

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

Dated 23rd December, 2020

Telecom Petition No.21 of 2019

Bharti Airtel Ltd. & Anr.Petitioners

Vs.

Union of IndiaRespondent

Telecom Petition No.22 of 2019

Bharti Airtel Ltd. & Anr.Petitioners

Vs.

Union of IndiaRespondent

BEFORE:

HON'BLE MR.JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

For Petitioners : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Harsh Kaushik, Advocate
Mr. Abhay Chattopadhyay, Advocate
Ms. Nikita Chitale, Advocate
Mr. Shikhar Singh, Advocate

For Respondent (UOI) : Mr. Dhruv Tamta, Advocate

ORDER

By S.K. Singh, Chairperson – Both the petitions were filed on 18.04.2019 raising similar issues in respect of several provisions/conditions subject to which the respondent has conveyed through letter dated 10.04.2019 (**Annexure P-1**) in both the petitions, approval of the competent authority to take on record the transfer/merger of the demerged undertaking of M/s Tata Teleservices Ltd.(TTSL), the transferor company to M/s Bharti Airtel Ltd. (BAL, the transferee Company-I) and Bharti Hexacom Ltd. (BHL or the transferee Company-II) in T.P. No.21/2019. In T.P. No.22/2019, the conditional approval of the competent authority is to take on record the transfer/merger of the demerged undertaking of M/s Tata Teleservices (Maharashtra) Ltd. (TTML or the transferor Company) with M/s Bharti Airtel Ltd. (BAL or the transferee Company).

2. All the parties have been heard in detail. This judgment and order shall govern both the petitions. For the sake of convenience, facts have been referred from the records of T.P. No.21/2019 unless indicated otherwise. The main prayers are issuance of an order to set aside the impugned conditions, i.e. Condition No.(c), (e), (f) and (g) as well as Annexure IV and Annexure V as contained in the communication dated 10.04.2019 (**Annexure P-1**). Additionally, petitioners have

prayed for setting aside/quashing the impugned demand notices dated 22.06.2018 and 26.06.2018 (**Annexures P-2 and P-3** respectively) issued by the respondent in respect of OTSC for the erstwhile Chennai LSA. Petitioners have also sought as final relief and also as interim relief a direction upon the respondent to take on record the merger of Petitioner No.1 and Petitioner No.2 companies with the “Demerged Undertaking-I” of TTSL and “Demerged Undertaking-II” of TTSL, respectively; an order to allow the petitioners to operationalise the entire spectrum of the Demerged Undertakings-I and II of TTSL and to permit the petitioners to make necessary filings with the Registrar of Companies and any other appropriate authorities in respect of the merger.

3. At the outset, it is useful to record that after hearing both the parties, vide order passed on 02.05.2019 this Tribunal modified/stayed the impugned conditions by way of interim relief and directed the concerned authorities of the Union of India to take the merger of two companies and licence on record subject to the modified conditions and the final result of the petition. That order also highlights the main issue to be determined in these petitions and therefore, Para 3 to final Para 12 of the same are extracted hereinbelow.

“**3.** Learned senior counsel for the petitioner submits that in similar circumstances this Tribunal has placed reliance upon interim order of High Court of Bombay dated 28.1.2013 and passed interim

orders such as one dated 10.4.2018 in T.P.No.55 of 2018 (Bharti Airtel Limited Vs. Union of India) and another dated 30.8.2018 in T.P.No.181 of 2018 (Bharti Airtel Limited & Anr Vs. Union of India) [(part of Annexure P-4(colly)]. He also pointed out that those orders also refer to some other interim orders passed by this Tribunal such as order dated 9.2.2015 and 25.1.2017 wherein the interim order of High Court of Bombay had been noticed and referred to. He submits that similar conditions such as in (c) requiring submission of Bank Guarantee towards OTSC have been stayed in many cases on account of stay orders passed by Bombay High Court and other High Courts. In respect of condition(e), the submission is that the vague condition requiring payment of all demands including OTSC in respect of erstwhile Chennai LSA is prima-facie bad because demands which have been stayed by Courts or which cannot be realized as per undertaking given to Courts cannot be forced to be paid by way of a general condition. Similar is the grievance in respect of conditions (f) and (g) requiring undertakings.

4. So far as requirement of undertaking as per condition (f) & (g) is concerned, this Tribunal has also asked the petitioners in other cases to submit the undertaking but with a clarification.

5. So far as conditions (c), (f) and (g) are concerned, there is no difficulty in following the various interim orders available on record and we shall order accordingly in this matter also. However, condition no.(e) is materially different in as much as it includes an OTSC demand of Rs.1287.97 crores raised upon M/s.BAL, through a letter dated 26.6.2018 (Annexure P-3), for the extended period of licence from 30.11.2014 to 27.09.2021 in respect of erstwhile Chennai LSA. This condition requires payment of this entire amount before grant of approval of transfer/merger by the competent authority.

