TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : August 3, 2012

Petition No.35 of 2011

Idea Cellular Ltd. …Petitioner

Vs.

Union of India & Another …Respondent

BEFORE:

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

For Petitioner : Mr.C.S. Vaidyanathan, Senior Avocate and Mr. Manjul Bajpai, Advocate

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

J U D G M E N T

1. This petition filed by the Petitioner, a licensee under the Indian Telegraph Act, 1885, is directed against the letters dated 7.1.2010 and 18.1.2010, whereby and whereunder the Respondent purported to have rejected requests made by it to the effect that permission be granted for merger of its licenses with that of Spice Communications Ltd. (hereinafter called and referred to for the sake of brevity as 'Spice') for the service areas of Haryana, Maharashtra, Delhi, Punjab, Kartnataka and Andhra Pradesh were rejected.

2. A prayer has also been made by the Petitioner to forwith transfer the licenses held by `Spice' in the said service areas to it.

The impugned letter dated 7.1.2010 reads as under:

> "This has reference to M/s Idea Cellular Limlited (ICL) and M/s Spice Communications Limited intimated to DoT vide their letter dated 25 June 2008, July 15, 2008 and ICL leter dated July 17, 2008, August 1, 2008 regarding proposed merger of Spice Communications Limited with Idea Cellular Limited. Also letter dated December 1, 2008, Maya 12, 2009 & June 23, 2009 from ICL regarding de-merger of 2 over lapping licences.
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> 2. M /s Spice Communications Limited having UAS Licence in Punjab and Karnataka, M/s Idea Cellular Limited also hold UAS licences with effective date of 25 January 2008, which is less than 3 years and M/s ICL holds CMTS Licences in Andhra Pradesh Maharashtra, Haryana and Delhi where M/s Spice Communictions Ltd. (SCL) also holds UAS licence with effective date 29.02.2008 and 03.03.2008, which is les than 3 years. Therefore as per licence condition 17 of intra circle merger guideline dated 22.04.2008 merger of companies cannot be permitted."

The aforesaid letter dated 18.1.2010 reads as under:

> "This has reference to M/s Idea Cellular Limited (ICL)'s letter dated 06.01.2009 on the above subject wherein reference of their letter to DoT June 25, 2008; July 15, 2008; July 17, 2008; August 1, 2008; December 1, 2008; May 12, 2009; June 23, 2009; September 24, 2009; and November 27, 2009 has been given.
>
> Undersigned has been directed to intimate that the permission of the amalgamation of the companies M/s Spice Communications Ltd. with Idea Cellular Ltd. can not be acceded to which has already been communicated to the company M/s Idea Cellular

> Limited and M/s Spice Communications Ltd. vide this office letter No.842-1001/2008-AS-IV(Pt.) 44 dated 07.01.2010 & No.842-1001/2008-AS-IV(Pt)45 Dated 07.01.2010."

3. It is not in controversy that applications before the Gujarat and Delhi High Court were filed for grant of sanction of a merger scheme between the Spice and the Petitoiner herein.

By reason of a judgment and order dated 5.2.2010 sanction to the said scheme was granted by the Hon'ble Delhi High Court.

This petition was filed on or about 17.1.2011.

4. The Respondent however, filed an application before the learned Company Judge of the Delhi High Court, inter alia, contending that the Petitioner suppressed the said letters issued by it whereby and whereunder prayer for grant of prior approval of merger of the two companies was rejected, which amounts to commission of a fraud on the Court and thus, the said order dated 5.2.2010 was liable to be recalled.

5. By reason of a judgment and order dated 4.7.2011 the learned Company Judge, while upholding the said contentin of the Respondent that suppression of the said letters amounted to non-disclousre and suppression of material facts from the Court and thus, a fraud having been practised on the Court, allowed the said application in part directng inter alia that the said order dated 5.2.2010 should be modified "to bring sanctioned scheme, in the present case, and in

confirmity with the Licnese and Merger Guidelines, 2008," by directing:

> "(i) The Six overlapping licenses of the Spice would now stand transferred or vested with the appellant till prior permission of DoT is obtained. Instead, till that time, these licenses shall stand transferred/vested with the respondent;
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> (ii) The spectrum allocated for such overlapping licenses shall also forthwith revert back to DoT;
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> (iii) Since the appellant had used the overlapping licenses (which belonged to the Spice) without any permission of DoT from 5.2.2010 till date, in contravention of the License and Merger Guidelines, DoT (respondent) is permitted to pass any such order for breach."

