TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 16 December 2010

Petition No. 407(C) of 2010
And
Petition No. 410(C) of 2010
And
Petition No. 416 (C) of 2010

Zee Turner Ltd. & Anr. .....Petitioner

Vs.

M/s. Prasar Bharti Ltd. .....Respondent

And

Seven Star Satellite Pvt. Ltd. .....Petitioner

Vs.

Prasar Bharati ..... Respondent

Enter 10 Television Pvt. Ltd. Vs. .... Petitioner

Versus

Prasar Bharati Vs. .... Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G.D. GAIHA, MEMBER

HON'BLE MR. P.K. RASTOGI, MEMBER

For Petitioners : Mr. Maninder Singh, Sr. Advocate

Mr. Navin Chawla, Advocate
Ms. Pratihiba M. Singh, Advocate
Mr. Tejveer Singh Bhatia, Advocate
Mr. Sharath Sampath, Advocate
Mr. Vadivelu Deendayalan, Advocate

For Respondent : Mr. Vikrant Yadav, Advocate
Mr. Shiv Mangal Sharma, Advocate
Mr. Rajeev Sharma, Advocate

J U D G E M E N T

S. B. Sinha

The petitioners herein in both the petitions are broadcasters. The respondent is also a broadcaster and successor in interest of the Government of India's broadcasting services being 'Doordarshan' having been constituted in terms of a Parliamentary legislation, known as the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 ('The said Act').

'The said Act' was enacted to provide for the establishment of a Broadcasting Corporation for India, to define its composition, functions and powers and to provide for matters connected therewith or incidental thereto.

Section 3 of 'the said Act' provides for the establishment and composition of Corporation. It lays down different provisions in regard to the appointment, tenure and removal of the authorities mentioned therein.

Section 12 of the said Act provides for the functions and powers of the Corporation, the principal ones being to organize and conduct public broadcasting service to inform, educate and entertain the public and to ensure a balanced development on broadcasting on radio and television. One of the functions which the respondent is required to discharge is to provide adequate coverage to the diverse cultures and languages of various regions of the country by broadcasting appropriate programme. Some others are:

> "providing comprehensive broadcast coverage through the choice of appropriate technology and the best utilisation of the broadcast frequencies available and ensuring high quality reception"

The said provisions are in addition to and not in derogation of the provisions of the Indian Telegraph Act, 1885.

Indisputably, the broadcasting activities are conducted by the respondent on two fronts, i.e.

1. by broadcasting its own products; and
2. by leasing out its DTH platforms to various broadcasters.

The respondent for the aforementioned purpose uses five transponders.

The capacity of the said transponders is in slight controversy, in so far as, whereas according to the petitioner, the private broadcasters having similar equipments on MPEG 2 platform can broadcast about 15 to 17 channels on each transponder, indisputably the respondent broadcasts only 10 channels each from two of its transponders and 13 from the three others.

The petitioners herein had been granted leases on payment of a fee; the amounts fixed therefor were different for different period ranging from Rs.25 lakhs per annum to Rs.80 lakhs per annum in the current year.

Zee Turner has three channels wherefor it entered into three different agreements with the respondent, known as ETC Music, Zee Smile and Zee Jagaran.

It contends that the genres of the said channels are unique and they are very popular amongst the viewers.

Seven Star Satellite similarly broadcast a channel known as 'Care World'. All of them have entered agreements with the respondent which expire on different dates in 2010.

Enter 10 Television Pvt. Ltd. had entered into an agreement with the respondent for the period 24.12.2009 to 23.12.2010. It runs a channel in the name of Enter 10.

It is not in dispute that M/s. Total Telefilms Pvt. Ltd., Zee Turner and Enter10 Television Pvt. Ltd. filed three different petitions before this Tribunal interalia questioning the action of the respondent terminating broadcasting of their channels from its Direct to Home (DTH) platform in the year 2007.

Various contentions were raised therein by the respondent Prasar Bharati; one of them being that this Tribunal has no jurisdiction to determine the issue in as much as it is not a broadcaster within the meaning of the said term as contained

under the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (The Regulations) inter alia on the premise that it had been constituted under a Parliamentary Act.

Various acts of omissions and commissions on the part of the respondent herein were also alleged, some of which have been repeated in these matters.

We may deal therewith a little later.

We may, however, notice that whereas the petition of M/s. Total Telefilm was dismissed, others were allowed.

Indisputably, the respondent has preferred an appeal before the Supreme Court of India against the said judgement of this Tribunal but therein they did not press for passing any order of stay.

We would principally notice the factual matrix of the matter from the case of Zee Turner.

Broadcasting of the aforementioned channels of Zee Turner started in the year 2007 wherefor they entered into an agreement for the year 2007-2008. In view of the order passed by this Tribunal in the aforementioned cases, the respondents continued to broadcast for the years 2008-2009. The agreement was renewed for the year 2009-10. They were valid up to November, 2010 (of course there are different dates in relation thereto).

Keeping in view the decision of this Tribunal in Total Telefilm (Supra), the respondent herein sought to terminate the agreement of the respondent. For the said purpose a 'Core Group' was constituted. The said core group met on 20th October, 2010. It took into consideration the matter not only relating to renewal of the existing channels but also the vacancies which are likely to arise till January, 2011 so as to accommodate new channels.

