

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

Dated : August 17, 2012

**Petition No. 464 of 2012**

Cellular Operators Association of India ...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.A.M. Singhvi and Mr. Maninder Singh, Sr. Advocates, Mr.Manjul Bajpai, Mr. Gopal Jain, Mr. Ankur Sood, Mr. Kunal Kaul, Advocates

For Respondent No.1 : Mr. Ruchir Mishra, Advocate

For Respondent No.2 : Mr.Aman Lekhi, Senior Advocate with Mansoor Ali Shoket, Mr. Nitin, Ms. Sadapurna Mitra, Advocates

**J U D G M E N T**

The first Petitioner is an associaton of the licensees.

The second, third and fourth Petitioners are holders of licenses, granted in their favour by the Respondent.

2. The Petitioners have filed this petition praying, inter alia, for the following reliefs:

“(a) hold and declare that 141 blocks of spectrum allocations (which includes spectrum allocated to Respondent number 2 and 3) freed up pursuant to cancelling and quashing of spectrum allocation (under the judgement dated 02.02.2012 passed by the Supreme Court) have to be put in the pool for public auction of spectrum.

(b) direct the DoT to amend modify/rectify its Record and its Press Release dated 15.02.2012 to the extent that it refers to 122 licences as being cancelled, to bring it in conformity with the directions given by the Hon’ble Supreme Court in the judgment dated 02.02.2012.

(c) direct the DoT to produce the records of the case and all the case files, including Applications, Responses of Respondent No.2 and Respondent No.3, spectrum allocation figures and calculation sheets maintained by the DoT.”

3. The Respondents No.2 and 3 are also holders of licenses granted in their favour in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885.

4. The principal question which arises for consideration herein is the interpretation of the judgment and order of the Supreme Court of India dated 2.2.2012 passed in Writ Petition No.423 of 2010, Centre For Public Interest Litigation & Ors. Vs. Union of India & Ors. since reported in (2012) 3 SCC 1.

5. Shortly stated, the Petitioners herein contend that the Respondent No.1 committed serious illegality in taking steps with regard to termination of licenses of only 122 operators in stead and in place of 141 operators, including the Respondent Nos.2 and 3 herein as they have also taken the

benefit of allocation of spectrum in their favour in the year 2008. They also transferred a part of the said spectrum in favour of other companies.

6. The Petitioner would contend that in terms of the said judgment and order, the Supreme Court of India while holding that the licenses and/or benefits accruing thereunder during the period October, 2007 to January 2008 relying on or on the or on the basis of the policy of 'first come first serve', in terms whereof about 141 blocks of spectrum allocated to it should have been made available to the first Respondent for the purpose of putting them to auction for 2G spectrum it must be held to have acted illegally as it had put 2G spectrum on auction which were allocated only to 122 licensees.

7. The first Respondent, however, would contend that the question as to whether the said judgment and order dated 2.2.2012 cover the licenses granted in the year 2007 and 2008 to those persons holding dual technology is the subject matter of a reference by the President of India in terms of Clause 1 of Article 143 of the Constitution of India.

8. We may notice that the press release dated 10.1.2008 which had, inter alia, been the subject matter of the said public interest litigation before the Supreme court of India refers also to the companies who have applied for the usage of dual technology spectrum and were also asked to collect the DoT's response thereto on 10.1.2008. Attention of this Tribunal has also been drawn to a letter dated 10.1.2008 addressed to the second Petitioner herein whereby and whereunder it was informed that a letter of intent was issued.

9. The impugned press release dated 10.2.2012 reads as under:

“18. Judgement of the Supreme Court pronounced on 2nd February, 2012 cancelling 122 licenses has implications for some of the recommendations of the Telecom Commission. Such recommendations are being examined further with reference to legal and other aspects and decisions in this regard will be announced later.”

10. Dr. A.M. Singhvi and Mr. Maninder Singh, learned senior counsel appearing on behalf of the Petitioner would contend:

1. From a perusal of the aforementioned judgment of the Apex Court dated 2.2.2012, it would appear that not only the licenses granted on or about 10.1.2008 had been directed to be cancelled and declared void but all, the benefits accrued thereunder in favour of any person whatsoever were directed to be stand cancelled.

2. Pointing out to subparagraph V of paragraph 81 of the said judgment it was urged that even a cost of Rs.5.00 crores was imposed on the Tatas.

