

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 26.9.2012

Petition No.375/2012

S. Tel Private Limited (Bihar)

... Petitioner

Vs.

Union of India

... Respondent

Petition No.376/2012

S. Tel Private Limited (Orissa)

... Petitioner

Vs.

Union of India

... Respondent

Petition No.377/2012

S. Tel Private Limited (J & K)

... Petitioner

Vs.

Union of India

... Respondent

Petition No.378/2012

S. Tel Private Limited (North East)

... Petitioner

Vs.

Union of India

... Respondent

Petition No.379/2012

S. Tel Private Limited (Himachal Pradesh)

... Petitioner

Vs.

Union of India

... Respondent

Petition No.380/2012

S. Tel Private Limited (Assam)

... 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 Krishnan, Advocate
Mr.Amit Gupta, Advocate
Mr.Gautam Narayan, Advocate.

For Respondent : Mr.Ruchir Mishra, Advocate
Mr.Sanjiv Saxena, Advocate.

J U D G M E N T

S.B. Sinha

Interpretation of different provisions of the license agreement entered into by and between the parties hereto is in question in these petitions.

The basic fact of the matter is not in dispute.

The Petitioner pursuant to or in furtherance of the aforementioned license agreements furnished, as was required of it, performance bank guarantees and financial bank guarantees in respect of six circles, namely, Bihar, Orissa, Jammu and Kashmir, North East, Himachal Pradesh and Assam for a sum of Rs.2 crores and Rs. 5 crores, respectively; for each of the circle, they being in category `C' circles.

Before advertng to the rival contentions raised by the parties hereto, we may notice the following details:-

SERVICE AREA	LICENSE NUMBER
Assam	20-203/2008-STel-AS-I Dated 4.03.2008
Bihar	20-204/2008-S Tel-AS-I Dated 29.02.2008
Himachal Pradesh	20-207/2008-S Tel-AS-I Dated 29.02.2008
Jammu & Kashmir	20-208/2008-S Tel-AS-I Dated 04.03.2008
North East	20-213/2008-S Tel-AS-I Dated 04.03.2008
Orissa	20-214/2008-STel-AS-I Dated 03.03.2008

It is accepted that so far as the States of Orissa and Himachal Pradesh are concerned, the Petitioner has complied with its both Phase I and Phase II roll out obligations.

Apart from the aforementioned bank guarantees, the Petitioner has also furnished four financial bank guarantees towards spectrum charges. The details of the financial bank guaranties so furnished by the Petitioner are as under:-

S.No.	Service	BG No.	Service Area	Amount	Valid till	Type	Nature
1	UASL	2009004IBGF0706	Orissa	5,00,00,000	31.08.12	FBG	USAL
2	UASL	2009004IBGF0707	North East	5,00,00,000	31.08.12	FBG	USAL
3	UASL	2009004IBGF0708	J&K	5,00,00,000	31.08.12	FBG	USAL
4	UASL	2009004IBGF0709	H.P.	5,00,00,000	31.08.12	FBG	USAL
5	UASL	2009004IBGF0710	Bihar	5,00,00,000	31.08.12	FBG	USAL
6	UASL	2009004IBGF0711	Assam	5,00,00,000	31.08.12	FBG	USAL
7	UASL	2009004IBGP0448	Orissa	2,00,00,000	31.08.12	PBG	USAL
8	UASL	2009004IBGP0449	North East	2,00,00,000	31.08.12	PBG	USAL
9	UASL	2009004IBGP0450	J&K	2,00,00,000	31.08.12	PBG	USAL
10	UASL	2009004IBGP0451	H.P.	2,00,00,000	31.08.12	PBG	USAL
11	UASL	2009004IBGP0452	Bihar	2,00,00,000	31.08.12	PBG	USAL
12	UASL	2009004IBGP0453	Assam	2,00,00,000	31.08.12	PBG	USAL
13	UASL	1101261BGF00246	N. E.	4,50,000	07.10.12	FBG	Spectrum Charges
14	UASL	1101261BGF00247	BIHAR	79,00,000	07.10.12	FBG	Spectrum Charges
15	UASL	1101261BGF00248	ORISSA	26,80,468	07.10.12	FBG	Spectrum Charges
16	UASL	1101261BGF00250	HP	25,91,467	07.10.12	FBG	Spectrum Charges

Total Rs.43,36,21,935/-

(Rupees Fourty three crores thirty six lakhs twenty one thousand nine hundred and thirty five only).

