



Union of India ...Respondent

**5. Petition No.457 of 2011**

Videocon Telecommunications Ltd. ...Petitioner  
West Bengal

Vs.

Union of India ...Respondent

**6. Petition No.458 of 2011  
(With M.A. No.177 of 2012)**

Videocon Telecommunications Ltd., Haryana ...Petitioner

Vs.

Union of India ...Respondent

**7. Petition No.459 of 2011,**

Videocon Telecommunications Ltd., Bihar ...Petitioner

Vs.

Union of India ...Respondent

**8. Petition No.460 of 2011**

Videocon Telecommunications Ltd., Karnataka ...Petitioner

Vs.

Union of India ...Respondent

**9. Petition No.461 of 2011**

Videocon Telecommunications Ltd., U.P. West ...Petitioner

Vs.

Union of India ...Respondent

**10. Petition No.462 of 2011**

Videocon Telecommunications Ltd., Kerala ...Petitioner

Vs.

Union of India ...Respondent

**11. Petition No.463 of 2011**

Videocon Telecommunications Ltd., Maharashtra ...Petitioner

Vs.

Union of India ...Respondent

**12. Petition No.464 of 2011**

Videocon Telecommunications Ltd.U.P.East ...Petitioner

Vs.

Union of India ...Respondent

**13. Petition No.465 of 2011**

Videocon Telecommunications Ltd.  
Andhra Pradesh ...Petitioner

Vs.

Union of India ...Respondent

**14. Petition No.466 of 2011**

Videocon Telecommunications Ltd.  
Tamilnadu ...Petitioner

Vs.

Union of India

...Respondent

**15. Petition No.467 of 2011**

Videocon Telecommunication Ltd., Rajasthan

...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. Dayan Krishan, Mr.Kirtiman Singh &  
Mr. Zartab Anwar, Advocates

For Respondent

: Mr.Ruchir Mishra, Advocate

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

Interpretation of Clauses 21.1 and 21.2 of the License Agreement vis-à-vis the roll out obligations on the part of the licensees is one of the questions which arises for consideration in this batch of petitions.

We would, however, notice the factual backdrop of the matter from Petition No.450 of 2011.

## **Background facts**

The petitioner was granted licenses in respect of 22 circles in India in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885. The said licenses covered three categories of circles commonly known as A, B and C.

In this petition we are concerned with the following circles:

1. Gujarat
2. Kerala
3. Maharashtra
4. Tamil Nadu
5. Haryana
6. Andhra Pradesh
7. Himachal Pradesh
8. Orissa
9. U.P.(West)
10. Rajasthan
11. Karnataka
12. U.P.(East)
13. Bihar
14. Madhya Pradesh
15. West Bengal

Out of the aforementioned circles Gujarat, Maharashtra, Tamilnadu, Andhra Pradesh, and Karnataka fall in the Category `A`, whereas Kerala, Haryana, U.P. West, Rajasthan, U.P. East and Madhya Pradesh fall in the Category `B` and the rest in Category `C`.

In terms of the conditions of license, the petitioners furnished both performance bank guarantees and financial bank guarantees as stipulated in the license agreement.

The Petitioner in respect of some of the circles complied with its roll out obligations within the time stipulated.

In view of the delay on the part of the Petitioner in complying with its first phase roll out obligations in respect of some of the circle, penalties of different sums (depending on the length of delay) were imposed.

In some cases the Petitioner deposited the entire amount.

In some others, the Petitioner approached this Tribunal questioning the legality and/or validity of the said orders of the DoT imposing penalties.

This Tribunal by an interim order directed the Petitioners to deposit 60% of the demanded amount and securitise the balance 40% thereof. Admittedly, the Petitioners have complied with the said directions.

In some of these matters prayers have been made for a direction upon the Respondent to down grade the financial bank guarantees furnished by the Petitioners.

In some of the matters during pendency of the petitions, the Petitioner is said to have completed its second phase of roll out obligations.

