

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

MONDAY ,THE 14TH DAY OF JANUARY 2019 / 24TH POUSHA, 1940

WP(C).No. 6681 of 2018

PETITIONER/S:

CABLE OPERATORS WELFARE ASSOCIATION
HAIHIND BUILDING, KUMBALAPALLY ROAD,
CHALIKKAVATTOM, VENNALA. P. O. , ERNAKULAM
REPRESENTED BY ITS PRESIDENT NAVEEN.V.D.

BY ADVS.

SRI.M.A.ABDUL HAKHIM

SRI.JOSEPH GEORGE (KANNAMPUZHA)

RESPONDENT/S:

- 1 UNION OF INDIA
REPRESENTED BY ITS SECRETARY, MINISTRY OF
INFORMATION AND BROADCASTING ROOM NO. 560, A-
WING, SHASTHRI BHAVAN, NEW DELHI-110002.
- 2 TELECOM REGULATORY AUTHORITY OF INDIA
MAHANAGAR, DOOR SANCHAR BHAVAN, JAWAHARLAL
NEHRU MARG, NEW DELHI-110002, REPRESENTED BY
ITS SECRETARY.
- 3 DEN NET WORKS LIMITED
KOSHY ARCADE, OPPOSITE OBERON MALL, ANCHUMANA
BYEPASS ROAD, ERNAKULAM, COCHIN-
682024, REPRESENTED BY ITS MANAGER.

BY ADVS.

SRI.JAISHANKAR V.NAIR, CGC

SRI.P.JAYABAL MENON

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
2.11.2018, THE COURT ON 14.01.2019 DELIVERED THE FOLLOWING:

ANU SIVARAMAN, J.

W.P(C).No. 6681 of 2018

Dated this the 14th day of January, 2019

JUDGMENT

The petitioner has approached this Court seeking the following relief:

“direct the 3rd respondent not to disconnect the Cable Television Signals to the members of the petitioner for non-execution of “Model Interconnection Agreement” or “Standard Interconnection Agreement” provided in Exhibit P6 Regulations, pending disposal of this writ petition.”

2. Heard Shri.M.A.Abdul Hakhim, learned counsel for the petitioner and Shri.Jaishankar v. Nair, the learned Central Government Counsel appearing for respondents 1 and 2 as well as Shri.P.Jayabal Menon, the learned counsel appearing for the 3rd respondent.

3. The petitioner, who claims to be an association having 62 local cable operators as it's members, challenges the provisions by which a default revenue sharing ratio of 55:45 between Multi System Operator (MSO) and Local Cable Operator (LCO) would be applicable in case parties fail to execute a Model Interconnection Agreement in Schedule V of

the Telecommunication (Broadcasting and Cable) Services Inter Connection (Addressable Systems) Regulations, 2017. It is stated that at present, on account of the self responsibilities and liabilities of the local cable operators, the 3rd respondent has been collecting only Rs.30/- per life connection per month including tax out of average monthly subscription of Rs.250/-. It is stated that this comes to around 12% monthly subscription charges. If the default revenue sharing ratio of 55:45 is in force, the 3rd respondent would be entitled to 55% of the monthly subscription which would be completely detrimental to the local cable operators who would be disabled from conducting their operations on the said ratio, it is contended. The contention is that the pressure exerted by the Regulations on the local cable operators to function at reduced revenue sharing would result in complete disruption of services, since the local cable operators would be unable to provide the services at the rates fixed in the default clause. The petitioner contends that the Regulations are unconstitutional being violative of the fundamental rights guaranteed to the members under Articles 19(1)(g) and 21 of the Constitution of India and are arbitrary, unreasonable and violative of Article 14 of the Constitution. It is further stated that in view of the unequal bargaining power between the MSOs and LCOs, the members of the petitioner Association will be forced to agree to a revenue sharing which is completely disproportionate and

is detrimental to the interest of such local cable operators. It is also contended that the bargaining power of the LCOs is severely restricted by the Model Revenue Sharing provided in the default clause. It is stated that the impugned provisions of the Regulations are devoid of legislative competence and is violative of the procedure prescribed for the framing of the Regulations as such.

