

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 29th May, 2019

Broadcasting Appeal No. 2 of 2018
(With M.A. Nos. 36 & 37 of 2019)

Bennett Coleman & Co. Ltd. & Anr. ... Appellants

Versus

Telecom Regulatory Authority of India ... Respondent

Broadcasting Appeal No. 4 of 2018
(With M.A. No.39 of 2019)

All India Digital Cable Federation ... Appellant

Versus

Telecom Regulatory Authority of India ... Respondent

Broadcasting Appeal No.1 of 2019

JPR Channel Mumbai ... Appellant

Versus

Telecom Regulatory Authority of India ... Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER



For Appellants (In B.A. No.2 of : Mr. Maninder Singh, Sr.Advocate
2018) Mr. Kunal Tandon, Advocate
Mr. Chetan Roy, Advocate
Mr. Prateek Jain, Advocate

For Appellant (In B.A.No.4 of : Mr. Arun Kathpalia, Sr. Advocate
2018) Mr. Nasir Husain, Advocate
Mr.Vibhav Srivastava, Advocate
Mr. Swapnil Gupta, Advocate
Ms. Neelambika Singh, Advocate

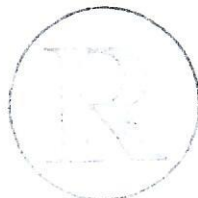
For Appellant (In B.A.No.1 of : Mr. Sharath Sampath, Advocate
2018) Mr. Manikya Khanna, Advocate
Ms. Kriti Bhalla, Advocate

For Respondent-TRAI : Mr. Saket Singh, Advocate
Mr. Arjun Natarajan, Advocate

ORDER

By S.K. Singh, Chairperson – All the three appeals have been heard together for final disposal because they involve common issues of law and facts. This judgment and order shall govern all the three appeals. Broadcasting Appeal No.2 of 2018 has been heard as the lead matter and hence reference to facts and documents will be from the records of that appeal only, unless indicated otherwise.

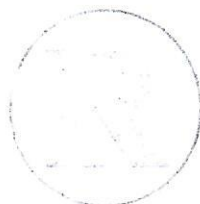
2. The appellants are aggrieved by the direction dated 03.12.2018 issued by the respondent, Telecom Regulatory Authority of India(TRAI) in purported exercise of power under section 13 read with section 11(1)(b)(ii) of the Telecom



Regulatory Authority of India Act, 1997(the Act). The prayer is for quashing and setting aside the said direction annexed as **Annexure-A**.

3. The subject of the impugned direction discloses the relevant provisions of law noted above and also discloses that it is a direction to broadcasters and distributors of television channels relating to display of television channels. After disclosing the statutory functions of TRAI under the Act and that in 2004 the Central Government in the Ministry of Communication & Information Technology (Department of Telecommunications), vide Notification No.39 dated 09.01.2004 has notified broadcasting services and cable services to be telecommunication service, in Para 3 of the impugned **Annexure-A** it has been disclosed that earlier TRAI had issued a direction dated 08.11.2017 to restrain all the broadcasters and distributors of television channels from placing any registered satellite television channel whose TV rating is released by TV rating agency, on the landing Logical Channel Number (LCN) or Landing Channel or Boot-up Screen. Further, it has been revealed that the said direction was challenged before this Tribunal and thereafter TRAI, vide its direction dated 25.04.2018 repealed the directions of 08.11.2017 after obtaining the permission of this Tribunal.

4. The impugned direction further reveals in various paragraphs that TRAI has issued a Consultation Paper on "Issues related to placing of television channel on Landing Page" on 03.04.2018 to seek comments/suggestions of all



the stakeholders. Several comments and counter-comments were received. TRAI also conducted an Open House discussion with the stakeholders on 28.05.2018. On the basis of stakeholders' response and analysis of the data obtained from distributors and also from Broadcast Audience Research Council (BARC), TRAI came to a conclusion that placing all the channels on landing page influences Television Rating Point (TRP). Since the TRP of TV channels which offer themselves for rating are released by the rating agency (and used by advertisers), the rated TV channels which find place on the landing LCN derived distinct advantage on account of additional viewership. This is, according to TRAI, resulting in non-level playing field among broadcasters of rated TV channels. In Para 9 of the impugned Annexure, TRAI has opined that although landing page is an important marketing tool for broadcasters and a distributor for promotion of their programmes and services, due to its ill-effects on TRP, placement of a rated TV channel on the landing page adversely affects accuracy and the credibility of TV rating system which in turn runs counter to the purpose for television ratings in India, which is, to have a credible system which is said to be presently based on recommendations of TRAI. TRAI has indicated that the concerned agency has ruled out the possibility of neutralising the influence of landing LCN on television ratings by suitably changing the method of measurement because it was not possible due to technical limitations. Other alternatives to mitigate the ill-effects on TRP were either not feasible or would impact the commercial interests of distributors. In the penultimate para



of the direction, TRAI has observed that the landing LCN is clearly not a natural choice of the viewer and that is the cause of distortion. TRAI has recorded that it is of the considered view that rating of TV channels should be free from any distortion otherwise its sanctity is affected. For that reason, in the final Para 14, the direction runs as follows:

“14. Now, therefore, the Authority, in exercise of the powers conferred upon it under section 13, read with sub-clause (ii) of clause (b) of sub-section (I) of section 11, of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), in order to protect the interest of service providers and consumers and ensure orderly growth of the sector, directs all broadcasters and distributors of the television channels to restrain from placing any registered satellite television channel, whose TV rating is released by TV rating agency, on the landing LCN or landing channel or the boot-up screen with immediate effect. In case of previously entered agreements, efforts may be made to implement these directions as soon as possible and it shall be implemented in all cases by 31st March 2019. Further the information of such pre-existing agreements with full details of the parties to the agreement, the territory, agreement period and other relevant details may be submitted to the authority within seven days from the date of issuance of this direction at email:advbcs-2@tra.gov.in.”



5. Both the appellants of Appeal No.2 of 2018 are broadcasters and engaged in the business of broadcasting various TV channels in India for more than 20 years. The original appellant in Appeal No.4 of 2018 is a Federation, claiming to be India's apex body for Digital Multi-System Operators (MSOs). Subsequently, four members of the Federation, as individual MSOs have also got themselves impleaded as Appellants Nos.2 to 5. Broadcasting Appeal No.1 of 2019 has also been filed by a MSO. The appellants in all the three appeals are thus affected and covered by the impugned decision which is directed at all broadcasters and distributors of the TV channels. The grounds urged by Mr.Maninder Singh, learned senior counsel appearing for the appellants in Broadcasting Appeal No.2 of 2018 and those urged by Mr.Arun Kathpalia, learned senior counsel appearing for B.A. No.4 of 2018 do cover some distinct and separate grounds but the common grievance of all the appellants in these appeals is that the impugned direction has serious adverse effects on the incoming revenue stream of the appellants for no good reasons. It neither serves the interest of service providers and consumers nor leads to orderly growth of the sector. The appellants claim that their right to carry on trade and business without undue and uncalled for interference has been put to jeopardy without providing any tangible or measurable benefit to the consumers or to service providers. According to them it would impede the orderly growth of the sector by affecting the lawful source of income of the broadcasters and



distributors because to compensate for such loss they will have to ultimately put more burden on the consumers.

6. If the arguments and grounds urged by Mr. Maninder Singh are given a consolidated shape for the purpose of focussed scrutiny, it emerges that as per submissions the impugned directions are bad in law for the following reasons:-

- (i) They are without jurisdiction as they do not relate to interconnection at all;
- (ii) The purpose of putting restrictions in general terms upon the rights of all the broadcasters and distributors may be possible only by law or regulations and not by executive directions;
- (iii) The directions run contrary to provisions of relevant Regulations of 2017 which permit use of landing page whereas the law is clear that directions cannot be contrary to Regulations; also because Section 37 mandates to place a Regulation before the Parliament and therefore, it has the flavour and force of law whereas directions, though governed by provisions of the Act, are only executive in nature.
- (iv) TRP as a subject lies within the domain and responsibility of Ministry of Information & Broadcasting which has permitted some broadcasters and advertisers to generate and circulate TRPs



but it is not the concern of Department of Telecommunication or TRAI. "Interconnection", as defined in the Telecommunications (Broadcasting and Cable Service Interconnection) (Addressable System) Regulation 2017 (the Regulation of 2017) does not relate to placement of a channel on any page/place including landing page.

- (v) In Para 99 of the Explanatory Memorandum of the Regulations 2017 a wrong attempt has been made to describe a Placement Agreement also as an Interconnection Agreement without explaining as to why the word "main" has been used before the words "interconnection agreement".
- (vi) TRP is not affected by the contents of the landing page because the viewer has the choice of shifting to any other page of his choice and under the new Regulations, any channel on the landing page must also be a channel opted by the viewer; and lastly,
- (vii) They are non-transparent, arbitrary and suffer from non-application of mind; the term "television channel" is defined under the Regulations of 2017, hence TRAI has no power to further classify channels into rated and non-rated and to issue the impugned directions in the interest of TRP's of channels which



voluntarily opt for ratings while aware of various lawful uses of landing page.