The matter relating to grant of interim relief as prayed for by the Petitioners came up for consideration before this Tribunal and by an order dated 10.1.2012, it was directed as under:

"28. So far as Financial Bank Guarantees are concerned, the Petitioner has contended that it has started rendition of services in respect of some circles, namely, Andhra Pradesh, Bihar, Gujarat, Haryana, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, UP (E), UP (W) and West Bengal. It has further been stated that the Petitioner had requested the Respondent to comply with the conditions mentioned in Clause 21.2 of the License Agreement by various communications but no response thereto was received.

By way of example, the Petitioner in the petition has stated that in respect of Tamil Nadu circle, although the Financial Bank Guarantees worth Rs.50.00 crores has been submitted, the same has been revised to Rs.1.32 crores and the revised Bank Guarantee had already been furnished. According to the Petitioner, it has furnished Financial Bank Guarantees to the extent of Rs.556.32 crores and in the event it has to renew the same, it will incur cost of Rs.7,61,75,000/-.

We, therefore, are of the opinion that the interest of justice would be sub-served if the Petitioner is directed to renew the Financial Bank Guarantees to the extent of 25% of the amount already furnished in respect of the areas in which it had already started rendition of services. The Bank Guarantees must be furnished with effect from the date of expiry of the earlier Bank Guarantees.

29. We have passed this order keeping in view the balance of convenience of both the parties and also the irreparable injury which the Petitioner may suffer, as it is asked for renewal of the Performance Bank Guarantees as also the Financial Bank Guarantees, deposit of a huge amount by the

Petitioner in getting the Bank Guarantees renewed would be necessary.”

### **Submissions**

Mr. Dayan Krishan and Mr.Kirtiman Singh, learned counsel appearing on behalf of the Petitioners submitted:

1. Interpretation of Clauses 21.1 and 21.2, vis-à-vis those contained in Clauses 34 and 35 having been considered by this Tribunal both in the cases of Sistema Shyam Tele Services Ltd. vs. Union of India, being P.No.314 of 2011 disposed of on 28.9.2011 as also the interim order dated 10.1.2012; the Petitioners are entitled to return/reduction of bank guarantees, as the case may be. During pendency of these petitions the Petitioners complied with its roll out obligations in phase II also which are the subject matters of Petition Nos.291-295 of 2012.
2. The Respondent must be held to have acted illegally in so far as despite the clear language contained in Clauses 21.1 and 21.2 it failed and/or neglected to comply with the conditions of license.
3. The Respondent should have reduced the quantum of financial bank guarantees as the Petitioners could not have been directed to renew the same being not contemplated

under the conditions of licenses that they should be kept alive for all times to come.

Mr. Ruchir Misra, learned counsel appearing on behalf of the Respondent, on the other hand, urged:

- (a) The question, as to whether the Petitioners have complied with both first phase and second phase of their roll out obligations or not is pending consideration of the Respondent and, thus, this Tribunal may not exercise its discretionary jurisdiction to direct return and/or reduce the bank guarantees.
- (b) Perusal of Clauses 21.1. and 21.2 of the license agreement would show that the licensees are required to comply with the coverage parameters laid down in Clause 34.1 both in respect of the first phase and the second phase of its roll out obligations.
- (c) Keeping in view the judgment of the Supreme Court of India in Centre of Public Interest Litigation & Ors. vs. Union of India & Ors., 2012 (3) SCC 1 whereby and whereunder, inter alia, the licenses of the Petitioners were found to be illegal and quashed, but had been given a prospective effect thereto upto 7<sup>th</sup> September, 2011, an opportunity should be given to

the Respondent to calculate the amount due and owing from the Petitioner.

- (d) Clauses 21.1, 21.2, 21.5 are required to be construed harmoniously with Clauses 34 and 35 of the license agreement and so construed it would be evident that the licensor is entitled to direct the licensees to keep the bank guarantees furnished by them alive.
- (e) Furnishing of the bank guarantees must satisfy all the three elements contained in Clause 21.2 therein, viz.,
  - (i) two quarters of annual gross revenue;
  - (ii) the dues of the Respondent which have not been securitized; and
  - (iii) an additional amount for which bank guarantees can be directed to be furnished; and in that view of the matter no case has been made out by the Petitioner for return or reduction of both performance bank guarantees and financial bank guarantees.

