

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 10th May, 2018

Telecommunication Petition No. 63 of 2016

Sistema Shyam Teleservices Ltd.	...	Petitioner
Versus		
Union of India & Anr.	...	Respondents

BEFORE:

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

For Petitioner : Mr.A.S.Chandhiok, Sr. Advocate
Mr.Amit Kapur, Advocate
Ms. Vibha Dhawan, Advocate
Ms. Radhika Gupta, Advocate
Ms.Apoorva Saxena, Advocate
Ms.Monika Tyagi, Advocate
Mr.Tejaswi Chaudhary, Advocate

For Respondents : Mr. Apoorv Kurup, Advocate
Ms. Nidhi Mittal, Advocate

ORDER

By A. K. Bhargava, Member - This petition has been filed by M/s Sistema Shyam Teleservices Limited (referred to as SSTL hereinafter) on 6-10-2016 against a

demand notice dated 22-09-2016 issued by the respondent Department of Telecom (referred to as DoT hereinafter) for payment of Reserve Price for continuation of the services from 02-02-2012 till the date of closure of services/last valid date of license with the following prayers

(a) *Declare and hold that the impugned demand notice dated 22.9.2016 and the impugned show-cause notice dated 17.11.2014 issued by the respondent are arbitrary, wrong and illegal.*

(b) *Quash and set aside the impugned demand notice dated 22.9.2016 and the impugned show cause notice dated 17.11.2014 issued by the respondent as being arbitrary and illegal.*

1. A brief history of the case will be appropriate to recapitulate at the outset. The petitioner – M/s SSTL was granted UAS License in 21 service areas in March 2008. Pursuant to the 2G judgment, the Hon'ble Supreme Court amongst others also cancelled the 21 licenses of SSTL. The operative part of the Hon'ble supreme Court judgment dated 2.2.2012 is as under:

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

(i) *The licenses 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.

1.1 Subsequent to this judgment, on 11.4.2012, TRAI issued a direction to M/s Etisalat DB Pvt. Ltd. and M/s S. Tel whose licenses were also cancelled by 2G judgment to ensure continuity of services during the period between 2.2.2012 till 2.6.2012. This direction was challenged by S. Tel before the Tribunal vide Appeal no. 2 of 2012 and Appeal No. 8 of 2013 which were dismissed by the Tribunal on the ground that in terms of 2G judgment licensees whose license got cancelled were under legal obligation to carry out their activities till 1.6.2012 and they could not have discontinued their operation till then.

1.2 In April 2012, since the respondent (DoT) was not in a position to hold an auction within the time frame laid down by the Supreme Court in its 2G judgment, it filed an IA 5/2012 seeking extension of time to conduct the auction

informing the Supreme Court that conclusion of the auction process would take at least 400 days.

On 24.4.2012, Hon'ble Supreme Court passed the following order in the IA:

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

1) *The time specified in judgment dated 2.2.2012 in Writ Petition no. 423 of 2010 and Writ Petition no. 10 of 2011 for conducting the auction for grant of fresh licenses and allocation of spectrum is extended up to 31.08.2012. This would necessarily mean that the applicant shall have to finalise the auction on or before 31.8.2012.*

2) *The existing licenses shall be entitled to continue to operate till 7.9.2012."*

1.3 Since the DOT was not in a position to conduct the auction, it again filed an application (IA No. 8 of 2012) in August 2012 seeking further extension of time.

On 27.8.2012, Supreme Court accepted the prayer made by DoT in this IA to the extent of allowing time to it till 11.1.2013 for conducting and completing the auction in terms of the direction given by the Court on 2.2.2012 and also allowed the existing operators to operate or continue with their operations till 18.1.2013.

1.4 On 12.11.2012 and 14.11.2012, the DoT conducted the first round of auction for both GSM and CDMA spectrum. However, there was no applicant for

CDMA spectrum (800 MHz). On 8.1.2013, the respondent DOT filed an affidavit in IA No. 8 of 2012 wherein it is stated that it has decided to have another round of auction of spectrum in 800 MHz in all the 21 circles. The petitioner filed an IA No. 14 of 2013 wherein it indicated its desire to participate in the upcoming auction and inter alia sought permission of the Hon'ble Supreme Court to allow it to operate till conclusion of auction scheduled on 11.3.2013.

