TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 4th July, 2019

Telecommunication Petition No. 19 of 2013

Vodafone Idea Limited ...Petitioner
Vs.
Union of India ...Respondent

Telecommunication Petition No. 441 of 2013
(with M.A. No. 12 of 2017)

M/s. Loop Mobile (India) Ltd. Mumbai ...Petitioner
Vs.
Union of India ...Respondent

BEFORE:

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

For Petitioner (In T.P. No.19 of 2013) : Mr.Maninder Singh, Sr.Advocate
Mr. Manjul Bajpai, Advocate
Dr.Shashwat Bajpai, Advocate
Mr. J.S. Sahani, Advocate
Ms.Palak Verma, Advocate
Ms.Soumya Dasgupta, Advocate
Mr.Sharad Aggarwal, Advocate
Mr.Prabhas Bajaj, Advocate

For Petitioner/Official Liquidator(In T.P. Nos.441 of 2013) : Ms. Akshara Chauhan, Advocate for
Mr. Ashish Makhija, Advocate

For Respondent : Mr.Vikramjit Banerjee, ASG
Mr.Dhruv Tamta, Advocate
Mr.Ayush Anand, Advocate
Ms.Anandita Barman, Advocate

ORDER

A.K. Bhargava, Member – TP No. 19/2013 has been filed on 11-1-2013 by Vodafone Mobile Services Ltd. and others, now known as Vodafone Idea Limited (referred to as Vodafone hereinafter). The other Telecom Petition No. 441 of 2013 has been filed on 9-12-2013 by Loop Mobile (India) Ltd. Since both petitions involve the same issue of imposition of one time spectrum charge (OTSC), a common order is being passed, with Vodafone's petition 19/2013 being treated as lead matter.

2. The petitioner in TP 19/2013 is a licensed telecom service provider (TSP) and has traversed a long journey in providing mobile services. Beginning in 1994-95, petitioner operated under CMTS licenses with fixed fee regime in the service areas of Delhi, Mumbai and Kolkata. Later, petitioner acquired similar licenses in few more circles. In March 1999, a new National Telecom Policy (NTP) was promulgated that replaced the earlier policy of 1994. Under NTP-99, revenue share concept for payment of license fee was advocated. Pursuant to NTP-99, DoT offered a migration package in 1999 to the cellular operators for moving from

fixed fee regime to a revenue sharing regime. The package was accepted by the industry, including the petitioner. In the meantime, guidelines for introduction of the 4th cellular license came on 5-1-2001 and tender dated 5-3-2001 provided for revenue share model for payment of spectrum charges. The petitioner acquired 4th cellular licenses for some service areas in 2001 on a revenue sharing arrangement. On 27-10-2003, TRAI recommended introduction of a unified access licensing regime, whereby both fixed and mobile services could be offered under a single license. The Government accepted these recommendations and issued UAS guidelines on 11-11-2003 for migration of existing licensees to UASL. Another set of guidelines for new UAS licenses was issued on 14-12-2005. The petitioner acquired new UAS license in some circles and also migrated its existing licenses in other circles to UASL regime in and around 2008.

3. During course of its operations, petitioner has been allocated various spectrum at different point of time. The allocation of spectrum to the petitioner is summarized in the Table-1 below (as per para 28, page 44-46 of the petition) :

Service Area	Date of License	Spectrum Allocated	Date of allocation
Delhi	29.11.94	4.4 MHz	05.07.95
		6.2 MHz	31.12.96
		8.0 MHz	17.07.02
		10.0 MHz	15.10.03
Mumbai	29.11.94	4.4 MHz	31.05.95
		6.2 MHz	04.02.97
		8.0 MHz	17.07.02
		10.0 MHz	15.10.03
Chennai	26.09.01	6.2 MHz	30.05.02
		8.0 MHz	01.06.06
Kolkata	29.11.94	4.4 MHz	29.11.95
		6.2 MHz	28.01.97
		7.8 MHz	30.06.04
		9.8 MHz	12.07.06
Maharashtra	19.12.95	4.4 MHz	19.12.95
		6.2 MHz	28.12.99
Gujarat	19.12.95	4.4 MHz	19.12.95
		6.2 MHz	06.03.00
		7.8 MHz	31.12.03
		9.8 MHz	13.05.05
Andhra Pradesh	29.09.01	6.2 MHz	11.03.02
Karnataka	26.09.01	6.2 MHz	11.03.02

