

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated : September 5, 2012**

**Appeal No. 2 of 2012**

S Tel Private Limited

...Appellant

Vs.

Telecom Regulatory Authority of India & Anr.

...Respondent

**BEFORE:**

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

For Appellant

: Mr.Dayan Krihnan & Mr. Amit Gupta,  
Advocate

For Respondent

: Mr.Saket Singh , Advocate

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

**Introduction**

1. Whether in terms of the judgment of the Supreme Court of India in Centre for Public Interest Litigation vs. UOI since reported in (2012) 3 SCC page 1, whereby and whereunder the licenses granted by the Union of India in favour of Appellant and the other operators similarly situated were declared illegal and consequently quashed by it, would

entitle the Appellant to refrain from carrying out its licensed activities, is the question?

**Factual background**

2. The Appellants were granted licenses for a large number of telecom circles pursuant to or in furtherance of the letters of intent issued to it on or about 10.1.2008.

The relevant directions of the Supreme Court of India in the aforementioned public interest litigation read as under:

“81. In the result, the writ petitions are allowed in the following terms:

(i) The license granted to the private Respondents on or after 10.1.2008 pursuant to two press release issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

(ii)The above direction shall become operative after four months.”

3. Amongst others, the Appellant also filed applications for review of the said judgment and order.

The Union of India also filed an application for extension of time to comply with the directions issued to it to put the available spectrum on auction.

4. By an order dated 24.4.2012 passed in the said applications, it was directed:

“This is an application by the Union of India for clarification of judgment dated 2.2.2012 and for

grant of permission to conduct the auction as per the time schedule set out in Annexure P! enclosed with the application.

We have heard the learned Attorney General and carefully perused the averments contained in the application.

In our view, it will be just and proper to partially accept the prayer made in the application and extended the time fixed by the Court up to the end of August, 2012.

Accordingly, the application is disposed of in the following terms:

- 1) The time specified in judgment dated 2.2.2012 in Writ Petition No.423 of 2010 and Writ Petition No.10 of 2011 for conducting the auction for grant of fresh licenses and allocation of spectrum is extended up to 31.08.2012. This would necessarily mean that the applicant shall have to finalise the auction on or before 31.08.2012.
- 2) The existing licenses shall be entitled to continue to operate till 07.09.2012.

IA Nos. 4, 6 and 7 in Writ Petition No.423 of 2010 and 6 and 7 in Writ Petition No.10 of 2011

In view of the order passed today in IA No.5 in Writ Petition No.423 of 2010, these applications are disposed of as infructuous.

IA Nos. 2 and 3 in Writ Petition No.423 of 2010

These applications have been filed by Idea Cellular Limited for clarification of judgment dated 2.2.2012 so as to exclude the applicant from the direction contained in para 81(i) of the judgment.

We have heard Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the applicant for some time and carefully perused the record.

In our considered view, para 81 (i) or for that reason any other part of the judgment does not suffer from any ambiguity requiring clarification.”

We may also place on record that by an order dated 29.8.2012, the Apex Court on an Interlocutory Application filed by the Union of India directed that the process of auction should be completed by 11.1.2013.

5. On the plea that in view of the aforementioned changed situation, namely, the directions issued by the Supreme Court of India the petitioner stopped carrying out the licensed activities complaints with regard thereto were made before the Respondent herein.

6. A show cause notice was issued by the Respondent on or about 16.5.2012, inter alia, stating:

“8. And whereas the Authority analyzed the audit reports, referred to in paras 5 and 6 to identify the cases where there has been failure on the part of the service providers to meet the Quality of Service benchmarks specified in the regulations and has noted that M/s S. Tel Private Limited has failed to meet the Quality of Service benchmarks in respect of the parameters for Cellular Mobile service specified in the said regulations in the service areas and the period contained in the Annexure-1 attached with this show cause notice.”

