>th</sup> e-auction on 11.02.2019. Although addressed separately to the petitioners, the notices are similarly worded. The said notice is hereafter referred to as ‘the impugned notice’.

4. The petitioners are broadcasters who own and operate television channels airing music of various genres and in various languages. Their grievance in the present petitions relates to the reserve price fixed for the slots for music channels under the Impugned Guidelines.

5. Respondent no.1 (Prasar Bharti) is India's public service broadcaster. The petitioners are aggrieved by the Impugned Guidelines for e-auction of slots to carry private TV channels on the respondent's "DD Free-Dish Platform". According to the petitioners the Impugned Guidelines are arbitrary and unreasonable. It is contended on behalf of the petitioners that the Impugned Guidelines are framed without consultation with the stake holders and, thus, offend Article 14 of the Constitution of India.

6. Prasar Bharti commenced its Direct-to-Home (DTH) services in December, 2004, which was later renamed as 'DD Free Dish' on 27.08.2013. By an order dated 16.12.2010, rendered in ***Zee Turner Ltd. & Anr. v. Prasar Bharati*** being ***Petition No. 407 (C) of 2010***, the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) directed Prasar Bharti to take a policy decision with regard to the allotment of slots to new applicants. Pursuant to the said direction, Prasar Bharti conducted its first e-auction for available slots on 27.07.2011. The petitioner submits that till date, 36 such e-auctions have been conducted. Thereafter, on 04.08.2017 Prasar Bharati notified the terms and conditions for the 37<sup>th</sup> such e-auction, due to be conducted on 22.08.2017. However, vide a notice dated 18.08.2017, the respondent

announced that the aforementioned auction would be kept in abeyance due to administrative reasons.

7. One of the private broadcasters challenged the public notice before the TDSAT (***Cinema 24x7 Pvt Ltd.v. Prasar Bharati*** being ***Broadcasting Petition No. 391 of 2017***). On 12.10.2017, the TDSAT passed an order, *inter alia*, directing that if the said petitioner (Cinema 24x7 Pvt. Ltd.) approaches Prasad Bharti with an application for interim arrangement on a pro-rata basis, the said application would be considered along with applications of other similarly placed persons, in accordance with law. In the meanwhile, several other parties also approached the TDSAT by filing separate petitions seeking extension of their erstwhile agreements on a pro-rata basis. On 27.10.2017, the TDSAT passed an order for an interim arrangement providing continuity on account of delay in holding of the e-auction.

8. On 15.06.2018, the respondent sent a letter to various interested parties, including the petitioners, inviting them for a discussion with regard to the manner in which online e-auctions of the sales could be conducted. It is the petitioner's case that although a meeting took place, the Impugned Guidelines were never discussed. It is stated that the petitioners were never informed as to the contents of the said guidelines in order for them to participate in the discussions in a meaningful manner.

9. On 15.01.2019, the respondent issued the Impugned Guidelines and, thereafter, issued the impugned notices.

10. Mr Sibal, learned senior counsel appearing for the petitioners in W.P. (C) 1029/2019, assailed the Impugned Guidelines on essentially four fronts. First, he submitted that the music channels were free to air channels and the petitioners were not collecting any subscription amount, thus the petitioners could not be classified in the same bucket as General Entertainment Channels (GEC) and other channels. Second, he contended that music channels were loss making channels and yet the reserve price of the prospective slots to such channels was higher than the reserve price for news channels. Third, he referred to paragraph 2.3 of the impugned guidelines, which provided that differential pricing for genre (language) will be based on principle of higher reserve price for genre (language) with greater commercial potential. He submitted that the aforesaid guiding principle was not followed, inasmuch as, the music channels have been placed in bucket “B” along with sports and GEC channels. He contended that the commercial potential of sports channels is greater than music channels and, therefore, classifying the same in one category is arbitrary and unreasonable. Fourth, he contended that the commercial potential of music channels was much lower than the commercial potential of news channels and yet, the reserve price for news channels has been fixed at ₹7 crores and music channels have been fixed at ₹10 crores. He also referred to the financial statement of the petitioners to contend that whereas the petitioners’ channels were loss making, the news channels were making profits. Lastly, he referred to the decision of the Supreme Court in ***Cellular Operators Association of India and Ors. v. Telecom Regulatory Authority of India and Ors.:*** (2016) 7 SCC 703 and contended that since no meaningful consultations

had been held with the petitioners, the impugned guidelines were arbitrary and unreasonable.

