

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

Judgment reserved on: 28.05.2018

Judgment pronounced on: 30.5.2018

+ W.P.(C) No.5861/2018

**ASIANET SATELLITE
COMMUNICATION PVT. LTD.**

..... Petitioner

Through: Mr. Jayant Bhushan, Sr. Advocate
with Mr. Jayant Mehta, Ms. Ayushi
Gaur, Mr. Vinod Shankar, Mr. Atul
Vinod and Ms. Amrita Cheema,
Advocates.

versus

STAR INDIA PVT. LTD.

..... Respondent

Through: Mr. P. Chidambaram and Mr. Amit
Sibal, Sr. Advocates with Mr. Kunal
Tandon, Mr. Shiddharth Chopra, Mr.
Shashank Shekher, Ms. Niti Jain, Mr.
Prateek Jain, Ms. Sneha Jain, Mr.
Ranjeet Singh, Mr. Aditya Swarup,
Mr. Ambar Bhushan and Mr. Vinay
Tripathi, Advocates.

+ W.P.(C) 5863/2018

ASIANET DIGITAL NETWORKS PVT LTD & ANR.Petitioners

Through: Mr. Jayant Bhushan, Sr. Advocate
with Mr. Jayant Mehta, Ms. Ayushi
Gaur, Mr. Vinod Shankar, Mr. Atul
Vinod and Ms. Amrita Cheema,
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Shashank Shekher, Ms. Niti Jain, Mr.

Prateek Jain, Ms. Sneha Jain, Mr. Ranjeet Singh, Mr. Aditya Swarup, Mr. Ambar Bhushan and Mr. Vinay Tripathi, Advocates.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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RAJIV SHAKDHER, J. (ORAL)

CAVEAT No.522/2018 in W.P.(C) No.5861/2018

CAVEAT No.523/2018 in W.P.(C) No.5863/2018

1. Since, appearance has been put in on behalf of the Caveator, the same is discharged.

C.M. APPL. No.22819/2018 IN W.P.(C) No.5861/2018

C.M. APPL. No.22825/2018 IN W.P.(C) No.5863/2018

2. Allowed, subject to all just exceptions.

W.P.(C) No.5861/2018 & C.M. APPL. No.22818/2018

W.P.(C) No.5863/2018 & C.M. APPL. No.22824/2018

3. This writ petition is directed against the interim order dated 23.05.2018, passed by the Telecom Disputes Settlement and Appellate Tribunal (hereafter referred to as 'Tribunal').

4. By virtue of the impugned order, two applications M. A.No.128/2018 and 127/2018, filed in Broadcasting Petitions No.150/2018 and 173/2018, preferred by the petitioners were have been disposed of.

5. The petitioners have approached this Court for the second time. In the first instance, the petitioners had filed writ petitions challenging the order dated 18.04.2018, passed by the Tribunal.

6. These writ petitions were numbered as W.P.(C) Nos.4408/2018 and 4409/2018. The said writ petitions were disposed of vide order dated 16.05.2018. The rationale which propelled this Court to set aside the earlier order of the Tribunal dated 18.04.2018, was that the order did not set out the reasons for rejecting the interim prayers made by the petitioners.

6.1 In the impugned order, though, broadly, the following reasons have been set forth:

(i) First, that the agreement between the contesting parties came to an end on 31.03.2018. Since, no agreement could be arrived at between them, respondent no.1, i.e. Star India Pvt. Ltd. (in short 'Star') was entitled to stop the transmission of signals under the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (in short '2012 Regulations').

(ii) Second, the petitioner, itself, had filed a broadcasting petition seeking an order for arriving at an agreement, albeit, on RIO basis w.e.f. 01.04.2018.

(iii) Third, in order to prevent injury to the parties, which includes the petitioners herein, the Tribunal generally grants time to the parties to arrive at either a negotiated agreement or the statutory right to

exercise the option of entering into a RIO based agreement. In the interregnum, continued transmission of signals to a MSO stands protected by interim order passed by the Tribunal. Such orders have regularly been passed by the Tribunal after replacement of the earlier regime (i.e. the analog regime) with the new regime i.e., Digital Addressable System (in short 'DAS').