6. The parties hereto preferred intra court appeals thereagainst before a Division Bench of the Delhi High Court.

By reason of a judgment and order dated 13.7.2012, a Division Bench of the Hon'ble Delhi High Court modified the said order dated 4.7.2011 passed by the learned Company Judge, in so far as the same related to overlapping licenses of Spice to be transferred with the licensor, opining that same should be substituted by the direction "that in so far as dispute about transfer of licenses of Spice to Idea is concerned, the same shall be decided and determined by the TDSAT and the parties. It will also be open to the TDSAT to determine the arrangement in the interregnum."

7. Immediately after pronouncement of the said judgment, evidently having been mentioned by one or the other party to the said Appeals, the Hon'ble Delhi High Court, however, passed the following order:

> "Since we have upheld the order of the learned Company Judge except one modification, as per the order of the learned Company Judge, the DoT has to take decision regarding transfer of licenses. The said decision shall be taken by the DoT within a period of three months."

8. In view of the aforementioned directions of the Hon'ble Delhi High Court, Mr. C.S. Vaidyanathan, learned senior counsel appearing on behalf of the Petitioner would contend that the Delhi High Court must be held to have quashed the aforementioned orders dated 7.1.2010 and 18.1.2010 as has been prayed for in prayer `A' of this petition and furthermore must be held to have issued a direction upon the Respondent herein which was the subject matter of prayer `B' thereof.

9. Mr. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, urged that the first prayer of the Petitioner already became infructuous in view of the order passed by the learned Single Judge of Delhi High Court dated 4.7.2011.

10. Learned counsel furthermore contended that by reason of the order dated 7.1.2010 prior approval of merger of the companies having specifically been sought for and rejected, in the event the same

is directed to be quashed, the Respondent would be gravely prejudiced while passing an order on the Petitioner's representations relating to merger of licenses, as has been directed by the High Court of Delhi in its order dated 13.7.2012.

11. We may notice that the Petitioner has also filed application before the Respondent for grant of approval with regard to merger/transfer of the licenses, pursuant to the order passed by the learned Company Judge as would appear from the proceeding sheet dated 29.11.2011.

12. It is not the case of the parties hereto that the DoT has passed any order on the said application.

The short question which arises for consideration is as to whether a case has been made out for grant of any relief to the Petitioner as has been prayed for.

13. There is no controversy that having regard to the order of the Hon'ble Delhi High Court the Respondent is bound to take into consideration the Petitioner's representations on merger of license one way or the other. Such consideration, must be made upon due application of mind and without in any way being influenced by any other order already passed by the Respondent.

14. We may at the outset notice the following relevant paragraphs of the judgment of the Division Bench of the Hon'ble Delhi High Court dated 13.7.2012:

A. "the contention of the Petitioner therein that the order of the learned Company Judge granting sanction of the merger scheme would result in the assignment of benefits and obligations of such license agreements from transferor to the transferee company, in consequence thereof the same would have its effect on the rights of the Government. The effect on the rights of the Government would depend upon the terms of the license which would not amount to transfer of licenses."

B. It was furthermore opined :

> "The order of the Court merges the companies, on account of which the appellant has become the party to the licence agreements executed between Spice and the Union of India. The future of such License Agreements and its consequences is a matter beyond the purview of proceedings before this Court. Equally the order of this Court sanctioning the Scheme would be of no avail to the appellants if the Government declines to continue the Licence Agreements between Spice and the Government, and any such dispute would have to be decided on the basis of the terms of the Licence agreements, the Government Policies and other matters of relevance and NOT the order of this Court sanctioning the merger."

It was held:

> "25. Mr. Salve may be right in his submission that the dispute as to whether as per the Licence

> Agreement, read in the light of the extent policy, the Government is obliged to merge the existing licence of Spice with that of the appellant or the Government can refuse the same is a matter which is to be resolved in a manner known to law and in appropriate fora, may be TDSAT. However, he is not entirely justified in his argument that it was not necessary to disclose this information at all in the Company Petition seeking sanction of the scheme. We are of the opinion that these facts were very much relevant and material facts for the purpose of Section 391 to Section 394 of the Companies Act. Position would have been different, had the appellant disclosed these facts and taken the position that the Company Court is not required to go into the controversy generated by the DoT in refusing to grant permission for demerger. In that event, the Company Court could have issue notice to the DoT and heard on the issue as to whether non grant of such a permission for merger by the DoT was relevant or not."

C. The Division Bench furthermore opined:

"in terms of the license agreement and merger guidelines, prior permission of DoT for merger of the company was mandatory wherefor the Appellant had started communicating with the DoT seeking such prior permission.

D. It was furthermore observed:

> "Whether the action of DoT in refusing to grant such a permission is valid or not is not the question. What is important is that all this becomes relevant information and material information casting an obligation upon the appellant to have disclosed the same. It is rightly pointed out by the learned Company Judge that sanction under Section 391 to 394 of the Companies Act is a single window clearance' for the purpose of said Act. There is no need to file application under the Act for

> consequential changes like for change of name of company or Alteration of Memorandum, Article of Association except for rejection of capital in certain circumstances which required a special procedure."

