

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

Date of decision: November 30, 2015

+ **W.P.(C) 11034/2015, CAV 1220-1222/2015 & CM**
Nos.28485-28487/2015

MINISTRY OF INFORMATION AND BROADCASTING

.... Petitioner

Through: Mr. Sanjeev Narula, CGSC
with Ms. Meha Rashmi, Mr.
Ajay Kalra & Mr. Anshuman
Upadhyay, Advocates

Versus

ASSOCIATION OF RADIO OPERATORS OF INDIA AND ORS

..... Respondent

Through: Mr.Amit Sibal, Sr. Advocate
with Mr.Abhishek Malhotra,
Mr.Angad Dugal,
Mr.Kaushik Moitra,
Mr.Debashis Mukherjee,
Advocates

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

CAV 1220-1222/2015

Learned counsel for the caveators has put in appearance.

The caveats stand discharged.

CM No.28485/2015

Exemption allowed subject to all just exceptions.

Application stands disposed of.

W.P.(C) 11034/2015

1. This writ petition has been filed by the Ministry of Information and

Broadcasting, challenging the order dated October 28, 2015 on the prayer of interim relief sought by the respondents herein. Vide the said order, the Telecom Disputes Settlement and Appellate Tribunal (Tribunal, in short), has passed the following order:

“On hearing counsel for the parties, it is directed, as an interim measure, that in such of the reference cities where there was no successful bid, for taking the average increase in Phase III bids in that city, the respondent shall take the reserve price as the bid amount for computation of the One Time Non-refundable Migration Fee (OTNMF). The petitioner (the licence holders being represented through it) shall pay the balance amount of OTNMF within three working days from the date of receipt of the intimation based on computation as directed above.

It is, however, made clear that in case the petition fails, the petitioner shall have to pay the remaining balance amount of the OTNMF along with interest and within such time, as may be directed by the Tribunal”.

2. It is the submission of Mr. Sanjeev Narula, learned counsel for the petitioner, that the order of the Tribunal is contrary to the expressed provisions of notification dated January 21, 2015 and to the Non-refundable One Time Migration Fee (NOTMF, in short) as prescribed by the petitioner in its order dated September 24, 2015. According to him,

such an order at the interim stage when the Tribunal was yet to decide the dispute raised by the respondents in their petition is untenable. He has drawn my attention to the order dated January 21, 2015 (page 140), more specifically, para 31, which relates to migration to Phase III, to contend that it provides for a formula for calculation of NOTMF in clear terms that “highest bid of the target Group X cities increased by the average increase in auction prices in Group Z cities” i.e. average increase in auction price has to be taken into consideration and accordingly, if there is no discovery of auction price due to auctions being unsuccessful, the increase cannot be considered as zero, which is the assumption of the respondents, which assumption is perverse and devoid of merit. He has explained me, the procedure/manner to workout the NOTMF in terms of the policy. He would also state the decisions on NOTMF for Phase III, were based on due deliberations and consultations with TRAI and the TRAI being an expert body, the Tribunal could not have interfered with the same. That apart, it is his submission that after the NOTMF was notified on September 24, 2015, the respondents had requested the petitioner for extending deadline for submission of NOTMF, which request was acceded to vide letter dated September 29, 2015 and October 6, 2015. He would also state, that the comments of the TRAI were also sought for by the petitioner vide its letter dated October 8, 2015. The TRAI vide its

letter dated October 26, 2015 observed that the methodology adopted by the petitioner in calculation of NOTMF is correct and in accordance with its earlier recommendation dated February 21, 2014 and the assumptions made by the respondents in their representations are not tenable. That apart, he would state, the order does not give reasons for granting the interim relief. Further, the balance of convenience lies in favour of the petitioner herein as the petitioner herein is a Department of Government of India and, if the NOTMF, as per the order dated January 21, 2015 and the order dated September 24, 2015 was directed to be paid by the Tribunal, by the respondents to the petitioner, the money was secured. The NOTMF would have been subject to the outcome of the petition before the Tribunal. The concept of prescribing the formula for NOTMF was for maximisation of revenue and that could not have been interfered with by the Tribunal at interim stage. He would rely upon the judgments of the Supreme Court in the case reported as *(2009) 10 SCC 388 Zenit Mataplast P. Ltd. Vs. State of Maharashtra and Ors.* and *2015 (6) SCALE 479 Bharti Airtel Ltd. and Ors. Vs. Union of India (UOI) and Ors.* and the judgment of the Patna High Court in the case reported as *Satyendra Singh and Ors. Vs. Sanjay Kumar and Ors., LPA No. 979 of 2000, decided on October 18, 2000* in support of his contention with regard to the parameters which weighed with the Court for granting the

interim relief.

