CASE ANALYSIS

M/s Noida Software Technology Park Ltd.

Versus

M/s Media Pro Enterprise India Pvt. Ltd. & Ors.

FACTS:

1. The petitioner had previously come to the Tribunal with the issue that *Media Pro* who used to be the "agent or intermediary" of numerous broadcasters, including two major broadcasters of the Star and Zee groups of channels was unfairly denying it the supply of signals.

2. The Tribunal found that Media Pro was denying signals to the petitioner for non-complying with certain technical conditions. The tribunal, accordingly, held that the denial of signals by Media Pro to the petitioner was unreasonable and hence the following petition is allowed.

3. Accordingly the petitioner had repetitively asked Media Pro to reveal the requisites and rates at which it was providing the signals of TV channels to other similarly situated distributors of TV channels so as to form negotiations to an agreement between the two parties.

4. Media Pro, however, completely refused the petitioner to unveil any information, taking a somewhat probing position, as, according to the order of the Tribunal it was obliged to give the petitioner the signals of its channels only in terms of its Reference Interconnect Offer (RIO) as under the Interconnect Regulations, 2004.

5. The petitioner faced the situation where the only option was to accept the Media Pro signals on its RIO terms and rates, and it so accordingly accepted and thus on 1st October, 2013 executed the RIO based agreement for the period 1st October 2013 to 30th September 2014.

6. However the 3 weeks time within which Media Pro was directed to enter into the interconnect agreement had lapsed, but before Media Pro could file an application for delay in execution of agreement by the petitioner, the petitioner

had already executed the RIO based agreement. To this Media Pro replied with the agreement under examination and it had to be finalized within 10 days.

7. On 30th October 2013, the Tribunal was informed that the parties had entered into an agreement in terms of the Media Pro RIO and the application was, accordingly, dismissed as infructuous.

8. The following observations were henceforth made -:

- There was a clear dichotomy between Media Pro RIO and the various other negotiated agreements that Media Pro enters into with many distributors of TV channels, almost all of which, would be for bouquets of TV channels.
- Having executed an agreement, based on Media Pro RIO, NSTPL never informed TDSAT that it was forced to enter into that agreement, despite having occasions to do so.
- From the beginning, Media Pro and NSTPL had completely different ideas regarding the nature of the interconnect agreement, and, the extent of negotiations leading to it.

9. After execution of an agreement based on Media Pro RIO, NSTPL kept asking to disclose the terms and conditions and the rates of its TV channels, in its negotiated agreements with similarly situated distributors of TV channels, or, at least, the concessions that it offered to other distributors of TV channels in its published agreement, that was available on its website. Media Pro responded by curt and indignant rejections.

10. As per Media Pro, it's RIOs for all delivery platforms that were uploaded on its website, were fully compliant with the applicable laws, including but not limited to regulations framed by Telecom Regulatory Authority of India (TRAI). As per Media Pro, the terms and conditions of its RIOs applied uniformly to all its affiliates who subscribed to its TV channels, on RIO terms.

11. As per Media Pro, it was not obliged to disclose to NSTPL, or to any third party, the rates and conditions of interconnect agreements executed by it, with other distributors of TV channels, on the basis of mutually negotiated terms. As per Media Pro, it was legally bound by its obligations of confidentiality to not share the details of its negotiated agreements, with NSTPL, or with any third party.

12. The second event is the Tribunal's decision in a case between Star and a large, pan-India Multi System Operator (MSO), called Hathway, wherein one of the main issues was in regard to the discriminatory rates given by Star to two MSOs both of which had inter-connection arrangement with it on the basis of mutually negotiated Petition No.47(C) of 2014 & other analogous cases agreements.

13. Initially in this case Star argued for its agreement on grounds of freedom of contract but down the case it filed an affidavit stating that for a period of 1 year it would enter into interconnect agreements with every distributor of channels only on a *la carte* basis, on its RIO rates.

