

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7215 OF 2014

COMPETITION COMMISSION OF INDIA ...APPELLANT

VERSUS

M/S FAST WAY TRANSMISSION ...RESPONDENT
PVT. LTD. & ORS.

J U D G M E N T

R.F. NARIMAN, J.

1. The present appeal by the Competition Commission of India raises several interesting questions relating to its functions under the Competition Act, 2002. The brief facts necessary to appreciate the controversy which arises in the present case are as follows:

An agreement dated 1stAugust, 2010 was entered into between respondent no.5, who was the broadcaster of a News Channel

called “Day & Night News”, and respondent No.1 to 4 who are Multi System Operators (hereinafter referred to as “MSOs”) who carried the aforesaid channel to persons who watch Cable T.V. A channel placement agreement was entered into, on the same day, between the broadcaster and the MSOs, all of which are stated to belong to the Fast Away Group. By notices of termination dated 19th January, 2011, the aforesaid agreements were terminated by relying on a clause of the said agreements which entitled them to do so on the mere giving of a thirty day notice. This being the case, respondent no.5 complained about the aforesaid termination. The Director General of Investigation looked into the complaint of the broadcaster, investigated the matter, and ultimately delivered its report to the Competition Commission, in which it found that the said MSOs indulged in practices which were violative of Sections 3 and 4 of the Competition Commission Act, 2002. Going by this report, and after hearing the parties to the dispute, the Competition Commission, by its detailed order dated 3rd July, 2012, first held that according to it, the relevant market to be looked at for the purpose of Sections 3 and 4 would be the State of Punjab and

Chandigarh. Having regard to this market, so far as Cable TV was concerned, a finding was entered stating that the MSO group had 85% of the subscriber share in that market, and was therefore, in a dominant position which could be misused. Ultimately, it found on facts that the group had never terminated any such similar agreement before the due date except in the instant case, and also found that this could not be said to be due to low TRP ratings, inasmuch as the complainant's TRP rating was almost equal to that of some other channels. The Commission then went on to find as follows:

“6.4.9 The evidences as above confirm that there were disruptions in the telecast of the channel. The Commission further observes that the OP has argued that as per TRAI regulations it is not bound by “must carry”, as against the informant who is bound by a “must provide” provision. However, the argument of the OP group does not take away the fact that the informant is dependent on it for transmission of its channel and if it is denied that, it cannot get access to the market. It is not that the informant was not paying the placement fee charged by the OP group. There was no dispute on non-payment of placement or carriage charges. An agreement was duly executed between the informant and the OP group for transmission of the channels of the former.

6.4.10 However, due to the fact that the subscriber base of the OPs is in excess of 40 lacs, every

broadcaster including the informant dependent upon their network. In such a situation, the Commission observes that the OP is in position to affect the market in its favour. Due to its market power, the OP group has denied the opportunity for transmission of channel of the informant. The group has no justification for termination of the agreement and its argument for justifying its conduct is not based on any sound footings. Its argument regarding shortage of spectrum for non-transmission of the informant's channel in face of the fact that the spectrum constraint might have been considered at the time of entering into agreement with the informant upon charge of premium from the broadcaster. Once that was considered, the question of shortage of spectrum during the period of the agreement does not arise. Similarly, the argument of low TRP is also not justified since in past there has been no practice of review of any agreement on the basis of TRP ratings in the middle of an agreement. The Commission observes that the argument of spectrum shortage and low TRP is merely an afterthought to justify its conduct.

6.4.11 The conduct of OP has resulted in loss to the informant-broadcaster as well as denial of services to the consumers who want to watch the channel of the informant. As on date the Informant has access to only 56,000 households on the cable TV in the state of Punjab & Chandigarh, where about 45 lacs households are connected on cable network. Thus, the informant has been effectively wiped out from the entire relevant market by the conduct of OPs.

6.4.12 In the light of the facts and circumstances of this case the Commission observes that due to the acts of the OP group the informant has been denied the market access and opportunity to compete and

holds that violation of the provisions of section 4(2) (c) of the Act gets established.”

2. Given the aforesaid finding, the Commission thereafter imposed a penalty in exercise of its power under Section 27 of the Act of Rs.8,40,01,141/-.

3. The appeal by the MSOs group to the Appellate Tribunal found favour with the aforesaid Tribunal. Essentially, the Tribunal's finding was that the denial of market access under Section 4(2)(c) can only be by one competitor against another, and that as a broadcaster cannot be said to compete with MSOs, there would be no violation of either Section 3 or Section 4 of the Act. On this short ground the appeal stood allowed.