3. On the other hand, Mr. Amit Sibal, learned Senior Counsel appearing for the respondents would submit that the petitioner cannot be said to be aggrieved by the interim order passed by the Tribunal inasmuch the order of the Tribunal was dated October 28, 2015, whereas the petition has been filed four days short of one month from the said date. He states that Tribunal had granted time to the petitioner herein to file reply by November 13, 2015 and had fixed the petition at the top of the list on November 26, 2015. According to him, instead of filing a reply, the petitioner took time to file writ petition. Otherwise, had they filed a reply before the Tribunal, within the time granted, the matter could have been heard on November 26, 2015 itself. He states, on November 26, 2015, further time was sought for by the petitioner to file reply. He would also state that the interim order was in the nature of pro-term measure as it is the case of the respondents that the formula/NOTMF is not correct. According to him, the Tribunal without even, agreeing with the case of the respondents, had directed the petitioner to rework the NOTMF in such of the reference cities, where there was no successful bid for taking average increase in phase III by taking reserve price as the bid amount. He would also state, that, no prejudice would be caused to the petitioner as the Tribunal has protected the interest of the petitioner by observing, that

in case the respondents fails, the respondents shall have to pay the remaining balance of the NOTMF along with interest and within such time, as may be, directed by the Tribunal. According to him, the Tribunal also being an expert Tribunal, can exercise its appellate jurisdiction, both on facts as well as in law, over a decision or order/direction of the Authority and its power to examine the correctness, legality and propriety of the order passed by the Authority, as also in relation to the dispute, must be held to be a wide one. He states, that, in terms of the interim order, the proceedings before the Tribunal has crossed interim stage and are at final stage for hearing and arguments could have been heard by the Tribunal on November 26, 2015 when the date was fixed. He would also state that the respondents had never sought extension of time, for depositing NOTMF, but, had pointed out errors in NOTMF, and instead of correcting the errors, the respondents had extended the time. He states, that the issue of NOTMP is still open and would be gone into by the Tribunal and the order should not be disturbed. He would rely upon the following judgments in support of his contention:

- (i) 146 (2008) Delhi Law Times 230 Star India P. Ltd. Vs. Life Style Communication P. Ltd.**
- (ii) (2003) 3 SCC 186 Cellular Operators Association of India and Ors. Vs. Union of India and Ors.**

4. Having heard the learned counsel for the parties, as is noted from the record, the petition was filed before the Tribunal on October 23, 2015. The same appears to have been listed for the first time on October 28, 2015 when the Tribunal by admitting the petition and granting time to the parties to complete their pleadings passed the order by which the petitioner is aggrieved. The writ petition was filed on November 24, 2015. It is noted from the impugned order, the petitioner herein was required to file a reply by November 13, 2015 and the respondents' rejoinder by November 20, 2015 and the case was to be listed for hearing on top of the list on November 26, 2015. As conceded by the learned counsel for the petitioner, reply has not been filed till date. Had the petitioner filed the reply before the Tribunal on or before the date stipulated, the matter could have been heard and decided by the Tribunal on November 26, 2015 itself. Surely, the facts as noted above are sufficient to dismiss the petition which was filed on November 24, 2015, two days before the date of hearing before the Tribunal.

5. Further, it is not a case of the petitioner that the Tribunal has decided the issue finally. The parties are yet to file their pleadings. Most of the submissions made by the learned counsel for the parties are on the merit of the dispute pending adjudication before the Tribunal. I refrain from commenting on the same as anything said would have a bearing on

the dispute before the Tribunal. It is also not a case where the Tribunal has, by granting an interim measure, not protected the interest of the petitioner. It has protected the interest by observing that if the petition fails, the respondents would pay the remaining balance amount of the NOTMF along with the interest and within such time, as may be directed by the Tribunal.

6. Insofar as the judgments relied upon by the learned counsel for the petitioner are concerned, in *Zenit Mataplast P. Ltd. (supra)*, the Supreme Court, by relying upon its own judgment in *Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., AIR 1999 SC 3105* observed that the considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:

- (i) Extent of damages being an adequate remedy
- (ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefore;
- (iii) The Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.

7. Insofar as the clauses (v) and (vi) cited above, and relied upon by Mr. Narula are concerned, there is no dispute on the aforesaid propositions. The plea of Mr. Narula that the Tribunal should have allowed the respondents to pay the petitioner as per the order dated January 21, 2015 and order dated September 24, 2015 and should have made the NOTMF, subject to the outcome of the petition before the Tribunal, is a plausible view, but, the impugned order also reveals the right earnest of the Tribunal, to hear the matter. The petitioner should

availed the opportunity and argue the matter before the Tribunal on November 26, 2015, rather than filing this petition on November 24, 2015.