The core group considered the question relating to renewal/non-renewal of those channels which were completing their term in January, 2011, being:-

1. Music India,
2. Care World,
3. ETC Music,
4. Time TV,
5. Zee Jagran,
6. Zee Smile,
7. Enter10 and
8. Total TV.

The relevant portions of the recitals of the said minutes of meeting read as under :-

"1. List of channels which are completing their term till Jan., 2011 was reviewed. Based on the various considerations, it was decided that following channels may be removed from DD Platform on completion of their present term.

i. Music India

ii. Care World
iii. ETC Music
iv. TimeTV
v. Zee Jagran
vi. ' Zee Smile
vii. Enter 10
viii. Total TV

Further necessary action to remove these channels as per contract agreement and as per appropriate procedure in consultation with a competent lawyer may be taken by Doordarshan immediately.

Paragraph 2 of the said minutes of meeting reads as under :-

"2. It was observed that as of now there is one vacancy in the bouquet. After discussion it was decided to bring following channels on DTH platform.

1. India News
2. Pragya"

No decision however, was taken by the 'Core Group' in respect of four new channels namely;

a. Imagine Showbiz,

b. Day & Night,

c. Khoj India &

d. Live India"

Relying on or on the basis of the said purported decision of the 'Core Group', not only a notice in terms of Regulation 4.1 of the Regulation had been issued but also public notices were published in two newspapers on or about 21.11.2010. So far as

Zee Turner is concerned, one of them reads as under :-

> *"This is to inform all the viewers of ETC Music Channel on DD Direct + that the agreement dated 28.12.2009 (entered into) between Prasar Bharati and Zee Turner Limited, 2nd Floor, Plot No. 9, Sector 16-A, Film City, Noida – 201301, Uttar Pradesh. Tel. No. 0120-6766466, Fax : 0120-6766465. Company in terms whereof the channel is being carried on DD Direct+ is expiring on 27.11.2010. The channel will be discontinued from DD Direct+ w.e.f. 28.11.2010. This notice is issued by Prasar Bharati in public interest in compliance of the provisions of the Telecommuniocation (Broadcasting and Cable Services) Interconnection Regulation 2004, as amended."*

Zee Turner protested thereagainst by its letter dated 24th November, 2009, stating :-

> *"In continuation of our letters dated 25.08.2010, 25.10.2010, 22.11.2010, the representative of our company Shri Raghvinder Singh, Assistant Vice President, had met your goodself on 22.11.2010 in your office.*
>
> *A cheque for Rs. 80 lakhs and a cheque for Rs. 8,06,000 towards applicable service tax for the continuation of our channel, namely, Zee Smile alongwith the original copy of agreement duly notarized on the stamp paper was submitted.*
>
> *Your goodself had informed him that the increase in charges is w.e.f. 1.11.2010 and on that basis we would be required to pay an amount of Rs. 2,90,411/- along with an amount of Rs. 29,912.33 payable towards service tax for the period from 1.11.2010 to 23.12.2010. You further informed our above mentioned representative that let the above mentioned amount of Rs. 2,90,411/- along with a cheque for Rs. 29,912.33 payable towards service tax towards the increase for the existing arrangement and the cheque for Rs. 80 lakhs for the next year has already been furnished by our company to Prasar Bharati through post.*
>
> *Further, as represented by your goodself, please also find enclosed herewith a cheque for an amount of Rs. 2,90,411/- bearing number 009204 drawn on BNP Paribas, Barakhamba Road, New Delhi, along with a cheque for Rs. 29,912.33 bearing number 009208 drawn on BNP Paribas, Barakhamba Road, New Delhi payable towards service tax for the period from 1.11.2010 till 23.12.2010. You are requested to kindly formalize the arrangement for the continuation of 'Zee Smile' on DD Direct+ till 23.12.2011."*

We may, however, notice certain events which had taken place in the mean while. Zee Turner in terms of the renewal clause contained in the agreement expressed its willingness for renewal of the existing agreement by its letter dated 3rd August, 2009. Others also did.

It is not much in dispute that for the purpose of entering into a fresh agreement, certain formalities are required to be complied with; the principal formality was to collect a format of the agreement from the respondent, get it typed on a stamp paper and hand over the same to the respondent. We may notice that for the purpose of obtaining renewal of the term, the channel concerned is required to convey its intention for extension at least 90 days before the expiry of the agreement.

We are not concerned with the terms and conditions thereof.

The petitioners issued three letters for three channels for the aforementioned purpose. We may notice a sample copy thereof that is for ETC-Music for which the prayer for renewal was made by the petitioner by its letter dated 25th August, 2010. As no response was received, a reminder was sent on or about 25th October, 2010. A notice purported to be in terms of Clause 4.1 of the Regulations being dated 29.10.2010 was received by the petitioner on 13.11.2010.

The petitioners herein questioning the aforementioned notice as also the public notice have filed the present petition.

So far as the case of Seven Star Satellite is concerned, it is relevant to notice that the respondent had taken off the said channel from its DTH platform w.e.f. 9.11.2010 and the said slot was allotted to another broadcaster 'Pragya'.

Keeping in view the fact that Shri Maninder Singh, the learned senior counsel appearing on behalf of the Zee Turner and Shri Navin Chavla, the learned counsel appearing on behalf of the Seven Star had pointed out several discrepancies in dates in various documents of the respondent, Mr. Rajiv Kumar, the Deputy Director (Programmes), DTH, made a statement before us on oath, stating that :

i) In terms of the decisions of the Core Committee the first channel to be offloaded was Music India and was replaced by India News.

ii) Subsequently, when the 2nd vacancy fell at the expiry of the contract of the Care World, it was replaced by 'Pragya Channel' on 15th November, 2010.

