

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

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Date of decision: 22nd January, 2016

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W.P.(C) 70/2016 & CM No.392/2016 (for directions)

STAR INDIA PRIVATE LIMITED

..... Petitioner

Through: Dr. Abhishek Manu Singhvi, Mr. Aman Lekhi & Mr. Gopal Jain, Sr. Advs. with Mr. Saikrishna Rajagopal, Mr. Gopal Singh, Mr. Sidharth Chopra & Mr. Saurabh Srivastava, Advs.

Versus

**M/S NOIDA SOFTWARE TECHNOLOGY PARK
LIMITED & ORS**

..... Respondents

Through: Mr. Vivek Chib with Ms. Ruchira Goel, Mr. Asif Ahmed & Mr. Joby P. Varghese, Advs. for R-1.
Mr. Meet Malhotra, Sr. Adv. with Mr. Tejveer Singh Bhatia, Mr. Upender Thakur, Mr. Viprav Singh Dhillon & Mr. Rohan Swarup, Advs. for R-2.
Mr. Kirtiman Singh with Mr. Waize Ali Noor, Ms. Perna Shah Deo & Mr. Gyanesh Bhardwaj, Advs. for TRAI.
Mr. Manjul Bajpai with Mr. Shashwat Bajpai & Ms. Madhur Bharatiya, Advs. for R-9.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the orders dated 7th December, 2015 (in Petition No.295(C)/2014 and Petition No.526(C)/2014) and 18th December, 2015 (in Petition No.314(C)/2015) of the Telecom Disputes Settlement and Appellate

Tribunal (TDSAT) *inter alia* on the ground that the procedure adopted by the TDSAT in making the said orders and the jurisdiction exercised in issuing the directions contained therein is / are beyond the powers of TDSAT under the Telecom Regulatory Authority of India (TRAI) Act, 1997.

2. The petition came up before this Court first on 6th January, 2016 when the counsel for the respondent no.1 caveator appeared and the senior counsel for the petitioner, the counsels for the other appearing respondents who are supporting the petition and the counsel for the respondent no.1 caveator were heard in extenso on the aspect of admissibility of the petition, particularly relating to the maintainability of the petition in the light of availability of alternative remedy of appeal under Section 18 of the TRAI Act and orders were reserved. On the contention of the senior counsel for the petitioner and the counsels for the other supporting respondents that TDSAT, notwithstanding having itself in the order dated 7th December, 2015 having suspended the operation of its said order till 31st March, 2016, was proceeding to implement the judgment, TDSAT was also requested to defer the hearing scheduled on 12th January, 2016 to a date after three weeks.

3. The senior counsel for the petitioner arguing on the aspect of TDSAT in passing the impugned orders having exercised powers beyond the

jurisdiction vested in it under the Statute establishing TDSAT contended that, (i) though the petitions were relating to inter parties disputes but the scope thereof was expanded and others including the Regulator namely TRAI were impleaded as parties; (ii) issues beyond pleadings in the petitions before TDSAT were framed; (iii) the petitions were proceeded with like a Public Interest Litigation (PIL) and as if TDSAT enjoyed plenary jurisdiction; (iv) directions were issued to TRAI to frame Reference Interconnected Offer (RIO) and it was further directed that if TRAI does not frame the RIO the contracts between the parties to the petitions before the TDSAT shall stand altered in terms of the judgment; (v) jurisdiction as vested by the TRAI Act in TRAI was exercised by TDSAT; (vi) directions in contravention of Regulations framed by TRAI issued; and, (vii) unequals were treated equally; (viii) freedom of contract obliterated.

4. Reliance was placed on *Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India* (2014) 3 SCC 222 to contend that the power of TRAI to make Regulations has been held to be a legislative as opposed to an administrative one and it was argued that TDSAT has no jurisdiction to hold the Regulations framed by TRAI to be bad or to direct TRAI to frame new Regulations or to pass any orders in contravention of the Regulations.

5. Reliance was also placed on the orders dated 18th April, 2013 and 14th November, 2011 of the Supreme Court in Civil Appeal No.9035/2011 titled ***Telecom Regulatory Authority of India Vs. Tamil Nadu Progressive Consumer Centre*** to contend that TRAI could not have been impleaded as a party before it by the TDSAT.