(iv) Fourth, since the enunciation of the DAS regime, many MSOs have preferred petitions seeking RIO based agreement.

(v) Fifth, Cost Per Subscriber (CPS) is not comparable if one MSO enters into a negotiated agreement while, the other MSO has, in his favour, a RIO based agreement. The negotiated agreement is imbued with many variable factors.

(vi) Sixth, the petitioner in the past had preferred petitions, whereby, challenge was laid to the RIO terms offered by Star. These petitions were numbered as: B.P. No.95/2017 and 229/2017. B.P. No.229/2017 was, ultimately, withdrawn on 19.07.2017, pending its disposal, an interim order dated 31.05.2017, was passed which contained a similar direction, which is, that an interconnect agreement should be signed by the parties based on published RIO terms.

(vii) Seventh, parties should, pending disposal of the main petition,

comply with the regulatory regime. It would, thus, be difficult to hold, pending adjudication of the main dispute, that the RIO terms offered by Star were bad in law.

(viii) Eighth, under the 2012 Regulations, the RIO terms offered by the Broadcaster can be challenged before the Telecom Regulatory Authority of India (TRAI). The petitioner has not filed any complaint with TRAI, on this score. So far as parity, equality and non-discrimination are concerned, these issues can easily be decided if the terms of RIO offered, are under challenge.

(ix) Ninth, when, parity with negotiated agreement executed between a Broadcaster and a MSO is claimed by another MSO, a thorough examination of all relevant factors is necessary before it can be held that they are similarly situate and deserve an identical deal. In the instant case the petitioner has claimed parity with KCCL. KCCL has a right of re-transmission of signals received from Star only *vis-a-vis* the State of Kerala, whereas, the petitioner exercises such right qua four (4) States. The petitioner, thus, has a potential for growth, and therefore, in a negotiated agreement, which stipulates a fixed fee, Star would be precluded from claiming a higher consideration even if there is significant growth in the business of the

petitioner. Thus, at this stage, this issue cannot be held to be in favour of the petitioner.

(x) Tenth, the Tribunal, in the larger interest of business, allows parties time to arrive at an agreement, hoping that, ultimately, market forces will instil good sense in the warring parties. However, at the interim stage, looking at the time involved, it would be difficult for the Tribunal to negotiate or mediate between the parties so as to arrive at a negotiated agreement based on fixed fee. Only in exceptional cases where the disparity is writ at large, that such an exercise is possible. The present case is not a case of that nature. In the instant case, the Tribunal, is unable to negotiate an agreement based on fixed fee between the parties, pending the conclusion of the main dispute. Therefore, there is no option, nor is there any *prima facie* case made out to hold that the petitioner is entitled to receive signals from Star without an agreement. The only option available to the petitioner is to enter into a RIO based agreement, which would be subject to the final outcome of the writ petition.

7. Based on the aforesaid broad findings, the Tribunal granted seven (7) days time to the petitioner, commencing from the date of the order to exercise either of the two options i.e., to enter into a negotiated agreement

or to execute an agreement with Star based on published RIO terms.

7.1 I am informed that the main petition stands fixed for hearing on 18.7.2018.

8. It is in this background that arguments were advanced by Mr. Jayant Bhushan, learned senior counsel, appearing on behalf of the petitioners, while on behalf of Star, submissions were made by Mr. Chidambaram and Mr. Amit Sibal, Senior Advocates.