It was directed :

“12. Now therefore, M/s. S. Tel Private Limited being provider, is hereby required to show cause, within fifteen days from the date of receipt of this notice as to why action should not be initiated against them and why a complaint should not be filed by the

Authority, as contemplated under section 34 of Telecom Regulatory Authority of India Act, 1997 (24 of 1997), before the court of competent jurisdiction to take cognizance of contravention of the provision of Quality of service of Basic Telephone Service (Wire Line) and Cellular Mobile Telephone Service Regulations, 2009 dated the 20<sup>th</sup> March, 2009 and if no written statement of explanation is received within the time so allowed, the matter will be proceeded with on the presumption that M/s. S. Tel Private Limited has nothing to offer in defence.”

7. It does not appear from the record that any cause was shown thereto by the Appellant. However a meeting between the parties hereto took place.

### **The impugned Direction**

8. Thereafter, the Respondent by an order dated 11.4.2012 inter alia relying on or on the basis of the judgment of the Supreme Court of India dated 2.2.2012 and Clauses 30.3, 10.3 and 10.8 of the UAS license, directed as under:

“9. And whereas as directed by the Hon’ble Supreme Court vide its judgment dated the 2<sup>nd</sup> February, 2012, its order quashing the licences that become operative after four months from the date of the judgment, the Authority is of the opinion that the licensee is required to comply with the terms and conditions of the licence till the date from which the judgment of the Hon’ble Court becomes operational;

10. Now therefore, in exercise of power conferred upon it under section 13 read with sub-clause (i) and clause (iii) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1994), the Authority hereby directs M/s. S. Tel Private Limited to comply with all the provisions of the Unified Access Service License, restore all network connectivity, ensure continuity of

service to its subscribers and maintain the quality of service till its license is operational and furnish the compliance report to the Authority within a period of three days from the date of issue of this direction.”

9. The Appellant is, thus, before us.

10. The contentions of the Appellant in short are that:

- (1) The judgment and order of the Supreme Court of India dated 2.2.2012, if considered in the factual backdrop in which the said writ petition was filed, it must be held that by reason thereof the licenses held by the Petitioner having been cancelled, it was optional for it to continue or not to continue its licensed activities.
- (2) In a situation of this nature where the licenses held by the Petitioner themselves having been found to be illegal and having been directed to be quashed, it is inconceivable in law that the Appellant would act thereupon by invoking the relevant clauses of the license relating to surrender the same, as a result whereof the right of the Appellant thereunder and/or otherwise shall be in jeopardy.
- (3) The decision of this Tribunal in *Sistema Shyam Teleservices Ltd. vs. TRAI*, Appeal No.13 of 2012 whereby and whereunder this Tribunal sought to equate the order of the Supreme Court with a legal fiction which is not applicable in

the facts and circumstances of the case, no reliance thereon can be placed.

11. Mr. Saket Singh, learned counsel appearing on behalf of the Respondent, on the other hand, would contend that :

1. The Supreme Court clearly having issued a direction in its order declaring that licenses granted to the Appellant were illegal and consequently liable to be quashed but the same having been given a prospective effect, the Appellant could not have absolved itself from its contractual obligations to continue its licensed activities.
2. While delivering the aforementioned judgment, the Supreme Court could not have created a vacuum, whereby the consumers would be deprived of continuous services from the operators.
3. The purported attempt on the part of the Appellant herein that the customers were assisted to port out of its network being not commensurate with the Regulations framed by the TRAI, the same could not have been acted upon.

12. The decision of the Supreme Court of India, in our opinion, is very clear and specific. It while issuing a declaration in subparagraph (ii) of paragraph 81 of its judgment clearly directed that the same shall become operational after a period of four months.

13. The said direction was evidently issued so as to enable the parties to work out their affairs during the period of transition and by reason whereof the customers would be put to the least inconvenience.

14. In the event, the Appellant as has been contended by Mr. Dayan Krishnan, found itself incapable of performing its licensed activities it could have sought for a clarification from the Supreme Court of India itself.

It, as indicated heretobefore, filed a review application. The same was not entertained.

