

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 25th February, 2010

Petition No.161 of 2009

Sify Limited

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...Petitioner

Vs.

Ministry of Communications & IT & Anr.

...Respondents

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

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For Petitioner

: Mr.Maninder Singh, Senior Advocate
Mr. Kaushik Mishra, Advocate

For Respondent

: Mr.Raghav Bansal,Advocate
Mr. Subhash Bansal, Advocate

JUDGMENT

S.B. Sinha

The Petitioner herein has filed this petition claiming inter alia the following relief(s):-

“(i) set aside and quash the letters dated 1st January 2008, 23rd September 2008 and 16th December 2008 demanding return of the spectrum under the 2.5 GHz frequency band”

The Petitioner, a company registered and incorporated under the Indian Companies Act, 1956 is engaged in the business of providing Internet Services to its customers.

For the said purpose it applied for and was granted a letter communicating the decision to grant to it W/T license by the Department of Telecommunication, Government of India on or about 30th May, 2003.

It was specifically mentioned in the said letter conveying the decision to grant a license that the same was not to be treated as a license. Some of the terms of the said letter of allocation of frequencies are as under:

“Parameters:

(a) Frequency (ies) 2540-0 MHz

(b) Emission – 10 MOF7B.

(c) Working Hours from 0000 to 2400

(d) R.F. Power Output for

(i) Fixed - (30 dBm) (ii) Veh mobile (iii) Handheld Mobile”

The number of stations for which the said letter of allocation was issued, were 170 nos.

The other terms and condition of the said allocation were:

- “3. Licence Fee Rs.1000 Royalty Rs.1,44,000 per annum per Transmitter location taking into account the submission unit proposed to be installed shall be less than 5 KMs.
4. Fixed W/T stations as per serial No.1 to 170, of the application

-As per annexure-
5. Equipment may be procured strictly adhering to agreed parameters.
6. Full site clearance should be obtained in respect of fixed stations at S.No.1-170 of list of FX stations as per instructions and a copy of site clearance from SACFA be enclosed.
7. This decision is valid for one year from date of issue.
8. The stations will be operated by Indian Nationals only.
9. Conditions to be fulfilled before issue of operating licence.
 - (a) Action should be initiated immediately of Siting Clearance and procurement of equipment. KINDLY SUBMIT A COYP OF INVOICE indicating Make/Model of equipment.
 - (b) Equipment should be procured from Dealers who are in possession of a Dealer’s Licence.

- (c) After above is completed and equipments are installed and ready for operation, fees may be paid through demand draft drawn from any branch of STATE BANK OF INDIA in favour of “Pay and Accounts Officer (Hqrs), Department of Telecommunications, New Delhi” and payable at STATE BANK OF INDIA, Main Branch, New Delhi 9Code: 0691).
- (d)
- (e) Install W/T sets with in-built security device low grade.
- (f) PSTN connection not permitted without DoT consent.
- (g) Operating licence should be obtained for the entire network.
- (h) Ensure adequate security arrangements to protect W/T equipment from falling into wrong hands.

NOTE: Operations should not be commenced before grant of operating license”

It is, however, not in dispute that the petitioner did not deposit the requisite Royalty or Spectrum Charges for all the 170 Base Stations.

By a letter dated 21.4.2006, the respondent asked the ISP license holders to pay the spectrum charges in respect of “all LMDS/MMDS decisions letters” issued so far in the frequency bands 2.5, 2.7, 3.7 and 5 GHz within 15 days from the date of issue thereof, failing which it would be presumed that they are not interested in the matter.

Pursuant thereto and in furtherance thereof, the petitioner asked for grant of operating license in respect of four stations in terms of its letter dated 26.4.2006 viz two stations at New Delhi, and one each at Chennai and Gurgaon.

With the said letter, the petitioner also annexed two demand drafts for a sum of Rs. 2,90000/- each, which were accepted by the respondent.

Indisputably the petitioner made some investments and started its operations of internet services to its customers from the said four stations.

On or about 7.8.2006, the petitioner paid a sum of Rs. 20 lacs to the respondent which was also accepted.

According to the petitioner the policy of the respondent regarding allocation of spectrum was ambiguous from the very inception which was pointed out by it to the respondent. It also demanded a level playing field.

The said communication of the petitioner, however, was not responded to.

The petitioner in terms of its letter dated 21.03.2007 sought for licenses for the locations mentioned in its letter dated 26.4.2006. The same was also not responded to.