So far as its roll out obligation in the Bihar circle is concerned, the Respondent demanded a sum of Rs.1 Crore 15 lakhs which sum has been paid on 11.1.2011 by the Petitioner under protest.

It got itself registered with the Term Cell in respect of 19 DHQs/towns.

So far as the State of Jammu and Kashmir is concerned, according to the Petitioner, in view of the decision of this Tribunal dated 13.1.2012 passed in Petition No.58/2011, the same is not applicable.

As regards Assam circle, the Petitioner has got itself registered with the Term Cell in respect of 14 towns/DHQs. However, in regard to North Eastern States, it has only completed the first phase of its roll out obligations.

Admittedly the Petitioner has applied for extension of time with regard to its second phase roll out obligation in respect of the said circle by a letter dated 1.9.2011, whereto allegedly no response has been made by the Respondent.

Mr.Gautam Narayan, learned counsel appearing on behalf of the Petitioner would contend that having regard to the provisions contained in Clause 21.1 of the license conditions, it was obligatory on the part of the Respondent to return/reduce the bank guarantees.

In support of the said contention, reliance has been placed on the judgment of this Tribunal dated 28.9.2011 passed in Petition No.314/2011 Sistema Shyam Tele Services vs. UOI, judgment dated 26.7.2012 passed in Petition No.443/2012 Etisalat DB Telecom (P) Ltd. vs. UOI and an interim order dated 10.1.2012 passed in Petition Nos.450/2011 entitled M/s Videocon Telecommunications Ltd. vs. UOI and other connected matters.

Mr.Mishra, learned counsel appearing on behalf of the Respondent, on the other hand, would contend that the Petitioner having not obtained the requisite certificates, from the respective Term cells except for the circles of Orissa and Himachal Pradesh, the bank guarantees cannot be directed to be refunded.

It was furthermore submitted that the Petitioner is not entitled to even reduction of the bank guarantees in respect of other circles.

So far as financial bank guarantees are concerned, Mr.Narayan would contend that in terms of Clause 21.2, the financial bank guarantees are required to be revised in accordance with the stipulations contained therein after a period of one year; the same being an obligation on the part of the Respondent, the Petitioner cannot suffer for the wrongs committed by the Respondent.

According to the learned counsel the estimated amount of AGR payable in respect of all the circles are as under:-

S.No	Circle	Quarter -2 (FY2011-12)	Quarter -3 (FY2011-12)
1	Assam	5,30,976	4,80,972
2	Bihar	70,51,938	50,35,242
3	HP	28,04,395	22,59,510
4	NE	1,70,703	1,49,679
5	Orissa	38,77,133	29,71,398
Total		1,44,35,145	1,08,96,801

In its reply, the Respondent has contended that the demands having been raised on account of annual license fee payable by the Petitioner for the years 2007-2008, 2008-2009, 2009-2010 and 2010-2011, for a sum of Rs.14.12 crores, the said amount has become payable by the Petitioner in the following terms :-

SL NO.	CIRCLE SERVICE AREA	DEMAND ON ACCOUNT OF ANNUAL LICENSE FEE		
		DATE OF DEMAND	FINANCIAL YEAR	AMOUNT
1.	P.No. 375 of 2012 (Bihar)	30.05.2012	2007 - 2008	Rs. 13,77,283/-
		30.05.2012	2008 - 2009	Rs. 13,38,869/-
		30.05.2012	2009 - 2010	Rs. 1,11,66,148/-
		30.05.2012	2010 - 2011	Rs. 2,50,63,311/-
		(Challenged in Pet. No. 434 of 2012)		
	TOTAL:			Rs. 3,89,45,611/-
2.	P.No. 376 of 2012 (Orissa)	30.05.2012	2007 - 2008	Rs. 13,77,283/-
		30.05.2012	2008 - 2009	Rs. 13,38,869/-
		30.05.2012	2009 - 2010	Rs. 1,23,42,145/-
		30.05.2012	2010 - 2011	Rs. 74,77,846/-
		(Challenged in Pet. No. 434 of 2012)		
	TOTAL:			Rs. 2,25,36,143/-
3.	P.No. 377 of 2012 (J&K)	30.05.2012	2007 - 2008	Rs. 13,77,283/-
		30.05 2012	2008 - 2009	Re. 13,38,869/
		30.05.2012	2009-2010	Rs. 1,01,03,192/-
		30 05.2012	2010-2011	Rs. 68,75,658/
		(Challenged in Pet. No. 434 of 2012)		
	TOTAL:			Rs. 1,96,95,002/

