



spectrum charges. The mode of payment of royalty for the radio frequency, however, was changed to the revenue share basis wherefor provisions of license were amended on 23.1.2004. The respondent, however, on the premise that the petitioner has defaulted in payment of royalty not only imposed interest which is penal in nature but also levied penalty of 150 % of the entire amount of short payment taking recourse to the following provisions in the license:-

- “1.5 Any delay in payment of LICENCE Fee, or any other dues payable under the LICENCE beyond the stipulated period will attract interest at a rate which will be 5 % above the Prime Lending Rate (PLR) of State Bank of India prevalent on the day the payment became due. The interest shall be reckoned as a full month for the purposes of calculation of interest.
- 1.8 In case, the total amount paid on the self assessment of the LICENSEE as quarterly LICENCE Fee for the 4 (four) quarters of the financial year, falls short by more than 10 % of the payable LICENCE Fee, it shall attract a penalty of 150 % of the entire amount of short payment. This amount of short payment alongwith the penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged as per terms of Condition 3.5. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed.”

The validity of the said demand was questioned by the petitioner before this Tribunal which was marked as Petition No. 73 of 2007.

The said petition alongwith a few others inter alia being Petition No. 8 of 2003, came to be considered by this Tribunal.

By a judgment and order dated 11.2.2010 this Tribunal interpreted the aforementioned clause in the light of various decisions to be a penal one observing:

“Once the clause in question is held to be a penal in nature, indisputedly the same would not be enforceable; particularly in a case of this nature where some sort of double penalty is sought to be levied.

The clause in question, therefore, contains a penal provision.”

This Tribunal furthermore considered the meaning of the word “payable” upon posing the question as to whether there was any shortfall in payment of license fee, held:-

“A huge amount was owing and due from the respondent. A decree was passed by this Tribunal in favour of the petitioner. They were in possession of huge amount. The said amount was held in trust. In some matters they preferred appeals before the Supreme Court of India. In some matters they did so only after a demand for refund of the said amount was made.

In some of the cases, as noticed hereinbefore, adjustments of the amount lying in their hands was sought for. The Supreme Court of India had not stayed the operation on the judgment of this Tribunal. The interim order passed by it was confined to adjustment of the amount. If the respondent was not ready and willing to adjust, the amount, lying in its hands, in view of the interim order passed by Supreme Court of India, should have been refunded in terms of the judgment of this Tribunal. It failed and/or neglected to do so.

Adjustment was made at a much later date i.e. after the penalty was levied. The respondent was

therefore did not take a fair action, which should have been taken by it, being a 'State' within the meaning of Article 12 of the Constitution of India. It cannot deny level playing field with the private operators.

It is of some significance to notice that interest on penalty has also been charged which clearly demonstrate that the first part of clause 4.8 has been given effect to by the respondent. It is well settled that no damage is payable on damages by way of interest or otherwise in as much as quantum of damages was required to be determined."

In regard to VSAT license agreement, it was observed:-

"The learned counsel in this matter rightly contended that the provisions of the contract would clearly demonstrate that no penalty can be levied for delayed payment of the spectrum charges as the manner in which such payment was to be made is as prescribed by the DoT from time to time.

There cannot be any doubt that in view of the Order dated 16.4.2003 passed by the respondent, in case of any delay in payment of spectrum charges only penal interest was to be charged and not any penalty. Clauses 1.8 and 1.9 of the amended license are, therefore, required to be read conjointly. The Order dated 16.4.2003 passed by DoT, together with clauses 1.8 and 1.9 would reveal that only in the event of delay in payment of license fee, the penal clause would be attracted and not otherwise. Spectrum charges, thus, being not license fee within the meaning of the agreement, no penalty @ 150 % of the shortfall could be levied."

The respondent has preferred an appeal before the Supreme Court of India against the said judgment and order. A prayer for stay of operation of the said Judgment was made but rejected.

The petitioner contended that a sum of Rs. 43,19,811/- had illegally been collected by the respondent which amount was paid by it under protest.

