

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Friday, the Twenty Eighth day of April Two Thousand Seventeen

PRESENT

THE HON`BLE MS.INDIRA BANERJEE, THE CHIEF JUSTICE

and

THE HON`BLE MR JUSTICE M.SUNDAR

WMP.Nos.10619 & 10620 of 2017

and WP.Nos.44126 & 44127 of 2016

STAR INDIA PVT. LTD., REP. BY [PETITIONER IN WMP.10619/17
VICE PRESIDENT-LEGAL, 15, IN WP.44126/16]
JAGANATHAN ROAD, NEAR GANPAT HOTEL,
NUMGAMBAKKAM, CHENNAI-34 TAMILNADU

& HAVING ITS REGISTERED OFFICE
STAR HOUSE, URMI ESTATE,
96, GANPATRAO KADAM MARG, LOWER
PAREL-W, MUMBAI-400013.

VIJAY TELEVISION PVT. LTD., [PETITIONER IN WMP.10620/17
REP. BY ITS ASST. VICE PRESIDENT IN WP.44127/16]
(LEGAL) 15, JAGANATHAN ROAD,
NEAR GANPAT HOTEL,
NUNGAMBAKKAM, CHENNAI-34

Vs

1 DEPARTMENT OF INDUSTRIAL [RESPONDENTS IN BOTH THE
POLICY & PROMOTION, MINISTRY OF PETITIONS]
COMMERCE AND INDUSTRY, UDYOG BHAWAN,
NEW DELHI 110 011

2 DEPARTMENT OF TELECOMMUNICATIONS,
REP. BY ITS SECRETARY,
MINISTRY OF COMMUNICATIONS,
SSANCHAR BHAWAN, ASHOKA ROAD,
NEW DELHI 110 001

3 MINISTRY OF INFORMATION &
BROADCASTING, REP. BY ITS SECRETARY,
ROOM NO.655, A WING SASTRI BHAWAN,
NEW DELHI 110 001

4 TELECOM REGULATORY
AUTHORITY OF INDIA, MAHANAGAR DOORSANCHAR
BHAWAN, JAWAHAR LAL NEHRU MARG, (OLD MINTO
ROAD), NEW DELHI 110 002

Petitions praying that in these circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to

(i) Grant a Stay the operation of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 notified on 03.03.17 and the Telecommunication (Broadcasting and Cable) Services (Eighth) Addressable Systems) Tariff Order 2017 notified on 03.03.17 (in WMP.No.10619/2017 in WP.No.44126/2016) and

(ii) Grant a Stay the operation of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 notified on 03.03.17 and the Telecommunication (Broadcasting and Cable) Services (Eighth) Addressable Systems) Tariff Order 2017 notified on 03.03.17 (in WMP.No.10620/2017 in WP.No.44127/2016) pending disposal of the above WP.Nos.44126 & 44127/2016 respectively.

Order : These petitions coming on for orders upon perusing the petition and the respective affidavits filed in support thereof and upon hearing the arguments of M/S.SAI KRISHNA RAJAGOPAL, for M/S.RAHUL BALAJI, Advocate petitioner in WMP.No.10619/17 in WP.No.44126/16 and of M/S.P.S.RAMAN Senior Counsel and M/S.GOPAL JAIN Senior Counsel for M/S.RAHUL BALAJI, Advocate petitioner in WMP.No.10620/17 in WP.No.44127/16 and of M/S.G.RAJAGOPALAN, ASG, Assisted by M/S.VENKATASWAMY BABU, Advocate for the 1 to 3 respondents in both the petitions and of M/S.P.WILSON, Senior Counsel for M/S.P.WILSON ASSOCIATES, for the 4th respondent in WMP.No.10619/17 in WP.No.44126/16 and of M/S.VIJAYNARAYANAN, Senior Counsel for M/S.JOSEPH GEORGER MAYILADUMPAR, for Intervenor and of M/S.KRISHNA SRINIVASAN, for M/S.S.RAMASUBRAMANIAN ASSOCIATES, intervenor and of M/S.AR.L.SUNDARESAN, Senior Counsel for M/S.S.ARJUN SURESH for M/S.B.KRISHORE for M/S.DUE ASSOCIATES, for intervenor and of M/S.VIJAY AND PARTRIDGE, for Intervenor and of M/S.P.WILSON, Senior Counsel for M/S.RICHARDSON WILSON, Advocate for the 4th respondent in WMP.NO.10620/17 in WP.No.44127/16 the court made the following order:-

There are two writ petitions. There is one interim stay petition in each of the two writ petitions. All counsel agreed to argue the interim stay petitions and they have done so. We propose to dispose off both the interim stay petitions by this common order.