6. Learned senior counsel for the petitioner has submitted that the second prayer in this petition is for quashing of the aforesaid demand notice dated 26.6.2018 and there is a separate interim prayer for staying the operation of this notice. This demand has been assailed on large number of grounds including delay, estoppels, lack of clear policy decision by the Government for raising such a

demand and that the demand has been calculated in absence of any rational basis because after merger of Chennai LSA with Tamil Nadu LSA in 2007 without any condition for OTSC, there has not been any auction determined prices for Chennai LSA which ceased to exist since 2007 on account of Government's own policy decision taken in public interest.

7. In reply, learned counsel for the respondent has submitted that the earlier interim orders were passed in respect of similar conditions which have been impugned by the petitioner also, but the demand of OTSC for the erstwhile Chennai LSA is different and justified in the light of general decision of the Central Government to demand OTSC in the event of fresh licence or extension of old licence. He placed reliance upon text of a press statement on the policy for spectrum assignment and prices dated 29.1.2011. He also submitted that the demand is justified in the light of judgment of the Hon'ble Supreme Court in what is known as '2G' case. On instructions, he submitted that against a similar demand M/s.Aircel Ltd could not get any relief from Madras High Court and although the matter is sub-judice before the Hon'ble Supreme Court, M/s. Aircel Ltd has paid Rs.250 crores as a part of the said demand. M/s. Vodafone Essar Cellular Ltd., by volition has paid Rs.2000 crores for meeting partially a similar condition including a demand of OTSC for the extended period of Tamil Nadu LSA for Rs.939 crores.

8. In reply learned senior counsel for the petitioners has submitted that for the entire Tamil Nadu LSA which includes Chennai LSA since 2007, the petitioners were served with a demand of OTSC which is subject matter of writ petition pending in the Hon'ble Bombay High Court in which interim protection is operating in favour of the petitioners. According to him, if OTSC as a basic concept is struck-down, the demand of erstwhile Chennai LSA will have to go. According to him, the demand is arbitrary and without any basis and further, its quantification is equally baseless in absence of availability of any market driven price of the spectrum for the erstwhile Chennai LSA.

9. Considering the case of both the parties in respect of demand of OTSC for the erstwhile Chennai LSA, in our considered view, petitioners have made out a prima-facie case for interference, at least in part. This demand, which appears as a part of the condition no.(e) which requires its immediate payment before approval, shall remain stayed until further orders provided the petitioners furnish with the Registry of this Tribunal Bank Guarantees for 50 per cent of the said demand within four weeks.

10. In the light of aforesaid discussions, we direct the concerned authorities of the Union of India to take the merger of two companies and licence on record, subject to undermentioned conditions and final result of this petition:

1. The petitioner will abide by rest of the terms of the conditions imposed upon it by the impugned notification contained in Annexure P-1 subject to the following modifications:

(i) The stipulation as made in condition (c) of the letter will remain stayed because it appears contrary to the interim order passed by the Bombay High Court.

(ii) The condition (e) will relate to demands which are enforceable and not stayed by any Court of law. So far as OTSC demand of Rs.1287.97 crores in respect of erstwhile Chennai LSA is concerned, the same will remain stayed provided the petitioner complies with the condition and files with the Registry of this Tribunal Bank Guarantees for 50 per cent of the said amount within four weeks' from today.

(iii) The petitioner will submit the undertaking as demanded in conditions (f) and (g) of the impugned order. But it is made clear that any condition of the undertakings or any omissions therefrom shall be without prejudice to the rights and conditions of the Parties before the Tribunal and the validity of the conditions of the undertaking/omissions therefrom will abide by the final outcome of the petition.

11. Reply may be filed within four weeks. Rejoinder, if any, may be filed within two weeks thereafter.

12. Put up the matter before the Registrar's Court on 18.7.2019 for completion of pleadings and for passing necessary orders to make the case ready for hearing.”

4. On the prayer of the petitioners some corrections/clarifications were made in the interim order on 06.05.2019. It was made clear that the petitioners will be free to operationalise the spectrum and undertake other consequential activities. SLP preferred by the Union of India against the interim order was dismissed on 18.11.2019. The petitioner BAL has furnished with the Registry of this Tribunal, Bank Guarantees for 50% of the demand of OTSC relating to erstwhile Chennai LSA and the interim order has taken effect. As desired by the Hon'ble Supreme Court, the matters have been heard for final disposal with all possible expedition.

