

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 5th DECEMBER, 2011

Petition No.238 of 2011

(M.A. No. 275 of 2011)

Idea Cellular Limited, Punjab Circle ...Petitioner

Vs.

Union of India ...Respondent

Petition No.240 of 2011

Idea Cellular Limited, Haryana ...Petitioner

Vs.

Union of India ...Respondent

Petition No.241 of 2011

Idea Cellular Limited, Karnataka ...Petitioner

Vs.

Union of India ...Respondent

Petition No.242 of 2011

Idea Cellular Limited, Andhra Pradesh ...Petitioner

Vs.

Union of India ...Respondent

Petition No.243 of 2011

Idea Cellular Limited, Maharashtra ...Petitioner

Vs.

Union of India ...Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioner : Mr. C.S. Vaidyanathan, Senior Advocate
Mr. Manjul Bajpai, Advocate
Mr. Gopal Jain, Advocate
Ms. Harshita Verma, Advocate
Ms. Nupur Pallavi, Advocate

For Respondent : Ms. Maneesha Dhir, Advocate
Mr. K.P.S. Kohli, Advocate

JUDGEMENT

These five petitions involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. Licenses for the circles of Haryana, Andhra Pradesh, Maharashtra, Delhi, Punjab and Karnataka were granted in favour of the petitioner by the respondent herein sometimes in Feb, 2008 with effect from 25.1.2008.

The petitioner had applied for grant for UAS Licenses for Punjab and Karnataka in the year 2006 and one Spice Communication Limited

applied for the service area of Haryana, Andhra Pradesh, Maharashtra and Delhi. 'Spice' was granted UAS Licence in the month of February, 2008. 'Idea' was also granted licenses for the said circular during the said time.

We would deal with the relevant conditions of licence agreement a little later.

A proposal was made for its merger with Spice which was communicated to the respondent herein on or about 2.6.2008.

As regards the conditions for merger of licenses, the respondent issued some guidelines on or about 22.4.2008. We would notice the relevant positions of the said guidelines at an appropriate stage.

3. According to the petitioner, Clause 17 of the said guidelines dealing with the provision that permission for merger would be accorded only after three years from the date of license was not attracted as the merger of licenses within a period of three years of the grant of licence was prohibited, and in this case both the petitioner and Spice held licenses for more than 12 years.

By a letter dated 15.7.2008, the petitioner informed the respondent that according to it the transaction comes within the purview of the 'permissible merger of the licensees' in terms of the said guidelines. It was contended that if despite the same the respondent thought it otherwise then the overlapping licenses of Punjab and Karnataka may be treated as surrendered.

By another letter dated 1.8.2008, the respondent was informed that a scheme of restructuring in terms of Sections 391 to 394 of Companies Act, 1956 would be filed whereby two overlapping licensees would be demerged into a separate legal entity.

4. It was stated that the petitioner 'will ofcourse additionally conform to all other license requirement in later stage'.

It was furthermore stated that the proposed action was strictly in accordance with Clause 6.3 of the license agreement and would require the respondent's written approval as well as the approval of the High Court. Prior approval is said to have been sought for. By a letter dated 1.1.2008 respondent was furthermore informed that the company had approved the merger of the two overlapping licensees. A meeting between the parties hereto was said to have been held on or about 6.3.2009. The relevant Clauses of minutes of meeting are as under:-

"M/s Idea Cellular Ltd. informed that they are ready to commission the services in Orissa and Tamil Nadu services areas and they will be able to meet the 10% rollout obligations in the stipulated time-frame in other service areas."

5. Respondent sought informations from the petitioner as to from which date it had been holding 41.09 per cent equity in Spice

Communication Limited; in response whereto petitioner by a letter dated 12.5.2009, disclosed the said date to be 17.10.2008.

The petitioner was allocated GSM Spectrum in Punjab service area on or about 6.5.2009, which was accepted.

By another letter dated 12.5.2009 the petitioner confirmed the respondent that it had complied with the policy that no single company/legal person either directly or through its associate would have substantial equity of 10 per cent or more share in one licensed company in the same service area which, however, was not accepted by the respondent.

6. The petitioner furthermore informed the respondent by a letter of the same date that it had filed the restructuring scheme for demerger in Gujarat High Court on 11.5.2010.

By a letter dated 12.6.2009 the respondent sought for informations as regards the scheme of de-merger and detailed equity structure of M/s Vitesse Telecom Pvt. Ltd. in response whereto the by a letter dated 12.6.2009, the respondent was informed by the petitioner that the scheme for de-merger between Idea and Vitesse Telecom Pvt. Ltd. was filed in Gujarat High Court on 11.5.2009 on which date the scheme for amalgamation of Spice Communication Limited with Idea was also filed.

It was stated:-

“The Scheme of Amalgamation will proceed independently. From Clause 17.3 of the Scheme of Amalgamation, you will note that if the scheme of de-merger is not pursued or does not become effective, for any reason whatsoever, then the amalgamation of the two companies will still proceed. In that case, post the court approved merger, the treatment of overlapping licenses will be as per advice of the DOT and in full compliance with relevant policy applicable. We expect to complete the court process within 6-7 months. Therefore, either through the de-merger scheme, or through the amalgamation (merger) scheme, the issue of overlapping licenses would cease to exist.”

7. On or about 23.6.2009 a similar letter was issued by Spice on 24.6.2009.

The UAS Licence was amended by the respondent on or about 23.7.2009 inserting Clause 1.8 therein, which reads as under:-

“1.8: There shall be following conditions for sale of equity of the UAS licensee company:

(i) There shall be a Lock-in-period for sale of equity of a person whose share capital is 10% or more in the UAS licensee company on the effective date of UAS licence and whose net-worth has been taken into consideration for determining the eligibility for grant of UAS license, till completion of three years from the effective date of the UAS

licence or till fulfilment of all the rollout obligations under clause 34, whichever is earlier.

(ii) Issue of additional equity share capital by the UAS licensee company by way of private placement/ public issues is permitted. However, such a person (on whom the Lock-in condition applies as per para (i) above) shall not transfer in any manner such as sale, assignment etc., his share capital directly or indirectly to any other person during lock-in period i.e. the invested amount in the shareholding by the equity holder shall not be reduced in any circumstances during the lock-in period.

(iii) In case of issue of fresh equity, within the lock-in period the declaration of dividend and/or special dividend shall be barred.

(iv) The provision of lock-in period shall not apply, in pursuance to enforcement of pledge by the lending financial institutions/banks in the event of defaults committed by the UAS licensee company.”

8. On and from the said date, restrictions were also placed on UAS Licensees from transferring/selling equity to UAS Licence cum Licensee Companies by transferring the license itself. By a letter dated 24.9.2009, the respondent was informed that the process of merger was at an advance stage in the respective High Courts and it had commenced service in 17 out of 22 service areas and it was expected to launch commercial operations in the balance 5 service areas also at an early date. By an order dated 26.11.2009 the scheme of merger

between the petitioner and Spice was approved by the Gujarat High Court.

The petitioner by a letter dated 27.11.2009 informed the DOT in the following terms as under:-

“We write further to our letter dated September 24, 2009 (copy enclosed) on the issue of amalgamation of Spice Communications with IDEA Cellular Limited.