The petitioner has filed a Writ Petition before the Delhi High Court invoking its jurisdiction on the premise that despite repeated representations, respondent has not complied with the directions issued by this Tribunal in its aforementioned order. The said Writ Petition was marked as WPC no. 478 of 2011. The said Writ Petition, however, was permitted to be withdrawn by the Delhi High Court by an Order dated 25.1.2011, stating:-

“Learned counsel for the Petitioner seeks leave to withdraw this petition with liberty to seek other appropriate remedies as may be available to petitioner in accordance with law.

The petition is dismissed as withdrawn with liberty as prayed for.”

The petitioner has contended that it made representations to the respondent for refund on the said amount on 28.9.2010 and also sent a reminder on 15.10.2010.

The said representations, however, had not been considered by respondent.

Mr. Ruchir Mishra, learned Counsel appearing on behalf of the respondent, however, contended that the reply is otherwise ready but no affidavit in support thereof could be affirmed. Only after the Judgment was reserved, a reply has been filed on 6<sup>th</sup> June, 2011, contending:

“That a perusal of Clause 1.5 of this order expressly and clearly provides as under:

“Financial settlement/accounting ‘of spectrum charges based on Estimated/Actual AGRs (Subject to physical verification) shall be undertaken on quarterly/financial year basis on the same Line procedure and term & conditions as applicable in main DoT license agreement”.

It is clear that financial settlement of WPC spectrum charges would be on the same terms & conditions as is applicable in main DOT license agreement. The submission of the petitioner that Sub-clause 1.8 out of the amended license agreement will not be attracted as it deals with penalty or uses the words “license fee” is incorrect.

It is submitted that entire procedure relating to the AGR based assessments, covered under Clause-1 of the amended license Agreement, ordinarily relate to “license fee” only but have been made applicable to spectrum charges mutates mutandis vide paragraph 1.5 of the WPC Wing circular No. R-11014/9/2001-LR dated 16.4.2003. It is submitted that the petitioner having unconditionally accepted the terms and conditions and having acted on the same cannot now be permitted to resile from the contract. The contract has to be read as a whole. The petitioner having benefited from the grant of license and the said terms and conditions cannot now be permitted to pick and choose the terms & conditions as per his likes & dislikes. It is submitted that the petitioner is bound by the WPC order referred to above.

3.6 The contents of para 3.6 are wrong in the way it has been pleaded. It is submitted that as per clause 9.0 of schedule B of the original license agreement the annual license fee as prescribed above does not include license fees/ royalty payable to WPC Wing of Ministry of Communications for use of radio frequencies which shall be paid separately by the Licensee on the rates prescribed by the WPC.

The principal objections of the respondent to the contentions of the petitioner, however, are:-

- i. This petition is barred under the principles of constructive resjudicata.
- ii. It is otherwise barred under Order II Rule 2 of the Code of Civil Procedure.
- iii. As the matter is pending before the Supreme Court of India, this Tribunal, at this stage, should not entertain this petition.

The Respondent as a 'State' within the meaning of Art12 of the Constitution of India is presumed to be a benevolent litigant. Its action is required to be fair and reasonable. It is supposed to give effect to a lawful order passed by a Court of Law. It is not supposed to raise any hyper technical questions which may be available to it. In *Urban Improvement Trust Vs. Mohan Lal* 2010(1) SCC512, the Apex Court held:

"It is a matter of concern that such frivolous and unjust litigations by Governments and statutory authorities are on the increase. Statutory authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and high-handed manner. They can not behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment. They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts by their officers are brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/restoration to the extent possible with appropriate compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected.

This Court has repeatedly expressed the view that Governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice.

But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, Government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court.

Unwarranted litigation by Governments and statutory authorities basically stems from the two general baseless assumptions by their officers. They are:

(i) All claims against the Government/statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the court and secure a decision."

A part of the said observations squarely applies to the fact of the present case.

Penalty was imposed on the ground of non payment of the royalty charges, although the same was not a license fee. In this case the principle of revenue share has no application.

