

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

WEDNESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

WP(C).No. 4748 of 2015 (P)

PETITIONER(S):

1. CABLE T.V OPERATORS ASSOCIATION
REG.NO.W299/02
REPRESENTED BY THE SECRETARY K.V.RAJAN
PANAMPILLY NAGAR, ERNAKULAM
2. RAJENESH P.S
S/O.P.G.SUNANDHAN, H.NO.9/848 A, ANJANAM
PANDIKUDY, KOCHI 682002
3. K.R.RAJEEV
S/O.K.G.RAVINDRAN, H.NO.19/376, KILIKKODAYIL HOUSE
P.D.ROAD, PALLURUTHY, KOCHI 682006
4. SURESH KUMAR P.P.
S/O.P.S.PARAMESWARAN, PALLIPRAYIL HOUSE
P.O.MADATHUMPADY, THRISSUR 680733
5. P.ANTONY
S/O.C.D.LONAPPAN, PANJIKKARAN HOUSE, P.O.MADATHUMPADY
THRISSUR 680733
6. VIJAYAKUMAR.B
S/O.BALAKRISHNAN NAIR, KRISHNALAYAM, THENGAMAM P.O.
PATHANAMTHITTA 690522
7. BAIJU C.A.
S/O.ANTONY C.V, CHIRAYANKANDATH HOUSE, MULLASSERRY
THRISSUR 680509

BY ADV. SRI.KALEESWARAM RAJ

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT
POWER DEPARTMENT, SECRETARIAT
THRIUVANANTHAPURAM 695001

: 2 :

2. KERALA STATE ELECTRICITY BOARD LTD
REPRESENTED BY THE SECRETARY (ADMINISTRATION)
KERALA STATE ELECTRICITY BOARD LTD.
VAIDYUTHI BHAVAN, THIRUVANANTHAPURAM 695001
 3. CHIEF ENGINEER (DISTRIBUTION)
KERALA STATE ELECTRICITY BOARD LTD.
VAIDYUTHI BHAVAN, THIRUVANANTHAPURAM 695001
 4. M/S.RELIANCE JIO INFOCOMM LTD.
REPRESENTED BY THE MANGING DIRECTOR/AUTHORISED OFFICER
RELIANCE INDUSTRIES LTD., MARKET CHAMBERS IV
NARIMAN POINT, MUMBAI 400 021, INDIA
 - ADDL.5. BHARAT SANCHAR NIGAM LTD.
REPRESENTED BY THE CHIEF GENERAL MANAGER
TELECOM, BHARAT SANCHAR NIGAM LTD.
KERALA TELECOM CIRCLE, PMG JUNCTION
KERALA CIRCLE
THIRUVANANTHAPURAM - 695 033.
- (ADDL.R5 IMPEADED AS PER ORDER DATED 24/2/2015 IN
IA.NO.2849/2015)
- R4 BY SENIOR ADVOCATE SRI.NAGESHWAR RAO.
R4 BY ADV. SRI.M.GOPIKRISHNAN NAMBIAR
R4 BY ADV. SRI.P.GOPINATH
R4 BY ADV. SRI.P.BENNY THOMAS
R4 BY ADV. SRI.K.JOHN MATHAI
R4 BY ADV. SRI.JOSON MANAVALAN
R4 BY ADV. SRI.KURRYAN THOMAS
R4 BY ADV. SRI.E.K.NANDAKUMAR (SR.)
R2,R 3 BY ADV. SRI.JAICE JACOB,SC,KERALA STATE ELECTRICITY BOARD
R1 BY GOVERNMENT PLEADER SRI.S.ABDUL SALAM.
R BY SRI.MATHEWS K.PHILIP,SC, BSNL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
30-06-2015 ALONG WITH WP(C) No. 13722/2015, THE COURT ON
04-08-2015 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

