

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 31ST OCTOBER 2012

Petition No.462 of 2012

Aircel Ltd. & Anr. ... Petitioners
Vs.
Union of India (DoT) ... Respondent

BEFORE:

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

For Petitioners : Mr. Meet Malhotra, Sr. Advocate
Mr. Gopal Jain, Advocate
Mr. Kunal Kaul, Advocate
Mr. Ravi S.S. Chauhan, Advocate

For Respondent : Ms. Maneesha Dhir, Advocate
Mr. K.P.S. Kohli, Advocate
Mr. Abhishek Kumar, Advocate
Mr. Tarveen Singh Nanda, Advocate
Ms. Debopama Roy, Advocate

ORDER

Petitioner No.2 was granted a licence for the Madras Telephone District which subsequently came to be known as Chennai Telephone District, on or about 30.11.1994. A similar licence was issued to the Petitioner No.1 for Tamil

Nadu Circle on or about 22.5.1998. The Respondent herein, however, took a decision to merge Chennai Metro and Tamil Nadu Service Area for CMTS/UAS licensee inter-alia, stating :-

“2(iii) The licensees, who are having licenses in both the service areas of Tamilnadu State, may apply for issue of license for merged service area in lieu of two separate licenses without payment of any additional entry fee. The effective date for the merged license shall be same as that of the existing licenses. However, in case the effective dates of existing licenses are not the same; the effective date of license later in date shall be the effective date for the merged license.

(iv) In case of Group Companies having separate licenses, if they desire and apply, they may be permitted to transfer their existing licenses to any one of the companies as a special case. In such cases, after the transfer of license to any such company, a fresh license may be issued for merged service area in lieu of separate licenses as in (iii) above. Group companies shall mean the companies where Notice Inviting Applications for Auction of 3G and BWA Spectrum.”

The Petitioners, however, continued to carry out their licensed activities in terms of their CMTS licences.

2. The Respondent issued a Notice Inviting Applications for participating in the auction of 3G and BWA Spectrum on or about 25.02.2010, inter-alia stating:-

“Associated Licensees – For the 3G Auction – existing UAS/CMTS licensees that have a common Parent.

For the BWA Auction – existing UAS/CMTS/ISP licensees that have a Common Parent.

Group Bidding Entity – A single entity nominated by Associated Licensees corresponding to a single Common Parent, which shall be authorized to bid on their behalf in the relevant Auctions.”

3. With a view to take part in the said auction process, the Petitioners furnished the requisite undertakings before the Respondent.

By reason of a letter dated 15.7.2010, the Petitioners gave an intimation to the Respondent that they propose amalgamation of the Petitioners herein, inter-alia stating :-

“Further, in support of our request, we would inform you that both ACL and AL Boards have empowered and authorized the Directors/ Senior officers of the Company to proceed with the filing of the Scheme of Amalgamation under Section 391-394 of the Companies Act and also initiate necessary actions for seeking and obtaining

amalgamation of ACL with AL along with the CMTS licences for Chennai and ROTN respectively. The Boards also authorized us to move the High Court of Judicature of Madras for getting the Scheme of Amalgamation approved. We are accordingly enclosing the copies of the Board Resolutions of both the companies, duly signed by the concerned company secretaries for your ready reference and perusal please.

As discussed with you during our personal meeting on 2nd July, 2010, the administrative/legal process of the said merger of service areas will take some time and we will be applying for the merged service area license in lieu of two licenses in due course. However, since the spectrum allocated is for the Tamilnadu (including Chennai) area, we therefore be permitted to use the same in the entire Tamilnadu service area, including Chennai Metro, and accordingly the spectrum be allotted to AL.”

4. The Petitioners filed a Scheme of Amalgamation in terms of Section 391 to 394 of the Companies Act, 1956 before the Madras High Court.

Paragraphs 3.1, 6.4 and 6.4.1 thereof read as under :-

“3.1 The amalgamation of the Transfer Company with and into the Transferee Company shall become effective on the Effective Date but with effect from the Appointed Date.