A statement was made by Shri Rajeev Kumar that on 20th October, 2010 there was no vacancy and 'India News' replaced Music India on or about 22nd October, 2010.

He however, could not give the date as to when Music India was disconnected, as the original record was not with him.

Relevant records have, however, been produced before us. We do not find the same to be of much relevance for our present purpose.

Mr. Maninder Singh, the learned senior counsel appearing on behalf of the petitioners, urged :-

1. From a perusal of the earlier judgment of this Tribunal in Total Television, it would appear that similar contentions had been raised by the respondent but the same were rejected.

2. As renewal of the agreements was to be made on certain principles and policy decisions; the respondent being a 'State' within the meaning of Article 12 of the Constitution of India and as in the instant case the Core Group did not lay down any policy far less any objective criteria as to on what basis renewals of agreements would be refused/granted, the impugned notices are liable to be set aside.

3. The petitioner having not only expressed its intention to get the agreements renewed, it having been invited to get the formatted agreement typed, pay the amount of consideration which has been enhanced from Rs.60,00,000 to Rs.80,00,000 per annum as also paid the balance amount, the impugned action could not have been taken in a manner in which it was sought to be done namely Mr. Rajiv Kumar asking the officers to the petitioner to handover the amount as also the agreement to the officers at the first instance, then asking him to meet Mr. Prem Singh who was found absent from the office and when the same were sent by Speed Post, refusing to accept the same.

4. The respondent having made inconsistent and contradictory statements in the reply itself with regard to the tender of the said document as also Demand Drafts, its action must be deprecated.

5. The contention of the respondent that the impugned orders have been passed on the basis of a policy decision adopted by the Core Group must be held to be wholly illegal in as much as :-

i. By reason of the impugned order no policy decision was laid down

ii. It does not show as to which factors have been taken into consideration being relevant for the purpose of rejecting the applications for renewal of the agreement.

iii. No criteria far less any objective criteria has been laid down.

iv. No reason far less any sufficient or cogent reason has been assigned.

v. The action on the part of the respondent and particular on 'the core group' must be held to be arbitrary as also malafide both on facts as also in law.

vi. The respondent being a 'State' within the meaning of Article 12 of the Constitution of India could not have discriminated between the channels of the petitioners vis-à-vis the other channel for the purpose of continuing to launch them from its DTH platform as in relation to the action of the respondent, the provisions of Article 14 of the Constitution of India would be attracted even in relation to enforcement of contract.

vii. The action of the respondent must be held to be wholly illegal as M/s. Total Television who had lost its case before this Tribunal was allowed to continue and it would further appear that the new channels had been brought in, which have hardly any popularity and the genres of the said channels was not the same as those of the petitioners.

viii. The capacity of each of the a transponders of the respondent being 15 to 17 channels on MPEG-2 technology, it is difficult to comprehend as to why it had been broadcasting only 10 channels from its two transponders and 13 channels from three transponders totaling 59 channels,

although for all practical purposes it could have carried at least 65 to 75 channels on its 5 transponders and thus accommodated the channels of the petitioner.

ix. One of the HD channels of the respondent having been withdrawn, there is absolutely no reason as to why 4 slots available to the respondent could not have been utilized as a result whereof the respondent, a public sector undertaking could have earned a huge revenue.

Mr. Navin Chawla, the learned counsel appearing on behalf of the Seven Star Satellite Pvt. Ltd., would contend :-

(a) The contentions raised by the respondent are not borne out from its records.

(b) The channel 'Pragya' being not a health care channel, it was incorrect to contend that the petitioner's channel could be substituted by Pragya.

(c) The minutes of meeting of the core committee having not been annexed with the reply, it must be held that the respondent took recourse to suppresio-veri and suggestio-falsi.

(d) From the records produced before this Tribunal, it would be evident that the contents of the reply are not correct.

(e) Issuance of notice in terms of Clause 4.1 of the Regulations and publication of public notice in terms of Clause 4.3 thereof being imperative in character, the respondent committed a serious illegality in so far as it disconnected the channel of the petitioners in violation thereof.

Mr. Dhingra, the learned counsel appearing on behalf of the respondent, in the matter of 'Zee Turner' and 'Seven Satellite' on the other hand, urged :-

(i) The petitioners herein have no legal right to obtain renewal of the agreements;

(ii) The petitioner did not comply with the other legal requirements thereof;

(iii) The DTH Core Group having taken a policy decision, this Tribunal should not interfere therewith;

(iv) Renewal of the agreements having been refused on sufficient and cogent reasons, no case has been made out for interference with the impugned orders.

(v) Clause 8.1 of the Regulations being attracted and the agreements having not been renewed, the petitioners were entitled to notices only under Clause 4.3 of the Regulations and not Clause 4.2 thereof.

(vi) In terms of Clause 4.3 of the Regulations, no reason was necessary to be assigned and in any event sufficient and cogent reasons having been assigned in the notices issued under clause 4.2 issued to the petitioners by way of abundant caution, no further reason was necessary to be assigned.

(vii) Notices under Clause 4.3 of the Regulations being not meant for the operators but for the public in general, the petitioners cannot raise any grievance in relation thereto.