8. Similarly, the reliance placed by Mr. Narula in the case of ***Bharti Airtel Ltd. and Ors. (supra)*** (in paras 76 and 77 of the judgment), primarily relates to the recommendations made by the TRAI and their binding nature and also on the decisions of the Government, which in fact, results in huge inflow of revenue, such a decision cannot be said to be totally irrational or irrelevant consideration in the context of spectrum management. Suffice to state, the petitioner shall be within its right to argue these aspects before the Tribunal at the time of final hearing to impress upon the Tribunal about the justification of its decision.

9. Insofar as the judgment in the case of ***Satyendra Singh and Ors. (supra)***, wherein the reliance has been placed by the learned counsel for the petitioner in para 12, which reads as under, there is no dispute on the below mentioned proposition. Surely, such a decision would help the petitioner while arguing the case finally.

“12. Prescribing qualification for a particular post by the competent authority is a policy decision. The Government frames a policy after taking into consideration the number of facts and circumstances, expert opinion and other relevant consideration. The

power of judicial review in such matter is limited. The Court can interfere only when the authorities have acted arbitrarily or in violation of the statutory or constitutional provisions. The Court does not sit as an appellate forum in disguise over the policy matter. It has no power to re-frame the policy matter and in case the policy matter is found suffering from any legal infirmities as indicated above, then the same is to be struck down and the matter is sent to the authority to consider the policy matter in accordance with the law laid down. If the rules have been framed prescribing the qualification for a particular post, the Court has no power to re-frame the rules or supplement the rule by adding additional qualification for the simple reason that is a function of the appointing authority and in the case of any legal lacuna the Court can only direct the appointing authority to consider the matter on the basis of the expert opinion and other relevant consideration. The Court cannot on the basis of the documents appended with the affidavit determine the equivalence or addition of qualification in the recruitment rules”.

10. That apart, insofar as the judgments relied upon by Mr. Sibal are concerned, in ***Star India P. Ltd. (supra)***, this Court, has in para 17 held as under:

“17. The Tribunal is invested with the power to adjudicate disputes, as an exclusive quasi judicial body. It has

gathered some institutional expertise; indeed its membership is also geared to facilitate the specialized dispute adjudication which it has to engage in. Judicial review, under Article 226, has to be understood within the overall structural parameters of its original dispute resolving task. If one keeps in mind the circumstance that the impugned order is an interim one, the jurisdiction of this Court gets even more circumscribed, as it were. Commenting on such restricted jurisdiction, the Supreme Court held, in Surya Dev Rai v. Ram Chander Rai as follows:

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and

only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

The TDSAT's orders can be interfered with where they disclose manifest errors, which are apparent on the face of the proceedings such as when it is based on clear ignorance

or utter disregard of the provisions of law, and a grave injustice or gross failure of justice has been occasioned. On an application of these parameters, this Court is unable to discern any such manifest error of law, or ignorance of, or utter disregard of provisions of law. The petitioner has also not been able to disclose any gross failure of justice”.

11. In the case of ***Cellular Operators Association of India and Ors.*** (*supra*), in para 31 and 42, Justice S.B.Sinha, concurring with Hon’ble the Chief Justice, has stated as under:

“31. The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert tribunal. It may not be the function of a court exercising power of judicial review to act as a super-model as has been stated in Administrative Law by Bernard Schwartz, 3rd edition in para 10.1 at page 625; but the same would not be a case where an expert tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT's jurisdiction is not akin to a court issuing a writ of certiorari. The tribunal although is not a court, it has all the trappings of a Court. Its functions are judicial.

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42. Sub-section (7) of Section 14A confers a wide jurisdiction upon the Tribunal. The Tribunal being an

expert body is entitled to exercise its appellate jurisdiction both on fact as also in law over a decision of order/decision/direction of the Authority. Its power to examine the correctness, legality or propriety of the order passed by the Authority as also in relation to the dispute must be held to be a wide one”.

12. Noting the impugned order passed is an interim measure, wherein the Tribunal has protected the interest of the petitioner, this Court is of the view that it is not a case where this Court in the facts should exercise its extraordinary jurisdiction under Article 226 of the Constitution of India and interfere with the same. The writ petition is dismissed.

CM Nos.28486-28487/2015 (for stay and producing additional documents on record respectively)

In view of the order passed in the writ petition, the present applications are disposed of as infructuous.

**(V.KAMESWAR RAO)
JUDGE**

NOVEMBER 30, 2015
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