TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 22nd April, 2010

Petition No.122 of 2007
(M.A.Nos.29 and 36 of 2009)

Cellular Operators Association of India & Ors. …Petitioners
Vs
Department of Telecommunications & Anr. …Respondents

BEFORE:

HON'BLE MR.JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.G. D. GAIHA, MEMBER

For Petitioners : Mr.C.S. Vaidyanathan, Sr.Advocate,
Mr.Manjul Bajpai, Mr.Ashish Yadav,
Ms.Devika Bajpai

For Respondents : Mr.Vineet Malhotra,Advocate
Mr.Shankar Chhabra, Advocate

ORDER

S.B. Sinha

Levy of Spectrum Charges for Micro Wave (MW) access and MW Backbone networks, GSM based Telecom Service upon the service providers by the respondent herein, in terms of an order dated 3.11.2006 is in question before us in this petition.

The Petitioner Nos.2 to 12 are service providers. They hold licenses for providing Cellular Services to their customers. The licenses had been granted in their favour by the respondent No. 1 in terms of Section 4 of the Indian Telegraph Act, 1885 (The Act). It reads as under:

"4. Exclusive privilege in respect of telegraphs, and power to grant licenses.

(1) Within [India], the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]:

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working-

(a) of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territorial waters], and

(b) of telegraphs other than wireless telegraphs within any part of [India].

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of it its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.]"

In terms of the licenses granted to them, the petitioner Nos. 2 to 12 were not only required to pay license fees, but also the spectrum charges.

Spectrum utilized by them are of two categories :- i) being GSM, which is absolutely necessary for connecting the Cellular Mobile user to the nearest tower of the licensees; and ii) the spectrum in question which is not absolutely necessary and in respect whereof the cellular operators would be able to connect the nearest tower to their own exchanges.

Payment of license fee as also the spectrum charges, indisputably, are governed by the conditions of the license. We would refer to the same a little later.

The Act was enacted to amend the law relating to 'Telegraph' in India. The term 'Telegraph' has been defined in Section 3 (1) (AA) inter alia to mean "appliance, instrument, material or apparatus used or capable of use for transmission or reception of science, signals, writing, images and sounds or intelligence of any nature by where, visual or other electromagnetic emissions, radio waves and hertz eon wave, galvanic, electric or magnetic means".

Part II of the Act provides for the privileges and powers of the Central Government. Section 4 purports to confer exclusive privilege to it for maintaining and working telegraphs. Two provisos have been appended thereto. As has been noticed heretobefore, the first proviso enables the Central Government to grant licences on such terms and conditions and in

consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India enabling them to do the same.

We, in this case, are not concerned with the second proviso.

The explanation appended to the said provision postulates that the payments made for the grant of a license would include such sum attributable to the universal service obligations as may be determined by the Central Government after considering the recommendations made in this behalf by Telecom Regulatory Authority of India established under Sub-Section 1 of Section 3 of Telecom Regulatory Authority of India Act 1997 (1997 Act).

Before however, adverting to the rival contentions raised by the parties hereto, we may notice the factual matrix involved herein.

Licenses had been granted to the petitioners commonly known as Metro Licenses in the year 1994. It is accepted, that the same did not contain any clause in terms whereof the respondent was entitled to enhance the royalty/license fee inter alia for microwave spectrum. It however appears that the respondent in terms of its letter dated 19th July, 1995 fixed royalty rates both for GSM Cellular Mobile Telephone Service as also for Microwave links.

By another letter of the same date the rates of license fee were levied. It gave rise to a dispute resulting in filing of a petition by the first petitioner before this Tribunal on or about 24.02.2001 questioning the legality thereof. On or about 25.09.2001 the respondent issued 'draft license amendment No. 2' thereby causing to amend WPC charges and in furtherance of an order dated 22.09.2001 issued by it in this behalf, an offer was made to the licensees by the respondent to accept the said royalty charges and withdraw the petition pending before this Tribunal. Pursuant to or in furtherance of the said offer, the petitioners agreed to withdraw the said petition.

