

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated March, 2016

Telecommunication Petition No.57 of 2015

Sistema Shyam Teleservices Ltd. (Delhi Circle)	...Petitioner
Versus	
Union of India	...Respondent

Telecommunication Petition No.58 of 2015

Sistema Shyam Teleservices Ltd. (Gujarat Circle)	...Petitioner
Versus	
Union of India	...Respondent

Telecommunication Petition No.59 of 2015

Sistema Shyam Teleservices Ltd. (Tamil Nadu Circle)	...Petitioner
Versus	
Union of India	...Respondent

Telecommunication Petition No.60 of 2015

Sistema Shyam Teleservices Ltd. (U.P. Circle)	...Petitioner
Versus	
Union of India	...Respondent

Telecommunication Petition No.61 of 2015

Sistema Shyam Teleservices Ltd. (Kerala Circle)	...Petitioner
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Versus
Union of IndiaRespondent
Telecommunication Petition No.62 of 2015

Sistema Shyam Teleservices Ltd.
(Karnataka Circle)Petitioner

Versus
Union of IndiaRespondent
Telecommunication Petition No.63 of 2015

Sistema Shyam Teleservices Ltd.
(Kolkata Circle)Petitioner

Versus
Union of IndiaRespondent
Telecommunication Petition No.64 of 2015

Sistema Shyam Teleservices Ltd.
(West Bengal Circle)Petitioner

Versus
Union of IndiaRespondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE DR. KULDIP SINGH, MEMBER
HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER

For Petitioner : Mr. A.S. Chandhiok, Sr. Advocate
Mr. Amit Sibal, Sr. Advocate
Mr. Mansoor Ali Shoket, Advocate
Mrs. Vibha Dhawan, Advocate
Mr. Kunal Singh, Advocate
Mr. N. Suri, Advocate

For Respondent : Mr. Vikramjit Banerjee, Advocate
Mr. Bharat Sood, Advocate

ORDER

By Aftab Alam, Chairperson – The Petitioner, Sistema Shyam is a telecom service provider. It holds spectrums in 800 MHz in eight service areas. In each of the eight service areas the spectrums held by the petitioner are under 5 MHz and are divided into blocks that are not contiguous but are at different spots in 800 MHz band. The petitioner wants its spectrum blocks in one contiguous series for a better and more efficient use of the spectrums and to that end seeks directions to the Government to (i) give it frequencies (in the Government’s possession) that might be contiguous to some frequencies held by the petitioner **in lieu** of some other frequency held by the petitioner at a distant spot in the band and (ii) allow it to exchange frequencies with other operators even though the spectrums held by them might not be “liberlised”, having been given to them bundled with their licences under the previous regime.

The facts of the case are simple and can be stated thus. In the 2G case¹ the Supreme Court made the operative order in paragraph 102 of the judgement that contained inter alia the following directions:

“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.
- (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) xxxxxxxx
- (vi) xxxxxxxx
- (vii) xxxxxxxx”

(emphasis added)

In pursuance of the Court’s direction, TRAI made its Recommendations on Auction of Spectrum on 23.04.2012 suggesting that the reserve price of spectrums in 800 MHz and 900 MHz bands should be two times the reserve price of spectrum

¹ (2012) 3 SCC 1

in 1800 MHz. And then, on a back reference made by the Government it gave its response on 10.05 2012 in which it made the following recommendation:

“In respect of 800 MHz, the amount of spectrum available for auction in some Circles is less than 5 MHz. As such, it is not possible with this spectrum, to offer all services that a truly liberalised spectrum can. Therefore, the Authority would be open to the Government fixing the Reserve price of 800 MHz spectrum at 1.3 times the 1800 MHz reserve price. This is only where 5 MHz spectrum is not being made available. The 1.3 factor is twice the value of the unliberalised spectrum in the 1800 MHz band, established by the experts (combined price of <6.2 MHz and >6.2 MHz in the ration of 6.2:1.8) which bears a ratio of 1.3 to the recommended reserve price of 1800 MHz.”

The Government fixed the reserve price of spectrums in 1800 and 800 MHz bands in light of the recommendations made by TRAI and issued the notice inviting applications (NIA) on 28.09.2012 putting up the spectrums for auction, as directed by the Supreme Court. For this auction spectrum in 800 MHz was available in 21 out of 22 service areas; it was not available in the service area of Rajasthan. Also, in the 21 service areas where spectrum in 800 MHz was offered for sale, it was available in amounts less than 5 MHz and in spectrum blocks that were non-contiguous.