6.4 APPROVALS REQUIRED FOR EFFECTIVENESS OF THE SCHEME

6.4.1 *The Scheme is and shall be conditional upon and subject to the following and shall become effective upon occurrence of the last of the following :-*

- (a) the Scheme being sanctioned by the Hon'ble High Court of Judicature at Madras under Sections 391-394 of the Act and certified copies of the orders of the Court sanctioning this Scheme being filed with the Registrar of Companies, Tamil Nadu, Chennai by each of the Transferor Company and the Transferee Company;*
- (b) the receipt of requisite approvals, licenses, registrations and consents from the DoT; and*
- (c) the receipt of requisite approvals, licenses, registrations and consents from the Reserve Bank of India.”*

5. On an application filed by the Petitioners herein, the Madras High Court granted sanction to the aforementioned scheme of amalgamation inter-alia, directing :-

“(1) That the Petitioner Companies herein do file with the Registrar of Companies, Chennai a certified copy of the order within 30 days from this date;

(2) That the parties to the Scheme of Amalgamation or any other person interested shall be at liberty to apply to this Court for any

directions that may be necessary in regard to carrying out this Scheme of Amalgamation annexed hereunder.

(3) That the Transferor Company viz. Aircel Cellular Limited shall be dissolved without being wound up.

(4) That Mr. M. Gopikrishnan, Additional Central Government Standing Counsel shall be entitled to a fee of Rs.2500/- (Rupees two thousand five hundred only) payable by the transferor company, as well as transferee company.”

6. The Petitioners intimated thereabout to the DoT by a letter dated 13 October 2010 in the following terms :-

“Please refer our letter dated 10th August 2010 wherein we had intimated that company has filed the petitions before the Hon’ble High Court of Madras for amalgamation of Aircel Cellular Limited with and into Aircel Limited on 5th August 2010. We are now please to inform you that Court has now passed the amalgamation of Aircel Cellular Limited with and into Aircel Limited.

We now request you to kindly take on your record the aforesaid amalgamation. Further, as per DoT order No. 842-503/2005-VAS/5 dated 15th September 2005, we request you to transfer our existing CMTS licence of Chennai (842-21/93-TM dated 30.11.2004) into Tamilnadu Licence (842-92/97/VAS dated 22.05.1998) and issue us a fresh UASL licence for the merged service area i.e. Tamilnadu (including Chennai), in lieu of separate licences.”

7. The Petitioner made a request for transfer of Chennai licence to Tamil Nadu licence having regard to the order passed by the Hon'ble Madras High Court on or about 13.10.2010, 23.11.2010, 03.12.2010, 27.01.2011, 30.8.2011 etc.

8. The Respondent only on 16.11.2011 in response to the Petitioner's letter dated 30.8.2011 sought for a copy of the Company Application filed by the Petitioner in the High Court of Judicature at Madras.

9. The Petitioners, thereafter, filed a representation before the Respondent. A large number of reminders were also sent.

10. The order of sanction of the scheme of the amalgamation although was a conditional one, the Registrar of Companies, however, deleted the name of the Petitioner No.2 – Aircel Cellular Ltd. as an entity from its records.

Indisputably, the Petitioners are required to file six monthly FDI compliance report, which was done on 01.01.2011.

11. Having found that name of one of the two companies stood deleted, the Petitioner filed an application before the Madras High Court, whereupon by an order dated 20.6.2011 it was directed :-

“3. The Department of Telecommunications was not a party to the company petition, in which the application is filed.

4. The prayer made is in the nature of mandamus, therefore, the remedy with the petitioner lies somewhere else, and not under the Companies Act by moving a company application under Rule 9 of Companies Court Rules.

5. In view of this, the learned counsel for the applicant, prays for permission to withdraw this application, to avail the legal remedy in accordance with law including filing of writ petition for direction to the Department of Telecommunication, if so advised. “Dismissed as withdrawn” with liberty as prayed for. No costs.”

12. The Hon’ble Madras High Court by an order dated 20.6.2011 directed as under :-

“3. The contention of the learned Senior Counsel for the Petitioner, is that the order of amalgamation is to become effective only after compliance of the clause 6.4.1 which is yet to take place. The application is not opposed by the learned counsel for the Registrar of

Companies, and the only objection taken that the Company Application is not under the appropriate section.

.....

5. *Consequently, this application is ordered.”*

13. In this petition, the Petitioners have prayed for the following reliefs :-

- “(a) direct the DoT to grant formal approval for transfer of the Chennai licence of the Petitioner into the Tamil Nadu licence;*
- (b) direct the DoT to issue a licence for the merged service area i.e. Tamil Nadu (including Chennai), in lieu of separate licences for Chennai and Tamil Nadu service area, in accordance with DoT’s circular dated 15.09.2005 regarding the merger of Tail Nadu and Chennai licences;*
- (c) restrain the DoT from taking any coercive steps against the Petitioners till the final disposal of the Petition.”*

14. On or about 12.10.2012, a show cause notice for penalty/termination of CMTS licences for Chennai Service Area has been issued to the Petitioner No.2.