It was urged by Mr.Narayan that out of Rs.30 crores of financial bank guarantees furnished by the Petitioner, it may at best be liable for a sum of Rs.2,53,31,946/- for all the circles put together and in that view of the matter the claim of the Respondent which is ex-facie inflated and unreasonable; most of the same being premised on interest, penalty and interest on penalty, the financial bank guarantees should not be directed to be renewed to the extent of the entire demand.

Learned counsel would further contend :-

- (i) In view of the judgment of the Supreme Court of India in Centre for Public Interest Litigation and Ors vs. UOI and Ors reported in (2012) 3 SCC 1, whereby and whereunder the licenses granted in favour of the Petitioner have been held to be illegal and therefore, quashed, the Respondent is under an obligation to return the said bank guarantees as it was not mandatorily required to continue to provide telecom services.

- (ii) The bank guarantees having been furnished to secure the terms and conditions of the licenses and the same having been quashed, any question of performing the terms of the license does not arise.
- (iii) The license agreement on declaration of the illegality thereof having come to an end, the purpose of furnishing bank guarantees has become frustrated, and thus, this Tribunal should direct return thereof.
- (iv) The Supreme Court having not attributed any fault on the part of the Petitioner but on the policy decision adopted by the Union of India; it cannot be permitted to take advantage of its own wrong.
- (v) The Respondent has illegally retained the amount of Rs.10 Crores 50 lakhs deposited by the Petitioner under protest as indicated heretobefore and whereupon interest of Rs.1,36,76,000/- as in February, 2012 has become payable, there is no reason as to any these petitions should not be allowed.

- (vi) The Respondent having not complied with the directions of this Tribunal issued in the aforementioned case, it cannot insist on the petitioner to renew the financial bank guaranties.

Mr.Ruchir Mishra, on the other hand, would urge that the AGR is now required to be assessed for the past years in terms of the judgment of the Supreme Court of India in Union of India vs. Association of Unified Telecom Service Providers of India reported in (2011) 10 SCC 543 as pursuant thereto or in furtherance thereof the provisional assessments have been made for some years and provisional assessment in respect of other financial years are still required to be made.

Clauses 21.1 and 21.2 of the license read as under :-

21. BANK GUARANTEES

21.1 Performance Bank Guarantee:

Performance Bank Guarantee (PBG) in prescribed format shall be submitted for amount equal to Rs. 2 crores (for category 'C' 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 certificate/ 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. 5 Crore (for category 'C' 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 securitized 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."

A bare perusal of the aforementioned provisions would clearly go to show that so far as the performance bank guarantees are concerned, the licensees were required to complete 10% of its roll out obligations within a period of one year, whereupon the Respondent was to reduce the amount of bank guarantee to the extent of 50%.

However, so far as the second phase of the roll out obligations of the licensees are concerned, the provisions of said requirement will go to show that tests certificates are required to be issued.

We have noticed heretobefore that the Respondent admits that the Petitioner has completed its roll out obligation and certificates have also been issued in respect of Orissa and Himachal Pradesh and in that view of the matter the Petitioner is entitled to return of the bank guarantees in respect of those circle.

So far as other 3 circles, namely, Assam, North East and Bihar are concerned, there is no dispute that certificates have not been granted in respect of 50% of the DHQs/ towns and granted only in respect of some of them.

It is true that the Petitioner has got itself registered with the respective Term Cells from 2009-2011 and it was expected that within a reasonable time, inspection would be carried out by the Term Cells and certificates would be issued.

Although, it is difficult to conceive as to why the matter had remained pending for such a long time at least so far as those

circles where roll out obligations have been completed i.e. for the years 2009, 2010 as also of 2011; however, the requirement on the part of the Respondent to return the PBGs being on grant of certificate and the said conditions having not been fulfilled, we are of the opinion that the Petitioner is not entitled to refund of their return of the PBGs but are only entitled to reduction thereof to the extent of 50% as in regard thereto it has already paid the penalty and/or otherwise securitize the respondent as would appear from the aforementioned chart.