- P1: TRUE COPY OF THE RELEVANT PAGES OF THE BYELAW OF THE 1ST PETITIONER ASSOCIATION.
- P2: TRUE COPY OF THE BOARD ORDER NO.3250/98 DATED 22.10.1987
- P3: TRUE COPY OF THE TENDER NOTIFICATION DATED 07.05.2013
- P4: TRUE COPY OF THE AGREEMENT DATED 27.10.2012 ENTERED INTO BETWEEN PETITIONER NO.7 AND THE BOARD
- P5 SERIES: TRUE COPIES OF THE AGREEMENT ENTERED INTO BETWEEN PETITIONERS 2 TO 6 AND THE BOARD
- P6: TRUE COPY OF THE BOARD ORDER DATED 31.12.2014
- P7: TRUE COPY OF THE GO.(MS) NO.5/15/PD DATED 30.01.2015
- P8: TRUE COPY OF THE NEWS REPORT WHICH APPEARED IN THE NEWSPAPER
- P9: TRUE COPY OF THE ORDER DATED 19.10.2009
- P10: TRUE COPY OF THE LETTER DATED MARCH 2014 ISSUED BY THE GOVERNMENT OF INDIA, MINISTRY OF INFORMATION AND BROADCASTING TO M/S.KERALA COMMUNICATORS CABLE LTD.
- P11: TRUE COPY OF THE UNIFIED LICENCE IN FAVOUR OF KERALA COMMUNICATORS CABLE LTD.
- P12: TRUE COPY OF THE EDITORIAL NOTE WHICH APPEARED IN THE JOURNAL OF SATELLITE AND CABLE TV.
- P13: TRUE COPY OF THE NEWS REPORT WHICH APPEARED IN MANGALAM DAILY DATED 21.2.2015
- P14: TRUE COPY OF THE NEWS REPORT WHICH ALSO SHOWS THE URL.
- P15: TRUE COPY OF THE PROPOSAL DATED 28.6.2013

RESPONDENT(S)' EXHIBITS

- EXT.R4(a) TRUE COPY OF THE ARTICLE TITLED "ADVANTAGES OF FIBER OPTICS" OBTAINED FROM THE WEBSITE.

- EXT.R4(b) TRUE COPY OF THE ARTICLE TITLED "AN OVERVIEW OF FIBER OPTIC TECHNOLOGY" OBTAINED FROM THE WEB SITE.
- EXT.R4(c) TRUE COPY OF THE LICENSE AGREEMENT DATED 15.11.2007 ALONG WITH ITS ANNEXURES.
- EXT.R4(d) TRUE COPY OF THE REGISTRATION CERTIFICATE FOR INFRASTRUCTURE PROVIDER CATEGORY-I (IP-I) DATED 23.6.2011.
- EXT.R4(e) TRUE COPY OF THE LICENSE AGREEMENT NO.20-401/2013 (AS-I) DATED 21.10.2013 FOR UNIFIED SERVICES WITHOUT THE SCHEDULE.
- EXT.R4(f) TRUE COPY OF THE LETTER NO.RJIL/ROW/KERALA/KSEB/01 DATED 28.4.2014 FROM THE FOURTH RESPONDENT TO KSEB.
- EXT.R4(g) TRUE COPY OF THE LETTER DATED 10.2.2015 FROM THE 4TH RESPONDENT TO KSEB ALONG WITH ENSLOSURE.
- EXT.R4(h) TRUE COPY OF THE AWARD DATED 8.8.2014 IN PLP NO.6639/13 PASSED BY THE DISTRICT LEGAL SERVICES AUTHORITY.
- EXT.R4(i) TRUE COPY OF THE ORDER NO.B.O.(FTD) NO.2456/2014 (LA II/ASIANET/PLP 6639 6639/13) DATED 19.9.2014 OF KSEB.

//TRUE COPY//

P.S. TO JUDGE.

“C.R.”

V.CHITAMBARESH, J.

