

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

DATED 25th May, 2011

PETITION No. 231 OF 2011

M/s Idea Cellular Ltd.

...Petitioner

Versus

Union of India

...Respondent

BEFORE:

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

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

HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner : Mr.C.S.Vaidyanathan,Senior Advocate
Mr. Manjul Bajpai, Advocate
Mr.Gopal Jain,Advocate

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

ORDER

P.K.Rastogi, Member

This petition has been filed by the petitioner challenging the Show Cause Notice dated 24.02.2011 issued by the respondent for termination of UASL of the petitioner for Punjab Service Area.

2. According to the petitioner, the said impugned letter is bad in law since no licence condition has been violated. The petitioner, therefore, has requested to set aside and quash the impugned communication dated 24.02.2011 issued by the Respondent. It has further requested to pass the following interim orders :

- i. Pass ad-interim / interim / ex-parte orders staying the operation of the impugned communication dated 24.02.2011;
- ii. Restrain the respondent from acting upon and giving effect to the impugned communication dated 24.02.2010 issued by the Respondent; till the final disposal of the present petition.
- iii. Pass any other / further order(s) as this Tribunal may deem fit in the interest of justice, equity and good conscience.

3. The Department of Telecommunications, Government of India, the respondent herein has issued a Show Cause Notice for termination of UASL for Punjab Service Area to the petitioner, herein, on 24.02.2011. We may peruse the said letter dated 24.02.2011 of the respondent, interalia, stating :

"Whereas on the examination of the matter with consideration, it is apparent that M/s Idea Cellular Limited has violated the terms and conditions of the above said UAS licence agreement for Punjab Service Area and the guidelines/instructions issued by DOT in the matter.

That M/s Idea Cellular Limited has violated condition 1.4 and condition 6.2 of the Unified Access Service Licence and clause 1 and 17 of the guidelines dated 22.04.2008 for Intra Service Area Merger of CMTS/UAS Licences.

Therefore, as per condition 10.2(i)(a) of the said UASL, the licensor may, without prejudice to any other remedy available for the breach of any conditions of licence by a written notice of 60 calendar days from the date of issue of such notice to the licensee

at its registered office, terminate this licence if the licensee fails to perform any obligation(s) under the license including timely payments of fee and other charges due to the licensor.

Therefore, M/s Idea Cellular Limited is called upon to show cause within 60 days from the date of issue of this notice as to why the UASL issued to the company for Punjab Service Area should not be terminated for violation of condition no. 1.4 and condition no. 6.2 of the UASL and clause

clause 1 and 17 of the guidelines dated 22.04.2008 for Intra Service Area Merger of CMTS/UAS Licences.

The present show cause notice is without prejudice to the other rights of the licensor to take appropriate action for violation of any other conditions(s) of the UASL agreement, including imposition of liquidated damages as per condition 35 of the UASL agreement on M/s Idea Cellular Limited."

4. Mr. C. S. Vaidyanathan, the learned senior counsel appearing for the petitioner has contended that this Tribunal in Petition No. 143 of 2011 has considered the legality and validity of the order dated 24.02.2011 issued by the respondent for imposing of Rs. 50 crores for alleged violation of the same terms and conditions of the licence for imposition of penalty by the respondent. This Tribunal vide its interim order dated 24.03.2011 has already held that the impugned order need not be given any further effect till further orders. Now the respondent has again initiated action against the petitioner for the violation of the same condition for which the issue is pending for adjudication in this Tribunal. The learned counsel for the petitioner further

stated that balance of convenience is in favour of the petitioner. Earlier this Tribunal had observed :

"26. We, therefore, are of the opinion that the petitioner has made out a triable case. The balance of convenience, keeping in view the equities between the parties, which can be adjusted in future also, lies in favour of the petitioner."

5. Mr. C. S. Vaidyanathan, the learned senior counsel for the petitioner further brought to our notice a letter dated 21.04.2011 issued by the DOT wherein the petitioner has been imposed liquidated damages for non-fulfilling of the first year roll out obligation of UAS Licence Agreement for Punjab Service Area. He contended that on one hand DOT was asking the petitioner to fulfil its roll out obligation and on the other side it has issued notice for the termination of UASL. These two actions of the respondent were contradictory to each other. The relevant portion of the letter issued by DOT to the petitioner on 21.04.2011 is reproduced below :

"To

M/s Idea Cellular Limited

Suman Tower, Plot No. 18

Sector No. 11, Gandhinagar – 382011

Kind attention : Shri Sanjeev Aga, MD, M/s Idea Cellular Limited

Subject : Imposition of Liquidated Damages(LD) for non fulfillment of first year roll out obligations of UAS Licence Agreement for Punjab Service Area”

“Whereas as per the condition 34 of the licence agreement and subsequent amendment vide Dot letter no. 842/320/2005-VAS-II Vol (III)/28 dated 10.02.2009, regarding roll out obligations, the licensee shall ensure that, in first phase of roll out obligation at least 10% of DHQs/towns where start up spectrum has been allocated are covered within one year of such spectrum allocation and whereas it is further provided that the date of allocation of spectrum shall be considered as reference for computing the final date of roll out obligation. While computing the period of one year, the average delay in SACFA clearance shall be excluded. It shall also been prescribed that the coverage of a DHQ / town shall mean that at least 90% of the area bounded by the Municipal limits shall get the required street level coverage.”

