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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3755 OF 2022**

Asianet Star Communications Private Limited ...Petitioner
Versus
Competition Commissioner of India & Ors ...Respondents

**WITH
WRIT PETITION NO. 3845 OF 2022**

Disney Broadcasting (India) Private Limited ...Petitioner
Versus
Competition Commissioner of India & Ors ...Respondents

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**WITH
WRIT PETITION NO. 3860 OF 2022**

Star India Private Limited ...Petitioner
Versus
Competition Commissioner of India & Ors ...Respondents

**Mr DJ Khambata, Senior Advocate, with Kunal Dwarkadas,
Rajendra Barot, Nafisa Khandeparkar, Ambareen Mujawar,
Nitin Nair, Varun Thakur, Akshay Agarwal, i/b AZB Partners,
for the Petitioner in WP/3860/2022.**

**Mr Musatafa Doctor, Senior Advocate, with Rajendra Barot,
Nafisa Khandeparkar, Ambareen Mujawar, Nitin Nair, Varun
Thakur, Akshay Agarwal, i/b AAB Partners, for the Petitioner in
WP/3755/2022.**

Mr Navroz Seervai, Senior Advocate, with *Avinash Amaranath, Tarun Donadi, Nikhil Gupta & Priyanka Chaddha, i/b Wadia Ghyandy & Co*, for Respondent No. 2, in WP/3860/2022.

Mr Somsekhar Sundaresan, with *Abhishek Venkatraman, Viswajit Deb, Manu Chaturvedi, Malhar Desai Hafeez Patanwala, i/b Juris Corp*, for Respondent No. 1, in all matters.

Dr Birendra Saraf, Senior Advocate, with *Pradeep Bakhru, Avinash Amaranath, Tarun Donadi, Nikhil Gupta & Priyanka Chaddha, i/b Wadia Ghandy & Co*, for Respondent No. 2 in WP/3755/22 & WP/3845/2022.

Mr Rajendra Barot, with *Nafisa Khandeparkar, Ambareen Mujawar, Nitin Nair & Varun Thakur, i/b AZB Partners*, for Respondents Nos. 3 & 4, in WP/3845/2022.

**CORAM G.S. Patel &
Madhav J. Jamdar, JJ.**
DATED: 6th April 2022

PC:-

1. We have heard this group of matters at some length today for admission and interim or ad-interim relief.
2. For the purposes of this ad-interim order, we will take the facts from Writ Petition No. 3860 of 2022 (where Star India Pvt Ltd is the Petitioner). There is a limited Affidavit in Reply on behalf of the 2nd Respondent (“ADNPL”).
3. The challenge in all these Petitions is to and an order dated 28th February 2022 issued by the Competition Commission of India (“CCI”) in Case No. 9 of 2022. That order directs an investigation under Section 26(1) of the Competition Act 2002. To understand the contours of this, we reproduce Section 26 of the Act.:

“Section 26: Procedure for inquiry on complaints under section 19.—

(1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

(2) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(3) Where on receipt of a complaint under clause (a) of sub-section (1) of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary.

(4) The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General relates on a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director-General.

(6) If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint.

(7) If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.

(8) If the report of the Director General relates on a reference made under sub-section (1) and such report

recommends that there is no contravention of the provisions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.

(9) If the report of the Director General referred to in sub-section (2) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

4. By this order, we propose to simply hold the parties in a form of a status quo or a neutral position until they can be heard fully once the Court reopens after the summer recess, and once the CCI has been given a reasonable opportunity to file an Affidavit and submit a compilation of relevant law. We also intend to give the 2nd Respondent, the complainant before the CCI, an opportunity to file a further Affidavit in Reply and a compilation of documents.

5. We believe it would be appropriate to briefly set out some of the facts and the rival contentions to provide the necessary context for this order. We have not made any determination, even a prima facie one as yet.

6. The Petitioners are, respectively, Asianet Star Communications Private Limited, Disney Broadcasting (India) Private Limited and Star India Private Limited, all major

broadcasters and media and entertainment companies. There is no doubt that they are covered by the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations 2017, a corresponding 2017 tariff order and the Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection Regulations 2017. This is the regulatory framework.

7. The 2nd Respondent, ADNPL, filed an application with the CCI seeking an order under Section 26(1) of the Competition Act 2002 as also other reliefs. A copy of its application is at Exhibit “B” at page 103. ADNPL is a Multi System Operator (“MSO”). It provides digital TV services predominantly in Kerala but also in Karnataka, Andhra Pradesh, Telangana and Odisha. It has been in the business of distribution of TV channels for the better part of three decades. It provides its digital TV services to customer directly as also through local cable operators. It claims to have a customer based of over 10 lakh customers in Kerala and at least 1.1 lakh customers in other territories.