We may notice some of the terms of the offer made to the petitioner by the respondent by its letter dated 18th April 2002, which reads as under:

> "3. Subject to the above conditions, the spectrum charges for microwave access networks (normally in the frequency band 10 GHz and beyond) would be as given below:
>
> - for spectrum bandwidth upto 112 MHz in any of the circles, or 224 MHz in any of the 4 metros, spectrum charges shall be levied @ 0.25% of AGR per annum; and
>
> - for every additional 28 MHz or part thereof (if justified and assigned) in circles or 56 MHz or part thereof in any of 4 metros areas, additional spectrum charges shall be levied @ 0.05% of AGR per annum.

7. The above package of spectrum charging on percentage revenue share will be available to the cellular operators on the premise that it is accepted in its entirety and simultaneously all legal proceedings, with regard to spectrum charging, instituted by them or COAI against the Government in Courts and Tribunals (TDSAT) etc. shall be withdrawn. The cellular operators without prejudice should make payments of all outstanding dues of spectrum charges in accordance with the applicable Government of India orders within a month from the date of issue of this order."

On or about 3.11.2006 the impugned order increasing microwave spectrum charges was unilaterally issued, stating: -

"2.1 The following revenue share percentage(s) shall be levied for assignment of Microwave networks of GSM and CDMA based telecom service providers

Spectrum Bandwidth	**Spectrum charges as percentage of AGR**	**Cumulative spectrum charge as percentage of AGR**
First carrier of 28 MHz (paired)	0.15%	0.15%
Second carrier of 28 MHz (paired)	0.20%	0.35%
Third carrier of 28 MHz (paired)	0.20%	0.55%
Fourth carrier of 28 MHz (paired)	0.25%	0.80%
Fifth carrier of 28 MHz (paired)	0.30%	1.10%
Sixth carrier of 28 MHz (paired)	0.35%	1.45%

2.2 The above spectrum charges (as percentage of AGR) are applicable for both for MW access carriers (in Metros and other telecom service areas) as well as the MW backbone carriers separately.

2.3 While the first microwave access carrier can be allotted for the complete service area, subsequent carriers shall be allotted based on justification and for the cities/districts where it is found to be essential.

2.4 However, the revenue share would be based on the AGR for complete service area for simplicity of calculations, which is one of the main features of the revenue share regime.

2.5 Assignment of frequencies for MW access and MW backbone networks for GSM and CDMA based telecom networks would continue to be considered on the basis of full justification of the requirements and availability of the spectrum, on case-to-case and link-to-link basis, after taking into consideration the spectrum requirement of the other users with a view to ensuring electromagnetic compatibility etc. The complete technical analysis and all related aspects of frequency assignments, including efficient use of spectrum, will apply before assigning frequencies for various MW access and MW backbone links. There will be no obligation on the part of the Government to assign frequencies for such purposes.

2.6 These charges include the royalty charges for spectrum usages and licence fee for the fixed stations in the MW access and MW backbone links.

2.7 The assignment of MW access and MW backbone frequencies shall not be exclusive for any service provider and will be shared with other services/users.

2.8 In addition, the charges for GSM spectrum (in 900 / 1800 MHz band) and CDMA spectrum (in 800 MHz band) will continue to be levied in accordance with the existing orders on the subject."

The first petitioner protested thereagainst by its letter dated 21.11.2006, whereafter a meeting between the parties was held on or about 5th January 2007. Paragraph 4 of the Minutes of the Meeting dealt with Microwave Access and Backbone Spectrum charges.

The respondent by a letter dated 12.04.2007 addressed to the first petitioner raised a contention that the 2002 agreement was with regard to the principle of revenue sharing and not by way of a particular percentage, stating :-

"1.2 In the year 2002, Government had agreed to the COAI plea for principle of revenue share for Microwave spectrum and not any particular percentage. The revenue share (percentage) has been reviewed and revised in view of the experience gained during this intervening period.

1.3 Microwave access and backbone links connect fixed locations, for which other alternatives like OFC etc. are available. With the increasing demand from new service providers, there is a greater need for more optimum use of spectrum including urging the service providers to gradually change over to OFC links."

According to the petitioners the contentions raised therein are wholly incorrect as the percentage of revenue share governed the field.

In response to a letter dated 11th April, 2007 issued by the first petitioner the respondent asked it to provide inputs on the issues for its further examination/discussions. It is, however, admitted that some service providers made payment in terms of the order made by the respondent increasing the spectrum charges under protest and/or without prejudice to their rights and contentions. Meetings were held by and between the parties. Additional datas were also supplied by the petitioners in support of their contentions but no agreement between the parties could be arrived at.