4. Shri P.S. Narsimha, learned Additional Solicitor General, appearing on behalf of the Competition Commission, who is the sole appellant before us, has argued that the role of the Competition Commission is delineated in the preamble read with certain provisions of the Act, as a positive one. The Commission has to prevent practices having an adverse effect on competition, to promote and sustain competition in markets,

as also to protect the interest of consumers, so that freedom of trade is ensured which in turn leads to healthy economic development of the nation as a whole. Viewed in this light, and after referring to certain other provisions of the Act, the learned Additional Solicitor General argued that the Appellate Tribunal has construed the Act in a constricted manner which would impede the Commissions' functioning in future cases. With his usual fairness, he has left it to the court to decide the amount of penalty that ought to be imposed on the facts of the case.

5. Learned senior counsel appearing on behalf of the respondent MSOs has been equally fair to the Court, and has brought to our notice the judgment of the Telecom Disputes and Settlement Appellate Tribunal (TDSAT) dated 25th April, 2012 in which this very termination by the MSOs in the present case was held to be unlawful, in that Regulation 4.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 was breached. Clause 4.2 of the aforesaid Regulation, which overrides agreements between the parties, specifically speaks about a three

weeknotice to the broadcaster clearly giving reasons for the proposed action of effacing transmission of a TV channel by the aforesaid MSOs. The notice of termination dated 19th January, 2011 do not conform to the aforesaid Regulation as reasons for the proposed termination have not been given. He further argues that no case for penalty has been made out against his clients for the reason that at the relevant time, the analogue platform was used, and the operational capacity of such platform was only for 80 channels as against the existing channels of about 550. He went on to add that the TRP ratings of the broadcaster, namely, respondent No. 5, was the lowest by far among all other news channels, getting a rating of only 3.8 as against the lowest rated news channel, which was MH Channel, of 7. This, according to him, was because of an experiment conducted by respondent No. 5 which failed, because it broadcast news in three different languages, and since most of the viewers were not familiar with each of these languages, the channel failed and respondent No. 5 was no longer in business. Therefore, according to him, even though technically speaking, Regulation 4.2 was breached, yet a notice

of termination could have been given stating the aforesaid reasons as to why the agreement between the MSOs and the broadcaster was terminated. This being the case it is clear that the termination of the agreement did not take place because of the MSOs dominant position in the market, but because of the factors aforesaid. In his view, therefore, this is not a case in which penalty should have been imposed.

We have heard learned counsel for the parties.

6. It is important to advert first to the provisions of the Act.

The Preamble to the Act reads as under:

“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

Section 2 Definitions-

In this Act, unless the context otherwise requires,-

(b) "agreement" includes any arrangement or understanding or action in concert,-

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

(f) "consumer" means any person who-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

(m) "practice" includes any practice relating to the carrying on of any trade by a person or an enterprise;

(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

Section 4 Abuse of dominant position-

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group-

(a) directly or indirectly, imposes unfair or discriminatory-

(i) condition in purchase or sale of goods or service;
or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts-

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation- For the purposes of this section, the expression-

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the *Explanation* to section 5.

Section 18 Duties of Commission-

Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

Section 19 Inquiry into certain agreements and dominant position of enterprise-

(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

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(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:-

- (a) market share of the enterprise;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) vertical integration of the enterprises or sale or service network of such enterprises;
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) countervailing buying power;
- (j) market structure and size of market;
- (k) social obligations and social costs;
- (l) relative advantage, by way of the contribution to the economic development, by the enterprise

enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

Section 27 Orders by Commission after inquiry into agreements or abuse of dominant position-

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:-

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(g) pass such other order or issue such directions as it may deem fit:

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the *Explanation* to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

Section 41 Director General to investigate contravention-

(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under sub-section (2) of section 36.

(3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

Explanation- For the purposes of this section,-

(a) the words “the Central Government” under section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as “the Commission”;

(b) the word “Magistrate” under section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as “the Chief Metropolitan Magistrate, Delhi”.

Section 53B Appeal to Appellate Tribunal-

(1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as

expeditiously as possible and endeavor shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

Section 53T Appeal to Supreme Court-

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them:

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

Section 60 Act to have overriding effect-

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

7. The Preamble of the Act, read with the aforesaid provisions, would show that the Commission set up by the Competition Act certainly has a positive role to play. A perusal of Sections 18 and 19 would show that it is a positive duty of the Commission to eliminate all practices which have an adverse effect on competition. Further the Commission should promote

and sustain competition, apart from protecting the interest of consumers, so as to ensure freedom of trade carried on by all participants in markets all over India. Also, a positive role is given to the Commission to inquire, *suo motu*, into the dominant position of enterprises, and to prohibit anti competitive agreements. Section 60 then gives the Act overriding effect over other statutes in case of a clash between the Act and such statutes to effectuate the policy of the Act, keeping in view the economic development of the country as a whole.