		8 MHz	22.01.05
Tamil Nadu	12.12.95	4.4 MHz	12.12.95
		6.2 MHz	28.12.99
		7.2 MHz	30.07.08
Kerala	12.12.95	4.4 MHz	12.12.95
		6.2 MHz	28.12.99
Punjab	05.10.01	4.4 MHz	03.04.02
		6.2 MHz	28.01.04
Haryana	12.12.95	4.4 MHz	28.12.95
		6.2 MHz	02.01.01
UP-West	13.02.04	6.2 MHz	06.05.04
UP-East	12.12.95	4.4 MHz	12.12.95
		6.2 MHz	02.01.01
		8.0 MHz	28.01.06
		8.2 MHz	21.01.09
Rajasthan	12.12.95	4.4 MHz	12.12.95
		6.2 MHz	02.01.01
Madhya Prades	20.03.07	4.4 MHz	11.02.08
West Bengal	23.03.04	4.4 MHz	12.08.04
		6.2 MHz	10.01.08

4. In respect of the above spectrum holding, the respondent, Department of Telecom, issued the impugned order dated 28-12-2012 regarding "*Levy of one*

time spectrum charges for GSM/CDMA spectrum held by the incumbent Telecom Service Provider". This was followed up by another order dated 8-1-2013 which quantified the OTSC demand on petitioner as Rs. 3599.4 Cr. The impugned order dated 28-12-2012 is important for our discussion and is reproduced below

"Sub: Levy of one time spectrum charges for GSM/CDMA spectrum held by the incumbent Telecom Service Providers

In pursuance of power conferred by Section 4 of Indian Telegraph Act, 1885 (Act No. 13 of1885) the Central Government hereby prescribes the following rates of one time spectrum charges for GSM spectrum held in 900 MHz and 1800 MHz by Telecom service providers.

i) For spectrum holder above 6.2 MHz (GSM) rates applicable for the period 01.07.2008 to 31.12.2012 shall be as per Schedule of Rates given in Annexure.
ii) For spectrum holder above 4.4 MHz (GSM), one time charge shall be effective from 01.01.2013 as per Schedule of Rates given in Annexure. Licensees may surrender spectrum beyond 4.4. MHz if they do not wish to pay the charge.
iii) In respect of service areas, Delhi, Mumbai, Karnataka and Rajasthan, the rates for 1800 MHz with effect from 01.01.2013 are provisional subject to adjustment against auction determined rate, when available.
iv) Like-wise in respect of 900 MHz Band, in all service areas these rates will be adjusted against Auction determined rate, when available.
v) For calculating the upfront charges in the case of spectrum holding in multiple bands (900 MHz & 1800 MHz), spectrum in 1800 MHz Band will be accounted for first, towards the limit of 4.4 MHz.
vi) These rates shall be charged on applicable quantum of spectrum held for the balance period of license on prorate basis.
vii) The charges shall be taken as non-interest bearing advance on annual basis and adjusted against the Auction determined rate, when available.

2. The CDMA spectrum holding above 2.5 MHz in 800 MHz band, order regarding the rate for one time spectrum charges with effect from 01.01.2013 shall be issued separately.

3. Terms of payment :

Licensees are permitted to pay in equated annual installments for the balance number of years of License (such that the last installment is payable not later than 12 calendar months prior to the expiry of the license) considering interest @ 9.75 %. The licensees shall also have option of upfront payment of prepayment of one or more installments.

