

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

DATED 1st SEPTEMBER, 2011

Petition No.342 of 2011

Idea Cellular Ltd.(Delhi) ...Petitioner

Vs.

Union of India ...Respondent

Petition No.343 of 2011

Idea Cellular Ltd.(Maharashtra) ...Petitioner

Vs.

Union of India ...Respondent

Petition No.344 of 2011

Idea Cellular Ltd.(Karnataka) ...Petitioner

Vs.

Union of India ...Respondent

Petition No.345 of 2011

Idea Cellular Ltd.(Haryana) ...Petitioner

Vs.

Union of India ...Respondent

Petition No.346 of 2011

Idea Cellular Ltd.(Andhra Pradesh) ...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. Gopal Jain, Advocate
Mr. Kaushik Mishra, Advocate
Ms. Monika Singhal, Advocate
Ms. Harshita Verma, Advocate
Ms. Nupur Pallavi, Advocate
for Mr. Manjul Bajpai, Advocate

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

ORDER

S.B.SINHA

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

These petitions relate to the Circles of Delhi, Karnataka, Maharashtra, Haryana and Andhra Pradesh in respect whereof the petitioner has been granted license by the respondent herein in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885.

2. So far as Petition No. 344 of 2011 relating to Karnataka Circle is concerned, undoubtedly both the petitioner and one Spice Communication Ltd held licenses. The said companies by orders passed by Gujarat and Delhi High court in terms of a scheme of merger obtained sanction thereof.

3. Various proceedings have been initiated by the respondent and various orders have been passed *inter alia* imposing penalty of Rs.50 Crores upon the petitioner herein which are pending consideration of this Tribunal.

4. Respondent *inter alia* had questioned the order sanctioning the scheme of merger of the said Spice Communications Ltd. with the petitioner before the Delhi High Court and by an order dated 4th July, 2011, a learned company judge directed as under:-

“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with the Licence and Merger Guidelines, 2008 as well as in view of the fact that simultaneous demerger scheme has been withdrawn, it is directed that notwithstanding anything stated in the sanctioned scheme (in particular paras 5.2 as well as 10.2) and/or in the order dated 5th February, 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. In fact, till permission of DOT is granted, the overlapping licences of Spice shall forthwith stand transferred/vested with the Licensor, i.e, DOT. 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 licences without any prior permission of DOT from 5th February, 2010 till date in contravention of the Licence and Merger Guidelines, it is directed that it shall be open to DOT to pass any order for such breach. Needless to say, any order passed by 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.”

5. The issue *inter alia* before the High Court was as to whether in the facts and circumstances of the case, the provisions of Clause 1.4 (ii) of the license was violated. A further issue had arisen, as to whether the Clause 17 of the merger guidelines was violative of Section 11(1) (a) of the TRAI Act.

6. We need not consider other and further contentions raised in the said matter as it is stated that the petitioner has preferred an intra-court appeal against the said order dated 4th July 2011 which has been marked Company Appeal No. 42 of 2011 and by an interim order

dated 21st July, 2011, a Division Bench of the said court directed as under:-

“List on 28th July, 2011 for arguments.

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.

A copy of this order be given dasti to both the parties, as prayed for.”

It is stated at the bar that a matter has now been posted on 29th August, 2011.

7. Before however, proceeding further in the matter we may notice that the licenses which are operational and those which are not stand on different footings, so far as the interim order by the Division Bench of Delhi High Court is concerned, as is evident therefrom.

8. In these matters the petitioner has *inter alia* prayed for setting aside the show cause notice dated 1.6.2011, the operative part thereof reads as under:-

“Therefore, M/s Spice Communications Limited is called upon to show cause within 60 days from the date of issue of this notice as to why the UAS Licence for violation of Condition No.1.4 (ii), Condition 1.8, Condition No.6.1, Condition 6.2 and Condition 6.3 of the Unified Access Service Licence and Clause 1 and 17 of the Guidelines dated 22.4.2008 for Intra Service Area Merger of CMTS/UAS Licences. The show cause notice is issued as the above stated violations of UAS License Agreement for Delhi Service Area and Clause 1 and 17 of the Guidelines dated 22.4.2008 for Intra Service Area Merger of CMTS/UAS Licences are admitted, wilful, deliberate and such actions of M/s Spice Communications Limited are without permission or prior approval and despite rejection by the LICENSOR vide letters dated 07.01.2010 and 18.01.2010 which were suppressed from the Hon’ble Delhi High Court in Company Petition No.403 of 2009 for amalgamation of M/s Spice Communications Limited with M/s Idea Cellular Limited.”

9. The license in respect of the Karnataka Circle was non-operational which is the subject matter of Petition No. 342 of 2011, whereas the licenses involved in other Petitions are operational.

10. It is not in dispute that the petitioner had not filed any show cause on the premise as submitted by Mr. Gopal Jain, learned counsel appearing on behalf of the petitioner that it had lost faith and confidence in the respondent.

11. It is also not in dispute that another Petition, marked as Petition No.231 of 2011 involving the Punjab circle wherein also the petitioner did not have any operational license; *inter-alia* on the premise that the petitioner had filed a show cause therein, the petition was not entertained holding the same to be a premature one.