In this auction that took place in November 2012, out of the total of 295 MHz of spectrums in 1800 MHz that were offered for sale, 127.5 MHz was sold out. No bids were received for spectrums in 1800 MHz band in four service areas

(Delhi, Mumbai, Karnataka and Rajasthan). Further, no bid at all was received in any of the 21 service areas for spectrums in 800 MHz band.

After the November 2012 auction that had remained completely unproductive in regard to the spectrum in 800 MHz, the Government decided to hold fresh auction for sale of spectrum in 900 MHz band in the three service areas of Delhi, Mumbai and Kolkata; in 1800 MHz band in the four service areas in which the November 2012 auction had remained unsuccessful and in 800 MHz band in all the 21 service areas where no bid had come in the November 2012 auction. For the auction, the Government issued the NIA on 30.01 2013.

For this auction the Government reworked the reserve price for spectrums in the bands that did not receive any bids in the November 2012 auction. The case of the Government in the present proceedings is materially based on the lowering down of the reserve price of spectrum in 800 MHz for this auction. It would be, therefore, best to state in the words of the Government itself the manner in which the reserve price of spectrum in 800 MHz band was revised. In paragraphs 9 to 13 of the reply filed by the Department of Telecommunication (DoT) it is stated as follows:

“9. That, subsequently, the Government of India decided to have another round of auction in March, 2013 for auction of spectrum in 900 MHz in Delhi, Mumbai and Kolkata, in 1800 MHz band in four service areas, namely, Delhi, Mumbai, Karnataka and Rajasthan, where no bids

were received during auction held in November, 2012 and 800 MHz band in 21 Service areas.

10. That the Government of India further decided, based on the recommendation from the Empowered Group of Minister (“EGoM”), a reduction in the Reserve Price by 30% for 1800 MHz band in the service areas (i.e. Delhi, Mumbai, Karnataka and Rajasthan) where no bids were received in November 2012.

11. That in the context of fixing the Reserve Price for 800 MHz band, the EGoM noted the following:

- i. Decision of the Union Cabinet on reduction of the Reserve Price by 30% for 1800 MHz band in those service areas where no bids were received in November, 2012 auction;
- ii. The limited number of players in 800 MHz band; and
- iii. Quantum of Spectrum put for auction during November, 2012 was less than 5 MHz in all service areas and was also non-contiguous in most of the service areas.

12. That in the light of the above, the EGoM recommended two options namely:

- a. reduction of the Reserve Price by 30% from the earlier approved Reserve Price for 800 MHz band; or
- b. reduction of the Reserve Price by 50% from earlier approved Reserve Price for 800 MHz band.

13. That the Government decided, based on the above recommendation of the EGoM a reduction in the Reserve Price by 50% from the earlier approved Reserve Price for 800 MHz band (i.e. the Reserve Price fixed for 800 MHz band for auction held in November, 2012).”

Coming now to the provisions of the NIA dated 30.01.2013; the NIA described the spectrums to be auctioned in clause 2 and, in respect of 800 MHz band, it was stated in clause 2.1(b) as under:

“b) **800 MHz Auction**

- Block size shall be of 1.25 MHz (Paired). One block of 1.25 MHz spectrum signifies actual assignment of 1.23 MHz (paired) spectrum.
- Three (3) blocks each of 1.25 MHz (3.75 MHz) is being put to auction. In addition, a provision has been made for spectrum of one (1) block of 1.25 MHz, wherever available, for topping up the 3 blocks of spectrum put to auction, to meet the requirement of new entrants, if such an exigency arises.

In the Service Areas of Punjab and Andhra Pradesh, Two (2) blocks each of 1.25 MHz (2.50 MHz) is being put to auction.

No spectrum is being put to auction in the Service Area of Rajasthan.”