### **The License Agreement**

We may at the outset notice some of the provisions of the license agreement.

**"21.1** Performance Bank Guarantee: Performance Bank Guarantee (PBG) in prescribed format shall be

submitted for amount equal to Rs.20 crores (for category 'A' service area) before signing the Licence Agreement. Further on completion of one year from the effective date of licence and after meeting the coverage criteria stipulated for first year, the PBG shall be reduced to Rs.10/5/1 crores for category 'A' / 'B' / 'C' service areas on self-certification provided by the Licensee.

Further on fulfilling the roll out obligations as stipulated in Clause 34, the balance PBG shall be released on receipt of test certificates/test certificates issued by TEC in respect of coverage."

**21.2** Financial Bank Guarantee: The Licensee shall submit a Financial Bank Guarantee (FBG), valid for one year, from any Scheduled Bank or Public Financial Institution duly authorized to issue such bank Guarantee, in the prescribed Performa annexed. Initially, the financial bank guarantee shall be for an amount of Rs.50 crore (for category 'A' service area) which shall be submitted before signing the Licence agreement. Subsequently, the amount of FBG shall be equivalent to the estimated sum payable equivalent to license fee for two quarters and other dues not otherwise scrutinised and any additional amount as deemed fit by the Licensor. The amount of FBG shall be subject to periodic review by the Licensor and shall be renewed from time to time till final clearance of all dues.

**21.4** Initially, the Bank Guarantees shall be valid for a period of one year and shall be renewed from time to time. The Licensee, on its own, shall extend the validity period of the Bank Guarantees for similar terms at least one month prior to date of its expiry without any demand or notice from the Licensor on year to year basis. Any failure to do so, shall amount to violation of the terms of the licence and entitle the licensor to encash the Bank Guarantees and to convert into a cash security without any reference to the Licensee at his risk and cost. No interest or compensation whatsoever shall be payable by the licensor on such encashment.

**21.5** Without prejudice to its rights of any other remedy, Licensor may encash Bank Guarantee (FBG as well as PBG) in case of any breach in terms and conditions of the Licence by the Licensee.”

“34. Roll-out Obligations:

34.1 LICENSEE shall be solely responsible for installation, networking and operation of necessary equipment and systems for provision of SERVICE, treatment of SUBSCRIBER complaints, issue of bills to its subscribers, collection of its component of revenue, attending to claims and damages arising out of his operations.

34.2 (a) Applicable for Category "A", "B" and "C" Service Area Licence (s)

LICENSEE shall ensure that

(i) At least 10% of the District Headquarters (DHQs) will be covered in the first year and 50% of the District Headquarters will be covered within three years of effective date of Licence.

(ii) The licensee shall also be permitted to cover any other town in a District in lieu of the District Headquarters.

(iii) Coverage of a DHQ/town would mean that at least 90% of the area bounded by the Municipal limits should get the required street as well as in-building coverage.

(iv) The District Headquarters shall be taken as on the effective date of Licence.

(v) The choice of District Headquarters/towns to be covered and further expansion beyond 50% District Headquarters/towns shall lie with the Licensee depending on their business decision.

(vi) There is no requirement of mandatory coverage of rural areas.

#### 34.2 (b) Applicable for Metro Service Area Licence(s)

The LICENSEE shall be required to provide in 90% of the service area street as well as in-building coverage within one year of the effective date.

#### 35. Liquidated damages:

35.1 The time period for provision of the Service stipulated in this Licence shall be deemed as the essence of the contract and the service must be brought into commission not later than such specified time period. No extension in prescribed due date will be granted. If the Service is brought into commission after the expiry of the due date of commissioning, without prior written concurrence of the licensor and is accepted, such commissioning will entail recovery of Liquidated Damages (LD) under this Condition. Provided further that if the commissioning of service is effected within 15 calendar days of the expiry of the due commissioning date then the Licensor shall accept the services without levy of LD charges.