4. It is stated that Section 36 of the Telecom Regulatory Authority of India Act, 1997 empowers the authority to make Regulations consistent with the Act and the Rules made there under to carry out the purposes of the Act. The purpose of the Act being to provide the Authority and Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto, it is contended that the prescription of a default clause for revenue sharing between MSOs and LCOs does not come within the ambit of the purpose of the Act and the impugned clauses in the Regulations are therefore *ultra vires* the enabling statute. It is stated that Exhibit P13 e-mail had been sent to the authority highlighting all the grievances of the LCOs, but the same has evidently not been taken into account while framing the Regulations. Learned counsel for the petitioner has placed reliance on

the decisions of the Apex Court in **Ramana Dayaram Shetty v. International Airport Authority of India** [(1979)3 SCC 489], **Central Inland Water Transport Corporation Limited v. Broji Nath Ganguly** [(1986)3 SCC 156], **Hindustan Times v. State of U.P** [(2003)1 SCC 591], **Telecom Regulatory Authority of India v. Bharat Sanchar Nigam Limited** [(2014)3 SCC 304] and **Dai-Ichi Karkaria Ltd. v. Union of India** [2000 KHC 1111] in support of his contentions.

5. A detailed counter affidavit has been placed on record by the 2nd respondent contending that the writ petition filed by the Association is itself not maintainable. It is contended that Rule 9 of the Cable Television Networks Rules, 1994 empowers the TRAI to specify standard interconnection agreement between the service providers and Rule 10 of the said Rules requires every Broadcaster, MSOs and LCOs to comply with the regulations, guidelines and orders issued by the TRAI. It is stated that it is only when the MSOs and LCOs fail to arrive at a mutual agreement, revenue sharing at the default ratio as provided in the Regulations would be made applicable. It is for the MSO and LCO concerned to negotiate and arrive at suitable revenue sharing arrangements and fall back arrangement is meant only to ensure sufficient protection to the LCO in case the MSO refuses to enter into the interconnection agreement. It is stated that the revenue

sharing of 55:45 is arrived at after taking all relevant factors into consideration. Relying on the decisions of the Madras High Court in W.P(C).No.44126 of 2016 and connected cases, it is contended that the power of the TRAI to frame Regulations has been upheld. It is stated that the said judgment has been further considered by the Apex Court in Civil Appeal Nos.7326 of 2018 and connected cases and the dictum has been upheld by judgment dated 30.10.2018.

6. The 3rd respondent has also placed a detailed counter affidavit on record and submits that the question raised in the writ petition is no longer *res integra*. It is submitted that the decision of the Apex Court, which has considered the entire legal and factual aspects of the matter, covers the issue and the challenge now raised is therefore unsustainable. The learned counsel places reliance on the decision of the Apex Court in **Public Services Tribunal Bar Association v. State of UP** [2003 KHC 949] and **Rajbala v. State of Haryana** [2015 KHC 4795] to contend that once legislative competence is established beyond doubt, this Court would not be justified in considering the challenge further. It is stated that the principle of substantial due process is not a part of Indian constitutional law and the examination of wisdom of legislative choices does not form a part of judicial review as envisaged in the Indian Constitution.

7. I have considered the contentions advanced. It is pertinent to note that the only challenge raised in this writ petition is as against the default clause for revenue sharing which is to be operated in case the MSOs and LCOs concerned cannot reach a negotiated settlement as to the sharing of the revenue generated from subscribers. That the TRAI has the power to frame the Regulations is beyond dispute. That the current regulations are well within the power granted by the statute and are not *ultra vires* now stands settled by the decisions of the Apex Court. The contentions raised on the basis of legislative competence therefore cannot be considered by this Court in view of the authoritative pronouncement by the Apex Court in ***Star India Private Limited v. Department of Industrial Policy and Promotion*** [2018(14) SCALE 651].

8. The issue considered by the Apex Court was with regard to different provisions of the TRAI Regulations. Since two Judges of the Madras High Court had differed on the extent of the power of TRAI and the matter had been decided by the opinion of a third Judge to whom the matter was referred, the question of extent of the power of TRAI to frame Regulations was considered threadbare by the Apex Court. Referring to all the provisions of the Statute as also the precedent law on the point, the Apex Court came to the definite conclusion that the TRAI had the power to frame Regulations, not only in respect of the

means of transmission or the carriage aspect of broadcasting, but also with respect to all the aspects of the industry, since the TRAI is the industry regulator. In paragraph 30 of the judgment it is held as follows:

“We are of the view that the provisions of the TRAI Act have to be viewed in the light of protection of the interest of both service providers and consumers. This being so, it is clear that no constricted meaning can be given to the provisions of this Act. It is important to remember that under Section 11(1)(a)(iv), one of the functions of the Authority, though recommendatory, is to facilitate competition and promote efficiency in the operation of telecommunication services (which includes broadcasting services) so as to facilitate growth in such services....”

