

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : 17.8.2012

Petition No.143/2011

Idea Cellular Ltd.

... Petitioner

Vs.

Union of India & Anr

... Respondents

Petition No.295/2011

Idea Cellular Ltd., Andhra Pradesh

... Petitioner

Vs.

Union of India & Anr

... Respondents

Petition No.296/2011

Idea Cellular Ltd., Maharashtra

... Petitioner

Vs.

Union of India & Anr

... Respondents

Petition No.297/2011

Idea Cellular Ltd., Delhi

... Petitioner

Vs.

Union of India & Anr

... Respondents

Petition No.298/2011

Idea Cellular Ltd., Haryana

... Petitioner

Vs.

Union of India & Anr

... Respondents

Petition No. 299/2011

Idea Cellular Ltd., Karnataka

... Petitioner

Vs.

Union of India & Anr

... Respondents

BEFORE:

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

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

For Petitioner

: Dr.A.M. Singhvi, Sr.Advocate
Mr.C.S. Vaidyanathan, Sr.Advocate

Mr.Manjul Bajpai, Advocate

For Respondent No.1 : Mr.K.P.S. Kohli, Advocate

J U D G M E N T

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

The Petitioner is aggrieved by and dissatisfied with an order dated 24.2.2011 passed by the Department of Telecommunication (DoT) imposing a penalty of Rs.50 crores on Spice Communication Ltd. in each of these cases inter alia on the premise that in relation to the circles in question both the Petitioner and the said Spice Communication Ltd. although had been holding different licenses, the later transferred shares of more than 10% in favour of the Petitioner.

On the premise that the Spice Communication Ltd. had violated conditions No.1.4, 6.1 and 6.2 of the Unified Access Service License and Clauses 1 and 17 of the Guidelines dated 22.4.2008 for

Intra Service Area merger of CMTS/UAS licenses, the said orders imposing penalty were issued.

The basic fact of the matters is not in dispute.

Spice Communication Ltd. obtained licenses in respect of the service areas of Haryana, Punjab, Andhra Pradesh, Karnataka, and Delhi. The Petitioner also obtained the UAS licenses in respect of the said circular.

The relevant provisions of the said licenses are as under:-

"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 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.

Note : Clause 1.4 (ii) shall not be applicable to Basic and Cellular Licensees existing as on 11.11.2003, and in case one of them migrates to UASL it shall not be necessary to surrender the other License. Further, Basic and Cellular Licensees existing as on 11.11.2003, shall not be eligible for a new UASL in the

same service area either directly or through its associates. Further, any legal entity having substantial equity in existing Basic/ Cellular licensees shall not be eligible for new UASL.

(iii) Management control of the LICENSEE Company shall remain in Indian hands.

License Agreement for UAS

4. Effective Date of this LICENSE shall be 25th January, 2008.

5. Additional Licenses in LICENSEE's service area may also be issued from time to time in future without any restriction of number of operators with same entry conditions or different entry conditions.

6. The License shall be governed by the provision of Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1933 and Telecom Regulatory Authority of India Act, 1997 as modified or replaced from time to time."

Indisputably, the Petitioner and the aforementioned Spice Communication Ltd. entered into a scheme of merger of the companies; pursuant whereto and in furtherance whereof, the Petitioner acquired 41.09% of the share of the Spice Communication on or about 17.10.2008.

For the aforementioned purpose, applications were filed in terms of Sections 391 and 394 of the Indian Companies Act, 1956

(in short referred to as `the Act') before the Gujarat High Court as also the Delhi High Court.

The said scheme was sanctioned by the Gujarat High Court on 9.12.2009 and by the Delhi High Court on 5.2.2010.

The Petitioner is said to have kept the Respondent informed thereabout at all stages.

Inter alia on the premise that the Petitioner has obtained the said order from the Delhi High Court by suppressing the letters of the Respondent dated 7.1.2010 and 18.1.2010 whereby and whereunder the prayer of Spice for merger of companies was rejected, the Respondent filed an application before the Delhi High Court for recall of the said order dated 5.2.2011.

By reason of a judgment and order dated 4.7.2011, the learned Company Judge upheld the said contention of the Respondent, opining that the suppression of the said letters amounted to suppression of material facts and thus a fraud had been practiced upon the said Court.

By reason of the said order, the following directions were issued:-

“(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;

(ii) The spectrum allocated for such overlapping licenses shall also forthwith revert back to DoT;

(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.”

The parties preferred intra court Appeals thereagainst before the Division Bench of the said Court and by a judgment and order dated 13.7.2012, the order of the learned Company Judge was modified in so far as the same related to overlapping of licenses of Spice and the Petitioner to be transferred to the licensor is concerned, opining that the dispute with regard thereto being pending before this Tribunal, the same should be determined.

However, immediately after the said judgment was pronounced, the matter appears to have been mentioned before the

Hon'ble Delhi High Court, whereupon the following order was passed:-

"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."

Dr.A.M. Singhvi and Mr.C.S. Vaidyanathan, learned senior counsel appearing on behalf of the Petitioner would contend that keeping in view the order passed by the Division Bench of the Delhi High Court in terms whereof the Respondent is required to take a decision as regards merger of the licenses, the question of imposition of any penalty upon the aforementioned Spice Communication does not arise.