4. The above order shall come into force with effect from 1st January, 2013.

5. This issues with the concurrence of DoT Finance vide Dy. No. 1859-Adv (F) dated 28.12.2012."

5. Aggrieved by the above mentioned impugned orders, the petitioner has filed the present petition with following prayers –

"i. Strike down the impugned Order dated 28.12.2012 and consequent Demand Note dated 08.01.2013 issued by DoT;

ii. direct DoT not to charge any One Time Spectrum Charges as stipulated in its impugned Order dated 28.12.2012 as also the consequent Demand Note dated 08.01.2013;

iii. stay the operation of impugned Order dated 28.12.2012 and consequent Demand Note dated 08.01.2013 issued by DoT;

iv. Restrain and direct the Respondent - DoT, its officers, agents, representatives etc. not to initiate, take or pursue any adverse steps / proceedings against the Petitioners with respect to the impugned Orders or otherwise;

v. Pass ad-interim / interim / ex-parte order(s) in terms of the above prayers.

vi. pass such other and further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice, equity and good conscience."

6. Learned senior counsel Mr. Maninder Singh has appeared for Vodafone in TP 19/2013 while learned counsel Ms Akshara Chauhan has represented on behalf of

official liquidator for petitioner Loop Mobile in TP 441/2015. Learned ASG Mr. Vikramjit Banerjee has represented the respondent Union of India.

7. While recounting the facts of the case, we also recall a similar case of OTSC imposition in ***TDSAT TP no. 219/2018, Reliance Communication Ltd. vs. Union of India,*** wherein the judgment was delivered by this Tribunal on 4-2-2019. This petition also had challenged the DoT order dated 28-12-2012, but **the examination of levy of OTSC in that judgment was confined to the spectrum allocated between 4.4 MHz to 6.2 MHz (GSM) only.**

8. In this judgment dated 4-2-2019, the Tribunal had noticed a similar case, ***WA 1454 & 1455 of 2014 Aircel Cellular Ltd. vs. Union of India,*** in which Madras High Court had delivered a judgment on 11-8-2016. In this case also Aircel possessed spectrum ranging from 4.4 MHz to 10 MHz and had challenged the imposition of OTSC beyond the star-up spectrum. Hon'ble Madras High Court had held in this case that the levy of OTSC by the Central Government, in exercise of power conferred on it by Section 4 of the Indian Telegraph Act 1885, read with clause 13.1 of the UASL of M/s Aircel, is not arbitrary and in fact justified and

enforceable. While noticing this judgment, the case of Reliance Communication in TP 219/2018 was sought to be distinguished on the basis that M/s reliance held only the contracted spectrum of 5 MHz (CDMA) / 6.2 MHz (GSM). However, Mr. Maninder Singh, who had also appeared in the TP 219/2018 case as *amicus,* had brought out many other facets to our notice. Mr. Maninder Singh maintains that those arguments are squarely applicable in the case of TP 19/2013 as well. For this reason, we extract below the relevant part from the judgment dated 4-2-2019 :

"..... Mr. Maninder Singh also submits that Madras High Court judgment is inapplicable on the principles of per incuriam and sub silentio. He points out that Madras High Court judgment has been rendered taking into account the fact that the petitioners were aware of the consultation between the Union and TRAI on imposition of OTSC but however they did not object to such imposition or no documents portraying their objection in this regard were placed before the court. Had the petitioners submitted their objections to the said demand during the consultation process, the matter could be looked at from a different angle. Mr. Singh submits that objections were indeed raised during the consultation process by COAI, an association of the service providers. For this reason alone, the judgment of High Court is not applicable to other service providers. Mr. Maninder Singh further submits that the judgment of the Madras High Court does not consider - (a) section 29 of contract Act (b) that provision of section 4 would not be available to DoT for amending any license agreement once the license agreement is already executed (c) the aspect that when demand letters are based only upon section 4 of the Telegraph Act, it is impermissible for DoT to place reliance on Clause 5(1), Clause 13(ii) or 14 (ii) or other clauses of the licenses. Besides, the judgment proceeded on the premise that the agreement itself was modified by DoT, which is per se incorrect. Therefore, according to Mr. Maninder Singh, the judgment of Hon'ble Madras Hugh Court is not a binding precedent having regard to the principles of per incuriam and sub silentio. In support of his contention on the