We are pleased to advise you that we have comprehensively completed all our network roll-out obligations (50%) DHQs, covering every service area of India. The TEC completion certificates are pending in certain cases only because of normal TERM Cell procedures.

The solitary exception to the above is the Service Area of North East. We are already radiating in a large part of this Service Area, and would have met comprehensive roll out obligations here also, but for the exceptional security situation prevailing in most of the 55 DHQs which make up NESAs. Despite this extraordinary challenge, we are progressing rapidly, and expect to complete NESAs within 3 months. Given the security background, we are sure you will appreciate that this North East service area is pending, despite all our efforts, only and for reasons not in our control.”

9. Communication as regards the approval of the High Court of the scheme of merger was sent to the respondent on 6.1.2010.

10. By a letter dated 7.1.2010, the respondent declined to accede to the request of merger of the two companies as being impermissible on the premise that whereas Spice held licenses for the Punjab and Karnataka circles, the petitioner also held a valid license with effect from 25.1.2008 and thus the period of three years had not elapsed.

Moreover, it was stated that the petitioner also held the same UAS License in Andhra Pradesh, Haryana, Maharashtra and Delhi and Spice also held the UAS License from 29.2.2008 and 3.3.2008 and thus, the period of three years from the dates of grant of licenses had not elapsed. Similar communication was also made by the respondent to the petitioner in terms of its letter dated 18.1.2010.

11. The respondent vide its letter dated 20.1.2010 asked the service providers for providing informations relating to launch of service in response whereto, the petitioner notified the DOT as under:-

“We request the DOT to kindly take cognizance of all our submissions including our letters of November 27, 2009 and January 6, 2010, to withdraw their letter of January 7, 2010 and to provide formal approval at the earliest. Should at all any clarifications be required, please let us know or call us for a meeting.”

12. By a letter dated 28.1.2010, the petitioner stated as under:-

“Subject: Your letter no. 842-320/2005-VAS(Pt.) dated 20th January 2010.

Dear Sir,

Refer your above-mentioned letter, desired data is enclosed as per Annexure A.

In this regard you would kindly note our letters dated November 27, 2009 & January 11, 2010, wherein we have highlighted comprehensive completion of our network roll-out obligations (50%) of DHQs, the sole exception being North East (where the roll-out is more than 10% in any case) due to extraordinary security conditions. Further we have also highlighted to you our complete readiness for 50% TERM registration and the problems being faced on submission of the same at TERM cells.

We once again request you to issue necessary guidance / instructions to respective TERM cells so that our applications for 50% registration are accepted and processed as per laid down procedures, without any further delay.

13. The Delhi High Court also approved the scheme of merger of Spice Communication with the petitioner by an order dated 5.2.2010.

14. The petitioner by a letter dated 15.3.2010/25.3.2010 stated as under:-

“2. We now turn to the 2 Idea Cellular licenses for Karnataka and Punjab dated 25.01.2008 and the 4 erstwhile Spice Communications licenses for

Maharashtra, Delhi, Haryana and Andhra Pradesh, all dated 25.01.2008. We draw your attention to our various letters right from the beginning where we have spelt out that the Merger process is constituted of various steps involving statutory bodies, viz, High Courts/SEBI/ other statutory bodies (all these steps have been concluded as originally spelt out, and the merger consummated).

5. The treatment of overlapping licenses of the merged entity, and of associated spectrum (spectrum for Delhi overdue for allotment) will be as per applicable telecom policy, for which we have written to you on several occasions.”

Yet again on 25.3.2010 the petitioner informed/communicated to the respondent in the following terms:

“4. Again, as stated in our earlier letters, all our operational licenses are inter-circle, and that distinction has been scrupulously maintained in conformity with the letter and spirit of the telecom policy. Similarly, the question of parallel roll-out in overlapping licenses, during the Court process, and converting these into operational licenses, did not arise, again in conformity with the letter and spirit of the telecom policy.

5. The treatment of overlapping licenses of the merged entity, and of associated spectrum (spectrum for Delhi overdue for allotment) will be as per applicable telecom policy, for which we have written to you on several occasions.”

15. The petitioner on or about 5.4.2010 requested for transfer of license in terms of the order of the Delhi High Court by the respondent. Yet again a formal approval for transfer of license was sought for by a letter dated 26.4.2010.

16. By a letter dated 28.4.2010 procedural consent of the respondent for transfer of the license held by Spice to Idea Cellular Limited was sought for. Respondent asked for informations relating to roll out services and commercial launch of services by the licensees to whom the UAS license had been granted in the years 2006, 2007 and 2008 in the proforma enclosed with its letter 1.7.2010. The petitioner furnished the requisite details on 2.7.2010.

On or about 22.12.2010, the petitioner informed the respondent reiterating its stand that on completion of process of amalgamation, the respondent may issue formal orders therefor, contending:-

“In a meeting held on August 7, 2008, chaired by the Secretary-DoT and senior DoT and Idea officials, this matter was discussed threadbare. The view that emerged was that looking at the intent of the policy, and the Guidelines in a holistic manner. Idea Cellular was eligible to proceed with the proposed Merger of Licenses. Since neither ‘consumer interest’ concerns no ‘fly-by-night operator’ concerns were attracted, and reading Clause 17 and Clause 18 holistically, it was concluded that the Intra Circle merger Guidelines did not bar the transfer of licenses where the merging companies were both more

than 3 years old, but the Guidelines merely determined the balance duration of the license. This was seen as equitable, as anyway there was no loss to the Government, since excess spectrum would be surrendered. We were clearly advised by the DoT that no prior approval of the DoT was required, and we could proceed with the merger of companies through the High Courts, and then inform the DoT for formal approval of the merger of licenses.

7. Post this advice and approval, we proceeded with the merger. The DoT was informed of the details of the amalgamation at each and every stage, by way of the 17 letters mentioned earlier and numerous personal meetings, and we have been requesting DoT to issue formal orders. Incidentally, we had also completed 50% DHQ roll-out obligations for all our licenses, well before the mandatory period of 3 years for completion. Therefore, we were surprised when we received a letter from the DoT dated 7th January 2010 saying the merger of the companies cannot be permitted (18 months after our merger announcement and 16 months after our meeting with the DoT – this letter came soon after we confirmed the approval of Hon'ble High Court). The same was evidently wrong and uncalled for, considering the advise for approval given earlier and given that merger of companies is not in the DoT's domain, and was appropriately responded by us. In fact on the contrary, upon us informing DoT about completion of the Court process of amalgamation, the DoT ought to have issued formal orders forthwith.

17. A show-cause notice dated 24.02.2011 was issued to the petitioner as to why the license held by it shall not be terminated. Questioning the same, the petitioner filed a petition before this Tribunal which has been marked as Petition No. 231 of 2011.

18. By an order dated 24.3.2011, the respondent imposed a penalty of Rs.50.00 crores on the petitioner.

The petitioner filed a petition before this Tribunal questioning the validity thereof and on or about 24.3.2011, an order of stay was passed therein, stating:-

“28. We are of the view that for the imposition of penalty of a sum of Rs.50 crores on the petitioner, prima facie the principles of natural justice were required to be complied with. The effect of non-compliance of principles of natural justice is well known. The order would be a nullity. It cannot be given effect to, subject to just exceptions.