9. Mr. Bhushan, broadly, reiterated his submissions which he had made in the first round, which is that there is a huge disparity between the fixed fee paid by KCCL and the petitioners. It was stated that KCCL, with the subscriber base of 29,43,028, was paying a fee of Rs.1.8 crores per month while, the petitioners were being called upon to pay a fee of Rs.2.5 crores against a subscriber base of 14,38,302. According to Mr. Bhushan, the petitioners, under the agreement with Star which expired on 31.03.2018, were paying a fixed fee of Rs.1.7 crores with the subscriber base pegged at 14,17,815. Therefore, Mr. Bhushan contended that the CPS in case of KCCL, would work out to Rs.6.12, whereas, the CPS in case of the petitioner comes to a figure of Rs.11.99. Mr. Bhushan also submitted that if the RIO terms as published by Star are taken into account, and if the subscribers were to opt for all channels, then, the outgo would be a sum of

Rs.138 crores, which would work out on CPS basis to a sum of Rs.962.09.

10. The sum and substance of Mr. Bhushan's argument was that since Star had monopoly, it was driving the price that a MSO would have to pay which includes the petitioners herein.

10.1 Learned counsel, thus, submitted that the Tribunal had failed to address itself to the vital issue, which was, that the fixed fee terms offered by Star to KCCL as against that which was offered to the petitioners was clearly discriminatory. Learned counsel further submitted that Star had, in fact, refused to disclose the terms which were contained in its agreement arrived at with KCCL.

10.2 Insofar as the RIO terms published by Star were concerned, Mr. Bhushan said that they were hugely burdensome and, even if the petitioners were to take into account the maximum discount which was permissible under the said terms and, other ameliorative factors, the RIO value would work out to Rs.156.64 per subscriber. In support of his submission, Mr. Bhushan relied upon the following orders passed by the Tribunal: -

- (i) Order dated 07.12.2015, passed in Petition No.295(c) of 2014, titled: *M/s. Noida Software Technology Park Ltd. vs. Media Pro Enterprise India Pvt. Ltd.*
- (ii) Order dated 25.09.2014, passed in Petition No.47(c) of 2014,

titled: *Star Sports India Pvt. Ltd. vs. Hathway Cable & Datacom Ltd.*

(iii) Order dated 26.02.2016, passed in C.A. no.1446/2016, titled: *Star India Pvt. Ltd. vs. Noida Software Technology Park Ltd. & Ors.*

(iv) Order dated 03.03.2016, passed in Petition No.39(c) of 2004, titled: *Star India Pvt. Ltd. vs. Asianet Satellite Communications Pvt. Ltd.*

(v) Order dated 30.03.2007, passed in Petition No.39(c) of 2004, titled: *Star India Pvt. Ltd. vs. Asianet Satellite Communications Pvt. Ltd.*

11. On the other hand, Mr. Chidambaram and Mr. Sibal submitted that a sea change had been brought about with the introduction of the DAS regime. It was contended by Mr. Chidambaram that the RIO did not operate like a bilateral agreement, that is, a negotiated agreement arrived at between the parties. According to the learned counsel, a RIO based agreement was not the same as a negotiated agreement. It was Mr. Chidambaram's contention that risk averse MSOs would, ordinarily, enter into a RIO based agreement; and if such a situation obtained, the Broadcaster (i.e., Star in this case) would not get any payment till the subscriber exercises his option as to the number of channels he/she would want to view. On the other hand, according to Mr. Chidambaram, if a bilateral agreement/ a negotiated

agreement is opted for by a MSO, who does not mind taking a risk, and such MSO backs his belief that he would, in due course, be able to enrol more and more subscribers and therefore, as the subscribers increase the CPS would fall—a circumstance which would benefit the MSO.

12. Learned senior counsel also made it a point to say that the judgments which Mr. Bhushan had relied upon were, those, which were rendered when the Analog System was in vogue. Learned senior counsel says that the judgment passed by the Tribunal, in the matter of: *Noida Software Technology Park Ltd.*, only directed that the RIO terms framed by the Broadcaster should be such that they are non-discriminatory. In this context, it was submitted by Mr. Chidambaram that the RIO terms published by Star are: non-discriminatory, offers bouquets, as well as, discounts.