5. There is no dispute that respondent have framed merger guidelines dated 20.02.2014 which permit merger of different categories of licences and authorizations. In May, 2018, the petitioner and TTSL filed the proposed scheme of arrangement before the Hon'ble NCLT and then intimated the respondent with a view to seek approval to the proposed merger. Sanction to the scheme of amalgamation was granted by NCLT on 30.01.2019. Soon thereafter, on 12.02.2019 the petitioner and TTSL requested the respondent to take the merger on

record. In principle approval of the merger was communicated vide letter dated 10.04.2019(**Annexure P-1**) but with several conditions. As noted earlier petitioners are aggrieved by some of the conditions, particularly Condition No.(c) which is a demand for Bank Guarantees(BG) against the disputed OTSC amount for the concerned LSAs. It is the petitioners' case that the demands on this account amount to Rs.7119.93 crores out of which Rs.6659.99 crores is against Airtel and Rs.459.94 crores against Hexacom for the Rajasthan LSA and that all these demands are covered by order of stay passed by the Hon'ble High Court of Bombay on 28.01.2013 in W.P.(L) No.184/2013. For this reason, according to petitioners, such a condition is bad and impermissible. Before coming to the most contentious issue in respect of Condition (e), it is better to clear the deck of two other conditions – (f) and (g). As per Condition (f), the respondent has demanded as follows:

“An undertaking in the prescribed proforma enclosed as **Annexure – IV** shall be submitted by M/s BAL to the effect that any demand raised/to be raised for the pre-merger period by any wing of the Department on M/s BAL and M/s TTSL in respect of UL (Access Service Authorisations)/UAS Licenses issued to M/s BAL and M/s TTSL for the LSAs of Andhra Pradesh, Bihar, Delhi, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Kolkata, Madhya Pradesh, Orissa, Punjab, Tamil Nadu (including Chennai), Uttar Pradesh (E), Uttar Pradesh (W), and West Bengal shall be paid by M/s BAL.”

6. In respect of the above condition, the petitioners have strong objection because of the word ‘any’ before the words ‘demand raised/to be raised for the principal merger period.....’ According to petitioners, the undertaking can be only in respect of admitted dues or lawfully payable dues which have not suffered judicial intervention on account of challenge to their legality and correctness.

7. Condition (g) makes the following demand:

“An undertaking in the prescribed proforma enclosed as **Annexure – V** shall be submitted by M/s BHL to the effect that any demand raised/to be raised for the pre-merger period by any wing of the Department on M/s BHL and M/s TTSL in respect of UL (Access Service Authorisations)/UAS Licenses issued to M/s BHL and M/s TTSL for Rajasthan LSA shall be paid by M/s BHL.”

8. This condition is similar in effect as Condition (f). Under both the conditions, the proforma of the undertaking have also been prescribed and enclosed as Annexures IV and V respectively. The objection to the Condition (g) and to Annexures IV and V are same or similar as directed against Condition (f) which has been noted above.

9. The interim order passed in these matters in respect of these three conditions has already been extracted.

10. Respondent had imposed *inter alia* identical conditions, other than the Condition (e) pertaining to Chennai LSA OTSC, while granting in principle approval for mergers of certain ISP licensee companies with Airtel and/or Hexacom. Such conditions were challenged by the petitioners along with other concerned entities before this Tribunal vide T.P. No.56/2015, T.P. No.6/2017, T.P. No.55/2018 and T.P. No.181/2018. Those petitions were heard and a judgment was passed in favour of the petitioners on 19.03.2019. However, on account of inadvertent mistake and confusion some of the issues arising on account of the impugned conditions were not dealt with in the March, 2019 judgment (**Bharti Airtel & Ors. Vs. Union of India**). This led to filing of review petitions by those petitioners that were disposed of by a common judgment dated 31.07.2019. The March, 2019 judgment dealt only with a condition relating to demand towards the differential entry fee. That demand contained in Condition (a) in that case was found to be without any basis or justification and was accordingly set aside. By the July, 2019 judgment this Tribunal considered the validity of conditions similar to Condition (c), (f) and (g) herein along with relevant clauses in merger guidelines dated 20.02.2014 which were relied upon to support the aforesaid conditions and

hence there was a prayer to quash such clauses in the guidelines or hold them inapplicable. While disposing of the review applications, this Tribunal held that the respondent is not entitled to seek BG in respect of those OTSC demands in respect of which Hon'ble Bombay High Court has directed the respondent not to take any coercive action. In respect of the undertakings of similar sweeping nature arising from Conditions Nos.(c) and (e) in those cases, this Tribunal did not find it necessary to quash or edit the undertaking but proceeded to hold that notwithstanding anything contained in the impugned undertaking, any condition of the undertaking shall be without prejudice to the rights and contentions of the parties before a Court of Law and the validity of such conditions of the undertaking shall be subject to the outcome of the judicial process. It was also clarified that regardless of the term "all dues", "there is no doubt that the respondent can receive only lawful dues and that such dues have to be in consonance with the rights of any party to seek legal remedies."

11. Relief was also granted with respect to prayer for taking on record the merger keeping in view an interim order to that effect passed in those cases.

