TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 16th September, 2015

Petition Nos. 329 of 2012
(With MA No.214 of 2015)
with
P.Nos. 435-449 and 451-455 of 2012

Loop Telecom Ltd. ... Petitioner

Versus

Union of India &Anr. …Respondents

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER
HON'BLE MR. B.B. SRIVASTAVA, MEMBER

For Petitioner (In P.No.329 of 2012)	:	Mr. Harish Salve, Sr. Advocate Mr. Meet Malhotra, Sr. Advocate Ms. Shally Bhasin, Advocate Mr. L. Kamath, Advocate Mr. Paras Anand, Advocate Mr. Chaitanaya Safaya, Advocate Mr. Ravi S.S. Chauhan, Advocate Mr. Sharath Sampath, Advocate Mr. Manikya Khanna, Advocate
For Respondent – UOI	:	Ms. Pinky Anand, ASG, Mr. A.P. Sahay, Advocate Ms. Somya Rathore, Advocate Mr. Dhruv Tamta, Advocate Mr. Piyush Beriwal, Advocate
For Respondent – TRAI (In P.No.329 of 2012)	:	Mr. Saket Singh, Advocate Ms. Sangeeta Singh, Advocate

ORDER

By Aftab Alam, Chairperson –

The Claim:

The petitioner, Loop Telecom Limited, seeks a direction to the Union of India in the department of Telecom (hereinafter, DoT) to refund[1] Rs.1454.94 crores paid by it as Entry Fee/Licence Fee for the grant of Unified Access Licences (UAS) (and the spectrum that came coupled with the licences) in twenty one (21) service areas. The petitioner's twenty one licences were among the one hundred and twenty (122) licences quashed by the Supreme Court by judgment and order dated 2 February 2012 in *Centre of Public Interest Litigation Vs. Union of India*[2]. In addition, it demands Rs.737.59 crores as interest on the principal amount for the period 10 January 2008 to 31 April 2o12, and further interest on the total sum @ 12% from 1May 2012 till the date of payment. It also seeks a direction for the discharge of the bank guarantees it gave to the DoT in terms of the licence. The bank guarantees submitted by the petitioner expired during the pendency of this petition and by an interim order passed by the Tribunal on 7 February 2014, the

[1] In the Petition as it was filed, altogether seven (7) reliefs were sought. Then, by an amendment application, filed on 2 July 2012 three more reliefs were added bringing up the number of reliefs to ten (10). In course of hearing, however, it was stated on behalf of the petitioner that the relief at sr.no. x was given up, those at sr. nos. vii and ix had now become inconsequential, those at sr. nos. iv and v were not being pressed as those now formed the subject of an international arbitration. In regard to the relief at sr. no. iii that asked for refund of liquidated damage deposited by the petitioner to the respondent, it was stated that the tribunal had asked the respondent to re-determine its liquidated damage which the respondent had not done so far; relief at sr. no. iii was also pressed in course of hearing. Relief at sr. no vi is for compensation/damages (of Rs.100crores plus interest) for loss of reputation. No evidence at all was led in support of the claim and this relief too was not pressed in course of hearing. Relief at sr. no. vii is for any order that the Tribunal might deem fit and proper.

[2](2012) 3 SCC 1

petitioner was permitted to not renew the bank guarantees subject, however, to giving an undertaking that depending upon the outcome of this case it would pay the demands raised by the DoT in connection with the 21 licences.

The background facts:

The facts of the case are simple and can be stated thus. On 6 September 2007 the petitioner applied for UAS licences in twenty one (21) service areas, that is, in all the service areas in the country, excepting Mumbai. Shortly thereafter, the DoT issued a press note on 24 September 2007, announcing the decision that until further orders, new applications for UAS licences would not be accepted after 1 October 2007. Till the date of the press note, 167 applications were received by the government. These included some applications that were submitted in March 2006 but lay unprocessed since then. After publication of the press note, 408 more applications came to be submitted. Thus, by 1 October, government had received 575 applications for UAS licences for the 22 service areas in the country. On 10 January 2008 the DoT issued another press note by which the dead-line for applications for fresh licences was retrospectively advanced to 25 September 2007. The press note further declared that the government was following the policy of first-come-first served under which initially an application that was received first would be processed first and thereafter, the applicant, if found eligible, would be granted Letters of Intent (LoI) and then whosoever complied with the conditions of

LoI first would be granted UAS licence. On the same day, at 2.45 pm, another press note was issued asking the applicants, who had submitted their applications on or before 25 September 2007, to come to the DoT head-quarters at 3.30 pm and collect the response(s) of the DoT. The press note further stated that all eligible LoI holders could submit compliance with the terms of LoIs to DoT within the prescribed period during the office hours.

The petitioner collected the LoI as directed in the latter press note and complied with the terms and conditions of the LoI on the following day. On compliance with the terms and conditions of the LoI the petitioner was granted UAS licences in twenty one (21) circles on 3 March 2008, effective from 25 January 2008. It paid the cumulative amount of Rs.1454.94 crores as Entry Fee/Licence Fee for the twenty one (21) circles.

Quashing of the licences by the Supreme Court:

Some public spirited people, apart from some government agencies, strongly felt that gross irregularities, amounting to criminality, were committed in grant of UAS licences (and the dispensation of spectrum, along with the licences) under the two press notes issued on 10 January 2008. Hence, writ petitions [Writ petition (C) No. 423 of 2010 and Writ Petition (C) No. 10 of 2012] came to be filed before the Supreme Court for judicial review of the grant of licences under the two press

notes. Another case [Civil Appeal No. 10660 of 2010] was separately filed to have the matter of grant of licences investigated by the CBI under court monitoring.

The Supreme Court allowed the writ petitions[3] and by judgment and order dated 2 February 2012 (hereinafter referred to as the 2G decision) declared as illegal and quashed all the one hundred and twenty two (122) licenses granted on or after 10 January 2008 pursuant to the two press notes released on 10 January 2008. The one hundred and twenty two (122) licenses quashed by the Supreme Court also included the twenty one (21) UAS licences granted to the petitioner[4]. Commenting upon the grant of licences through the two press notes issued on 10 January, the Supreme Court observed[5]:

> "All the applicants including those who were not even eligible for UAS license collected their LoIs on 10.1.2008. The acceptance of 120 applications and compliance with the terms and conditions of the LOIs for 78 applications was also received on the same day. Soon after obtaining the LoIs, 3 of the successful applicants offloaded their stakes for thousands of crores in the name of infusing equity, their details are as under:
>
> (i) Swan Telecom Capital(P) Ltd. (now known as Etisalat DB Telecom (P) Ltd.) which was incorporated on 13-7-2006 and got UAS licence by paying licence fee of Rs. 1537 crores transferred its 45% owned subsidiary of Emirates Telecommunications Corporation of UAE for over Rs. 3544 crores.
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> (ii) Unitech which had obtained licence for Rs. 1651 crores transferred its stake 60% equity in favour of Telenor Asia Pte. Ltd., a part of Telenor Group (Norway) in the name of issue of fresh equity shares

[3]Writ Petition (C) No. 423 of 2012 & Writ Petition(C) No. 10 of 2011.
[4]The present petitioner was respondent no. 4 in Writ Petition (C) No. 423 of 2010.
[5] Paragraph 45 of the judgment reported in (2012) 3 SCC 1

for Rs. 6120 crores between March 2009 and February 2010.

(iii) Tata Teleservices transferred 27.31% of equity worth Rs. 12,924 crores in favour of NTT DOCOMO.

(iv) Tata Teleservices (Maharashtra) transferred 20.25% of equity worth Rs. 949 crores in favour of NTT DOCOMO."

