

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 4th November, 2020

Broadcasting Petition No.612 of 2020

Bennett Coleman & Co. Ltd. & Anr.Petitioners

Versus

Broadcast Audience Research Council IndiaRespondent

Broadcasting Petition No.614 of 2020

SUN TV Network Ltd.Petitioner

Versus

Broadcast Audience Research Council IndiaRespondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

- Petitioner(In BP No.612/2020) : Mr. Maninder Singh, Sr. Advocate,
Mr. Kunal Tandon, Advocate
Mr. Shashank Shekher, Advocate
Mr. Prabhas Bajaj, Advocate
Mr. Amandeep Singh, Advocate
- Petitioner(In BP No.614/2020) : Mr. Gopal Jain, Sr. Advocate
Mr. Abhishek Malhotra, Advocate
Ms. Shilpa Gannani, Advocate
Ms. Atmaja Tripathy, Advocate
Mr. Gurmukh Choudhri, Advocate
- Respondent : Mr. Amit Sibal, Sr. Advocate
Mr. Sidharth Chopra, Advocate
Mr. Nitin Sharma, Advocate
Ms. Sneha Jain, Advocate
Mr. Shilpa Gupta, Advocate
Mr. Ranjeet Singh Sindhu, Advocate
Mr. Sudarshana Mj, Advocate

ORDER

By S.K. Singh, Chairperson – Both the Broadcasting Petitions have been preferred by companies who are admittedly “broadcasters” and “service providers” within the meaning of these terms under the Telecom Regulatory Authority of India, 1997 (TRAI Act). They have approached this Tribunal under Sections 14 and 14A of the TRAI Act to challenge the legality, validity and propriety of an Email communication dated 03.09.2020 and also a Press Release of the same date

as well as answer to Frequently Asked Questions(FAQs), all originating from the respondent, Broadcasting Audience Research Council(BARC). On merits, the grievance of the petitioners is to the effect that the respondent has acted arbitrarily by adopting a formula which according to petitioners reduces the viewership data collected by measurement tools of BARC.

2. In view of issues arising in respect of jurisdiction of this Tribunal, the same has been heard on several days as a preliminary issue and orders were reserved. Parties have filed written submissions also in respect of the above issue. For the sake of convenience, the facts have been taken from the brief of B.P. No.621 of 2020 unless stated otherwise.

3. At the outset, it is relevant to notice that for some time during September, 2020 the functioning of this Tribunal stood suspended due to a COVID-2019 positive case and therefore, Bennett Coleman and Co.Ltd., against the Emails/Decision of BARC dated 03.09.2020 preferred a writ petition bearing WP(C) No.6238 of 2020 before the Hon'ble Delhi High Court and claimed interim relief till the petition could be taken up for hearing by this Tribunal. The order of the Hon'ble High Court dated 29.09.2020(**Annexure P-31**) takes note of some of the relevant facts as well as submissions on merits for the purpose of considering the interim prayer in the light of stand of the petitioners. Thereafter, from Para 15

onwards the Hon'ble Delhi High Court noted and considered the submission on behalf of the respondent BARC that the petition before the learned TDSAT would not be maintainable because of limitations flowing from Section 14 of the TRAI Act which vests power in TDSAT to adjudicate any dispute – (i) between a licensor and licensee; (ii) between two or more service providers; and (iii) between a service provider and a group of consumers. Additionally TDSAT has appellate jurisdiction against directions, decisions or orders made by TRAI but the appellate jurisdiction is not involved in the present matter. The respondent's case is that it is neither a licensee nor a service provider as understood in the context of TRAI Act. It claims that its functions are merely that of a rating agency. The respondent further raised a defence that under the Policy Guidelines issued by the Government of India third parties or contracting parties have to approach the court of competent civil jurisdiction for adjudication of their grievance and not before TDSAT. Even under the End User Licence Agreement (EULA) the dispute in connection with the agreement with Bennett Coleman can be agitated only before the courts at Mumbai.

4. Para 24 of the High Court judgment discloses that the stand of the petitioners was that petition would be maintainable before the TDSAT because BARC carries out the functions of a licensee of Government of India and is, therefore, a "service

provider” also. The petitioners relied upon Clauses 19.1, 19.2 and 24.1 of the Policy Guidelines in support of their stand that TDSAT would have jurisdiction in the matter. The petitioners highlighted the fact that Government had sought recommendations from the TRAI on the Television Audience Measurement and Rating System in India and the same were submitted by TRAI to the Government on 28.04.2020.