This takes us to the case of Jammu and Kashmir. The Petitioner in regard to the demand made by the Respondent filed a petition before this Tribunal which was marked as Petition No. 58 of 2011. In that case it was held that allocation of spectrum having been made only in respect of two districts, namely, Dodha and Anantnag, the question of the Petitioners' complying with its first phase of roll out obligations did not arise.

It was held:-

"...The first phase would be 10% of the DHQs where start spectrum has been allocated.

The 10% referred to coverage of service area within one year from the date of allocation of startup spectrum.

Clause (iv) provides that the licensee shall ensure that at least 50% of the DHQs where startup spectrum has been allocated are covered within three years of the date of allocation.

The Respondent in its reply contended that it was not obligatory on it to allocate start up spectrum in respect of all the DHQs.

It is difficult to conceive that for the purpose of interpretation of the said clause the situation as stood prior to amendment must be taken into consideration. If the mischief rule or rule akin thereto is to be applied, the purpose thereof must be considered, namely, that 10% of the DHQs were required to be covered from the date of allocation of spectrum and not from the effective date of license. It would mean that despite non-allocation of spectrum in respect of the concerned districts, the Petitioner was to start providing services in both the districts. It is not the case of the Respondent that spectrum has since been allocated to the rest of the districts, the Petitioner was not required to carry out any further roll out obligation. The two phases of roll out obligations in such an event would become meaningless.

The same would render the second phase of roll out obligations otiose.” (Emphasis added)

In the said decision, it has clearly been held that allocation of startup spectrum in all the DHQs is imperative in nature.

It was furthermore held :-

“It is also a well settled principle of law that if the terms used in a document are not clear, the same

should be construed in favour of the grantee and against the grantor.”

In that view of the matter it was inter alia held that the demand for liquidated damages was bad in law.

The earlier case, being Petition No.58/2011 filed by the Petitioner, was allowed.

In Unitech (supra) this Tribunal has referred to a large number of decisions to hold that a penalty clause must receive strict construction.

Clause 21.1, it is trite, must be read with Clause 34.

In terms of the license agreement as amended by the circular letter dated 10.2.2009, what was necessary for meeting the roll out obligation was to comply with the coverage criteria.

The term ‘coverage criteria’ has been defined in Clause 34.2A (i) and (iii).

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

LICENSEE shall ensure that

(i) Atleast 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."

Clauses 8, 34 and 35 of the said license agreement stood amended on 10.2.2009, the relevant clauses whereof are as under:

"(viii) The Licencee is permitted to cover any other town in the District in lieu of the District Headquarters.

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

xxx

(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."

The terms and conditions of the license for the aforementioned purpose must be read in their entirety. In terms of the

aforementioned license vis-à-vis the roll out obligations, the licensee has a wide ranging choice.

It can cover 10% of the district headquarters and 50% of them in one year and three years respectively from the effective date of the license for complying with both phases of roll out obligation.

It could also choose any other town in stead and in place of a district headquarter.

In that view of the matter failure to meet its roll out obligations would arise, provided the licensee was in a position to choose the towns/ district headquarters situated in one circle.

Unless the spectrum is issued, the question of its exercise of any choice on the part of the licensee would not arise.

In Jammu and Kashmir out of 22 districts, spectrum was allocated in two districts only. In absence of allocation of any spectrum, the Petitioner could not have started its commercial activities in any other town of its liking which may have a higher

number of consumers. The choice having been left with the licensee, in the opinion of this Tribunal the same has to be given an effective meaning.

The license is granted in respect of a circle. The roll out obligations will be with regard to the towns in the concerned circle. The conditions of license provide that in a case where there are 25 districts as for example, the licensee has to complete its roll out obligation in the first phase at least three towns and within a period of three years 13 towns.

It is, therefore, difficult to comprehend that 50% of the roll out obligations would mean 50% of the towns in which the spectrum has been allocated.

Whatever meaning to the terms is attributed to the first phase roll out obligation, the same must be assigned for the second phase.

Keeping in view that aspect of the matter, this Tribunal is of the opinion that the Petitioner was not liable to comply with its roll

out obligations in one of the two districts of Jammu and Kashmir circle keeping in view its commercial interest.

Mr.Mishra will contend that in view of the fact that spectrum had been allocated by the WPC wing at least in two districts in Jammu and Kashmir, the petitioner should have met its roll out obligations to the extent of 50% thereof, namely, at least in one district.