35.2 In case the LICENSEE fails to bring the Service or any part thereof into commission (i.e., fails to deliver the service or to meet the required coverage criteria/ network roll out obligations) within the period prescribed for the commissioning, the Licensor shall be entitled to recover LD charges @ Rs. 5 Lakh (Rupees: Five Lakhs) per week for first 13 weeks; @ Rs 10 lakhs for the next 13 weeks and thereafter @ Rs. 20 lakhs for 26 weeks subject to a maximum of Rs. 7.00 crores. Part of the week is to be considered as a full week for the purpose of calculating the LD charges. For delay of more than 52 weeks the Licence may be terminated under the terms and conditions of the Licence agreement. The week shall mean 7 Calendar days from (from

midnight) Monday to Sunday; both days inclusive and any extra day shall be counted as full week for the purposes of recovery of liquidated damages.

We may mention that the Respondent by a circular letter dated 10.2.2009 amended Clauses 8, 34 and 35 in the following terms:-

(i) Roll-out obligations shall apply for wireless network only and not for wireline network.

(ii) The Licensee shall ensure that metro service area of Delhi, Mumbai, Kolkatta and Chennai are covered within one year of date of allocation of start up spectrum.

(iii) In non-metro service areas, the licensee shall ensure that in first phase of roll out obligation at least 10% of DHQs where startup spectrum has been allocated are covered within one year of such spectrum. The date of allocation of frequency shall be considered for computing a final date of roll-out obligation.

(iv) Further, in second phase of roll out obligation, the licensee shall ensure that at least 50% of DHQs where start up spectrum has been allocated are covered within three years of date of allocation of such spectrum in non-metro service areas.

(vi) Coverage of a DHQ/town shall mean that at least 90% of the area bounded by the Municipal limits shall get required street level coverage.

(ix) In-building coverage shall not to be considered for roll-out obligations as mentioned in sub-paras (ii) to (iv) above and for imposition of liquidated damages.

(xi) Date of registration by TEC/TERM is to be treated as date of meeting the roll-out obligation in

case of coverage criterion is met for roll-out obligation on testing.

(xii) PBG shall be encashed to the extent of the Liquidated Damages.

As noticed heretobefore, inter alia, Clauses 34 and 35 stood amended.

The coverage criteria was not to be complied with on the basis of the actual services rendered by the licensees and they were to cover only 90% of the street coverage.

Indisputably, in that view of the matter only the effect of the amendment is required to be taken into consideration. The said amendment will prevail over the original Clauses 34 and 35. For the said purpose the 'Mischief rule' or 'Heyden's rule' of interpretation of statute is required to be given effect to.

We may for the aforementioned purpose notice a decision of the Supreme Court of India in Bengal Immunity Co. Ltd. v. State of Bihar AIR 1955 SC 661 wherein the law was laid down in the following terms:

"It is sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case was decided that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the

common law) four things are to be discerned and considered:

1st-What was the common law before the making of the Act,

2nd-What was the mischief and defect for which the common law did not provide,

3rd-What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and

4th-The true reason of the remedy;

and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief and 'pro privato commodo' and to add force and life to the cure and remedy according to the true intent of the makers of the Act 'pro bono publico'."

Recently, in *M. Nizamudeen vs. Chemplast Sanmar Limited and Others* reported in (2010) 4 SCC 240, the law was stated in the following terms:

"39. Notwithstanding imperfection of expression and that exception clause is not happily worded, we are of the view that by applying purposive construction, the expression, "in the port areas" should be read as "in or through the port areas". The exception in Para 2(ii) then would achieve its objective and read, "except transfer of hazardous substances from ships to ports, ships to terminals and ships to refineries and vice versa, in or through the port areas". This

construction will be harmonious with Para 3(2)(ii) which permits the activity of laying pipelines in the CRZ area.”

See also Delhi International Airport (P) Ltd. vs. Union of India & Ors. (2011) 12 SCC 449.

Interpretation of Clauses 21.1 and 21.2 of the License agreement vis-à-vis the roll out obligations of the licensees has been taken into consideration by this Tribunal in its judgment dated 28.9.2011 passed in Petition No.314 of 2011 Sistema Shyam Services. Ltd. vs. UOI. The said judgment has also been considered in the interim order dated 10.01.2012 in these matters.