15. If, however, the Appellant ceased to have any network and/or requisite infrastructure to provide the services in view of the changed situation, we are of the considered opinion that its remedy, if any, was to file a suitable application before the Apex Court itself.

16. In *Sistema Shyam Teleservices Ltd vs. TRAI*, being Appeal No.13 of 2012 decided on 20.7.2012, it was opined:

“23. In a situation of this nature, we are of the opinion that the Petitioner has made out a strong prima-facie case.

They could not have been discriminated against. If the decision of the Supreme Court of India directing the licenses to remain operational till 7<sup>th</sup> September, 2012 is equated with a legal fiction, having regard to the decision of Lord Asquith’s in *East End Dwelling Co. Ltd. vs. Finsbury Borough Council* (AC pp. 132-33) 1951 vol.II page 567, which has been followed by the Supreme Court of India in a number of cases.”

17. So far as the question of taking assistance from the decision of the Court of Appeals in East End Dwellings Co. Ltd. (supra) is concerned, this Tribunal in Sistema Shyam did not apply the principles contained therein but the principle analogous thereto.

18. Reliance has been placed on paragraph 12 of the judgment of this Tribunal in Sistema Shyam (supra) by Mr. Krishnan.

It reads as under:

“12. Mr. Saket Singh, learned counsel for the Respondent, on the other hand, urged that keeping in view the fact that option of the number portability facilities having merely been provided to some consumers, no discrimination has been caused, thereby.

Learned counsel pointed out that a piquant situation has arisen, owing to the decision of the Supreme Court of India and in the event the Petitioners do not choose to take part I the impending auction of 2G Spectrum and/or do not become successful therein, they would have to windup their operations by 7<sup>th</sup> September, 2012 and thus 7 days' time would be too short a period for the MNP agency to effect the number portability option given by the consumers of the Petitioners and in view of the said fact only the impugned Regulation has been issued.”

19. The said contention of the Respondent must be read in the context of the subject matter of that appeal which is substantially different from the subject matter of the present case.

20. The Supreme Court of India directed the parties to continue to operate their operation for a period of four months which was extended upto 7.9.2012 and now to 13.1.2013, presumably, in

exercise of its jurisdiction under Article 142 of the Constitution of India and/or Section 148 of the Code of Civil Procedure.

21. It has not reviewed its order dated 2.2.2012. While laying down the law of the land relating to auction of natural resources vis a vis the 'first cum first serve' policy adopted by the Union of India, the Supreme Court did not intend to perpetrate an illegality.

22. Submission of Mr. Dayan Krishnan that had the Appellant acted in terms of the license, it would have committed contempt of the Supreme Court of India cannot be accepted.

23. It is true that a decision cannot be read as statute. It has to be read harmoniously and in its entirety.

It is, however, difficult to accept the submission of Mr. Dayan Krishnan that while interpreting a judgment whereby the law has been declared by the Apex Court in exercise of its jurisdiction under Article 141 of the Constitution of India having regard to the directions issued by it which would bind the parties thereto with a view to do complete justice to all concerned, an interpretation which can give effect to both the parts thereof should be adopted.

24. It is not for this Tribunal to say that in that behalf the decision of the Supreme Court or at least a part of it need not be complied with.

25. Our attention has been drawn by Mr. Dayan Krishnan to various paragraphs of the said judgment to contend that the TRAI itself along

with the Union of India was responsible for bringing about such a situation. It may or may not be, but we are not concerned with such a decision.

We are of the view that for more than one reason the operative part of the judgment of the Apex Court need to be given effect to.

26. Submission of the learned counsel that two options having been provided to the licensees to carry out their licensed activities, the one not to carry on it's business, could be availed of by it, in our considered opinion, is not correct.

27. Paragraph 81 of the judgment dated 2.2.2012 does not appear to have provided for such an option.

Mr. Krishnan would urge that the directions contained in sub-paragraph (ii) of paragraph 81 of the judgment having been passed under Article 142 of the Constitution of India must be construed reasonably.

28. It may be true, but that does not mean that the said directions would be read differently in the different factual matrix involved in different cases.