The respondent on or about 1.1.2008 issued a circular which reads as under:

“Subject: Shifting of frequency assignments in 2.5 GHz Band.

I am directed to refer to the Guidelines for Broadband Wireless Access (BWA) services released by the Government on 12 November, 2007 and to state that as per these guidelines, to begin with, the BWA services will be permitted in the 2.5 GHz band by UASL and ‘A’ ISPs, besides BSNL/MTNL.

2. In view of the above, it is requested that all the operators who have assignments in both frequency bands (i.e. in 2.5 GHz and 3.3 GHz) to shift all their operations from 2.5 GHz band in 3.3-3.4 GHz band immediately. Further, the operators, who have assignments only in 2.5 GHz band, are requested to shift all their operations from 2.5 GHz band to 2.7-2.9 GHz band.

3. The compliance report in this regard may be sent to this Ministry positively by 28 February, 2008.”

According to the petitioner, it had acquired a vested right to continue to operate in the 2.5 GHz band having made substantial investments relying on or on the basis of the said letter of allocation.

The petitioner also applied for clearances in respect of all 170 base stations wherefor a sum of Rs. 1000/- was paid for approval in respect of each of the stations.

It is also not in dispute that the Internet Services Providers Associations (ISPAI) made a detailed representation to the respondent in respect of the said circular letter dated 1.1.2008.

However, the respondent on or about 23.09.2006 issued a communication cancelling the said allotment of spectrum, stating:

“Subject: Shift of frequency assignments in 2.5 GHz band.

I am directed to invite your kind attention towards this Ministry’s letter of even number dated 01.01.2008 (copy enclosed) on the above mentioned subject and to state that no reply has been received so far from your side. Further, as per records it is observed that neither any spectrum charge has been paid by you for the assignment in 2.5 GHz band nor any operating license has been obtained so far for the same.

In view of above frequency assigned in 2.5 GHz band (2540.0 MHz) may be treated as cancelled. No further communication in the matter would be entertained.”

Questioning the legality and/or validity of the said circular letter dated 01.01.2008 and the order dated 23.09.2008 this petition has been filed.

Mr Maninder Singh, the learned senior counsel appearing on behalf of the petitioner, would contend:

- i) As no outer time limit had been fixed for obtaining licenses for all the 170 base stations at one point of time, the petitioner was entitled to apply for grant of operating license at a suitable time on the basis of the said letter of allocation and having regard to the fact that license fees for the spectrum charges deposited by the petitioner were accepted, derived a legal right in relation thereto.
- ii) Acceptance of the charges payable for operating four base stations by the respondent would amount to grant of operating license as the terms 'license' and 'permission' are interchangeable.
- iii) Having regard to the fact that the respondent had accepted payments made by the petitioner and as pursuant thereto, it has made substantial investments, the respondent must be held to have granted permission to operate the ISP activities by the petitioner and, thus, the impugned letters dated 1.1.08 and 23.09.2008 are vitiated in law.
- iv) Even if it be assumed that the letter of allocation of frequency dated 30.05.2003 was not to be treated as a license, the respondent ought not to have accepted any payment from the petitioner and allowed it to carry on its business from the year 2006 onwards and on that ground too the impugned action is not sustainable.
- v) It being not the case of the respondent that the activities of the petitioner were illegal as no operating license was obtained by it within a period of one year from the date of issuance of the letter of allocation of spectrum band, no action in terms of section 20 of the Indian Telegraph Act, having been taken, the respondents are estopped and precluded from issuing the impugned order.
- vi) The second part of the letter dated 23.09.2008 having nothing to do with the circular letter dated 1.1.2008, the impugned order must be held to be vitiated in law, particularly having regard to the fact that the order of cancellation of license would imply the existence thereof.

- vii) The respondent cannot be allowed to raise any new ground in its counter affidavit which have not been taken in the impugned order.

Mr. Bansal, the learned counsel appearing on behalf of the respondent, on the other hand, would urge:-

- 1) Petitioner being not a license holder has no legal right to carry on any business in internet.
- 2) The letter of allocation being not a license and in any event the same having expired, the petitioner cannot carry on its business relying on or on the basis thereof.
- 3) The matter relating to shifting to a new spectrum band having been decided by this Tribunal in Petition No. 77 of 2009 (Internet Service Providers Association of India Vs. Union of India, disposed of on 20.01.2010), no grievance can be raised in relation thereto.

