

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 14.02.2019

+ **W.P.(C) 5377/2016 and CM Nos. 22424/2016, 24097/2016, 25986/2016, 41287/2016 & 21958/2017**

UJJWAL JAIN & ORS.

..... Petitioners

Versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Pradeep Dhingra, Mr Mohit Nandwani,
Mr Nishant Kumar, Ms Hitendra and Mr
Praveen Kumar

For the Respondents: Mrs Bharathi Raju, CGSC for R-1/UOI.
Mr Rajeev Sharma, Advocate for R-2 & 3.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition, *inter alia*, challenging the "Slot Sale Policy" (hereafter 'the said policy'), as announced by respondent no. 2 (Prasar Bharti), by a request for proposal (RFP) issued on 23.05.2016. Further, the petitioners pray that directions be issued to respondent no. 2 to not give effect to the said policy.

2. The petitioners are producers of television content. The petitioners contend that the Prasar Bharti's decision to adopt the said

policy is arbitrary and discriminatory *qua* the petitioners, inasmuch as, it is aimed at eliminating the competition in the market to favour larger production houses. The petitioners claim that the eligibility criteria as stipulated under the said policy, excludes all small production houses from participating and adversely affects their livelihood.

3. Prasar Bharti disputes the above. It contends that the said policy is neither arbitrary nor capricious and, therefore, not amenable to judicial review under Article 226 of the Constitution of India. The respondents submit that the eligibility criteria as set out under the said policy is to maintain and increase the quality of telecast content, and not to act against a producer, whether big or small.

Factual Background

4. The petitioners submit that respondent no. 3 (Doordarshan) has been following various policies for the commissioning and airing of programmes. Between 1980 and 2005, it worked through “Sponsored Programmes”, whereby the producers would make a programme, pay respondent no.3 a telecast fee and would recover their expenses by selling the Free Commercial Time (FCT) as allocated by respondent no. 3. Thereafter, in 2005, respondent no. 3 introduced the “Self-Financing Commissioning” (SFC) scheme, wherein respondent no. 3 would acquire programmes from the producers and market such programmes. Under the said policy, producers would be given the production cost after a period of 90

days. In 2013-2014, this policy was replaced by two schemes, the “Revenue Share Scheme” and the “Advertisement Funded Programme”. Under the Revenue Share Scheme, producers would submit a proposal along with a pilot episode, for respondent no. 3’s approval. Respondent no. 3 would then market the programme and share the revenue with the producer after deducting a pre-determined opportunity cost. Under the “Advertisement Funded Programme”, the producer would submit a pilot episode along with a proposal. The producer was expected to meet his costs by marketing the allocated FCT.

5. On 11.11.2014, respondent no. 3 invited proposals under the SFC scheme for its prime time and mid time telecast slots, whereby the producer would produce the programme at his own risk, and if selected by respondent no. 3, the latter would market and telecast the programme. And, pay the producer after a period of 90 days. All rights stemming from the produced programme would vest with respondent no. 3. As per the said scheme, the producer was required to submit a pilot episode along with a demand draft of ₹25,000/- as processing fee. In terms of the said guidelines, respondent no. 3 would refund the processing fees if a programme was returned to its producer.

6. The petitioners submit that sometime in April 2015, respondent no. 3 indicated that the proposals received under the SFC scheme till 15.04.2015, would be processed between 28.04.2015 and

25.05.2015. Thereafter, the Evaluation Committee allegedly evaluated about 179 proposals, and approved 30 programmes.

7. On 17.11.2015, respondent no. 3 issued a letter proscribing its facilitation counter from accepting any SFC proposals with effect from 20.11.2015. The petitioners allege that between 15.04.2015 and 20.11.2015, around 154 proposals had already been received by respondent no. 3, and were pending evaluation. The petitioners' proposals under the SFC policy form a part of the said proposals as presented to respondent no. 3. According to the petitioners, each proposal costs the producer approximately ₹8 Lacs to ₹10 Lacs in addition to the processing fee (that is, ₹25,000/-). However, these costs as alleged by the petitioners are disputed by the respondents.