(viii) In the event of non-service of notice under Clause 4.3 and/or any irregularity in relation thereto, the petitioners may only be entitled to damages, if at all.

Mr. Rajeev Sharma, appearing in the matter of 'Enter 10', submitted :-

(i) Clause 3.2 of the Regulations does not provide for a 'must carry' provision;

(ii) The TRP rating of the petitioner was very low and, thus, it was not entitled to renewal of its agreement;

(iii) The petitioners do not have any legal right to obtain renewal of an agreement from the respondent to carry the said channel;

(iv) Even in terms of Clause 4.2 of the Regulations, the petitioner may have a right of notice but not in respect of a 'must carry' clause.

The respondent has been constituted under The Prasar Bharti (Broadcasting Corporation of India) Act, 1990.

At the outset, we must notice that a lot of discrepancies have been shown to be existing between the records of the case produced before us and the statements made in the reply filed by the respondent and/or the statement of Shri Rajib Kumar. It is also evident that the annexures of the replies to the petitions do not tally with each other.

Even there have been certain omissions in the annexures in one of the replies vis-à-vis the other.

It is really a matter of regret that the minutes of meeting of the Core Group dated 20.10.2010, on the basis whereof the impugned orders have been passed as also the relevant entries made in the note sheet relating to the issuance of public notice was not annexed to the reply of Seven Star Satellite Pvt. Ltd. differ. We fail to understand the attitude of the respondent in this behalf.

The DTH Core Group met on 20.10.2010 under the chairmanship of CEO, Prasar Bharti.

The other members, who were present in the said meeting, were (i) DG, Door Darshan; (ii) E-in-C, Door Darshan; (iii) DDG (RV); (iv) OSD (T); (v) OSD (DM); and (vi) Director (Tech).

No agenda item in regard to the said meeting dated 20.10.2010 had been annexed to the reply nor any could be found from the relevant records.

From paragraph 1 of the said minutes of meeting, it would appear that although the decision of the Core Group was said to have taken on the basis of a policy decision, evidently no such policy decision was in place.

It is said to have been based on various considerations, which has not been clearly spelt out. Why only some of the channels were removed from DD Platform has not been explained. It has also not been shown as to why despite the fact that a large number of channels i.e. 36 channels were being aired on DTH Platform and a large number of them would have completed their term by January 2011, only 8 of them were picked up; 3 of them being belonging to one group.

It has been pointed out before us that one of the channels, namely Total TV, evidently had been allowed to continue despite the decision of this Tribunal in the case of Total TV (Supra).

It furthermore appears that some of the channels were allowed to continue, although they were defaulters.

The Core Group opined that some follow up actions were to be taken; one of them being holding consultations with a competent lawyer. The procedures for terminating the agreements were required to be complied with. Keeping in view the

decision of this Tribunal in Total TV (Supra), the legal advice should have been taken or a direction to comply with the provisions of the Regulations should have been issued.

By a notice dated 22.8.2010, the petitioner Seven Star Satellite requested the respondent for continuance of its channel and undertook to enter into an agreement.

Although on 29.10.2010, a fax was received that the Core Committee had decided to discontinue with the channels of the Seven Star, the same was to be treated as a notice under Clause 4.1 of the Regulations, but despite the fact that the period of 21 days did not expire, the channel in question was disconnected on 09.11.2010.

It immediately protested thereagainst stating :

"At the outset we intend to inform you and place on record that our channel "CARE WORD" has been removed from Your DTH platform today i:e. 09/11/2010 without waiting for 21 days as specified by you in your aforesaid Notice, it is pertinent to mention over here that not a single day have been given to us from the date of receipt of said notice under reply.

That by removing/closing the said channel from your DTH platform without abiding the statutory provision under section 4.1 of Telecommunication (Broadcasting and Cable Services) Regulation Act 2004 is illegal as such you requested to restore the said channel with immediate effect

With reference to paper notice as contemplated under Section 4.3 of Telecommunication (Broadcasting and Cable Services) as well as specified by you in said notice under reply, we have not seen any notice in any ·newspaper till date as such if published please furnish the details of the same.

Without prejudice to aforesaid contention and in response to said Notice we would like to inform you that we had, already communicated our intention for renewal. of the agreement in respect to DTH facility well in advance by our letter dated 22nd August 2010 as well as our executive officer have regularly approached your office' seeking the Order for payment of License fees, but was always informed that same would be communicated in due course and suddenly to our utmost surprise we have received your said Notice under reply."

You are aware that we are the only health & Wellness channel in the segment of Health Care Industry even thereafter our said channel was not considered ; the DTH Core Group Committee is shocking, its seems this factor is not considered by the said core group committee or where not aware of the genre of the channel."

No opportunity, therefor, was given to it to approach this Tribunal before such disconnection was caused. It also does not appear from the records that its request for renewal of the agreement has been placed before the Core Committee. From the records it appears that a note in the file was put for publication of the notice, although in the reply, a statement has been made that the request in this behalf had already been made on 29.10.2010.

Seven Star again requested the respondent to continue its channel on its DD+ platform.

Without complying with the legal provisions in the matter of disconnection of the petitioner's channel, an agreement had been entered into with 'Pragya' which is a 'religious channel and not a 'health channel' like the petitioner on 15.11.2010. There is nothing on record to show as to how and in what manner 'Pragya' was brought in and when a valid agreement, upon completion of the formalities, had been entered into.