29. We, therefore, are of the opinion that the impugned order need not be given any further effect till further order.”

19. The respondent, however, filed an application before the learned Company Judge of the Delhi High Court, which was marked as Company Application No. 578 in Company Petition No. 403 of 2009.

An ex-parte order of stay of operation of the said order dated 5.2.2010 was passed on 30.3.2011.

20. By reason of the impugned order dated 21.4.2011, liquidated damages to the tune of Rs.4.55 crores was imposed, in respect of the Punjab circle. Liquidated damages of diverse sums were also imposed in respect of the other circles.

By reason of an order dated 8.6.2011, this Tribunal on the condition that the petitioner deposits 60 per cent of the demanded amount stayed the operation of the said orders.

21. The Delhi High court by an order dated 4.7.2011 held as under:-

“Moreover, the submissions that petitioner-companies have simultaneously not used two overlapping licences, does not impress this court in as much as non roll-out of licence obligations within a particular time frame itself makes the licensee liable to pay compensation and penalties. Also holding of two licences simultaneously by a company, even if one of the licences is non-operative, prevents competition.”

Stricto sensu, in these petitions, we are not concerned with any observations made in the said order, in view of the operative portion thereof, which, to our mind is clear and explicit.

22. The petitioner again requested the respondent for transfer of licensees on or about 8.7.2011. Indisputably, an intra-court appeal was preferred before a Division Bench against the order of the learned Company Judge dated 4.7.2011 which was marked as Company Appeal No. 42 of 2011.

23. The petitioner again requested for consideration of pending applications seeking transfer of licensees as also formal order of transfer.

24. This Tribunal in its order dated 1.8.2011 recorded that the petitioner has not operationalized its licenses.

25. An additional demand of Rs.2.44 Crores was made by the respondent upon the petitioner on the premise that the period of 52 weeks have elapsed from the date of expiry of one year of the grant of license during which period the petitioner was to comply with its roll out obligations.

26. The petitioner has filed a Miscellaneous Application for amendment of the petition which has been marked as M.A. No. 275 of 2011.

27. We may also place on record that on or about 4.10.2011, a show cause notice has been issued for termination of UAS License for the

Punjab Circle for alleged non-compliance of roll out obligations on the part of the petitioner.

28. Mr. Vaidyanathan, learned Senior Counsel appearing on behalf of the petitioner would contend:-

- a) Imposition of liquidated damages upon the petitioner for alleged failure on its part to carry on the roll out obligation is not only illegal but also unjust, unfair and unreasonable in so far as the respondent has failed to establish that petitioner has breached the licence agreement in that behalf having regard to the fact that no actual loss or injury has occurred to it nor any adjudication thereupon has been carried out.

- b) The DOT itself having stated that the overlapping licenses should not be operationalized and the petitioner having abided by the said license condition scrupulously which was communicated to it by a letter dated 25.1.2010 and reiterated on 22.12.2010 and furthermore in view of the fact that the respondent did not respond to petitioner's request for transfer of license despite being fully informed thereabout through as many as 17 letters, the impugned demand should be quashed. If the contention of the respondent that the license is invalid is accepted, it is difficult to conceive as to how the petitioner could act in terms of

an invalid licence and thus even the roll out obligations to be carried out by the petitioner should also be held to be invalid.

- c) The impugned demand is violative of the principles of natural justice as prior to issuance thereof neither any opportunity of hearing had been given nor any reason has been assigned in support thereof.
- d) The stand of the respondent is self contradictory and inconsistent in so far as on the one hand it contends that by reason of cross holding of shares, the petitioner had committed violation of Clause 1.4 of the licence agreement and therefore licensees are required to be cancelled but simultaneously liquidated damages have been imposed on the premise that the licenses had been existing.
- e) Having regard to the fact that the learned Company Judge of the Delhi High Court had not set aside the order of merger, the respondent had a duty to take a decision one way or the other on the petitioner's request of transfer of license and by remaining quiet for all these periods, it must be held to have acted arbitrarily.
- f) The respondent has proceeded on an erroneous assumption that roll out obligations were not met by the petitioner having regard

to the fact that it was notified that it would not operationalize its licensees till the issue as regards merger of licenses was resolved and in that view of the matter, there exists an error apparent on the face of the record.

- g) The petitioner having become a merged company w.e.f. 1.3.2010 and having regard to the fact that spectrum was allotted to it on 6.5.2009, it was not possible for it to comply with its roll out obligations within a period of one year from the date of allocation of spectrum.
- h) Having regard to the fact that the petitioner had been keeping the DOT informed with regard to its merger proposal as also the developments which took place from time to time, it is not correct to contend that it violated the conditions of licenses.
- i) The respondent having itself advised to obtain approval after the scheme of merger of companies was sanctioned could not have equated the said word with the word 'permission' in as much as approval, if granted relates back to the date of the request and in that view of the matter it could not have refused to pass orders one way or the other on the petitioner's request.
- j) Reliance placed on the merger guidelines by the respondent is misplaced as it failed to notice that the same must be construed

in such a manner so as to fulfill the object of the scheme of merger, namely, that the same legal entity cannot have more than one licence as the same would be anti-competitive in nature.

- k) A holistic reading of the conditions of license would clearly go to show that during the interregnum, a transitory phase may come into being resulting in grant of overlapping of licenses and grant of spectrum in favour of both the companies. However, only on merger of the companies, the excess spectrum was required to be surrendered within a period of three months from the date of approval of merger as provided for in Clause 18 of the merger guidelines subject to the condition that keeping in view the number of subscribers to the concerned circle, the maximum spectrum to the extent of 15 MHz may be permitted to be retained.
- l) The respondent in terms of paragraph 12 of the 2004 guidelines having power to relax, waive or suitably amend the conditions of licence, there cannot be any doubt or dispute there could be cases of cross-holding of equity shares in more than one license by a licensee.

m) Paragraph 10 of the merger guidelines dated 22.4.2008, clearly postulates that spectrum can be held by the merged company for a period of three months and in that view of the matter, the contention of the respondent that the petitioner having accepted allocation of spectrum is bound to comply with its roll out obligation cannot be said to be correct as the merger of the company having become effective, it was obligatory on the part of the respondent to take a decision thereupon.

29. Ms. Maneesha Dhir, learned counsel appearing on behalf of the respondent, on the other hand, submitted:-

- a) The petitioner having admittedly violated the scheme of guidelines as also the conditions of license on: (i) merger issue (ii) amalgamation issue and (iii) substantial equity holding by Idea and Spice, imposition of liquidated damages by the respondent was justified.
- b) The Petitioner having been allocated spectrum and having accepted the same, could not have refused to comply with its roll out obligation which has nothing to do with the merger issue.
- c) For the purpose of imposition of liquidated damages which is a pre-estimated reasonable sum agreed to by and between the parties, the principles of natural justice were not required to be complied with.

- d) The imposition of liquidated damages must be distinguished from invocation of the penalty Clauses as contained in Clause 10 (I) and Clause 10 (II) of the conditions of licence.

