

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 2ND NOVEMBER 2012

Petition No.320 (C) of 2012

M/s. T.V. Vision Ltd., Mumbai ... Petitioner

Vs.

Tata Sky Ltd. ... Respondent

BEFORE:

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

For Petitioner : Mr. Shyam Divan, Sr. Advocate
Ms. Manali Singhal, Advocate
Mr. Santosh Sachin, Advocate
Mr. Amit Agarwal, Advocate
Mr. Nirman Sharma, Advocate

For Respondent : Mr. Maninder Singh, Sr. Advocate
Mr. Tejveer Singh Bhatia, Advocate
Mr. Upender Thakur, Advocate for
Mrs. Prathiba M. Singh, Advocate

J U D G E M E N T

Whether the Petitioner has any legal right to obtain a direction from this Tribunal directing the Respondent to carry its channel on DTH Platform is the short question which arises for consideration in this petition.

2. The Petitioner, a broadcaster, started production of a Music Channel known as 'Mastiii' in August 2010.

The Petitioner had been requesting the Respondent, which is a DTH Operator, to carry its channel on the DTH platform; the first of such request was made on 03.8.2010 in the following terms :-

"I haven't met you personally but would like to see you in a very near future.

I have met Mukund before launch of my channel Mastiii and had assured him that it will be on top in just its few weeks of its run and the result is in front of you. The attached article endorse the same.

Do you think that the esteemed viewers of Tata Sky should deprive from a popular channel like Mastiii?

I hope you will take the best decision in interest of your viewers.

Please let me know the convenient time to get to see you personally."

3. The Respondent replied the said request, stating as under :-

"As per our channel access policy we at Tata Sky take some time to include new channels on the platform because the capacity to cater to the diverse needs of subscribers across the country in various genres and regional languages is growing by the day and, therefore, needs careful consideration.

As discussed with you we have another big complaint (i.e. the limited satellite space), but are working on a satellite solution but not sure when we will have it up and running in full force.

As a consumer-centric service, while we are committed to provide our subscribers; the best spread of content, it is also in our interest to carry the maximum number of channels that might be commercially and technically viable. However, our limited satellite transponder capacity prevents us from carrying your channel at the moment.

I will be in touch with you and Manish and re-evaluate the carriage of Masti TV as soon as we get comfortable satellite bandwidth.”

4. The correspondences between the parties continued.

According to the Petitioner, it is at the top in the list of TAM rating and, thus, it's channel would be a very popular one of them, there is absolutely no reason as to why the Respondent did not carry on its channel on the DTH platform.

5. It has further been contended that although the Petitioner's request continued to remain pending, the Respondent herein had started carrying several other channels including two music channels.

6. The Respondent, however, in its reply would contend that a DTH operator for the purpose of carrying of the channel of a broadcaster is required to take into consideration various factors like genre, language, genre portfolio, balance regional channels, contractual commitments etc.

It is furthermore the case of the Respondent that in the Pan India market the DTH platform has to cater to, reliance placed by the Petitioner on the rating of its channel being selective need not be sole criteria for carrying out of its channel, particularly when it does not have any legal right.

7. The Respondent furthermore contends that UTV, StarZ is being carried upon removal of the channel 'Luminier' which was owned by UTV today in terms of an existing agreement. Similarly, signaling of 'Sony Mix' was put on the Respondent's platform after removal of 'Animax', which was being distributed by MSM Discovery.

8. 'Tarang', according to the Petitioner, is a regional channel and not in the same genre as that of the Petitioner.

The Respondent has already been carrying a channel of the Petitioner's group 'Mi Marathi' on its platform and, thus, the question of cartelization does not arise.

9. So far as the allegation of the Petitioner that it has also included in its platform 'Comedy Central' and 'Zee Salam' are concerned, which are not of the same genre.

10. The parties went to TRAI on the said issues.

Whereas the Petitioner did not examine any witness, the Respondent examined Ms. Nicola Bamford.