6. Mr. Gopal Jain, Sr. Advocate also appearing for the petitioner contended that TDSAT has in the impugned orders stepped out from its adjudicatory role into regulatory function which under the TRAI Act is of the TRAI and not of the TDSAT. It was contended that the direction in the order dated 7th December, 2015 to TRAI to frame Regulations is contrary to the dicta of the Supreme Court in ***Hotel & Restaurant Association Vs. Star India (P) Ltd.*** (2006) 13 SCC 753. He further argued that though the petitioner had filed an application before TDSAT objecting to the jurisdiction being exercised by it and had taken the said plea in its written submissions also but TDSAT has ignored the same and not dealt therewith.

7. The senior counsel for the respondent no.2 M/s Media Pro Enterprise India Pvt. Ltd. contended that TDSAT in the impugned order has re-written the Regulations as is evident from internal pages 71&72 of the impugned order dated 7th December, 2015. Attention was invited to Regulation 3(3) of

the Telecommunication (Broadcasting And Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 to contend that though the same refers to a mutually agreed Agreement between the Broadcaster and Multi System Operator but TDSAT has held that there can be no such mutual Agreement. Attention was also invited to Regulation 3.5 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 also providing for “mutual agreed terms” between Broadcaster, Multi System Operator or HITS Operators (Head-End in the sky Operator).

8. The senior counsel for petitioner added that TDSAT itself in the past has recognized the autonomy of the contract and the impugned orders are contrary to the earlier orders of the TDSAT itself. Attention was invited to internal pages 73&74 of the impugned order dated 7th December, 2015 to contend that the contents thereof are contrary to the 2004 Interconnection Regulations. He also invited attention to the pleas in this regard taken before TDSAT and which were not adjudicated.

9. The counsel for the respondent no.4 TRAI on being asked the stand of TRAI contended that TDSAT in the impugned orders has interpreted the Regulations and TRAI is not finding any fault with the impugned orders.

10. I, at the outset only enquired from the senior counsels for the petitioner as to how this writ petition is maintainable owing to the availability of the alternative remedy to the petitioner against the impugned orders, of appeal to the Supreme Court under Section 18 of the TRAI Act.

11. Though neither the senior counsels for the petitioner nor the counsels for any of the supporting respondents contended that the appeal does not lie but their argument was that a writ petition is also maintainable for the reason of TDSAT having passed the order exceeding its jurisdiction and having failed in the impugned orders to deal with the contentions on jurisdiction urged before it. The senior counsel for petitioner in this regard relied on *Harbanslal Sahnia Vs. Indian Oil Corporation Ltd.* (2003) 2 SCC 107 laying down that in an appropriate case, inspite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the *vires* of an Act are challenged. He thus contended that the writ petition is maintainable. Reference was also made to, (i) *Babu Ram Prakash Chandra Vs. Antarim Zila Parishad Muzaffar* AIR 1969 SC 556;

(ii) *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 11; (iii) *Bela Rani Bhattacharya Vs. Union of India* 212 (2014) DLT 1; (iv) judgment dated 23rd April, 2015 in W.P.(C) No.4021/2015 titled **Dr. Yashwant Singh Vs. Indian Bank**; and, (v) judgment dated 21st May, 2015 in W.P.(C) No.254/2015 titled **Dr. Yashwant Singh Vs. Indian Bank**.

12. I enquired from the senior counsel for the petitioner whether not what is being contended as “contrary to the Regulations” can also be said to be “interpretation of the Regulation” even though the interpretation may be found to be erroneous. It was enquired whether not TDSAT, even though not entitled to strike down Regulations framed by the TRAI, is entitled to interpret the same and even if has wrongfully interpreted the same will it not be within the jurisdiction of TDSAT and how can it be said that any wrongful interpretation by a Tribunal, against orders whereof appeal is maintainable, would entitle the person aggrieved therefrom to instead of appeal avail of the writ remedy by contending order with a wrongful interpretation of Regulations, which was within jurisdiction of the Tribunal, to be an order without jurisdiction.

13. The counsel for the TRAI, on the aspect of maintainability of the writ petition, drew attention to *Jamia Millia Islamia Vs. South Delhi Municipal Corporation* 2015 (222) DLT 351, where I have relied on *Shrisht Dhawan Vs. M/s Shaw Brothers* (1992) 1 SCC 534 and a plethora of other judgments to hold that error in assumption of jurisdiction should not be confused with mistake, legal or factual, in exercise of jurisdiction.