ISSUES:

The Tribunal in the present case raised following issues:

1. Whether or not, in the particulars of this case, is there a dispute requiring the adjudication of issues framed by the Tribunal's order dated 30th July 2015?

2. Whether the right to freedom of contract is embedded in the Interconnect Regulations and whether mutually negotiated agreements are outside the purview of the non-discrimination obligation under the Interconnect Regulations, 2004 or even under the regulatory regime?

3. Whether, in light of the scheme of the Copyright Act and the fact that what is being transmitted is licensed content, the Interconnect Regulations 2004 must essentially be interpreted as according absolute freedom of contract and primacy of mutual negotiations in matters of interconnection?

4. What elucidation ought to be sited on the diverse clauses of the 2004 Regulations? Specifically, what is contemplated by an RIO, and what is the extent of negotiation that is acceptable in deviating from the terms of the RIO?

REASONING AND ANALYSIS -:

<u>For the first issue</u>

The provisions of the Regulations mentioned below were relied upon by the petitioner and those interveners who argued for limiting the scope of mutual negotiations and to bring it within the confines of the broadcasters RIO, for not putting any limitation or control over mutual negotiations for entering into an agreement.

- Reference **(13.2A.1)** Interconnect Offers for direct to home service.
- Every broadcaster must in its Reference Interconnect Offer specify, inter-alia, the technical and commercial terms and conditions for interconnection.
- Every broadcaster, who makes any modification to its Reference Interconnect Offer referred to in sub-regulation **13.2A.1**

- The RIO according to the above mentioned shall be the basis of all interconnection agreements, provided, that such an agreement has been entered on non-discriminatory basis.
- Under clause **13.2A.7**, Time limit for entering into agreements between the broadcasters and direct to home operators.
- Clause **13.2A.11** relates to Compulsory offering of channels on a-la-carte basis.
- Clause **13.2A.12** talks about the rates for pay channels on *a-la-carte* basis and rates for bouquets shall be subject to the following conditions.

The tribunal clarified that the reference interconnect offer containing various terms and conditions including commercial terms, published by a broadcaster for provision of signals to ordinary subscribers shall apply to provision of signals to commercial subscribers. Every broadcaster shall publish a copy of the Reference Interconnect Offer (RIO).

For the second issue

The standard format of the interconnect agreement as prescribed by the Authority has been seriously challenged as infringing freedom of contract, contrary is has been argued correctly that in the contractual regime there is an absolute liberty for the parties to be of the same mind upon mutually accepted terms and conditions and there seems no scope for meddling by way of prescribing any standard format of agreement.

So far as this argument of complete freedom to contract is concerned -:

- Firstly, we have to note down that the approved interconnect agreement comes into play only after the parties fail to reach an agreement on their own for which they have absolute freedom.
- 10 days time has been allowed to parties to negotiate. If they fall short to arrive at an agreement within such time period, only then the prescribed agreement has to be entered into.

In case if either of the party thinks that the time period of 10 days is short enough, then that party may approach the TRAI for extension of the period. Also, ***Rule 10(4) of the CTN Rules, 1994*** requires prescription of a standard interconnect agreement by the Authority which the broadcasters and the MSOs have to enter into in case they fail to arrive at mutually acceptable agreement.

In respect to freedom to contract, Article 19 (1)(g) of the Constitution gives the parties a freedom to trade which includes freedom to contract as well. However, this freedom is subject to reasonable restrictions. Accordingly, article 19 permits '*reasonable restrictions*' being imposed in the domain of freedom of contract. Both the acts, **TRAI** and the **CTN** are primary legislations which assert to regulate the broadcasting services and sufficiently provide for rational restrictions to be imposed, if any. Hence the argument was seen to be without any merit, to be put aside.

