

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI

Dated 3<sup>rd</sup> August, 2018

Telecommunication Petition No. 74 of 2018

Reliance Communication Ltd.

... Petitioner

Vs.

Union of India

... Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON**  
**HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Petitioner : Mr. Salman Khurshid, Sr. Advocate  
Mr. Saket Singh, Advocate  
Mr. Chaitnanya Safaya, Advocate  
Mr. Prateek Gupta, Advocate  
Ms. Alisha Panda, Advocate  
Ms. Azra Rehman, Advocate  
Mr. Vikramaditya Singh, Advocate

For Respondent : Mr. A.P. Sahay, Advocate  
Mr. Indra Bhushan Prasad, Advocate

**ORDER**

**By A. K. Bhargava, Member:** The petitioner, Reliance Communication Ltd. is a merged entity that has acquired the Telecom business of Systema Shyam Teleservices Ltd. (SSTL). This petition has been filed by Reliance Communication Ltd. (RCL) against the Union of India in respect of the

spectrum acquired by SSTL in 800 Mhz band in March 2013 auction, with the following prayers –

1. *Strike down /quash clause No. 8 of the Guidelines for Trading of Access Spectrum by Access Service Providers dated 12.10.2015 issued by the Respondent to the extent it imposes the condition to pay the difference in March 2013 auction price and the latest auction price of spectrum held / acquired by the petitioner as it is illegal, arbitrary and highly discriminatory towards the petitioner.*
2. *Grant interim stay against the operation of Clause no. 8 of the Guidelines for Trading of Access Spectrum by Access Service Providers dated 12.10.2015 issued by the Respondent, pending disposal of the present petition.*
3. *Direct the respondent to allow the petitioner to trade its spectrum without charging any differential money in terms of clause 8 of the Trading Guidelines towards the difference in price of spectrum acquired in March 2013 auction with the latest auction price.*
4. *Pass ad-interim / interim / ex-parte order(s) in respect of above prayers.*

2. In November 2012, the respondent, Department of Telecom (DoT) had auctioned spectrum in various bands including the 800 Mhz band, in 21 Licensed Service Areas (LSAs) through the Notice Inviting Application (NIA) dated 28-09-2012. No spectrum was sold in 800 Mhz band in November 2012 spectrum auction. Subsequently, DoT decided to have another round of auction in March 2013 in various bands including the

unsold 800 Mhz band. This time the reserve price for 800 Mhz band was reduced by 50% of the reserve price fixed in November 2012 auction in all the 21 LSAs. Systema Shyam Teleservices Ltd. (SSTL) acquired 3.75 Mhz of spectrum in 800 Mhz band in 8 LSAs namely Delhi, Gujarat, Karnataka, Kerala, Kolkata, Tamil Nadu, UP (West) and West Bengal service areas at these reduced reserve price. Subsequently, there have been two more rounds of spectrum auctions in March 2015 and October 2016 for various bands including the 800 Mhz bands. The reserve price and the winning price in these subsequent auctions were much higher than the winning price of March 2013 auction.

3. In October 2015, DoT issued guidelines for Trading of Access spectrum by access Service Providers. According to the guidelines *“spectrum trading leads to greater competition, provides incentives for innovation, better/new services being available to consumers at cheaper tariffs, better choice to consumer, etc. This also facilitates ease of doing business in India by allowing free play in the commercial decisions and leads to optimization of resources apart from improving the spectral efficiency and quality of service”*.