15. In its reply, the Respondent inter-alia contends that :-

“3. In this regard, it is submitted that the application for transfer of license of Petitioner No.2 to Petitioner NO.1 is under consideration of the Respondent. However, as prima facie there are certain violations of license conditions by the Petitioners, a decision on the application for transfer of licenses shall be taken after decision on the above-stated aspect is taken.

7. That in view of the above License Conditions and Merger Guidelines, it is evident that Respondent is a necessary party to the Scheme of Amalgamation/Merger involving Telecom Companies. As both the Petitioners have the sole business of telecommunications and the only asset they seek to transfer is the telecom license which is granted by the Respondent, thus the scheme for merger of Petitioner No.2 with Petitioner No.1 could not have been filed without prior approval of the Respondent. It is pertinent to note that by merger of Petitioner No.2 with Petitioner No.1, the only necessary consequences would be transfer of license to Petitioner No.2 to Petitioner No.1. As stated above, the right of transfer of licenses from one company to another is the sole prerogative of the Respondent.

11. That during the relevant period, the six monthly FDI compliance report furnished by Petitioner No.1 on 01.01.2011, it is stated as follows :-

“We are also giving this unconditional compliance for the Chennai Service Area (license held by erstwhile ACL, which has since amalgamated with the company, vide Order dated 01st October, 2010. The request for merger of the Chennai CMTS License with the Tamil

Nadu CMTS License is already submitted with your esteemed office vide letter dated 13th October, 2010.”

13. *That from the above, it is clear that the Petitioner No.1 on 01.01.2012, has furnished the FDI Compliance Report including the license held by Petitioner No.2 also whereas the report furnished for 01.07.2011, the Petitioner No.1 and Petitioner No.2 have filed separate reports and referred to order dated 24.06.2011 passed by the Hon’ble High Court.*
15. *That it is pertinent to note that in the present case Petitioner No.1 and Petitioner No.2 had applied for permission of the Respondent after approval of amalgamation of Petitioner No.2 with Petitioner No.1 by the Hon’ble Madras High Court. Moreover, the Petitioner No.1 started using the license of Petitioner No.2 even before obtaining any prior approval of the Respondent. The same is evident from the six monthly FDI compliance statements. It may be noted that the use of the license issued in the name of Petitioner No.2 by Petitioner No.1 without prior approval is not permissible and is violation of above mentioned license conditions.*
16. *Thus, the Petitioner No.1 had illegally/unauthorizedly used the license of the Petitioner No.2, who has transferred the license to Petitioner No.1 without prior permission of the Respondent. Therefore, both the Petitioners violated license condition 15 of the CMTS license.”*

16. Mr. Meet Malhotra, learned senior counsel appearing on behalf of the Petitioners would urge that the contention of the Respondent that its application for amalgamation by reason of the scheme filed by it, is violative of the conditions of licence and/or the merger guidelines, are not correct in as much as not only prior thereto the Petitioners have given due intimation thereabout and moreover, merger of licences has nothing to do with the merger of companies.

17. Ms. Maneesha Dhir, learned counsel appearing on behalf of the Respondent, on the other hand, would urge that the Petitioners having violated conditions of licences as also the merger guidelines, it is not entitled to the grant of approval of the transfer of licence. It was furthermore submitted that unless and until the proceeding drawn against the Petitioner No.2 is completed, the Respondent would not be in a position to pass any order on the Petitioner's application for transfer of licences.

18. The conditions of licence, which are said to have been violated, read as under :-

“1.4(ii) the proper upkeep and maintenance of the equipment.

6.3 (iii) *The transferee/assignee is fully eligible in accordance with eligibility criteria contained in tender conditions or in any other document for grant of fresh license in that area and show its willingness in writing to comply with the terms and conditions of the license agreement including past and future roll out obligations.”*

19. The present case appears to be a peculiar one. The Petitioners did not take the benefit of the scheme of merger of licences of Tamil Nadu Circle with Madras Circle to which it was entitled to do.

It filed the aforementioned application only when it was to take part in the auction of 3G and BWA Spectrum. The parties, thus, are governed by the NIA.

With a view to enable it to take part in the auction, the Petitioners complied with their obligations as envisaged thereunder. It has participated in the said auction. Prima facie, it appears that the Petitioners have not committed any illegality.