The public notices were issued in two newspapers; one in Hindi and another in English. The versions in the two newspapers differ.

We may, however, notice the English version:

"DOORDARSHAN

Doordarshan Bhawan, Copernicus Marg, New Delhi – 110001

PUBLIC NOTICE

This is to inform all the viewers of Care World TV channel on DD Direct Plus that the agreement dated 6.11.2009 (entered into) between Prasar Bharti and Atul B. Shroff, CMD (Care World), Seven Star Satellite Pvt. Ltd., Hariom Chamber, 7th Floor, B-16, Veera Industrial Estate, Offlink Road, Andheri (West), Mumbai-400058. Telephone : +91-22-26733190/1/2/3. Fax : +91-22-26733189 Company in terms whereof Care World channel is being carried on, DD Direct Plus is expiring on 5.11.2009. The channel will be discontinued from DD Direct Plus with effect from 6.11.2010. This notice is issued by Prasar Bharti in public interest in compliance of the provisions of the Telecommunications (Broadcasting & Cable Services) Interconnection Regulations, 2004 as amended.

davp 22502//11/00007/1011"

However, from the version in the newspaper published in the vernacular 'Delhi Dainik Jagran', it would appear that on and from 5th and 6th November, 2010 the channel was not being exhibited on DD Direct Plus; whereas in the English News Paper it was stated :-

"The channel would be discontinued from DD Direct Plus with effect from 6.11.2010."

Why such differing versions were made, has not been explained.

It is neither in doubt nor in dispute that in terms of Clause 4.3 of the Regulations, the disconnection of the channel, if any, is to be caused on the expiry of 21 days from the date of publication of the notice in the newspapers or service of notice issued in terms of Clause 4.1 thereof, whichever is later.

The legal requirements, therefore, had not been complied with.

Mr. Rajiv Sharma has drawn our attention to a decision of this Tribunal in Tata Sky Vs. Zee Turner Ltd. – Petition No. 189 (C) of 2006 disposed of on 31.3.2007, to contend that the broadcasters were not entitled to a notice. Clause 4.2 of the Regulations was inserted in the year 2007 and, thus, the said decision cannot be said to have any application.

From the records, it appears that in the notice dated 29.10.2010 issued to the petitioners, it was stated that the termination be effected alternatively. No request has been received for renewal. We fail to understand as to how such an alternative can be taken as either request for renewal had been received or had not been received.

From paragraph 2 of the said minutes also it would appear that the Core Group was given to understand that there existed one vacancy.

A statement, however, has been made before us that 'Music India' channel was connected only after the 'Care World' channel was disconnected. Moreover, a statement has been made before us that the channel 'India News' has been substituted in place of 'Music India' and the channel 'Pragya' has been substituted in place of 'Care World'.

The genre of two channels are different. Before us, however, a contention is sought to be raised that 'Pragya' also is a health channel. The said statements made in the replies are apparently wrong. 'Pragya' channel is basically a one belonging to a religious/spiritual genre. Even in its application, which was filed on 02.6.20008, according to the Pragya TV itself under the heading 'particulars' it was stated that it is a channel for 'revival of rich cultural heritage'.

The petitioner has annexed with its rejoinder the website of the said channel, from a perusal whereof it appears that it undertakes only a programme for health known as "call for care" wherein some of the health issues are discussed including gynaelogical, skin related or dermatological, general health, different issues, psychological and spiritual queries.

In its reply, however, it is stated :-

> *"16. That the contentions taken in this paras are wrong and denied. It is submitted that the respondent issued notice on 29.10.2010 to the petitioner regarding the Channel Care World to disconnect the Channel w.e.f. 09.11.2010 as per the decision of the DTH Core Group Committee taken on 20.10.2010. The DTH Core Group Committee after considering the fact that there are more better channels with vide variety of contents awaiting placement on DD's DTH Platform. Thus the Care World has been replaced with another attractive health Channel namely Pragya from the wait list and public is not denied about the health education in any manner."*

The said statements are, therefore, apparently inconsistent with the records.

If, furthermore, a criteria was to be evolved with regard to suitability of certain channels on the DTH Platform, we do not understand as to on what base those 4 channels were selected out of 97 applicants.

We have noticed heretobefore that a lot of discrepancies in the annexures filed in two petitions have been pointed out. We, however, need not go into the same in details.

We must, however, notice that serial number 30 is missing in the case of Zee Turner whereas in one of the cases pertaining to 'India News' has been shown to have Haryana Sector besides Delhi and in the other, Chennai has also been mentioned.

We were although asked by the learned counsel to go into the said question, we do not feel it necessary so to do.

Moreover, the 'status' of DTH channel on the platform of the respondent as on 16.9.2010 would show that the channel 'Care World' is not there but 'Total TV' besides 'Pragya TV' was there, the later having started from 15.11.2010. It may further be placed on record that although a few channels including 'Shakti TV' and 'Shradha TV' were also to be taken into consideration by the Core Group as their terms had also expired on 22.10.2010, no reason was assigned as to why apart from them, various others also, whose terms were to expire in January 2011, had been left out.

We may now consider paragraph 5 of the said minutes of meeting. It appears that on the aforementioned basis only, the petitioners were informed about the increase in the rate. Mr. Chawla, however, would urge that even the list of the channels would show that payments have not been received from various channels including Kalaigner, Amrita TV, Total TV, B4 TV etc., to contend that even defaulters have been continuing and those who paid their charges, have been discontinued.