We may notice some of the statements in her cross examination :-

“Q.16: Is there any written Board Resolution or policy document containing criteria for inclusion or non inclusion of channels on Tata Sky?”

A: To the best of my knowledge, there is no Board Resolution and also several internal documents discussing the criteria for inclusion on the Tata Sky platform.

Q.17: Do you regularly evaluate the available capacity to carry new channels?

A: Yes.

Q.18: Till date how much of the transponder capacity of Tata sky has been utilized?

A: 100%.

Vol.: There may be a very small amount that from time to time is unused which is likely to be less than the amount of band width for standard definition channel.

11. She furthermore stated :-

“Q.21: Are the factors inclined in your affidavit for consideration of including channels informed in advance to a content provider?”

A: No.

Vol.: But when a channel provider requests for its channel to be included on a Tata Sky platform, such factors are discussed.

Q.27: How do you determine that a music channel is metro centric?”

A: By evaluating the TAM ratings for the major metros as compared to TAM ratings on an All India basis and also the TAM ratings where available on a State by State basis excluding the major metros in that State.

Q.29: What is the limit for number of English movie channels, Hindi movie channels, Regional movie channels, Regional News channels, Sports channels, Cartoon channels that Tata sky has decided on?”

A: Tata Sky has a fixed amount of Band Width and seeks to optimize the balance of channels by genre and also by language within that constraint.

Q.31: I suggest to you that the respondent company is leaving no scope for new entries to gain access to the respondent’s DTH platform by allowing swapping of channels?”

A: Tata Sky believes in honoring contracts.

Q.34: Is it correct that you are not including the petitioner's channel Mastii due to Band Width constraints?

A: To date, Tata Sky has not included Mastii in its channel lineup due to portfolio balance considerations largely driven by Band Width constraints.

Q.35: I suggest to you that respondent is not having band width constraints and decision to take add a channel is taken arbitrarily?

A: By definition Tata Sky has a fixed amount of Band Width which acts as a constraint on its business. The decision to squeeze/add any channel to the lineup is taken carefully and after a thorough analysis of the needs of the platform in growing its subscriber base.

Q.37: Are top channels of all genre on your platform?

A: No.

Q.38: Top channels of which genre are not on your platform?

A: Life Style, Religious/Spiritual and Music. Further of the 15 regional languages carried on Tata sky, in 8 such cases, one or more of the top channels are not carried.

Q.39: Are you aware that the petitioner's channel Mastii is a free to air channel?

A: No, I am not aware but the question is irrelevant to the issue being discussed.

Q.40: Is Sony Mix a pay channel?

A: Yes.

Q.41: By not including the petitioner's channel Mastii, are you not acting against consumer's interest by adding channels like Sony Mix which are pay channels over free to air channels?

A: The structure of Tata Sky's consumer packages does not explicitly distinguish between pay and free to air channels.

Q.44: When was Animax channel removed from Tata Sky?

A: Animax channel was swapped with Sony Mix in the summer of 2011. I do not know the exact date."

Q.46: Can you tell us how long Sony Mix was distributed prior to it being added on your platform?

A: My recollection is that Sony Mix was a relatively new channel in the market prior to being added to Tata sky platform in place of Animax.

Q.47: How many channels were removed from Tata sky platform during the period 9.7.2010 to 30.10.2011 and how many channels were added during this period?

A: My recollection is that approx. 8 to 9 channels were removed and I do not know the exact number of channels that were added during this period.

Q.48: How many channels has Tata Sky added since October 2011 till date and how many channels have been removed?

A: Approx. 1 or 2 channels have been removed and approx. 17 channels have been added. I do not have for the record this cut of dates in my memory.

Q.49: Were Comedy Central and Zee Salam added in replacement of any other channel?

A: Comedy Central and Zee Salam were added after we found further ways to compress the number of channels on the platform.

Q.50: When were Comedy Central and Zee Salam added?

A: I do not have exact dates in my memory.

Q.51: Can you give us an approx. period when they were added?

A: They were added, I believe, in the beginning of 2012.

Q.52: When were 9X Tashan and Aditya channels added?