At that point of time this petition was filed questioning inter alia the validity of the aforementioned order issued by the respondent.

Some events also took place during pendency of this petition. The respondent issued another order on or about 10.11.2008 in continuation of its earlier order, increasing the microwave spectrum charges unilaterally.

It was given retrospective effect w.e.f. 3.11.2006.

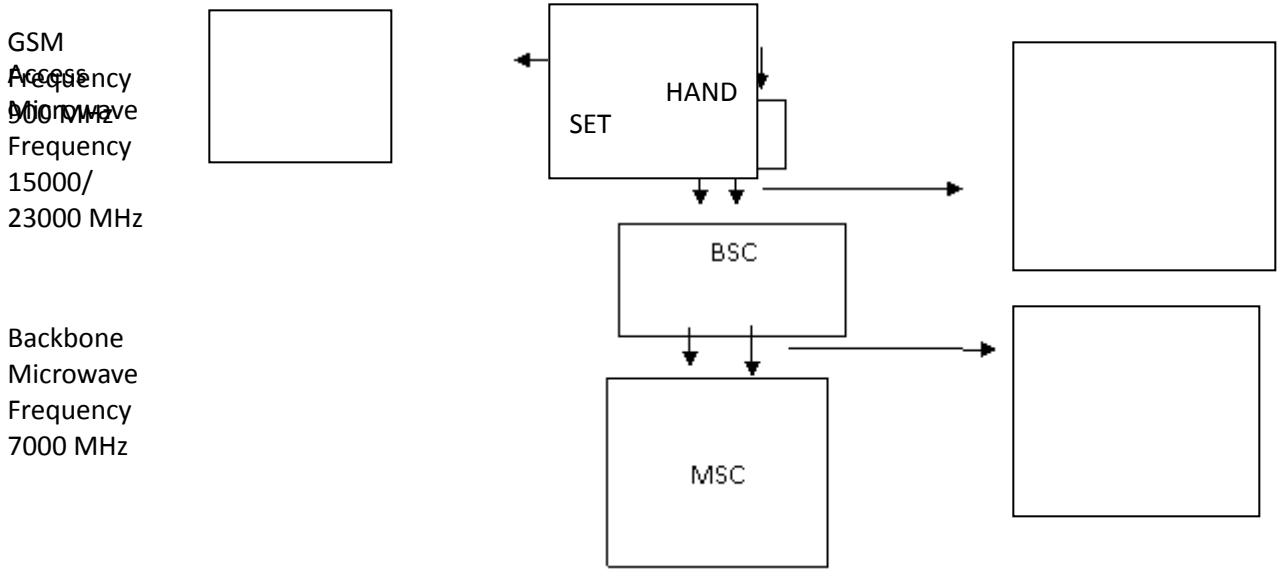
The respondent furthermore asked the Cellular operators to consolidate smaller carriers of 3.5 MHz/7 Mhz/14 MHz, in different 28 MHz carrier bands within one or two carriers of 28 MHz by 31st October, 2008.

Petitioners protested thereagainst too.

An application for amendment of this petition was filed on or about 4.3.2009.

Having regard to the subsequent event, we allow the same, keeping in view the fact that the question raised herein are pure questions of law and the principal contention raised by Mr.Malhotra is that the respondent has the requisite jurisdiction to enhance the charges in terms of 18.3.1 of the license agreement issued under Section 4 of the Act. In that view of the matter we are of the opinion that no additional reply need be filed as the relevant contentions raised by the petitioner have already been adverted to in the original reply. No other or further contention has been raised before us.

By an order dated 13.04.2009 the respondent was asked not to give retrospective effect to the said order. We may notice the carriage of the manner in which the spectrum are used.



BTS – Base Transceiver Station

BSC – Base Station Controller
MSC – Mobile Switching Centre

Mr. C. S. Vaidyanathan, learned senior counsel appearing on behalf of the petitioners would contend :

1. The respondent has no jurisdiction to increase the spectrum charges in absence of any contract enabling it to do the same.
2. Only 18 out of 128 GSM Cellular licenses having contained clause 18.3.3 in terms whereof unilateral enhancement of spectrum charges is impermissible, the impugned orders are liable to be set aside.
3. The retrospective effect given to the said orders must be held to be illegal and without jurisdiction.