The Court held that for alienating a valuable and scarce natural resource like spectrum, the State was duty bound to follow the method of auction. The grant of licence, which actually meant allocation of spectrum since it came bundled with the licence, following the policy of first-come-first served was inherently flawed. The recommendation of the Telecom Regulatory Authority in this regard, based on the plea of "level playing field" was wholly misconceived and its implementation by DoT resulted in gross violation of the objective of the National Telecom Police 1999 and the decision taken by the Council of Ministers on 31 October 2003. The Court further held that "*its [TRAI's] recommendations became a handle in the hands for the then Minister of Communications and Information Technology and the officers of DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concern raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers*"[6]. It further held that the grant of licence/allocation of spectrum in 2007 on the price fixed in the year 2001 had caused great loss to the public exchequer and

[6]Paragraphs 91of the judgment

"*if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores*"[7]. In regard to the procedure followed by DoT for granting the licences in question, followed by allocation of spectrum the judgment said "*The exercise undertaken by the officers of DoT between September 2007 and March 2008, under the leadership of the then Minister of Communications and Information Technology was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of Communication and Information Technology wanted to favour some companies at the cost of the public exchequer…..*"[8]. The Court then (in paragraph 97 of the judgment) went on to enumerate nine irregular steps taken by the Minister to achieve the purpose.

On the basis the findings arrived at, the Court passed the orders, in paragraph 102 of the judgment, as under:

> "102. In the result, the writ petitions are allowed in the following terms:
>
> (i) The licences granted to the private respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

[7] Paragraph 91 of the judgment
[8] Paragraph 97of the judgment

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

(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.

(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(v) Respondent Nos.2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs.5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs.50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. We have not imposed cost on the respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.

(vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

(vii) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and others agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be

> filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes.

The petitioner, as ordered, shut down its operations in all the twenty one service areas covered by the licences on 1 June 2012.

From the orders passed by the Supreme Court it is clear that while quashing the licences and allocations of spectrum, the Court quashed all the licences regardless of any individual wrong-doing because all the grantees had unjustly benefitted by getting spectrum at very low prices that were artificially and arbitrarily fixed, and not the realistic price determined through auction. For the purpose of awarding costs, however, the Court made a distinction among the grantees; those who shortly after getting the licence/spectrum off-loaded their stakes for thousands of crores of rupees came in for the heaviest costs of Rs.5 crores each, those who benefitted merely by getting the spectrum very cheap (the present petitioner, who was respondent no.4 and respondents nos. 6, 7 and 10 before the Court) were awarded costs of Rs.50 lakh each and those few who had made their applications in 2004 and 2006 and who possibly could not have had anything to do with the wrong-doings in 2007-08 were let off without any costs.

Further, the orders neither prohibited nor expressly permitted the holders of the quashed licences to take part in the auction for redistribution of the spectrum

freed as the result of quashing of the 122 licences. However, in the order passed on February 2013 one of the directions was that "the licensees, who did not give bid in the auction conducted on 12.11.2012 and 14.11.2012 or who remained unsuccessful shall forthwith discontinue their operations in the concerned circles/areas and the successful applicants should be allowed to operate in those circles/areas". The direction shows that the Supreme Court had no objection to the holders of the licences that were quashed by it, taking part in the auction for the redistribution of the spectrum released as the result of quashing of those licences.

More importantly for the present purpose, however, there is no clear clue in the orders as to whether or not the Supreme Court considered it a fit case for refund of entry fees to the holders of licences that were quashed (along with the allocation of spectrum against those licences) by its judgment. But one may find some significance in that the very same bench of the Court in *Akhil Bhartyia Upbhokta Congress V. State of Madhya Pradesh*[9], even while holding that the allotment of 20 acres of land in favour of an institute was made on political considerations, in contravention of Article 14 of the Constitution, apart from suffering from other illegalities and consequently declaring the allotment illegal and quashing it, had deemed fit to direct the State government to refund the money deposited by the allottee. While dealing with the 2G case the bench was not

[9] (2011) 5 SCC 29

unmindful of its decision in *Akhil Bhartiya Upbhokta Congress* as the decision finds mention, albeit in a different context, in paragraph 86 of the 2G judgment yet in the 2G case no direction is made for the refund of entry fees. This, of course, is not to say conclusively that the Supreme Court was not in favour of refund of entry fees to the grantees of the licences that it quashed.

The criminal case:

The judicial Review of the grant of licences/allocation of spectrum is only one part of the story. The other part relates to the criminality in the grant of licences/allocation of spectrum, dealt with in a separate, though parallel proceeding, the salient points of which are noted below.

As stated above, the highly unusual way in which licences were granted by the government did not go unnoticed. On 4 May 2009 a body called Telecom Watch submitted a representation to the Chief Vigilance Commissioner (CVC) pointing out the irregularities committed in the grant of UAS licences. Five days later one A. K. Agarwal made a complaint to the CVC highlighting the manipulations made by some of the applicants for getting the licences and how the exercise undertaken by DoT had resulted in serious loss to the public exchequer. The CVC got an inquiry made under section 8(d) of the Central Vigilance Commission Act, 2003 and a copy of the inquiry report was forwarded to the Director, CBI to investigate into the matter to establish criminal conspiracy in the

allocation of 2G spectrum under the UASL policy of DoT and to bring to book all wrong doers. On receipt of the communication from the CVC, CBI registered FIR No. RC-DAI2009-A-0045, dated 21 October 2009 against unknown officials of DoT and unknown private persons/companies and others under section 120B of the penal Code read with sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988.

On 20 May 2010, one NGO, called Centre for Public Interest Litigation filed Writ Petition (Civil) no.3522/2010 before the Delhi High Court *inter alia* alleging that the CBI was not properly investigating the case and seeking a direction to it to investigate the case properly. The Delhi High Court declined to interfere in the matter and by order dated 25 May 2010 dismissed the writ petition.

Against the dismissal of its writ petition by the High Court, Centre for Public Interest Litigation filed SLP(Civil) no.24873/2010 which, on leave being granted, was converted into Civil Appeal no.10660/2010.

Even while the appeal was pending before the Supreme Court, the Comptroller and Auditor General of India submitted its report on 8 November 2010 on the allocation of 2G spectrum. The report *inter alia* stated that in the allocation of 2G spectrum there had been a loss of approximately Rs.1.76 lakh crores to the public exchequer. The Comptroller and Auditor General of India also

reported that 85 out of 122 licences granted by DoT on 10 January 2008 had gone to applicants who did not fulfill the eligibility criteria.

On 16 December 2010, the Supreme Court passed a detailed order in Civil Appeal no.10660/2010. Paragraph 19 of the order that contains the directions to the CBI and the Directorate of Enforcement is reproduced below:

> "19(i) The CBI shall conduct thorough investigation into various issues highlighted in the report of the Central Vigilance Commission, which was forwarded to the Director, CBI vide letter dated 12.10.2009 and the report of the CAG, who have prima facie found serious irregularities in the grant of licences to 122 applicants, majority of whom are said to be ineligible, the blatant violation of the terms and conditions of licences and huge loss to the public exchequer running into several thousand crores. The CBI should also probe how licences were granted to large number of ineligible applicants and who was responsible for the same and why the TRAI and the DoT did not take action against those licensees who sold their stakes/equities for many thousand crores and also against those who failed to fulfill rollout obligations and comply with other conditions of licence.
>
> (ii) CBI shall conduct the investigation without being influenced by any functionary, agency or instrumentality of the State and irrespective of the position, rank or status of the person to be investigated/probed.
>
> (iii) CBI shall, if it has already not registered first information report in the context of the alleged irregularities committed in the grant of licences from 2001 to 2006-2007, now register a case and conduct thorough investigation with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licensees/service providers and also on the issue of allowing use of dual/alternate technology by some service providers even before the decision was made public vide press release dated 19-10-2007.
>
> (iv) CBI shall also make investigation into the allegation of grant of huge loans by the public sector and other banks to some of the companies which have succeeded in obtaining licences in 2008 and find out whether the officers of DoT were 3 signatories to the loan

> agreement executed by the private companies and if so, why and with whose permission they did so.
>
> (v) The Directorate of Enforcement/agencies concerned of the Income Tax Department shall continue their investigation without any hindrance or interference by anyone.
>
> (vi) Both the agencies i.e. CBI and the Directorate of Enforcement shall share information with each other and ensure that the investigation is not hampered in any manner whatsoever.
>
> (vii) The Director General, Income Tax (Investigation) shall, after completion of analysis of the transcripts of the recording made pursuant to the approval accorded by the Home Secretary, Government of India, hand over the same to CBI to facilitate further investigation into the FIR already registered or which may be registered hereinafter."