W.P (C) Nos.4748 & 13722 of 2015

Dated this the 4th day of August, 2015

J U D G M E N T

The case unfolds the legal hassles in the venture of an entrepreneur to first launch 4th Generation ['4G' for short] telecommunication services in the State of Kerala.

2. The Kerala State Electricity Board Limited ['the KSEB' for short] issued an order dated 31.12.2014 for verification of poles used by cable television operators. This was for the purpose of the settlement of disputes between the KSEB and the operators as regards the actual number of poles used and to dismantle the unauthorised cables. Clause 6 of the order clarified that no exclusivity would be allowed and that a network can be used by multiple operators provided they remit the pole rent. M/s.Reliance Jio Infocomm Ltd. ['the Company' for short] being not a cable television operator sought permission of the KSEB to lay aerial optical fibre cables. The cables were to be laid through the distribution poles of the

KSEB for providing 4G services primarily for the benefit of mobile phone users. The KSEB thought it fit to move the State Government since it involved a policy decision and also this was the first request of an exclusive internet service provider. The State Government directed the KSEB to get the offer of the Company on the pole rent and to negotiate with it for a comparatively higher amount. Accordingly the committee constituted by the KSEB comprising of the Directors of Finance, Distribution and Safety and Renewable Energy and Planning held negotiations with the Company.

3. The pole rent for the cable television operators to draw cables through the poles of the KSEB were ₹.311/- and ₹.155.50 per pole per annum in Urban/Semi Urban areas and Rural areas respectively. The Company offered ₹.360.02 and ₹.180.01 per pole per annum in Urban/Semi Urban areas and Rural areas respectively and agreed to pay the rent for five years upfront for drawing optical fibre cables. The State Government by order dated 30.1.2015 allowed the KSEB to accord permission to the Company to draw aerial optical

fibre cables through the distribution poles. This was for the limited purpose of providing 4G services by collecting rent at the rate decided through negotiation. It was made clear in the order that the permission should be for a period limited to a maximum of five years as a purely temporary measure on a 'non-exclusive' basis subject to terms and conditions. This order is challenged by the petitioners who claim to be the association of the Cable Television Operators as well as its members in these two writ petitions.

4. The petitioners contend that the impugned order of the State Government militates against the order dated 22.10.1998 issued by the KSEB granting permission to the cable television operators. The said order inter alia provided that only one cable television operator would be granted permission to use a pole for technical, safety and maintenance reasons. The order of the KSEB had even stated that the basic principle of selection for granting permission to use the poles for the cable television operators would be first-cum-first-served basis. But the order of the

KSEB dated 31.12.2014 as well as the order of the State Government dated 30.1.2015 permitted multiple operators asserting non-exclusivity to a single operator. The petitioners point out that such use by multiple operators would offend the technical, safety and maintenance norms safeguarded earlier. It is also the case of the petitioners that a right to draw aerial optical fibre cables should not have been parted with in favour of the Company without an auction. The petitioners submit that they too would have participated had an auction been conducted for drawing aerial optical fibre cables offering a higher amount.

5. It is on the other hand pointed out that the petitioners are only cable television operators whereas the Company is an exclusive internet service provider particularly of 4G services. The Company contends that the order dated 31.12.2014 of the KSEB pertained to cable television operators particularly in the context of a dispute relating to pole rent. This prompted the Company to put in an application dated 28.4.2014 with the KSEB for permission to draw aerial

optical fibre cables through distribution poles. The KSEB was cautious enough to refer the matter to the State Government for a policy decision since this was the first request of such a nature. The Company reiterates that permission was granted securing the financial interest of the KSEB and without affecting the rights of any other internet service provider. The KSEB adds that the permission accorded to the Company covers only 12,000 poles which is only a very nominal percentage of the total strength of 60,00,000 poles.

6. I heard Mr.Kaleeswaram Raj, Advocate on behalf of the petitioners, Mr.L.Nageswara Rao, Senior Advocate on behalf of the Company, Mr.Jaice Jacob, Standing Counsel on behalf of the KSEB and Mr.S.Abdul Salam, Government Pleader.