### **The effect of the Supreme Court order**

The Supreme Court in a public interest litigation has considered the effect of a policy decision adopted by the UOI, viz., first come, first serve basis opining that spectrum being a natural resources, it was the duty of the Respondent to put the same on auction in order to serve public interest.

Indisputably, inter alia, on the basis of the aforementioned finding, 122 licenses including those of the Petitioners were declared to be illegal and quashed. However, keeping in view the interest of the

consumers the said order was directed to come into effect on or about 01.6.2012.

Concedingly an application was filed by the UOI for review of the said order and/or for extension of time, which was granted by the Supreme Court so as to enable it to auction 2G spectrum, the Supreme Court extended the same till 31.8.2012. It has since been extended upto 10.01.2013.

Presumably, the prospective effect was given to the said judgment despite the license having been found to be illegal and thus void ab initio, the Supreme Court exercised its extra ordinary power conferred on it under Article 142 of the Constitution of India. In the aforementioned situation this Tribunal is of the opinion that so long the licenses remain valid, both the parties to the contract must abide by the terms and conditions of license.

### **Performance Bank Guarantee**

We may at the outset consider Clause 21.1 of the License agreement. Diverse sums towards performance bank guarantees depending on the fact as to in which category the circle in question falls, have been furnished.

The roll out obligations required to be performed by the licensees have to be completed only in two phases; the first phase

being the coverage criteria stipulated for the first year on self-certification furnished by the licensee. On such self certification bank guarantees were to be reduced to 50% of the original bank guarantees i.e. to Rs.10.00 crores, Rs.5.00 crores or Rs.1.00 crore, or as the case may be.

From a chart which has been furnished by the Petitioner, the correctness of which has not been denied or disputed, it would appear that the Petitioner could not complete its first phase of roll out obligations as per the criteria laid down by the DoT and liquidated damages of diverse sums were imposed on it.

The Petitioners, as indicated heretobefore, either paid the said amount in full and/or complied with interim order passed by this Tribunal in Petition No.71 of 2011.

It has also not been denied and disputed that the concerned TERM Cells of the Respondent has registered the Petitioner in respect of the second phase of its roll out obligation. They have also issued test certificates during the period beginning from 2010 and 07.02.2012.

Yet again concedingly the said test certificates were required to be sent to the DoT and it is presumed that TERM Cells have sent them to the Respondent. The Respondent keeping in view of its contractual

obligation was bound to consider the said test certificate in one or the other way within a reasonable time.

This Tribunal heard the parties on 17.5.2012.

Even on the said date with a view to provide another opportunity to the Respondent to consider the test certificates issued by the concerned TERM Cells of the Respondent, the Petitioners were directed to supply copies thereof to Mr. Ruchir Misra. It is stated at the Bar that the copies of the said certificates have been handed over to Mr. Ruchir Misra on 21.5.2012.

For the said purpose, the Respondent was directed to take into consideration its own stand taken in Petition No.1 of 2011 decided on 13.01.2012, viz., the date of allotment of startup spectrum so far as the roll out obligations of the Petitioners is concerned and verify the details supplied by it.

Mr. Ruchir Misra stated before us that the verification of the said certificates has not yet been completed, although in term of the said order, it was expected that the same shall be complied with by 30.5.2012.

It is not the case of the Respondent that the certificate issued by the Term Cells and/or registrations or completion of the roll out

obligations of the Petitioner suffers from the vice of fraud, mistake or misrepresentation.

**Re: Clause 34**

Clause 34.1 defines as to what would amount to a roll out obligation. Clauses 34.1 and 34.2 must be read keeping in view the circular letter of the Respondent dated 10.2.2009 providing for the date of compliance of the roll out obligations and empowering the State to encash the performance bank guarantee to the extent of liquidated damages.

It is not in dispute that maximum amount of liquidated damages which can be invoked is upto a period of 52 weeks and to the extent of Rs.7.00 crores only.

The licensor itself having fixed a period of one year keeping in view the roll out obligations required to be performed on the part of the licensee it cannot now take a stand contrary thereto or inconsistent therewith.