Following the direction by the Supreme Court, CBI proceeded with the investigation and on 2 April 2011 submitted charge-sheet under sections 120B, 468, 471 and 420 of the Penal Code and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act in respect of the UAS licences granted to Etisalat DB and Unitech Wireless on 10 January 2008. The persons cited as accused in this charge-sheet, included the then Minister of Communications and Information Technology. The learned Special Judge took cognizance of the offences mentioned in the charge-sheet by order dated 2 November 2011. On 25 April 2011, the CBI filed a supplementary charge-sheet against a number of accused under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act.

On 12 December 2011, CBI filed charge-sheet against the petitioner company, its promoters, Mr. and Mrs. Khaitan, another company, namely, Essar Teleholdings Ltd. and Mr. Ravi Ruia and Mr. Anshuman Ruia, under section 420 read with section 120B of the Penal Code. In the charge-sheet submitted against the petitioner company and other co-accused, it is the case of the CBI that the petitioner company was ineligible for grant of 21 UAS licences as it was in violation of clause 8 of the UASL guidelines being a front/alter ego/associate of the Essar Group and the Essar Group, at the relevant time, held 33% equity in Vodafone-Essar Ltd., another pan-India licensee.

On 20 December 2011, the learned Special Judge took cognizance of the offences described in the charge-sheet and framed charges against the petitioner company and the other co-accused under the sections indicated in the charge-sheet. The trial has since then proceeded and at present it is at the stage of arguments after the evidences are adduced by both sides.

Submissions on behalf of the petitioner:

Mr. Harish Salve, Senior Advocate appearing for the petitioner, in his highly persuasive way presented the case of the petitioner as one of great simplicity. He submitted that the State had made the petitioner pay a very large amount of money for giving it something which it took away from the petitioner as a result of the Supreme Court decision. It followed, therefore, that the State must refund the

money to the petitioner, logically, equitably and as mandated by the Contract Act. To a query by the Tribunal whether the petitioner could be denied the relief because it was facing criminal charges in connection with the grant of licences, Mr. Salve replied in the negative. He submitted that unlike a Constitutional Court it is not open to a civil court or a tribunal established under an Act of parliament to decline exercise of its jurisdiction, citing some self-perceived 'larger public interest'. In deciding this case, the Tribunal is bound to strictly follow the provisions of the Contract Act. To another question as to whether there is any connect or linkage between the petitioner's restitutionary claim before the Tribunal and the criminal charges on which the petitioner is facing trial before the Special Court, Mr. Salve once again replied in the negative. Learned Counsel maintained that the two proceedings are quite separate. If any wrongdoing by the petitioner is established in the criminal trial it would face the consequences, but it cannot be denied restitution on the ground of pendency of the criminal case.

Mr. Salve submitted that the case of DoT before the Tribunal and its stand before the trial court were quite inconsistent. Before the Tribunal, DoT positively resisted the petitioner's claim for refund of its entry fees but before the trial court its stand was highly ambivalent. There, it is keeping distance from the case made out by CBI against the petitioner and persistently refused to acknowledge that it was cheated by the petitioner into granting licences to it. He further submitted that

though in the Reply filed on behalf of the Union of India there was no reference to the criminal case (even though the fact was clearly stated by the petitioner in the petition filed by it), in the Sur-rejoinder filed by the Union of India the pendency of the criminal case against the petitioner is taken as one of the main pleas for denying refund to the petitioner. In the Sur-rejoinder there is a detailed reference to the criminal case. Statements made in paragraphs 3 to 10 *inter alia* allude to the charge-sheet submitted by the CBI against the petitioner, the case of the prosecution against the petitioner and clause 8 of the UASL guidelines that forms the basis of the accusations against the petitioner. In paragraphs 7 it is stated that by the CBI investigation it was established that the petitioner company "is not only an associate but an alter ego of Essar Group of Companies who in violation of clause 8 of the UASL guidelines obtained 23 (sic) licences in 2008 which fact was concealed fraudulently by the company for getting the UAS licences from DoT". Further, in paragraph 11 it is stated that in view of the charge-sheet submitted by the CBI, the matter is completely enmeshed in the criminal trial and the petitioner's action in claiming refund of the licence fee is aimed at somehow stalling and derailing the criminal proceedings against it. Mr. Salve submitted that in the Sur-rejoinder the pendency of the criminal case is the main ground taken by DoT for rejecting the petitioner's claim for refund. He further submitted that the accusation against the petitioner is that in its applications for licences it falsely and

fraudulently certified that it met the conditions prescribed under clause 8 of the UASL guidelines and thus misled DoT into granting licences to it. Mr. Salve strongly contended that the ground on which refund was being denied to the petitioner made it legitimate for it to ask the Tribunal to interpret the meaning and scope of clause 8 of the UASL guidelines, for once clause 8 is truly constructed it would be apparent that there was no violation of the provision on the part of the petitioner. Learned Counsel then proceeded to present before the Tribunal clause 8 of the UASL guidelines and to contend that the certification by the petitioner along with its applications was in complete accord with the requirements of the clause. Mr. Salve also submitted that the entire set of facts that formed the basis of the CBI case was from before fully known to DoT through several complaints from members of parliament and from some other quarters. Those complaints were thoroughly examined by DoT, and also by the Department of Corporate Affairs and it was found that there was no violation of clause 8 of the UASL guidelines in the petitioner's applications for licences. Thus, in any event there was no question of any deception or cheating. To an observation by the Tribunal whether any discussion or finding on clause 8 of the UASL guidelines by the Tribunal would not amount to preempting the proceedings of the criminal trial, Mr. Salve submitted that the interpretation of the clause falls within the special domain of the

Tribunal and it must not fight shy of addressing the issue irrespective of its impact on the criminal trial.

Mr. Salve insistently urged the Tribunal to interpret clause 8 of the guidelines for grant of UAS licence and stressed that if the true scope of the provision is clearly explained it would immediately appear that there was no violation of the clause and the accusation of cheating against the petitioner will fall to the ground.

Submissions on behalf of the Union of India:

Ms. Pinky Anand, learned Additional Solicitor General, appearing on behalf of the Union of India strongly resisted the petitioner's claim for refund of the licence/entry fees. She submitted that entry fee is the charge the applicant was obliged to pay for entering into a field that is within the exclusive privilege of the State under section 4 of Indian Telegraph Act. The entry fee is not for usage of spectrum for which there is a separate charge. She referred to a number of clauses in the UASL guidelines and the licence itself where the entry fee is mentioned with the prefix "non-refundable" and submitted that in view of the express stipulation there was no question of any refund of the entry fee.

The learned ASG submitted that the issue of refund of entry fee is settled by an earlier decision of the Tribunal and in light of the Tribunal's judgment dated 9

March 2005 in Petition no. 6 of 2005 the present petition is also liable to be dismissed.