Now therefore, M/s Idea Cellular Limited is directed to pay the liquidated damages amount to Rs. 4.55 crores as per condition 35.2 of the UASL agreement immediately and in any case within 15 days of the date of this notice failing which further action may be initiated under the conditions of UASL agreement. The amount may be deposited by means of demand draft/banker’s cheque drawn on any scheduled bank in favour of PAO, Department of Telecom Headquarters, New Delhi-110001, in the pay and accounts office of the Department of Telecommunications at New Delhi.

The Licensor, however, reserves the right to claim/recover any additional liquidated damages on this account, if found payable at a later date.

This notice is issued without prejudice to any other remedy available to the licensor and also to any other actions for the breach of any of the conditions of said UASL agreement signed with the company.

Kindly acknowledge the receipt of this notice.”

6. On the other hand, Mr. K.P.S. Kohli, the learned counsel appearing on behalf of the respondent pointed out that the Show Cause Notice issued to the petitioner herein on 24.02.2011 was for violation of certain terms and conditions of the licence agreement by the petitioner and the action is initiated under clause 10.2(i) of the said UASL agreement. While another order of 24.02.2011 where the penalty of a sum of Rs. 50 crore was imposed for violation of the terms and condition of UASL agreement for Punjab Service Area was issued to M/s Spice Communication under clause 10.2(ii). The relevant portion is reproduced below :

"That M/s Spice Communication Ltd. has thus violated condition 1.4 condition 6.1 and 6.2 of UAS licence and clause 1 & 17 of the UASL guidelines dated 22.04.2008 for Intra Service Area Merger of CMTS/UAS Licences.

Although the licensor has the right to take action against M/s Spice Communication Ltd under condition 10.2(i) for termination of license agreement for violation of condition 1.4 condition 6.1 and 6.2 of UAS licence and clause 1 & 17 of the guidelines UASL dated 22.04.2008 for Intra Service Area Merger of CMTS/UAS Licences, but without prejudice to the said rights, M/s Spice Communication Ltd. Is called upon pay a sum of Rs. 50 crores (Rupees of Fifty crore) in terms of condition 10.2(ii) of the UASL within 15 days of receipt of this notice for above said violations of licence agreement for Punjab Service Area. In the event, the said amount is not paid within 15 days of the receipt of this notice, the licensor shall be within its right to take action under condition 10.2(i) for termination of license agreement for violation of condition 1.4 condition 6.1 and 6.2 of UAS licence and clause 1 & 17 of the guidelines UASL dated 22.04.2008 for Intra Service Area Merger of CMTS/UAS Licences besides any other remedy etc. which right we hereby specifically reserve against M/s Spice Communication Ltd.

Whereas, the present demand is without prejudice to the rights of the licensor to take appropriate action for any other violation of the UASL agreement by M/s Spice Communication Ltd.

The amount of demand of Rs. 50 crore (Rupees Fifty Crore) may be deposited by means of demand draft/banker's cheque drawn on any scheduled bank in favour of PAO, Department of Telecom Headquarters, New Delhi-110001, in the pay and accounts office of the Department of Telecommunications at New Delhi."

7. Regarding the imposition of liquidated damages through its letter dated 21.04.2011, the learned counsel for the respondent contends that the liquidated damages has been imposed for non-fulfillment of first year roll out obligation of UASL agreement. He further contends that the licensor has the authority to terminate the license of the licensee in terms of the clause 10 of the licence. The relevant terms and conditions of the UASL agreement are reproduced below:

"10. Suspension, revocation or Termination of Licence.

10.1 The LICENSOR reserves the right to suspend the operation of this LICENCE in whole or in part, at any time, 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 TELEGRAPH. Licence Fee payable to the LICENSOR will not be required to be paid for the period for which the operation of this LICENCE remains suspended in whole. If situation so warrant, it shall not be necessary for Licensor to issue a notice for seeking comments of the LICENSEE for this purpose and the decision of the Licensor shall be final and binding.

Provided that the LICENSOR shall not be responsible for any damage or loss caused or arisen out of aforesaid action. Provided further that the suspension of the LICENCE will not be a cause or ground for extension of the period of the LICENCE and suspension period will be taken as period spent.

