

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

12TH JULY, 2012

Petition No.437 of 2011
(Alongwith M.A. No.47 of 2012)

Sistema Shyam Teleservices Ltd. ... Petitioner

Vs.

Department of Telecommunications & Anr. ... Respondents

BEFORE:

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

For Petitioner : Mr. Nitin Kala, Advocate

For Petitioner : Mr. Ruchir Mishra, Advocate
Mr. Mukesh Kumar Tiwari, Advocate

J U D G E M E N T

The Petitioner by way of this petition has inter-alia prayed for a declaration that it is entitled to 3rd CDMA Carrier in the circles of Karnataka, West Bengal, Tamil Nadu, Mumbai and Delhi having met the subscriber base criteria laid down by the Respondent.

2. The basic fact of the matter is not in dispute.

The Petitioner was granted various licences for the aforementioned circles on diverse dates. It, having met its roll out obligations started rendition of its services in terms thereof to its customers.

3. The Respondent herein by reason of a policy decision, as contained in its order dated 17.01.2008, prescribed the subscriber link criteria for allocation of the 3rd and 4th CDMA Carriers in the following terms :-

<i>Service Area</i>	<i>Subscriber base (in Lakh) supported by CDMA spectrum in MHz (eligibility for allotment of next step)</i>				
	<i>2x2.5 MHz (2 carriers)</i>	<i>2x3.75 MHz (3 carriers)</i>	<i>2x5 MHz (4 carriers)</i>	<i>2x6.25 MHz (5 carriers)</i>	<i>2x7.5 MHz (6 carriers)</i>
<i>Metro Service Area</i>	5	20	30	50	
Telecom Circles as Service Area					
<i>Category 'A' and 'B' circles</i>	8	50	80	100	
<i>Category 'C' circles</i>	6	40	60	80	

It is noteworthy that the Order dated 17.01.2008 also specified the following :

- "2. The spectrum allotment is subject to availability of spectrum.*
- 3. The active subscribers and peak traffic averaged over a month (for a minimum of 40 m Erlang per subscriber) in the Visitor*

Locator Register (VLR) would be taken into account for this purpose.

4. *The revenue share for spectrum charges, as per orders in this regard, would apply on the AGR for the complete service area”.*

4. Pursuant to and in furtherance thereof the Petitioner allegedly having met the subscriber base criteria contained therein, applied for grant of 3rd Carrier Spectrum on 31.01.2012 for the circles of Karnataka and West Bengal; on 09.6.2011 for the circle of Tamil Nadu and on 11.7.2011 for the circle of Mumbai and Delhi. The Petitioner contends that surplus spectrum being available, it is entitled to invoke its right in terms of the said circular letter dated 17.01.2008.

It is also the case of the Petitioner that apart from the said policy decision dated 17.01.2008, the Respondent had earlier also issued circulars for assignment of 3rd and 4th CDMA Carriers on 10.12.2004, 29.3.2006 and 09.01.2008.

5. The Respondent in its reply did not traverse the said contentions of the Petitioner vis-à-vis the circular letters issued by it. It, however, referred to TRAI's recommendations dated 28.8.2007 and stated that 3rd CDMA Carrier Spectrum was allotted to BSNL on 18.7.2007 in the Kerala circle. It was

furthermore contended that the said circular letter dated 17.01.2008 was issued by way of an interim measure.

6. It is however, not in dispute that two Public Interest Litigations were filed before the Supreme Court of India, one by Centre for Public Interest Litigation and Others and the other by Mr. Subramanian Swamy.

By reason of a judgment and order dated 02.02.2012 since reported in (2012) 3 SCC 1, it was inter-alia directed as under :-

- “102. (i) The licences granted to the private respondents on or after Jan 10, 2008 pursuant to two press releases issued on Jan 10, 2008 and subsequent allocation of spectrum to the licencees are declared illegal and are quashed.*
- (ii) The above direction shall become operative after four months.*
- (iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 service areas by auction, as was done for allocation of spectrum in 3G band.”*

7. It is not in dispute that in terms of the aforementioned judgment, the licences granted to the Petitioner for all the aforementioned circles were also declared illegal and have been quashed.

The Petitioner, however, filed a Review Petition thereagainst, which has also been dismissed.

8. It is, however, stated at the Bar that a Curative Petition has been filed by the Petitioner, which is pending consideration before the Supreme Court of India.

9. The short question, which arises for consideration, is as to whether keeping in view the aforementioned judgment and order of the Supreme Court of India dated 02.02.2012, any relief, as has been prayed for or otherwise, can be granted in favour of the Petitioner.

10. Mr. Nitin Kala, learned counsel appearing on behalf of the Petitioner, however, has drawn our attention to order of this Tribunal dated 09.02.2012 and submitted that as the implication of the said order is in issue in this petition and furthermore, this Tribunal having entertained some other petitions on similar question, this petition is maintainable as the Petitioner in terms of the judgment and order of the Supreme Court of India, as modified by an order dated 24.4.2012 continues to be a holder of licences in respect of

aforementioned circles till 07.9.2012 and in that view of the matter, the prayer of the Petitioner may be considered on merit.

11. Having heard the learned counsel for the parties, we are, however, of the opinion that no relief can be granted to the Petitioner in this petition.

12. The things as they stand today, the Petitioner although may be considered to be an existing licensee in terms of the aforementioned orders of the Supreme Court of India, it cannot be denied or disputed that the licences granted in its favour have been declared illegal and have been quashed.

The Petitioner, however, is entitled to continue its operation in terms of the aforementioned licences only in view of sub-para (ii) of para 102 of the aforementioned direction of the Supreme Court and as modified by an order dated 24.04.2012. The parties to the said licence agreement, therefore, are required to comply with their mutual rights and obligations till 07.9.2012 only; whereafter subject to any order that may be passed by the Supreme Court of India in the Curative Petition, the declaration as regards the legality of the licences in question would come into effect.

It is therefore, in our considered opinion, futile to go into the merit of the matter, as at present advised.

13. We say so in view of the fact that if the Petitioner cannot be permitted to continue its operation in terms of the licences granted in its favour beyond 07.9.2012, it would be futile to pass any order in its favour, even assuming for the sake of argument that it is entitled to the grant of 3rd Carrier subscriber based spectrum.

14. A court of law, it is trite, would not issue a declaration which would be incapable of being given effect to.

Spectrum is ordinarily allocated for a number of years and in this case, naturally, if a declaration, as has been prayed for, is granted in favour of the Petitioner, the same would have continued till the expiry of the period of the licences held by it.

As indicated heretofore, as on the expiry of the 07.9.2012, the declaration as regards validity of the licences in terms of the judgment of the Supreme Court of India in Centre for Public Interest Litigation (supra) shall come into effect and, therefore, the Petitioner cannot continue its services and in that view of the matter we are of the opinion that this petition, as stands today, is not maintainable.

15. There cannot, however, be any doubt or dispute that in the event the Curative Petition filed by the Petitioner is allowed and the judgment and order

of the Supreme Court of India dated 02.02.2012 is set aside and/or modified, it would be open to the Petitioner herein to file a fresh petition.

16. This petition is dismissed as being not maintainable in view of the aforementioned orders, without any order as to costs.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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