Learned ASG next submitted that such of the grantees whose licences were quashed by the 2G judgment but who (unlike the petitioner) took part in the fresh auction as per the direction of the Supreme Court and were able to win spectrum were allowed adjustment of the money deposited by them for the quashed licences. The statements regarding set off allowed to the successful bidders in the fresh auction are made both in the Reply and the Sur-rejoinder filed on behalf of the Union of India. The Sur-rejoinder states about the order of the Empowered Group of Ministers (EGoM) dated 18 October 2012 by which it was decided to adjust the licence fees paid earlier towards the bid amount by a telecom service provider who managed to win spectrum by taking part in the fresh auction held as per the direction of the Supreme Court. In paragraph 15 of the Sur-rejoinder details are given of set-off allowed in favour of four telecom service providers who after the quashing of the licences took part in the fresh auction and were successful in getting spectrum; some of them, like the petitioner, are also accused in the criminal case and are in fact facing graver charges than the petitioner. It is stated that the petitioner did not take part in the fresh auction and thus it lost out on the chance to get any adjustment/set off. It is no longer open to the petitioner, therefore, to make any complaints and ask the Tribunal to direct refund in its favour.

Referring to the scheme of set off devised by the EGoM, learned ASG submitted that by not taking part in the fresh auction the petitioner had brought about a self-induced frustration of the contact and hence, could not claim any relief under section 65 of the Contract Act. In this regard she further submitted that even assuming that section 56 of the Contract Act applied to the facts of the case, section 65 was in two parts, restoration of the advantage or compensation for it. She submitted that the set off given to the successful bidder was in the nature of compensation and this fully satisfied the requirement of section 65.

The ASG strongly argued that it is not open to the Tribunal to go into any aspect of the criminal trial pending before the Special Court constituted under the order of the Supreme Court. But, at the same time, the learned ASG maintained that there was no connection between the petitioner's claim before the tribunal and the accusation against it in the criminal trial.

Coming to the issue of the bank guarantees and the claim of liquidated damages, if any, by the Union of India, the ASG submitted that the Supreme Court had extended the term of the licences till 15 February 2013 and the petitioner was liable for liquidated damages till that date.

Discussion:

To us it appears that submissions based on section 4 of the Telegraph Act or the characterisation of the entry fee in the UASL guidelines and the licence as

"non-refundable" is really begging the question. The submissions would have carried weight if the petitioner's licences were cancelled or terminated for any violation of the terms of the licence or were surrendered by it of its own accord. In the facts of the present case the petitioner failed to get entry into and got pushed out from the exclusive domain reserved by law for the State and the licence did not survive for placing reliance on its provisions.

The reliance on the earlier decision of the Tribunal also appears to be quite misplaced. In that case a telecom service provider, called *Bharti Infotel Limited* held basic service licences in five service areas. It *surrendered* its basic service licences in four service areas on account of the fact that its sister company, namely *Bharti Cellular Limited* which was holding licences for providing mobile services in those service areas got Unified Access Service Licence under which it could provide not only mobile services but also basic services. According to *Bharti Infotel Limited*, the licences held by it in the four service areas thus became surplus and redundant and the working of those licences would have only meant duplication of resources. It was on those facts that the Tribunal found and held as follows:

> "The real ground of surrender of the licenses would be that the petitioner does not wish to run two establishments to run the same service. Petitioner has not challenged the guidelines because its sister company Bharti Cellular Ltd./Bharti Mobile Ltd. has taken advantage of that as it migrated to UASL without payment of any additional entry fee. It may also be noticed that this sister company which was earlier providing cellular

> services could provide basic services as well without making further payment of license fee or entry fee for providing basic services. It would appear it is purely a commercial decision of the petitioner to surrender these four licenses. Petitioner is not entitled to refund of entry fee for the licenses so surrendered either in law or as per the terms of the licenses."

It is quite clear that the decision in Bharti Infotel Limited has no application to the facts of the present case.

The denial of refund to the petitioner on the ground that it did not take part in the fresh auction also appears quite anomalous. Mr. Salve strongly assailed the policy of restitution through set off restricted to those only that were able to successfully bid for spectrum in the fresh auction held as per the orders of the Supreme Court. Learned Counsel submitted that the DoT's insistence that in order to claim restitution the petitioner should have taken part and won spectrum in the later auction brings out the glaring contradiction in its stand and the case of CBI. According to CBI, the petitioner was not eligible for the grant of licence and it managed to obtain the licences by giving a false and fraudulent certificate regarding compliance with clause 8 of UAS guidelines. He submitted that by taking part in the fresh auction the petitioner would have thus further incriminated itself in the eye of CBI.

Mr. Salve further submitted that the policy of set off framed by the EGoM was wholly unreasonable and arbitrary. There could be many good reasons for a grantee of the licences that were quashed by the 2G judgment to not take part in

the fresh auction; it might have been left with no money, having spent all its resources in payments for the licences that were quashed; it might not find the spectrum that would come for much higher price in the auction as a source of profitable business in telecom services or it might have been so bruised by the previous misadventure that it might not wish to do telecom business any longer. Hence, the scheme to limit restitution through set off was based on capricious and illogical classification and was unsustainable. Mr. Salve contended that DoT cannot make any discrimination in allowing refund and since it had given set off to similarly situated persons it must also refund the petitioner's money.

Here it needs to be noted that the validity of the set off policy is being questioned for the first time. We find that after the 2G judgments, in the affidavits filed before the Supreme Court on behalf of the Union of India there is the mention of the set off policy but it does not find any mention, much less any approval or sanction by the Court in any of its orders. We are of the view that the soundness of the set off policy is not free from doubt. At any rate it is very difficult to either reject the petitioners claim on that basis or to allow it on grounds of parity.

On hearing Counsel for the parties we are inclined to accept the submission made on behalf of the petitioner that the grounds raised by DoT to deny its claim for refund are mostly misconceived, untenable and somewhat inconsistent. But that is not to say that the petitioner's claim must be allowed for that reason alone. The

petitioner's claim must withstand judicial scrutiny on its own. The primary issue before the Tribunal is not the correctness of the reasons assigned by DoT for denying refund to the Petitioner. The primary issue is the entitlement of the Petitioner to the refund, and if so, its realization through the present proceedings before the Tribunal. The question, therefore, is whether on the facts of the case the petitioner's claim of refund is sustainable before the Tribunal. This is a question of law, the answer to which has to be found regardless of the objections taken by DoT.

Nature and effect of quashing by the Supreme Court:

In order to answer the question whether in the facts of the case the petitioner's claim for refund is sustainable before the Tribunal it is essential to clearly understand the legal nature of the quashing of the petitioner's licences. Can the quashing of the licences by the Supreme Court be said to fall under any provisions of the Contract Act or was it an exercise beyond and outside the frame-work of the Contract Act?

The Petitioner's claim for restitution or refund is premised principally on section 65 of the Contract Act, 1872. Section 65 provides for such restitution when an agreement is discovered to be void, or when a contract becomes void. Hence, it is necessary to examine whether the pre-conditions for invoking section 65 exist in this case. In other words, is this a case where an agreement has been

discovered to be void, or when a contract has become void. The petitioner's licenses were "declared illegal and quashed" by the Supreme Court. Having been so quashed, can they be said to have been discovered to be void, or to have become void (within the meaning of section 65 of the Contract Act). The question assumes a broader dimension, which relates to whether the decision of the Supreme Court is at all one in the realm of contract law, or whether it is an exercise of jurisdiction vested in the Court by the Constitution of India, where the discretion of the Court is guided by well evolved administrative law principles (illegality, irrationality and procedural impropriety) and constitutional law principles (arbitrariness as a violation of Article 14).