7. Appearing for the appellants in Appeal No.4 of 2018, Mr.Arun Kathpalia, learned senior counsel has not only supported the earlier noted submissions of Mr.Maninder Singh but has further submitted some grounds and reasons to assail the impugned directions. These are:-

- (i) The source of power claimed by TRAI for issuing the directions under challenge relate to TRAI's power to lay down terms and conditions of interconnection and to ensure that it is effective and technically compatible, whereas the entire exercise is admittedly for purity of TRP which has nothing to do with interconnection;
- (ii) Interference with the revenue source of distributors is beyond the scope of issuing directions under the Act;
- (iii) If the right of placement of a channel on any page includes the landing page also in terms of the Regulations of 2017, the directions are *ex facie* legally invalid;
- (iv) Section 11(4) of the Act requires the TRAI to maintain transparency so that reasons and materials for a decision can be examined but in the present case there is no material except pure ipse dixit for concluding that purity of TRP of rated channels is



so valuable and it has adverse effects to such an extent that the distributors must be deprived of their recognised source of revenue through the rated channels as contents of landing page;

- (v) Lastly, it is reiterated that the decision is arbitrary and suffers from non-application of mind.

8. Mr.Kathpalia would submit that as against 193 million total households viewing TV programmes, only 50000 are BARC households which have received training and contribute to the data for deciding TRP. Hence, the effect of such households is negligible. Further submissions of Mr. Kathpalia are to the effect that it is wrong for TRAI to assume that landing page is not a choice of the consumers or that it distorts TRP because changing of channel would take more than 30 seconds. Such a conclusion, according to him, is based upon no material or evidence and it has been wrongly asserted in the impugned order that it is based upon a study carried out by a stakeholder. According to him, BARC has not said anything about distortion in TRP much less a significant distortion requiring curtailment of an important revenue stream of distributors. Such drastic effect should not be permitted on mere conjectures.

9. On behalf of appellant in B.A. No.1 of 2019, all the arguments in other appeals were adopted by the learned counsel. He further submitted that there are practical difficulties in implementing the impugned directions because it is not



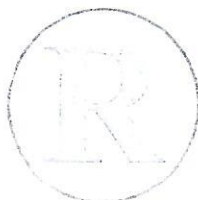
known which of the broadcasters have currently opted for measurement of TRP and continue to be a rated channel.

10. Mr. Saket Singh, learned counsel appearing for respondent/TRAI referred to the objects and purpose of the Act as indicated in the Preamble. He pointed out that through a notification dated 09.01.2004, broadcasting has been brought under the ambit of telecommunication services and Regulation 2(j) in the Regulations of 2017 defines broadcasting in very wide terms. According to him Section 36 of the Act confers a wide power to frame Regulations to carry out the purposes of the Act whereas Section 13 permits issue of directions only for discharge of functions under sub-section(1) of Section 11 and that also on the matters specified under clause (b) of sub-section(1) of Section 11. But exercise of power under Section 13 is not made dependent upon Section 36 and hence, no additional express limitations to that effect are mentioned nor there is any good reason to imply any such restriction on the power conferred by Section 13. He pointed out that directions under Section 13 can be issued only to the service providers whereas the Regulations can have general applicability so as to impact even the consumers. Since the power under Section 36 is quite wide hence it contains a check through the requirement of being laid-down before Parliament as provided in Section 37 of the Act.

11. On the most important issue touching jurisdiction, it was submitted on behalf of TRAI that although the Act does not define the word



“interconnection”, the Regulations of 2017 through Regulation 2(x) provide that – Interconnection means commercial and technical arrangements under which service providers connect their equipments and networks to provide broadcasting services to the subscribers. According to Regulation 2(y), Interconnection Agreement means agreements on interconnection providing technical and commercial terms and conditions for distribution of signals of television channels. Reliance was placed on Paras 99-100 of the EM of the Regulations of 2017 to submit that placement also amounts to interconnection and placement is permitted as would be clear from the explanation to Regulations 3(3) and 18. However, a categorical stand has been taken that Regulations of 2017 do not deal at all with placement on the landing page and therefore, the directions are valid, justified and within the powers of TRAI. Strong reliance was placed upon the contents of the impugned directions including the EM to submit that the issues involved were discussed in a transparent manner and then it was found that landing page showing a rated channel vitiates the concept of TRP and therefore, the impugned directions are necessary for ensuring purity of TRP. This would encourage good contents and better competition. It was submitted that involuntary viewership of contents on the landing page restricts and affects the rights of the consumers to view only the contents of their choice. It was also submitted that in order to allow the distributors to still earn from the landing page, restriction has been imposed only



on placement of rated channels and not on placement of other channels and materials which may include advertisements.