7. The agreements executed by the individual cable television operators with the KSEB specifically states that the technical and safety standards in the guidelines set by the KSEB forms part. It also states that subsequent amendments from time to time in the guidelines shall be adhered to by the cable television

operators during installation and maintenance. It necessarily follows that the guidelines set by the KSEB in its order dated 22.10.1998 can be amended by its order dated 31.12.2014 as has been done. The cable television operators would then be bound by the specification on technical and safety standards in the guidelines as amended. There is no violation of any guidelines therefore by permitting use by multiple operators by order dated 31.12.2014 as against a single operator by order dated 22.10.1998. The petitioners have themselves conceded that 'the aerial optical fibre cable is a non-conductive input fibre optical facility which is used for providing the different facilities'. The petitioners therefore need not be apprehensive of any conduction between the aerial optical fibre cable used by the Company and the television cables being used by the operators. Moreover the orders dated 22.10.1998 and 31.12.2014 pertain to the cable television operators whereas the Company is an exclusive internet service provider.

8. None of the petitioners have a case that

they are providing internet 4G services to its customers even though there is a tall claim that they are capable of doing so. Neither the Multi System Operator (MSO) Registration dated 21.3.2015 nor the Unified Licence dated 7.1.2015 relied on by the petitioners show the above. 4G services may perhaps be a platform to provide services like Internet, Telecom Data Internet Protocol (IP) phone, Cable TV, Radio Transmission Signals etc. as alleged. The question however remains as to whether the right of the petitioners to provide internet 4G services even if available is in any way impaired ? The non-exclusivity clause found in the order dated 31.12.2014 of the KSEB and the order dated 30.1.2015 of the State Government dispels any doubt on this question. The petitioners are also equally free to apply for permission to draw aerial optical fibre cables through the distribution poles of the KSEB. The petitioners can complain only if their request is not considered by the KSEB or the state Government notwithstanding the fair offer made by them as regards pole rent. The KSEB has infact adopted

a stand that multiple operators would have to be permitted to avoid monopoly and to curb unauthorised use of distribution poles by operators.

9. The dictum in *Association of Unified Tele Services v. Union of India* [2014 (6) SCC 110] and *Citi Industrial Development Corporation v. Platinum Entertainment* [2015 (1) SCC 558] is relied on. The plea in essence of the petitioners is that there is a need to have a transparent process of allocation of the right to draw aerial optical fibre cables. It is their case that the KSEB was bound to act in consonance with the principles of equality and public trust while distributing its resources. The petitioners add that neither the State nor the KSEB can give largesse to any person like the Company according to its sweet will and whims without any auction. But the question of conducting an auction arises only if the right is to be given in favour of a person to the exclusion of all others in the field. I have already held that the petitioners are also free to draw aerial optical fibre after obtaining permission from the KSEB and the State

Government on satisfaction of the norms.

10. Moreover conducting an auction is not the only mode by which a right could be conferred on another since different resources may require different treatment. The Supreme Court in Natural Resources Allocation's case [(2012) 10 SCC 1] has observed as follows:

“129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially, whenever the object of policy is anything but revenue maximisation, the executive is seen to adopt methods other than auction.

130. A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often,

exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilisation of the resources discovered: a prudent business venture would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.”

That there has been a revenue maximisation is evident from the fact the pole rent far exceeding the prevalent rent for cable television operators is being collected from the Company and that too on payment upfront. The State Government directed the KSEB to negotiate with

the Company for a comparatively higher pole rent in order to safeguard its interest. Such an approach is economically sound and I am not satisfied that the orders impugned are vitiated by arbitrariness violating Article 14 of the Constitution of India. The petitioners seem to be a possible rival in trade with the Company and even their very locus standi to maintain these writ petitions is doubtful.

The writ Petitions fail. Dismissed. No costs.

Sd/-
V.CHITAMBARESH,
Judge.

nj.