11. Mr Neeraj Kishan Kaul, learned senior counsel appearing for the petitioners in W.P. (C ) 1030/2019, also advanced contentions similar to those advanced by Mr Sibal.

12. Before proceeding further, it would be relevant to refer to Article 2 of the Impugned Guidelines which sets out the guiding principles for the revised policy. Article 2 is set out below:-

**“2. Guiding Principles for the revised policy:**

2.1 Carriage of Private Channels on DD FreeDish will be based on e-auctions but with differential pricing based on genre (language).

2.2 Private satellite TV Channels desirous of placing their channels on DD Free Dish shall be allowed to bid only in e-Auctions specific to the genre (language) they belong to. For this purpose Broadcasters shall be required to declare genre and language of their channel/ (s) to Prasar Bharati while applying for e-auction bidding process to be eligible to participate in the e-auction.

2.3 Differential pricing for genre (language) will be based on the principle of higher Reserve Price for genre (language) with greater commercial potential.

2.4 To maximize revenue potential from e-Auctions and to ensure a stable portfolio of channels from a viewer standpoint, e-Auctions will be held on annual basis for all vacant slots for a period of one year.

2.5 Bidding in the e-Auction will be conducted in multiple rounds starting with genres with highest

Reserve Price and progressing in a descending order of Reserve Price by genre (language) till all vacant unreserved MPEG 2 slots are filled up.

2.6 The payment terms for successful bidders upon award of a slot will be revised to ensure a sustainable cash flow while lowering entry barrier across genres to encourage maximum participation of bidders in e-Auctions.

2.7 To promote the DD Free Dish authorised Set Top Boxes, bidding in e-Auction of vacant unreserved MPEG-4 slots will be open to all genre (language) at the same invitational Reserve Price that is irrespective of the genre (language).

2.8 Placement of regional channels of Doordarshan that are currently not available on DTH/Cable may be considered for placement on vacant MPEG 4 slots reserved for the same.”

13. Para 2.3 of the impugned guidelines indicates that the respondent would adopt a policy of differential pricing for genre (language) based on the principle of a higher reserve price for greater commercial potential. The word “Genre” is defined in the opening chapter captioned ‘Definitions’, of the Impugned Guidelines, and the relevant clause reads as under:-

“7. GENRE: Classification of a channel based on its content as ‘Devotional’, or ‘General Entertainment’ or ‘Infotainment’ or ‘Kids’ or ‘Movies’ or ‘Music’ or ‘News and Current affairs’ or ‘Sports’ or Teleshop or ‘Miscellaneous’.”

14. In terms of the above, a music channel is to be considered as a separate genre, and in terms of Paragraph 2.3 of the Impugned

Guidelines, the respondent would fix the reserve price depending on the commercial potential of the genre and the language. In terms of the above, the respondent has classified various genre (languages) in five categories termed as Buckets A+, A, B,C & D. Reserve price for MPEG-2 channels has been fixed under Paragraph 3.3.1 of the Impugned Guidelines, and is as under:-

“3.3.1 The Reserve Price for the commencement of e-auction for different Buckets as provided in clause 3.2 above, shall be as under:

| BUCKETS   | RESERVE PRICE |
|-----------|---------------|
| Bucket A+ | Rs.15.00 Cr   |
| Bucket A  | Rs.12.00 Cr   |
| Bucket B  | Rs.10.00 Cr   |
| Bucket C  | Rs.7.00 Cr    |
| Bucket D  | Rs.600 Cr     |

A tabular statement indicating the classification of various genre (language) for MPEG-2 channels is set out below:-

| Type of sots | Bucket    | Genre/language of channel                         | Reserve Price     |
|--------------|-----------|---------------------------------------------------|-------------------|
| MPEG-2       | Bucket A+ | All GEC (Hindi) Channels<br>Teleshopping channels | Rs.15.00<br>Crore |
|              | Bucket A  | All Movie (Hindi) Channels                        | Rs.12.00<br>Crore |

|  |          |                                                                                                                         |                |
|--|----------|-------------------------------------------------------------------------------------------------------------------------|----------------|
|  | Bucket B | All Music (Hindi) Channels, Sports (Hindi) Channels, GEC (Bhojpuri) Movies (Bhojpuri)                                   | Rs.10.00 Crore |
|  | Bucket C | News & Current Affairs (Hindi) Channels, News & Current Affairs (English) and News & Current Affairs (Punjabi) Channels | Rs.7.00 Crore  |
|  | Bucket D | All other remaining Genre (Language) Channels                                                                           | Rs.6.00 Crore  |

15. It is apparent from the above that all music channels in the Hindi language are categorized under Bucket ‘B’ and music channels in other languages would fall under the residuary classification – Bucket ‘D’. According to the petitioners, the said classification is not as per the commercial potential of that genre – music (Hindi).