Even otherwise the principle of Order II Rule 2 of the Code of Civil Procedure are not applicable to the fact of the present case.

Cause of action for filing the present petition is different and distinct from the cause of action of the earlier petition, wherein a mere declaratory had been passed.

Order II Rule 2 CPC does not provide for including in one action, different causes of action or prohibit a second suit on a different causes of action.

In Gurubax Singh Vs. Bhooralal reported in AIR1964SSC1810, it was held:

“In order that a plea of a Bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out; (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in CS 28 of 1950 were not filed by the appellant in the present suit as

evidence in support of his plea under Order 2 Rule 2 of the Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable.

Learned Counsel for the appellant, however, drew our attention to a passage in judgment of the learned Judge in the High Court which read:

“The plaint, written statement or the judgment of the earlier court has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsel for the parties have likewise done so. That file is also before this Court.”

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge. “The two courts have, however, freely cited from the record of the earlier suit” is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under Order 2 Rule 2 of the Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under Order 41 Rule 27 of the Civil Procedure Code by consent of parties. There is nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under Order 41 Rule 27 of the Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit.”

In *Inacio Martins Vs. Nareyan Hari Nayak* reported in 1993 (3) SCC

123, the Apex Court opined:

“It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court. But the rule does not preclude a second suit based on a distinct cause of action.”

The Supreme Court in *Bengal Waterproof Ltd. Vs. Bombay Waterproof Manufacturing Co.* (1997 (1) SCC page 99 stated the law:

“A mere look at the said provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) of Rule 2 of Order 2 CPC is concerned, bar of which appealed to both the courts below, before the second suit of the plaintiff can be held to be barred by the same it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press in service in that suit cannot be subsequently prayed for except with the leave of the court.”

(See also *Viacom 18 Media India Pvt. Ltd. Vs. MSM Discovery Pvt. Ltd.* Petition No. 220 (C) of 2010

In the earlier case, the cause of action was invocation of bank guarantee upon levy of penalty, for penalty, whereas the present petition involves recovery of the amount.

A license for the purpose of allocation and use of radio frequency is granted by the WPC Wing of the respondent. The provisions of the license postulate that grant of license by itself would not entitle the licensee to obtain allocation of spectrum. Allocation of spectrum will not only depend upon the availability but also on payment of the requisite charges therefor.

Apart from the fact that this Tribunal has held that the provisions in question being penal in nature, the same could not have been invoked, it has also been held in the case of the petitioner that the said provisions were not applicable. The order passed by the respondent was, therefore, without jurisdiction and thus a nullity. If the demand and/or consequent realization of any amount was wholly illegal and without jurisdiction, a mere declaration was sufficient. The petitioner as against the respondent was not bound to pray for refund of the entire amount. Thus respondent as a 'State' within the meaning of Art12 of the Constitution of India was supposed to abide by the sua declaration suo motu.

As indicated heretofore, a 'State' stands completely on a different footing as a litigant. If that be so, in the opinion of this Tribunal in the facts and circumstances of the case, the State ordinarily should not have taken recourse to the technicalities of the principles of 'Constructive Resjudicata' and/or Order II Rule 2 of the Code of Civil Procedure, when its action was a complete nullity. The said provisions are otherwise not applicable.

Filing of an appeal having regard to the provisions contained in Order XLI Rule 1 of the Code of Civil Procedure, 1908, would not amount to stay. We have noticed heretofore that the respondent prayed for grant of stay but the same has been refused by the Supreme Court of India.

In that view of the matter, it was expected of the respondent to pay the excess amount deposited by the petitioner on its own motion. It did not do so. The petitioner filed a representation. It also sent a reminder. It was obligatory on the part of the respondent herein to respond to the said representations/reminder of the petitioner within a reasonable time. It could not have neglected to respond to a fair demand made by the petitioner for refund of an amount which was illegally received from it, ad nausum.