8. On the facts of the present case, it is clear that “dominant position” is clearly made out. The Explanation to Section 4 specifically refers to a position of strength that is enjoyed by an enterprise or group thereof in the relevant market, which, as is stated hereinbefore, is Punjab and Chandigarh, in the Cable TV market, which enables respondents no. 1-4 to operate independently of competitive forces prevailing in the relevant market. The Commission has found, on facts, that since the aforesaid MSOs group has 85% of the subscribers share in the aforesaid cable TV market in the State of Punjab and Chandigarh, and that they are able to

operate independently of competitive forces prevailing in the aforesaid market. This finding has not been set aside by the Appellate Tribunal. Also, the respondent would fall within Explanation (a)(ii) as well, though it is enough that it would fall within sub-section a(i) of the Explanation. Sub-section (ii) refers to a position of strength as enjoyed by the respondents which enables them to affect consumers in its favour.

9. Replying upon the definition in Section 2(f)(ii), ShriNarsimha, learned ASG has, in our view, correctly argued that a broadcaster would certainly fall within the wide language contained in the aforesaid sub-section. We may also add that in all fairness the learned counsel for the respondent has agreed with the same. This being the case, it is clear that as both sub-sections (i) and (ii) of clause (a) of the Explanation apply, the respondent could be said to be in a “dominant position”, for the purpose of Section 4, in the facts of the present case.

10. The question which now arises is whether there is an abuse of such dominant position under Section 4(2)(c) where

the respondent could be stated to have indulged in a practice resulting in denial of market access in any manner.

11. It can be seen that in the facts of the case, the broadcaster, namely respondent No. 5, had a broadcast agreement which was entered into for a period of one year from 1st August, 2010. This was sought to be terminated within the aforesaid period by the respondent by notices dated 19th January, 2011. The TDSAT has, by its order dated 25th April, 2012, adverted to Regulation 4.2 of the relevant Telecom Regulations, and has found that the respondents have not followed the aforesaid regulations, inasmuch as no reasons for termination have been given in the notices of termination. This being the case, it is clear that, on the present facts, there is an abuse of the dominant position enjoyed by the respondents 1-4 only for the reason that the broadcaster was denied market access on and after 19th February, 2011 until 1st August, 2011. The words "in any manner" are of wide import and must be given their natural meaning. This being the case, it is difficult to appreciate the reasoning of the Appellate Tribunal that, as the broadcaster and MSOs are not in competition with one another,

the provisions of Sections 3 and 4 do not get attracted. As has been held by us, the “dominant position” held by the respondent MSOs is clearly established for the purpose of Section 4 in the present case, and the Commission finding in that behalf is also not set aside by the Appellate Tribunal. If this be so, then once a dominant position is made out on facts, whether a broadcaster is in competition with MSOs is a factor that is irrelevant for the purpose of application of Section 4(2)(c) which, as has been found by us, becomes applicable for the simple reason that the broadcaster is denied market access due to an unlawful termination of the agreement between the said broadcaster and the respondents 1-4.

12. Having said this, however, we are of the view that no penalty ought to have been imposed on the facts of the present case. The finding of the Competition Commission that TRP rating of the broadcaster was not so low as it was almost equal to that of other channels, is not correct. In the counter affidavit filed before us by the respondent, they have specifically stated the TAM ratings of the respondent channel, as opposed to other

news channels, from the month of September 2010 to January 2011, were as follows:

S.No.	Name of the Channel	Average GRP of the Channel during five month period (Sept.'10 – Jan.'11)
1.	AAJ TAK	33.6
2.	Day and Night News	3.8
3.	IBN7	24.7
4.	MH1 News	7.0
5.	NDTV India	22.5
6.	PTC News	35.6
7.	Star News	27.9
8.	Zee News	21.5

13. A perusal of the aforesaid chart would show that the GRP given to the news channel 'Day and Night' is much lower than that given to any other channel, and that learned senior counsel for the respondent was correct in stating that this was the reason for terminating the agreement with the broadcaster in mid-stream. Though we find that, on the facts of this case, Section 4(2)(c) has been breached, yet the reason given by respondents 1 to 4 for termination being otherwise justifiable,

we feel that no penalty should be levied on the facts of the present case.

14. The appeal is accordingly allowed, and the judgment of the Appellate Tribunal, as well as the penalty imposed by the Competition Commission, both stand set aside.

.....J.
(R.F. Nariman)

.....J.
(Navin Sinha)

**New Delhi;
January 24, 2018.**

ITEM NO.2

COURT NO.12 SECTION XVII
S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).7215/2014

COMPETITION COMMISSION OF INDIA

Appellant(s)

VERSUS

M/S FAST WAY TRANSMISSION PVT. LTD.
& ORS.

Respondent(s)

Date : 24-01-2018 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE NAVIN SINHA

For Appellant(s)

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Ms.Reena Rathore, Adv.
Ms.Smriti Jain, Adv.
Ms.Shweta Rath, Adv.
Mrs.Pragya Baghel, AOR

UPON hearing the counsel the Court made the following
O R D E R

The civil appeal is allowed in terms of the signed
reportable Judgment.

(Ashok Raj Singh) (Saroj Kumari Gaur)
Court Master Court Master
(Signed reportable Judgment is placed in the file)