The said contention of the Respondent, in our opinion, cannot be accepted for the reason that the roll out obligations, having regard to the various conditions of license, would depend upon fulfilment of the mutual obligations on the part of the parties to the agreement.

If the roll out obligations are not met, it will entail imposition of penalty and in a given case may lead to termination of license.

A penalty can be imposed only when the licensee violates the conditions of license and not otherwise.

From a perusal of different provisions of the license agreement, it is evident that meeting of roll out obligations will depend upon allocation of spectrum. Spectrum may or may not be allocated. Spectrum in respect of entire circle if not allocated for one reason or the other, the licensee should not be burdened with meeting the roll out obligations; as on its failure to comply therewith, the penalty of a huge sum may be imposed. Even for that purpose construction of an agreement which is primarily commercial in nature should be given a commercial meaning.

The Union of India while parting with its exclusive privilege is entitled to lay down the terms and conditions for grant of license. It is, therefore, in a dominant position. Where a power has been conferred on the licensor to impose penalty, the obligations on a party to the agreement must be read reasonably.

Even assuming that two views are possible, a construction which would be reasonable should be adopted in preference to the other which puts the licensee to a disadvantageous position.

Moreover, if that was the intention of the licensor that even in a case of the present nature the roll out obligations on the part of

the licensee are to be complied with, it could have been so stated explicitly.

In respect of wire line services, allocation of spectrum is a must, if the services have to be rendered. It is true that it has to be applied for. It is also true that the same may be allocated in phases, but if the same are allocated in phases, it cannot be expected of a party to a license agreement to go out of its turn and comply with its obligations despite the fact that the licensor on its part has failed to allocate spectrum which subject to availability was required to be done. If the spectrum was not available or a policy decision has been taken not to allocate spectrum, in the considered opinion of this Tribunal it would not be correct to contend that the Petitioner is still bound to comply with its second phase of roll out obligations.

So far as the financial bank guarantees are concerned, it is true that on the license becoming effective, only for the first year a financial bank guarantee to the extent of Rs.5 crores was to be furnished but on the expiry of that initial period of one year, the Respondent was obligated to review the same. It has not complied with the said provision.

We may notice that in *Siestema Shyam (supra)* it was observed :-

“On a harmonious reading of Clause 34.1 and 21.1, I am of the opinion that interest of justice shall be met if the Petitioner is directed to keep the bank guarantee of the 40% of the amount of liquidated damages imposed on it in respect of the aforementioned five circles, namely, Orissa, Kerala, Kolkata, Delhi and Mumbai i.e. for a sum of Rs.0.78 crores, 2.80 crores, 0.46 crores, 1.10 crores and 0.66 crores, respectively, in view of the fact that out of a total amount of Rs.65.3 crores, the Petitioner has already deposited a sum of Rs.59.54 crores in respect of all its licenses.

Sofar as the financial bank guarantees are concerned, the interim order dated 9.8.2011, is made absolute. The financial bank guarantees should be reviewed. Periodic review indisputably would not mean downward review but also upward review. In terms of the provisions of the license, the Petitioner is bound to furnish financial bank guarantees, strictly in terms of Clause 21.2 of the license.

The Petitioner, thus, has seriously been prejudiced. It had to make arrangement for payment of a large amount to secure the Bank Guarantees.”

In an interim order in *Videocon (supra)*, this Tribunal has held:-

“28. So far as Financial Bank Guarantees are concerned, the Petitioner has contended that it has started rendition of services in respect of same 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/-."

However, the instant case stands on a different footing.

The licenses of the Petitioner have been found to be illegal and quashed by the Supreme Court of India in Centre for Public Interest (supra).

What would be the effect thereof would be considered a little later.

It however, stands admitted that for one reason or the other the Petitioner has stopped its licensed activities. It furthermore appears that the bank guarantees furnished by the Petitioner have expired on 31.8.2012.

If the judgment of the Supreme Court was not clear as was contended by Mr. Gautam, prima facie, it was for that Court to clarify any doubt, if any, as regards the implication thereof.

We, however, subject to any clarification which may be made by the Supreme Court of India in future, are of the opinion that the licensees, whose licenses despite having been found to be illegal and quashed, keeping in view the Clause (ii) of paragraph 81 of the directions, were bound to carry out their licensed activities.

If that be so, what would be the effect of Clause 11.2 must be considered by us.