A: These channels were added in the last three months.

Q.53: Were these channels also added in replacement of any other channels?

A: No.

Q.56: I put it to you that during 9.7.2010 to 30.10.2011 only 9 channels were removed and 26 channels were added on the Tata Sky platform?

A: Those figures may well be correct but I do not have exact recall.”

12. The Petitioner based its case entirely on clause 7.6 of the licence.

It reads as under :-

“7.6 The Licensee shall provide access to various content providers/channels on a non-discriminatory basis.”

13. Mr. Shyam Diwan, the learned senior counsel appearing on behalf of the Petitioner, would contend that the Petitioner has a legal right to obtain a direction from this Tribunal upon the Respondent herein to carry its channel; although there is no provision of ‘Must Carry’ in the Regulations.

It was urged that as a licensee under the Union of India, the Respondent has a legal obligation to see that it does not commit any discrimination between the same genres of channels and in any event, it having included one music channel, it was necessary for the Respondent to clearly state its policy with regard thereto. Strong reliance in this behalf has been placed on Secretary, Ministry of Information & Broadcasting, Government of India & Ors. Vs. Cricket Association of Bengal and Others reported in (1995) 2 SCC 161, Common Cause Vs. Union of India and Others reported in (1996) 6 SCC 530 and Deepak Theatre, Dhuri Vs. State of Punjab and Others reported in (1992) Suppl. 1 SCC 684.

14. The learned counsel would contend that keeping in view the fact that the broadcasters are entitled to a level playing field vis-à-vis the other broadcasters, no discrimination can be caused by the DTH operator; level

playing field being a facet under Article 14, 19(1)(g) and 21 of the Constitution of India.

15. Mr. Maninder Singh, learned senior counsel appearing on behalf of the Respondent, on the other hand, urged that in view of the decisions of this Tribunal in Total Telefilms Pvt. Ltd. Vs. Tata Sky Ltd. – Petition No. 113 (C) of 2007 and Tata Sky Vs. Zee Turner Ltd. – P. No. 189 (C) of 2006, there cannot be any doubt or dispute that bandwidth capacity of a DTH operator is a relevant consideration as regards the question of carriage of channel and in any event, the Petitioner having no legal right, cannot be granted any relief.

16. The question before this Tribunal, being essentially a question of law, it is not necessary to consider the correspondences passed between the parties herein.

It, however, stands admitted that during the period 09.7.2010 and 30.10.2011 the Respondent while removing nine channels, added twenty six channels on its platform.

17. The Petitioner in this petition has prayed for the following reliefs :-

“(a) declare that the refusal of the Respondent to permit the Petitioner to distribute its Channel “Mastiii” over the DTH platform of Respondent, being arbitrary and discriminatory, is illegal, in breach of the license conditions applicable to the Respondent and violative of the rights of the Petitioner;

(b) direct the Respondent to comply with clause 7.6 of the License Agreement, and include the Petitioner’s channel on its DTH Platform in a non-discriminatory basis;

(c) restrain the Respondent from including any new channel on its DTH platform pending disposal of the instant Petition.”

18. This Tribunal as a substitute of a Civil Court can grant an order of mandatory injunction interalia in terms of Section 39 of the Specific Relief Act, 1963.

It reads as under :-

“39. Mandatory injunctions . - *When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”*

19. It is not in dispute in view of a large number of decisions of this Tribunal including Tata Sky (supra) that the Regulations do not provide for a 'must carry' clause.

20. The Petitioner, however, has strongly relied upon clause 7.6 of the licence agreement.

In view of the decision of the Supreme Court of India in AUSPI vs. Union of India reported in 2011 10 SCC 543, it is no longer res integra that the licence agreement constitutes a bilateral contract between the parties. It is not a statutory contract.

21. Ordinarily, the Petitioner being a third party to the contract, cannot seek to find a legal right in itself and a legal duty in the Respondent in terms of the contract unless and until such a provision was made in the contract itself and/or the Petitioner is found to be a beneficiary thereunder.