While, however, agreeing with the finding of the learned Company Judge that the Petitioner did not disclose material facts while obtaining the order of sanction of the Court, the Hon'ble Division Bench held that the same would not amount to practicing fraud on the Court.

E. It was held:

> "29. We are of the opinion that had this fact been disclosed it would not have resulted in non sanction of the scheme of amalgamation of the two companies. Instead, the company Judge would have passed a conditional sanction order. We say so keeping in mind the following aspects.
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> 30. As noted above, argument of the appellant is that as per the Licence Agreement, read in the light of the Merger Guidelines issued by the Government, the action of the government in refusing merger of the existing licences of Spice with the existing licenses of the appellant is not appropriate. Thus, according to the appellant, even as per the terms of the Licence Agreement, the government is obliged to recognize the appellant as the licensee in place of Spice. The Dot contends otherwise. The DoT has refused the permission. It is a common case that this dispute is to be ultimately resolved by the TDSAT which is the appropriate forum. The matter is already before the TDSAT. At the same time, the scheme contains the clause that on the amalgamation of Spice with the appellant overlapping licence of Spice would vest in the appellant. In such a situation, even with the production of the entire relevant material including Merger Guidelines, terms of the Licence Agreement as well correspondence exchanged between the parties, the Company Court could have

imposed such other conditions. Here, Mr. Salve is right in his submission that the amalgamation of the companies would be different from the amalgamation of the licenses. Therefore, these material facts would have bearing on the sanctioning of the Scheme with certain conditions and would not have resulted into the dismissal of the company petition seeking sanction. For this reason, we hold that non-disclosure of the aforesaid facts would not amount to fraud resulting into vitiating the very action namely order sanctioning the scheme. Once it is found that implication of the disclosure of the opinion could have led to passing an conditional order of merger, that is precisely the course of action adopted by the learned Company Judge. Thus, apart from the reasoning given by the learned Company Judge that it is not possible to scramble the unscrambled eggs at this juncture, additionally on the aforesaid reason, we feel that there was no case made out by the DoT for recall of the orders dated 05.2.2010 sanctioning the scheme."

F. It was concluded :

> "31……………We agree with all the modifications except one, viz., six overlapping licenses of Spice would vest with the DoT. No doubt, even as per the contention of the appellant itself, sanctioning of merger scheme amounts only the merging of company and not the licenses and therefore, the appellant itself maintains that for transfer of these licenses, prior permission of DoT is required. It is also recognized that there is a dispute on this issue inasmuch as, as per the appellant, it is entitled to get the license transferred in its name and the refusal of the Government on this account is not appropriate. This is a dispute which has to be resolved by the TDSAT and parties are already before the TDSAT. Therefore, it is for the TDSAT to give directions, including interim orders in this behalf."

15. The impugned letters issued by the Respondent herein refer to merger of Companies and not mergers of licenses.

16. In view of the submissions made before the learned Company Judge as also the Division Bench of the Hon'ble Delhi High Court, there cannot be any doubt or dispute that the scheme of merger of companies would be within the exclusive domain of the company Court and not the Union of India.

17. The Union of India, however, again in view of the aforementioned findings of the Hon'ble Division Bench would be bound to consider the request of the Petitioner for grant of permission for merger of licenses.

18. On a plain reading of the orders passed by the learned Company Judge as also the Division Bench of the Hon'ble Court, we are of the opinion that the direction of the learned Company Judge to the effect that as the DoT was to consider the question of the prayers of the Petitioner with regard to merger of the licenses, the said question need not be decided by the Tribunal as the Petitioner has already filed appropriate applications therefor.

19. Moreover, as indicated heretobefore, the Hon'ble Division Bench itself has directed that the said application be disposed of within three months.

In fact prayer `B' of the Petitioner is only to the said effect.

20. Having considered the judgment of the Hon'ble Delhi High Court, we are of the opinion, that as the Respondent is to consider the

Petitioner's prayer for merger of license independently and furthermore keeping in view the fact that the High Court has clearly opined that the prayer for sanction of a scheme for merger or demerger lies within the jurisdiction of the Company Court in terms of the provision of the Indian Companies Act, 1956; it matters little as to whether the said orders are quashed or not, having regard to the fact that the aforementioned directions issued of the Hon'ble High Court are binding on both the parties hereto.

21. We, therefore, are of the opinion that in view of the order passed by the Hon'ble Division Bench of the Delhi High Court in Company Appeal No.42 of 2011 read with the later portion of its order of the same date, it must be held, that the subject matter of this petition is covered by the decision of the Hon'ble Delhi High Court.

In this view of the matter nothing survives in this Petition, which is disposed of accordingly.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

August 3, 2012
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