We cannot go into the aforementioned question, as such a contention had not been raised in the petition.

For the self same reason, we are also not in a position to take one view or the other as to whether the respondent can be said to be correct in not utilising its transponders to its fullest capacity being not necessary to do so.

We may, however, place on record that from the respective dates of applications as also genre of the channels, it is difficult for us to arrive at a conclusion as to whether any objective criteria had been laid down or not,

We may at this stage notice certain factual aspects relating to the first petition. The prevailing agreement of ETC Music expired on 27.11.2010 and those of Zee Jagran and Zee smile were to expire on 22.12.2010. Notices to these channels have been given under clause 4.2. Public notices were issued on 21.11.2010.

It is in the aforementioned backdrop of events we have also to consider as to whether the contention of Mr. Dhingra that in a case where Regulations would apply, what are the requirements to be complied with by the respondent who had been broadcasting the channels of the petitioners from its DTH platform.

Keeping in view the decisions of this tribunal in Total TV (Supra) there cannot be any doubt or dispute and in fact no such contention has been raised by Mr. Dhingra that the provisions of the Regulations will have no application. In fact, Mr. Dhingra submitted that Clause 8.1 of the Regulations shall apply.

If renewal has to be claimed as a matter of right keeping in view the fact that the Regulations provide therefor, there cannot be any doubt or dispute that the same were to be complied with in letter and spirit. Regulation 8.1 provide for two basic requirements.

1. The process of negotiation should start at least two months before the due date of expiry of the existing agreement.
2. Actual negotiations should ensue.

The proviso appended to the said regulations state that if the negotiations for removal continue beyond the due date of expiry till a new agreement is reached, or for the next three months from the date of expiry thereof whichever is earlier, the old conditions shall continue. However new commercial terms have become applicable from the date of expiry of the original agreement.

The second proviso appended thereto postulates that in case no mutually acceptable settlement is arrived at, the commercial terms of the original agreement shall apply till the signals are disconnected upon issuance of three weeks' notice in the manner specified in Clause 4.3. Issuance of notice under Clause 4.3 of the Regulations, despite expiry of the agreement, is imperative in character.

We are not in a position to agree with the submission of Mr. Naveen Chawla that despite the expiry of the agreement, the broadcasters will be entitled to a notice under Clause 4.2. The second part of Clause 4.3 provide for a procedure only and not of a right.

In this case however, the petitioners have expressed their willingness to obtain renewal of the agreement. The petitioners in Petition No. 407 of 2010 were asked to comply with certain terms. According to them, they had complied with all

the formalities and in fact, they had also deposited the amount. The respondents however failed and/or neglected to enter into any negotiation. We are not entering into the question as to whether a statutory corporation like the respondent is required to enter into negotiations as an ordinary DTH operator is required to do with a broadcaster, being not necessary.

We were asked that Clause 3.2 of the Regulations may not provide for 'must carry' clause. But, as noticed heretobefore, Mr. Dhingra himself suggested that Clause 8.1 of the Regulations shall apply. If that be so, the said clause will apply on its own force and not in all situations. It must be read with Clause 3.2.

The Regulations may not lay down consequence of violation of Clause 4.2 and 4.3, but then they having been made it mandatory, same must be given effect to. Suffice it to point out that such provisions, if not directory in nature, only in some given cases this Tribunal may not grant a relief of restoration of signal and/or continuation of signal on proper terms; but even such a exceptional case has also not been made out. Mr. Dhingra himself suggests that in case of violation of a regulation, an order of injunction may be passed. It may, therefore, be passed also in mandatory terms.

The respondent is a statutory Corporation having been enacted in terms of a Parliamentary Act.

It has to function keeping in view the purpose, for which it had been created. The statutory Corporation, it is beyond any controversy, keeping in view the decision of the Supreme Court of India in a large number of cases including Ramanna Dayaram Shetty v. International Airport Authority of India reported in (1979) 3 SCC 489 would be a 'State' within the meaning of Article 12 of the Constitution of India.

It is contended that even a Statutory Corporation may wear two hats, one for its dealings in public law domain and another in private law domain. Even in its private law domain including the contractual matters, it is required to comply with the 'Equality Clause' enshrined in Article 14 of the Constitution of India, except in a case where the terms for enforcement arise out of a contract, qua contract. It must perform its duties in terms of its functions as a 'State'. Similar objections taken by the respondent in Total TV has been negatived in para 72 of the judgment.

In Ramanna Dayaram Shetty (Supra) the Supreme Court of India stated the law, thus:

*"**20.** Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.*

***21.** This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well-settled as a result of the decisions of this Court in E.P. Royappa v. State of T.N., (1974) 4 SCC 3 reported in and Maneka Gandhi v. Union of India reported in (1978) 1 SCC 248 that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality.*

See also M/s. Dwarka Das Marfatia & Sons Vs. Board of Trustees of Port of Bombay 1989 Vol. 3 SCC page 293, para 23

Yet again in ***Mahabir Auto Stores v. Indian Oil Corpn.,*** *reported in* ***(1990) 3 SCC 752****, the law has been laid down in the following terms:*

> *"In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu, Maneka Gandhi v. Union of India, Ajay Hasia v. Khalid Mujib Sehravardi, R.D. Shetty v. International Airport Authority of India*[5] *and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."*

It may be true that in Assistant Excise Commissioner Vs. Issac Peter & Ors. Etc. Etc. 1994 (1) scale page 715 the Supreme Court of India observed that its decision in Mahabir Auto Store was rendered in the facts of that case. The same is not very material for our purpose.