The reason such exercise is relevant is that it affects the restitutionary remedy available to the Petitioner. If the quashing of the license by the Court is the same as becoming void within the meaning of section 65, the remedy may lie within the four corners of the Contract Act. But if, on the other hand, the entire basis of the Supreme Court's decision lies outside the Contract Act, then section 65 may not be applicable. That is not to say that restitution may not be granted as a public law remedy, but as noted above, the Supreme Court's decision is silent on this aspect, and it would not then be a matter for the Tribunal to pronounce upon.

Turning then to the decision of the Supreme Court itself, it must be noticed at the outset that the decision was rendered in Writ Petitions filed under Article 32 of the Constitution of India. The challenge was centered mainly on the manner in which the Government could transfer, distribute or alienate natural resources, the recommendation of TRAI on spectrum pricing and whether it was consistent with the decision of the Union Cabinet in 2003, the policy of first-come-first-served, and the exercise undertaken by DOT in 2007-2008 for grant of UAS licenses. *The question pertaining to whether licenses were liable to be quashed was consequential in nature.* If the entire policy and process followed by the Government were found to be vitiated, *the quashing of the licenses would be the necessary consequence. The challenge was therefore focused on arbitrariness and mala fide in government policy and processes, and not on the contract itself.*

The Supreme Court did not advert to any provision of the Contract Act. Instead, its decision had a three-fold basis:

(a) The State was duty-bound to adopt the method of auction while alienating a natural resource such as spectrum;
(b) The recommendation of TRAI on spectrum pricing was flawed, and contrary to the 2003 decision of the Union Cabinet on spectrum pricing;
(c) The entire exercise undertaken by the Government for grant of UAS licenses was discriminatory, arbitrary, capricious and contrary to public interest.

Thus, on matters of principle, policy and procedure, the Supreme Court held against the Union of India. It was illegality and arbitrariness that vitiated the entire

process leading up to the grant of license and tainted the licenses themselves, as a result of which the Supreme Court was constrained to declare the licenses illegal and quash them. The decision was principally concerned with the arbitrariness in the allocation of natural resources, arbitrariness in spectrum pricing, and arbitrariness in the procedure followed by DoT for granting UAS licenses in 2007-08. This is entirely consistent with the well settled principle that constitutional courts will not usually exercise extraordinary writ jurisdiction in contractual matters. Instances do arise where contractual rights are intertwined with issues of violation of rights of citizens by actions of the State, and in those cases, decisions of Courts may incidentally have some impact on the private rights of the parties to the contract. But writ jurisdiction involves *"a remedy under public law*"[10]. In cases where the State awards contract by tender, a public interest litigation may be filed challenging the award of contract by the State. The Court would need to ascertain that the petition has been filed bona fide and not to further the cause of an interested party, and it would need to ascertain that there is some public interest involved. Where there is an allegation of mala fides or that the contract has been entered into for collateral purposes, the Court would be justified in entertaining petition.

[10]See Mohammed Hanif vs. The State of Assam:(1969) 2 SCC 782

Thus, it is entirely possible that a license or contract may be quashed if the Court ultimately finds that the administrative process or action antecedent to the contract was arbitrary and illegal. In any event, if a license is quashed on account of the exercise of a public law (i.e. by the exercise of writ jurisdiction by a constitutional court), it is highly debatable that the quashing would attract the remedy provided by section 65 of the Contract Act.

Directions for restitution in public law proceedings are not unknown but we have not come across any case where a writ court might have based its direction for restitution on section 65 of the Contract Act. There are of course instances where a Constitution Bench of the Supreme Court[11], for directing refund of wrongly collected tax, has drawn analogy from section 72 of the Contract Act but as we shall see presently section 72 has no application to the facts of the petitioner's case. Moreover, a direction for refund outside the purview of the Contract Act and in exercise of Constitutional powers is clearly beyond the authority of this Tribunal and in that regard the petitioner must approach the Court that quashed its licences, that is, the Supreme Court and seek appropriate reliefs.

Whether facts of the case come under the Contract Act?

We have so far seen the quashing of the petitioner's licences from the perspective of Constitutional Law and Administrative Law on the basis of which

[11] Mafatlal Industries Ltd. vs. Union of India:(1997) 5 SCC 536

we come to the conclusion that restitutionary remedy under section 65 of the Contract Act may not be available to the petitioner before the Tribunal. We now propose to see the quashing of the petitioner's licences from the perspective of the Contract Act and find out whether the claim of the petitioner can be brought under the provisions of that Act.

The Indian Contract Act, 1872 contemplates a range of circumstances in which an agreement may be regarded as void, or a contract may become void. Broadly, these relate to formation defects by which consent stands vitiated, public policy rules which negate the contract, and frustration of contract. Under the Contract Act an agreement not enforceable in law is said to be void; an agreement enforceable in law is a contract; an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other, is a voidable contract and finally a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. Section 10 of the Act further defines contract, that is, an agreement enforceable by law and enumerates the elements that are essential for the formation of a contract and for want of anyone of which no contract will come into being. The section is as under:

> **"10. What agreements are contracts -** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

> Nothing herein contained shall affect any law in force in [1][India], and not hereby expressly repealed, by which any contract is required to be made in writing[2] or in the presence of witnesses, or any law relating to the registration of documents."

Section 13 then defines "consent" as agreement between two or more persons "upon the same thing in the same sense". "Free consent" is defined in section 14 as "consent" which is not caused by coercion, undue influence, fraud, misrepresentation and mistake. "Coercion", "undue influence", "fraud" and "misrepresentation" are defined in sections 15, 16, 17 and 18 respectively. Then section 19 lays down that when consent is caused by coercion, fraud or misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. Consent caused by undue influence equally renders the contract voidable at the instance of the party whose consent was so caused and the terms on which such a contract may be set aside are dealt with in section 19 A. Contracts resulting from consent caused by mistake are dealt with in sections 20, 21 and 22. Section 20 provides where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. Section 21 deals with the consequences of a mistake as to law. Section 22 provides that a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to fact.

Here it is important to note that all the elements and causes that render an agreement void or a contract voidable as referred to in the provisions of the

Contract Act mentioned above are relatable to the *formation* of the agreement/contract. The petitioner's licences are declared illegal and quashed by the Supreme Court as the Court found there were infringement of Article 14 of the Constitution and other grave illegalities in grant of the licences. But, although in a sense it relates to formation, what needs to be emphasized here is that the defects that rendered the licences illegal and liable to be quashed are totally different from the elements and causes contemplated under the Contract Act for rendering an agreement void or a contract voidable. The exercise of judicial review by the Supreme Court took place far beyond the Contract Act paradigm.

Next comes section 23. It identifies a few other causes (apart from a mistake as to a fact by both parties to an agreement, already dealt with in section 20) that render an agreement void. The marginal heading of the section is, "What consideration and objects are lawful, and what not" and it lays down that the consideration would not be lawful if, among other things, the Court regards it as opposed to public policy. The concluding sentence of the section says, "Every agreement of which the object or consideration is unlawful is void". Here it may be recalled that in the 2G judgment, one of the observations of the Supreme Court is that spectrum was given to the applicants at a very low price. Can this observation be viewed as the Court regarding the consideration for the contract (of licence) as opposed to public policy and can it be contended that the licence was thus voided

under section 23 of the Contract Act. In our view such a contention would be far-fetched and highly contrived. The observation by the Supreme Court regarding the alienation of spectrum on a very low and arbitrarily fixed price was made in a totally different context and it does not seem to have any connection with the consideration being unlawful as contemplated under the Contract Act.

