

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 31st October, 2017

Broadcasting Petition No. 378 of 2016

Noida Software Technology Ltd.

...Petitioner

Versus

Ministry of Information & Broadcasting

...Respondent

BEFORE:

HON'BLE MR. B.B. SRIVASTAVA, MEMBER
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioner : Ms. Ruchira Goel, Advocate

For Respondent : Mr. Sandeep Mahapatra, Advocate

ORDER

The petitioner is a HITS operator having obtained permission from the Respondent Ministry in 2003 to establish, install, operate and maintain "Headend in the sky" for providing digital cables services throughout India. During course of its operations, the petitioner approached Dena Bank for financial assistance to run and operate its HITS project and was asked to obtain an NOC from the Respondent Ministry for allowing the HITS license of the petitioner company to be kept as collateral security. The petitioner company sought an NOC from the respondent ministry on 6-11-2013 relying on the fact that in the past the respondent ministry had granted similar NOC to the DTH operators and also on the clause 3.3 of the HITS Guidelines which state that the HITS license is transferable with the prior approval of the Government. The respondent

ministry vide its communication dated 3-9-2014 did not accede to the requested NOC stating that "there is no policy in the Ministry to allow Head-end-in-the-sky (HITS) service providers to assign their HITS permission to Banks for raising loans for their HITS operations". Aggrieved by this refusal, the petitioner approached this Tribunal vide petition no. 439(c)/2014 challenging the said communication dated 3-9-2014. This Tribunal passed the following directions in this petition vide its order dated 27-5-2015

"We are clearly of the view that it is incumbent upon the MoIB to take a policy decision in this regard, taking into account all relevant considerations. It must then reconsider the petitioner's request in light of the policy framed by it. It is ordered accordingly.

The MoIB is directed to take a fresh decision on the petitioner's request, as directed above, within two months from the date of receipt of a copy of this order."

After a lot of delay, the MoIB finally issued a communication dated 5-10-2015 rejecting the petitioner's request and stating that the policy relating to signing of Tripartite Agreement in DTH sector since has been cancelled. Aggrieved by this communication dated 5-10-2015, the petitioner has filed this petition with the following main prayers :

(a) Quash the impugned communication dated 5.10.2015

(b) Direct the respondent ministry herein to grant the NOC requested by the petitioner company vide letter dated 6.11.2013

Interim prayer made is as follows:

(a) Pass an interim order permitting the petitioner, till the pendency of the present petition to extend its HITS licence as a collateral security in order to secure financial assistance from any bank or a financial institution.

Both the parties were heard on the issue of granting interim relief. Learned counsel for the petitioner Ms Ruchira Goyal mainly relied on the doctrine of level playing field as elucidated in Reliance Energy Limited vs. Maharashtra State Road Corporation (2007) 8 SCC 1, wherein the Hon'ble Supreme Court has held that entrepreneurs when setting up business in the country, are entitled under Article 14, 19 and 21 of the Constitution to the non-discriminatory right to opportunity and a level playing field. She further argued that the petitioner had a legitimate expectation in view of the policy to allow DTH operators to assign their licenses to banking institutions to raise financial assistance for their operations. Now the respondent ministry is attempting to defeat the said legitimate expectations by changing the existing DTH policy in an irrational and perverse manner since the impugned order does not give any reason for cancellation of DTH policy.

Learned Counsel for the respondent argued that the question of level playing field in this petition does not arise because there is no policy now of granting such permission to the DTH operators as well. He also pointed out that the interim prayer in the nature of final relief and can't be allowed at this stage. He also submitted that if the petitioner had misled the Bank in believing that HITS license can be assigned, the respondent can not be held responsible for that. He also denied that policy review was without any basis. The respondent has also submitted that the basic premise of entering into a tripartite agreement for a purely commercial transaction by the Government is questionable and there are direct implications of the role of the Government in this exercise.

On careful reading of the prayers, we are persuaded by the argument that the interim relief is in the nature of final relief. Permitting petitioner to extend its HITS licence as a collateral security in order to secure financial assistance from any bank or a financial institution as an

interim measure till pendency of this petition will have the same effect commercially as quashing the impugned order and directing the respondent ministry to grant the NOC requested by the petitioner company vide its letter dated 6.11.2013. We are also mindful of the fact that if such an interim arrangement is made, it will create implications for the respondent which may not be retracted. Since there is no contractual obligation or relationship of such nature between the parties, such an interim arrangement would not be equitable. The main challenge is on the grounds of level playing field and reasonableness of scrapping the policy, which needs to be adjudicated. Since the policy itself does not exist, we find no basis for making any equitable interim arrangement, especially when it will have same implications as those prayed in the final relief. Accordingly, we find no need to grant any interim relief. Let the case be prepared for final hearing. Put up before the learned Dy. Registrar on ²⁰¹⁷ 28th Nov for the same purpose.

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member