2. These two writ petitions have a chequered trajectory qua hearings in the last four months. Subject matter and prayers in both the writ petitions are common and therefore, the two writ petitions are being heard together from day one.

3. Subject matter is challenge to certain clauses in a set of regulations and some clauses in a tariff order, both made by the Telecom Regulatory Authority of India (hereinafter referred to as "TRAI", for brevity), in exercise of its regulation making and tariff order making powers under The Telecom Regulatory Authority of India Act, 1997 (hereinafter "TRAI Act" for brevity).

4 Originally the writ petitions were filed with prayers assailing the impugned consultation paper dated 10.10.2016 titled "Consultation on the draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016" and the consequential "Consultation Paper on the Draft Telecommunications (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016" dated 14.10.2016 and all other connected proceedings.

5 This Court, on 23.12.2016, had granted an interim order of status quo in the above said two writ petitions (in W.M.P.Nos.37952 and 37953 of 2016 in W.P.Nos.44126 and 44127 of 2016 respectively). Relevant portion of interim order reads as follows :

"There will be an order of status quo till the next date of hearing as the issue involved in this Writ Petition is regarding the jurisdictional issue of applicability of copyright Act or the Telecom Regulatory Authority of India Act, 1997."

6 This interim order of status quo was carried to Supreme Court by TRAI by way of S.L.P.(C)Nos.562-563 of 2017. After hearing both sides, the above said Special Leave Petitions were disposed off by the Hon'ble Supreme Court of India by a common order dated 03.03.2017. We deem it necessary to extract the relevant portions of the said order of Hon'ble Supreme Court of India and the same are as follows :

"As prayed by the learned Additional Solicitor General, we permit that the finalized Regulations be notified in the official Gazette. We have been told that a minimum of 30 days period is available after the date of Notification thereof, to give effect to certain provisions of the same.

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We make it clear that once the Regulations are notified, and if any party is aggrieved with any of

the clauses contained therein, they are at liberty to agitate/challenge the same before the appropriate forum.

Liberty is granted to the respondents to raise all grievances before the High Court, including praying for a stay of giving effect to the aforesaid regulation.

Liberty is also granted to the respondents to take necessary steps either to amend the Writ Petition or file a fresh Writ Petition, as may be advised to them.

The Special Leave Petitions are disposed of on the above terms."

7 Pursuant to the aforesaid order of the Hon'ble Supreme Court of India, TRAI notified the regulations and tariff order on the same day, i.e., on 3.3.2017. The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 is hereinafter referred to as "Interconnect regulations" for brevity and The Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 is hereinafter referred to as "Tariff Order", for brevity.

8 Thereafter, the prayer in the writ petitions were amended by the writ petitioners, assailing 6 clauses (Clauses 2(h), 2(j), 2(mm), 2(pp), 3 and 7) in the Interconnect regulations and 5 clauses (Clauses 2(f), 2(h), 2(zg), 2(zh) and 3) in the Tariff Order.

9 Respondents 1 to 3 are collectively referred to as 'Union of India / Central Government' for convenience and clarity. Respondent No.4 as already set out supra is referred to as "TRAI" for brevity, convenience and clarity.

10 Under the above circumstances, the writ petitioners argued for an interim stay in the above said interim stay petitions before us elaborately.

11 Pivotal submissions of the writ petitioners are that the interconnect regulations and tariff order, as made by TRAI, are outside the scope of its regulation making power and tariff order making power. In other words, the writ petitioners would contend that the interconnect regulations and tariff order are invalid as they are ultra vires the parent Act / parent statute, under which they have been made. It is also the contention of the writ petitioners that their contracts with the Multi-System Operators (hereinafter referred to as "MSO" for brevity) are entirely in the realm of the Copyright Act, 1957 (as amended and as obtaining now) and therefore, the TRAI Act or TRAI cannot step in. To put it differently, writ petitioners contend that TRAI can regulate carriage but not content. This is broadly on the merits of the main

matter and we do not delve more into it at this stage as interim stay applications were argued. All these points raised before us by petitioners are kept open and can be agitated by the petitioners when the main writ petitions are heard by us.