The NIA also gave details of the spectrum put up for auction in 800 MHz

band in the form of a table as follows:

Table 2-C		Frequency Spots in 800MHz band							
Sl. No.	Service Area	1st Block of 1.25 MHz		2nd Block of 1.25 MHz		3rd Block of 1.25 MHz		4th Block of 1.25 MHz	
		U/L	D/L	U/L	D/L	U/L	D/L	U/L	D/L
1	Delhi	841.59	886.59	842.82	887.82	829.02	874.02	NIL	
2	Mumbai	830.25	875.25	831.48	876.48	833.01	878.01	NIL	
3	Kolkata	835.17	880.17	836.40	881.40	832.08	877.08	NIL	
4	Maharashtra	830.25	875.25	831.48	876.48	833.01	878.01	NIL	
5	Gujarat	827.79	872.79	829.02	874.02	836.07	881.07	838.53	883.53
6	Andhra Pradesh	841.59	886.59	842.82	887.82	NIL		NIL	
7	Karnataka	841.59	886.59	842.82	887.82	829.02	874.02	834.54	879.54
8	Tamil Nadu	841.59	886.59	842.82	887.82	829.02	874.02	834.54	879.54
9	Kerala	841.59	886.59	842.82	887.82	829.02	874.02	830.55	875.55
10	Punjab	829.02	874.02	834.24	879.24	NIL		NIL	

11	Haryana	841.59	886.59	842.82	887.82	834.54	879.54	840.06	885.06
12	Uttar Pradesh (West)	841.59	886.59	842.82	887.82	829.02	874.02	835.77	880.77
13	Uttar Pradesh (East)	841.59	886.59	842.82	887.82	829.02	874.02	834.54	879.54
14	Rajasthan	NIL		NIL		NIL		NIL	
15	Madhya Pradesh	830.55	875.55	831.78	876.78	825.03	870.03	834.24	879.24
16	West Bengal	835.77	880.77	837.00	882.00	831.78	876.78	842.82	887.82
17	Himachal Pradesh	841.59	886.59	842.82	887.82	835.77	880.77	840.06	885.06
18	Bihar	841.59	886.59	842.82	887.82	829.02	874.02	834.54	879.54
19	Orissa	841.59	886.59	842.82	887.82	834.54	879.54	840.06	885.06
20	Assam	841.59	886.59	842.82	887.82	834.54	879.54	839.76	884.76
21	North East	841.59	886.59	842.82	887.82	834.54	879.54	839.76	884.76
22	Jammu & Kashmir	841.59	886.59	842.82	887.82	829.02	874.02	840.06	885.06

The Government reserves the right to change the above frequencies without assigning any reason at any point of time in the 824-844 MHz paid with 869-889 MHz(800 MHz band).

On the basis of the NIA dated 30.01.2013, auction was held in March 2013 in which the petitioner was the only bidder for spectrum in 800 MHz. It gave its bids in 8² of the 21 service areas where spectrums in 800 MHz were on offer. The petitioner was issued Letter of Intent on 30.04.2013 under which spectrum blocks were earmarked to it for provision of service under Unified Licence (Access Service)/Unified Licence (USAL/UL). In paragraph 2 of the letter it was stated that the Government reserved the right to change the frequency of allotment at any point over the duration of the relevant licenses if so required for harmonising bands and promoting spectrum efficiency.

On 03.10.2013, the petitioner was granted Unified License and by communication dated 09.10.2013 allocation of spectrums, as indicated in the Letter of Intent were made in its favour.

It is stated on behalf of the petitioner that in terms of the NIA, the bids were restricted to 3.75 MHz and the petitioner was, therefore, unable to secure 5 MHz spectrum required for offering next generation services as envisaged in the TRAI recommendations. Further, even the 3.75 MHz that it was finally able to get was in non-contiguous blocks of frequencies. However, the petitioner could not have then made any grievance in regard to the non-contiguity of the spectrum blocks because

²Delhi, Kolkata, Gujarat, Karnataka, Tamil Nadu, Kerala, West Bengal and UP(West)

in the NIA the spectrums being offered for sale were clearly shown to be in blocks that were non-contiguous.

The next auction of spectrum was held in the year 2015 for which the NIA was issued on 09.01.2015. Like the 2013 NIA, the NIA dated 09.01.2015 at the end of paragraph 1.3 stipulated as under:

“Frequency reconfiguration i.e. rearrangement of spot frequencies in the same band, from within the assignments made to the licensees, may be carried out, with the authorization of WPC Wing, among the licensees, only when the entire spectrum held by them is liberalized or acquired through auction conducted in 2010, 2012, 2013, 2014 and onwards. No charges will be levied for rearrangement of frequency spots.”