12. It is thus clear that the July 2019 judgment discussed above fully applies in the present case and supports the petitioners contention raised for challenging

Conditions (c), (f) and (g) as well as the formats of undertaking prescribed through Annexures IV and V of the impugned communication. This is notwithstanding clauses 3(i) and 3(m) of merger guidelines on which reliance has been placed to justify the conditions of BG for the OTSC dues. The provisions in the guidelines need not be formally quashed and it is sufficient to declare that they will not be applicable to circumvent and overreach the judicial orders passed by the Hon'ble High Court of Bombay. As a matter of fact on behalf of respondent Union of India also there is no arguments to the contrary and it is an accepted position that the petitioners are entitled to similar reliefs as was granted by this Tribunal by July 2019 judgment and such relief effectively takes care of the objections raised against Conditions (c), (f) and (g) in these petitions. Learned counsel for the Union of India, however, underlined the fact that the Union of India has preferred an appeal against the aforesaid March and July 2019 judgments and the same is pending in the Hon'ble Supreme Court. It is also noted that there is no interim order against those judgments and hence they are required to be followed as a precedent. Accordingly the claims of the petitioners in respect Conditions (c), (f) and (g) are allowed in terms of the said judgment.

13. The main issue that now remains to be decided is in respect of Condition No.(e) pertaining to the Chennai LSA OTSC. As noted earlier, this condition is on

account of impugned demand contained in **Annexures P-2** and **P-3**. A perusal of these two documents, however, shows that the demand dated 26.06.2018 (**Annexure P-3**) explicitly mentions that this document is in supersession of the office letter of even number (No.1022/06/2011-WR) dated 22.06.2018. In other words letter of even number dated 22.06.2018(Annexure P-2) stand superseded with issuance of Annexure P-3 on 26.06.2018. Both the letter bear the same number but different dates. The only difference in the two letters is the fact that in **Annexure P-2** towards the end there is a line which reads – “the demand is subject to outcome of court decision on the issue”. But in **Annexure P-3** this line has been omitted. Otherwise both the documents are same in respect of subject as well as the contents. Since **Annexure P-2** has been superseded, therefore, the challenge to this document is unnecessary and hence only Annexure P-3 shall be treated as the demand under challenge in this case.

14. A perusal of the demand letter dated 26.06.2018 reveals that respondents have made a demand of One-Time Spectrum Charges (OTSC) of Rs.1287.97 crores for GSM spectrum held by BAL in Chennai Service Area for the extended period of licence from 30.11.2014 to 27.09.2021. The letter mentions explicitly that this demand is “pursuant to WPC Wing order dated 28.12.2012”. The calculation sheet of one page has also been attached for reference. A further

clarification has been made that the demand is based on the rates prescribed by WPC Wing orders dated 28.12.2012 and 22.05.2018 and is provisional. The calculation chart shows that the charges have been calculated for Chennai Service Area for the extended period for total quantum of spectrum being 9.2 MHz, quantum of spectrum in 900 MHz band being 6.2 and quantum of spectrum in 1800 MHz band being 3. A rate of Rs.24.48 crores per MHz per year of 900 MHz band and another rate of Rs.12.24 crores per MHz per year in 1800 MHz band has been applied to determine the value of spectrum of 900 MHz as Rs.1037.07 crores and the value of spectrum in 1800 MHz as Rs.250.90 crores. Adding the two, the demand is for a total Rs.1287.97 crores. Through notes, it has been clarified below the chart that (i) as per letter dated 22.05.2018 rate of Tamil Nadu for 1800 MHz has been considered as that for Chennai Service Area as per the recommendation of a Committee, (ii) rate as per letter dated 28.12.2012 for Tamil Nadu for 900 MHz has been considered because the auction determined rate for Tamil Nadu in 900 MHz is not available till date and hence the demand is only provisional to that extent and (iii) rate for Tamil Nadu Service Area has been considered for Chennai Service Area as per recommendation of a Committee.

15. Before considering the arguments and the submissions advanced by the rival parties in respect of Condition (e) relating to OTSC demand for the erstwhile

Chennai LSA, some basic facts relevant for this issue need to be noticed. There is no dispute that until 2005, the LSAs of Chennai and Tamil Nadu were treated as two different LSAs for which two different licences had been issued. Both the LSAs/Circles required different and independent compliance. The policy makers felt that the residents of these two different LSAs (being separate licence areas) were unnecessarily required to pay STD and roaming charges when calls were made between the areas of two LSAs although these were part of the same State of Tamil Nadu and were contiguous. With a view to take care of such higher charges for contiguous areas, the Union of India issued Merger Policy dated 15.09.2005, permitting the merger of CMTS and UAS Licences for the Chennai and Tamil Nadu LSAs. For the sake of clarity Paras 1 and 2(i) to (iii) of the said letter/Merger Policy are extracted herein below:

“To,

All the Access Service Providers (CMTS/ UAS)

Subject : Merger of Chennai Metro & Tamil Nadu Telecom Circle Service Areas for the CMTS/ UAS Licence.

For the purpose of Cellular Mobile Telephone Service (CMTS)/ Unified Access Services (UAS), the State of Tamilnadu has been divided into two Service Areas, namely Chennai Metro, and Tamil Nadu Telecom Circle, which is not generally the case in relation to other States.