1.5 On 14.1.2013, Hon'ble Supreme Court further allowed the existing licensees to continue their operation till the next date of hearing which was 4.2.2013. On 15.2.2013, Hon'ble Supreme Court in IA No. 11 of 2012 filed by Vodafone, inter-alia passed the following directions:

“(i) The entire spectrum released as a result of quashing of the licenses on 2.2.2012 should be auctioned without further delay.

(iii) Such of the licensees, who continued operation after 2.2.2012, whether or not they gave bid in the auction conducted on 12.11.2012 and 14.11.2012 shall pay the reserve price fixed by the Government for the purpose of conducting auction in November 2012.

(v) The issue relating to liability of the licensees, who discontinued their operation between 2.2.2012 and this date shall be decided separately.

1.5 On 11.3.2013, auction of 800 MHz took place with revised reserve price in which the petitioner was sole successful bidder in 8 circles. While the petitioner continued providing services in these 8 circles, it discontinued its operations in the remaining 13 circles with effect from 23.3.2013. On 30.4.2013 DoT issued the LOI to the petitioner earmarking frequencies in 800 MHz which clearly provided the term of 20 years from the date of issue of LOI. On 3.10.2013, petitioner was granted Unified License in 8 circles, where it won the spectrum in March 2013.

1.6 On 17.11.2014 respondent issued impugned Show Cause Notice to the petitioner as to why the reserve price of Rs. 639.90 crores and interest thereon should not be recovered from it as per directions of the Supreme court in its order dated 15.2.2013. The petitioner submitted a detailed reply and subsequently a personal hearing was granted by the respondent. On 22.9.2016 respondent issued the impugned demand notice directing the petitioner to pay an amount of Rs. 820.5242 crores within 15 days. The impugned demand is in two parts:

- (a) Rs. 636.9 crores towards reserve price calculated from 2.2.2012 to 2.10.2013 (in 8 circles where SSSL won the spectrum in March 2013 auction) and 23.3.2013 in the remaining 13 circles and

(b) Rs. 183.6242 crores towards interest calculated from 17.11.2014 (i.e. date of issuance of Show Cause Notice) to 21.09.2016 @ SBI PLR.

Aggrieved by this demand, the petitioner filed this petition on 6.10.2016. Later the petitioner filed an M.A. No. 55 of 2017 to take on record subsequent events which was allowed to the extent that the subsequent events are taken on record. It was noted that the DOT issued a revised demand notice on 14.2.2017 wherein a total amount to be paid by the petitioner has been mentioned as Rs. 926.5089 crores (Rs. 584.94 crores as reserved price calculated from 2-2-2012 to 2-10-2013 in various circles + Rs. 341.5689 crores as interest thereon from 2-2-2012 to 2-10-2013).

2. Heard Mr. A.S. Chandhiok, learned senior counsel appearing on behalf of the petitioner who put forward very carefully calibrated arguments. His first argument was that no charges were payable by SSTL at all since the impugned demand is bad in law. In the alternative, the demands can not be raised before 18-3-2013 which is the date till when the Apex Court allowed the existing licencees to operate. Summary of his arguments is that - (a) impugned show cause notice is bad in law since it lacks basis, particulars and reasons for the

demands (b) the impugned order demands payment for “continuation of the services from 2-2-2012 till the date of closure of services/last valid date of license”. The respondent in its reply in para 12 states that the demand is for the use of spectrum. As part of the valid license terms and conditions, licensee has paid due amount of license fee and spectrum usage charges and fulfilled its obligations. The word OTSC (one time spectrum charges” is nowhere used. (c) The Apex court has explicitly mentioned that the direction regarding quashing of license will be operational after four months. Hence, till 2-6-2012, the licensee had a right to continue operating the service. This period was subsequently extended from time to time till 18-3-2013 by the Apex court. Hence no charges could be levied by the DoT before this date. (d) Licensee had no option to close the service on its own as is evident from TRAI directions which were subsequently upheld by TDSAT. Therefore, under the circumstances, levying of OTSC is not just (e) charge from 2-2-2012 in any case is not tenable. The respondent in its affidavit before the Apex court had stated that it be allowed to charge from 19-12-2012 and therefore principle of estoppel must apply.