Article 14 of the Constitution of India postulates that all acts on the part of the State would be reasonable. It is expected, keeping in view the Constitutional provisions, as also the provisions akin/analogous to Section 80 of Code of Civil Procedure that a 'State' would respond to a just demand of a litigant within a period of 60 days. If the same has not been done and the prayer for stay was made and rejected, it will bear repetition to state that even in that view of the matter, the State having failed to perform its duties, another cause of action has arisen, as by reason of its own acts of omission and commission, it intended to unjustly enrich itself.

In Mahabir Kishore & Ors. Vs. State of MP, (1989) 4 SSC 1, the Supreme Court of India noticed as under:-

“In that case Moses received from Jacob four promissory notes of 30sh. Each. He endorsed these to Macferlan who, by a written agreement, contracted that he would not hold Moses liable on the endorsement. Subsequently, however, Macferlan sued Moses on the notes in a Court of Conscience. The court refused to recognise the agreement, and Moses was forced to pay. Moses then brought an action against Macferlan in the King’s Bench for money “had and received” to his use. Lord Mansfield allowed him to recover observing as above.

Courts in England have since been trying to formulate a juridical basis of this obligation. Idealistic formulations as ‘*aequum et bonum*’ and ‘natural justice’ were considered to be inadequate and the more legalistic basis of unjust enrichment is formulated. The doctrine of ‘unjust enrichment’ is that in certain situation it would be ‘unjust’ to allow the defendant to retain a benefit at the plaintiff’s expense. The relatively modern principle of restitution is of the nature of quasi-contract. But the English law has not yet recognised any generalised right to restitution in every case of unjust enrichment. As Lord Diplock has said, “there is no general doctrine of ‘unjust enrichment’ recognised in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system i.e. based upon the civil law”. In *Sinclair Vs. Brougham* Lord Haldane said that law could not ‘*de jure*’ impute promises to repay whether for money “had and received” otherwise, which may, if made *de facto*, it would inexorably avoid.

The principle of unjust enrichment requires: first, that the defendant has been ‘enriched’ by the receipt of a “benefit”; secondly, that this enrichment is “at the expense of the plaintiff”; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for

instance where inevitable expense has been saved.”

The Supreme Court of India held that any amount including tax paid to a State would be refundable under section 72 of the Indian Contract Act. It was opined that for the aforementioned purpose, even a Writ Petition would lie. It was furthermore observed that the period of limitation shall begin to run from the date when the mistake came to be known, stating:-

“It is thus a settled law that in a suit for refund of money paid by mistake of law, Section 72 of the Contract Act is applicable and the period of limitation is three years as prescribed by Article 113 of the Schedule to the Indian Limitation Act, 1963 and the provisions of Section 17 (1) (c) of that Act will be applicable so that the period will begin to run from the date of knowledge of the particular law, whereunder the money was paid, being declared void; and this could be the date of the judgment of a competent court declaring that law void.”

The petitioner in that view of the matter cannot be deprived of its right to property as envisaged under Act 300A of the Constitution of India. For that purpose, even a writ petition could be maintained.

{See U.P. Pollution Control Board Vs. Karasic Industries Ltd. 2001(1) SCR559}

The contention of Mr. Mishra, that the respondent may become remediless if the judgment of this Tribunal is reversed by the Supreme Court is stated to be rejected. We do not think that the respondent can have any real apprehension in this behalf as the petitioner is licensee. There is nothing on record to show that it is fly by night operator. As a licensee a huge amount

has been paid to Union of India. The petitioner has also furnished in terms of the licenses, bank guarantees.

In the event of the judgment of this Tribunal is reversed by the Supreme court of India, the principles of restitution as contained in Section 144 read with section 151 of CPC would be available to respondent. It can, thus, invoke the said provisions.

It is not a case where by grant of a decree in favour of the petitioner, the things would become irreversible and as a result thereof the respondent would not be able to recover the amount in question.

For the aforementioned reasons, this petition is allowed. A decree for a sum of Rs.43,19,811/- is passed. The petitioner shall also be entitled to interest @ 12 % per annum from 11.2.2010 till realization. This decree shall however, be subject to any judgment/order which may be passed by the Supreme Court of India in the appeal pending before it.

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

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