30. Licenses had been granted in favour of the petitioner by the respondent in the year 1995. It had asked for migration to the UAS regime in the year 2006 and as indicated heretofore the same was allowed.

We may notice the relevant conditions of license.

“3. The LICENSEE hereby agrees and unequivocally undertakes to fully comply with all terms and conditions stipulated in this Licence Agreement and without any deviation or reservations of any kind.”

31. The license agreement is in several parts being contained in the Schedule appended thereto.

Part I provides for the general conditions. Part II provides for the commercial conditions. Part III provides for the financial conditions. Part IV provides for the technical conditions.

Operating conditions are contained in the Part V, whereas security conditions are provided for in Part VI.

Frequency authorization is dealt with in Part VII of the Schedule.

Some of the relevant conditions of the said licence read as under:-

“1.3 The merger of Indian companies may be permitted as long as competition is not compromised as defined in condition 1.4 (ii).

1.4 The LICENSEE shall also ensure that:

(i) Any changes in share holding shall be subject to all applicable statutory permissions.

(ii) No single company/ legal person, either directly or through its associates, shall have substantial equity holding in more than one LICENSEE Company in the same service area for the Access Services namely; Basic, Cellular and Unified Access Service. ‘Substantial equity’ herein will mean ‘an equity of 10% or more’. A promoter company/ Legal person cannot have stakes in more than one LICENSEE Company for the same service area.

“5. Modifications in the Terms and Conditions of Licence

5.1 The LICENSOR reserves the right to modify at any time the terms and conditions of the LICENCE, if in the opinion of the LICENSOR it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the telegraphs. The decision of the LICENSOR shall be final and binding in this regard.

6. Restrictions on ‘Transfer of Licence’

6.1 The LICENSEE shall not, without the prior written consent as described below, of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-Licence and/or partnership relating to any subject matter of the LICENCE to any third party either in whole or in part i.e. no sub-leasing/partnership/third party interest shall be created. Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.

6.2 Intra service area mergers and acquisitions as well as transfer of licences may be allowed subject to there being not less than three operators providing Access Services in a Service Area to ensure healthy competition as per the guidelines issued on the subject from time to time.

6.3 Further, the Licensee may transfer or assign the License Agreement with prior written approval of the Licensor to be granted on fulfilment of the following conditions and if otherwise, no compromise in competition occurs in the provisions of Telecom Services :-

(i) When transfer or assignment is requested in accordance with the terms and conditions on fulfilment of procedures of Tripartite Agreement if already executed amongst the Licensor, Licensee and Lenders; or

(ii) Whenever amalgamation or restructuring i.e. merger or demerger is sanctioned and approved by the High Court or Tribunal as per the law in force; in accordance with the provisions; more particularly Sections 391 to 394 of Companies Act, 1956; and

(iii) The transferee/assignee is fully eligible in accordance with eligibility criteria contained in tender conditions or in any other document for grant of fresh license in that area and show its willingness in writing to comply with the terms and conditions of the license agreement including past and future roll out obligations; and

(iv) All the past dues are fully paid till the date of transfer/assignment by the transferor company and its associate(s) / sister concern(s) / promotor(s) and thereafter the transferee company undertakes to pay all future dues inclusive of anything remained unpaid of the past period by the outgoing company.

8. Delivery of Service

8.1 The LICENSEE shall commission the Applicable Systems within one year from the effective date of the Licence. The date of Test Certificate issued by the Authorized Testing Party of the Licensor as specified from time to time shall be reckoned as the date of commissioning the service for the purpose of calculating liquidated damages in terms of Condition 35 of the Licence Agreement.

However, the LICENSEE may start providing service to customers at any time without the need of specific approval of the Licensor.

14. Way Leave:

14.1 The LICENSEE Company shall make its own arrangements for Right of Way (ROW). However, the Central

Government may issue necessary notification conferring the requisite powers upon the LICENSEE for the purposes of placing telegraph lines under Part III of the Indian Telegraph Act'1885.

Provided that non-availability of the ROW or delay in getting permission /clearance from any agency shall not be construed or taken as a reason for nonfulfillment of the Roll-out obligations and shall not be taken a valid excuse for not carrying any obligations imposed by the terms of this Licence.

16. General:

16.1 The LICENSEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI.

21. BANK GUARANTEES:

21.1 Performance Bank Guarantee:

Performance Bank Guarantee (PBG) in prescribed format shall be submitted for amount equal to Rs. 20 / 10 / 2 crores (for category 'A' / 'B' / 'C' service areas) before signing the Licence Agreement.

Further on completion of one year from the effective date of licence and after meeting the coverage criteria stipulated for first year, the PBG shall be reduced to Rs. 10/5/1 crores for category 'A'/'B'/'C' service areas on self certification provided by the Licensee.

Further on fulfilling the roll out obligations as stipulated in Clause 34, the balance PBG shall be released on receipt of test certificate/ test certificates issued by TEC in respect of coverage.

34. Roll-out Obligations :

34.1 LICENSEE shall be solely responsible for installation, networking and operation of necessary equipment and systems for provision of SERVICE, treatment of SUBSCRIBER complaints, issue of bills to its subscribers, collection of its component of revenue, attending to claims and damages arising out of his operations.

34.2(a) Applicable for Category “A”, “B” and “C” Service Area Licence(s)

LICENSEE shall ensure that (i) Atleast 10% of the District Headquarters (DHQs) will be covered in the first year and 50% of the District Headquarters will be covered within three years of effective date of Licence.

(ii) The licensee shall also be permitted to cover any other town in a District in lieu of the District Headquarters.

(iii) Coverage of a DHQ/town would mean that at least 90% of the area bounded by the Municipal limits should get the required street as well as in-building coverage.

(iv) The District Headquarters shall be taken as on the effective date of Licence.

(v) The choice of District Headquarters/towns to be covered and further expansion beyond 50% District Headquarters/towns shall lie with the Licensee depending on their business decision.

(vi) There is no requirement of mandatory coverage of rural areas.

34.2(b) Applicable for Metro Service Area Licence(s)

The LICENSEE shall be required to provide in 90% of the service area Street as well as in-building coverage within one year of the effective date.

35. Liquidated damages:

35.1 The time period for provision of the Service stipulated in this Licence shall be deemed as the essence of the contract and the service must be brought into commission not later than such specified time period. No extension in prescribed due date will be granted. If the Service is brought into commission after the expiry of the due date of commissioning, without prior written concurrence of the licensor and is accepted, such commissioning will entail recovery of Liquidated Damages (LD) under this Condition. Provided further that if the commissioning of service is effected within 15 calendar days of the expiry of the due commissioning date then the Licensor shall accept the services without levy of LD charges.

35.2 In case the LICENSEE fails to bring the Service or any part thereof into commission (i.e., fails to deliver the service or to meet the required coverage criteria/ network roll out obligations) within the period prescribed for the commissioning, the Licensor shall be entitled to recover LD charges @ Rs. 5 Lakh (Rupees: Five Lakhs) per week for first 13 weeks; @ Rs 10 lakhs for the next 13 weeks and thereafter @ Rs. 20 lakhs for 26 weeks subject to a maximum of Rs. 7.00 crores. Part of the week is to be considered as a full week for the purpose of calculating the LD charges. For delay of more than 52 weeks the Licence may be terminated under the terms and conditions of the Licence agreement. The week shall mean 7 Calendar days from (from midnight) Monday to Sunday; both days inclusive and any extra day shall be counted as full week for the purposes of recovery of liquidated damages.