However, in paragraph 3.10 under the caption “Payment for making contiguous spectrum in 800 MHz band acquired in auction held in March 2013”, the 2015 NIA put the following condition:

“Regarding rate of charging for making spectrum contiguous, acquired in the auction held in March 2013, the licensee in such cases would be charged differential of the latest auction price and the March 2013 auction price on pro-rata basis on the balance period of right to use the spectrum.”

It was at this stage that the petitioner filed the present petition before the Tribunal seeking a direction to the Government to reassign the blocks/frequencies allocated to it in 800 MHz in a manner that the three blocks of the spectrum become contiguous. It also prayed that in the interim, the Tribunal should pass an *ex parte ad interim order* directing the Government to keep necessary blocks of

spectrum vacant and free from any encumbrance for creating a contiguous blocks of spectrum for the petitioner till the pendency of the present petition.

Unable to get any interim relief from the Tribunal, the petitioner filed Writ Petition (Civil) No.1383 of 2015 before the Delhi High Court questioning and seeking to challenge condition 3.10 of the NIA dated 09.01.2015 along with the clarification issued by the Government on 05.02.2015 in regard to that condition. The Writ Petition was transferred to the Supreme Court where it was numbered as Transferred Case No.42 of 2015. It appears that by the time the Transferred Case was taken up at the Supreme Court, the auction was over and the petitioner did not take part in that auction. Finally, the Transferred Case was finally permitted to be withdrawn by order dated 30.04.2015 with the following observations:

“In view of the aforesaid, the transferred case is permitted to be withdrawn with liberty to the petitioners to continue his proceedings initiate by them before the TDSAT agitating their grievance and in case, the TDSAT unsuits them on the ground that the validity of the clause in question has not been assailed, it would open to them to challenge the validity of the said clause under Article 226 of the Constitution of India.”

It is in these set of facts that the petitioner seeks the reliefs as indicated in the opening paragraph of this judgment.

Mr. Chandhiok learned Senior Advocate, appearing for the petitioner presented before us charts to show how the spectrums allocated to the petitioner

were fragmented in spectrum blocks that were non-contiguous thus compromising the efficiency of the spectrum for deployment of the next generation technology in telecom services. For example, the chart for the service area of Gujarat depicting the spot frequency positions of the spectrum blocks (after the 2015 auction) showed the petitioner holding Ch. #3 and Ch. # 4 (marked as 93 and 134) that adjoined each other; Ch. # 5, adjoining Ch. # 4 (marked 175) continued to be in possession of the Government. The petitioner had the third channel at Ch. #9, (marked as 369) several spots away from the other two channels held by it. Mr. Chandhiok submitted that if the Government gave to the petitioner Ch. #5 (marked 175) in lieu of Ch. #9 (marked as 369) the exchange would make the petitioner's three spectrum blocks contiguous, vastly improving the spectrum efficiency, without any loss to the Government.

Learned Counsel contended that the Government was obliged to facilitate contiguity in the blocks of frequencies for improvement in the efficiency of service and to make the spectrum truly liberalised for being used in any technology. In support of the contention, he relied on passages from the TRAI recommendations dated 23.04.2012 and referred to paragraph 2.34 of the Recommendations where it is recommended that all spectrums to be assigned through auction process in future should be liberalised. In other words, spectrum in any band might be used for

deploying any services in any technology. He further referred to paragraph 3.22 of the Recommendations where it said that all spectrums to be auctioned in future should be liberalised spectrum and, therefore, the block size should be such as to satisfy the needs of any technology; further that 5 MHz being the minimum of spectrum required for deployment of any technology within the allocated spectrum, all future auction must offer spectrum of at least 5 MHz in any band, unless the available spectrum itself is less than 5 MHz. TRAI further observed that the design of the block size should be such as to allow the requisite flexibility and recommended that the blocks of 1.25 MHz each would adequately meet the needs of any given situation enabling the bidder to choose the number of block as per any technology. TRAI, therefore, recommended that the bids should accordingly be per block of 1.25 MHz. However, in case of spectrums in 800 MHz and 1800 MHz, TRAI made an exception and in paragraph 3.23 of its Recommendations stated as under:

There will however be an exception to the above rule in respect of the auction relating to 800 MHz and 1800 MHz that immediately follow these recommendations. The Authority recommends that in respect of these auctions, only an amount of 5 MHz be put to auction in all Service areas. This is with a view to balancing the different requirements. Firstly, even as there is a need to offer spectrum to all aspirants in all service areas, there is also the need for setting aside spectrum in the 1800 MHz band for refarming of the spectrum in the 900 MHz band. Secondly, there is need to properly determine the full price of spectrum, which will then be the base price in the given band for the next auction whenever it takes place, with the rider that it will suitably be adjusted in the event of gap beyond one year.”