principles of per incuriam and sub silentio, he places reliance on MCD vs. Gurnam Kaur (1989) 1 SCC 101 (para 11, 12), State of U.P. vs. Synthetic s and Chemicals Ltd. (1991) 4 SCC 139 (para 39-42) and Foreshore Coop. Housing Society vs. Pravin D. Desai (2015) 6 SCC 412 (para 56-57). In facts of the case, we are of the opinion that while it is important to keep the Madras High Court judgment in mind, it will be in the interest of justice to examine all the submissions made along with all the materials placed by the petitioner as well as the respondent. Based on such an examination only a specific finding can be rendered in the case involving 26 different licenses of the petitioner."

As stated in the aforementioned judgment of this Tribunal, we reiterate that in this case also, while it is important to keep the Madras High Court judgment in mind, it will be in the interest of justice to examine all the submissions made along with all the materials placed by the petitioner as well as the respondent. Based on such an examination only a specific finding can be rendered in the case involving different allocations of spectrum to the petitioner at different points of time.

9. In the case of ***TDSAT TP No. 219/2018 Reliance Communication Ltd. vs. Union of India,*** this Tribunal, on examination, had set aside the demand for OTSC on spectrum allotted beyond the start-up spectrum and up to the contracted limit of 6.2 MHz (GSM). From the Table-1 in para 3, we notice that the petitioner Vodafone has been allocated spectrum in the range of 4.4 MHz to 10 MHz in

various circles. While we shall examine in detail the issue of OTSC levy on spectrum allocated beyond 6.2 MHz, we note that the facts of the case and points of law in respect of spectrum allocated up to the contracted limit of 6.2 MHz are same between the two sets of petitions. Learned ASG Mr. Banerjee, appearing on behalf of the Union also offers no fresh arguments in respect of the contracted spectrum up to 6.2 MHz. Hence, relying on this Tribunal's judgment dated 4-2-2019, we have no hesitation in holding that the demands for OTSC on spectrum allotted beyond start-up spectrum and up to the contracted limit of 6.2 MHz are not sustainable in these petitions also. Accordingly, the OTSC demands for spectrum allotted up to 6.2 MHz are set aside.

10. Having set aside the OTSC demand for spectrum allotted up to 6.2 MHz, we now consider the demands in respect of balance spectrum as given in the Table-2 below :

Service Area	**Date of License**	**Spectrum Allocated Beyond 6.2 MHz**	**Date of allocation**
Delhi	29.11.94	8.0 MHz	17.07.02
		10.0 MHz	15.10.03
Mumbai	29.11.94	8.0 MHz	17.07.02

		10.0 MHz	15.10.03
Chennai	26.09.01	8.0 MHz	01.06.06
Kolkata	29.11.94	7.8 MHz	30.06.04
		9.8 MHz	12.07.06
Gujarat	19.12.95	7.8 MHz	31.12.03
		9.8 MHz	13.05.05
Karnataka	26.09.01	8 MHz	22.01.05
Tamilnadu	12.12.95	7.2 MHz	30.07.08
UP-East	12.12.95	8.0 MHz	28.01.06
		8.2 MHz	21.01.09

11. We notice from this Table that the allotment of spectrum beyond 6.2 MHz has taken place over a period of time ranging from 2002 to 2009. Over this time-frame, lot of regulatory, policy, administrative and licensing developments took place which we shall take note of while dealing with various contentions on OTSC imposition.