Mr.Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, urged that as it has been conceded by the Petitioner and/or its processor-in-interest that even for the purpose of merger of companies, approval of the DoT was necessary, the impugned order is unassailable.

It was furthermore submitted that only in response to the Respondent's letter dated 5.5.2009 addressed to the Petitioner and

the said Spice Communication Ltd., a disclosure was made by it to the effect that it had acquired 41.09% of the share of Spice Communication Ltd. on 17.10.2008.

According to the learned counsel, therefore, the predecessor in interest of the Petitioner having admittedly violated the terms of the license agreement, the impugned order should not be interfered with.

As far as the question of quantum of penalty is concerned, Mr.Kohli urged that the Petitioner had not filed any proof by way of documentary evidence or otherwise to establish that the quantum of penalty was disproportionate to the gravity of charges.

The dispute between the parties is as to whether in view of the aforementioned admitted fact as also subsequent orders passed by the Hon'ble Delhi High Court, the impugned order imposing penalty is sustainable.

We may notice the relevant paragraphs of the judgment and order of the Division Bench of the Delhi High Court dated 13.7.2012.

"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 License Agreements between Spice and the Government, and any such dispute would have to be decided on the basis of the terms of the License Agreements, the Government Policies and other matters of relevance and NOT the order of this Court sanctioning the merger.

xxx

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 as 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 issued 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....

....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."

The High Court, therefore, in our opinion made a distinction between the 'merger of companies' and 'mergers of licensors', while holding that the said orders dated 7.1.2010 and 18.1.2010 ought to have been disclosed.

So far as the question of merger of companies is concerned, the same being governed by the provisions of Sections 391 and 394 of the Act, the Company Court alone will have jurisdiction with regard thereto.

As noticed heretofore, the question with regard to the merger of licenses having been directed to be determined by the High Court within a period of three months from the date of delivery of the judgment in the aforementioned matter, undoubtedly the Respondent is bound to do so.

While the said matter remains pending before the DoT, can we uphold the impugned order imposing penalty is the question.

Our answer thereto must be rendered in the negative.

Apart from the order passed by the Division Bench of the Delhi High Court, in a case of this nature, the principles of natural justice were required to be complied with. An order of penalty and that too to the extent of Rs.50 crores i.e. the maximum amount which could be levied, should have been preceded by an adjudication.

Our attention has been drawn to a large number of communications passed by and between the Petitioner and its predecessor in interest, on the other hand, and the Respondent, on the other, to contend that the Respondent had all along being informed thereabout. It furthermore appears that there had been meetings between the parties on 7.8.2008, which has also been noticed by the Hon'ble Delhi High Court.

For determining the question as to whether violation of Clauses 6.1, 6.2 and 6.3 would attract the penalty clause contained in Clauses 10 (2) (i) and (ii) of the license agreement, the matter required a hearing.

According to the learned counsel for the Petitioner, Clauses 1.42, 1.43 and 1.46 of the guidelines will have no application whatsoever. We are not concerned with the said question at this stage.

We, in our interim order dated 24.3.2011, while prima facie, holding upon taking into consideration the various decisions of the Apex Court as also a decision dated 18.12.2009 in the case of Tata Tele Services (Maharashtra) Ltd. Vs. Union of India being Petition No.58 of 2006, emphasised on the necessity to comply with the principles of natural justice cannot be minimized.

Submission of Mr.Kohli that the onus was on the Petitioner to show that the quantum of penalty was unreasonable, cannot be accepted.

The penalty clause contained in the license agreement provides for a discretion in favour of the licensor. It was for it to invoke or not to invoke the same.

Perusal of Clause 10.2 (ii) of the License Agreement would clearly go to show that the penalty of Rs.50 crores was the maximum amount and thus for the levy thereof, adequate reasons

were required to be assigned. It was therefore, for the DoT to explain by assigning reasons as to why the said decision was rendered.

Had reasons in support of the said order been assigned; the Petitioner could have questioned the same by filing appropriate petition before this Tribunal.

It is well-known that the discretion cannot be a substitute for whim or caprice.

An order involving civil or evil consequences, unless the Statute otherwise requires, must be preceded by complying with the principles of natural justice. Assignment of reason is also a part of the aforementioned principle.

Moreover, the contention of Mr.Kohli that the impugned order has been passed having regard to the admission made by the Petitioner cannot also be accepted.

Admission as is well-known must be clear and unambiguous and cannot be inferred from the circumstantial evidence.

Reasons, therefore, must be found out from the impugned order itself.

It is not for the Petitioner to establish its innocence.

It was for the Respondent to establish the charges, which could be done either by assigning reasons in the order or if the reasons in the impugned order remained uncommunicated, from the record of the Respondent.

The Petitioner contends that apart from the fact that they have kept the Respondent informed all along, had an opportunity of hearing been granted, it could have shown that the acquisition of share was part of the scheme of merger of the two companies.

To give effect to a penal clause, an adjudication was necessary. The necessity to comply with the principles of natural justice cannot be bypassed only by raising a demand.

As noticed heretobefore, the Davison Bench of the Hon'ble Delhi High Court has already issued a direction to the DoT to pass

an appropriate order on the Petitioner's applications/ representations with regard to merger of licenses.

For the reasons aforementioned, these petitions are allowed. The Respondent is directed to exercise its discretion and pass a fresh order upon complying with the principles of natural justice.

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

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

August 17, 2012
`ns'