20. Ms. Dhir, however, would rely upon a judgment of Division Bench of the Delhi High Court in Company Appeal No.42 of 2011 and Company Appeal No. 67 of 2011 (Idea Cellular Ltd. Vs. Union of India), wherein it was observed as under :-

“25. 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. However, the appellant disclose this information at all even when there was a specific provision in the scheme that upon the sanctioning of the scheme and resultant merger, the overlapping licenses of the Spice would stand transferred to the appellant. Further, Mr. Chandhiok is right in his submission that the appellant itself understood the implication of Licence Agreement and Merger Guidelines, 2008 as per which prior permission of DoT for merger of the companies was mandatory and for this reason simultaneously with the decision of amalgamation the Spice with the appellant, the appellant itself had started communicating with the DoT seeking such prior permission. 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. It is well settled that Section 391 of the Companies Act is a complete code under which the Court can sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out in the structure of the company for the purpose of carrying out the scheme, except reduction of share capital which requires a special procedure. The whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of application under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme. The learned Company Judge also rightly observed that if the same permission is required under separate statute or licence for completely affecting the amalgamation/merger that would not mean that it is not to be obtained. These facts were relevant from one point of view. Had these facts been placed before the Court at the time of seeking sanction of the scheme, the Court could have put a stipulation by making conditional order namely the scheme will come into effect when other statutory permission have been obtained."

21. Ms. Dhir, however, would agree that the sanction granted by the Madras High Court to the amalgamation scheme filed by the Petitioners was a

conditional one. It could not have been given effect to without obtaining the order of the DoT on the application of the Petitioners on merger of licences.

A mistake, however, was committed by the Registrar of Companies.

The Madras High Court on an application filed by the Petitioner itself, has brought the parties to the same position as if no order of sanction has yet been passed.

22. It is in the aforementioned situation, submission of Ms. Dhir that the Petitioners have violated the conditions of the merger guidelines does not appear to be correct.

Ordinarily, as has been done by the Delhi High Court in the aforementioned judgment dated 13.7.2012 and an order passed by this Tribunal in Petition No. 10 of 2011 (Idea Cellular Ltd. Vs. Union of India) whereby this Tribunal directed the Respondent to follow the order of the Delhi High Court by granting ninety days' time to it to pass an appropriate order on the said question of transfer of licences, could be resorted to.

23. When a conditional order has been passed and/or when the scheme of amalgamation itself is clear that it would stand sanctioned only after obtaining the approval, the question of violation of the order of the Madras High Court and/or conditions of licence does not arise.

It may be noticed that in the Scheme dated 01.10.2010, the Petitioner itself stated :-

“6.4 APPROVALS REQUIRED FOR EFFECTIVENESS OF THE SCHEME

6.4.1 The Scheme is and shall be conditional upon and subject to the following and shall become effective upon occurrence of the last of the following :-

- (a) the Scheme being sanctioned by the Hon’ble High Court of Judicature at Madras under Sections 391-394 of the Act and certified copies of the orders of the Court sanctioning this Scheme being filed with the Registrar of Companies, Tamil Nadu, Chennai by each of the Transferor Company and the Transferee Company;*
- (b) the receipt of requisite approvals, licenses, registrations and consents from the DoT; and*
- (c) the receipt of requisite approvals, licenses, registrations and consents from the Reserve Bank of India.*

6.5 EFFECT OF NON-RECEIPT OF APPROVAL

In the event of any of the said sanctions and approvals referred to in the preceding clause not being obtained and/or the Scheme not being sanctioned by the Court or such other competent authority, this Scheme shall stand revoked, cancelled and be of no effect, save and except in respect of any act or deed done prior thereto as is

contemplated hereunder or as to any rights and/or liabilities which might have arisen or accrued pursuant thereto and which shall be governed and be preserved or worked out as is specifically provided in the Scheme or as may otherwise arise in law. In such an event, each party shall bear and pay its respective costs, charges and expenses for and or in connection with the Scheme.”

24. In that view of the matter, interest of justice would be sub-served if the show cause notice dated 12.10.2012, which has been served on the Petitioner, be directed to be expeditiously disposed of, whereafter the Petitioner's application for transfer of licences be considered, wherefor the following directions are issued :-

- (i) The Petitioner may file its show cause to the Respondent within one week from date;
- (ii) The Respondent shall upon giving an opportunity of personal hearing to the Petitioner herein, shall dispose of the said proceeding within three weeks thereafter;
- (iii) in the event the Respondent drops the said proceedings and/or pass some order other than terminating the licence, it shall pass

an order on the Petitioner's application for transfer of licences within three weeks thereafter.

25. The prayer for interim order sought for by the Petitioner is disposed of accordingly.

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

rkc