8. The Petitioners broadcast satellite-based TV channels. Each has multiple channels in different languages and in various genres. ADNPL receives broadcasting signals from these broadcasters. ADNPL and the Petitioners have had a commercial business relationship for nearly two decades.

9. According to the regulations and the decisions of the Telecom Regulatory Authority of India (“TRAI”) and the Telecom Disputes

Settlement and Appellate Tribunal (“**TDSAT**”), broadcasters (such as the Petitioners) must not have discriminatory pricing in commercial contracts with multi service operators. Crucial to this entire construct is a concept of ‘interconnectivity’. The current regulatory framework after 2017 has a concept of a maximum retail price. The 2017 Regulations inter alia cap discounts and distribution fees payable to distributors. They apparently mandate, according to ADNPL, that broadcasters must offer discounts on fair, transparent and non-discriminatory terms.

10. ADNPL says that it has frequently had to seek legal redress because of various discriminatory acts on the part of the Petitioners. The Petitioners deny these entirely and point out that ADNPL has not yet obtained any orders in its favour. We will consider all these contentions at a later date.

11. We do not propose to set out the entirety of the present complaint. The submission by ADNPL before the CCI was that the Petitioners are all in ‘positions of dominance’. They abused this position of dominance by providing to a direct competitor of ADNPL in Kerala, one Kerala Communicators Cables Limited (“**KCCL**”) significant discounts though these were indirectly buried in the form of allied agreements that apparently offered a cashback system. Whether this is or is not correct is yet to be determined. ADNPL seems to have said to CCI that the agreements were intended to bypass the TRAI/TDSAT-set caps or upper limits, or to subvert them, and to that extent were sham or bogus agreements only ostensibly complying or being in accordance to what was permissible but actually designed to provide unfair

advantage ADNPL's competitor, KCCL. This resulted in a massive erosion of ADNPL's customer-base.

12. This was the complaint to which CCI tribunal applied its mind. The impugned order in question is at Exhibit "A". In paragraph 9 this is how the CCI summarised the case before it.

"9. It was stated by the Informant that, to circumvent the New Regulatory Framework and grant additional discriminatory discounts to KCCL, OP-1 has entered into marketing agreements with KCCL whereby OP-1 pays KCCL for advertising which apparently is an admitted fact by OP-1 in one of its communications. It is also averred that it is claimed by OP-1 that the subscription agreement and marketing agreement are two independent transactions and that ADNPL is attempting to link two different transactions with mala fide intentions."

13. We reproduce only three paragraphs of the order at this stage.

"14. The Commission has considered the Information and other material available on record. Based on the averments and allegations made in the Information, it is observed that the main thrust of the allegations levelled by the Informant is that by offering additional discounts to select MSOs and the main competitor of ADNPL in Kerala viz. KCCL, OP-1 has placed the MSOs like ADNPL at a huge disadvantage which is detrimental to the competition and competitors in the market. Such conduct by a dominant player is alleged to be violative of the provisions of Section 4 of the Act as it not only amounts to imposition of unfair/discriminatory prices but also denies market access to the Informant besides distorting the level playing field in the market place and hindering the ability of the players to complete in an effective manner.

18. While advertng to the alleged abuse of dominance perpetrated by the Ops, it is averred in the Information that OP-1 was providing a bouquet of channels to the competitor of the Informant at lesser prices resulting into denial of market access and also amounting to unfair/ discriminatory pricing. Apparently, KCCL was getting the channels at about 30% of the MRP with about 70% discount (special discounts of up to 50% added with distribution fee of 20%) whereas the maximum permissible discounts under the New Regulatory Framework is capped at 35%, i.e., a minimum of 20% distribution fee and other marketing discounts of maximum 15% (combined, both capped at 35%). As per the allegation, OP-1 chose an indirect way to provide these discounts to circumvent the New Regulatory Framework by way of promotion and advertisement payments to KCCL through high valued advertising deals.

19. The resultant impact was that the Informant was constrained to price its channels at a higher price than that of KCCL and ultimately pay the price by losing consumers consistently whereas KCCL has gained new consumers. The Informant was ultimately offering its services at a loss-making price just to prevent the subscriber base from migrating to KCCL's services but in a vain. It is stated that ADNPL's subscriber base fell from about 14.5 lakh in April 2019 to about 11.76 lakh in September 2021 while the subscriber base KCCL went up from 21.3 lakh in April 2019 to 29.35 lakh in September 2021. Therefore , the alleged discriminatory conduct of price discrimination between different MSOs of OP-1 has resulted into significant loss in the consumer base of the Informant and therefore prima facie appears to be in violation of the provisions of Section 4(2)(a)(ii) of the Act as also in contravention of the provisions of Section 4(2)(c) of the Act due to discriminatory pricing and denial of market access respectively."