The next provision of the Contract Act that needs to be considered is section 56. Section 56 is in three parts. The first part lays down that an agreement to do an act impossible in itself is void and the third part provides for compensation for loss through non-performance of act known to be impossible or unlawful. These two parts of section 56 have no application the present case and this takes us to consider the second or the middle part of the section. Section 23, as seen above, describes still born contracts or agreements that failed to qualify as contracts on account of their object or consideration being unlawful. The second part of section 56 describes contracts that get killed due to some supervening event. The second part of section 56 is as under:

> "**56.** Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

According to section 56 if the act promised under a contract that was perfectly valid at the time of its formation, at a later stage, becomes unlawful or

impossible to perform, the contract gets voided from that stage. A moment's reflection will make it clear that the facts of the case do not fit into the provision of section 56. In the present case there is no question of the act under the licence becoming impossible of performance either physically or legally. The petitioner's licence was directly quashed by the Supreme Court and that prohibited the petitioner from carrying out the activities under the licence. The position will become clear if seen from the point of cause and effect sequence. Under section 56 the cause is the act promised under the contract becoming impossible of performance physically or legally and the effect is the contract getting rendered void. In the present case the position is just the reverse; the cause is the quashing of the licence by the Supreme Court as the consequence of which the activities permitted under the licence cannot be carried on.

The matter can be looked at from a different point of view. Section 56 envisages an event taking place outside the contract that makes the performance of the act under the contract impossible (in a physical sense) or unlawful and as a result the contract becomes void. In the present case the Court quashed the licences and as a result, to carry out the works permitted under the licence became unlawful. Can it be said that on that account the licences became void? The licences did not survive to be described as void or otherwise!

Thus looked at from any angle the case of the petitioner does not fall under section 56 of the Contract Act.

The above discussion shows that the quashing of the petitioner's licences by the Supreme Court cannot be equated with a situation contemplated under section 56. Also, it would be very odd to hold that the quashing of the licences amounted to the licences being void as envisaged under section 23 of the Contract Act. Nonetheless, let us, for the sake argument, assume that the quashing of the licences and the consequent frustration of the licence contract took place under the Contract Act –section 23 or section 56 or any other provision, and then see how the petitioner's claim of restitution plays out within the framework of the Contract Act.

In India the law governing contracts is codified in the form of the Indian Contract Act, 1872. The provision concerning restitution, which with all its complexities is the subject of the Common Law in England, is contained in section 65 of the Indian Contract Act which is as under:

> "**65.** When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Here we may usefully refer to an observation in an early decision of the Privy Council, "*the plaintiff's claim for compensation rests, not on any principle or*

formula of English law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope".[12]

It also needs to be noted that the principle of *in pari delicto* (in equal fault!) which is so vital in judging many claims of restitution strangely finds no mention in the Indian Contract Act. Notwithstanding the omission from the codified law, the courts in India, from the beginning, have freely applied the maxims *ex turpi causa non oritur actio* (from a dishonourable cause action does not arise) and *in pari delicto potio rest condition defendentis* (in equal fault better is the condition of the possessor) both in cases under the Contract Act and cases outside the Contract Act. As early as in 1937, in a full bench decision by the Nagpur High Court in *Asaram and others V. Ludheswar and others*[13], Vivian Bose J in his judgment (disagreeing with the third judge and concurring with the C. J.) observed:

> "The refusal to direct restitution is not founded on any section of the Contract Act but is because of the matters with which I have dealt: public policy, *ex turpi causa, in pari delicto* and the like. If do not apply then this section at any rate is not a bar."

In 1954 a five bench decision of the Andhra Pradesh High Court, in *Budhulal V. Deccan Banking Company*[14] considered the question whether money given under a promissory note that was held to be in violation of section 15 of the Hyderabad Paper currency Act and, therefore, void in terms of section 24 of the

[12] Harnath Kaur vs. Indar Bahadur Singh:(1922-23) 50 IA 69
[13] AIR 1938 Nag 335
[14] AIR 1955 Hyd 69

Hyderabad Contract Act (section 23 of the Indian Contract Act) was recoverable under section 66 of the Hyderabad Contract Act (section 65 of the Indian Contract Act). Jaganmohan Reddy J. who wrote the leading judgment discussed the language of section 65 – "when an agreement is discovered to be void" and pointed out that in regard to an agreement that is illegal from the inception, in case the parties are aware from the beginning that it is illegal there would be no question of any *discovery* of the fact at any later stage and in such a case section 65 will have no application. Learned judge, however, explained that whether or not the parties had the knowledge of the illegality of the agreement is a question of fact. There may be a case where though the agreement is illegal from the inception, the fact of its illegality might not be realized or known to both the parties or to one of the parties. In such a case discovery regarding the illegal nature of the agreement might take place at a later stage and in that case recovery may be legitimately claimed under section 65. He observed:

> "…….The section by using the words 'when an agreement is discovered to be void' means nothing more nor less than when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the pre-existence of something which is subsequently found out and it may be observed that S. 66, Hyderabad Contract Act makes the knowledge (Ilm) of the agreement being void as one of the pre-requisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be

> void. There is nothing specific in S. 65, Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.
>
> A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void, The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this Section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such case where the owner of property transfers it to another for illegal cases, the defendant possesses an advantage over the plaintiff -- in pari delicto potio rest condition defendentis.
>
> Section 84, Indian Trust Act however has made an exception in a purpose and such purpose is not carried into execution or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor.
>
> This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that S. 65, Contract Act, is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for the subsequent discovery of that fact."

The decision in *Budhulal* is important in that it reconciles the *in pari delicto* maxim with the language of section 65, by laying down that even an agreement void *ab initio* can be "discovered" to be void, provided the object of the illegal agreement was not known to the parties at the time of entering into the agreement.

If it was so known to the parties, it cannot be said to have been "discovered", and section 65 will therefore, have no application.

The Andhra Pradesh decision in *Budhulal,* along with several other decisions of different High Courts, was noted with approval by the Supreme Court in its decision in *Kuju Collieries Ltd. V. Jharkhand Mines Ltd.*[15]. In *Kuju Collieries* the Supreme Court pointed out that section 65 dealt with an agreement and a contract separately and used the word "discovered' for the agreement and "becomes" for the contract. The Court further pointed out that a party to the contract *in pari delicto* is aware of the illegality from the stage of formation of the agreement itself and in his case, therefore, there is no question of any "discovery" regarding the illegality of the agreement at any later stage and in such case restitution cannot be claimed under section 65. In *Kuju Collieries,* the plaintiff took a mining lease from respondent no.1 and in pursuance of the lease, paid the sum of Rs.80000/- to the respondent. For some reasons the plaintiff was unable to get possession of the leased property. Hence, it instituted a suit for recovery of the leased property along with *mesne* profits and in the alternative for refund of the sum of Rs.80000/- and certain other sums. In appeal before the Supreme Court, however, the relief was confined to refund of Rs.80000/- only. An important fact in the case was that The Mineral Concession Rules, 1949 rendered any stipulation for payment of

[15] (1974) 2 SCC 533

salami illegal and, therefore, the trial court held that for that reason the lease too was illegal. The decision of the trial court was affirmed by the High Court and in appeal the Supreme Court, agreeing with the trial court observed that "the plaintiff should have been aware of the illegality of the agreement even when it entered into it and therefore section 65 of the Contract Act cannot help it". In paragraphs 4, 6, 11 and 12 of the judgment the Court observed and held as under:

> "4. The trial court held that as the plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors and their lease deed was drawn up and prepared by solicitors, there was no occasion for the plaintiff to have been under any kind of ignorance of law and as the Mineral Concession Rules of 1949 rendered any stipulation for payment of salami illegal and the lease on that basis was also illegal, the plaintiff was not entitled to claim relief under Section 65 of the Indian Contract Act. It, therefore, dismissed the suit.
>
> 5. On appeal the High Court also held that neither Section 65 nor Section 72 of the Contract Act applied to the facts of the case.
>
> 6. We are of the view that Section 65 of the Contract Act cannot help the plaintiff on the facts and circumstances of this case. Section 65 reads as follows:
>
> > When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into an agreement, known that the agreement was in

law not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties know that it was not lawful and, therefore, void, there was not contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply.