12.1 Furthermore, learned senior counsel stressed upon the fact that Star's RIO terms had been in public domain, since, May 2016.

12.2 It was also emphasised that the petitioners herein had filed petitions challenging Star's RIO terms, which were later withdrawn.

12.3 In support of his submission that the RIO terms were not burdensome, Mr. Chidambaram adverted to the fact that 72 MSOs had signed RIO based agreements with Star.

12.4 Learned counsel also contended that the petitioners were in arrears

with regard to demands raised by Star. According to the learned counsel, a sum of Rs.5.73 crores was due and payable to Star, since, January 2018.

13. Mr. Bhushan in rejoinder, reiterated his submissions and, in fact, brought to fore, the aspect that the RIO terms had been challenged before the Tribunal as against TRAI, which, according to him, was permissible. It was further stated that Star, itself, had taken the position that it reserved the right to recover the outstanding amount. For this purpose, my attention was drawn to paragraph 15 at page 318 of the paper-book.

14. Having heard learned counsel for the parties and perused the record in some detail, in my view, the Tribunal has given some broad reasons as to why at this, interim stage, it can only grant a leeway to the petitioners to either arrive at a negotiated settlement with Star within the prescribed period of seven (7) days or in the alternative, give them the option of executing a RIO based agreement with Star - if it wishes to retain the facility of receiving signals from Star, subject to the final adjudication of the dispute pending before it.

14.1 The Tribunal, as is apparent, has exercised its discretion *qua* the matter in issue, and therefore, for me to supplant its view with mine merely because I may have had a different view had the matter come before me in the first instance would not be appropriate. To my mind, unless the Court,

while exercising its powers under Article 226 of the Constitution, comes to a conclusion that the *protem* arrangement is wholly perverse and that no reasonable man would come to the conclusion which the Tribunal has reached, it should, ordinarily, refrain from interfering with interlocutory orders so that proceedings before the Tribunals can conclude unimpeded. This is, especially so, if the purported monetary loss caused to the aggrieved party is retrievable.

14.2 In the first round, I had set aside the order of the Tribunal for the reason that there were no substantial reasons discernible from the order. As indicated, at the very outset, this time around, the Tribunal has given, broadly, its mind as to why it has reached the conclusion which it has in the impugned order.

14.3 While I must confess that Mr. Bhushan may have a point that the aspect of discrimination, emanating from the difference in the fixed fee between KCCL and the petitioners needs examination; the stage, for the same, in my view, has not arrived as yet.

14.4 The Tribunal may have to examine, closely, at the relevant stage, factors which propelled Star to offer a lower fixed fee to KCCL as compared to the petitioners, especially, in the context of the contention advanced by the petitioners that 88% of its subscribers are situate in Kerala,

and that, its presence in the other States is nominal.

14.5 Furthermore, the submission of Mr. Bhushan that the RIO based terms as they obtain today are burdensome, is also, an aspect which the Tribunal may have to rule upon, when, it finally decides the dispute between the contesting parties.

15. Since, Star, undoubtedly, in the given market segment, holds a monopolistic position, there is a need for the Tribunal to decide such like disputes with expedition as any delay could completely debilitate the MSO, in the short-term—though, it may be able to recoup its losses if it finally succeeds in the matter.

16. I must, thus, indicate that it may be appropriate, in the fitness of things, that Star considers disclosing its terms of engagement with KCCL, to establish its *bona fide*. I am informed that an application in that behalf has been moved by the petitioner, which is pending adjudication before the Tribunal.

16.1 Therefore, for the moment, I need not comment on this aspect any further, leaving it for the Tribunal to rule on this plea.

17. Thus, in view of the foregoing, I am not inclined to interfere with the impugned order passed by the Tribunal. The writ petition is, accordingly, dismissed.

18. The Tribunal is requested, in the given circumstances, to endeavour to complete the final adjudication at the earliest.

**RAJIV SHAKDHER
(JUDGE)**

MAY 30, 2018
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