5. In Para 26, the High Court has extracted Clauses 19.1 and 24.1 of the Policy Guidelines which read as follows:

“19.1 In the event of any question, dispute or differences arising between the Central Government and the company with respect to registration issued under these Guidelines, the same shall be resolved before Telecom Disputes Settlement and Appellate Tribunal as per the provisions of Telecom Regulatory Authority of India Act, 1997.

XXXXX

24.1 The company shall also be governed by the provisions of the Telecom Regulatory Authority of India Act, 1997.”

The High Court inferred from the said clauses that any dispute between Government of India and respondent is required to be raised before TDSAT and clearly the respondent is governed by the provisions of the TRAI Act. Section

2(i)(j) of the Act was also noted by the High Court because it defines "service provider" to mean the Government as a service provider and includes a licensee.

6. The Hon'ble High Court has *prime facie* accepted BARC as a service provider as per definition under the TRAI Act by accepting the contention on behalf of the petitioners that BARC is a licensee of Ministry of Information & Broadcasting (MIB) of the Central Government and in absence of any statutory provisions, the terms of the Policy Guidelines dated 16.01.2014 are binding on the MIB as well as BARC. The guidelines require registration/permission for carrying out the specific activities permitted by those guidelines and hence the registration/permission in terms of the guidelines is a licence granted by the MIB to carry out those specifically permitted activities which cannot be carried on in absence of such registration/permission.

7. The stand of BARC as appears from the written notes as well as arguments is that the registration or permission cannot make it a licensee for the purpose of the TRAI Act because Section 2(1)(e) defines licensee to mean "any person licensed under sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing "specified public telecommunication services"³³.

8. It is the case of the respondent that "specified public telecommunication services" must be a service as evident from Section 4 of the Indian Telegraph Act 1885. The respondent have also placed reliance upon definition of the term "telecommunication service" which as per Section 2(1)(k) of the TRAI Act means "service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services: Provided that the Central Government may notify other services to be telecommunication service including broadcasting services".

9. It is not in dispute that the proviso which grants power to the Central Government to notify other services to be telecommunication services including broadcasting services was added to the Section 2(1)(k) through an amendment Act of 24.02.2000. It is also not in dispute that on 09.01.2004 the Central Government notified the "broadcasting services" to be "telecommunication services". Since the original definition of telecommunication services did not include broadcasting services, some of the provisions such as definition of the term "licensee" only in the context of the Section 4 of the Indian Telegraph Act needed further

interpretation by this Tribunal and the Hon'ble Supreme Court with a view to bring within the ambit of TRAI Act the service providers of broadcasting services who were recognized to be (i) Broadcasters, (ii) Distribution Platforms/multi-service providers(MSOs) and (iii) Local Cable Operations(LCOs). These services are definitely central to the broadcasting services which are clearly otherwise covered by the original definition of telecommunication services. Because of such coverage, the broadcasting services, as per then prevailing policy, had to be originally excluded explicitly. Once they came to be included on account of the proviso and notification of 2004 by the Central Government, the term "licensee" had to be liberalized in order to iron-out the creases and achieve the scope and purpose of the Act which defined telecommunication service by explicitly spelling-out that it would mean "service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means. The definition of telecommunication services did not require and has not been given any different "liberalized" interpretation.

10. It is the case of BARC that even in case of broadcasting services the service providers or the licensee can be only those who provide a specified public

telecommunication/broadcasting service which is made available to users. According to Mr. Amit Sibal, learned Senior Counsel for BARC, those who produce the contents for broadcasting which is made available to users alone can be accepted as broadcasters and not others who participate in the process of production of contents. Otherwise, all actors, musicians etc. would become service providers which is not the correct position. In other words, the submission is that only those service providers whose services/products are made available to users either in the form of content or by means of transmission of signals etc. can be accepted as providers of specified public telecommunication/broadcasting within the meaning of the terms "licensee" or a "service provider".