Mr. Chandhiok also relied upon paragraph 3.186 of the recommendations where the Authority suggested that spectrum trading should be allowed between spectrum holders having obtained spectrum through auction or having paid the auction determined price for the spectrum held by them, only for the limited purpose of frequency configuration (arranging spectrum in a contiguous band).

We are not impressed by the submission. The recommendations made by TRAI can never be viewed as a commitment by the Government casting any obligation upon it. After due consideration of the TRAI's recommendations and its response to the Government's back reference, the Government issued NIAs, first dated 28.09.2012 for the November 2012 auction and the second dated 30.01.2013 for the March 2013 auction. The rights and obligations of the parties must be determined on the basis of the terms of the NIA and not in light of the TRAI's recommendation preceding the NIA. No material was brought to our notice that may be construed as an obligation on the part of the Government to give to the petitioner contiguous blocks of frequencies in the 800 MHz band. On the contrary, in the NIA dated 30.01.2013, details were given of the frequency spots in 800 MHz band clearly showing that the blocks of frequencies were non-contiguous. The letter of allotment and the final allocation of frequencies were made fully in accord

with the table given in the NIA and hence, the petitioner can have no cause of grievance on that score.

Mr. Chandhiok then submitted that an exchange of frequencies would not only make the spectrum held by the petitioner more efficient but it would be also greatly to the benefit of the Government. He referred to the Consultation Paper dated 26.11.2015 issued by TRAI on Valuation and Reserve Price of Spectrum in 700, 800, 900, 1800, 2100, 2300 and 2500 MHz Bands. The Consultation Paper gives details of spectrums in 800 MHz band that remain in the hands of the Government after the March 2015 auction and also the spectrums that would come to it on expiry of licenses during May 2016 to March 2018. Table 2.4 in the Consultation Paper that is drawn up on the basis of the information furnished to TRAI by the Government gives details of total spectrum in 800 MHz band available with DoT for auction in 22 service areas. According to the Table, in a number of services areas (including Delhi, Kolkata, Gujarat, Karnataka, Kerala, UP(West) and West Bengal, where the petitioner is holding spectrums in 800 MHz band) though the Government had available with it some limited amount of spectrums, those were “unsalable due to non-availability of inter-operator Guard band”. Mr. Chandhiok submitted that swapping of frequencies with the petitioner would not only make the blocks of frequencies held by the petitioner contiguous

and consequently more efficient but it would also remove the lacuna in the frequencies held by the DoT and make the spectrum saleable and capable of fetching very substantial amount of money. As the submission advanced on behalf of the petitioner appeared reasonable, Mr. Banerjee counsel appearing for the Union of India was asked to get specific instructions on this aspect of the matter.

He has filed an affidavit on behalf of the DoT in which it is stated as under:

“6(ii). As regards the saleability or un-saleability of frequency spots in the services areas of Delhi, Gujarat and Kerala, the letters written by DoT to TRAI regarding the un-saleability of the said vacant spots (Copy of letter provided as **ANNEXURE-R/6**), it is clarified that there may be many methodologies through which the said frequency spots can be made saleable; however, the referred letter to TRAI is aimed at providing the status to the TRAI as it is so that they can analyze the issue in its entirety and make recommendations to provide the best possible solution towards making these frequency spots saleable after due process as decided by them and may include an open consultation.”

The Government is the best judge of what is advantageous for it and what is not. It is entitled to take its decisions and as rightly submitted by Mr. Banerjee, the Government cannot be compelled to do swapping of frequencies simply on the ground that the petitioner perceives the swapping as being advantageous both to itself and the Government. We are, therefore, satisfied that no case is made out for a direction to the Government to exchange with the petitioner the blocks of frequencies to make the spectrum held by the petitioner in the 8 service area contiguous.