22. It is, however, not free from doubt as to whether the Respondent can be directed to take the Petitioner's channel on its platform.

Either in Total TV (supra) or in Tata Sky (supra), it must be placed on record that interpretation of clause 7.6 did not arise for consideration from the

point of view, this petition has been argued, but it must be placed on record that therein it was categorically held that clause 7.6 would not be attracted and that a DTH operator has a discretion in regard thereto.

23. Without going into the aforementioned question, this Tribunal is of the opinion that RW-1 in her cross-examination categorically stated that for the present there is hardly any bandwidth available to accommodate the Petitioner's channel.

24. So far as the decision cited by Mr. Divan is concerned, it must be placed on record that all the cases centre round the duty of a 'State' vis-à-vis distribution of state language.

25. In CAB (supra) the question, which arose for consideration as to whether Doordarshan can deny the right of the appellant therein to downlink and uplink the cricketing events. The answer was rendered in the affirmative having regard to the utilization of the spectrum vis-à-vis the public interest.

In Deepak Theatre Vs. State of Punjab and Others reported in (1992) Suppl. (1) SCC a provision was made in the tariff for fixing the price of cinema

tickets under a statutory rule and the apex court upheld the validity thereof in the context of public interest.

In Common Cause (supra) the question which arose for consideration by the apex court was as to whether the matter relating to allocation of petrol pump by the State would be subjected to certain policy decisions keeping in view of the provisions of the Article 14 of the Constitution of India.

26. In Reliance (supra) the question was as to what should be the standard of judicial review for considering the tenders submitted by eligible candidates.

27. We may notice that in the context of issuance of a writ or in the nature of 'Mandamus'.

The Apex Court in Oriental Bank of Commerce Vs. Sunder Lal Jain and Another reported in (2008) 2 SCC 280, stated the law thus :-

“12. These very principles have been adopted in our country. In Bihar Eastern Gangetic Fishermen Cooperative Society Ltd. v. Sipahi Singh and others, AIR 1977 SC 2149, after referring to the earlier decisions in Lekhraj Satramdas Lalvani v. Deputy Custodian-cum-Managing Officer, AIR 1966 SC 334; Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College, AIR 1962 SC 1210 and Dr. Umakant Saran v. State of Bihar, AIR 1973 SC 964, this Court observed as follows in paragraph 15 of the reports :

"..... There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of the officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate Tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

..... In the instant case, it has not been shown by respondent No. 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable.

Accordingly, we are clearly of the opinion that respondent No. 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same."

Therefore, in order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the authorities. The respondents have not been able to show that there is any statute or rule having the force of law which casts a duty on the appellant bank to declare their account as NPA from 31st March, 2000 and apply R.B.I. guidelines to their case.

13. The High Court, therefore, erred in issuing a writ of mandamus directing the appellant bank to declare the respondents account as NPA from 31st March, 2000 and to apply the RBI Guidelines to their case and communicate the outstandings which shall be recoverable by quarterly instalments over a period of two years. The later part of the order passed by the High Court wherein a direction has been issued to stay the recovery proceedings and the recovery certificate issued against the respondents has been cancelled is also wholly illegal as the decree passed by the DRT had attained finality and proceedings for execution of decree could not be stayed in an independent writ petition when the respondents had not chosen to assail the decree by filing an appeal, which is a statutory remedy provided under Section 20 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993.”

28. The Petitioner contends that two of the channels were music channels.

The producers of the said channels have not been impleaded as a party in this petition.

The Respondent, as indicated heretobefore, in its reply as also RW-1 in her evidence had offered an explanation as to on what basis UTV Star Z and Sony Mix were included in its platform. I have noticed heretobefore that at present no bandwidth is available for carriage of any new channel.

In that view of the matter too no relief as has been prayed for by the Petitioner can be granted.

Moreover, I am of the opinion that the remedy of a broadcaster in a situation of this nature, if any, is either to file a complaint before the TRAI or the licensor. For the reasons aforementioned, there is no merit in this petition, which is dismissed accordingly.

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(S.B. Sinha)
Chairperson

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