2. The removal of above anomaly, in public interest, was under consideration of the Government and the undersigned is directed to state that for the purpose of CMTS/ UAS Licenses the Service Areas of Chennai

Metro, and Tamil Nadu Telecom Circle are merged with immediate effect subject to the following conditions:

- (i) Merged service areas of Tamilnadu State shall be called “Tamilnadu Service Area”. All new UAS Licenses shall be for the merged service area.
- (ii) The entry fee for merged service area shall be the sum of the individual entry fees of these service areas i.e. the entry fee for Tamilnadu Service Area now would be Rs. 233 Crores (Rupees Two Hundred Thirty Three Crores only).
- (iii) The Licensees, who are having Licenses in both the service areas of Tamilnadu State, may apply for issue of License for merged service area in lieu of two separate licenses without payment of any additional entry fee. The effective date for the merged licence shall be same as that of the existing Licenses. However, in case the effective dates of existing Licenses are not the same; the effective date of the License later in date shall be the effective date for the merged License.”

16. It has been highlighted that the two telecom circles were merged with immediate effect in public interest with defined and explicit conditions which did not reserve any right to demand any further fee or charges except what was mentioned in Paras (i) to (iii). The name of merged area became Tamil Nadu Service Area for new UAS licences with a consolidated entry fee. As per condition (iii) the then existing licensees having licences in both the service areas were given option to apply for issue of Licence for the merged Service Area in lieu of their two separate licences without payment of any additional entry fee. The merged(new) licence would have the same effective date as the existing licences.

However, if the existing licences had different effective dates, the merged licence would have the effective date of the licence later in date.

17. Petitioner had licences for Chennai as well as Tamil Nadu service areas. At the relevant time the licences came bundled with the spectrum. Petitioner applied for merger in terms of the said policy on 22.09.2005. The respondent through their reply dated 05.01.2007 (**Annexure P-16**) communicated to the petitioner that on consideration of its request and in pursuance of the Merger Guidelines dated 15.09.2005, petitioner's Licence Agreements for Tamil Nadu stands amended to the effect that in place of "Tamil Nadu Telecom Circle Service Area", the text "Tamil Nadu Service Area (including Chennai Service Area)" shall appear at all the places in the Licence Agreement and the "Service Area" definition shall also stand amended accordingly. In Annexure VI (Definition of Service Area) at Sr.No.20, definition of "Chennai Metro" also stood deleted. The other terms and conditions remained unchanged in the licence for merged service areas that came to be called "Tamil Nadu Service Area". Since the effective date for the Chennai LSA was earlier than that for Tamil Nadu LSA, the effective date for the merged licence became that for the erstwhile Tamil Nadu, due to expire on 27.09.2021. The validity of the Chennai Licence with bundled spectrum thus became co-

terminus with the Tamil Nadu Licence because of the effective date for the merged licence in terms of the Merger Policy.

18. It is not in dispute that only some of the licence holders and not all licence holders applied for merger under the Policy of 2005 because it reduced their revenue on account of STD and Roaming charges getting obliterated for calls between the Chennai and Tamil Nadu LSAs. The apparent incentive was the assurance of no payment of any additional entry fee and the effective date for the merged licence would be the effective date of the licence later in date. Besides the petitioner, Reliance Communications Ltd. and Tata Teleservices Ltd. also merged their Chennai and Tamil Nadu licences as per the Merger Policy. It has been highlighted that while accepting their request for merger the respondent did not impose any further conditions for the merger and made no demand for any kind of payment on ground of OTSC or any other ground.

19. A significant judgment of the Hon'ble Supreme Court of India relating to auction as a mode for determining price of spectrum allocation by the Union of India came on 02.02.2012 in the case of **Centre for Public Interest Litigation & Ors. Vs. Union of India & Ors; (2012) 3 SCC 1**. Pursuant to that decision in what is known as the '2G Case', the DoT issued a Press Release on 15.05.2012

which stated that “all future licences will be Unified Licence and allocation of spectrum will be delinked from the licence. Spectrum, if required, will have to be obtained separately.” Later, in the Unified Guidelines dated 19.08.2013, the Central Government stated that “the allocation of spectrum is delinked from the licences and has to be obtained separately as per prescribed procedure.” The respondent issued an order dated 28.12.2012(2012 order) for the levy of OTSC on telecom service providers including Petitioner No.1, for all telecom circles including the merged Tamil Nadu Circle. Through this order, the respondent decided to levy a one-time charge for holding spectrum above 6.2 MHz from 01.07.2008 to 31.12.2012 as per the rates provided in that order and further to impose the said OTSC charge also in respect of spectrum holding of more than 4.4 MHz from 01.01.2013 onwards as per the rates provided for in the 2012 order. Accordingly, the respondent issued an OTSC demand for Rs.5201.24 crores on Petitioner No.1 for all circles including the merged Tamil Nadu LSA. This demand is comprehensive, based entirely upon the 2012 Order, as can be seen at Pg.233 of Vol.I. This demand was later revised to Rs.8412 crores vide letter dated 27.06.2018 (**Annexure P-27**). It was issued a day after the impugned demand contained in **Annexure P-3**. It mentions that the revised demand is in respect of OTSC demand issued earlier on 08.01.2013. It also clarifies that the calculation in

respect of J&K and Tamil Nadu service areas is based on provisional rates and subject to revision on availability of auction determined rates.