11. Mr. Ruchir Misra, learned counsel appearing on behalf of the first Respondent would, however, contend that the interpretation of the judgment so far as the same relates to the policy decision of the Union of India dated 19.10.2007 is concerned, in terms whereof the Respondents No.2 & 3 had applied for dual technology and the question as to whether the same was in issue in the said PIL is the subject matter of a Presidential Reference made in terms of the Article 143(1) of the Constitution of India.

12. Mr. Aman Lekhi, learned counsel appearing on behalf of the Respondents Nos. 2 & 3 would contend that:

1. The Petitioner in this petition not only failed to raise a contention that the judgment of the Supreme Court of India applies to all the 141 licenses and the findings of the Supreme Court of India must be gathered from reading the said judgment in its entirety.
2. So read, it would be evident, that the Respondents No.2 & 3 being the existing licensees and having been operating in 19 circles, the policy decision dated 19.10.2007 cannot be said to be the subject matter of the said litigation.
3. The Supreme Court of India having not stated as to whether only 122 licenses were to be cancelled, all the telecom licensees who had been granted licenses and/or were being granted licenses pursuant to or in furtherance of the policy decision dated 19.10.2007 were not affected by reason of the aforementioned judgment.
4. Costs were imposed on the Respondents No.2 & 3 only because three CDMA licenses had been granted in their favour on 10.1.2008, and not for any other reason, no adverse inference can be drawn on the basis thereof or otherwise.
5. Perusal of the judgment rendered by this Tribunal in Petition No.286 of 2007 disposed of on 31.3.2009, it would be clear that the said policy decision was held to be good in law.

Indisputably, an appeal has been preferred against the said judgment dated 31.3.2009 by the Petitioners herein before the Supreme Court of India which has been marked as C.A. No.3472 of 2009.

In the said appeal the Petitioners have filed an interlocutory application praying for certain reliefs not only against the Respondents No.2 & 3 therein but also against Respondent No.5, namely, the Respondent No.2.

6. Although a purported rectification application has been filed by the Petitioners seeking to substitute the Respondent No.5 by Respondent No.8, no order has yet been passed thereupon and in that view of the matter, it is evident that the Petitioners are pursuing their remedies before the Supreme Court of India.

13. The basic fact of the matter is not in dispute. The Petitioners had filed a petition before this Tribunal which was marked as Petition No.286 of 2007.. By a judgment and order dated 31.3.2009 this Tribunal opined that in issuing the policy decision reflected in the letter of the DoT dated 18.10.2007 or the press release dated 19.10.2007, no impropriety had been committed by it.

It was furthermore stated:

“We are unable to agree with the petitioners that the impugned decision of DOT dated 19.10.2007 has disturbed the level playing field. We hold that there is nothing irregular in grant of 4.4 MHz as start up spectrum to the Respondents. We do not agree with the contention of the Petitioners that those with dual technology and dual spectrum should be charged the spectrum usage charges on the basis of the combined spectrum. We do not agree with the Petitioners’ contention that the DOT has disregarded the Recommendations of TRAI in respect of contingent roll-out obligation.”

14. From the rival contentions raised by the Parties herein it is evident that the interpretation of the aforementioned judgment of the Supreme Court of India is in question in this Petition.

15. However in a situation of this nature, whether this Tribunal should entertain this petition or not arises for consideration.

At the outset, we may mention that Mr. Ruchir Misra has placed before us the entire proceeding sheets in Special Reference No.1 of 2012 to show that although for the time being the learned Attorney General for India had been arguing the merit of the matter so far as question No. 1 to 4 are concerned, there is nothing on record to show that question No.6 has been abandoned. The learned counsel appears to be correct.

16. A perusal of the said questions would show that determination of Question No.6 would arise if the questions No.1 to 5 are answered in affirmation. In absence of any statement having been made by the learned Attorney General that reference to Question No.6 has been given up, it cannot be said, that despite the same this Tribunal will exercise its jurisdiction under Section 14 of the TRAI Act, 1997.