4. As is apparent from the prayers, only grievance of the petitioner is against the clause 8 of this guideline which reads as follows

*“Only that spectrum, as specified in para 6 above, is permissible to be traded which has either been assigned through an auction in the year 2010*

*or afterwards, or on which the Telecom Service Provider (TSP) has already paid the market price as per para 24 below. In such a case, entire spectrum would be tradable. In respect of spectrum in 800 Mhz acquired in the auction held in March 2013, trading of spectrum shall be permitted only if the 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 is paid”.*

5. Mr. Salman Khurshid, learned counsel for the petitioner has argued that the clause 8 of the policy guideline - (a) is arbitrary and discriminatory (b) is in violation of Article 14 of constitution of India (c) amounts to change in NIA terms (d) has been done without consultation with TRAI. Mr. A. P. Sahay, learned counsel for the respondent has defended the policy guideline arguing that (i) clause 8 provision qua petitioner is based on reason and public interest (ii) petitioner is not prevented from trading (iii) no promise related to trading was made in NIA and no NIA conditions are violated (iv) TRAI recommendations are not binding on the respondent.

6. In this background, we now analyze the issues arising out of the condition qua petitioner in clause 8 of the Trading guidelines.

7. It is not in dispute that the respondent is the sole owner of the spectrum under question. Through the process of auction, it has given right

to use this spectrum to the licensed service provider for a certain period. Relevant NIA and license conditions govern this relationship. There is no specific averment that the respondent has altered or acted in any manner to change this contractual relationship. Spectrum Trading is the further transfer of right to use the spectrum from seller to the buyer. It is pertinent to note that neither the NIA nor the license conditions promise a right to trade. This has been facilitated by a separate guideline dated 12-10-2015. The guideline does not mandate trading and the licensee is free to exercise the option of trading as per its commercial interest. The guideline, however, does put conditions. A reading of the guideline shows that there are not one, but several conditions. Trading can be done only between two access service providers holding certain type of licenses, it can be done only in specified block sizes, it is permitted only on a pan-LSA basis and in specific case provisions of liberalization of spectrum are made applicable. Thus, merely the act of putting a condition, as in the case of the petitioner, does not imply discrimination. The test of course is that such a condition should be fair and reasonable, especially since the respondent is the "state". In this regard, the respondent has made detailed submission in its reply in para 4, 5 and 6 which we reproduce below

- "4. *That the company who would trade the 800 MHz spectrum acquired in 2013 could certainly make a wind fall gain, because*

*the true market price of that spectrum is many times higher compared to the price of the same spectrum in any other auction in which 800 MHz was auctioned : 2012, 2015 or 2016. The 800 MHz price in 2013 auction is therefore an 'outlier'. Such a situation is not warranted in the spectrum management as such asymmetry would create a non – level playing field among the Telecom operators and should be avoided in public interest.*

5. *That the respondent has taken a policy decision in the public interest while incorporating the condition in respect of spectrum in 800 MHz acquired in the auction held in March 2013 that trading of spectrum shall be permitted only if the 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 is paid. This is summed up in the Clause 8 of the Guidelines for Trading of Access Spectrum by Access Service Providers dated 12.10.2005.*
  
6. *That the Spectrum Trading Guidelines is a policy document intended to maximize the optimum use of spectrum, a scarce natural resource. The challenged provision in the clause 8 in Spectrum Trading Guidelines dated 12.10.2005 has been introduced to ensure that it is optimally and efficiently used and the Department has to ensure that undue enrichment and windfall gain of a single entity is not provided at the cost of the exchequer by spectrum trading. The additional provision inducted exclusively for March 2013 auction price in the trading*

*guidelines balances the asymmetry that Government is not deprived of its rightful revenue.”*

The respondent, as a licensor and as a custodian of valuable natural resource has a duty of doing due diligence in formulation of policy and if a classification / exception is made on this basis, it may not be viewed as arbitrary or discriminatory. Therefore, while formulating a policy involving commercial arrangements, it is not unreasonable for the licensor to consider what happens to 800 Mhz spectrum auctioned in March 2013 when reserve price was reduced across the board in all LSAs and winning prices then went up many times in March 2015 auction. As a counter to this, Mr. Salman Khurshid pointed out certain instances where reserve price was reduced for some LSAs in some auctions in different bands. Public policy such as this does not require interference in every case since the concept of trading inherently implies that one or both parties would be benefiting commercially out of the transaction and interference in every case would defeat the purpose of policy and the stated objectives like ease of doing business. However, the respondent has shown that the 800 Mhz price in 2013 auction is an “outlier” and that trading would lead to wind fall gain and that such asymmetry should be avoided in public interest. Therefore, in such a situation, we find the application of diligence by way of putting a condition as in clause 8 of the guideline as fair and reasonable.