20. The petitioners have first contended that the concept of OTSC and demand raised on that basis is under challenge in the Hon'ble Bombay High Court and hence any demand claimed as OTSC should be subject to the orders that have been or may be passed by the Hon'ble High Court in the pending writ petitions. However, during arguments it has been accepted by learned counsel for both the parties that the impugned demand of Rs.1287.97 crores is not the usual OTSC demands for all circles including that for the merged Tamil Nadu LSA which are pending in the Bombay High Court. The quantum of spectrum which was available for the Chennai LSA with the licence of the petitioner is now being charged because there happened a chance extension in the validity of Chennai Licence and hence it is a new licence and not an existing licence for the period between 30.11.2014 and 27.09.2021. This concept of deemed extension warranting OTSC charges for the merged Chennai licence is a unique case raising several independent issues which are not at all involved in the cases pending before the Hon'ble Bombay High Court. Hence, the parties have argued that such issues need to be determined without going into the validity of the concept of OTSC as

per 2012 Order, which will be decided by the Bombay High Court and the parties will be bound by the ultimate decision in those matters.

21. The first and foremost ground to challenge the impugned demand is that it undermines the sanctity of the government policy. Earlier to 2012 the policy prescribed by the government ensured that the spectrum is bundled with the licence. The Merger Policy of 2005 was in accordance with that policy and permitted merger of Chennai Licence into Tamil Nadu Licence with a clear prescription that the validity of the combined or merged licence and the spectrum which came bundled would be till September, 2021 as per the validity of the Tamil Nadu Licence. The licence for the merged Tamil Nadu Licence Area which included the Chennai Licence Area did not stipulate for any OTSC charges for the Chennai Licence for a period to begin after 11 years i.e. on its expiry. The terms of the Licence Agreement for the merged Tamil Nadu are being altered unilaterally under exercise of executive powers which is impermissible.

22. It has also been submitted that the demand has been made after 13 years from the issuance of the Merger Guidelines in 2005 and 11 years after the approval of the terms of the licence for merged service area i.e. Tamil Nadu Service Area and hence it is barred by limitation and/or suffers from arbitrariness because for

money claims in relation to a contract/agreement the usual period of limitation is only 3 years as prescribed by the Limitation Act.

23. Lastly, it has been argued that the demand as actually made is based on incorrect assumptions and suffers from gross errors. Admittedly, the auction determined price(market price) is available only for the merged circles i.e. Tamil Nadu including Chennai. In such a situation, if it was permissible to look to any rational basis, the Notice for Auction (NIA) dated 08.08.2016 prescribes that if the price of spectrum for a part of service area is to be determined, the auction determined price for the bigger area has to be pro-rated on the basis of population of that part of the Service Area. It is petitioners' case that this method has been used by DoT in all the NIAs since 2012. Since the market determined price for Chennai city is not available and cannot be available, DoT instead of using the existing methodology indicated above erred in determining such price as the market determined price for the merged Tamil Nadu circle including Chennai. According to calculations included by the petitioner in its letter dated 12.07.2018(**Annexure P-17**), the amount could have been only Rs.83.56 crores and not Rs.1287.97 crores. On behalf of petitioners, Learned Senior Counsel has also raised issues of *promissory estoppel* on account of the terms of the Merger Policy 2005 and cited various judgments of Hon'ble Supreme Court including that

in the case of **Kusumam Hotel Pvt. Ltd. Vs. Kerala State Electricity Board & Ors.; (2008) 13 SCC 213**. It has been highlighted that when a concluded contract by way of Licence Agreement for the merged Tamil Nadu Service Area exists between the parties the impugned demand being contrary and beyond the terms of the agreement cannot be sustained, moreso, when no decision even by way of policy by the appropriate authority of Central Government has been brought on record to show that under the authority of law the merged licence of Chennai has to be treated as alive and capable of a fiction of extension after 2014. Hence, it has been submitted that the demand is contrary to the concluded contract and without any authority of law. In support of these propositions of law, Learned Senior Counsel has cited a judgment of this Tribunal dated 04.02.2019 passed in T.P. No.219/2018 (**Reliance Communications Ltd. Vs. Union of India**). In that judgment it was held that demand or charges like OTSC could not be levied without authority of law, and contrary to the terms of the contract between the parties. In support of the proposition that parties are bound by a concluded contract and no change can be made unilaterally, reliance has been placed on **Bharat Sanchar Nigam Ltd. & Anr. Vs. BPL Mobile Cellular Ltd. & Ors., (2008) 13 SCC 597**.