12 Per contra, Union of India / Central Government and TRAI, which made submissions in more or less similar lines would submit that only some clauses of the interconnect regulations and tariff order have been challenged and in any case the interconnect regulations and tariff order are well within the regulation making power and tariff order making powers of TRAI. They would also submit that with regard to the arrangement between the writ petitioners (who are into programming service and are broadcasters) and the MSOs, being in the realm of the Copyright Act and there being a overlap between Copyright Act and TRAI Act, the same is not only unfounded, but also untenable. Qua at least one of the petitioners as they had already admitted the position that TRAI does have powers to regulate dehors the Copyright Act, in their earlier round of litigation in the Delhi High Court vide *Star India P. Ltd. Vs. The Telecom Regulatory Authority of India and others* [146 (2008) DLT 455], in which the Hon'ble Supreme Court of India refused to interfere, TRAI would also plead *res judicata*.

13 As above submissions are touching upon the merits of the main matter, we do not delve into it now and we express no opinion or view on the same at this stage. We also reserve the rights and rival contentions of parties *supra* to be agitated, heard and decided in the main writ petitions, as we are now disposing off only the stay petitions, as agreed to by all counsel.

14 With regard to the stay petitions, the petitioners would urge that the notified interconnect regulations and tariff order would get activated / implemented on 02.05.2017 and once they get activated / implemented, the situation will become irreversible and therefore, there should be an order of interim stay. It is also the further case of the writ petitioners that the date of getting activated / implemented was earlier postponed by 30 days in this very proceedings by TRAI.

15 In the light of the above, we deem it necessary to say that we have noticed some dates. Interconnect regulations and tariff order were notified by TRAI on 03.03.2017, pursuant to the permission granted by Hon'ble Supreme Court of India on 03.03.2017, earlier in the day. While so notifying, in the tariff order vide clause 1(3)(b), it was made clear that Clauses 3, 6 and 8 of the tariff order shall come into force after 30 days from the date of publication of the tariff order in the official gazette. Vide a letter dated 28.03.2017, TRAI stated that clause 3 of the said tariff order shall come into force after 60 days from the date of publication of the tariff order in the official gazette instead of 30 days as stipulated in clause 1(3)(b) of the tariff order. It was further clarified by TRAI that publication in official gazette shall be made before 02.04.2017 and therefore, clause 3 shall come into force from 02.05.2017. Accordingly, publication in the

Government gazette was made on 30.03.2017. These dates are undisputed. It is on this basis that it is contended that the implementation of the tariff order would commence on 02.05.2017. This is also not in dispute.

16 These submissions were made by Mr.P.S.Raman, learned Senior Counsel, leading the counsel on record for the petitioner in W.M.P.No.10620 of 2017 in W.P.No.44127 of 2016 and Mr.Sai Krishna Rajagopal, learned counsel for the petitioner in W.M.P.No.10619 of 2017 in W.P.No.44126 of 2016. It was reiterated by Senior Advocate Mr.Gopal Jain, leading counsel on record for petitioners in both the writ petitions in his plea qua interim arrangement. He submitted that court has powers to mould relief and make a workable arrangement.

17 Opposing the plea for interim stay vehemently, the learned Additional Solicitor General Mr.G.Rajagopalan, appearing for the Union of India / Central Government, heavily relies upon the earlier order of the Hon'ble Supreme Court of India dated 03.03.2017, portions of which have been extracted supra. The learned Additional Solicitor General submits that when the Supreme Court says permitted to "notify", it is not without meaning. The learned Additional Solicitor General would also submit that when the Supreme Court directed the interconnect regulations and tariff order to be notified, it is with a meaning. He would also go on to assert that the Hon'ble Supreme Court was fully conscious of the consequences of it being notified. Further the provision made in the order of Supreme Court of India to amend the prayer or to file a new writ petition (post writ petition) and ask for interim stay should only be understood as making provision for a situation for grant of interim stay, if ground situation changes (for reasons other than being notified and its consequences) drastically warranting an interim order. It is his further assertion that the ground situation has not changed.