14. The counsel for the respondent no.1 caveator opposing the writ petition of course controverted that TDSAT, in the making of the impugned orders, has exceeded its jurisdiction. He agreed with the queries put by me earlier to senior counsel for the petitioner and contended that wrong interpretation of Regulations by TDSAT (as the petitioner contends) would not entitle the petitioner to instead of the Statutory Appellate remedy avail of the remedy under Article 226 of the Constitution of India. It was contended that if the writ petition is to be entertained it can lead to an anomalous situation; attention was invited to the fact that there are as many as 24 respondents to this petition and who are also parties to the petitions before TDSAT and it was argued that any of them if aggrieved from the aforesaid orders can avail of the Statutory remedy under Section 18 supra, of appeal to the Supreme Court and in which case both, the Supreme Court as Appellate Court and the

Writ Court would be simultaneously seized of the matter and which may lead to conflicting decisions. It was further argued that the petition has been filed under Article 226 of the Constitution of India when at best this Court could, over TDSAT, exercise supervisory jurisdiction under Article 227 of the Constitution of India. It was further argued that the urgency for the petitioner to approach this Court is owing to the petitioner having been asked by TDSAT to disclose the Agreements entered by it and for which purpose the matter is listed before TDSAT on 12th January, 2016; else the petitioner did not challenge the order dated 7th December, 2015. It was without prejudice also contended that the petitioners have not pointed out any jurisdictional error in the order dated 18th December, 2015 by which the petitioner has been so directed. Attention was drawn to Section 14A(7) of the TRAI Act dealing with the power of TDSAT to call for records. A compilation of judgments in, (i) *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd.* (1985) 1 SCC 260; (ii) *Tin Plate Co. of India Vs. State of Bihar* (1998) 8 SCC 272; (iii) *Punjab National Bank Vs. O.C. Krishnan* (2001) 6 SCC 569; (iv) *Star India Pvt. Ltd. Vs. Life Style Communication Pvt. Ltd.* 146 (2008) DLT 230; (v) *Nivedita Sharma Vs. Cellular Operators Association of India* (2011) 14 SCC 337; (vi) judgment dated 23rd February,

2012 in W.P.(C) No.1077/2012 titled ***Union of India Vs. Aircel Limited***; (vii) ***Bela Rani Bhattacharya Vs. Union of India*** 212 (2014) DLT 1; (viii) ***Commissioner of Income Tax Vs. Chhabil Dass Agarwal*** (2014) 1 SCC 603; (ix) ***Union of India Vs. Major General Shri Kant Sharma*** (2015) 6 SCC 773; (x) ***Phonographic Performance Ltd. Vs. Union of India*** 220 (2015) DLT 90; (xi) order dated 25th September, 2014 in Petition No.47C/2014 titled ***Star Sports India Pvt. Ltd. Vs. Hathway Cable and Datacom Ltd.***; (xii) order dated 22nd January, 2015 in Petition No.231(C)/2014 titled ***M/s. Sri Sumangali Digital Communication India Pvt. Ltd., Gulbarga, Karnataka Vs. SUN Distribution Services Pvt. Ltd.***; (xiii) order dated 24th April, 2015 in Petition No.231(C)/2015 titled ***M/s. Sri Sumangali Digital Communication India Pvt. Ltd. Gulbarga, Karnataka Vs. SUN Distribution Services Pvt. Ltd.***; and, (xiv) order dated 16th July, 2015 in Civil Appeal No.5019-5022/2015 titled ***Star Sports India Pvt. Ltd. Vs. Hathway Cable and Datacom Ltd.*** was handed over.

15. The senior counsel for the petitioner in rejoinder contended that the test is not whether an appeal lies against the impugned orders but whether there is any jurisdictional error and whether the petition under Article 226 lies. It is

contended that the parameters laid down in ***Harbanslal Sahnia*** supra having been satisfied a case for entertaining the writ petition is made out.

16. Mr. Gopal Jain, Senior Advocate also drew attention to ***Pearlite Liners (P) Ltd. Vs. Manorama Sirsi*** (2004) 3 SCC 172 to contend that the petitioner having raised an issue of jurisdiction of TDSAT at the threshold, TDSAT ought to have decided that first and having not done that the writ petition is maintainable.