At the outset, we may notice the letter of allocation dated 30.05.2003 from a perusal whereof it would appear that the same was not to be treated as a license. Indisputably, license is granted in terms of the provisions of Section 4 of the Indian Telegraph Act, 1885 (1885 Act).

License was to be granted in respect of the all the 170 base stations. There is nothing on record to show that the respondent had agreed to grant license only in respect of four base stations or a few others at the mere asking of the petitioner. It is true that the amount deposited by the petitioner was accepted without any demur whatsoever but the same in our opinion would not mean that the petitioner was not required to act in terms of the letter of allocation or otherwise. The letter of

allocation was to remain valid only for a period of one year. The petitioner had no legal right to obtain license after the said period.

The impugned letter dated 1.1.2008 reads as under;

“Subject: Shifting of frequency assignments in 2.5 GHz Band.

I am directed to refer to the Guidelines for Braodband Wireless Access (BWA) services released by the Government on 12 November, 2007 and to state that as per these guidelines, to begin with, the BWA services will be permitted in the 2.5 GHz band by UASL and ‘A’ ISPs, besides BSNL/MTNL.

2. In view of the above, it is requested that all the operators who have assignments in both frequency bands (i.e. in 2.5 GHz and 3.3 GHz) to shift all their operations from 2.5 GHz band in 3.3-3.4 GHz band immediately. Further, the operators, who have assignments only in 2.5 GHz band, are requested to shift all their operations from 2.5 GHz band to 2.7-2.9 GHz band.

3. The compliance report in this regard may be sent to this Ministry positively by 28 February, 2008.”

The petitioner did not act in terms thereof.

Only thereafter the impugned letter dated 23.03.2009 was issued which states:

“Subject: Shift of frequency assignments in 2.5 GHz band.

I am directed to invite your kind attention towards this Ministry's letter of even number dated 01.01.2008 (copy enclosed) on the above mentioned subject and to state that no reply has been received so far from your side. Further, as per records it is observed that neither any spectrum charge has been paid by you for the assignment in 2.5 GHz band nor any operating license has been obtained so far for the same.

In view of above frequency assigned in 2.5 GHz band (2540.0 MHz) may be treated as cancelled. No further communication in the matter would be entertained.”

It is true that the said letter is in two parts, the first part dealing with the earlier letter dated 01.01.2008 and the second part dealing with the spectrum charges to be paid and non-obtaining of any operating license.

For the purpose of maintaining this petition the petitioner was required to show an existing legal right in itself and a corresponding duty on the respondent. The second part of the said letter dt.23.09.2008 cannot be equated with exercise of a statutory function by a statutory authority. The parties hereto were to act in terms of the provisions of the 1885 Act.

The petitioner admittedly has not shifted its operation from 2.5 GHz to 2.7-2.9 GHz band. As per law, one, who has not derived a vested right should act in terms of the existing guidelines. The petitioner as noticed hereinbefore claims in itself a legal right to continue on 2.5 GHz band. It could have done so provided it had obtained an operating license and paid the requisite spectrum charges.

Spectrum charges were required to be paid in respect of all the 170 base stations. In absence thereof, it is difficult to accept the submissions of Mr.Maninder Singh that the petitioner obtained a legal right by reason of deposit of the spectrum

charges only in respect of 4 base stations. Such deposit, in our opinion, does not satisfy the requirements of the letter of allocation.

It may be true that for the year 2006 a sum of Rs.10 lakhs was deposited but it is also true that when the petitioner intended to deposit the requisite charges in respect of the said four base stations, the cheque for the subsequent year for a sum of Rs.10 lakhs was returned. In our opinion, it would not be correct to contend that even for the year 2008 onwards the petitioner had any legal right to obtain any operating.

A grant made by a State is required to be in terms of the provisions of Article 299 of the Constitution of India or the relevant provisions of the statute by an authority authorized to exercise the said power on its behalf.

It is now a well settled principle of law that the statutory authority while granting license must satisfy itself in regard to the fulfillment of the pre-conditions therefor.

Submission of Mr.Maninder Singh that the terms of license and permission are interchangeable may not be correct in the present fact scenario, although generally speaking, the same may be correct.

In this case, the petitioner on its own showing had also applied for grant of operating license. No such operating license was granted. By accepting some amount in one of the years for four base stations in our opinion, would not sub-serve the requirements of law which would enable this petitioner to continue to operate the licensed activities.