Once the roll out obligations are found to have been complied with, the performance bank guarantee must either be reduced and/or returned.

Not only in Sistema Shyam (supra) but also in other cases this Tribunal has taken notice of the fact that in the event the Petitioners

are directed to renew the bank guarantee, they may be seriously prejudiced.

The Petitioner cannot suffer for acts of omission and commission of the Respondent.

The Respondent furthermore cannot take advantage of its own way.

It was expected to perform its obligations within a reasonable time.

### **Application of the said principles**

Clause 21.1 is, thus, required to be construed in the light of the amendment of the conditions of license dated 10.2.2009.

We, therefore, are unable to agree with Mr. Misra that the first phase of roll out obligations as stipulated in Clause 34 must be treated to be the actual service rendered by the licensee.

The effect of the said amendment has not only been considered in Sistema Shyam (supra) but also in the interim order passed by this Tribunal.

We, therefore, direct that the performance bank guarantees be reduced or returned to the Respondent, as the case may be. PBG will

be reduced to fifty percent in circles of U.P. (West ) – Petition No. 461 of 2011, Bihar – Petition No. 459 of 2011, Madhya Pradesh – Petition No. 455 of 2011 and West Bengal – Petition No. 457 of 2011 and the Performance Bank Guarantees will be returned in all other circles.

For the reasons aforementioned the Respondent is directed to comply with its contractual obligations as contained in Clause 21.1, in respect of the areas for which these petitions have been filed.

### **Financial Bank Guarantee**

The conditions of license as contained in Clause 21.2 clearly stipulate that the initial bank guarantee would remain valid only for one year. The obligations on the part of the licensor subsequent thereto would be to ask the licensees to furnish the financial bank guarantees covered by the second part thereof.

A wide direction issued to the licensees by the DoT that the bank guarantees must be renewed, cannot be held to be applicable in respect of any additional amount as deemed fit by the licensor’.

The license conditions have to be read in a reasonable manner. When a duty has been cast on the licensor together with a power, the same should be treated to be mandatory in character.

What is not in dispute is that furnishing of bank guarantee entails civil consequences.

No person has a right to obtain bank guarantee from the Banks only on his mere asking. A bank would levy some charges on the seeker of the bank guarantee. It may also ask the seeker to furnish adequate security therefor. If furnishing of the bank guarantee entails civil consequences, the provisions of Clause 21.2 must be construed strictly.

So construed in our opinion it was incumbent on the part of the Respondent to raise demands in respect of its dues which are not otherwise securitized.

In absence of a demand, no liability of the licensee to furnish bank guarantee can be imposed. It has not been contended that any demand has been raised on the licensee.

Mr. Misra would contend that Clause 21.2 does not contemplate that financial bank guarantees should be confined not only to the two quarters of AGR, but also the sums which are due and any additional amount as directed by the DoT.

In our interim order dated 10.01.2012 with regard to the decision of this Tribunal in Sistema Shyam (supra), it was observed:-

“19. Although in the said judgement, Clause 21.5 has not specifically been referred to, a bare perusal of Clause 21 in its entirety would clearly go to show that by reason thereof, a right to encash bank guarantee has been provided, which was otherwise available to it in law. The said clause has to be construed harmoniously with the other sub-clauses of Clause 21.”

In that order, this Tribunal has also noticed a circular letter dated 29.10.2010, which reads as under:-

“4. TERM Cell shall communicate the testing date(s) in writing to Service Provider, at least 10 days in advance for making the necessary test equipment ready on date(s) of testing. If Service Provider is not ready on testing date(s), the date can be extended by 10 more days by DDG (TERM) on written request from Service Provider, after which the registration will be closed and Service Provider will have to again register by paying normal fee. Service provider will make all the resources available for testing.

5. TERM Cell shall carry out the testing on the above scheduled date as per TSTP mentioned above. It may be ensured by TERM Cells that pre-requisite Checks for Coverage as per Part-I of TSTP are tested and passed, before carrying out coverage tests. Minor deviations in prerequisites can be approved by DDG (TERM) concerned.