It is further held in paragraph 37 of the judgment as follows:

“It can thus be seen that both the Regulation as well as the tariff order have been the subject matter of extensive discussions between TRAI, all stakeholders and consumers, pursuant to which most of the suggestions given by the broadcasters themselves have been accepted and incorporated into the Regulation and the Tariff Order. The Explanatory Memorandum shows that the focus of the Authority has always been the provision of a level playing field to both broadcaster and subscriber....”

After elaborate discussions on the provision of the TRAI Act, the Copy Right Act as well as the Indian Wireless Telegraphy Act, the Apex Court found that where royalties/compensation payable to broadcasters under the Copy Right Act are regulated in public interest by TRAI under the TRAI Act, the former will give way to the latter.

9. The fixation of ceiling prices of pay channels by MSOs by the TRAI, as a market regulator, has been considered in extenso and the Apex Court has held that it is well within the powers of the TRAI as provided under Section 36 of the Telecom Regulatory Authority of India Act, 1997 as well as the Cable Television Networks (Regulation) Act, 1995 and the Rules made there under to regulate all aspects of the agreements between the stakeholders in the best interest of regulating the industry.

10. The contention of the petitioner herein is that the default clause would amount to restricting the contracting freedom of the parties and imposing a clause detrimental to the interest of the local cable operator in the agreement. On an examination of the provisions of the Regulations which are under challenge, it is clear that what is contemplated is the signing of a mutual agreement between the MOS and LCO concerned. The parties are free to arrive at a negotiated settlement in respect of the revenue sharing as well. However, in case such a negotiated settlement with regard to revenue sharing is not arrived at between the parties, the impugned provision states that the revenue sharing will be in the ratio of 55:45 between the MSO and LCO. It is contended by the learned counsel appearing for the 1st respondent as well as the 3rd respondent that the intention is to see that the LCO gets at least 45% of the revenue even in case no

agreement is reached between the parties and that the end customer does not suffer disruption due to disputes between the parties.

11. The learned Central Government Counsel would submit that all the aspects of the matter including the respective responsibilities and expenses of the contracting parties have been taken into account to arrive at the default profit revenue sharing ratio of 55:45. It is specifically contended that this Court, exercising the power of judicial review, is not expected to consider whether the said ratio is proper or not or to substitute its own opinion for the opinion of the TRAI, which is an expert body specifically empowered to consider such matters. The Apex Court in ***Star India Private Limited's case (supra)*** has, after considering all the precedents on the point, specifically held that the TRAI exercises jurisdiction not only to fix tariff but also to lay down terms and conditions for providing services and fix norms and the mode and manner in which the consumer would get services. It is stated that the TRAI which is a market regulator issues regulations and tariff orders keeping the interest of the stakeholders and consumers in mind and that the Regulations so issued are *intra vires* the power under Section 36 of the TRAI Act.

12. The contention that the default clause providing for a fixed ratio of revenue sharing is violative of the petitioner's fundamental rights does not appeal to reason for the simple fact that there is no

fetter imposed on the rights of the contracting parties to negotiate and arrive at any revenue sharing ratio which is at variance with the default ratio as provided in the guidelines. The existence of default clause, by itself, cannot be said to fetter the contracting freedom of the parties to an agreement. It is only in case a negotiated agreement cannot be arrived at, that the default ratio would be applicable. The essential grievance of the petitioner appears to be that the MSO can refuse to enter into a proper negotiation and in the absence of an agreement between the parties as to revenue sharing, the ratio would become applicable. From a consideration of the provisions of the TRAI Act, I find that in case any individual dispute arises with regard to the refusal of MSO to hold negotiations or enter into a revenue sharing agreement only to defeat the rights of the LCO and to make the default revenue sharing ratio applicable, the same would constitute a dispute between two service providers which would be liable to be raised and considered before the Telecom Dispute Settlement and Appellate Tribunal in terms of Section 14 of the TRAI Act, 1997.

In the above view of the matter, I am of the opinion that the challenge to the Regulations on the ground that it restricts freedom of the parties to negotiate and enter into an agreement as to revenue sharing is completely unsustainable. Leaving open the rights of the local cable operators to approach the Telecom Dispute Settlement and

Appellate Tribunal in case there is any dispute as to the refusal on the part of any MSO to enter into negotiated agreements with regard to revenue sharing, the writ petition is dismissed.