12. In rejoinder, both the senior advocates, Mr.Maninder Singh and Mr.Arun Kathpalia, have vehemently contested all the factual and legal submissions advanced on behalf of TRAI. According to Mr.Singh power for taking the impugned decision can be claimed by TRAI only through Regulations. According to him, this view is justified also by a careful reading of Section 29 which provides penalty for violations of the directions of the Authority. According to him, the Authority has the necessary power to enforce compliance of Regulations.

13. Mr.Kathpalia has submitted by way of rejoinder that broadcasting services cannot include TRP and for improving the purity of TRP, TRAI can have only an advisory role; interconnection is different than placement; impact of impugned decision on revenue has not been assessed and therefore, there is non-application of mind; consumer interest is not affected because now all the channels are as per option of the viewer and non-TRP channels are still permitted on the landing page. According to him, the conclusions drawn in various paras of EM though aim to show transparency but are actually not the reasons for the impugned decision. The reasons cannot be real unless a study is carried out so as to collect valuable data on the extent the TRP are vitiated due



to contents of landing page, their effect on the broadcasters and advertisements and the effect of control on landing page on the revenue of distributors.

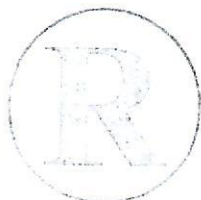
14. The final submission of all the appellants is that contents of landing page can at best amount to advertisements which is legally permissible and there is no appreciable and measureable injury on account of alleged distortion of TRP. The MSOs/distributors would suffer a large and disproportionate injury by way of loss of revenue and the same has also not been measured. Lastly, it has been submitted that even if it was proved that distortion in TRP is appreciable and requires some remedial action, all the alternative options should have been sought from specialised agencies including BARC and then an informed decision should have been taken in a transparent manner so as to cause minimum injury to the stakeholders, particularly, the distributors/MSOs. It was also submitted that BARC is an agency representing 60% broadcasters, 20% advertisers and 20% advertising agencies and if BARC has any problems relating to TRP, it should be allowed to take initiative for remedies if the problem is genuine. It has also been submitted that since BARC has not taken any such initiative, it must be presumed that none of the stakeholders in BARC are adversely affected to any material extent and on this ground also the impugned directions are arbitrary and unreasonable.

15. Although, parties have put reliance upon some judgments, these will be discussed and referred only when necessary for deciding the material issues.



16. The most important and fundamental issue is whether TRAI has jurisdiction to issue the impugned directions under relevant provisions in Section 11(1)(b), particularly, clauses (ii) and (iii). For this issue, it is important to understand the meaning and concept of interconnection between the service providers in the field of broadcasting. As already noted, the word “interconnection” has not been defined under the Act but fortunately it has been defined in the Regulations of 2017 and used at various places in the said Regulations. A plain reading of the definition in Regulation 2(x) clearly shows that it refers to and means only those commercial and technical arrangements which enable or authorise service providers to connect their equipments and networks to provide broadcasting services to the subscribers. In absence of such commercial and technical arrangements, naturally, service providers will not have the right and corresponding obligation under which they can connect their equipments and networks for the purpose of providing broadcasting services to the subscribers. To achieve this minimum connectivity for providing broadcasting service to the subscribers generally a “carriage fee” is payable by a broadcaster to the distributor. This fee has been defined in Regulation 2(m) in following terms:

“carriage fee” means any fee payable by a broadcaster to a distributor of television channels only for the purpose of carrying its channels through the distributor’s network, without, specifying the placement



of such channels onto a specific position in the electronic programme guide or, seeking assignment of a particular number to such channels;

17. Clearly, carriage fee is a necessary commercial term for interconnection and it need not specify anything relating to placement of channels. Placement or terms and conditions for placement are not at all necessary for interconnection. This is also clear from Regulation 2(jj). This provision defines “Reference Interconnect Offer” or “RIO” to mean a document published by a service provider specifying terms and conditions on which the other service providers may seek interconnection with such service provider. The Regulations contain provisions under which a distributor is obliged to carry channels of a broadcaster on fair and transparent terms and from definition of RIO it is again clear that interconnection can be sought by way of right on RIO terms without there being any condition for placement or a placement agreement between the parties.