11. The Mineral Concession Rules came into force on October 25, 1949. As the lease came into force on September 7, 1950 and money was paid on that date, the fact that there was an earlier unregistered contract does not make any difference to the question at issue. Section 4 of the Mines and Minerals (Regulation and Development) Act, 1948 provides "no mining lease shall be granted after the commencement of this Act otherwise than in accordance with the Rules made under this Act, and any mining lease granted contrary to the provisions of sub-section (1) shall be void and of no effect". Under Rule 45 of the Mineral Concession Rules, 1949 "no prospecting license or mining lease shall be granted except to a person holding a certificate of approval from the Provincial Government having jurisdiction over the land in respect of which the concession is required". The plaintiff had no certificate of approval from the State Government. Under Rule 49 "no grantor of a prospecting license or a mining lease shall charge any premium in addition to or in lieu of the prospecting fee, surface fee, surface rent, dead rent or royalty specified in such license or lease". There was a stipulation for payment of a premium under the lease deed in favour of the plaintiff. Therefore, ,clearly the lease in favour of the plaintiff was contrary to the provisions of the Mines and Minerals (Regulation and Development) Act, 1948 and the Mineral Concession Rules, 1949 and as such void.

12. The further question is whether it could be said that this contract was either discovered to be void or became void. The facts enumerated above would show that the contract was void at its inception and this is not a case where it became void subsequently. Nor could it be said that the agreement was discovered to be void after it was entered into. As pointed out by the trial Court the

> plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors. So there was no occasion for the plaintiff to have been under any kind of ignorance of law under the Act and the Rules. Clearly, therefore, this is not a case to which Section 65 of the Contract Act applies. Nor is it a case to which Section 70 or Section 72 of the Contract Act applies. The payment of the money was not made lawfully, nor was it done under a mistake or under coercion.

The decision in *Kuju Collieries* has naturally been followed consistently by the different High Courts. It is interesting to note that though in *Kuju Collieries* there is no mention of the maxims *in pari delicto* or *ex turpi causa*, the High Courts have read the decision as introducing the principle of *in pari delicto* in section 65 of the Contract Act.[16] It would thus not be wrong to say that though in the Contract Act there is no mention of those maxims, *in pari delicto* and *ex turpi causa* are introduced in the law governing restitution in India through judicial pronouncements.

Let us now see the case of the petitioner in light of the *Kuju Collieries* decision. The petitioner is currently facing charges under section 120B and 420 of the Penal Code in a case relating to the grant of the licences. In case the charges are proved and the petitioner is convicted it would be plainly *in pari delicto* and in that case the decision in *Kuju Collieries* would be on all fours with the case of the petitioner and, therefore, section 65 of the Contract Act would be of no help to it.

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[16] See for instance:

i. *Maroti Ashorba Sodner V. Balaprasad Govardhandas and others*: 1982 MhLJ 255, paragraph 12
ii. *Holy Faith International Pvt. Ltd. and others v. Dr. Shiv K. Kumar*: AIR 2006 AP 198, paragraph 31
iii. *Virendra Singh V. Laxmi Narain and Another*:2007 CriLJ 2262

In order to complete the survey of the Contract Act we may now refer to sections 70 and 72. Section 70 has the marginal heading, "obligation of person enjoying benefit of non-gratuitous act" and section 72, "liability of person to whom money paid, or thing delivered, by mistake or under coercion". A bare reading of two sections is sufficient to make it clear that the provisions contained therein have no application to the facts of this case.

Conclusion:

In light of the discussions made above, we come to the conclusions:

i. The petitioner's licences were quashed by the Supreme Court in exercise of its Constitutional powers and in a proceeding of judicial review of the process followed by the Government for grant of licences. The Supreme Court order appears to be in the realm of a public law remedy.

ii. The quashing of the licences by the Supreme Court and its consequences are very difficult to fit into the provisions of the Contract Act (section 23 or section 56)

iii. In any event, no direction for refund in terms of section 65 Contract Act can be made in favour of the petitioner by the Tribunal at least until the possibility of its being *in pari delicto* is completely removed; in other words, until the petitioner is exonerated of the charges in the criminal trial.

iv. We are unable to accept Mr. Salve's submission that there is no connection between the petitioner's claim for refund before the Tribunal and the criminal proceedings being faced by it. As

pointed out above we see a direct and vital connection between the two. The criminal trial in which the petitioner is one of the accused casts a cloud over its claim for refund and until that cloud is removed the petitioner cannot invoke section 65 of the Contract Act to its aid.

v. We are also unable to accede to Mr. Salve's submission asking the Tribunal to interpret clause 8 of the guidelines for granting UAS licence and to hold that the petitioner's applications for licences were fully within the provision. That would amount to holding parallel proceedings to the criminal trial. Such a course would be totally contrary to the essence of the Supreme Court orders and the Court's intent.[17]

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[17]Hearing of this case concluded on 10 august 2015. On 8 September 2015, when the judgment in the case was almost ready, a mention was made on behalf of the petitioner seeking permission to file "Additional Written Submissions" in light of some order passed by the Delhi High Court. The permission to file any additional submission was declined but the petitioner was allowed to file the Delhi High Court Order.

By this order the High Court dismissed LPA no. 97/2013 in which the petitioner company was appellant no.3, along with two other individuals who to-gather owned the company to the extent of 97.85%. The order was passed on 21 February 2013, that is, long before the hearing of this case before the Tribunal.

From the order it appears that the petitioner company along with the two other persons, filed WP(C) No. 7050/2012 seeking from the High court "an order, direction or writ in the nature of *Certiorari* quashing/setting aside Clause 8 of the UASL guidelines, 2005 as being void for vagueness". From the other two reliefs prayed for in the writ petition it was clear that the petitioners' object was to get refund of the Entry fee/licence fee paid for the twenty one licences that were quashed by the Supreme Court. To that extent there was a clear overlap between the writ petition and the present petition that was filed before the Tribunal in May 2015. A learned single judge dismissed the writ petition. In appeal the apprehension was expressed before the Division Bench of the High Court that the Tribunal may not examine the legality of UASL Guidelines 2005 and the decision of EGOM dated 18 October 2012 as matters falling outside its jurisdiction.

The Division Bench did not accept the Appellants apprehensions saying that the Tribunal would surely examine the issues sought to be raised by the Appellants before the High Court and dismissed the Appeal observing……

> "The learned senior counsel appearing for the appellants submits that in the event of TDSAT taking a view that it cannot examine legality of clause 8 of UASL Guidelines, 2005 and / or decision dated 18.10.2012 taken by EGoM, the appellants may be rendered remediless, a situation the Court is required to avoid. We, therefore, make it clear that in the event of TDSAT taking a view that it cannot examine legality of clause 8 of UASL Guidelines, 2005 and/or decision taken by EGoM dated 18.10.2012, the appellants would be at liberty to avail such remedy as is open to

The earlier judgments:

We are mindful that earlier this Tribunal had the occasion to deal with two cases that too had their genesis in the 2G decision by the Supreme Court. The decisions in those two cases were not relied upon by either side in the present case. But for the sake of consistency, which is one of the basic requisites of any judicial proceedings we deem fit to examine the conclusions arrived at here against the reasoning on which the two decisions are based.

We find that those two cases were a few steps removed from the core questions that arise for consideration in the present case. In *Unitech*, what was in

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them in law, including approaching this Court by way of fresh writ petition against such an order of the TDSAT.