To the same effect is the decision of the Supreme Court of India in Food Corpn. of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71 and New Horizons Ltd. v. Union of India, (1995) 1 SCC 478, Navjyoti Coop. Group Housing Society v. Union of India, (1992) 4 SCC 477 para 1516, National Buildings Construction Corpn. v. S. Raghunathan, (1998) 7 SCC 66.

In Global Energy Ltd. v. Central Electricity Regulatory Commission, reported in (2009) 15 SCC 570 it has been laid down :

"72. *The constitutive understanding of the aforementioned guarantees under the Fundamental Rights Chapter in the Constitution does not give rise to a mere rhetoric and symbolic value inhered by the polity but has to be reflected in minute functioning of all the three wings of State—executive, legislature and judiciary. When we talk of State action, the devil lies in the detail. The approach to writing of laws, rules, notifications, etc. has to showcase these concerns.*

73. *The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the context of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters.*

74. *A subjectively worded normative device also enables the agency to acquire rents. It determines the degree of accountability and responsiveness of officials and of political and judicial control of the bureaucracy. However, when the provision inherently perpetuates injustice in the award of licenses and brings uncertainty and arbitrariness it would be best to stop the Government in the tracks."*

Indisputably, even in the matter of allotment of Petrol Pumps, the Supreme Court in Common Cause Registered Society v. Union of India reported in AIR 1996 Supreme Court page 3538 held :

"Such a discretional power, which is capable of being exercised arbitrarily, is not permitted by Article 14 of the Constitution of India."

Radio Waive is public property, like the subterranean water or oil; the regulations whereof, would be in the hands of the Government. As to how they are to be distributed may be a matter of statute.

The air wave, being in the public domain and a Statutory Corporation having been constituted by the Parliament, it must sub-serve the common goods.

The right to air one's views is a fundamental right under Article 19(1)(a) of the Constitution of India. A right to carry business is also a fundamental right, subject to reasonable restrictions.

In Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, reported in (1995) 2 SCC 161, it was held :

"78. *There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed."*

When air waives and spectrum are scarce commodities, it is necessary to make best utilisation thereof. The respondents cannot refuse to do so only on the touch tone of contractual actions. For the said purpose, a well thought out policy decision was required to be laid down. Application of mind was imperative on the part of the appropriate authority. Sufficient or cogent reason was absolutely necessary to be assigned.

In Food Corpn. of India v. State of Punjab reported in (2001) 1 SCC 291, it was held :

"12. On a reading of the afore-quoted provisions, it is clear that while vesting the power in the committee to amend an assessment list, the legislature has taken care to specify the circumstances in and the grounds on which such amendment may be made; it has also laid down the manner in which such amendment or revision of the assessment list is to be made. Care has also been taken to comply with the principle of natural justice by making the provision for giving notice to the person who is likely to be affected by the proposed amendment giving him not less than a month's time to tender objection, if any, to the committee and allowing him an opportunity of being heard in support of the objections raised. Notice to the affected person mandated in the section is not an empty formality; it is meant for a purpose. A vague and unspecific notice will not provide reasonable opportunity to the notice to file objection meeting the reasons/grounds on which the amendment of the assessment list is proposed to be made. Such a notice cannot be taken to be complying with the statutory requirement."

Mr. Sharma, while relying upon a decision of Supreme Court of India in Jagdish Mandal Vs. State of Orissa and Others reported in 714 SCC page 517 wherein Ravindran, J. opined as under :

"Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial

functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out."

The said decision was rendered keeping in view the threshold consideration of tender and not when an agreement has already been entered into. The right of renewal is contained in the agreement itself subject, of-course, to fulfillment of certain conditions. The petitioners have accepted the conditions laid down before it. They have accepted the commercial terms. Therefore, cases have not been taken into consideration despite the fact that they had applied after 90 days from the date of expiry of their respective agreements.

In the aforementioned situation, the petitioners deserve serious consideration of their application for renewal at the hands of the respondent.

In M.P. Oil Extraction v. State of M.P. reported in (1997) 7 SCC 592, the Supreme Court of India opined :

"44. *The renewal clause in the impugned agreements executed in favour of the respondents does not also appear to be unjust or improper. Whether protection by way of supply of sal seeds under the terms of agreement requires to be continued for a further period, is a matter for decision by the State Government and unless such decision is patently arbitrary, interference by the Court is not called for. In the facts of the case, the decision of the State Government to extend the protection for further period cannot be held to be per se irrational, arbitrary or capricious warranting judicial review of such policy decision. Therefore, the High Court has rightly rejected the appellant's contention about the invalidity of the renewal clause. The appellants failed in earlier attempts to challenge the validity of the agreement including the renewal clause. The subsequent challenge of the renewal clause, therefore, should not be entertained unless it can be clearly demonstrated that the fact situation has undergone such changes that the discretion in the matter of renewal of agreement should not be exercised by the State. It has been rightly contended by Dr Singhvi that the respondents legitimately expect that the*

renewal clause should be given effect to in usual manner and according to past practice unless there is any special reason not to adhere to such practice. The doctrine of "legitimate expectation" has been judicially recognised by this Court in a number of decisions. The doctrine of "legitimate expectation" operates in the domain of public law and in an appropriate case, constitutes a substantive and enforceable right."

