

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 1.6.2012

Petition No.3/2012

Idea Cellular Limited

... Petitioner

Vs.

Union of India

... Respondent

And

Petition No.4/2012

Idea Cellular Limited

... 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.Manjul Bajpai, Advocate
Mr.Gopal Jain, Advocate.

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

J U D G M E N T

S.B. Sinha

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

2. The Petitioner is a licensee inter alia in respect of Haryana and Maharashtra circles.

3. One Spice Communications Ltd. also held licenses in respect of the aforementioned circles.

4. The two companies are said to have merged in terms of orders sanctioning a scheme of merger. Orders of amalgamation passed by the High Court of Gujarat and High Court of Delhi on 26.11.2009 and 5.2.2010, respectively.

5. It is not in dispute that the question as to whether the sanction of the scheme of merger has rightly been granted or not is pending consideration before a Division Bench of the High Court of Delhi.

6. Petitioner was imposed liquidated damages for a sum of Rs.4.55 cores each purported to be for not complying with its roll out obligations for a period of 39 weeks. The validity/ legality of the said orders were the subject matter of five petitions being Petitions No. 238/2011, 240/2011, 241/2011, 242/2011 and 243/2011 in respect of the circles of Punjab, Haryana, Karnataka, Andhra Pradesh and Maharashtra.

7. By reason of a judgment and order dated 5.12.2011, inter alia on the premise that the Respondent failed to comply with the principles of natural justice the said demands were set aside.

8. However, the impugned orders raising a further demand of Rs.1.80 crores for each of the circles, have been issued by way of liquidated damages.

9. Despite notice, no reply on the merit of the matters has been filed by the Respondent.

10. On or about 16.5.2012, an affidavit affirmed by one Ms.Irene Cherian has been filed inter alia contending that :-

- (i) the Supreme Court by a judgment dated 2.2.2012 has cancelled 122 licenses and,
- (ii) the implications of the said judgment being under consideration and having regard to the fact that the Delhi High Court has reserved orders on 29.3.2012 in Company Appeal No.42/2011 (Idea Cellular Ltd. Vs. Union of India) and Company Appeal No.67/2011 (Union of India vs. Idea Cellular Ltd.), concerning the question of merger of M/s Spice Communication Ltd with the Petitioner;

(iii) four weeks further time was sought for.

11. We may notice that by an order dated 14.4.2012 four weeks time had been granted to the Respondent to file a reply.

12. The matter has been on board since 9.4.2012. We, therefore, are of the opinion that no further time can be granted to the Respondent to file any reply.

13. Mr.Gopal Jain, learned counsel appearing on behalf of the Petitioner would contend :-

a. The impugned demands dated 23.12.2011 are ex-facie illegal and without jurisdiction keeping in view the judgment of this Tribunal dated 5.12.2011.

b. Although, the impugned demands had been issued much after the judgment in the cases of the Petitioners was delivered, no reference thereto has been made therein for reasons best known to the Respondent.

c. In any event, the principles of natural justice having not been complied with, the impugned orders are liable to be set aside.

14. Ms.Maneesha Dhir, learned counsel appearing on behalf of the Respondent would, on the other hand, contend that the impugned demands have been raised as the Petitioner has failed to meet its roll out obligations for a period of 52 weeks as provided for in Clause 34 of the License Agreement.

15. A bare perusal of the judgment dated 5.12.2011 would clearly show that the matter relating to the merger of Spice Communication with the Petitioner had not been dealt with by this Tribunal in its judgment dated 5.12.2011.

16. This Tribunal in its aforementioned judgment, clearly held that the Respondent before imposing the amount of liquidated damages was bound to comply with the principles of natural justice in the following terms :-

"73. There was, thus, a need of giving show cause notice to the Petitioner before imposing liquidated

damage and examine all the complicated issues including orders of the Learned Company Judge and Hon'ble High Court.

74. As no opportunity was provided to the Petitioner to show cause and implication of pendency of the companies merger issue in the High Court examined by the Respondent, we set aside the order of the Respondent. However, it will be free to proceed with its proceedings after complying with the principle of Natural Justice keeping in view the observations made by us heretofore. The Respondent shall subject to the ultimate order is directed to refund the amount deposited by the Petitioner with interest @ 12% per annum."

17. It also appears that the Respondent itself in an affidavit filed on 16.5.2011 clearly stated that despite pendency of the merger issue before the High Court of Delhi, this Tribunal may proceed with the matter.

18. We fail to see any reason as to why despite our judgment dated 5.12.2011, the impugned demands have been raised without complying with the principles of natural justice; the core issue between the parties remaining the same.

19. Recently by an order dated 25.4.2012 passed in Petition No.5/2012 and other connected matters, the demand made by

the Respondent in respect of additional LD has been set aside, stating :-

"30. We find some force in the aforementioned contention of Mr.Srinivasan, particularly in view of the fact that the impugned order has admittedly been passed without giving an opportunity of hearing to the Petitioner.

31. Following our judgment dt. 13.1.2012 passed in Petition No. 1 of 2011 and other connected matters, we are of the opinion that even in a case of this nature, the least the Respondent could do was to grant an opportunity of hearing to the Petitioners.

32. If the principles of natural justice were required to be complied with for the purpose of imposing liquidated damages in terms of Clause 34 of the conditions of license, we fail to see any reason as to why the said principle should not be applied where additional demands are made purported to be relying on or on the basis of the recommendations of the TRAI."

20. We, therefore, are of the opinion that the impugned demands cannot be sustained.

They are set aside, accordingly.

21. Respondent would, however, be at liberty to raise a fresh demand upon complying with the principles of natural justice.

22. These petitions are allowed.

23. The Petitioners are entitled to costs of these petitions.

24. Advocate's fee assessed at Rs.25,000/- in each of the petitions.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

June 1, 2012
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