24. On the issue of limitation and latches, Learned Senior Counsel has placed reliance upon judgment of the Apex Court in the case of **State of Punjab & Ors. Vs. Bhatinda District Cooperative Milk Producers Union Ltd.; (2007) 11 SCC 363**. The principle laid down in that judgment is that even where there is no period of limitation prescribed for raising a demand *qua* arrears, a statutory authority is required to act within a reasonable time. As to what shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.

25. On behalf of respondent also, written submissions have been filed pursuant to order dated 17.08.2020 in respect of the main issue i.e. the demand of OTSC for the extended period of spectrum for the Chennai Service Area. In the submissions it is admitted that for the first time such demand was made through letter dated 22.06.2018 for the extended period of validity of spectrum from 30.11.2014 to 27.09.2021 in respect of erstwhile Chennai Metro LSA on the entire holding of spectrum for that area. That letter was amended and superseded by letter dated 26.06.2018. The respondent have relied solely upon the judgment of the Hon'ble Supreme Court in 2G Case in which Supreme Court highlighted that spectrum is a scarce, finite and renewal natural resource and the State while distributing such natural resource must ensure that the people are adequately compensated for the

transfer of the resource to the private domain. It has been argued that by virtue of Article 141 of the Constitution of India the said judgment created an obligation upon the respondent to demand OTSC over the entire holding of spectrum for that area, admittedly beyond what is contemplated by the 2012 order which provided charges for a certain quantum of spectrum above the initial limit of 4.4 MHz and was based on the policy approved by the Cabinet as enunciated through the Ministry of Communication's Press Release dated 08.11.2012.

26. It has also been submitted that the respondent has power under Section 4 of the Indian Telegraph Act 1885 to levy One-Time Spectrum Charge (OTSC) in this particular case because the period of the Chennai Licence got extended. The respondent have referred to Clauses 7, 16 and 45 of the Licence Agreement to submit that the order passed under the Indian Telegraph Act shall be binding on the licensee and that mere issuance of a licence does not affect the power of the licensor under Section 4 to levy such charges required to be levied in view of judgment of the Hon'ble Supreme Court. The various clauses in the licence respecting circulars and orders of the Central Government have been highlighted to support the aforesaid submissions. It has also been submitted that petitioner cannot challenge the validity of the terms of the contract as held by the Hon'ble Supreme Court in **AUSPI Case; (2011) 10 SCC 543**.

27. In respect of Merger Policy of 2005, the stand of the respondent is that it exempts the licensee from additional entry fee only and not from OTSC charges. It is the stand of the respondent that reference to the 2012 Order dated 28.12.2012 is only for the purpose of rates which are to be market determined rates and for no other purpose. Learned counsel has explained that the 2012 Order is for another type of OTSC charge applied to spectrum holding above a certain quantum. In the present case OTSC is another kind of charge levied for the extended period of use of spectrum in Chennai/Tamil Nadu service areas.

28. It is also the submission on behalf of respondent that similar OTSC charges were levied on other two companies, Vodafone and Aircell and the judgments of Madras High Court in the case of Aircell is applicable to the present cases also.

29. In rejoinder learned counsel for the petitioner has distinguished the judgment of Madras High Court in the case of Aircell Cellular Ltd. by pointing out that in the case of those petitioners as well as in the case of M/s Vodafone Mobile Services Pvt. Ltd., the merger of licences for Chennai Metro LSA and Tamil Nadu(excluding Chennai) LSA was not in terms of option given by the 2005 Merger Policy rather it was on account of a Notice Inviting Auction(NIA) of 2010

for the auction of 3G and BWA spectrum. It made mandatory for the licensees that in case the Group Bidding Entity is successful in the auction for Tamil Nadu(including Chennai) then they shall merge their licenses of Chennai and Tamil Nadu service areas as per DoT's letter of 15.07.2005. It has been submitted that even the judgment of Madras High Court has not attained finality and the matter is pending in the Apex Court. Vodafone has also challenged imposition of OTSC and its petition is still pending. From Para 47 of the counter affidavit of the respondent it has been shown that at the time of Merger Policy 2005 there was no concept of OTSC. It appears that the term "One-Time Spectrum Charge(OTSC)" was used for the first time in TRAI's recommendations dated 28.07.2007 to the Government on "Review of Licence Terms and Conditions and Capping of number of Access Providers". In the case of the petitioner even the approval of the merger had come earlier in January 2007. But as explained in Para 17 of the counter affidavit of the respondent the request of Aircell Ltd. for merging of its two licences was made in 2010 and it received the in-principle approval of the respondent on 03.10.2013. In that approval the respondent imposed some conditions including that for payment of OTSC for the spectrum held for the erstwhile two service areas. Aircell challenged such conditions before the Madras High Court but without success. In the present case the petitioners received the approval of merger and consequent amended licence without any such conditions.