8. The petitioners submit before this Court that even after the expiry of 13-14 months from the date of submission of their proposals under the SFC policy, they have not received any information from the respondents regarding the status of evaluation. The petitioners contend that this delay is causing them, *inter alia*, immense pecuniary loss. Aggrieved, the petitioners herein filed a Writ Petition (***W.P. (C) 2615 of 2016*** captioned ***Ujjwal Jain &Ors. v. Union of India &Ors.***) before the co-ordinate bench of this Court. The Court disposed of the said petition by an order dated 23.03.2016, with directions to respondent no. 2 herein to disclose reasons for the non-evaluation of the petitioners' proposals within a period of three weeks. However, the petitioners contend that the order dated 23.03.2016 was not complied with by the respondents.

9. Thereafter, the petitioners submit that the respondents devised a new policy being the “Slot Sale Policy” for prime time slots, that is, the same viewership slots for which the petitioners had submitted their proposals. Under this policy, the producer would be responsible for making the programme and was to recover its costs by selling the allocated FCT.

10. The respondents submit that by a letter dated 26.05.2016, they had informed the petitioners that since the SFC proposals, as submitted by the petitioners, were no longer required in light of the said policy being introduced, and the petitioners’ proposals were no longer processed by respondent no. 3.

11. The petitioners submit that on 08.11.2016 (vide Diary No. 288389), the respondents introduced a new policy called the “New Content Acquisition Scheme”. Allegedly, the petitioners contend that the New Content Acquisition Scheme was materially similar to the Slot Sale Policy and was only slightly modified. However, the new policy modified the eligibility criteria for proposals thereunder. Under the New Content Acquisition Scheme, only those producers who fulfill the eligibility criteria as set out in Clause 8 of the Scheme would be permitted to bid for the slots. Clause 8 of the said scheme is reproduced hereunder:-

“8. ELIGIBILITY CRITERIA

a. The Production House should be an Indian entity (individual proprietorship, partnership, company, society, trust etc.

Incorporated/registered/recognized, as the case may be, under the respective applicable laws and in existence for the last 3 financial years.

b. The Production House must have produced, for any Broadcaster(s), at least 200 hours of general entertainment programming (including Feature Films) in any Indian language that has been telecast in the last three calendar years. Applicants for weekend slots in the genres of Reality, Game, Quiz should have produced 100 hours of such content that has been telecast in the last three calendar years.

c. It should have in regard to TV and Film production a turnover of at least Rs. 3 crores per annum in each of the last three financial years.

d. The Production House should not be a defaulter in payment of dues to DD at the time of submission of the bid.

e. Consortium will not be allowed in any form.

f. A blacklisting order passed by the Central Govt/State Govts/any PSU should not be in operation against a bidder at the time of the submission of the qualification bid”

12. The petitioners submit that the criteria as set out above tends to favour only a few producers, and are detrimental to smaller producers.

13. Aggrieved by the same, the petitioners have filed the present petition.

Submissions

14. Mr Dhingra, learned counsel appearing for the petitioners had advanced arguments, essentially, on three fronts. First, he submitted that it was not open for Prasar Bharati to avoid evaluating those proposals which had been accepted. He submitted that the petitioners had spent a considerable amount of time, effort, and money for submission of the said proposals and it was, thus, incumbent upon Prasar Bharati to evaluate the same. He further contended that the said proposals could not be returned without evaluation, once Prasar Bharati had accepted the fee for the same.

15. Second, he contended that the Policies now adopted by Prasar Bharati, namely, the Slot Sale Policy and the New Content Acquisition Scheme were arbitrary, unreasonable and had been designed to favour only a few large producers. He submitted that these policies are violative of Article 19(1)(g) of the Constitution of India, as small producers who do not fulfill the eligibility criteria, namely, 200 hours of general entertainment and a turnover of ₹3 crores per year, would be rendered without any means of carrying on their business.

