

News Broadcasting Standards Authority

Order No. 33 (2014)

In the matter of complaints dated 8.4.2014 of Mr. Vishal Kudchadkar and Mr. Syed Ali Hussaini against CNN IBN, NDTV, TIMES NOW & HEADLINES TODAY

On 7.4.2014, BJP released its manifesto at New Delhi. Some constituencies in Assam and Tripura went to polls on 7.4.2014. The BJP manifesto release was broadcast live on 7.4.2014 by several channels including CNN-IBN, Times Now, Headlines Today and NDTV. The telecast could be viewed all over India including those constituencies which went to poll on that day. The complainants have alleged that such broadcasters violated Section 126 (1) of the Representation of People Act, 1951 (for short 'RP Act') which prohibits any public display of election matter by means of cinematography, television and other similar apparatus during the period of 48 hours prior to the end of polling. According to complainants, such live telecast was carried out in spite of specific instructions to the contrary from the Election Commission of India. The complainants contend that the said live coverage telecast of BJP manifesto, apart from violating the provisions of Section 126 (1) of the RP Act and the direction of Election Commission of India, also violated Guideline 12 of the NBA Guidelines for Election Broadcasts. The complainants, being not satisfied with the response from the broadcasters denying any violation, complained to the NBSA with a request to take action against the erring channels, namely CNN-IBN, Times Now, Headlines Today and NDTV.

2. The complainants have produced the e-mails exchanged amongst the editors of various channels, in support of their contention that in spite of a prohibition and clear warning by the ECI, the channels had proceeded to broadcast the release of BJP manifesto. The relevant portions of e-mails exchanged are extracted below.

“6.4.2014 (19:47) - from Arnab Goswami to Sanjay: We should take it up with the cec. who from bea will speak to him. Anything regarding polls is “election matter” by that definition.

6.4.2014 (7.57 PM) – from Shazī Zaman to Arnab Goswami and others: Arnab can you pl speak to cec. We cannot restrict our beam. Anything we cover and show will be visible in poll bound area.

6.4.2014 (08.48 PM) – from Shazi Zaman to Vinay Tewari and others: After CEC clarification, my view would be to go ahead with showing the manifesto release. As per EC advice on not publicising it in regions going to polls, I think it is beyond our control to limit the signal. **Best we can do is to NOT highlight issues specific to the states going to poll**, though if it comes in live, cannot stop it.

If we manage to speak to CEC, would sent an update.

6.4.2014 (20.57) – Rajdeep Sardesai to others: Have spoken to cec. *Says there is no specific restriction.*

6.4.2014 (09:04 AM) – Shazi Zaman to others: Many Thanks. *So this issue is settled.*

6.4.2014 (11.04 PM) – Rajdeep Sardesai to Shazi Zaman and others: Subject: Re: BJP manifesto release. Sorry! Sampath has called back. *Ec has now changed its mind. Ec legal counsel mr mendiratta has now said that it cannot be shown till 5 pm. Any violation he says will attract section 126 right away. This is subsequent to a mtg with ec officials. Ec claims position has been made amply clear that manifesto can influence voters in tripura and assam and cannot be shown till polling is complete. It is now for us to decide. But ec says it is a clear violation and any live telecast will lead to notices being served. I would suggest collection action, whatever it be.*

[The names of only the sender and first of the persons to whom the e-mail is addressed are mentioned above. The e-mails were addressed to editors of several broadcasters, including the four against whom the complaint is lodged].

From the said e-mails, complainants want NBSA to infer that the Chief Election Commissioner (Mr. Sampath, referred to in the e-mail) had informed that the manifesto release could not be shown till 5.00 PM on 7.4.2014 and any violation would attract Section 126 of RP Act and that in spite of the said clarification, the editors collectively decided to proceed with the broadcast knowing fully well that it was in violation of Section 126 of RP Act and Guideline 12 of the NBA Guidelines.

3. In response to the complaints, the broadcasters have contended that in broadcasting the release of BJP manifesto, they were only discharging their

duty to effectively disseminate relevant news to the viewers; that they covered the release of manifesto of all the major political parties in order to apprise the people of India, the views/vision of the political parties on key issues; and that the broadcast of BJP manifesto was in public interest and in exercise of their right to freedom of speech and expression guaranteed by the Constitution of India. They also contended that the Election Commission of India had not issued any circular or communication in regard to release of the said manifesto. The broadcasters therefore contended that they have not violated either Section 126 of RP Act or any provision of the NBA Code of Ethics/Regulations.