17. The question raised by the Petitioners herein is thus, still pending before the Supreme Court of India. It is not in dispute that the Petitioners have filed an interlocutory application in the said appeal wherein inter alia, the following prayers were made:

- i. Allow Civil Appeal No.3472 of 2009 in terms of judgment and order dated 01.02.2012 passed by this Hon'ble Court in Writ Petition (Civil) No.423 of 2010;
- ii. Quash and set aside the decision taken by the Respondent No.1 allotting GSM Spectrum to the CDMA Licensees;
- iii. Direct that the GSM spectrum allocated to Respondents Nos.3,4 and 8 be taken back and allocated through auction as was done for allocation of spectrum in the 3G band;

18. It is not in dispute that the Respondent No.2 was arrayed as Respondent No.5 in the said application.

However, it also appears that a rectification application has been filed therein whereby and whereunder the Respondent No.5 was sought to be substituted by Respondent No.8. No order has yet been passed by Supreme Court of India on the said application.

19. As noticed heretofore, it is furthermore evident that no order has also been passed by the Supreme Court of India, in the interlocutory application filed by the Petitioner herein being IA No.6 of 2012 in the said Civil Appeal No.3472 of 2009 as would appear from the following averments in the petition:

"S. The Petitioners submit that a Civil Appeal No.3472 of 2010 has been filed in the Hon'ble Supreme Court, which is pending consideration of the Hon'ble Supreme Court, which arises out of Press Release dated 19.10.2007. An application has been filed in the said civil appeal being IA No.6 of 2012. The scope of the same is different. This is evident from Para 19 of the said application reads as under:

"it is submitted that LOI /In Principle Approval, License amendment and subsequent allocation of GSM spectrum to TTSL, have been quashed by this court vide its Judgement dated 02.02.2012. On the basis of submissions made herein the LOI/In Principle Approval, License amendment and subsequent allocation of GSM spectrum to CDMA operators viz. Reliance, Shyam and HFCL also caught to be quashed.""

20. It would furthermore appear that the said IA marked with the letter 'A' forming the documents marked 'C' at page 14 as, however, as indicated heretofore, according to the Petitioners, a typographical error has crept

therein in so far as in stead and in place of Respondent No.8 Respondent No.5 was typed therein.

21. After the judgment was passed by the Supreme Court of India in Writ Petition No.423 of 2012 in Center for Public Interest Litigation vs. UOI (2012) 3 SCC 1 the Hon'ble President of India made a reference to the Supreme Court of India in terms of Article 143 (1) of Constitution of India wherein the following questions, inter alia, were referred:

“Q.1 Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

Q.2. Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgement of the Supreme Court including those of Larger Benches?

Q.3. Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?

Q.4 What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?

Q.5 Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to

take into account investments made under the said policy-including investments made by foreign investors under multilateral/ bilateral agreements?

Q.6 If the answers to the aforesaid questions lead to an affirmation of the judgment dated 02.02.2012, then the following questions may arise, viz.

(i) Whether the judgment is required to be given retrospective effect so as to unsettle all licenses issued and 2G spectrum (800, 900 and 1800 MHz bands) allocated in and after 1994 and prior to 10.01.2008?

(ii) Whether the allocation of 2G spectrum in all circumstances and in all specific cases for different policy considerations would nevertheless have to be undone?

And specifically

(iii) Whether the telecom licenses granted in 1994 would be affected?

(iv) Whether the telecom licenses granted by way of basic licenses in 2001 and licenses granted between the period 2003-2007 would be affected?

(v) Whether it is open to the Government of India to take any action to alter the terms of license to ensure a level playing field among all existing licensees?

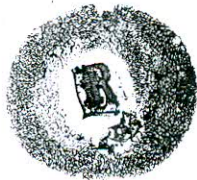
(vi) Whether dual technology licenses granted in 2007 and 2008 would be affected?

(vii) Whether it is necessary or obligatory for the Government of India to withdraw the Spectrum allocated to all existing licensees or to charge for the same with retrospective effect and if so on what basis and from what date?

The interpretation of the judgment of the Supreme Court of India in Centre for Public Interest Litigation (supra) is, thus, pending consideration before the Supreme Court itself in the aforementioned Reference.

Even no order has been passed in the rectification application filed by the Petitioners in the aforementioned Civil Appeal No.3472 of 2009.

23. For the reasons aforementioned we are of the opinion that as at present advised <sup>s</sup>by this petition should not be entertained. The petition is dismissed accordingly, subject, however, to the leave granted to the Petitioner herein to approach this Tribunal if and when any fresh cause of action arises therefor.



(S.B. Sinha)  
Chairperson

(P.K. Rastogi )  
Member

August 17, 2012  
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