Mr. Malhotra, learned counsel appearing on behalf of the respondent, on the other hand, urged : -

1. All licenses issued in favour of petitioner No. 2 to 8 would clearly show that the respondent has jurisdiction to levy charges for use of Spectrum in addition to the licencees on revenue share basis, which were to be notified separately from time to time by WPC Wing and in that view of the matter, no illegality can be said to have been committed by the respondent in issuing the impugned orders.
2. The impugned orders were issued as spectrum is a scarce commodity and the demand therefor was much more than its availability and furthermore in view of the fact that the operators have an option of taking recourse to the alternate method of connecting the towers with their exchanges through optical fiber, this petition should be dismissed.
3. The petitioners Nos.2 to 12 being established Cellular Operators, use 7-8 carriers each of which has 28 MHz space available and in that view of the matter they use a huge space which creates difficulties in allotment of spectrum to the new licensees who in fact could be allotted maximum of 2 carriers.

4. The source of power of the respondent to increase the spectrum charges flows from Section 4 of the Act and the petitioners having accepted the terms of contract, the impugned orders are wholly unassailable.

5. As an exclusive privilege exists in favour of respondent, its demand can also be given a retrospective effect.

The Act is a 19th Century Act. The exclusive privilege doctrine was evolved for the benefit of the crown dealing in 'telegraph'. This said Act, however, after the Constitution of India has come into being must be read subject to Part III thereof. It is, moreoever, not a prohibited trade. Merely a monopoly had been created by reason of the provisions of the said Act in favour of the Government of India. When the statute itself provides for the mode and the manner in which the licences are to be granted, the terms and conditions thereof and working out of interconnect agreements being exclusively within the realm of the jurisdiction of TRAI, in our opinion, it cannot be said that the Central Government would be entitled to do whatever it likes. It's actions, as a 'State' must be fair and reasonable. The State is bound to comply with the constitutional requirements of 'equality before law and equal protection of law'. Right of a citizen of India to carry on a business being a fundamental one, the same can be restricted/regulated only in accordance with law and not otherwise.

The respondent while doing so was liable to keep in mind its constitutional obligations to also maintain the level playing field as has been held by the Supreme Court of India in a large number of decisions.

See for example – Reliance Energy Ltd. And Another Versus Maharashtra State Road Development Corpn. Ltd. And Others – 2007(8) SCC 1.

With that backdrop in mind, we may notice the terms of the licenses. We may also notice that the licenses originally held by the petitioners other than the Petitioner No.1 were CMTS ones. They migrated to UASL Licenses. Migration took place also in respect of the licenses which were granted to them as basic service operators (BSOs).

License agreements thereafter have been entered into providing for unified access services circlewise and metrowise. Each of the licenses contains detailed terms and conditions.

Financial conditions are enumerated in part III thereof. Clause 19 of the said licenses provides for the 'fees' payable to the licensor. Clause 19.1 provides for the entry fees which is payable only one time. Clause 19.2 provides for payment of license fee which, subject to variation, was to be paid usually at the rate of 12% of 'Adjusted Gross Revenue'. Clause 19.3 provides for Radio Spectrum Charges which is payable in addition to the license fees. It reads as under:

> "**19.3 Radio Spectrum Charges** :
>
> In addition, the cellular licensees shall pay spectrum-charges on revenue share basis of 2% of AGR towards WPC Charges covering royalty payment for the use of cellular spectrum upto 4.4 MHz + 4.4 MHz and Licence fee for Cellular Mobile handsets & Cellular Mobile Base Stations and also for possession of wireless telegraphy equipment as per the details prescribed by Wireless Planning & Coordination Wing (WPC). Any additional band width, if allotted subject to availability and justification shall attract additional Licence fee as revenue share (typically 1% additional revenue share if Bandwidth allocated is upto 6.2 MHz + 6.2 MHz in place of 4.4 MHz + 4.4 MHz).

Further, royalty for the use of spectrum for point to point links and access links (other than Cellular Service Spectrum) shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/royalty for the use of spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation etc. Authorization of frequencies for setting up Microwave links by Cellular Operators and issue of Licences shall be separately dealt with WPC Wing as per existing rules.

The above spectrum charge is subject to review by WPC Wing from time to time."

Clause 19.3, thus, is in two parts. The first part provides for levy of spectrum charges on revenue share basis which is known as GSL. There is no dispute in regard to aforementioned provision.