4. NBSA, at its meeting on 2.6.2014, considered the complaint and responses by the broadcasters and decided to issue notices to all the four broadcasters to file their written statements with supporting documents and called them for a hearing on 17.7.2014. Accordingly, arguments were heard on 17.7.2014 and 27.8.2014.

CONTENTIONS:

5. The contentions urged by Mr. M.S. Ganesh, learned Senior Counsel for the complainants, are as under:

“(i) The release of the manifesto of a political party is an “election matter” as defined in the RP Act; and broadcast of any election matter during the period of 48 hours ending with the hour fixed for the conclusion of poll is an election offence.

“(ii) The broadcasters who had aired the BJP election manifesto while the elections were going on in other areas in the country not only violated Section 126 (1) (b) of the RP Act but also violated the NBA Guidelines on election broadcasts dated 3.3.2014, in particular Guideline 12, which stated that “the broadcasters shall not broadcast any matter intended or calculated to influence or affect the result of an election, during the 48 hours ending with the hour fixed for the conclusion of poll in violation of Section 126 (1) (b) of the RP Act 1951.

“(iii) In view of NBSA incorporating in its own Guidelines the contents of section 126 of RP Act, any failure to follow it, would be a violation of its Code of Ethics and Guidelines; and such violations by the broadcasters deserve the punishment in the hands of NBSA by way of

censure, penalty and recommendation to I&B Ministry to cancel the broadcaster's licence.

(iv) It is evident from the e-mails exchanged that the Broadcasters were fully aware that the broadcast of the BJP manifesto was in contravention of section 126(1)(b) of RP Act and in spite of it, they proceeded with the broadcast.”

6. Ms Indu Malhotra, learned Senior Counsel for the broadcasters (Headlines Today, Times Now and CNN-IBN), urged the following contentions:

- (i) Election manifesto of a political party is not an “election matter,” but is merely a “news item”; and all channels have an obligation to disseminate the said information to the public. Broadcast of election manifesto during the 48 hour period prior to the hour fixed for conclusion of the poll, does not therefore violate Section 126 of RP Act or the Regulations/ Guidelines issued by NBA/NBSA. The fact that the ECI did not issue any advisory to the broadcasters regarding telecast of manifestos makes this position clear.
- (ii) An 'electoral offence' can only be considered or tried by a court of law, on a complaint by the ECI and not under the NBSA regulations. As per NBSA regulations on election broadcasts, NBSA can consider a complaint, only if the violation of NBSA Regulations/Guidelines is reported by the ECI and not otherwise.
- (iii) “Polling area” is not defined in RP Act 1951. Contextually and literally it refers to the polling station. Therefore, even if there is any prohibition, it should be restricted in regard to the said area.
- (iv) Even if polling area should be interpreted as referring to an entire constituency (or part of a constituency), in a multi-phased election where on a given day polling takes place only in a part of the country, it is not possible for the broadcasters to stop the broadcast in those constituencies where the polling is taking place.

7. Mr. Mrinal Bharti, learned counsel appearing for CNN IBN, contended as under:

“(i) The complaint had been filed before the wrong forum. Any

allegation relating to violation of Section 126 of the RP Act, can be considered only by the ECI.

(ii) Whether an offence has been committed under Section 126(1)(b) of RP Act can be decided only by a Court of Law. No action can be taken under NBSA Guidelines 12, unless a Court of Law has held, in a complaint by ECI, that there is a violation of Section 126(1)(b) of the RP Act.

(iii) The broadcast of the release of the manifesto of BJP, one of the main large political parties in India, is a discharge of a public duty by the electronic media.

(iv) The broadcast involves various distribution platforms like cable, DTH, etc. Only the Government, acting under the Cable Television (Regulation) Act, 1995 can give instructions to the District Magistrate to take appropriate action of shutting Cable/DTH in polling areas. It was not possible for the broadcasters to switch off broadcast in only some parts of the country.

(v) The complainants have not disclosed the source of the e-mails produced by them. The fact that the complainants produced private exchange of e-mails among the editors of the broadcasters, showed that the complainants were acting at the behest of someone who had 'access' to such e-mails.”

8. Mr. Ajay Mankotia representing NDTV adopted the submissions made by the counsel for the other broadcasters. He stated that the broadcasters in general, and NDTV in particular, had covered release of the manifestos of all major political parties, and not merely that of BJP. He stated that party manifestos are relevant information which requires to be placed before the public, during elections.