14. In view of this, the CCI directed the Director General to cause an investigation to be made into the matter and submit an investigation report within 60 days. He was to do so without being influenced by any observations in the CCI's order.

15. Mr Khambata's submission for the Petitioners are on several counts. He maintains that the impugned order is entirely bad and cannot be sustained. Before that, Mr Sundaresan on before of the CCI raises a preliminary point of the jurisdiction of this Court. We have heard him and Mr Khambata briefly on this. Today we leave that jurisdictional question entirely open for decision at a later date. We are not expressing a prima facie view.

16. As to the order itself, Mr Khambata draws our attention inter alia to the decision of the Supreme Court in *Competition Commission of India v Bharti Airtel Limited and Ors.*¹ He does so to submit that a complaint of the nature presented by the 2nd Respondent must be first placed before the TDSAT and cannot be placed before the CCI directly. The *Bharti Airtel* judgment has been followed or applied, Mr Sundaresan says, by various Courts and the formulation by Mr Khambata is, in his submission, inaccurate given the nature of the complaint that the CCI before it. Specifically, there is no universal pre-condition that every complaint under the Competition Act against a broadcaster must be filtered through the TDSAT. Indeed, the judgment itself indicates to the contrary.

1 2019 (2) SCC 521.

17. Mr Sundaresan is supported in his submissions quite vigorously by Mr Seervai, who maintains that Mr Khambata's reading of his complaint is entirely wrong. All that ADNPL said is that while the TRAI/TDSAT established certain norms or standards, the Petitioners have been attempting to subvert them. There are no questions of 'interconnectivity' or 'Points of Interconnectivity' (POIs) that need to be decided by TDSAT. The only question is of discrimination to the disadvantage of the complainant. ADNPL's stand is that the Petitioners have given KCCL additional discounts over and above the maximum permitted by TRAI/TDSAT, but these have been disguised in marketing and advertising agreements. This, Mr Seervai says, falls squarely within the meaning of Section 4 of the Competition Act 2002; hence the complaint. This has nothing at all to do with the remit of the TDSAT. Mr Seervai submits that Dr Justice Sikri's judgment in *Bharti Airtel* did not say that every single complaint against a broadcaster had perforce to be routed first to the TDSAT, nor did it say that the TDSAT would first have to disclaim jurisdiction, after which alone could the CCI exercise its jurisdiction. Mr Seervai maintains that the Petitioners' agreements with KCCL are sham and bogus, but this has been clearly spelt out to mean that they are attempts to bypass TDSAT-mandated caps or norms. That does not mean TDSAT has to first adjudicate the issue.

18. Further, both Mr Seervai and Mr Sundaresan also point out that at this stage CCI has not directed anything except information-gathering or data-collection.

19. We believe that CCI must be afforded an opportunity of placing its case fully before the Court. ADNPL too may wish to place a law or to file a further Affidavit. Annexed to the Petitions, after all, is only the body of its complaint. That complaint before the CCI was supported by quite voluminous material that is not before us today.

20. We will hold the matter over to the 8th June 2022 when it will be placed high on the supplementary board for directions so that we can fix a date for final disposal at the admission stage. CCI will file its Affidavit in Reply and compilation of documents by 7th May 2022. By that date any further Affidavit in Reply by the complainant must also be filed. We will permit a Rejoinder by 3rd June 2022.

21. In the meantime, the Petitioners in all three cases will, on a without-prejudice and no-equities basis, furnish to the Director General such documentary material and information as he has called for or in response to his queries. The CCI is not to pass any further orders or to adjudicate further on the 2nd Respondent's complaint until further orders of the Court. The CCI is not to permit or direct any coercive actions against the Petitioners until the next date. This order will operate until 8th June 2022.

22. The information collected by the Director General is to be kept confidential as specifically required by law.

23. In particular, the information and documents supplied to the Director General (and to him alone) under are not to be shared with

or used by the 2nd Respondent in any manner until the next date. Mr Sundaresan assures us that there is no question of the 2nd Respondent being given access to the documents and information at this stage.

24. List the matters on 8th June 2022, for directions on the supplementary board.

(Madhav J. Jamdar, J)

(G. S. Patel, J)