This takes us to consider the alternative relief claim by the petitioner, that is, permission to exchange frequencies with other operators even though the spectrums held by them might not be “liberlised” having been given to them bundled with their licences under the previous regime. The case of the petitioner in this regard is based on a stipulation made in the NIA dated 30.01.2013 coupled with a development that took place during the pendency of this petition and after the March 2015 auction. Both Mr. Chandhiok and Mr. Sibal appearing for the petitioner strongly argued that the allocation of spectrum was made to petitioner on the promise that rearrangement of spot frequencies would be permissible without payment of any charges and the solemn promise made in the NIA could not be withdrawn unilaterally and arbitrarily. The allusion is to a provision in the NIA for the auction in which the petitioner got its spectrums. In that NIA, at the end of clause 1.3 it was stated as under:

“Frequency reconfiguration i.e. rearrangement of spot frequencies in the same band, from within the assignments made to the licenses, may be carried out, with the authorization of WPC Wing, among the licensees, **only** when the entire spectrum held by them is liberalized. No charges will be levied for rearrangement of frequency spots.”

It is undeniable that before the auction of March 2013 no telecom service provider held any liberlised spectrum in 800 MHz. It was the petitioner which first got liberlised spectrum in 800 MHz band by having it allocated through the process

of auction. It is noted above that the petitioner was the lone operator that took part in the March 2013 auction for spectrum in 800 MHz and got the spectrum in that band in eight service areas. Having regard to the amount of spectrum available for auction and the other restrictions imposed by the NIA, there could not be a second allottee of spectrum in 800 MHz in those eight service areas and hence, there was no possibility of any rearrangement of spot frequencies inter se the petitioner and any other operator getting spectrum in the March 2013 auction. It is thus clear that the rearrangement of spot frequencies as envisaged under the above clause would work for the petitioner only in future when some other operator got liberalised spectrum in 800 MHz band through auction or any other operator holding spectrum in 800 MHz, allocated administratively and hence, non-liberalised got it liberalised by paying the differential amount. But once there is some other operator having liberalised spectrum in 800 MHz we fail to see why the two, by mutual consent, cannot enter into an arrangement of rearrangement of spot frequencies with the view to make their respective blocks of frequencies contiguous, subject of course to the authorization of WPC Wing, but without levying any charges for the rearrangement of spot frequencies.

The DoT takes the position that the petitioner must not be allowed to improve the efficiency of the spectrums by realising contiguity of its frequency

blocks until it pays the difference between the reserve price for spectrum in 800 MHz fixed for the March 2013 auction and the price for which 800 MHz spectrum was sold in the March 2015 auction. On behalf the Dot the vast difference in the prices of fixed for and/or fetched by 800 MHz in the three auctions is shown in a table marked as annexure R-3 to the affidavit filed in course of hearing of the case.

The table is as under:

Price Comparison

S.No.	Service Area	Prices in Crores (per block of 1.25 MHz)				% of 2015 winning price to winning price of 2013
		Reserve Price (R.P.) in Nov, 2012 Auction	Reserve Price (R.P.) in Mar, 2013 Auction (same as winning price)	Reserve Price (R.P.) in Feb/Mar, 2015 Auction	Winning Price in Feb/Mar, 2015 Auction	
1	Delhi	900.98	450.49	771.25	1059.62	235.21
2	Gujarat	292.29	146.15	343.75	347.18	237.55
3	Karnataka	429.16	214.58	378.75	Unsold	-----
4	Kerala	84.89	42.45	-----	-----	-----
5	Kolkata	147.84	73.92	183.75	183.75	248.57
6	TN	397.92	198.96	450	Unsold	-----
7	UP(W)	139.63	69.82	118.75	118.75	170.08
8	WB	33.59	16.79	71.25	71.25	424.36

The DoT refers to the observations made by the Supreme Court in the 2G case that “spectrum being a scarce natural resource held by the Government of India is required to be sold by the process of auction in public interest”. It further points out that the Supreme Court “has emphasized the alienation of natural resources such as Spectrum at market prices while ensuring its efficient utilization.” It is then stated on its behalf that “it is the endeavour of the Licensor i.e. Respondent No. 1 that Spectrum be efficiently utilized and the consumer should be able to reap the benefit of the latest technologies *while ensuring, as envisaged in the Hon’ble Supreme Court Judgment 2012 (3) SCC 1 that spectrum should be at market price and nobody should get undue enrichment.* This principle is to be followed while sharing or trading spectrum, acquired through auction or by any reconfiguration/rearrangement of spot frequencies.”