9. Mr. V.V.P. Sharma, Senior Editor, TVTN, admitted that the editors debated amongst themselves the issue of broadcast of BJP manifesto and that a series of e-mails were exchanged among the editors of various channels (who were members of NBA and Broadcast Editors Association) to decide whether the release of the manifesto and the contents of the manifesto could be aired, when polling was going on in Assam. He stated that they did not disclose any 'defiance' to law or any collective decision to deliberately violate law, as alleged by the complainants. He pointed out that conversation

between one of the editors and the Chief Election Commissioner referred to in the e-mails indicated that broadcasters could air the release of the BJP manifesto. Since there was no official prohibition by the ECI, the broadcasters had decided to release the details of the election manifesto in their broadcasts, as news broadcasters owed a duty to disseminate information regarding the BJP manifesto, which was of immense news value during elections. He further pointed out that where ECI wanted to prohibit any types of broadcast, it had come out with clear and specific instructions and gave the example of opinion polls, where ECI had come out with a categorical circular which was followed by the broadcasters. He stated that in the absence of any such ECI circular in regard to broadcast of election manifesto, and in the absence of any mechanism to curtail the broadcast in specific areas, the editors were justified in deciding to broadcast the details of the BJP election manifesto.

TECHNICAL & PRACTICAL ASPECTS:

10. The broadcasters explained the following facts and circumstances to show that it was difficult, in fact impossible, to block a telecast in the areas going to polls:

(i) BJP held its conference where the party manifesto was released on 7.4.2014 which was a Monday and it lasted for 1 hour 30 minutes from 09:46 Hrs. to 11:13 Hrs. Confirmation of BJP's conference's time, place and objective was received only on 6.4.2014, that is Sunday afternoon. Taking any decision relating to technical operations/functions was very difficult on Sundays.

(ii) As per TRAI data, there are approximately 270 cable operators in Assam and approximately 124 cable operators in Mizoram. Out of them, about 65 cable operators in Assam and 19 cable operators in Mizoram down link the signals of channels and re-transmit to other cable operators and subscribers in the States. There are also atleast five major cable operators who service multiple States besides Assam and Mizoram, from a single control room. TRAI regulation provides for mandatory notice of atleast 21 days for any de-activation of a channel by a broadcaster. Any decision to de-activate feed to cable operators in polling area, resulting in de-activation of feed to cable operators outside polling area would result in action by the Regulator.

(iii) In addition to cable connected homes, there are large number of

DTH homes in the two States who get the channels directly from the service providers, along with the entire country. It is not possible for the broadcaster to switch off beaming to those homes. The channels also reach the consumers through routes other than regular cable, like internet, which cannot be blocked. In fact, there has never been an occasion where a designated area is completely blocked out by a broadcaster.

(iv) While switching off the feed to a particular identified cable operator could be effectively carried out by a simple procedure in a short time, switching off the feed to the cable operators to block out the entire area requires considerable resources, planning and systematic execution and the time required for complete switch off of signals of a TV channel in a given area will be anything between 24 and 48 hours. The procedure involves time consuming exercise of taking out details of cable operators in the area intended to be blacked out from the Broadcasters' agreement data base. The Subscriber Management System, which manages activation and de-activation, takes time to de-activate the IRDs and VCs of the cable operators intended to be switched off. Further such a procedure is not available in the case of Direct-to-Home (DTH) service, where the subscribers receive the broadcasts from the channels directly from the service provider throughout the country and it is impossible for broadcasters to switch off the broadcast to such subscribers. Thus, even by following a complex process, it will be beyond the control of the broadcasters to completely black out the channel in a given area.

11. In reply, Mr. M.S. Ganesh contended and clarified as under:

- (i) The contention of complainants is that election manifesto of a political party is intended or calculated to influence or affect the result of an election and therefore an 'election matter'; that the broadcast of the release of manifesto of a political party during 48 hours ending with the hour fixed for the conclusion of poll would be an offence under section 126(1)(b) of RP Act and violation of Guideline 12 of NBA Guidelines.
- (ii) The question whether a broadcaster committed an offence under Section 126(1)(b) of the RP Act, is a matter to be decided by a criminal court. But, NBSA can independently decide whether there is a violation of Guideline No. 12 of NBA Guidelines on Election

Broadcasts. Any finding by NBSA on an enquiry under Guideline No. 12 will be a finding for the purpose of taking action under the NBSA Regulations and will not be construed as a finding in regard to any offence under Section 126(1)(b) of the RP Act; and therefore, there can be no objection for NBSA enquiring into the question whether there is a violation of the Guidelines, irrespective of the fact that there is no complaint to a court under Section 126(1)(b) of the RP Act and there is no complaint by ECI before NBSA.