11. In order to support the stand that BARC is neither a licensee nor a service provider under the TRAI Act, it has further been submitted that while considering the issue of jurisdiction of the High Court vis-à-vis TDSAT in the case of **VIOM Network Ltd. and Anr. Vs. STel Pvt. Ltd. & Anr.; (2013) SCC OnLine Del 4511**, the Hon'ble Delhi High Court held that providers of infrastructure (to telecommunication service providers) who are neither the Government nor a licensee can not be considered as a service provider. It was held that such infrastructure service provider were not covered by the definition of telecommunication service under the TRAI Act and moreso their service could not

qualify as a service made available to users. In Para 24 the High Court therefore clearly held that the word 'services', on a conjoint reading of the definition of "licensee" and "telecommunication services" in Section 2(1) of the TRAI Act is service to users who are members of the public and not providing to another who in turn may be providing such services to users who are members of the public.

12. Having heard both the parties on various issues relating to jurisdiction, this Tribunal find that the main task is to find out (i) whether BARC is a licensor of any(specified) public telecommunication/broadcasting services; and (ii) whether it is providing a service which is made available to public as users.

13. The pleadings on the functions and role of BARC are not under dispute. The petitioners have averred that MTB in January 2008 sought recommendations from TRAI for formulating Policy Guidelines for Television Audience Measurement(TAM)/Television Rating Points(TRP). TRAI recommended for self-regulation through the industry led body with Government exercising oversight through its nominees and guidelines covering organization, functions and methodology to be adopted for rating by the industry led body. TRAI also recommended Policy Guidelines to be framed for registration of the rating agencies including the eligibility and standards for such agencies. In 2010 BARC was incorporated under the Companies Act, 1956. It received permission to operate as

a Television Rating Agency on 28.07.2015 pursuant to notification of the Policy Guidelines on 16.01.2014. BARC is presently the only entity conducting television ratings in India. No doubt petitioners claim that rating of television channels is very essential for smooth operation of advertisers and the broadcasters who are guided by Television Rating Points(TRP) published by BARC but such activities and functions of BARC do not fall, even by analogy, under any of the specified public telecommunication services covered by sub-section(1) of Section 4 of the Indian Telegraph Act 1885 which empowers the Central Government to grant a licence on appropriate conditions to any person (i) to establish, (ii) to maintain or (iii) work a telegraph within any part of India. The permission granted to BARC to carry out required activity to make available to the advertisers and other service providers the TRPs cannot be stretched to mean a permission to either establish or maintain or work a telegraph within any part of India. BARC may be of significant help to some who are not service provider and to some of the service providers such as broadcasters but it clearly has no permission or licence to establish, maintain or work a telegraph as defined within the meaning under the Indian Telegraph Act, 1885. The submission made on behalf of petitioners that BARC works a telegraph which means it works appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals etc. by wire or other electromagnetic means, radio waves etc. cannot be accepted only

on the plea that it has the permission of the Government and also of some other service providers with whom it has agreements, to collect samples and extract data from their systems. Such functions cannot amount to working a telegraph. BARC's functions do not come even remotely closer to the recognized service providers in the broadcasting sector. It is neither a Broadcaster nor a Distribution Platform nor an LCO. It has simply been permitted to carry out some service for collecting and providing data which are not functions central to providing essential broadcasting service to public as users by means of any content or transmission etc.

14. The provisions in the Policy Guidelines such as Clauses 19.1 and 24.1 can not impact or adversely affect the statutory provisions in the TRAI Act.

15. On the basis of aforesaid discussion this Tribunal finds no option but to differ from the *prime facie* opinion of the Hon'ble Delhi High Court that BARC is a licensee or a service provider under the TRAI Act. It is noted that in Para 34 of its order dated 29.09.2020, the Hon'ble High court clarified that the finding that TDSAT would have jurisdiction to entertain the petition was a *prima facie* one and in Para 45 it was further made clear that none of the observation shall bind TDSAT which shall hear the petition filed by the petitioners and any interim application filed therein without being influenced by any of the observations made in the

order. Hence the issue of jurisdiction has been raised afresh and parties have been heard in detail.

16. Since it has been found above that respondent BARC is neither a licensee nor a service provider as defined under the TRAI Act, the petitions under consideration are found to be beyond the jurisdiction of this Tribunal as provided under Sections 14 or 14A of the TRAI Act. The petitions are, therefore, dismissed on the ground of lack of jurisdiction. It goes without saying that the petitioners would be at liberty to pursue their grievances in accordance with law before any court of competent jurisdiction. Any observation in this order on merits of the case of the parties shall be treated merely as a *prima facie* view and shall not affect adversely any of the parties in future proceedings before any competent court of law.

17. The petitions are accordingly dismissed with the aforesaid liberty and observations. There shall be no order as to costs.

(S.K. Singh)
Chairperson