17. I had during the hearing drawn the attention of the counsels to the judgment/order dated 5th November, 2014 of the Division Bench of this Court of which the undersigned was a member in W.P.(C) No.2844/2014 titled ***Dinkar Kumar Vs. Union of India*** where, after giving detailed reasons, notice of a PIL impugning the *vires* of the provisions of several statutes providing for statutory appeal to the Supreme Court against the order of the Apex Adjudicatory constituted under each of the said legislations (on the ground of the same violating the basic structure of the Constitution of India by overriding the power of judicial review conferred upon the High Courts by Articles 226 and 227 of the Constitution of India) was issued. Section 18 of

the TRAI Act is also under challenge therein. In the said order/judgment it has been observed:

- (i) that the Constitution Bench in *L. Chandra Kumar Vs. Union of India* (1997) 3 SCC 261 has held the power of judicial review conferred on the High Courts under Articles 226 & 227 to be a part of the basic structure of the Constitution;
- (ii) subsequently in *Nivedita Sharma* supra also it was held that Article 226 being a basic feature of the Constitution, cannot be curtailed by Parliamentary legislation;
- (iii) but the Supreme Court in *Nivedita Sharma* nevertheless further held that it is one thing to say that in exercise of power vested in it under Article 226 the High Court can entertain the writ petition and it is an altogether different thing to say that each and every petition filed under Article 226 must be entertained by the High Court as a matter of course, ignoring the fact that the aggrieved person has an effective alternative remedy;
- (iv) however applying the aforesaid proposition, Supreme Court in *Chhabil Das Agarwal* supra held that the High Court will not

entertain a petition under Article 226 of the Constitution of India on the exceptional grounds of violation of principles of natural justice or the order being wholly without jurisdiction or the *vires* of the Statute being under challenge as reiterated in *Nivedita Sharma* also, if an effective alternative remedy is available to the aggrieved person or the Statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance and that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation;

- (v) applying the aforesaid law this Court, as noted in *Bela Rani Bhattacharya* supra, has been taking a view that if in the alternative remedy provided, the grounds of violation of principles of natural justice and jurisdiction can also be taken, writ petition under Article 226 would still not be available;
- (vi) that thus effectively, by providing for statutory appeal to the Supreme Court, with/without any limitations, against the orders of the Bodies constituted under the Statutes provisions whereof

were under challenge, the power of judicial review under Article 226 though not *de jure* prohibited/curtailed, has been *de facto* prohibited/curtailed thereby doing indirectly what cannot be done directly.

- (vii) reference was made to passages in *Madras Bar Association Vs. Union of India* (2014) 10 SCC 1 to the effect that writ remedy cannot be curtailed.

18. It would be obvious from our observations supra in *Dinkar Kumar* that in terms of the *Chhabil Das Agarwal* supra, this writ petition cannot be entertained owing to the effective alternative remedy before the Supreme Court being available to the petitioner under Section 18 of the TRAI Act.

19. *Dinkar Kumar* supra was entertained and notice thereof issued only for the reason that the writ remedy, against the orders of TDSAT appealable before the Supreme Court under Section 18, stands effectively closed. Having observed/held so, this petition cannot be entertained and has but to be dismissed. Only if in final decision in *Dinkar Kumar* any window for entertaining the writ petitions is opened or the Supreme Court itself in some

other matter clarifies/dilutes *Chhabil Das Agarwal*, would an occasion for entertaining the writ petitions arise.

20. I am also not satisfied that the petitioner has been able to establish a case for entertaining the writ petition within the exception carved out in *Harbanslal Sahnia* of the order of TDSAT being without jurisdiction. A jurisdictional fact is one on the existence of which depends the jurisdiction of a Court, Tribunal or Authority. If the jurisdictional fact does not exist, the Court or Tribunal cannot act and if wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. Reference in this regard can be made to *Arun Kumar Vs. Union of India* (2007) 1 SCC 732 and *Ramesh Chandra Sankla Vs. Vikram Cement* (2008) 14 SCC 58. Supreme Court in *Shrisht Dhawan* supra has explained that error in assumption of jurisdiction should not be confused with mistake, legal or factual, in exercise of jurisdiction. Applying the said law a Division Bench of this Court in *Triton Corporation Limited Vs. Karnataka Bank Limited* MANU/DE/1129/2011 held that the determination by the Bank whether the account of a borrower is a non-performing or not cannot be classified as a jurisdictional fact but would fall in the category of adjudicatory facts relating to the merits. However since this Court is refusing to exercise jurisdiction

under Article 226 owing to the availability of alternative remedy, I refrain from rendering any final view thereon.

21. I thus hold this petition to be not maintainable for the reason of availability of alternative remedy of appeal under Section 18 of the TRAI Act and dismiss the same.

No costs.

RAJIV SAHAI ENDLAW, J

JANUARY 22, 2016
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