The second part, however, provides for payment of royalty for the use of spectrum in respect whereof payments were to be made separately to the WPC Wing as per the existing rules. To our query, it was clearly stated that no rules under the Act has been framed. Admittedly separate circular letters are issued from time to time by the WPC which does not satisfy the requirements of law so far as rule making power of the Central Government is concerned.

It is, however, of some significance to notice that clause 19.3 provides for 'Spectrum Charges' and 'Royalty' separately. That part of the power conferred upon the WPC Wing to review the spectrum charges from time to time, thus, would not extend to its in regard to royalty. The term 'royalty' has a definite connotation. Royalty being not leviable in terms of the provisions of

a statute, it must be given its ordinary meaning. [See State of West Bengal Vs. Kesoram Industries Limited & Ors.- 2004 (10) SCC 201]

Different provisions of the licenses relating to spectrum charges and allocation thereof have been brought to our notice. Before however, we advert thereto the financial conditions stipulated in the UASL regime as contained in clause 18 therein providing for spectrum charges may also be noticed. They read as under:-

"18. FEES PAYABLE

18.1 Entry Fee

One Time non-refundable Entree Fee of Rs.1.00 crores (one crore only) has been paid by the LICENSEE prior to signing of this Licence agreement.

18.2 Licence Fees :

In addition to the Entry fee described above, the Licensee shall also pay Licence fee annually @ 10 (TEN) % of Adjusted Gross Revenue (AGR), excluding spectrum charges.

Annual Licence fee w.e.f. 1.4.2004 shall be @ 8 (EIGHT) % of AGR. The Licencsor reserves the right to modify the above mentioned Licence Fee any time during the currency of this Agreement.

We may also notice clause 18.3.3 which is contained in only 18 of the licenses relating to grant of unified access service by CMTS. It reads as under:

"18.3 **Radio Spectrum Charges** :

18.3.1 The LICENSEE shall pay spectrum charges in addition to the Licence Fees on revenue share basis as notified separately from time to time by the WPC Wing. However, while calculating 'AGR' for limited purpose of levying spectrum charges based on revenue share, revenue from wireline subscribers shall not be taken into account.

18.3.2 Further royalty for the use of spectrum for point to point links and other access links shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/royalty for the use of spectrum/ possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation and other related aspects etc. Authorization of frequencies for setting up Microwave links by Licensed Operators and issue of Licenses shall be separately dealt with WPC Wing as per existing rules."

As our attention has also been drawn to the different conditions in the CMSP Licenses, we may notice the same also:

"18.3.3 The above spectrum charge is subject to unilateral review by WPC Wing from time to time which shall be binding on the licensee.

The above spectrum charge is subject to review by WPC Wing from time to time."

The provisions are the same, both in respect of the licenses granted circlewise and metrowise.

GSM Spectrum charges and the MW Backbone Spectrum with which we are concerned, therefore, stand on different footings. The purposes for which they are used are also different. We have noticed heretobefore that whereas GSM Spectrum is absolutely mandatory for operation of the cellular mobile services, it is not so, so far as the Microwave Spectrum is concerned.

It may be true that the spectrum is a scarce commodity. It may further be true that appropriate regulations are required to be made so that the new operators can also be allotted some spectrum.

The same however, in our opinion, would not mean that increase in the charges thereof is the only remedy. Even otherwise, increase in the charges is required to be done in accordance with law. Charges whether in terms of a license or otherwise can be increased only in terms of the provisions of statute or a contract. Unlike the prohibited items like liquor or gambling, the State can not claim an absolute power in relation to grant of licenses for operating telegraphs as otherwise, the same would otherwise be an arbitrary act on its part. It having granted license, must act within the four corners of a statute or the provisions contained in the license. The Petitioners pay about 4% of AGR towards spectrum charges. The respondent, therefore, was not correct to contend that revenue sharing in respect of spectrum was only on principle and not in reality. Even otherwise, it could have been categorically spelt out in the license or the statute.