It reads as under:-

“11.2 On termination or surrender or expiry of the LICENCE, the Bank Guarantee shall be released to the LICENSEE only after ensuring clearance of all dues, which the LICENSEE is liable to pay to the licensor. In case of failure of the LICENSEE to pay the amounts due to the LICENSOR, the outstanding amounts shall be realized through encashment of the Bank Guarantee without prejudice to any other action(s) for recovery of the amounts due to the LICENSOR without any further communication to the Licensee.”

It has been argued before us that the said clause would apply only when the license is terminated or surrendered or has expired.

Evidently, illegality of the license agreement was not in contemplation by the parties hereto.

In the changed situation, the operative part of the judgment of the Supreme Court of India may be held to attract Clause 11.2 of the license.

We however, need not pronounce finally thereupon.

The fact remains that so long as the licenses remain alive, the licensees are bound to fulfill the contractual obligations. Some demands have to be securitized; some demands which are not securitized may be directed to be securitized.

In its reply, the Respondent categorically stated, which has not been denied or disputed, that a demand towards AGR charges have been raised.

Such demands of AGR is in relation to a few financial years, namely, financial years 2007-2008, 2008-2009, 2009-2010 and 2010-2011. Provisional assessments are yet to be made for the financial years 2011-2012 and 2012-2013.

Submission of learned counsel is that the said demand is ex-facie illegal. In this case, we are not concerned with the legality and/or validity of the said demand.

Indisputably, the Petitioner has filed a separate petition questioning the same. The said question is, therefore, required to be gone into therein and not in the instant case.

Having regard to the fact that as of now, the Respondent has raised substantial demands, we are of the opinion that the financial bank guarantees cannot be directed to be refunded particularly, in view of the contention of the Petitioner that it has stopped its licensed activities; the effect whereof is yet to be considered by an appropriate court.

So far as the submission of Mr.Gautam that the Petitioner is not liable to carry out its licensed activities is concerned, suffice it to point out that in Appeal No.2/2012 filed by the Petitioner against TRAI, this Tribunal has not accepted the said contention.

It may, in a given case, be permissible to argue that once the licenses are found to be illegal, the underlying object and purpose of the bank guarantees becomes frustrated. However herein despite a finding that the licenses granted in favour of the Petitioner are illegal and are liable to be quashed, the Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution of India has directed the same would become operative after a period of four months, which has since been extended to 7.9.2012 and then to January, 2013.

The contention of Mr.Gautam that the Respondent cannot take advantage of its own wrong is not appropriate.

The policy decision of the Central Government was set aside on the ground that the same was against the public interest.

As indicated heretobefore, even the Respondent did not think of the same at the time of entering into an agreement and in fact could not have contemplated thereabout at the time of carrying out the formalities to enter into a contract.

The parties to the license agreement will have to comply with their respective obligations which would include payment of the just dues. If the Petitioner is dissatisfied, it may take recourse to such remedies as are available to it in law.

So far as the submission of the Petitioner that the Respondent has not complied with the judgment of this Tribunal in Unitech (supra) is concerned, we do not know as to why the amounts payable to the Petitioner have not yet been released. If the Petitioner has furnished the bank guarantees and, thus, securitized the said amount, we do not see any reason as to why the Respondent would fail to comply with the directions of this Tribunal.

However, the same is not a subject matter of the present petitions.

Similarly, the contention raised by the Petitioner that it has paid a sum of Rs.337 crores towards entry fee/license fee for the grant of three category 'C' circles for Orissa, Bihar and Himachal Pradesh in respect of 3G spectrum, does not merit any consideration.

It was urged that the Respondent shall complete verification of the claim of the Petitioner with regard to four more circles within a period of 3 to 4 weeks, whereafter requisite certificate should be issued to the Petitioner.

Mr.Gautam Narayan, however, would contend that the Petitioner have no infrastructure and no subscriber, and thus the question of verification of the Petitioner's claim at this stage does not arise. The said contention must be raised before the concerned officers of the Term Cells.

We, therefore, are of the opinion that the financial bank guarantees should be renewed. A direction to that effect has already been issued in terms of our order dated 29.8.2012.

For the reasons aforementioned these petitions are allowed in part and to the extent mentioned herein before. In the facts and circumstances of this case the parties shall pay and bear their own costs.

(S.B. Sinha)
Chairperson

September 26, 2012/`ns'