43. FREQUENCY AUTHORIZATION

43.1 A separate specific authorization and licence (hereinafter called WPC licence) shall be required from the WPC wing of the Department of Telecommunications, Ministry of Communications permitting utilization of appropriate frequencies / band for the establishment and possession and operation of Wireless element of the Telecom Service under the Licence Agreement of Unified Access Service under specified terms and conditions including payment for said authorization & WPC licence. Such grant of authorization & WPC licence will be governed by normal rules, procedures and guidelines and will be subject to completion of necessary formalities therein.”

32. The said license was amended on or about 10.2.2009; the relevant Clauses whereof read as under:-

“(i) Roll-out obligations shall apply for wireless network only and not for wireline network.

(iii) In non-metro service areas, the licensee shall ensure that in first phase of roll out obligation at least 10% of DHQs where startup spectrum has been allocated are

covered within one year of such spectrum. The date of allocation of frequency shall be considered for computing a final date of roll-out obligation.

(v) While computing the period of one year under sub- paras (ii) to (iv) above the average delay in SACFA clearances shall be excluded.

(vii) The date of application for SACFA or date of allocation of frequency, whichever is later, shall be taken into account for the purpose of calculating average delay in SACFA clearance.

(x) For calculation of number of DHQs to be covered, the fraction which comes to 0.5 or above shall be rounded off to the next whole number and if the fraction is less than 0.5 it shall be ignored.

(xi) Date of registration by TEC/TERM is to be treated as date of meeting the roll-out obligation in case of coverage criterion is met for roll out obligation on testing.

(xii) PBG shall be encashed to the extent of the Liquidated Damages.”

Merger guidelines were issued by the respondent on or about 21.2.2004.

“1. Merger of licences shall be restricted to the same service area.

2. Merger of licence consequent to mergers/acquisitions or restructuring of the operations shall be permitted in the following category of licences:

- (i) Cellular Licence with Cellular Licence;
- (ii) Basic Service Licence with Basic Service Licence;
- (iii) Unified Access Services Licence (UASL) with Unified Access Services Licence;
- (iv) Basic Service Licence with Unified Access Services Licence;
- (v) Cellular Service Licence with Unified Access Services Licence;

In case of a merger of a basic service license with UASL, the basic service licensee shall pay, at the time of application for merger, the difference of amount of the entry fee, if any, as per the Guidelines for migration to UASL dated 11.11.2003.

3. Merger of licences will be permitted subject to the condition that there are at least three operators in that service area for that service, consequent upon such merger. It is clarified that Unified Access Service Licensee will be counted for Basic as well as Cellular service separately while deciding the number of operators in a given service area.

12. While granting permission for merger of licences, the Licensor may, suitably amend / relax/waive the conditions in the respective licences relating to the Clause on holding of 'substantial equity'.

13. LICENSOR reserves the right to modify these guidelines or incorporate new guidelines considered necessary in the interest of national security, public interest and for proper conduct of telegraphs.”

33. The guidelines which however is at present operative having been issued in supercession of the earlier guideline on 22.4.2008, we may notice the relevant Clauses thereof:-

1. Prior approval of the Department of Telecommunications shall be necessary for merger of the licence.

2. Merger of licences shall be restricted to the same service area.

3. Merger of licence(s) shall be permitted in the following category of licences:

(i) Cellular Mobile Telephone Service (CMTS) Licence with Cellular Mobile Telephone Service (CMTS) Licence;

(ii) Unified Access Services Licence (UASL) with Unified Access Services Licence (UASL);

*(iii) Cellular Mobile Telephone Service (CMTS) Licence with Unified Access Services Licence (UASL);
Merged licences in all the categories above shall be in UASL category only.*

8. The market share of merged entity in the relevant market shall not be greater than 40% either in terms of subscriber base separately for wireless as well as wireline subscriber base or in terms of Adjusted Gross Revenue.

9. No M&A activity shall be allowed if the number of UAS/CMTS access service providers reduces below four in the relevant market consequent upon such an M&A activity under consideration.

10. Consequent upon the Merger of licences in a service area, the post merger licensee entity shall be entitled to the total amount of spectrum held by the merging entities,

subject to the condition that after merger, licensee shall meet, within a period of 3 months from date of approval of merger by the Licensor, the prevailing spectrum allocation criterion separately for GSM & CDMA technologies, as in case of any other UAS/CMTS licensee(s).

In case of failure to meet the spectrum allocation criterion in the above mentioned period of 3 months, post merger Licensee shall surrender the excess spectrum, if any, failing which it may be treated as violation of terms & conditions of the licence agreement and action accordingly shall be taken. In addition, after the expiry of above mentioned period of 3 months, the applicable rate of spectrum charge shall be doubled every 3 months in case of excess spectrum held by post merger licensee.

Further, the spectrum transfer charge, as may be specified by the Government, shall be payable within the prescribed period.

15. The annual license fee and the spectrum charge are paid as a certain specified percentage of the AGR of the licensee. On the merger of the two licenses, the AGR of the two entities will also be merged and the license fee will be therefore levied at the specified rate for that service area on the resultant total AGR. Similarly, for the purpose of payment of the spectrum charge, the spectrum held by the two licensees will be added/merged and the annual spectrum charge will be at the prescribed rate applicable on this total spectrum.

However, in case of holding of spectrum for various technologies by the entity subsequent to M&A, spectrum charges & license fee etc. or any other criterion being followed by the licensor shall be applicable as in case of any other UAS/CMTS licensee.

16. For regulating acquisitions of equity stake of one access services licensee Company/ legal person/promoter company in the enterprise of another access services licensee in the same license area, present guidelines on Substantial Equity shall continue i.e. "No single company/ legal person, either directly or through its associates, shall have substantial equity holding in more than one LICENSEE Company in the same service area for the Access Services namely; Basic, Cellular and Unified Access Service. 'Substantial equity' herein will mean 'an equity of 10% or more'. A promoter company/ Legal person cannot

have stakes in more than one LICENSEE Company for the same service area.”

17. Any permission for merger shall be accorded only after completion of 3 years from the effective date of the licences.”

34. We may at the outset notice the following chart which has been placed before us by the respondent with its reply:-

<i>S.No.</i>	<i>SERVICE AREA</i>	<i>M/S CELLULAR LICENSES</i>	<i>IDEA</i>	<i>M/S SPICE COMMUNICATIONS LICENSES</i>
<i>1.</i>	<i>Karnataka</i>	<i>New UASL w.e.f 25.1.2008</i>		<i>UAS migrated from CMTS w.e.f. 09.04.1996</i>
<i>2.</i>	<i>Punjab</i>	<i>New UASL w.e.f 25.1.2008</i>		<i>UAS migrated from CMTS w.e.f. 09.04.1996</i>
<i>3.</i>	<i>Maharashtra</i>	<i>CMTS License w.e.f 12.12.1995</i>		<i>New UASL w.e.f 25.1.2008</i>
<i>4.</i>	<i>Delhi</i>	<i>CMTS License w.e.f 05.10.2001</i>		<i>New UASL w.e.f 25.1.2008</i>
<i>5.</i>	<i>Andhra Pradesh</i>	<i>CMTS License w.e.f 19.12.1995</i>		<i>New UASL w.e.f 25.1.2008</i>
<i>6.</i>	<i>Haryana</i>	<i>CMTS License w.e.f 12.12.1995</i>		<i>New UASL w.e.f 25.1.2008</i>

35. We may consider the question having regard to the order of merger, vis-à-vis the purported obligation on the part of Idea to comply with its roll out obligations.