The Petitioner No. 1 in its letter dated 28th November, 2008 has shown adverse financial impact on operators as a result of repeated increase in microwave charges; wherefor it had set out certain tables from a perusal whereof it would appear that the impact of increase is severe, being manifold. It is as under :

MICROWAVE ACCESS

S. No.	Frequency Bandwidth (Frequency spot of 28 MHz)	Original Charges Contractually settled 18.04.2002		Revised charges -1 03.11.2006 (applied prospectively)	Revised charges – 2 10.11.2008 (applied retrospectively)
		(Circle)	(Metro)		
1	28	0.25	0.25	0.15	
2	56				
3	84			0.35	
4	112				
5	140	0.30		0.55	
6	168	0.35			
7	196	0.40		0.80	
8	224	0.45			
9	252	0.50	0.30	1.10	
10	280	0.55			
11	308	0.60	0.35	1.45	
12	336	0.65			
13	364	0.70	0.40	Not prescribed*	1.85
14	392	0.75			
15	420	0.80	0.45	Not prescribed*	2.30
16	448	0.85			
17	476	0.90	0.50	Not prescribed*	2.80
18	504	0.95			
19	532	1.00	0.55	Not prescribed*	3.35
20	560	1.05			
21	588	1.10	0.60	Not prescribed*	3.95
22	616	1.15			

MICROWAVE BACKBONE

S.	Frequency	Original Charges	Revised charges -1	Revised charges – 2

No.	Bandwidth (Frequency spot of 28 MHz)	Contractually settled 18.04.2002	03.11.2006 (applied prospectively)	10.11.2008 (applied retrospectively)
1	28	0.10	0.15	
2	56			
3	84	0.15	0.35	
4	112	0.20		
5	140	0.25	0.55	
6	168	0.30		
7	196	0.35	0.80	
8	224	0.40		
9	252	0.45	1.10	
10	280	0.50		
11	308	0.55	1.45	
12	336	0.60		
13	364	0.65	Not prescribed*	1.85
14	392	0.70		
15	420	0.75	Not prescribed*	2.30
16	448	0.80		
17	476	0.85	Not prescribed*	2.80
18	504	0.90		
19	532	0.95	Not prescribed*	3.35
20	560	1.00		
21	588	1.05	Not prescribed*	3.95
22	616	1.10		

Another question which arises for our consideration as is to whether the respondent could revise the rates unilaterally.

An offer was made to the petitioners in terms of an order dated 18th April 2002 followed by a letter and accepted by the petitioner No.1 in terms of its letter dated 23rd August, 2002. Petition No. 5 of 2001 was withdrawn from this Tribunal on 19th

September, 2002. We have noticed that charges were to be paid instead of a fixed percentage basis on revenue sharing basis in the UASL Licenses.

It has not been denied or disputed that all charges, not only before the initiation of the instant proceedings but also even during the pendency thereof, no proposal was mooted, no discussions were held, no opportunity of hearing had been granted and as such no consensus was arrived at between the parties.

Any order for allocation of spectrum has never been issued. The spectrum charges are subject to the provision of a contract. It is now almost a well settled principle of law that when a matter is governed by a contract, the parties must be ad-idem in regard to variation and/or novation of the terms and conditions thereof which would include the charges payable by one party to the other in terms thereof unless there exists any provision therefor in the contract itself or in any provision of statute governing the field.

Before, however, we refer to the decisions relied upon by the learned counsel for the petitioners, we may notice the requisite averments made by them in the petition:

> "With respect to Clause 18.3.3 in the CMTS migrated to UASL License it is submitted that as out of 128 GSM Cellular Licenses, 110 Licenses do not have Clause 18.3.3, it goes to show that DoT did not intend to have a Clause 18.3.3 in any Licence, and therefore, Clause 18.3.3 ought to be treated as redundant. It is submitted that the same Bharti/Airtel has new UASL License which does not contain Clause 18.3.3 at the same time it has some Licenses i.e. UASL migrated from CMTS which do contain Clause 18.3.3. Understandably, two different yardsticks for

levying microwave charges cannot be applied on the same Licensee for providing the same kind of service. Similarly, as submitted earlier, out of 128 relevant Licenses,110 Licenses do not have Clause 18.3.3 and, therefore, the power thereunder admittedly cannot be invoked in the case of these 110 Licenses and further that application of such a Clause in case of other 18 Licenses would be violative of Article 14 of the Constitution of India qua such 18 Licencees. It is further submitted that after having executed mutually agreed contract between the parties, insertion of such Clause 18.3.3 in migrated UASL License would be unreasonable. The power as contained in Clause 18.3.3 cannot override a specific contract between the parties, whereunder as a specific consideration the Cellular Operators had given up their rights by withdrawing their pending litigation and therefore Clause 18.3.3 are not applicable to the facts of the present case."