- (iii) The fact that there will be some difficulties in blocking out the broadcast in the polling areas where the elections are taking place, is not a ground to proceed with an all India broadcast; and that if it is not possible to block out the broadcast in a particular area where there is a prohibition, then there could be no broadcast at all of such election matter. A violation does not cease to be a violation merely because it is not a violation in other areas where the prohibition under Section 126 does not operate. Broadcasters cannot therefore take shelter under the contention that there was no prohibition regarding the broadcast in the major part of the country where there was no imminent polling.

VIEWS OF ECI:

12. As the complaints related to broadcasts which was alleged to be in violation of the provisions of RP Act and specific directions of Election Commission of India, a communication was addressed by NBSA to the Election Commission of India to ascertain its views on the following question:

“Whether broadcast of a political party's manifesto at New Delhi in a particular day by news channels would violate any election law, if there was polling on that day only in only one State, say Assam, and there was no bar in regard to election matters being broadcast in New Delhi or other parts of the country.”

13. In response to it, Mr. Akshay Rout, Director General, ECI and Mr. S. K. Mendiratta, Legal Advisor, ECI met the members of NBSA and explained the stand of ECI in the matter, as under: (i) Prior to the commencement of the elections they had issued a Press Note dated 7.3.2014 regarding “General election to 16th Lok Sabha and State legislative assemblies

2014 – media coverage during the period referred to in Section 126 of the RP Act 1951,” which also included the Guidelines dated 3.3.2014, for election broadcasts issued by NBSA. (ii) No special instructions or inputs were given to the Electronic Media by ECI regarding the coverage of the BJP election manifesto on 7.4.2014, in the light of the polling taking place in some parts of the country, and those who contacted ECI were advised to go by the provisions contained in Section 126 of the RP Act. (iii) The Ministry of I&B had confirmed that it would not be possible to partially switch off broadcasts in regard to 'election matters' in particular areas going to poll. (iv) The legal opinion (obtained by EC) on the issue relating to Section 126 of RP Act was that the said section, being a penal provision, had to be strictly construed; and that the telecasting of an election related event such as release of election manifesto or an election address or a press conference outside the limits of a constituency going to the poll would not attract the penal provisions of Section 126; and that the prohibition regarding the release of a manifesto or election address or press conference will have to be restricted to any election matters relating to that constituency and the candidates in that constituency. On an overall consideration, they indicated that ECI was not proposing to consider the broadcast of the BJP manifesto as a violation of Section 126 of RP Act.

FINDING OF NBSA:

14. We have considered the complaints, replies as also the written and oral submissions and the documents relied upon by the parties. The core question whether the broadcast of BJP election manifesto violated Section 126(1)(b) of RP Act and Guideline No. 12 of NBA Guidelines on Election Broadcasts.

15. Section 126 of the RP Act is extracted below:

“126. Prohibition of public meetings during period of forty-eight hours ending with hour fixed for conclusion of poll – (1) No person shall -

(a) convene, hold, attend, join or address any public meeting or procession in connection with an election; or

(b) **display to the public any election matter by means of cinematograph, television or other similar apparatus; or**

(c) propagate any election matter to the public by holding, or by arranging the holding of, any musical concert or any theatrical performance or any other entertainment or amusement with a view to attracting the members of the public thereto,

in any polling area during the period of forty-eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling areas.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to two years or with fine, or with both.

(3) In this section, the expression “election matter” means any matter intended or calculated to influence or affect the result of an election.
(Emphasis supplied)

16. Guideline No. 12 of NBA Guidelines on Election Broadcasts provides:

“The broadcasters shall not broadcast any ‘election matter’ that is, any matter intended or calculated to influence or affect the result of an election during the 48 hours ending with the hours fixed for the conclusion of poll, in violation of Section 126 (1) (b) of the Representation of People Act, 1951.”

(Emphasis supplied)

17. On a careful consideration of Section 126 of RP Act, we are of the view that the question whether an offence has been committed under Section 126(1)(b) of the RP Act, is a matter within the domain of the criminal courts and NBSA has no jurisdiction to decide that question. In fact this position is not seriously disputed by the complainants.

18. Learned Counsel for the complainants however submitted that when NBA/NBSA formulates the regulations and guidelines and a complaint is made complaining violation thereof, NBSA has to enquire into and can find out as to whether there was such a violation; that the very purpose of NBA/NBSA having a guideline would be defeated, if NBSA is not able to examine whether there is a violation of a Regulation or Guideline; and that NBSA has therefore the jurisdiction to decide whether the broadcasters had violated Guideline 12 of NBA Guidelines on Election Broadcasts.