3. Mr. Apoorv Kurup appearing for the respondent, justified the demands on the basis that (a) show cause was a proper notice detailing why, what, how of the

demand. In addition, appellant was given sufficient opportunity to represent. (b) Demand raised is in accordance with the orders of the Apex court as mentioned in the impugned order itself. (c) Dispute is regarding the starting date of raising the demand. This date has to be the date when operations were declared to be illegal. (d) extension by the court is for operations so that the services are not disrupted and does not indicate terms of extension (e) The said statement in the affidavit referred to was in the nature of a suggestion to the Apex court and cant be treated as binding. Accordingly, the principle of estoppel is not applicable.

4. Learned counsel for the petitioner Mr Chandhiok has laid much emphasis on the argument that the show cause notice and the impugned order are inadequate as they lack particulars and are bad in law. He cites **Commissioner of Central Excise vs M/S Brindavan Beverages (P) Ltd. (2007) 8 SCC 388**, Para 14 which states that *"The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice"*. We agree with the citations made by Mr Chandhiok but on closer examination do not find his allegations as noted above to

be convincing. The decision of the Apex court has been mentioned in the impugned notice which is the basis of the demand. As stated by Mr Kurup, why, what and how of the demand is made known. The appellant has been able to make a detailed response and has been given due hearing also by the respondent. The interpretation or contentions made by respondent in quantifying the demands may be faulted with, but we are not persuaded to fault the impugned order on procedural grounds.

5. The main issue here is the starting date for raising the demand. The Apex court order dated 15-2-2013 specifies that *“Such of the licensees, who continued operation after 2.2.2012, whether or not they gave bid in the auction conducted on 12.11.2012 and 14.11.2012 shall pay the reserve price fixed by the Government for the purpose of conducting auction in November 2012.”* The petitioner falls into this category of licensees and accordingly is required to pay reserve price as per this order. However, this order does not specify from which date this price is to be paid.

6. Mr. Chandhiok has aptly cited the judgment **Goan Real Estate & Construction Ltd. Vs UOI 2010 (S) SCC 388** which states in para 31 that *“an order*

of a court must be construed having regard to the text and context in which the same was passed. For the said purpose, the judgment of this court is required to be read in its entirety. A judgment, it is well settled, cannot be read as a statute. Construction of a judgment should be made in the light of factual matrix involved therein". We look at the issue of timelines for alleged demand in this light.

6.1 We start with the judgment dated 2-2-2012 which gives directions in terms of timelines

"(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."

This clearly indicates that the licenses and subsequent allocations of spectrum that were declared illegal and were to be quashed were to remain operative till 1-6-2012. Terms and conditions under which license and spectrum can remain operative are that the obligation regarding license fee and SUC is fulfilled and no other charge like one time charge is mentioned that can be fastened for continuing the operation. In fact, the term "operative" indicates continuity and

absence of vacuum. Respondent relies on 2-2-2012 being the date as start of “illegality” and therefore being the basis of charging reserve price from that date. However, reading clause (i) and (ii) of the operative part of the order together, it is apparent that license as well as allocation of the spectrum remained legally operative under court order till 1-6-2012. Accordingly, there appears to be no basis for levying one time charge till 1-6-2012.

6.2 We further note that vide order dated 24-4-2012, the Apex court directed that the existing licensees shall be entitled to continue to operate till 7-9-2012. This period is further extended vide order dated 27-8-2012 wherein the Apex court *inter alia* allowed the existing licensees to continue to operate till 18-01-2013. Period between 18-01-2013 to 15-02-2013 is covered by the Apex court order dated 14-01-2013 wherein it was directed that “the existing licensee are allowed to continue their operations till the next date of hearing”. It is thus clear that the existing licensees were allowed to “continue to operate” under the Apex court’s order and no one time charge could be levied by the respondent as discussed in para 6.1 above till **15-2-2013**.