12. Mr. Maninder Singh submits that the spectrum allocation beyond 6.2 MHz is also a contracted spectrum and therefore is covered squarely by the *ratio decidendi* in the judgment dated 24-2-2019. To substantiate his point, he takes us

through the history of allocation of spectrum. He first brings to our notice DoT order dated 22-9-01 which deals with royalty and license fee charges towards spectrum usage up to 6.2 MHz. This letter is reproduced below :

"Subject : Royalty and License fee charges towards WPC spectrum usage by cellular telephone service providers

The issue of charging royalty and license fee for cellular mobile telephone service has been reviewed and it has now been decided that the cellular licnesees shall pay spectrum charges with effect from 1.8.99, the cut-off date of change over to NTP-99 regime, on revenue share basis of 2% Adjusted Gross Revenue (AGR) towards WPC charges covering royalty payment for the use of cellular spectrum up to 4.4 .MHZ + 4.4. MHz and license fee for cellular mobile handsets and cellular mobile base stations and also for possession of wireless telegraphy equipment as per the details prescribed by Wireless Planning and Coordination Wing (WPC). Any additional bandwidth if allotted subject to availability and justifications shall attract additional royalty and license fee as revenue share (typically 1% additional revenue share if bandwidth allocated is up to 6.2 MHz + 6.2 MHz in place of 4.4. MHZ + 4.4. MHz).

2. Further royalty and license fee for the use of spectrum for point to point links and access links (other than cellular service spectrum) shall be separately payable as per the details and prescription of Wireless Planning and Coordination Wing. The fee/royalty for the use of spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation etc. Authorization of frequencies for setting up microwave links by cellular operators and issue of licenses shall be separately dealt with by WPC Wing as per existing rules.

3. The above spectrum charge is subject to review by WPC Wing from time to time."

Another order was issued by DoT on 1-2-2002 which deals with the license fee towards spectrum usage beyond 6.2 MHz and up to 10 MHz. This letter is also reproduced below :

"Subject : Allocation of additional Cellular Radio Frequency Spectrum to the Cellular Mobile Telephone Services (CMTS)Providers

In order to meet the requirements of growth of subscribers, it has been decided to assign additional spectrum up to 1.8 MHz + 1.8 MHz to the CMTS operators. Any operator may apply for allotment of additional spectrum after reaching a customer base of 4 lakh or more under a license in a service area, after which the process of allotment would be initiated; however, actual assignment of the spectrum would be made, subject to availability and coordination on case to case basis, after a customer base of 5 lakh or more has been reached in the service area. This additional assignment will be beyond already allocated spectrum of 6.2 MHz + 6.2 MHs. The additional spectrum of 1.8 MHz + 1.8 MHz would be assigned to 1800 MHz Band.

2. The cellular licensees are to pay spectrum charge with effect from 1.8.99 on revenue share basis at the rate of 2% of Adjusted Gross Revenue (AGR) for spectrum up to 4.4. MHZ + 4.4. MHz and 3% of AGR for spectrum up to 6.2 MHz + 6.2 MHs .

3. Further, for this additional spectrum of 1.8 MHz + 1.8 MHz, if assigned for any one or more placed in a Service Area. Beyond 6.2 MHz + 6.2 MHs, an additional charge of 1% of AGR will be levied. Thus, the total spectrum charge to be paid by such operators would be 4% of AGR from the Service in the respective Service Area. This Spectrum charge of 4% of AGR would also cover allocation of further spectrum, which may, become possible to allocate in future subject to availability, to add, up to a total spectrum allocation not exceeding 10 MHz + 10 MHz per operator in a Service Area. Such additional allocation could be considered only after a suitable subscriber base, as may be prescribed, is reached.

4. This order is issued in partial modification to the order of even number dated 22nd September, 2001; other terms and conditions of the said order shall remain unchanged.