The new licences were granted to the petitioner w.e.f. 25.1.2008 in respect of Punjab and Karnataka Circles. With effect from the said

date, licenses for the circles of Maharashtra, Delhi, Andhra Pradesh and Haryana were granted in favour of Spice Communication. The petitioner acquired 41.09% of share in Spice Communication.

According to it, it did so as a step in aid of the proposed merger.

36. With its letter dated 25.6.2008, it attached a press release providing for a detailed proposed Merger, which is in the following terms:-

*“The purchase by Idea of 40.8% of the shares held by MCorpGlobal Communications Pvt Ltd. (**“MCPL”**) in spice;*

*A public offer by Idea, TMI India Limited, a wholly owned subsidiary of TM International Berhad (**“TMI”**) to purchase up to 20% of the shares in Spice held by the public in compliance with SEBI Takeover Regulations;*

*A preferential issue by Idea of 14.99% shares to a wholly owned subsidiary of TMI(**“TMI”**) which presently holds 39.2% of the share capital of Spice (through TMI India Limited); and*

*A merger of Spice with Idea (**“Merger”**) pursuant to sections 391 to 394 of the Companies Act on the receipt of all necessary approvals.”*

It was further stated:-

*“The Merger will result in the vesting of Spice Licenses in Idea. In this connection, while clause 17 of the DoT M&A Guidelines of April 22, 2008 (**“Guidelines”**) regulates merger*

of licenses within the first 3 years of the license, this will not apply to the present transaction since both Spice and Idea have existing licenses pursuant to which they have been providing services for over 12 years.

Now, M&A includes a variety of activities, such as mergers / demergers, acquisition of shares/assets/enterprises, new equity, long term convertible debt (with or without pre-dated change of control), or any other corporate transaction, resulting in a change of control.

In our case the Government has either delayed or not fulfilled its obligation to provide spectrum. In the absence of operations, there is neither public nor consumer interest attracted which is the stated purpose of the Guidelines.

Moreover, as the shares of Spice held by TMI will be necessarily extinguished by the Merger, the restrictions on a single company / legal person having substantial equity holding in more than one Licensee Company do not apply. However, if for any reason, the Merger does not become effective within a year, you may treat our UAS licenses for Karnataka and Punjab as surrendered.

Even as we are complying with the policy fully, transparently and faithfully, we trust we will not be disadvantaged unfairly post an unlikely license surrender should the Government decide to refund Entry Fee for licenses where spectrum was not provided.

We will keep you periodically updated, and will also be pleased to provide any further information you may require.”

37. The respondent, indisputably did not respond to the said communication of the petitioner prior to 7th Jan, 2010 and 18th Jan, 2010 when the prayer of the petitioner for amalgamation of licences was rejected.

38. It appears that the petitioner by another letter dated 15.7.2008 made additional submissions in the following terms :

1. *“Clause 17 of the DoT Guidelines of 22-04-2008 restricts permission for merger of licenses within 3 years of the effective date. The term licenses is used as a generic expression. Clause 17, by itself, is unclear whether, within the same service area, **one** or **both** of the licenses have to be older than 3 years to qualify for merger of licenses. This clarity has to be derived through a purposive construction of the intent of Clause 17, and other surrounding stipulations.*

2. *Clearly, the intent of Clause 17 is to allow only serious operators and to prevent new licensees from seeking arbitrage at the expense of the public interest. That is evidently not the case here as both Idea and Spice are pioneering operators with over a decade of serious operations. The overlapping licenses are fully paid up, and overlapping license operations are Nil. There is no public interest or consumer interest attracted, which is the expressly stated intent of the Guidelines. Thus, merger of these licenses appears permissible from the intent of the policy.*

3. *The same conclusion is arrived at by asking whether a new licensee can be permitted to transfer control through any M&A activity, direct or indirect, within 3 years of the effective date. In case the answer is yes, then evidently and certainly the same DoT policy has to allow another corporate with a license in the same service area to do the same, so long as other competition related conditions are satisfied. No other conclusion is possible.*

4. *Notwithstanding the obvious, yet if the policy permits change of control within 3 years of a new license to others, but prohibits only older licensees from the same service area, then please confirm whether you would have any objection if we also demerge our 2 new licenses into a subsidiary, and transfer control in the subsidiary to another promoter who does not have a license in the same service areas. We will do this divestment with your prior approval, and ensure our resultant holding is below the limits set out in the cross holding license clause.*

In light of the above, we request the following :

a. *Your confirmation that Merger of Licenses is permissible in this instance, and specific clarity with respect to points 1, 2, and 3.*

b. *Irrespective of whether the answer to (a) is yes or no, is the demerger route as set out in point 4 permissible for the 2 new licenses ?*

c. *If, the answers to both (a) and (b) are negative, then what is your understanding regarding the License Fee collected against the new licenses ? We are aware that the License Fee is stated as non-refundable. But this would be,*

a situation that the Licensor has collected large consideration for the license, and would rely on an interpretation of a subsequent policy to disallow exercise of the license, without itself having acted or conferred any benefit to the Licensee in the majority of cases. Clearly, the Licensor should return the license fee.”

Similar informations were also furnished with regard to the development of the situation from time to time.

39. The petitioner filed an application for its merger with Spice Communication in Gujarat High Court on 11.5.2009. We may, however place on record that the petitioner on the same date also filed an application for de-merger of the companies in favour of a third party, which is said to have not been pressed.

40. An application for sanction of the proposed scheme of merger was filed before the Delhi High Court on 15.5.2009.

41. The petitioner’s application was allowed by the Gujarat High Court by its judgment dated 26.11.2009 and by the Delhi High Court by a judgment dated 5.2.2010.

42. Pursuant to or in furtherance to the said orders, steps were taken by the petitioner for making the scheme of merger effective by way of compliance to the legal requirements as also the directions issued by the Gujarat High Court and the Delhi High Court.

43. On and from 1st March, 2010, the new merged company, i.e, the petitioner herein came into existence. Of course, the issue of merger of the companies is being agitated before the Delhi High Court.

44. It is not in controversy that the spectrum was allotted in favour of the petitioner on 6.5.2009. It's roll out obligation to provide for services in 10 per cent of the District HQs within a period of one year, if any, is said to have expired on 6.5.2010.

As noticed by us heretobefore, attention of this Tribunal has been drawn to the relevant conditions of license agreement, the guidelines issued by the respondent No.1 as also the letters issued by the parties hereto from time to time.

It has also been noticed by us that submissions have also been made as regards the effect of the orders issued and/or the communications made by the parties hereto.