The respondent does not dispute that the spectrum charges were increased during pendency of the proceeding. It is also not in dispute that the effect in the increase in the spectrum charges is from 0.5 paise to 1.15 paise in different bands in circle and the charges 0.25 percent to 0.60 percent then prevailing in different band was increased to about Rs.1.50 to Rs.1.45 which in terms of circular letter dated 10.11.2008 in respect of band frequency. Bands contained in serial No. 13 to 22 in respect of which no rate was prescribed theretobefore was fixed from 1.85 paise to 3.95 paise.

It is furthermore not in dispute that in the UASL license, maximum committed spectrum circlewise are laid down in Annexure IX.

The power to increase an amount under a contract unilaterally, must flow from it.

In Delhi Development Authority Vs. Joint Action Committee reported in 2008 Vol. 2 SCC page 672, the Supreme Court of India held as under:

> "62. It is well-known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject-matter of a public notice. Apart from the fact that the parties rightly or wrongly proceeded on the basis that the demand by way of fifth installment was a part of the original Scheme, DDA in its counter-affidavit either before the High Court or before us did not raise any contra plea. Submissions of Mr. Jaitley in this behalf could have been taken into consideration only if they were pleaded in the counter-affidavit filed by DDA before the High Court.
>
> 66. The stand taken by DDA itself is that the relationship between the parties arises out of the contract. The terms and conditions therefor were, therefore, required to be complied with by both the parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract-making process. The parties thereto must be ad idem so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allottee. Having not done so, it, relying on or on the basis of the purported office orders which are not backed by any statute, new terms of contract could (sic not be) thrust upon the other party to the contract. The said purported policy is, therefore, not beyond the pale of judicial review. In fact, being in the realm of contract, it cannot be stated to be a policy decision as such.

It was observed :

80. A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Contract Act reads as under:

> "29. Agreements void for uncertainty. – Agreements, the meaning of which is not certain, or capable of being made certain, are void."

A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot be thrust upon a contracting party"

Yet again in Bharat Sanchar Nigam Limited and another Vs. BPL Mobile Cellular Limited, 2008, (13) SCC, page 597, the law has been laid down in the following terms:-

> "44. If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion that no interference, with the impugned judgment is called for."

A three judge bench of the Apex Court in City Bank Vs. Chartered Bank reported in 2004 (1) SCC page 12 held as under :

> "47. Novatio, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. The Special Court was right in observing that Section 62 would not be applicable as there was no novatio of the contract. Further, it is neither Citi Bank's nor CMF's case nor even SCB's case that there was a tripartite arrangement between the parties by which CMF was to accept the liability. Such a case of novatio does not arise for consideration. Shri Andhyarujina, the learned Senior Counsel for Citi Bank has also not seriously pressed for Citi Bank's case being considered by reference to Section 61 abovesaid"

With regard to level playing field in the matter of payment of interst, this Tribunal, in Cellular Operators Association of India Vs. Deptt. of Telecommunications in Petition No.123 of 2008 82, held as under :

> "Levy of interest or penalty must be supported by an authority of law. The respondents themselves quantified/crystalised the amount and/or rates payable towards WPC Charges only in the year 2002. Any modification or novation on a contract is permissible when both the parties thereto agree. If no interest or penalty could be levied in terms of the provisions of the contract, the purported Office Orders, which have no force of law, would not make a demand of interest enforceable in law."

In any event, the increase in the rates could not have been given a retrospective effect and retroactive operation.

In City Bank(Supra), the Supreme Court of India held as under:

"Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective."

Before us, the respondents have produced certain orders being dated 20.7.1995 and 1.2.2002. The relevant portions of the Order dated 20.7.1995 read as under:-

"Royalty rates for GSM Cellular Mobile Telephone Service

The royalty shall be charged on the basis of :

i) Fixed Multiplier 'M' (M-4800)

ii) Number of RF channels each of 200 KHz bandwidth represented by 'C'

iii) Constant Multiplier 'K' (K=B) for GSM Standard).

iv) Weighing factor W dependent on the number of subscribers where W=1000 for every thousand subscriber or part thereof.