13. According to Mr. Singh, these orders show that a CMTS Operator is entitled for consideration and grant of additional spectrum up to 10 MHz on fulfilling the twin conditions viz. (i) availability of spectrum with the DoT and (ii) fulfilment of the subscriber based criteria laid down by the DoT. Mr. Singh then brings to our

notice another order dated 18-4-2002 on the subject of MW access and backbone networks. Part of this order also deals with GSM spectrum and the relevant paras are extracted below :

"Subject : Spectrum charges for MW access and backbone networks of cellular networks

This is in continuation to the Government of India Order Nos. 14041/06/2000-NTG dated 22.09.2001 and 1 February, 2002 specifying spectrums charges for GSM frequencies in 900/1800 MHz band.

2. Assignment of frequencies for MW access and MW backbone networks for cellular operations, would continue to be considered on the basis of full justification of the requirements and availability of the spectrum, on case-to-case and link-to-link basis, after taking into consideration the interest of the other users with a views to ensuring electromagnetic compatibility etc. The complete technical analysis and all related aspects of frequency assignments, including efficient use of spectrum, will apply before assigning frequencies for various MW access backbone links. There will be no obligation on the part of the Government to assign frequencies for such purposes. Migration to revenue sharing concept is basically to simplify the system for charging of spectrum and in no way it should be linked to the grant of frequency spectrum.

...

6. In addition, the charges for GSM spectrum (900/1800 MHz band) will continue to be levied in accordance with Government of India Orders No. L-14041/06/2000-NTG dated 22.9.2001 and 01.02.200.

7. The above package, of spectrum charging on percentage revenue share will be available to the cellular operators on the premise that it is accepted in its entirely and simultaneously all legal proceedings, with regard to spectrum charging, instituted by them or COAI against the Government in Courts and Tribunals (TDSAT) etc. shall be withdrawn. The cellular operators without prejudice should make payments of all outstanding dues of spectrum charges in accordance with the applicable Government of India orders within a month from the date of issue of this order.

8. This order will come into force from the date of issue.

9. Acceptance of the above shall be communicated to this Ministry within seven days from the date of issue of this order."

14. COAI as industry representative and the petitioner Vodafone have communicated their response to DoT vide letters dated 23-8-2002 and 22-8-2002. These letters are also extracted here. Letter Dated 23-8-2002 from COAI is as follows:

"Sub: Spectrum charges for M/W Access and backbone networks of CMTS

This has reference to WPC order No. L-14047/01-2002-NTG dated April 18, 2002 on the above mentioned subject. We are pleased to inform you that as per the decision taken in the COAI Executive Council meeting on 23rd August, 2002, the COAI on behalf of members hereby accepts the spectrum charges on percentage revenue share and is taking necessary action at the earliest to withdraw all legal proceeding with regard to spectrum charging instituted by COAI and its members against the Government in Courts and TDSAT."

Letter dated 22-8-2002 from Vodafone is as below:

"This refers to your order Number L-14047/01/2002-NTG dated 18.04.2002 and the letters dated 07.08.2002 and 20.08.2002 addressed to the DG, COAI on the above subject.

We hereby convey our acceptance of the terms and conditions specified in the above said order with respect to charge of MW access and backbone networks of cellular networks and withdraw all legal proceedings with regard to spectrum charging instituted by us, if any, including the matters where we have been named as a party by Cellular Operators Association of India (COAI)."