Mr.Maninder Singh has placed strong reliance upon a judgment of this Tribunal in M/s. Total Telefilms Pvt. Ltd. Vs. M/s. Prasar Bharati [Petition No.183(C) of 2008] disposed of on 15.12.2008. Therein the question which arose for consideration

was as to whether DTH service would come within the purview of the term 'telegraph'. It was held that the Prasar Bharti was bound to obtain a license under the Telegraph Act and it is not exempted therefrom. It was in the context of obtaining an allocation of frequency in number which was akin to a letter of intent, this Tribunal held that Prasar Bharti is a licensee within the meaning of Section 4 of the Indian Telegraph Act.

A similar observation was made by this Bench in Star India Pvt. Ltd. Vs. Bharat Sanchar Nigam Ltd. (Petition No.172 of 2009) disposed of on 22.01.2010.

In this case, however, no permission was granted in favour of the petitioner. The petitioner in terms of the letter of allocation itself was required to obtain a license within one year from the date of issuance thereof. The Governmental work, it is well settled, is required to be done in writing and in conformity with the provisions of the Constitution of India and/or the concerned statutes by a statutory authority.

The respondent in its counter-affidavit stated as under:

“3) That the petitioner was assigned frequencies for LMDS applications i.e. for last mile connectivity for providing the internet services in the following frequency bands –

2.5 GHz band 2540 MHz with 10 MHz bandwidth

3.3 GHz band 3303.5/3353.5 MHz with 12 MHz bandwidth

5.7 GHz band 5732.5/5792.5 MHz with 30 MHz bandwidth & 5807.5 with 15 MHz bandwidth

3.1 Out of the above assignments, M/s SIFY Ltd. has obtained licence for operation for 5.7 GHz only. The licence issued by M/s SIFY as on date is P-5229 valid upto September 2006.

3.2 Besides above, M/s SIFY Ltd. is also using frequency bands which have been delicensed frequency bands such as 2400-2483.5 MHz and 5825-5875 MHz for providing internet services in the country.

3.3 As regards the payment of licence fee and royalty for use of the above frequency assignments, M/s SIFY Ltd. has not paid full amount due to them as outstanding dues for use of radio networks i.e.:

- (i) 5.7 GHz band Rs.4,41,62,020/- (As on 30.09.09)
- (ii) 3.3-3.4 GHz band Rs.36,78,94,537/- (As on 26.05.09).
- (ii) 2.5 GHz withdrawn on 1.1.2008

However, Operator has to pay licence and royalty for the period, frequency assignment was with them.”

It was furthermore averred:

“20. That in reply to this para, it is submitted that prior to 2005, the spectrum charges are payable from the date of issue of license or the date of invoice of equipment. From 2005 onwards the spectrum charges payable are from the date of issue of the decision letters that is the date of allotment. Hence for the 170 base stations spreading over 60 cities spectrum charges will be two & half crores approximately, the petitioner did not pay any spectrum charges for revalidation of the decision letter.”

It has also not validated the frequency assignments and made payment of two years in lieu of frequency assigned to them on 5.8 MHz.

It has also been reiterated in para 24 of the reply that the letter issued in 2003 was valid for one year only.

It is not a case where statutory authority was exercising a statutory power while determining a dispute. In this case, it will bear repetition to state that the petitioner would be entitled to relief provided it can base its claim on an existing right. The petitioner has not paid the licence fee for the period in question and even if the stand taken by it is accepted to be correct, it cannot be said to have acquired a vested legal right.

Although it is also difficult to accept the submission of Mr. Maninder Singh that a presumption may be raised that a license had been granted in favour of the petitioner on the 2.5 GHz band but even if we assume that to be correct the same evidently was for a temporary period and, thus, it cannot be said that it has acquired an enforceable right.

If as on the date of filing of the petition no licence and/or permission had been subsisting, the question of granting any relief in favour of the petitioner does not arise.

We may, furthermore, place on record that the petitioner has made a statement before us that it would be paying the entire amount of 2.5 crores as disclosed in the counter affidavit and would also shift the band. We are of the view that the offer made by the petitioner may be considered by the respondent if it is otherwise permissible in law.

We may also place on record that we have not gone into the question as to whether the respondent herein would be entitled to realize the entire amount for all the bands for a period of two years or not as it has not filed in counter claim in this behalf.

The petition is dismissed with the aforementioned observations. In view of the stand taken by the petitioner there shall be no orders as to costs.

....., J
(S.B. Sinha)
Chairperson

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(G. D. Gaiha)
Member