6. Date of Registration of the case by TERM Cell is to be treated as date of meeting roll-out obligation, in

case test results are found in order in the testing carried out by the TERM Cell.

9. If test results on examination are found in order, the case shall be approved by the DDG of the concerned TERM cell and Service Test Result will be issued by the respective TEERM Cell as per Performa, with copy to security and licensing unit of DoT.

10. If the test results in the testing conducted by the TERM Cell are found to be deficient in meeting the roll out obligation, except for deviations approved, the case shall be rejected by the TERM Cell and the test results still will be given to service providers with a copy to licensing and security of DoT and registration will be closed. The concerned service provider shall re-register the case once again by paying three times the normal test fee.

11. TERM Cell shall make comprehensive list and recommend the case for issue of Service Test Certificate for particular license area, after TERM Cell has tested, passed and issued requisite number of Service Test results. Service Test Certificate for roll out obligation shall be issued by Security Wing DoT after getting recommendation of TERM Cell. A copy of which will be sent to licensing Wing. DDG (TERM) cell shall send the draft Service Test Certificate to Security Wing along with other details.”

Recovery of an amount said to be due from the licensee may be made in various ways. One of the options given in terms of license to the licensor is to ask the licensee to furnish bank guarantee to the extent of demand, if not otherwise securitized.

Thus, in the event the amount said to be due from the licensee to the licensor is already securitized, no further security is required to be furnished.

### **Due and Payability Issue**

The said term, in our opinion should be assigned purposive meaning. For the said purpose even the object for which the same has been used in the license agreement must also receive due consideration.

In *Vanmala Manoharrao Kamdi & Ors. v. The Deputy Charity Commissioner & Ors.* LPA No.226/2011 decided on 04.5.2012, it has been held :-

"30. In *Heydon's* case, the fourth proposition for sound construction of a Statute was stated thus:

"Fourth proposition : - The true reason of the remedy; and the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, to suppress subtle inventions and evasions for continuance of the mischief, and to 'pro privato commodo', and to add force and life to the cure and remedy, according to the true intent or the makers of the Act, 'pro bono publico'.

In the case of *Philips Medical Systems (Cleveland) Inc.-Versus-Indian Mri Diagnostic and Research Limited* and another, reported in 2008 (10) Supreme

Court Cases 227 in paragraph no.17, the Apex Court held that when an amendment is made to an Act, or when a new enactment is made, Heydon's mischief rule is often utilized in interpreting the same.

In the case of Sri Ram Saha Versus State of West Bengal and others, reported in AIR 2004 Supreme Court 5080 the Apex Court as to the 'purposive interpretation' in paragraph no.18 said thus :

"18. It is well-settled principle of interpretation that a statute is to be interpreted on its plain reading; in the absence of any doubt or difficulty arising out of such reading of a statute defeating or frustrating the object and purpose of an enactment, it must be read and understood by its plain reading. However, in case of any difficulty or doubt arising in interpreting a provision of an enactment, Courts will interpret such a provision keeping in mind the objects sought to be achieved and the purpose intended to be served by such a provision so as to advance the cause for which the enactment is brought into force. If two interpretations are possible, the one which promotes or favours the object of the Act and purpose it serves, is to be preferred. At any rate, in the guise of purposive interpretation, the Courts can not re-write a statute. A purposive interpretation may permit a reading of the provision consistent with the purpose and object of the Act but the Courts cannot legislate and enact the

provision either creating or taking away substantial rights by stretching or straining a piece of legislation."

The terms 'due' and 'payable' carry significant meanings.

In Hughes Communications India Limited v. Department of Telecommunications, Petition No.327 of 2007, dated 3rd May, 2010 it was held:

"Furthermore, the question as to whether the amount in question is payable or not is itself pending before the Supreme Court of India. The terms 'payable' carries with it a definite meaning. It means 'owed and required to be paid'. It was so held by the Supreme Court of India in State of Kerala v. V.R. Kalliyankutty - 1999(3) SCC 657 stating as under—