15. According to Mr. Maninder Singh, these documents show that the petitioner was allotted the spectrum for a consideration (of higher revenue share as spectrum charges), that DoT made an offer as a "package" and that the petitioner (along with the industry) accepted this offer. This results in a concluded contract, making all the allotted spectrum as part of the license agreement and all the additional allotted spectrum as contracted spectrum. This being the case, imposition of OTSC subsequently will mean altering the contract conditions unilaterally which is not permissible under law. He submits that it is settled law, as laid down by the Hon'ble Apex Court that every license granted by the DoT to telecom service provider is in the nature of an ordinary contract. After the license u/s 4(1) is granted by the DoT to any service provider through a license agreement, the future conduct of both the parties is then governed purely and strictly as per the terms and conditions of the license agreement. In this regard, he places reliance upon the judgments in ***Union of India Vs. AUSPI (2011) 10 SCC 543 (paras 39-41,55)*** and ***Bharti Airtel Ltd. Vs. Union of India (2015) 12 SCC 1 (paras 32-35,39,43)***. He further submits that any license agreement u/s 4 is an ordinary contract and not in the nature of a statutory contract and cites the judgments in ***India Thermal Power Ltd. Vs. State of MP (2000) 3 SCC***

379 (para 11), KSEB & Anr. Vs. Kurien E. Kalathil (2000) 6 SCC 293 (paras 10-11) and ***Idea Cellular Ltd. Vs. Union of India TDSAT TP No. 238/2011 (paras 60-62)***. He also invokes the principle of legal certainty in contracts and cites judgment of Hon'ble Supreme Court in ***DDA vs. Joint Action Committee – (2008) 2 SCC 672,*** wherein the Apex court, inter alia, held that (i) once the relationship between the DDA and flat allottees is governed by the contract, it would be impermissible for DDA to unilaterally amend the contract to the extent of introducing new liabilities and (ii) definite price is an essential element of contract and any unilateral amendment which would permit any change in the essential element of the contract would fall foul of Section 29 of the Contract Act. He then relies on ***TDSAT judgment dated 4-2-2019*** to assert that just as no OTSC is leviable on contracted spectrum up to 6.2 MHz, no OTSC can be levied on additional spectrum beyond 6.2 MHz as well; additional spectrum being part of the license agreement and being contracted spectrum.

16. On the other hand, Learned ASG Mr. Vikramjit Banerjee, contends that the allotment of additional spectrum is not in the nature of contract but is in the exercise of respondent's powers and rights of exclusive privilege under section 4 of the Indian telegraph Act. Exclusive privilege for spectrum and license is not co-

terminus. Therefore the respondent can exercise its privilege in respect of spectrum and impose any condition outside of the license in this case. The impugned orders thus are apparently outside the rubric of license. That being the case, additional spectrum allotted is governed by the terms of 'exclusive privilege' and the respondent therefore is entitled to impose any condition, including pricing, outside the license. Having taken this stand, he then deals with the orders dated 22-9-2001, 1-2-2002, 18-4-2002 and 22-8-2002, relied upon by Mr. Maninder Singh. He points out that the order dated 22-9-2001 not merely mentions the royalty and license fee in terms of revenue share but something more. It also states that the spectrum charge is subject to review by the respondent from time to time. Order dated 1-2-2002 prescribes a subscriber based criterion for additional spectrum beyond 6.2 MHz and also prescribes additional rate of Adjusted Gross Revenue (AGR) as revenue share for the same. Both these orders neither make any offer, nor ask for any acceptance. He further clarifies that the order dated 18-4-2002 is in the context of M/W access and backbone network regime being migrated from fixed fee to revenue share. This is evident from the heading under 'subject' also. The acceptance of the petitioner vide its letter dated 22-8-2002 is also with respect to charges of M/W

access and backbone network only. Thus, such offer and acceptance cannot be construed as a concluded contract for additional GSM spectrum beyond 6.2 MHz under the license agreement. Having thus demonstrated that the allotment of additional spectrum (beyond 6.2 MHz) is not the contracted spectrum within license agreement, Mr. Banerjee submits that neither the principles enunciated in the judgment dated 4-2-2019 are applicable nor any of the arguments made by Mr. Singh (as listed in para 15 above) are applicable. Mr. Banerjee further contends that once power is there, it can be exercised belatedly and for a purpose under whatever the name given. Such an exercise need not be exhaustive. In support, he cites judgment in ***State of Punjab and Another vs. Devans Modern Breweries Ltd. and Another, (2004) 11 SCC 26 (paras 110, 111, 118, 126, 138).*** He brings to our notice the reference made in para 120 which states that *"the statutory provision in question must be interpreted and read broadly and not narrowly. The approach must be to uphold the validity of the impugned delegated legislation by a process of fair and broad reading of the statutory mandate. Even if the Act does not specifically provide for the levy in question by name, to provide statutory authority for its imposition by delegated legislation, and the levy is actually imposed by the delegated legislation*