The appeal is dismissed with the above clarification."

The first thing that needs to be stated here is that the petition before the Tribunal was framed and the case was argued on behalf of the petitioner on lines entirely different from what was projected before the High Court as noted in paragraphs 11 and 12 of the order. (This may, perhaps, be the reason why the High Court order was not produced before the Tribunal in course of the hearing and it is brought to the notice of the Tribunal long after the hearing was concluded). It is to be noted that none of the ten (10) reliefs claimed on behalf of the petitioner even indirectly referred to Clause 8 of the UASL guidelines or decision of the EGoM dated 18.10.2012. It is, however, true that in course of hearing the main focus of the submissions on behalf of the petitioner was on Clause 8 of the UASL Guidelines but Clause 8 was introduced in the debate in a highly circuitous way. It was contended that one of the grounds on which the refund was denied to the petitioner was pendency of the criminal case against it based on Clause 8 of the UASL guidelines. And this gave the petitioner the right to show to the Tribunal that it never violated the provisions of Clause 8. The correctness and legality of Clause 8 was never challenged and what was contended that the petitioners' actions did not violate Clause 8 if viewed in the light of proper interpretation of the Clause.

The decision of the EGoM is neither mentioned in any reliefs prayed for by the petitioner nor it was touched upon in course of arguments on behalf of the petitioner. However, when the counsel representing UOI referred to the EGoM decision in support of its case for denial of refund to the petitioner, in rejoinder it was contended on behalf of the petitioner that the EGoM decision provided a strong case for refund in favour of the petitioner. Far from challenging the validity of the EGoM decision, it was sought to be used to bolster the petitioners' case for refund.

In the body of the judgment, we have discussed the reasons for not accepting the petitioners' request to make any pronouncement regarding its action being in conformity in Clause 8 or otherwise. The EGoM decision is also dealt with in the body of the judgment.

issue was the Inter-connect agreement it had entered into with Bharat Sanchar Nigam Limited (BSNL) following the grant of the licences by the DoT. Under the Inter-connect agreement, BSNL had set-up Ports for *Unitech* at the Points of Inter-connect in its exchanges at different places. The agreement provided (vide clause 3.5.4) that in case of any request for removal or cessation of the port by the operator, it would be required to pay one year's port charges as the cost of removal of the capacity. After its licences were quashed by the Supreme Court by the 2G decision, *Unitech* asked BSNL for removal of the ports installed by BSNL in six service areas. BSNL demanded one year's port charges as the cost of removal of the ports, as stipulated in the inter-connect agreement. *Unitech* came to the Tribunal challenging the demand[18]. The Tribunal found that the Inter-connect agreement was entered into for no purpose other than working out the authorisation to provide telecom services granted under the licences. The quashing of the licences made it both impossible and unlawful for *Unitech* to provide telecom services. Thus, the Inter-connect agreement between *Unitech* and BSNL was rendered unworkable and was discharged by frustration. In any event, in the Inter-connect agreement itself clause 8.2.1(a) provided that the agreement would be immediately terminated without any further notice in case, among other contingencies, either party to the agreement ceased to hold a licence under section

[18] Petition No. 436 of 2013[Unitech Wireless (T.N.) Pvt. Ltd. vs. BSNL & Ors.]

4 of the Indian Telegraph Act. Looking thus from any point of view, the Tribunal held, the demand of the BSNL for one year's rent as removal of port charges was not tenable and upheld Unitech's plea by decision dated 21 August 2014. In the Tribunal's judgment there is reference to section 56 of the Contract Act and a brief discussion on discharge of contract through frustration, in light of some decisions of the Supreme Court and a decision of the Delhi High Court. But the judgment mainly rests on clause 8.2.1 (a) of the agreement in terms of which the agreement got terminated. The issue of restitution did not arise in the case and does find any mention in the Tribunal's judgment. An appeal preferred by BSNL[19] against the Tribunal's judgment was dismissed by the Supreme Court at the threshold by order dated 6 February 2015.

In *S Tel* the licences that were granted to *S Tel*, before those were quashed by the Supreme Court, had enabled it to take part and win 3G spectrum in three service areas on payment of Rs.337.67 crores as fees for allocation of 3G spectrum. It needs to be made clear here that the licences, that were eventually quashed by the 2G decision of the Supreme Court had come bundled with 2G spectrum. The allocation of 3G licence on the basis of auction was a separate transaction. Nevertheless, holding a UAS or CMTS licence was vital for (i) taking part in the auction for dispensation of 3G spectrum[20] and (ii) the exercise of usage

[19]Civil Appeal Dy.No.38102/2015.
[20] Eligibility: vide clause 3.1 (i) of the NIA.

rights over 3G spectrum[21]. As a result of the quashing of its licences by the Supreme Court, S Tel lost the legal competence to use the 3G spectrum in any manner whatsoever. It represented before the government for permission for assignment of the 3G spectrum or to use it through creation of wholly owned subsidiaries. The government disregarded STel's requests and withdrew the spectrum in 2.1 GHz band earmarked to it in three service areas on the ground that the UAS licences in its name were quashed by the Supreme Court. After withdrawing the spectrum from S Tel the government put it again to auction and allocated it some other operator realizing from the next allottee full spectrum fee. In this set of facts the Tribunal *inter alia* held that the performance of the contract concerning 3G spectrum became impossible. The contract thus got discharged through frustration under section 56, calling for restitution as provided under section 65 of the contract Act. It accordingly allowed S Tel's claim for refund of the amount paid by it for allocation of 3G spectrum in three service areas[22] by the judgment and order dated 6 July 2015.

The earlier two cases are referred here in some detail to emphasise that in neither of the two cases the 2G licences quashed by the Supreme Court were in issue. In those two cases the Tribunal was not required to analyse the precise nature of the quashing of the licences. Rather, the Supreme Court decision

[21] Duration of allocation: vide clause 3.6 of the NIA.
[22] Petition No. 438 of 2014 (S. Tel Pvt. Ltd. vs. Union of India)

quashing the licenses was, in those two cases, the extraneous event which brought the cases under Section 56 of the Contract Act or the termination provisions in the Agreement. However, in this case as discussed above it became imperative for the Tribunal to examine the reasons for which the licences were quashed by the Supreme Court and to determine if the quashing of the licence by the Supreme Court is the same as an agreement being discovered to be void or a contract becoming void and if so whether the remedy under section 65 is available, even to a party to which the illegality, at least in part, might be attributable or which might be the intended beneficiary of the illegality.

In light of the discussions made above we come to the firm conclusion no direction for refund as claimed by the petitioner can be given by the Tribunal in its favour at least at this stage.

This takes us to the other relief claimed by the petitioner concerning the bank guarantees or the undertaking given by it in place of the bank guarantees. The learned ASG had claimed liquidated damages till 15 February 2013. But that is the date till when the Supreme Court permitted and not mandated the licence-holders to operate. Moreover, in the order dated 1 August 2013 the Court made it clear that the liability of the licence-holders will remain confined up to June 1, 2012. We may note here that towards the end of the hearing of the case it was stated on behalf the Union of India that up to 1 June 2012 it had claim of liquidated damages

against the petitioner amounting to Rs.58.70 crores plus the claim for licence fee. The DoT may accordingly raise its demand against the petitioner within two months from today. In case the petitioner makes payment of the demand its bank guarantees/undertaking shall stand discharged. In case, however, the petitioner opts to contest the demand, it must keep alive its undertaking to the extent of the DoT's demand.

In the result the petition is dismissed subject to the above direction in regard to the bank guarantees/undertaking given by the petitioner.

There will be no order as to costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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(B.B. Srivastava)
Member