16. Lastly, he contended that these policies had been tailor-made to favour Balaji Telefilms Ltd., which is one of the large production houses. He submitted that the son-in-law of one of the Board Members of Prasar Bharati was the CEO of Balaji Telefilms Ltd. and the decision to entertain the bids of Balaji Telefilms Ltd., is biased.

He also submitted that Balaji Telefilms Ltd. was a defaulter and, thus, could not have participated for acquiring any slot under the Slot Sale Scheme. However, to overcome the same, Prasar Bharati had agreed to waive several crores of dues against certain software produced by Balaji Telefilms Ltd.

Reasons and Discussion

17. The first and foremost issue to be addressed is whether the petitioners have any vested right for evaluation of their proposals submitted to the respondents, under the SFC Scheme. In this regard, it is relevant to refer to Clause 47 of the Guidelines for the SFC Scheme which is set out below:-

“L. General

47. Depending on its need and at its discretion, DD reserves the right to process a commissioning proposal or return the same without processing. When a programme is returned without processing, the processing fees will be refunded in full.”

18. It is relevant to mention that the terms of the SFC Scheme are not under challenge. The petitioners have not impugned Clause 47 of the said Guidelines. Thus, indisputably, Prasar Bharati would have the right to return a programme without processing the same.

19. The contention, that Prasar Bharati would have no right to return a proposal without evaluating the same once it has accepted

the fee, is unmerited. Clause 47 of the Guidelines for the SFC Policy clearly indicates that Prasar Bharati reserves its right to return the proposal without processing and, further, stipulated that in such cases, the processing fee would be refunded in full. The question of refund of processing fee would arise only once the fee is accepted and the demand drafts are encashed.

20. The next question to be addressed is with regard to the challenge to the Slot Sale Policy and the New Content Acquisition Scheme. At the outset, it is necessary to bear in mind that the scope of judicial review regarding a policy is very limited. It is not open for the Court to evaluate the merits of the policy. Interference in these proceedings would be warranted only if it is established that the policy is totally arbitrary or capricious and falls foul of Article 14 of the Constitution of India.

21. In *Census Commissioner & Ors. v. R. Krishnamurthy: (2015) 2 SCC 796*, the Supreme Court held as under:

“33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the court is not expected to sit as an appellate authority on an opinion.”

22. In the case of *Villianur Iyarkkai Padukappu Maiyam v. Union of India: (2009) 7 SCC 561*, it was held as under:

“169. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a Petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.”

23. In *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India: (1992) 2 SCC 343*, the Supreme Court was observed as under:-

“31. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the Courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.”

24. In *Essar Steel Ltd. v. Union of India and Anr.: (2016) 11 SCC 1*, it was held as under:

“49. A perusal of the above mentioned judgments of this Court would show that this Court should exercise great caution and restraint when confronted with matters related to the policy regarding commercial matters of the country. Executive policies are usually enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or malafide manner, or that it offends the provisions of the Constitution of India.”

25. In the present case, Prasar Bharati has taken a decision to bring in a change in the policy, and instead of acquiring programs from producers on payment of money, it had decided to sell slots to established production houses. This is a paradigm shift in the policy whereby, Prasar Bharati would instead of incurring expenses and earning revenue, would be generating revenue by auctioning slots. The task of making programs and marketing the same to various advertisers would be left to the production houses.

26. It is Prasar Bharti's case that the said policy was adopted as it was suffering losses, and the quality of programmes was very poor. This is contested by the petitioners, who contend that Prasar Bharati was generating revenue under the SFC Scheme. It is not necessary for this Court to examine the aforesaid controversy in any detail. The decision as to how the affairs of Prasar Bharati are to be managed rests with its management. The merit of the policy adopted by Prasar Bharati for conducting its affairs is, plainly, beyond the scope of judicial review under Article 226 of the Constitution of India. The

question as to which policy is better cannot be a matter of judicial review. It is not open for this Court to examine the wisdom of adopting one policy or the other.