Then Annual Royalty R = M x C x K + 1200 x W"

Annual royalty was to be charged for the first year on quarterly basis. It was clearly stated therein that the license fee would be paid in terms of a separate order issued in that behalf. So far as the order dated 20.7.1995 is concerned, similar rates of license fee were prescribed. It does not contain any license fee for GSM Cellular Mobile Telephone service.

Another Order was issued on 1.2.2002, whereby, the cellular licensees were to pay spectrum charges on revenue sharing basis from 1.8.1999 @ 2% of AGR for spectrum upto 4.4. MHz + 4.4 MHz and 3% of the AGR for spectrum upto 6.2 MHz + 6.2 MHz.

A corrigendum was issued on 1.4.2003 stating that paragraphs 4 and 5 of the Order dated 20.7.1995 to be read as under:-

"CORRIGENDUM

Sub : Royalty Charges for the grant of licence to establish, maintain and work Terrestrial Microwave Point-to-point and point to multi-point networks under the provisions of the Indian Telegraph Act, 1885.

In pursuance of the powers conferred by section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and in partial modification to this Ministry's Order No. R-11014/4/87-LR (Pt) dated 20th July 1995, it has now been decided that Para 4 and Para 5 of the above order be read as

1. (Para-4) Royalty for all kind of terrestrial Microwave Links for

   4.1 Fixed Microwave Radio Relay Networks
   4.2 Point to Multi-point Networks

2. (Para-5) The royalty for all kind of terrestrial Microwave Links shall be charged on the basis of :

5.1 Constant Multiplier M where :

M=1200 for point to point Microwave Link(s) with end-to-end distance Less than or equal to 05 Kms.

M=2400 for point to point Microwave Link(s) with end-to-end distance greater than 05 Kms but less than or equal to 25 Kms

M=4800 for point to point Microwave Link(s) with end-to-end distance greater than 25 Kms but less than or equal to 60 Kms.

M=9000 for point to point Microwave Link(s) with end-to-end distance greater than 60 Kms but less than or equal to 120 Kms.

M=15000 for point to point Microwave Link(s) with end-to-end distance greater than 120 Kms but less than or equal to 500 Kms.

M=20000 for point to point Microwave Link(s) with end-to-end distance greater than 500 Kms

5.2 Weighting Factor 'W' which is decided by the adjacent channel separation of the R.F. channeling plan deployed where:

W=30 for adjacent channel separation upto 2MHz

W=60 for adjacent channel separation greater than 2MHz, but less than or equal to 7 MHz

W=120 for adjacent channel separation greater than 7MHz, but less than or equal to 28 MHz

W=(120)+(30 for each additional 7MHz Bandwidth or part thereof)

for adjacent channel separation greater than 28MHz

5.3 Number of RF channel used (equal to twice the number of duplex RF Channel pairs) represented by 'C'

Then, Annual Royalty R=M x WxC

3. The order shall come into force from the date of issue.

4. These issue with the concurrence of wireless finance branch vide their Dy. No. WPF/139/03 dated 26.03.2003.

5. All other conditions of the order No. R-11014/4/87-LR (Pt) dated 20th July 1995, as amended from time to time, will remain the same.

Sd/- (Ashok Kumar)
Joint Wireless Adviser to the Govt. of India"

The executive orders do not partake to any statutory rules framed under the Act. Clause 18.3.2 of the UASL license provides that authorization of frequencies for setting up microwave links by cellular operators and issue of licenses should separately be dealt with WPC Wing as per the existing rules. The rules in terms of the provisions of 'the Act' would mean rules framed thereunder. Indisputably, such rules were required to be laid before both the Houses of Parliament in terms of the statute. The word 'prescribed' would ordinarily mean prescribed by rules. It is true that the said provision is directory in nature but there cannot be any doubt or dispute that all such rules should ordinarily be published in the official Gazette.

The Office Orders filed by the respondent herein, thus, are not rules; but are merely circular letters. There is furthermore nothing on record to show that these circular letters were issued by the authority, who could frame the rules. By reason thereof, the terms and conditions of license might have been fixed but in absence of any statutory sanction in regard thereto, they cannot

fall in the category of a subordinate legislation. The parties having entered into a contract, the terms thereof could not be modified in absence of any express provision.

We, therefore, are of the opinion that the impugned Orders cannot be sustained. They are set aside accordingly.

This petition is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

…….....J
(S.B. Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member