19. We have carefully considered the said submission. The bar contained in the guideline, is in regard to broadcast of any “election matter” in violation of Section 126(1)(b) of the R.P. Act. Having regard to the clear wording of Guideline No. 12 of NBA Guidelines on Election Broadcasts, NBSA cannot consider a complaint of breach of the said guideline, unless there is a finding by a competent Court that the broadcasters have violated the provisions of Section 126(1)(b) of R.P. Act. We might have been persuaded to accept the contention of complainants if Guideline No. 12 had not used the words “in violation of Section 126(1)(b) of the Representation of People Act, 1951”.

20. However as both sides have made elaborate submissions on the merits of the matter, we consider it appropriate to consider the controversy on merits, on the assumption that Guideline No.12 requires or permits NBSA to independently consider whether the broadcasters have broadcast any matter “intended or calculated to influence or affect the result of an election during the 48 hours”.

21. Guideline 12 will have to be considered with reference to the realities of multi-phase elections. The multi-phase elections in April-May 2014 were held during the course of 36 days. If the prohibition relating to broadcast of election matters during 48 hours (ending with the hour fixed for conclusion of poll) is to be applied in regard to each phase of election for the entire country, the result would be that there could not be any debate, discussion, announcement, report or coverage of any election related issue on television during a period of about 27 days out of 36 days. That would adversely affect the right of the candidates to effectively campaign during the election. Surely, that was not the object of Guideline No. 12.

22. The words “any matter intended or calculated to influence or affect the result of an election” will have to be read to mean any matter intended or calculated to influence the result of an election in a given constituency or a given candidate. The prohibition should be read as referring to a specific constituency which is going to the polls and the candidates therein. This can be clarified by the following illustration: On a certain day, the polls are to be held in a constituency in Haryana, where the prohibition regarding display to public of any public matter, is in force. But, in a neighbouring town in Punjab where polls are to take place much later, the election campaign is in full swing and meetings are being held. In both constituencies, the same political party has fielded candidates. In such a scenario, the prohibition of display to public of any election matter in operation in the Haryana

constituency cannot obviously prevent the telecast of electioneering being carried on in the neighbouring Punjab, in respect of a candidate belonging to the very political party whose candidate is also contesting in the Haryana constituency. The media would be entitled to broadcast the electioneering in regard to the Punjab constituency in regard to the same party candidate using the manifesto of the party, irrespective of the fact that the transmission would be seen in Haryana constituency also. So long as the broadcast of the election related programmes in Punjab is not used for promoting or attacking any specific candidate in the Haryana constituency election, there can be no objection. Where the broadcast is in respect of an election related matter of a general nature (or an election related matter of candidates in some other constituency where there is no prohibition) and the election related programme does not specifically touch upon the constituency going to polls or candidates therein, the prohibition under Guideline 12 will not be attracted. In other words, 'election matter' does not mean any and every matter referring to or relating to an election, but means a matter which is intended or calculated to influence or affect the result of '*an election.*' What are prohibited are any advertisements or sponsored programmes or any reports intended to support or criticise a candidate in the constituency which is going to polls, which are intended or calculated to influence or affect the results of an election.

23. Covering a general event relating to a political party which is relevant and of common interest across the country or across a State, which does not extol the public to support any candidate or which does not criticise any candidate in the constituency going to polls, is not a violation of Guideline No. 12.

24. We therefore hold as follows :

(a) NBSA has no jurisdiction to decide the question whether there is a violation of Section 126(1)(b) of the R.P. Act, in the absence of a finding thereon by a competent Court.

(b) Assuming that NBSA can examine the question under Guideline No. 12 independent of Section 126(1)(b) of the R.P. Act, we are of the considered view that broadcast of a party manifesto is not a matter intended or calculated to influence or affect the result of *an election*, and it does not violate Rule 12 of NBA Guidelines for Election Broadcasts.

(c) In view of the above findings, there is no need to consider the various other contentions urged by the complainants and broadcasters.

(d) The complaints are found to have no merit and are closed.

25. NBSA directs the NBA:

(i) To send a copy of this order to the complainants, Election Commission of India and four broadcasters;

(ii) To circulate this order to all Members, Editors and Legal Heads of NBA;

(iii) To release the Order to media.

(iv) To host a summary of this Order on its website and to include such summary in its next Annual Report;

Sd/-

Justice R.V Raveendran (Retd.)
Chairperson

Place : New Delhi

Dated : November 6, 2014