6.3 The judgment dated 15-2-2013 refers to the affidavit of Shri R. Chandrashekar Secretary DoT, filed on behalf of the respondent. We look closely at this affidavit dated 8-1-2013 in IA 8 of 2012 in WPC 423 of 2010. Para 15 of this affidavit states as follows -

"The Government of India is committed to ensuring that such auction is conducted fairly and impartially and in a manner that all eligible persons can participate in the auction in keeping with the principles enunciated by this Hon'ble Court in its judgment dated 2.2.2012. It is respectfully stated that existing operators whose licenses stand quashed may or may not evince interest in such an auction if they are not allowed to offer their services pending conduct of such an auction and this may impact the discovery of an optimal price for spectrum. These existing operators have been permitted, by the order of this Hon'ble Court, to operate till 18.1.2013. In the event that this Hon'ble court is inclined to continue to permit these existing operators to offer services till the commencement of operations by the successful bidders in the proposed auction, the Government of India respectfully suggest that this Hon'ble Court may impose a condition that such operators will be liable to pay the spectrum allotted to them, the price discovered for such spectrum in the proposed auction or the reserve price, whichever is higher, with effect from 19.12.2012". (emphasis supplied)

On the basis of this affidavit, Mr. Chandhiok invokes the principle of estoppel. He cites *Mrs. Madhulika Srivastava & Anr. vs Union Of India & Ors 2010 (166) DLT 210*, which states that -

"In our country, estoppel has been treated as a rule of evidence and given statutory recognition in Section 115 of Indian Evidence Act. The essence of the principle is that a person will not be allowed to plead the contrary of a fact or state of things, which he has formally asserted by words or conduct. In other words, the person is not allowed to say one thing at one time and opposite of it at another time. It means that a man is estopped from denying or withdrawing his previous assertion or from going back from his own act, even if it be to tell the truth."

Mr. Kurup strongly refutes this and cites **Pratima Chowdhury vs Kalpana Mukherjee & Anr (2014) 4 SCC 196** which states as follows -

"It needs to be understood, that the rule of estoppel is a doctrine based on fairness. It postulates, the exclusion of, the truth of the matter. All, for the sake of fairness. A perusal of the above provision reveals four salient pre conditions before invoking the rule of estoppel.

- (i) Firstly, one party should make a factual representation to the other party.*
- (ii) Secondly, the other party should accept and rely upon the aforesaid factual representation.*
- (iii) Thirdly, having relied on the aforesaid factual representation, the second party should alter his position.*
- (iv) Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position.*

Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position."

Mr. Kurup asserts that in view of the conditions laid down as stated above, principle of estoppel is not applicable in this case. We agree with Mr. Kurup and also with his averment that the statement made in the affidavit was in the form of a suggestion only (and therefore not binding). While we agree that it was only a suggestion, we also note the intent behind the suggestion, which is that a cost be allowed in case such licensees are allowed to continue to operate further. We also note that no retrospective effect is mentioned or even alluded here. Therefore, position of the respondent that this demand be levied retrospectively from the date of declaration of illegality i.e. 2-2-2012 cannot be sustained.

6.4 In view of the above, we find that the demand can be levied only from 15-2-2013 (date on which the Apex court passed the order) and not before. Mr. Chandhok has also argued that the Apex court allowed SSTL to continue to operate without any condition imposed in 8 circles as per subsequent order dated 13-3-2013 passed in IA 14/2013 and that reading both the orders together, no further charges can be levied for those 8 circles. We do not agree with Mr.

Chandhiok's contention. The order of the Apex court regarding continuation at a cost is prior to the order passed on 11-3-2013 and is not nullified by the later order dated 11-3-2013. In fact, the issue of cost is neither averred nor discussed there. Thus reading together both the orders, SSTL could continue but at a cost as per the order dated 15-2-2013.

7. This brings us to the question of end date of such demand. For these 8 circles where SSTL won the spectrum, DoT has charged up to 2-10-2013 when it issued a new license to the petitioner. We note here that the relevant date is not the date of issue of license but the date from which it got the allocation of spectrum on regular basis in 8 circles. We further note that an L.O.I was issued for 8 circles on **30-4-2013** which provided that *"the date of issue of this LOI is the effective date for reckoning the period of 20 years for which the spectrum has been acquired by you through auction"*. Since the auction amount as per LOI is paid for, any other charge for the spectrum beyond 30-4-2013 would be a case of additional, undue and unjust charge. Therefore, we reckon that the respondent can charge in respect of 8 circles only up to 30-4-2013 and not beyond. Further,

for the remaining 13 circles, the end date has to be the date of stopping operations viz. 23-3-2013.