We, however, think that keeping in view the fact that several proceedings entered between the parties having been pending before several forums, it would not be prudent on our part to deal therewith one way or the other as any finding arrived at or even any observations made may prejudice one or the other in the said proceedings.

For the aforementioned reasons, we refrain ourselves entering into any controversy arising out therefrom.

45. Was it possible for Idea to have two licenses to carry out its roll out obligations in respect of two different licenses is one of the principal questions?

It is not in controversy that the petitioner has never operationalized its Punjab and Karnataka licenses. It furnished the requisite intimations to the respondent from time to time.

46. Clause 1.4 (ii) of the licence agreement creates a bar in a licensee to acquire any other licence. If that was the mandate of the licensor, the question is whether the same could be violated.

47. Before, however, adverting to the said question, we may notice that by diverse orders, a penalty of Rs.50.00crores was imposed upon the petitioner for violating the conditions of licence in so far as it acquired 41.19 per cent shares in Spice Communications.

Aggrieved by and dissatisfied with the validity of the same orders passed by the respondent in respect of the circles, the petitioner had filed petition before this Tribunal, being Petition No. 143 of 2011 and batch cases.

Effect of the said orders imposing penalty is also, thus, required to be determined.

48. It may further be placed on record that on or about 04.10.2011, a notice to show cause has also been issued against the petitioner for

alleged violation of its roll out obligations under the licence as to why the same should not be terminated.

49. The petitioner had also filed a petition before this Tribunal which has been marked as Petition No.231 of 2011 questioning a notice dated 24.2.2011 directing the petitioner to show-cause as to why the license shall not be terminated for violation of various conditions of license as also the guidelines, and instructions, in respect of substantial equity conditions but the same has been dismissed directing the petitioner to file its show cause before the appropriate authority. The said matter is, thus, pending before the respondent for its consideration.

50. In view of pendency of the aforementioned petitions, a peculiar situation has arisen. On the one hand, the respondent contends that the licensees are liable to be cancelled and penalty of Rs.50.00 crores was rightly imposed for violation of conditions of licence, the petitioner having acquired 41.9 per cent shares in Spice Communications Limited; and on the other that the license issued in its favour is valid as spectrum having been allocated in its favour, it was bound to comply with its roll out obligations.

51. Do these two stands taken by respondent are contradictory and inconsistent is the question.

Mr. Vaidyanathan would submit that such contradictory stands could not have been taken; whereas Ms. Dheer submits that there is no contradiction.

We would assume to be so for the purpose of disposal of this petition.

52. It is at this stage, we may furthermore take notice of the fact that inter-alia on the premise that the petitioner has deliberately and/or willfully suppressed the respondent's letter 7.1.2010 dated and 18.1.2010 from the Delhi High Court as the said orders were passed before the order was reserved by the Delhi High Court, the respondent filed an application for recall of the aforementioned order dated 5.2.2010 in March, 2011. The learned Company Judge of the Delhi High Court while maintaining the order sanctioning scheme of merger issued certain directions; the relevant portions whereof read as under:-

“Moreover, the submissions that petitioner-companies have simultaneously not used two overlapping licences, does not impress this Court inasmuch as non roll-out of licence obligations within a particular time frame itself makes the licence liable to pay compensation and penalties. Also holding of two licences simultaneously by a company, even if one of the licences is non-operative, prevents competition supremacy on the Act vis-à-vis other statutes/contracts, but would also amount to rendering

nugatory other statutory and contractual provisions which the Act does not provide.”

“It is also not understood as to how DOT’s consent in August, 2008 could be claimed for transfer of overlapping licences to Idea when the Scheme itself proposed by Idea and sanctioned by this Court on 5th February, 2010 states in Para 17.3 that the said Scheme is conditional on approval/sanction of demerger of overlapping licences of Spice and Idea to third companies namely, Vitesse Telecom Private Limited and Claridges Communications Private Limited. In fact, in the opinion of this Court, the petitioner-companies are today in violation of their own scheme!”

“However, the present applications for recall of sanction order dated 5th Feb, 2010 have been filed after a delay of thirteen months. There is no plausible explanation for the delay except for the submission that Government’s decisions are ‘proverbially slow’.”

“In fact, today, the ‘situation at the ground’ is that Spice has lost its entity after having been dissolved without following the process of winding up and all its employees have become employees of Idea. The assets and liabilities of Spice have got vested in Idea. The shares of

erstwhile Spice have also been delisted from the relevant stock exchange. Further some of the shareholders of erstwhile Spice, who had received the shares of Idea, would have also transferred the same to third parties. Consequently, today it is not possible for this Court to ‘unscramble the eggs’ by recalling in its entirety the order dated 5th Feb, 2010 sanctioning the Scheme of Amalgamation.”

It was concluded:

“Consequently, to bring the sanctioned scheme, in the present case, in conformity with the Licence and Merger Guidelines, 2008 as well as in view of the fact that simultaneous demerger scheme has been withdrawn, it is directed that notwithstanding anything stated in the sanctioned scheme (in particular paras 5.2 as well as 10.2) and/or in the order dated 5th Feb, 2010 the six overlapping licences of the Transferor Company/Spice would not stand transferred or vested with Transferee Company/Idea till prior permission of DOT is obtained. The spectrum allocated for such overlapping licences shall also forthwith revert back to DOT. In the event DOT refuses or grants conditional approval to transfer of licences, Idea would be entitled to challenge the same before TDSAT who would decide the same in accordance with law after hearing both

the parties. Since the Transferee Company has used the overlapping licence without any prior permission of DOT from 5th Feb, 2010 till date in contravention of the Licence and Merger Guidelines, it is directed that it shall be open to DOT can be challenged by Idea before any competent court or tribunal. To avoid inconvenience to public at large, DOT is directed to ensure that cell phone customers of the two overlapping licence areas namely, Punjab and Karnataka are provided regular and uninterrupted services like in the past.”

53. The petitioner has preferred an intra-court appeal thereagainst which has been marked as Company Appeal No.42 of 2011.

54. By an interim order dated 21.7.2011,a Division Bench of the High Court of Delhi directed as under:-

“Till the next date of hearing, status quo be maintained in respect of the two licenses which have been operational till date, in Punjab and Karnataka. So far as the licenses which have not been operated upon, no coercive steps shall be taken in respect of any demand that may be raised by the respondents.”

55. The petitioner, as noticed heretofore, held six licenses in six different service areas, two of them were non-operational being those of Punjab and Karnataka.

56. Other licenses, however, were operational. The interim order of the Division Bench of the Delhi High Court must be construed and considered , having regard to the aforementioned factual scenario.

57. Mr. Vaidyanathan would submit that the respondent had no jurisdiction to adjudicate on the question as regards the nature or the quantum of liquidated damages and, thus, the entire demand is illegal.

58. We do not agree that the respondent was not entitled to make any demand. The legality, validity or correctness thereof certainly could be raised so as to be adjudicated by this Tribunal in exercise of its jurisdiction under Section 14 of the TRAI Act, as also having regard to Clause 16.3 of the conditions of the license.

However, Ms. Dheer and Mr. Kohli themselves have taken us through a large number of documents which require determination of complicated questions of fact.