18. On a careful reading of Paras 96 to 99 of the EM of Regulations of 2017, it is found that carriage and placement have been treated differently. Carriage fee has been defined to secure interconnection with placement provisions. It also recognises the fact that there can be an interconnection agreement. There is nothing to suggest that after interconnection has been achieved through interconnection agreement or RIO, there can not be a separate placement agreement at any later point of time.



19. The discussion in the EM noted above and the provisions in the main Regulations such as Regulations 3(3) and 18 leave no manner of doubt that placement is a concept different from interconnection. Under the Regulations, placement is permitted subject to certain conditions without specifying any condition that any particular channel cannot find placement on the landing page. There is merit in the submission advanced on behalf of appellants that interconnection takes place on account of finalisation of carriage fee and this can be totally different from an agreement for placement. The word "interconnection" cannot be taken as an equivalent of "placement" either in literary sense or technically. Both are different concepts and placement will always follow interconnection. There can be interconnection without placement but there can be no placement without interconnection.

20. In the relevant sub-clauses (ii) and (iii) of clause (b) of Section 11(1) of the Act, the reference to interconnectivity including terms and conditions thereof as well as technical compatibility and effectiveness refer purely to interconnectivity which is different from placement. Terms and conditions for interconnectivity can be prescribed by TRAI under the aforesaid provisions of the Act but clearly the provisions which have been claimed and are also mentioned in the impugned directions as source of power and which have been relied upon by learned counsel for the respondent, do not vest any power in the TRAI to issue directions for the purpose of curtailing the right of distributors to



carry any channel on any page including the landing page by way of content or by way of advertisement. Such right is a valuable right to carry on trade and business for profit and can be regulated or curtailed only for good reasons through statutory provisions like the Regulations. Section 11(1)(b)(ii) vests power to issue directions only in respect of "interconnectivity" and not for controlling contents of landing page for TRP purposes. For such a purpose there is no power in TRAI to issue directions under the Act.

21. Hence, in our considered view, the impugned directions are beyond the provisions of the Act which empower TRAI to issue directions. Therefore, the impugned directions must be set aside on this point alone. We order accordingly.

22. Since the main point of power or jurisdiction to issue the impugned direction has been decided against the respondent, it is not necessary to decide other issues and hence they are left open but in the interest of all the stakeholders and also for achieving the objects and purpose of the Act, it is deemed necessary to observe that a so called valuable right of the distributors, if proposed to be curtailed should be interfered with only after seriously considering all the pros and cons including the extent of injury likely to be sustained by different stakeholders if such a curb is not imposed or if it is imposed. The relevant data on the basis of study should justify such a strong measure of Regulation, if again proposed in future.

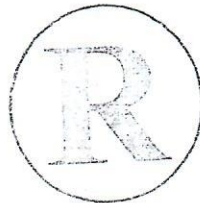


23. Having said that distributors' rights may require a serious consideration of all the pros and cons germane to the issue, it is worthwhile to note that the issue of landing page may throw up conflicting interests and rights because TRAI claims to balance them mainly in the interest of consumers. Such rights can be properly understood and regulated only when it is clearly understood as to whom landing page belongs to as an owner and also as a beneficiary of the end product. Does it belong to the subscriber or to the DPO who brings the signals to the subscriber or to none of these? To be fair, such a question of law has been canvassed neither by appellants which include DPOs and Broadcasters, nor by TRAI which claims to have also acted in the interest of consumers. Mr. Maninder Singh makes it clear that it belongs to the DPOs, who therefore have full rights on what to place on the landing page. TRAI has not applied its mind to this basic question but has obliquely referred to the suggestion whether landing page can be used for subscriber related information. Such a suggestion has been dismissed on account of technical difficulties that the DPOs may face. We do not know such difficulties or whether those difficulties are insurmountable. However, we do know that the Authority has applied sufficient energy and diligence in addressing technical problems faced by BARC since BARC did not wish to change its methodology keeping in view the international best practices. No one can have cavil with following best practices. However, we do not know what are the best international practices in respect of landing page or in respect of regulation of LCNs in general. Would it not be a best



practice if subscriber is given a choice to "opt"? Should the landing page be a default or a separate page in its own right? Can the subscriber be presented with a default, be it a rated or unrated channel? Or, as Mr. Maninder Singh suggests, the subscriber's right is sufficiently covered since the DPO determines the tariff for subscriber after accounting for revenue generated through the default landing page? Of course, the question at hand may have many perspectives and the regulator is not obliged to conceive or answer all of them. The observation we wish to make is that when subscriber's interest is canvassed, it may be appropriate to consider question of their rights, howsoever small, in more details.

24. The Broadcasting Appeals are allowed in the light of discussions and reasons noted above. However, there shall be no order as to costs.



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(S. K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member