We thus find that the respondent is entitled to charge reserve price for 800 MHz spectrum from 15-2-2013 to 30-4-2013 in respect of 8 circles and from 15-2-2013 to 23-3-2013 in respect of the remaining 13 circles.

8. In the SON dated 17-11-2014 and the impugned demand dated 22-9-2016, interest has been calculated from 17-11-2014 @ SBI PLR. Subsequently, in the revised demand notice dated 14-2-2017, interest has been demanded from 15-2-2013. Mr. Chandhiok has argued that this interest demand is arbitrary and without any basis on the grounds that (a) Apex court has never directed payment of any interest in its order date 15-2-2013 (b) there is neither any contractual right nor statutory right (c) No liability accrues when the demand has not been crystalized (d) DoT is itself liable for delay in issuing the demand notice (e) respondent cannot take benefit of its own wrong and cannot revise the interest component while revising the demand once the matter is *sub-judice* before the Tribunal.

In case a party fails to make the payment, interest is generally justified from the date when the amount becomes due and payable. In this regard, petitioner has made following submission in para 59 I of the petition

“no interest could have been levied from 17-11-2014 i.e. the date of issuance of show Cause Notice as liability to pay interest will arise only when the party fails to make the payment within the stipulated period from the date when the demand became final and payable. In this case the final demand was finally adjudicated and issued on 22-9-2016. Therefore, no interest could be levied by the Respondent for the period prior to that”.

In reply, the respondent has denied contents of 59I and submitted that -

“even after giving full opportunity to the petitioner to make the payments as required by the order dated 15-2-2013 passed by the Hon’ble Supreme Court, the Petitioner refused to do so. The imposition of interest, therefore, is clearly due to the intransigence of the Petitioner in fulfilling its obligations, and not due to any delay caused by the Respondent.”

From the above, we have already noted that the demand could have been issued by the respondent any time after 15-2-2013. However, respondent for its own reasons has chosen to issue the show cause notice only as late as 17-11-2014. Hence no amount could have been payable before 17-11-2014. Further, the SCN

had given to the petitioner a time of 21 days from the date of issue of the show cause notice to explain why principal and interest is not to be recovered from him. Thus no amount would have been payable before **8-12-2014**. SSTL filed its detailed reply on 6-1-2015. Thereafter, a number of events have happened leading to delay for which both sides must share responsibility and the only comment we can make is that the due process of law has taken place with usual element of delay. Under the circumstances, earliest date from which the interest could have been charged is 8-12-2014. Accordingly we allow interest @ SBI PLR from 8-12-2014 till the date of issue of this order. We also set aside the impugned orders and direct the respondent to issue revised demand in accordance with our observations in para 7 and 8 preferably within 4 weeks from the issue of this order. We further direct that the petitioner be allowed a time of 3 weeks from the date of issue of the revised demand to make the payment. If the petitioner fails to make the payment within the stipulated time, respondent will be entitled to charge interest for the further delay.

9. To summarize, we direct as follows:

(a) Respondent is entitled for payment of Reserve Price for continuation of services as follows -

(i) For 8 circles (Delhi, Gujrat, Karnataka, Kerala, Kolkata, TN, UP(W) & WB) from 15-2-2013 to 30-4-2013

(ii) For remaining 13 circles from 15-2-2013 to 23-3-2013

(b) Respondent is allowed to charge interest from 8-12-2014 till the date of issue of this order.

(c) In view of the above, impugned orders are set aside. Respondent is directed to issue revised demand in accordance with the directions (a) and (b) above, preferably within 4 weeks of issue of this order.

(d) Petitioner will be allowed a time of 3 weeks from the date of issue of the revised demand to make the payment. If the petitioner fails to make the payment within the stipulated time, respondent will be entitled to charge interest for the further delay.

Telecom petition 63 of 2016 along with all applications is disposed of in above terms. No cost to either side.

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(S. K. Singh, J)
Chairperson

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member