The above passage from the DoT’s affidavit neatly sums up its case. Making the observations in the 2 G case as the sheet anchor of its case the constant refrain in paragraph after paragraph in the reply and in the affidavit filed on behalf of the DoT is that the petitioner got the spectrum at a much lower price and, therefore, it is not entitled to any reconfiguration/rearrangement of its frequency blocks even

with another operator unless it pays the differential price for the spectrums held by it.

We find it difficult to accept the ground advanced by the DoT to deny to the petitioner reconfiguration/rearrangement of its spectrum blocks even with another operator in terms of the clause in the NIA.

The Government fixed the reserve price of the spectrum in 800 MHz for the November 2012 auction at 1.3 times of the spectrum in 1800 MHz as recommended by TRAI because spectrum in 800 MHz available for alienation was under 5 MHz and thus not capable to offer all services as can be offered by truly liberalised spectrum. In that auction no bids came for spectrums in 800 MHz in any of the 21 service areas. For the next auction that took place in March 2013, the Government revised the reserve price of the spectrum in 800 MHz band and reduced it to 50% of the reserve price that had filed to draw any bids. In paragraph 11 of the reply filed by the DoT (extracted in the earlier part of this judgment), it is suggested that one of the reasons for lowering down the reserve price was that the amount of spectrum put up for auction during November, 2012 was less than 5 MHz in all service areas and was also non-contiguous in most of the service areas. The reason that might have weighed with the Government for lowering down the

reserve price was neither made known to the prospective bidders nor would it be of any concern to them.

The petitioner offered the reserve price as stated in the NIA and got spectrums allocated in its favour subject to the rights and liabilities as stipulated in the NIA. In the later auction, the DoT was able to sell spectrums in 800 MHz band at substantially higher rates and this makes the DoT believe that the petitioner had got spectrums at much lower rates and therefore, its rights in respect of the spectrums allocated to it need to be circumscribed regardless of the terms of the NIA on the basis of which the spectrums were allocated to it. The stand of the DoT is undoubtedly based on the laudable intent to secure as much revenue for the Government as possible but it is contrary to all canons of the law of contract.

It is well established that the terms and conditions stipulated in the NIA forming the basis of the auction constitute the terms and conditions of the contract of sale. Any right that the petitioner would derive from the terms of the agreement cannot be recalled simply because in a later auction, the DoT was able to realise much higher returns for the spectrums in the same band. This would plainly amount to re-writing the contract unilaterally.

It must, therefore, be held that the right of the petitioner in terms of the provision at the end of clause 1.3 of the NIA dated 30.01.2013 remains completely unaffected by the sale of spectrums in 800 MHz band at a much higher price in the March 2015 auction.

However, the provision in question will take the petitioner's case only as far as the plain language of the provision goes and it would give the petitioner the right of reconfiguration/rearrangement of its spectrums blocks with another operator having liberalised spectrum. But the petitioner wishes to go beyond this and asks for reconfiguration/rearrangement of its spectrum blocks even with non-liberalised spectrum held by another operator. In order to travel this extra distance, the petitioner relies upon the fact that in case of another telecom service provider, namely, Reliance Jio, the DoT allowed reconfiguration/rearrangement of its spectrum blocks with non-liberalised spectrum held by Reliance Communication.

The fact regarding reconfiguration/rearrangement of spectrum blocks of Reliance Jio came to light in course of hearing of the petition whereupon the Tribunal, by order passed on 15.01.2016 asked the DoT to clear its stand. This order is as under:

“In course of hearing, it is submitted on behalf of the petitioner that the Government has allowed the telecom operators, who were allocated spectrum in 800 MHz band in 2015 auction to exchange some of the their allocated frequencies with other telecom operators who had administratively allocated (“non – liberalized”) frequencies in 800 MHz band for the former to attain contiguity of spectrum band.

This plea was not stated in the main petition and hence, it is understandable that Mr. Banerjee may not be in a position to give a clear answer on this issue. However, on the basis of instructions received by him, Mr. Banerjee accepts that exchange of frequencies was permitted between Reliance Jio (that got 800 MHz frequencies in the 2015 auction) and Reliance Communication (that held administratively allocated 800 MHz frequency) but he cannot give details of the exchange off hand.

It will be only proper to allow Mr. Banerjee to file an affidavit giving full details in regard to the exchange, **particularly on the issue whether the DoT imposed any charges either on Reliance Jio for the exchange of frequencies or on Reliance Communication for liberalization of the administratively allocated frequencies held by it.**

The affidavit will also enclose a chart showing the position of frequencies held by the two telecom operators as well as vacant frequencies, if any, both before the exchange and after the exchange.