10.2(i) The LICENSOR may, without prejudice to any other remedy available for the breach of any conditions of LICENCE, by a written notice of 60 Calendar days from the date of issue of such notice to the LICENCEE at its registered office, terminate this LICENCE under any of the following circumstances :

If the LICENSEE:

- a) fails to perform any obligation(s) under the LICENCE including timely payments of fee and other charges due to the LICENSOR;*
- b) fails to rectify, within the time prescribed, any defect/deficiency/correction in service/equipment as may be pointed out by the LICENSOR.*
- c) goes into liquidation or ordered to be wound up.*
- d) is recommended by TRAI for termination of LICENCE for non-compliance of the terms and conditions of the LICENCE.*
- e) fails to comply with FDI norms.*

10.2(ii) The Licensor may also impose a financial penalty not exceeding Rs. 50 crores for violation of terms and conditions of licence agreement This penalty is exclusive of Liquidated Damages as prescribed under clause 35 of this Licence Agreement.”

8. The learned counsel further contended that the respondent has not taken final decision yet and the action will be taken for termination of the license or otherwise only after examining the reply of the petitioner to the Show Cause Notice. He submitted that pending final decision by the

government, no interim order should be passed by the Court in favour of the petitioner. He cited a Judgment Union of India v. Kunisetty Satyanarayana(2006) 12 SCC 28, wherein the Supreme Court of India has held :

"13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh, Special Director v. Mohd. Ghulam Ghouse, Ulagappa v. Divisional Commr., Mysore, State of U.P. v. Brahm Datt Sharma, etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some

other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

9. Mr. C. S. Vaidyanathan, the learned senior counsel appearing on behalf of the petitioner contends that the licensor i.e. DOT has already made up its mind that the petitioner has violated licence conditions and the respondent cannot be an adjudicator for its own case.

10. The jurisdiction of this Tribunal emanates from Section 14 and 14 A of the Telecom Regulatory Authority of India Act, 1997.

It is true that in terms of the said provisions, this Tribunal is entitled to adjudicate any dispute between a licensor and licensee on its original side. But the same would not ordinarily mean that a petition should be entertained even if for all intent and purport it is a premature one.

11. The Show Cause Notice was issued on 24.02.2011. The petitioner did not question the said Show Cause Notice contending that the respondent has already made up its mind; it has shown its cause on or about 30.03.2011.

Having filed its reply to show cause notice, it is idle for it to contend that for all intent and purport, the respondent has already taken a decision and, thus, the show cause notice should be treated to be an order and / or the same is covered by the matters which are pending before this Tribunal.

Had that been the contention of the petitioner, it ought not to have filed any reply to the show cause notice at all.

12. Indisputably, in terms of clause 10(i) of the license, a show Cause in writing of 60 calendar days is to be issued, before an order can be passed.

13. The respondent is bound to comply with the principles of natural justice. The respondent for violation of conditions of licence may take recourse to one or the other clauses of the conditions of the licence against the licensee.

14. Moreover, any further contentions which are available to the petitioner must have been raised in the cause shown by the petitioner which are required to be considered by the DOT.

15. We are informed at the Bar that the decision to cancel a licence is ordinarily taken at the highest level. A high authority having been conferred power to consider the reply to show cause notice filed by the licensee, ordinarily, is expected to apply mind on all the relevant contentions of the petitioner.

16. The learned counsel of the petitioner may be correct in contending that jurisdiction exercised by this Tribunal being original in nature, need not be equated with judicial review. But there cannot be any doubt or dispute that the principles thereof may have to borne in mind before an interim order is passed.

17. We are of the view that the petitioner has failed to make out a prima facie case. It is, therefore, not necessary for us to consider the other factors necessary for passing of an order of injunction.

18. We have gone through the records and contentions of the parties. The Show Cause Notice issued by the respondent for termination of the UASL issued to the petitioner for Punjab Service Area on 24.02.2011 is for violation of condition 1.4 and 6.2 UAS licence and clause 1& 17 of the guidelines dated 22.04.2008 for Intra Service Area Merger of CMTS/UASL and the petitioner was given 60 days' time to reply to the said notice from the date of issue.

19. The petitioner has the opportunity to satisfy the Government that it has not violated the terms and conditions of the agreement or otherwise. When the respondent has not examined the case fully, and have not come out with any conclusion, it will not be proper on the part of this Tribunal to pre-empt enquiry to be conducted by the respondent.

20. Therefore, we are of the opinion that this petition is premature and cannot be entertained at this stage. However, if the petitioner is aggrieved by the final orders of the respondent, it will be at liberty to approach this Tribunal.

21. This petition is disposed of with the aforementioned observations. In the facts and circumstances of the case, there shall be no order as to costs.

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(S.B. Sinha)

Chairperson

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(G. D. Gaiha)

Member

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(P.K. Rastogi)

Member

/NC/