16. It is apparent that the Impugned Guidelines embody a policy decision and the same would not be amenable to judicial review on merits. Clearly, it would not be apposite for this Court to enter into a controversy as to the assessment of the commercial potential of various genres/channels. The question of fixing a reserve price is a matter of commercial discretion of the respondent. This Court cannot be called upon to enter into a controversy as to the assessment whether a news channel has a higher commercial potential than a Hindi music channel.

17. Mr Sharma, learned counsel appearing for the respondent, had also pointed out that the total revenue of the petitioner 9X Media Pvt. Ltd. (petitioner in W.P. (C) 1029/2019) for the year ended on 31.03.2018, was in the vicinity of about 146.12 crores, which included Rs.138.71 crores

as revenue from operations. He submitted that the reserve price of a slot was a very small fraction of the revenue and, therefore, the said decision could not be questioned. He also pointed out that the petitioners were already paying eight crores and the reserve price was only 25% more than the existing price.

18. In view of the aforesaid, this Court is unable to accept that the Impugned Guidelines or the reserve price fixed thereunder would amount to disabling an entrepreneur from carrying on the business of broadcasting a music channel. It is also relevant to note that the 'DD Free-Dish' is not the only platform for airing or broadcasting a TV Channel and there are multiple platforms, which are now available. Thus, even if it is accepted that the reserve price fixed by respondent is on the higher side, the same would not amount to excluding the petitioners from the business of broadcasting. It cannot, by any stretch, be construed as violative of Article 19(1)(g) of the Constitution of India.

19. Although, Prasar Bharti is a State within the meaning of Article 12 of the Constitution of India, nonetheless, it is fully entitled to carry its affairs on a commercial basis to fix the prices for its facilities. Prasar Bharti's commercial decision to fix the prices is not amenable to judicial review under Article 226 of the Constitution of India, unless it is established that the same is so arbitrary or so unreasonable that no reasonable person could possibly take such a decision (***Wednesbury Test***).

20. The scope of judicial review of such policy decision has been explained by the Supreme Court in number of decisions. In ***Census***

***Commissioner & Ors v. R. Krishnamurthy: (2015) 2 SCC 796***, the Supreme Court clearly held that it would not be within the domain of the Courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. A similar view was also expressed by the Supreme Court in ***Villianur Iyarkkai Padukappu Maiyam v. Union of India : (2009) 7 SCC 561***.

21. It was contended by Mr Sibal that petitioners are not challenging the policy, but only the implementation thereof. This contention is also unpersuasive as the petitioners are seeking to challenge the fixation of reserve price which itself is a matter of policy. Para 2.3 of the Impugned Guidelines only provides for one of the guiding principles. The discretion of Prasar Bharti to fix the reserve price as per its commercial assessment is not curtailed.

22. The contention that the Impugned Guideline fall foul of the Article 14 of the Constitution of India, inasmuch as, the petitioners have not been consulted is also unpersuasive. The reliance placed by the petitioners on the decision of the Supreme Court in ***Cellular Operators*** (*supra*) is misplaced. In the said case, the Supreme Court was examining the scope of the expression “transparency”. The Court examined the Regulations framed by the Telecom Regulatory Authority of India (TRAI) in exercise of powers under Section 11(4) of the Telecom Regulatory Authority of India Act, 1997. The said provision required the TRAI to ensure transparency whilst exercising its powers and discharging its functions. TRAI had held consultations with all the

stakeholders and also allowed them to make submissions before it. The Court found that although the consultations have been held, there was no discussion or reasoning dealing with the arguments put forth by service providers with regard to the reasons for call drops. Since the conclusion was bereft of any reasoning in this regard, the Supreme Court set aside the same. However, in the present case, the Impugned Guidelines have been framed in exercise of administrative powers, and not under any Statute, which requires prior consultation for such an exercise.

23. As stated above, this Court does not consider it apposite to enter into a controversy as to the evaluation of the commercial potential of various TV Channels or the potential of various genres of television content.

24. The petitions are, accordingly, dismissed. The pending applications are also disposed of.

25. Order *dasti* under signatures of the Court Master.

**VIBHU BAKHRU, J**

**FEBRUARY 04, 2019**

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