8. On the issue of classification being discriminatory and violative of Article 14 of the constitution, Mr. Khurshid has cited (1967) 2 SCR 214 : AIR 1967 SC 1305, D. S. Reddy vs. Chancellor, Osmania University & Others. In this case, the appellant was appointed VC under sub-section (1) of section 12 of the Osmania University Act, 1959 for a fixed term. This Act was amended by the Osmania University (Second Amendment) Act, 1966 (Act 11 of 1966). Under this amendment, section 13-A was enacted to the effect that the person holding the office of VC, immediately before the commencement of the amending Act of 1966, was to hold office only until a new VC is appointed and also that such appointment will be made within 90 days after such commencement and on the appointment of such new VC and on his entering upon such office, the person holding the office of VC shall cease to hold that office. Para 43 of the judgment observes that "*this is a clear case where the statute itself directs its provisions by enacting section 13-A, against one individual viz. the appellant; and before it can be sustained as valid, this court must be satisfied that there is a reasonable basis for grouping the appellant as class by itself and that such reasonable basis must appear either in the statute itself or must be deductible from other surrounding circumstances*". The judgment then goes on to find this amendment discriminatory and violative of Article 14 of the constitution. It has been argued by Mr. Khurshid that the petitioner has similarly been

targeted and that such classification for the purpose of trading is discriminatory and violative of Article 14. We find such reasoning as misplaced. It is to be noted that no contractual right, leave alone any statutory right has been ousted through the Trading policy. The condition / classification is not without any reason and such reasons are easily deductible as discussed above. Further such classification is based on intelligible differentia. Therefore, even as per the guidance taken from this cited judgment, we find the classification / condition in clause 8 of the trading policy as sustainable. Mr. A. P. Sahay has further met with this argument of discrimination and violation of Article 14 upfront by citing the judgment in State of Orissa & Others vs. Harinarayan Jaiswal & others, (1972) 2 Supreme Court Cases 36. Para 13 of this judgment states that *“The fact the Government was the seller does not change the legal position once its exclusive right to deal with these privileges is conceded. If the Government is the exclusive owner of these privileges, reliance on Article 19 (1) (g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government – nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights”*. Mr. Sahay does not forget to remind us that the Government has exclusive right on the valuable spectrum under Telegraph Act 1885 and

that the observations in the cited judgment are directly applicable in this petition as well.

8. Mr. Salman Khurshid has also referred to a judgment of TDSAT in TP No. 57-63 of 2015 in support of the petitioner's case. This case is about providing contiguous spectrum after paying differential of the latest auction price and the March 2013 auction price. The petitioner succeeded in its challenge to this demand to the extent indicated in the judgment. DoT has appealed against this judgment and the matter is pending in the Apex Court. However, we wish to observe that both in the matter of facts and point of law, this case is different than the TP 57-63 of 2015 since the core issue is not related to NIA conditions.

9. Another argument advanced by Mr. Khurshid was that in respect of clause 8, TRAI was not consulted and hence the provision is not transparent and not sustainable. Mr. Sahay has countered by submitting that the Government is not bound to accept TRAI recommendations. On perusal, we find that the guideline itself states that the Government has decided to allow trading of access spectrum after considering the recommendations of TRAI on spectrum trading. While accepting the recommendations, details and modalities may vary. We are therefore not

persuaded to accept that on this count alone the clause 8 of the Trading guideline be declared illegal.

10. For the above reasons, the prayers made by the petitioner are disallowed and the TP 74 of 2018 is disposed of. No costs to the either sides.

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**(S.K. Singh, J)**  
**Chairperson**

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**(A.K. Bhargava)**  
**Member**