In case any other operators were also permitted similar exchange, the details in regard to them shall also be given.

The affidavit should be filed on 20.1.2016 when the petition will be listed for further hearing.”

(emphasis added)

As directed by the order, the DoT filed its affidavit on 19.01.2016 in which it has sought to explain at great length the manner in which the reconfiguration/rearrangement of spectrum blocks was allowed only in case of

Reliance Jio while ensuring that Reliance Communication may not derive any advantage from the exercise and the spectrum blocks held by it should continue to remain non-contiguous. However, in regard to the specific question in the above order whether the DoT imposed any charge either on Reliance Jio for the exchange of frequencies or **Reliance Communication for liberalisation of the administratively allocated frequencies held by it**, the affidavit is quite vague. In paragraph 4(ii) and 4(iv) of the affidavit, it is stated as under:

“4(ii). M/s RCOM requested for shifting their 800 MHz band carriers obtained by them in Assam and NE Service Areas, through auction held in March, 2015 on expiry of its licenses in these Service Areas. It is submitted that M/s RCOM also requested for liberalization of all of their administratively allotted carriers held in the balance 20 Service Areas. It was also submitted by M/s RCOM that necessary payments as demanded/decided by the Government for liberalizing their administratively held carriers would be made.

iv. In view of the above requests, the Department undertook the shifting/re-arrangement of carriers with the aim of making contiguous only those carriers of M/s RCOM and M/s Reliance Jio which were acquired by them through the auctions held in March, 2015. The Shifting of administrative carriers of M/s RCOM was necessitated in the process of making carriers contiguous acquired by M/s RJIL in March, 2015 auction for which their NOC was taken as it would only inconvenience them rather than providing any benefits. It is submitted that during the entire process it was ensured that the existing contiguity or non-contiguity of administratively held carriers of M/s RCOM was not altered in any manner whatsoever i.e. to say that in the whole process, it was ensured that any of the non-contiguous carriers of M/s RCOM are not provided the benefit of contiguity.”

(emphasis by DoT in its affidavit)

As may be seen, in paragraph 4(ii) it is stated that M/s RCOM submitted that “necessary payments as demanded/decided by the Government for liberalising their administratively held carriers would be made”, but there is no positive averment in the affidavit that payments for liberalisation of the administratively allocated spectrums were actually received before allowing reconfiguration/rearrangement of spectrum blocks of Reliance Jio.

Here it may be noted that clause 1.3 towards its end in the NIA dated 09.01.2015 had a similar stipulation as the one contained in the NIA dated 30.01.2013. The stipulation in the NIA dated 09.01.2015 is as under:

“Frequency reconfiguration i.e. rearrangement of spot frequencies in the same band, from within the assignments made to the licensees, may be carried out, with the authorization of WPC Wing, among the licensees, only when the entire spectrum held by them is liberalized or acquired through auction conducted in 2010, 2012, 2013, 2014 and onwards. No charges will be levied for rearrangement of frequency spots.”

In case, Reliance Jio was allowed reconfiguration/rearrangement of its spectrum blocks with the non-liberalised spectrums of Reliance Communication, the DoT clearly relaxed the above provision in the NIA in case of Reliance Jio. There does not appear any reason why the petitioner should be treated differently and the same relaxation may not be allowed in its case.

On behalf of the DoT, reliance is placed on clause 3.10 of the NIA dated 09.01.2015 for not allowing the same relaxation in case of the petitioner. In our view, the reliance placed by the DoT is misconceived as the terms and conditions of the NIA dated 30.01.2013 cannot be modified adversely to the petitioner on a much later date after the transaction under the 2013 NIA had been fully completed. We also fail to see how Reliance Jio can be said to acquire any superior rights in respect of the 800 MHz bands simply on the ground that it got allocations in its favour at much higher rates in an auction held two years after the auction in which the petitioner got its spectrum.

In light of the discussions made above, we come to the conclusion that in case the petitioner seeks reconfiguration/rearrangement of its spectrum blocks on the basis of any mutual agreement with another operator holding non-liberalised spectrum, it must be allowed by the DoT on exactly the same terms as reconfiguration/rearrangement of spectrum blocks was allowed to Reliance Jio. We direct accordingly.

In the result the petitions are allowed to the extent indicated above. 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

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