18 The learned Additional Solicitor General also referred to the object of TRAI Act and would submit that the interconnect regulations, tariff order and its notification (pursuant to Supreme Court's permission order) are all in larger public interest keeping in mind the viewers and therefore, it would cause harm to larger public interest if stay is granted.

19 Mr.P.Wilson, learned Senior Counsel appearing for TRAI would submit that such a scheme of things qua broadcasting and cable services is in vogue from 2004 and this is nothing new. He would further submit that the earlier postponement of 30 days was done owing to the request from the stakeholders and not by way of an interim arrangement in the writ petitions. It was merely recorded by this Court is his say. Mr.P.Wilson, learned Senior Counsel, would further go on to submit that on 02.05.2017, every broadcaster shall publish on its website a Reference Interconnect Offer (RIO) for providing signals of all its pay channels. This is as per Regulation 7(1). He would also point out that the said requirement to publish RIO was there even in the earlier regime. He

then took us to the time line for implementation. He would submit that after declaration of RIO by broadcasters, a distributor who wishes to enter into a new interconnection agreement can make a request and the broadcasters (writ petitioners herein) have time of another 30 days from the date of receipt of request to sign the agreement. Assuming the request is made on 02.05.2017, they will have time till 01.06.2017. It is is say that the time line does not end there. Even though agreement has to be signed on 01.06.2017, the commercial operation / transactions under the agreement can start only from 01.09.2017.

20 Besides all the above, we also notice that an entity, which goes by the name "All India Digital Cable Federation" has been permitted to intervene in these proceedings by an order of this Court dated 22.2.2017. We are informed that this entity has under its wings about 10 MSOs operating pan India. This entity also opposes the prayer for interim stay and supports Union of India / Central Government and TRAI.

21 We are also informed that there are more than 1000 other MSOs, but we notice that no one has chosen to come before this Court and support the plea for stay.

22 The other entity, namely, Indian Broadcasters Federation, which we are told has under its wings over 50 broadcasters, has also been permitted to intervene. Though this entity would support the plea for stay, we are informed that many broadcasters, who are said to be under its wings, are now in favour of the impugned interconnect regulations and tariff order.

23 Considering all the above said facts and circumstances, we are of the view that the petitioners have not made out a strong and prima facie case for interim stay. The principle of "presumption is in favour of validity" operates against the petitioners who have chosen to challenge some clauses in the interconnect regulations and tariff order. The writ petitioners, in our opinion, have, prima facie, not been able to show that an exception has to be made in this case. We have also kept in mind the larger public good plea made by the learned Additional Solicitor General as well as the earlier order of the Hon'ble Supreme Court, directing this to be notified. We are also taking into account the fact that the petitioners have not been able to show that the situation that prevailed on 03.03.2017 (date when the Supreme Court passed the above order permitting to notify) and the one that prevails today has changed so drastically that it warrants a stay post notification on 03.03.2017.

24 We, therefore, fix the main writ petitions for final hearing on 12.06.2017. Enforcement and/or implementation of Clause 3 of Tariff order on 02.05.2017 and all other consequences of such implementation / enforcement shall abide by the outcome of the main writ petitions.

Both Writ Miscellaneous Petitions are disposed off,

accordingly.

-sd/-
28/04/2017

/ TRUE COPY /

Sub Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 DEPARTMENT OF INDUSTRIAL
POLICY & PROMOTION, MINISTRY OF
COMMERCE AND INDUSTRY, UDYOG BHAWAN,
NEW DELHI 110 011

2 THE SECRETARY,
DEPARTMENT OF TELECOMMUNICATIONS, MINISTRY
OF COMMUNICATIONS, SSANCHAR BHAWAN, ASHOKA
ROAD, NEW DELHI 110 001

3 THE SECRETARY,
MINISTRY OF INFORMATION & BROADCASTING,
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ROAD), NEW DELHI 110 002

C.C. to M/S.P.WILSON Advocate, SR.No.6261.

+2 C.C. to M/S.RAHUL BALAJI Advocate SR.No.6259.

C.C. to M/S.R.SENTHILKUMAR Advocate, SR.No.6260.

Order

in

WMP.Nos.10619 & 10620 of 2017

and WP.Nos.44126 & 44127 of 2016

Date :28/04/2017

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KP(28.04.2017) (IT)