29. Faced with this situation, Mr. Krishnan would contend that in any event in its subsequent order dated 21.4.2012, the Supreme Court of India having used the word "entitled to" must be held to have meant that those parties who do not desire to continue its services could have

stopped from doing so. The said order was passed having regard to the application for extension of time filed by the Union of India.

30. The Appellant, if it so desired, could have either opposed the said prayer and/or raised an independent contention that if not legally, at least practically it is impossible for it to carry out the directions of the Supreme Court of India.

31. Had such a contention been raised, we are sure, the Apex Court would have bestowed its serious consideration thereupon. But once a direction has been issued, the correctness or propriety whereof is not and cannot be questioned before the Tribunal having regard to the doctrine of judicial discipline; we are of the opinion that the impugned order passed by the TRAI cannot be said to be wholly without jurisdiction and/or is liable to be set aside.

32. It is one thing to say that the order of the Regulator cannot be given effect to but it is another thing to say that it is illegal in view of the subsequent events but herein we are not concerned therewith.

33. The remedy of the Appellant would be either to approach the Supreme Court of India or the TRAI itself.

34. It was urged that keeping in view the decision of this Tribunal in *Unitech Wireless Tamilnadu vs. Union of India* Petition No.1 of 2011 disposed of on 13.1.2012, the Appellant was entitled to an opportunity of hearing.

35. As noticed heretofore, the Appellant was served with a show cause notice. It furthermore appears that the parties met in March, 2012.

36. One of the questions which appeared to have been discussed in the said meeting was as to whether the requirements contained in the licenses could have been dispensed with by the Appellant in terms of offering a solution to the number portability issue by way of issuing an advertisement in its website.

37. According to the Respondent, the mobile number portability was required to be availed through the MNP service provider. It submitted a report on or about 14.3.2012.

38. The Appellant had already disconnected the MNP facility on or about 27.2.2012 whereupon the impugned direction was issued on 11.4.2012; whereas the extension was granted by the Supreme Court of India only on 24.4.2012.

39. It is not for us to consider as to whether there has been substantial compliance of the statutory requirements in a case of this nature; the same having not been raised before us.

40. The conditions of the license provide for surrender of the licensed activities by issuing 60 days' notice. The consumers are also entitled to 30 days' notice.

The relevant conditions of license are:

- (i) Clause 30.3 of the Unified Access Service License provides as under:

“The LICENSEE shall ensure continuity of services to its customers unless License is Terminated or Suspended by the Licensor for any reason whatsoever”

- (ii) Clause 10.3 reads as under:

“LICENSEE may surrender the License, by giving notice of at least 60 Calendar days in advance. In that case it shall also notify all its customers of consequential withdrawal of Service by sending a 30 Calendar days notice to each of them..”

41. Clause 10.8 of UAS License, inter alia, provides that it is the responsibility of the Licensee to maintain Quality of Service which reads as under:

“It shall be responsibility of the LICENSEE to maintain the Quality of Service, even during the period when the notice for surrender/termination of LICENSE is pending and if the Quality of Service is not maintained during the said notice period, it shall be liable to pay damages...”

42. Even in a case of this nature, we are of the opinion that the requirements to comply with the principles of natural justice would have been futile.

43. The submission of Mr. Dayan Krishnan that the TRAI could not have taken advantage of its own wrong cannot be accepted.

44. It might have committed a mistake in the matter of implementation of the policy decision which the Apex Court pointed

out in its aforementioned judgment dated 2.2.2012, but the same would not mean that on that ground alone the directions of the Supreme Court of India need not be complied with, even if the licensees were required to continue with the licensed activities. The contractual obligations of the licensee were required to be carried out in terms of the extant laws which would include the regulations framed by the TRAI.

45. It is therefore, not correct to contend that despite a clear direction issued by the Supreme Court of India, the Appellant could have ignored its legal obligations.

46. For the reasons aforementioned, we find no merit in this appeal which is dismissed accordingly.

There shall, however, be no order as to costs.

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

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

**September 5, 2012/anu**