12. Submission of Mr. Jain is that keeping in view the fact that an order of Status Quo has been passed by the Division Bench of the Delhi High Court and this Tribunal also in term of an order dated 24.3.2011 passed in Petition No. 143 of 2011, stayed the order imposing penalty of Rs.50 Crores by an interim order of injunction, an order on similar terms should be passed in these petitions also.

13. Ms. Manisha Dhir, learned counsel appearing on behalf of the respondent, on the other hand, would urge that these matters have nothing to do with the matter pending before the Division Bench as well as Petition No. 143 of 2011.

14. In these cases the merger of two companies, namely, Spice Communications Ltd. with the petitioner is not in issue.

The issue involved herein is as to whether the petitioner has violated the conditions of license whereby and whereunder transfer of shares exceeding 10% by a licensee in favour of another licensee is prohibited, as the petitioner is said to have been holding more than 10% of share in Spice Communications Ltd. in respect of Punjab Circle as also the Karnataka Circle.

15. Its contention however, had been that it had not violated any condition of license and/or any other law for the time being in force as it had kept its license non-operational and in fact at one point of time it intended to surrender the said licenses.

It is in the aforementioned situation, the petitioner questioned the show cause notice issued by the respondent herein, in relation to the Punjab Circle which as noticed heretobefore was dismissed.

16. It is true that in that case this Tribunal has taken into consideration the fact that the petitioner had filed its show cause but there was absolutely no reason as to why no show cause could be filed in these cases also.

17. If the petitioner had lost faith and confidence in the respondent, *inter-alia* on the premise that it had already arrived at a finding and no fruitful purpose would be served by filing a show cause, we find no reason whatsoever as to why these petitions could not have been filed earlier.

18. We have serious doubt that despite wide jurisdiction of this Tribunal, the petitioner is entitled to maintain a petition questioning a mere show cause notice.

In appropriate cases it may be held to permissible e.g. in a case, it is prima-facie found that the same would be necessary in the interest of justice having regard to the fact that respondent has already pre-determined the issue upon application of its mind and there is hardly any possibility of a different view being taken.

Such is not the position here.

19. Delay in cases of this nature moreover, in our opinion, is vital in as much as in terms of the conditions of license, the respondent is obligated to serve upon the licensee at least 60 day's notice asking it to show-cause as to why the license shall not be terminated before a decision is taken one way or the other.

20. We are of the opinion that ordinarily when a decision of such a vital matter like cancellation of license is to be taken by a high authority, all aspects of the matter would receive due consideration.

21. Mr. Jain, has strongly relied upon a decision in Siemens Ltd. Vs. State of Maharashtra and others reported in (2006) 12 Supreme Court Cases 33 wherein the Apex Court held as under:-

“Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of UP Vs. Brahm Datt Sharma, Special Director Vs. Mohd. Ghulam Ghouse and Union of India Vs. Kunisetty Satyanarayana but the question herein has to be considered from a different angle vis., when a notice is issued with premeditation, writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.”

22. Siemens (Supra) has been distinguished on facts by the Apex Court in Union of India and Another Vs. Kunisetty Satyanarayana reported in (2006) 12 Supreme Court Cases 28 and Divisional Forest Officer and Others Vs. M. Ramalinga Reddy reported in (2007) 9 SCC 286.

Each case, therefore, would depend upon its own fact.

23. Prima-facie however by reason of the order passed by the Learned Single Judge of the Delhi High Court, the six licensees have vested in the Central Government.

The Division Bench, as indicated heretofore in its order dated 21st July, 2011 clearly made a distinction between two types of licenses, namely, operational and non-operational. Whereas in the case of later, the respondent has been injuncted from taking a coercive steps from enforcing its demand which may be raised by it, in the case of the former, it directed maintenance of status-quo, i.e., the licenses under which the petitioner had been operating would continue to be operative.

24. It is, therefore, difficult to agree with Mr. Jain that the subject matter of these petitions is covered by the aforementioned Interim Order passed by the Division Bench of the Delhi High Court. Even it that be so, the remedy of the petitioner lies in obtaining a clear and explicit order from the Division Bench of High Court and not before us.

25. We are, however of the opinion that despite the fact that in Petition No.143 of 2011, the petitioner had filed its show-cause, keeping in view the fact that the petitioner has also an opportunity to do so in these cases and having not done so for a period of more than 85 days, it's not a fit case, where any discretion should be exercised in its favour.

26. Keeping in view the fact that the respondent is yet to pass a final order in the matter, we are of the opinion that this order may not be construed to mean that in the event such an order is passed, the petitioner would be remediless.

27. It would be entitled to raise all such contentions which are available to it for filing appropriate application before this Tribunal in such an event. We have not considered the other aspects of the matter, including the findings of the Learned Single Judge of the Delhi High Court to which reliance has been placed by Ms. Dhir as we opine that it would be improper on our part to comment, one way or the other on a judgment of a competent court of law with which we are not concerned.

28. For the reasons aforementioned, these petitions are dismissed subject to the observations made hereinbefore.



(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

HKC/ 26.8.2011/29.8.11