27. As observed above, interference with policy decisions would be warranted only if it is found that the policy is totally arbitrary, unreasonable, capricious or falls foul of any provision of law. In the present case, it is contended that the Slot Sale Policy and the New Content Acquisition Scheme is violative of Article 19(1)(g) of the Constitution of India and, the said scheme is *mala fide* for favouring few large production houses. The aforesaid contention is also unmerited.

28. The right of the petitioners to carry on their business is not impinged in any manner. It is clearly not their fundamental right to ensure that their programs are purchased by Prasar Bharati. There are large numbers of channels that are now available, and there is no right of the petitioners to insist that Prasar Bharati conducts its business in the manner so that it procures programs from them.

29. The contention that the said policy is tailor-made to favour any particular production house is also unmerited. The said policy (Slot Sale Scheme), as initially adopted, provided for an eligibility criteria where only companies which had been in existence for three years, had a track record of 300 hours of telecast programs, and a turnover of ₹5 crores, were eligible.

30. The said eligibility criteria was subsequently relaxed to broaden the participation base. In order to fulfill the revised eligibility criteria, the production houses were required to have only 200 hours of general entertainment telecasted programmes and a turnover of ₹3 crores per annum. There is no material to establish that the said criteria was tailor-made for any particular production house and excluded all other production houses.

31. In view of the above, the contention that the Slot Sale Policy or the New Content Acquisition Scheme was faulted, cannot be accepted.

32. The contention, that the decision of the Board of Prasar Bharati is flawed on account of inclusion of one of the members whose son-in-law is an employee of Balaji Telefilms Ltd., is also unmerited. It is affirmed on behalf of Prasar Bharati that the said member had disclosed that his son-in-law was employed in Balaji Telefilms Ltd. and had further recused from participating in any decision relating to Balaji Telefilms Ltd. Thus, the grievance of the petitioners in this regard is also unjustified.

33. The petitioners had also made a grievance that Prasar Bharati had waived the amounts owed to Balaji Telefilms Ltd. in order to facilitate its bid pursuant to the Slot Sale Policy. In this regard, Prasar Bharati has clarified that Balaji Telefilms Ltd. owed a sum of ₹7,57,20,114/- which included a sum of ₹2,01,07,579/- as principal and ₹5,76,12,535/- as interest. Balaji Telefilms Ltd. had discharged

its liability towards the principal amount in two installments which were paid on 22.11.2012 and 04.04.2013. It had offered to discharge its liability towards interest by providing programs in Kannada, Telugu and Malayalam at the rate of ₹25,000 per Episode. The aforesaid proposal was accepted by the Director General on 10.08.2013. This was much prior to Prasar Bharati adopting the Slot Sale Policy which is impugned in the present petition. Further, Prasar Bharati had also affirmed that it felt that the purchase of certain software content at the rate of ₹25,000/- per episode was beneficial for Prasar Bharati, as it would fetch greater revenues than the acquisition cost and would also assist Prasar Bharati to sustain its 24-hour channels. There is no reason for this Court to doubt the *bona fides* of the aforesaid decision. Clearly, the allegation that the said decision (which was taken on 10.08.2013) was to facilitate Balaji Telefilms Ltd.'s bid, almost three years later, cannot be accepted.

34. In view of the above, this Court finds no merit in the present petition. The same is, accordingly, dismissed. The pending applications also stand disposed of. It is, however, clarified that Prasar Bharati would return the fees collected from the producers whose proposal is not being evaluated in terms of Clause 47 of the Guidelines for the SFC Scheme.

VIBHU BAKHRU, J

FEBRUARY 14, 2019/RK/pkv