They have also invited us to determine various complicated questions of law.

59. If determination of complicated questions of fact or complicated questions of law was necessary for the purpose of levy of liquidated

damages, we are of the opinion, that the petitioner was entitled to an opportunity of being heard.

In a case of this nature the principles of natural justice was, thus, required to be complied with.

60. We may for the purpose of determination of the issues arising in these matters consider the legal aspects thereof.

The Central Government parts with its exclusive privilege conferred on it by reason of the proviso appended to Section 4 of the Indian Telegraph Act, 1885 by grant of licenses on such terms and conditions and on such considerations as it may think fit and proper.

The licenses, however, are not granted in any prescribed form.

61. The licensees having regard to the nature of transactions and being recipient of a privilege from the Central Government may not have much say in the matter.

The licenses are granted in a printed proforma.

The Indian Telegraph Act or the Rules framed thereunder, however, do not provide for the terms and conditions of the licenses. No proforma has been prescribed in terms whereof the license has to be granted. Whereas a license which is granted in terms of the provisions of a Statute would give rise to a statutory contract, a license granted in a case of this nature having regard to the fact that the terms and conditions thereof would depend upon the discretion of the Central Government, the license agreement would only constitute a contract.

62. The Central Government, however, being a 'State' within the meaning of Article 12 of the Constitution of India must also while discharging its contractual obligations vis-à-vis a licensee which entails grave civil or evil consequences is required to act fairly and reasonably, keeping in view the principles enunciated under Article 14 of the Constitution of India.

63. For the purpose of imposition of liquidated damages having regard to the principles of law enunciated by the Supreme Court of India in *Fateh Chand vs. Balkishan Das* AIR 1963 SC 1405, *Maula Bux vs UOI* AIR 1970 SC 1955 and *UOI vs. Raman Iron Foundry* (1974) 2 SCC 231, the first respondent was required to consider as to whether a case has been made out for invoking the liquidated damages clause which could be done (i) if there is a breach of contract; (ii) the nature and extent of breach; and (iii) the quantum of damages.

In *Fateh Chand* (supra) and other cases following it the Supreme Court in no unmistakable terms laid down, the law that there is no qualitative difference between 'liquidated damages' and 'unliquidated damages' as envisaged under Sections 73 and 74 of the Indian Contract Act.

64. While saying so we are not oblivious of the fact that a two Judge bench of the Supreme Court of India in *ONGC vs. SAW Pipes Ltd.* 2003 3 SCC 705 has opined that a genuine plea estimate damages will

cast the burden on the person who raises the contention that the same is unreasonable.

It is also a trite law that the action on the part of the licensor, which is being impugned must be judged having regard to the facts as was obtaining on the date of passing of the order i.e. 21.4.2011.

Such an order must be supported by reasons and was required to be passed by a competent authority on application of mind.

65. Ms. Manisha Dheer has strongly urged that the order of the Gujarat High Court dated 26.11.2009 and that of the Delhi High Court dated 5.2.2010, having been obtained by the petitioner by suppression of material facts, must be held to be a nullity.

Strong reliance has been placed on a number of judgments of the Supreme Court of India and the Delhi High Court in this regard. We are not referring to the said decisions as the principles of law laid down therein are unquestionable. Moreover, the said question has been dealt with by the Hon'ble Delhi High Court extensively.

66. Submission of Ms. Dheer is that fraud on Court committed by the petitioner would be evident from the decision of the learned Company Judge of the Delhi High Court dated 4.7.2011 and, thus, the petitioner was liable to pay liquidated damages and its license having remained alive and valid throughout.

Before adverting to the said contention, it must be placed on record that the Delhi High Court in its order dated 4.7.2011 merely

imposed other and further conditions and did not set aside the order granting sanction to the merger scheme in view of the peculiar circumstances of this case.

67. So far as submission of Ms. Dheer that the order of the Delhi High Court sanctioning the scheme of merger has not come into operation as the schemes as regards demerger of the petitioner company as also of the Spice Communication in separate identities have not come into force is concerned; suffice it to say that our attention has been drawn to the fact that even before the Gujarat High Court the petitioner did not press the demerger scheme which was recorded in its order dated 15.4.2009 and the same is said to have been brought to the notice of the Delhi High Court.

Mr. Kohli appearing for the respondent disputes the same.

68. Ms. Dheer and Mr. Kohli have taken great pains in taking us through the entire order of the learned Company Judge dated 4.7.2011 to contend that the petitioner is guilty of committing fraud.

Our attention in particular has been drawn to paragraph 53 of the said order. We have noticed the same heretofore:-

69. We for the reasons stated hereinbefore are of the opinion that having regard to the operative portion of the judgment, the

observations made in various paragraphs thereof are not of much relevance.

70. A submission has also been made by Ms. Dheer that even if the merger of two companies would come into effect on and from 1.4.2010, an order of stay having been passed on 30.3.2011 by an interim order of the Delhi High Court and the merger having ultimately been sanctioned on 4.7.2011, the period of 3 months 4 days, even is to be added to the period of license held by the petitioner, i.e. the date of allocation of spectrum being 6.5.2009 to 31.3.2010 i.e. for a period of 9 months and 2 days, i.e., for a period of 12 months 29 days and thus, the license having been in force for the said period, the licensee was bound to comply with its roll out obligation. Such a question keeping in view the terms of the license agreement, in our opinion does not arise.

71. Ms. Dheer had also taken great pains in taking us through a large number of correspondences to show that the petitioner was all along aware that it was to take prior approval of the Central Government before acquiring more than 10% of the equity in the 'Spice Communications'. Keeping in view the fact that the said question is pending consideration in other petitions as also before the Delhi High Court, we, being not necessary, do not intend to deal therewith or express our opinion thereupon one way or the other.

Ms. Dheer would submit that the respondent has also preferred an appeal recently before a Division Bench of the Delhi High Court from a part of the order dated 4.7.2011.

However, the respondent in its Reply (page 323) categorically stated that the pendency of the company appeal before the Delhi High Court should not stand on the way of this Tribunal in hearing these matters.

72. We have noticed heretofore that the petitioner has filed an Appeal before the Division Bench against the order of the learned Company Judge. The respondent has also filed an appeal against the order of the learned Company Judge.

The Division Bench of the High Court Bench has ordered to maintain status quo. Any order of the High Court will have impact on the outcome of the proceedings of imposing liquidated damages on the petitioners.

73. There was, thus, a need of giving show cause notice to the petitioner before imposing liquidated damage and examine all the complicated issues including orders of the Learned Company Judge and Hon'ble High Court.

74. As no opportunity was provided to the petitioner to show cause and implication of pendency of the companies merger issue in the High Court examined by the respondent, we set aside the order of the

respondent. However, it will be free to proceed with its proceeding after complying with the principle of Natural Justice keeping in view the observations made by us heretofore. The respondent shall subject to the ultimate order ^{is directed} to refund the amount deposited by the petitioner with interest @ 12% per annum.

75. This petition is allowed to the aforementioned extent.

76. In the facts and circumstances of the case, there shall be no order as to costs.

.....
(S.B. Sinha)
Chairperson

.....
(P.K. Rastogi)
Member

HKC/