Salar Jung Sugar Mills Ltd v. *State of Mysore*[1] and in *Star India P Ltd* v. *Telecom Regulatory Authority & Ors*[2], the Division Bench at Delhi High Court rejected all grounds of challenge, including those invoking Articles 19 (1)(a) and 19(1)(g) in lieu of broadcasting and regulations by TRAI, wherein the court also discussed about the **public trust doctrine**. The court was also of the view that in respect of the broadcasting laws the freedom-of-contract argument has already been tested and repelled by the courts and the matter is no longer ***res integra***.

For the third issue

1. The court is seen of the view that it doesn't find that the RIO regime amounts to a compulsory license. Interconnect Regulations only require that similar offer be made to all similarly situated distributors. It is upon the broadcasters to design and customize their own RIO terms and conditions through which they enjoy a large measure of freedom in the manner in which such RIOs are framed.

2. If Regulations, such as those prescribing a mandatory sharing ratio for CAS areas are permissible, there is no rationale to find any fault with a far less intrusive Regulation which gives broadcaster ample freedom.

3. The inclusion of Rule 6(3) is mainly to protect against piracy that no programme must be shown without entering into an agreement with the copyright owner. All such regulations have been made to create a non-discriminatory administration where a broadcaster must offer the same terms to every distributor and this in no way undermines the copyright that vests in the content owners.

"Section 39(A) of the Copyright Act does not make section 31 applicable to "broadcast reproduction rights" and it is thus true that under the scheme of the Copyright Act, "broadcast reproduction rights" do not come under compulsory licensing."

For the fourth issue

The fourth issue draws our attention that the RIO based agreements and negotiated agreements, are both totally separate and parallel rules which is to be set aside or say, which are totally non maintainable. Further, as it was noticed in the Star's case, it has been correctly upheld even this case that, it is completely wrong to assume that any publication of RIO on the website satisfies the condition to act non-discriminatory, as such is not a case. It could turn out either wise as well. The judgment further delivers that it is even wrong to assume that MSO has full freedom in negotiation agreements, which includes right to maintain parity or even discriminate between comparable seekers of television signals.

[1] 1972(1)SCC23
[2] 2007 SCC On Line Del 951

Further, as on page 62, it is noticed that same distributors of channels must be given same commercial terms. It would rather be unappreciable if a particular distributor is given special rates on any regional, cultural, linguistic or any other special consideration, and another distributor is rather kept away for providing same. However, that another similar distributor should only be able to claim the same commercial terms, promising, in return, to give similar paybacks to the broadcaster if he is well diverse with the special deal given to another distributor. And so to say, the issue of disclosure becomes important for enforcement of non-discrimination.

CONCLUSION -:

The first petition on 10th July, 2014, NSTPL raised certain questions regarding RIO and wanted the Tribunal to declare Clause 3.2 of The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004, as amended from time to time should order that all distributors be offered the same rate per subscriber per month which is the rate specified in the broadcaster's RIO, unless the conditions of Clause 3.6 of Interconnection Regulation are fulfilled.

While the clause 3.6 of interconnect regulations 2004 speak out that, if any discounted number related scheme, it must be disclosed in a clear as crystal manner, so as to not facilitate the similarly located distributors to benefit of the same.

To the conclusion the court directs Media Pro to disclose the volume related schemes at which it offers TV channel signals to distributors which are similarly placed with NSTPL and it further permits NSTPL to avail of such schemes. However, to the second petition on 12th December, 2014 is against Taj and TRAI, which impugned the disconnection measures that had been initiated by Taj against NSTPL on account of suspected default like non-payment of assured amounts of subscription fees.
The courts directions are however for the greatest interest of the broadcasting sector. The regulation be interpreted in a way that there be a meaningful RIO be framed wherein all bouquets as well as a-la-carte rates are listed out, along with it is to been seen that there is still some scope for effective mutual negotiations between the parties to the best of their interest.

BY
Kapil Dhyani – Batch of 2012-2017, Symbiosis Law School, Noida; Sushant Chaturvedi (Associate, K&T Law Offices)