"8. Looking to the object of Section 71 we have to examine whether time-barred claims of the State Financial Corporation and the banks can be recovered under it. Is the object only speed of recovery or is it also enlargement of the right to recover? The respondent-institutions rely on the words "amount due" in Section 71 as encompassing time-barred claims also. Now, what is meant by the words "amounts due" used in Section 71 of the Kerala Revenue Recovery Act as also in the notifications issued under Section 71? Do these words refer to the amounts repayable under the terms of the loan agreements executed between the debtor and the creditor irrespective of whether the claim of the creditor has become time-barred or not? Or do these words refer only to those claims of the creditor which are legally recoverable? An

amount "due" normally refers to an amount which the creditor has a right to recover. Wharton in Law Lexicon defines "due" as anything owing; that which one contracts to pay to another."

In Black's Law Dictionary, 6th Edn., at p. 499 the following comment appears against the word "due":

"The word 'due' always imports a fixed and settled obligation or liability; but with reference to the time for its payment there is considerable ambiguity in the use of the term, the precise signification being determined in each case from the context. It may mean that the debt or claim in question is now (presently or immediately) matured and enforceable, or that it matured at sometime in the past and yet remains unsatisfied, or that it is fixed and certain but the day appointed for its payment has not yet arrived. But commonly and in the absence of any qualifying expressions, the word 'due' is restricted to the first of these meanings, the second being expressed by the term 'overdue' and the third by the word 'payable'."

It was observed that in CCE & Customs v. ITC Ltd., (2007) 1 SCC 6, it was stated:

"21. The question as to non-levy or short-levy of an excise duty would arise only when the levy had been levied in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable."

Yet again in HFCL Infotel Ltd., Punjab v. Bharat Sanchar Nigam Limited, Petition No.119 of 2008 dated 15th January, 2010, this Tribunal opined:

“Furthermore even if the respondent was to point out the defect in the mode of raising a bill, it should have done so within the period of limitation as provided under Article 137 of the Limitation Act. The term “payable” as is well known means legally recoverable. [See Commnr. Central Excise and Customs, Mumbai and Ors. Vs. I.T.C. Ltd. and Ors. - 2007(1) SCC 62].”

So far as the question of securitization of additional amount is concerned, although the words “as deemed fit by the licensor” have been used, the same would not mean that fiscal security is to be furnished on mere whims or caprice.

Even in respect of enforcement of a contract, the Respondent being a ‘State’ within the meaning of Article 12 of the Constitution of India is required to act reasonably and not arbitrarily.

In that view of the matter we are of the opinion that even in respect of the additional amount, the same has to be specified. It is possible that in the given case the bank guarantees furnished by the licensee may not be adequate to cover the dues of the Respondent, in which event, even additional bank guarantee can be directed to be furnished.

Clause 21.5 on a plain reading enables the licensor to encash bank guarantee but such encashment of bank guarantee would be permissible only in a case where any breach in terms of conditions of license by the licensees has been committed.

If the contention of Mr. Ruchir Misra that the demand can be raised at any time during pendency of the license is accepted, the Respondent in its whims would ask for renewal of bank guarantee year after year, in which event it's obligation to reduce and/or return the bank guarantees would be rendered otiose.

In *Sistema Shyam* (supra), this Tribunal has clearly held that the bank guarantees as originally specified cannot be directed to be continued for the entire period of license.

This aspect of the matter has also been clarified in our interim order dated 10.01.2012.

We, therefore, are of the opinion that in absence of any demand having been raised in respect of any amount which was not securitized and/or stated in clear terms, the additional sums, if any, cannot be required to be securitized, the Petitioners are therefore, entitled to the reliefs prayer for.

Mr. Misra would contend that the liability of the Petitioner in so far as its liability towards AGR is concerned must be met and as the same is yet to be assessed the FBGs cannot be divided to be reviewed.

This may be so but then in our interim order dated 10.01.2012 we thought that furnishing of 25% bank guarantee shall serve the purpose.

We think that interest of justice would be sub-served, if the aforementioned interim order is made absolute.

These petitions are disposed of on the above terms with no order as to costs.

**(S.B. Sinha)**  
**Chairperson**

**(P.K. Rastogi)**  
**Member**

**October 29, 2012**  
**`anu'/rkc**