This aspect of the matter presents a different view of the case of Aircell Ltd. and the same is distinguishable from that of the petitioners herein.

30. On a careful analysis of the submissions made by both the parties, the arguments raised on behalf of respondent to support the impugned demand is found to be without merits. Amendment in the licence of the petitioners was made as per 2005 Merger Policy without any conditions like payment of OTSC for the erstwhile service area of Chennai. At that stage there was no concept of charge like OTSC even under contemplation of the respondent. The claim that respondent Union of India has powers under Section 4 of the Indian Telegraph Act cannot be assailed but every exercise of power has to be through a proper instrument/order and in accordance with law. It cannot be used to unilaterally alter the charge etc., vital provisions in a concluded contract. Secondly, the manner of exercise of such power as well as the final outcome must be shown in a transparent manner so as to facilitate a judicial scrutiny. In the present case no decision of the Cabinet or an authority of the requisite level who can decide on behalf of Union of India or the Central Government in such policy matters and/or for exercising statutory powers under Section 4 has been brought on record. Any changes or additions in the 2012 Order on OTSC has also not been shown although it has been argued that the above concept is different, whereas OTSC as a different concept has been applied

in the present case in the light of judgment of the Apex Court in the 2G Case said to be binding under Article 141 of the Constitution of India.

31. The stand of the respondent noted above does not bear countenance in the light of clear finding in Para 98 of the reported judgment in SCC. In that Para, while repelling the submission for cancellation of all the licences granted 2001 onwards, the court observed that such argument “does not deserve acceptance because those who have got licence between 2001 and 24.09.2007 are not parties to these petitions and legality of the licences granted to them has not been questioned before this court.” The said finding clearly escaped the attention of the respondent while deciding to proceed against the petitioners to raise the impugned demands which they claim to be based upon the 2G judgment of the Apex Court; only the rates have been worked out by taking help of some later orders including the 2012 Order but clearly without any authorization by a competent authority. It is also found that the calculation of the demand indicated through Annexure P-3 is not satisfactory and no appropriate decision or policy has been put forward to support the conditions indicated for making the calculations. On this score also the criticism and submissions advanced on behalf of the petitioners is found to have merits

32. The principles of estoppel and acquiescence are not relevant when the parties are bound by the terms of a concluded Licence Agreement. The issue of limitation as developed in the cited judgment is only an extension of constitutional requirement upon the State and its authorities not to act arbitrarily. In the present case the thought of raising such demands for OTSC in respect of Chennai LSA which has ceased to exist on account of 2005 Merger Policy and duly accepted in the case of petitioner in January 2007 has definitely come belatedly and is not backed by any statutory order, policy or terms of the contract. The judgment of the Apex Court in 2G Case also does not apply in the present case. Hence, the impugned demands contained in Annexure P-2 which has merged into Annexure P-3 cannot be sustained. The said demand is set aside as one without any authority of law. As a result the contentious part of condition (e) impugned on grounds noted earlier is also rendered bad and inoperative.

33. Having given the aforesaid finding with regard to the main issue relating to condition (e), it is further declared and made clear that following the ratio and findings given by this Tribunal in the case of **Bharti Airtel Ltd. Vs. Union of India** on 19.03.2019 and again on 31.07.2019, the reliefs granted vide the interims orders in respect of some other prayers in these petitions are found to be appropriate and just. Those interim orders are therefore made absolute. T.P.

No.21/2019 is allowed accordingly along with T.P. No.22/2019 in which the main issue relating to condition (e) does not arise. In respect of that petition learned counsel for the respondent had frankly submitted, as recorded in the order passed on 17.08.2020, that the issues in this petition appear to be settled by the judgment of this Tribunal dated 31.07.2020 passed in R.A. No.3/2019 in T.P. No.56/2015 and some other connected matters. Of course, it was highlighted that the said judgment and order has been challenged before the Hon'ble Supreme Court and the appeal is pending but without any order of stay. As a result both the petitions stand allowed to the extent indicated above. Since the combined effect of the interim order and this final order has taken effect as an interim arrangement, it is now clarified that the said effect shall continue subject to added findings and directions in this final judgment.

34. In the interim order dated 02.05.2019 a condition was imposed upon the Bharti Airtel that liability to pay the OTSC charges for Chennai LSA as part of Condition (e) shall remain stayed until further orders provided the petitioner furnishes with the Registry of the Tribunal, Bank Guarantees for 50% of the said demand within four weeks. As per that condition, Bank Guarantees for the 50% of the amount has been furnished. Now, since the said demand as well as that part of Condition (e) has been declared bad in law, the Registry is directed to return the

Bank Guarantees submitted by the petitioners at the earliest, preferably within two weeks against receipt to be submitted by the authorized representative of Bharti Airtel Ltd.

35. Both the petitions are accordingly disposed of but without any order as to costs.

Sd/-

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

sks