A contention has been raised in the reply that the petitioner Seven Star Satellite Pvt. Ltd. has approached this Tribunal belatedly in so far as it has filed petition on 29.11.2010 when the disconnection has been caused on 9.11.2010 and the channel has already been allotted to another broadcaster. Before dealing with the said question, we must notice that the agreement by and between the parties hereto entered in the year 2008-09 expired in September 2009. The petitioner had expressed its desire to continue with the channel although it was asked to deposit a sum of Rs.60 lacs plus Service Tax @ 10.3% for revival, by a letter dated 22.9.2009 but the same was said to be cancelled by a letter dated 01.10.2009.

However, as no communication was received, the petitioner made payments and complied with all the requirements. The agreement for year 2009-10 was executed on 19.8.2010, which was to expire on 05.11.2010. Within a few days i.e. on 22.8.2010, the petitioner has sought for its renewal.

The petitioner, therefore, cannot be said to be at fault in making representations that the disconnection of the channel having been effected without complying with the statutory requirements, the same ought to have been restored.

It does not lie in the mouth of the respondent now to contend that by its action, it would perpetuate the illegality. If it has chosen to act in undue haste, it must face the consequence thereof.

It, as a Public Sector Undertaking, cannot commit blatant illegality and then to contend that the same has become a fait accompli. Such a stand can be, subject to adjustment of equities, may be held to be permissible only in exceptional situation.

In Virender Gaur v. State of Haryana reported in (1995) 2 SCC 577, Ramaswamy, J. speaking for a Division Bench of the Supreme Court of India opined :

> **"**The declaration would be rendered illegal unless the prospective operation was given. A chaos would ensue. To obviate such a catastrophe, this Court had made the operation of the declaration prospective. That is not the situation in this case. It is seen that as soon as the appellants have become aware of the grant made in favour of PSS, they filed the writ petition. Instead of awaiting the decision on merits, PSS proceeded with the construction in post-haste and expended the money on the construction. They have deliberately chosen to take a risk. Therefore, we do not think that it would be a case to validate the actions deliberately chosen, as a premium, in not granting the necessary relief. It was open to the PSS to await the decision and then proceed with the construction. Since the writ petition was pending, it was not open to them to proceed with the construction and then to plead equity in their favour. Under these circumstances, we will not be justified in upholding the action of the State Government or the Municipality in allotting the land to PSS to the detriment of the people in the locality and in gross violation of the requirements of the Scheme."

It may be true that M/s. Pragya Channel is not a party to the proceeding but we do not think that it was necessary for the respondents to do so in the facts and circumstances of the case. The petitioners can be accommodated in the respondent's platform, one of the channels being vacant on the date of passing of the impugned order and as four channels have become available after one HD Feed has been withdrawn.

Even otherwise, it had decided to allot four more new channels in its slot.

Mr. Chawla has drawn our attention to a decision of this Tribunal in M/s. Shreya Broadcasting Pvt. Ltd. Vs. Helapuri Cable Vision Pvt. Ltd. – Petition No. 236 (c) of 2009 dated 01.12.2009, wherein it was held :

> *"In this case, in our opinion, Regulations 4.2 and 4.3 are attracted. It has not been denied or disputed before us by the learned counsel for the respondents that the statutory requirements contained in clauses 4.2 and 4.3 have not been complied with. The learned counsel however submits that the petitioner was communicated of the decision to disrupt retransmission of signals orally, which according to us does not meet the requirements of law. The contentions raised on behalf of the respondents, therefore, in our opinion, are liable to be rejected.*
>
> *As action on the part of the respondent in disconnecting or disrupting retransmission of signals of the aforementioned TV-5 channel is illegal, the petitioner is entitled to the reliefs prayed for herein."*

The question, which survives, is as to what relief can be given to the petitioners.

We, in exercise of our jurisdiction under Section 14 and 14-A of the Telecom Regulatory Authority of India Act, 1997, have wide jurisdiction. We have, however, not for various reasons and due to paucity of time, gone into the various contentions raised by the parties herein. We have chosen to decide these matters on broad principles.

We are, therefore, of the opinion that subject to passing of an order refusing to renew the licence and/or continue the same, interest of justice would be sub-served if the following directions are issued :

(i) The respondent at its highest level may take a policy decision with regard to the refusal of new channels and/or allotment thereof to the new applicants;

(ii) Appropriate authority of the respondent shall take the appropriate decision(s) in the case of the petitioner and others, who are similarly situated, in accordance with the law and in the light of the aforementioned policy decision only;

(iii) Till such time an appropriate order is passed, the petitioners shall be allowed to continue to broadcast the channel on payment of usual charges, as is payable by others and in case of a decision to refuse to renew their channel on proportionate basis;

(iv) The channel Seven Star Satellite must be restored within twenty four hours.

The respondents in the event take a decision to discontinue the said channels, it goes without say that the relevant provisions of the Regulations must be complied with.

These petitions are allowed to the aforementioned extent.

There shall be no order as to costs.

.....J
(S.B. Sinha)
Chairperson

.....
(G. D. Gaiha)
Member

.....

(P. K. Rastogi)
Member

Manoj/rkc