Sd/-
ANU SIVARAMAN
JUDGE

vgs

APPENDIX**PETITIONER'S/S EXHIBITS:**

- EXT.P1 . A PHOTOSTAT COPY OF THE CERTIFICATE OF REGISTRATION ISSUED BY THE REGISTRAR DATED 10-02-2016.
- EXT.P2 . A PHOTOSTAT COPY OF THE LIST OF MEMBERS OF THE PETITIONER DATED 26-2-2018.
- EXT.P3 . A PHOTOSTAT COPY OF THE ONE OF THE INTER CONNECTION AGREEMENTS EXECUTED BY ONE OF THE MEMBERS OF THE PETITIONER WITH JOINT VENTURE ASSOCIATE OF THE 3RD RESPONDENT DATED 17-5-2011.
- EXT.P4 . A PHOTOSTAT COPY OF THE ONE OF THE MONTHLY INVOICE EXECUTED ISSUED BY THE 3RD RESPONDENT TO ONE OF THE MEMBERS OF THE PETITIONER DATED 30-12-2015.
- EXT.P5 . A PHOTOSTAT COPY OF THE INTERIM ORDER DATED 29-6-2016 PASSED BY THIS HON'BLE COURT IN W.P.(C) NO. 21901/2016.
- EXT.P6 . A PHOTOSTAT COPY OF THE TELECOMMUNICATION (BROADCASTING AND CABLE) SERVICES INTER CONNECTION (ADDRESSABLE SYSTEMS) REGULATIONS, 2017 (NO.1 OF 2017) DATED 3-3-2017 ISSUED BY THE 2ND RESPONDENT.
- EXT.P7 . A PHOTOSTAT COPY OF THE ONE OF THE PRESENT MONTHLY INVOICE DATED 31-1-2018 ISSUED BY THE 3RD RESPONDENT TO ONE OF THE MEMBERS OF THE PETITIONER.
- EXT.P8 . A PHOTOSTAT COPY OF THE ORDER DATED 15-12-2017 OF THE TDSAT IN BROADCASTING PETITION NO. 354/2016.
- EXT.P9 . A PHOTOSTAT COPY TO THE ORDER OF THE TDSAT DATED 19-2-2018 IN BROADCASTING PETITION NO. 354/2016.
- EXT.P10 . A PHOTOSTAT COPY OF THE MODEL INTERCONNECTION AGREEMENT SENT BY THE 3RD RESPONDENT TO THE MEMBERS OF THE PETITIONER DATED NIL.

EXT.P11. A PHOTOSTAT COPY OF THE OBJECTION DATED 23-2-2018 SENT BY ONE OF THE MEMBERS OF THE PETITIONER TO THE 3RD RESPONDENT.

EXT.P12. A PHOTOSTAT COPY OF THE E-MAIL DATED 26-2-2018 SENT BY ONE OF THE OFFICERS OF THE 3RD RESPONDENT TO ONE OF THE MEMBERS OF THE PETITIONER.

EXHIBIT P13 A PHOTOSTAT COPY OF THE SAID E-MAIL SENT BY THE PETITIONER TO THE 2ND RESPONDENT.

EXHIBIT P14 A PRINT OUT OF THE WEBSITE OF THE 2ND RESPONDENT.

EXHIBIT P15 A PHOTOSTAT COPY OF THE E-MAIL SENT BY ONE OF THE MEMBERS OF THE PETITIONER TO THE 3RD RESPONDENT.

EXHIBIT P16 A PHOTOSTAT COPY OF THE E-MAIL SENT BY THE PETITIONER TO THE 3RD RESPONDENT..

EXHIBIT P17 A PHOTOSTAT COPY OF THE ORDER OF THE DISTRICT COLLECTOR, ERNAKULAM TO THE 3RD RESPONDENT.

EXHIBIT P18 A PHOTOSTAT COPY OF STANDARD INTERCONNECTION AGREEMENT AND COVERING LETTER PROVIDED BY THE 3RD RESPONDENT AND SIGNED BY ONE OF THE MEMBERS OF THE PETITIONER.

RESPONDENT'S/S EXHIBITS:

EXHIBIT-R3 (A) TRUE COPY OF AN SIA EXECUTED BY THE SOME LCO WHO HAD EXECUTED EXHIBIT P3.

EXHIBIT -R2 (A) JUDGMENT/ORDER OF THE TRIBUNAL DATED 19/10/2012.