made under that statute, the same would be valid and not ultra vires". Accordingly, Mr. Banerjee asserts that the levy of OTSC on spectrum beyond 6.2 MHz is valid and legal.

17. From the submissions, we find that the issues of law and facts are intricately inter-twined in considering the levy of OTSC. If the additional spectrum beyond 6.2 MHz is indeed the contracted spectrum under license agreement, all the submissions advanced by Mr. Maninder Singh in para 15 need to be seriously considered in his favour. However, Mr. Banerjee has shown that it indeed is not the case. On careful reading of the documents, we agree with Mr. Banerjee that these documents shown on allotment of spectrum do not form an 'offer' and 'acceptance'. The revenue share regime had come in existence well before the 2002 order and petitioner's acceptance vide 22-8-2002 has to be read as stated therein, i.e. acceptance of revenue share in respect to charge of MW access and backbone networks of cellular networks. Consequently it will follow that the arguments advanced by Mr. Maninder Singh as listed in para 15 are not directly applicable in the case of spectrum allotted beyond 6.2 MHz.

18. Mr. Maninder Singh then contends that the meaning of contract need not be construed narrowly in a technical manner. The documents shown by him indicate that they were part of the revenue sharing regime that was mutually agreed upon. The spectrum altered the revenue share which they dutifully paid. The allotted spectrum had to be operated under the given license. Hence, by conduct and practice, it is a case of contract under the license. He also submits that spectrum as a policy was always bundled with the license and was un-bundled only after 2010. Hence by common understanding also, additional spectrum has to be treated as part of the license. We understand the nuance but are not convinced by these arguments. Central Government is exclusive owner of all the spectrum and decides how to put it to use. It has made some spectrum bands free and no license is required to operate in those bands. Some spectrum is allotted to entities like police and railways without license for operating certain telecom services. Some spectrum is technology neutral and some is not. Spectrum can be shared or traded but we have yet to see sharing or trading of the license. Some spectrum is given on experiment basis, some on ad-hoc basis. We therefore accept Mr. Banerjee's submission that license and spectrum are not co-terminus. Of course, for providing

mobile access service, a license is required and consequently any spectrum can be used only if a TSP has the requisite license. This does not alter the nature and terms of allotment of spectrum to a TSP. We also note that the term 'bundling' of spectrum with license is not used anywhere in any license or allotment letters and 'unbundling' term surfaces only after 2010 in policy documents. The fact that a license assured start-up spectrum of 4.4 MHz and also entitled CMSP to a further spectrum up to 6.2 MHz can be described as spectrum being bundled with the license. Beyond this, we are not willing to give any meaning to the term 'bundling' and extend, by assumption and inference, consequential rights. In facts of the case, we are of the opinion that the contracted spectrum up to 6.2 MHz and additional spectrum beyond 6.2 MHz stand on two different footings.

19. Mr. Singh further submits that the treatment of additional spectrum between 4.4MHz - 6.2MHz and beyond 6.2MHz is exactly the same, that is allocation of additional spectrum is based on subscriber linked criteria and attracts additional fee as revenue share. Hence no artificial distinction can be created in respect of spectrum allocated up to or beyond 6.2MHz. Mr. Maninder Singh also brings to our attention a copy of DoT note-sheet (placed at page 545 and 546 of Vol III of petition)

to show that for additional spectrum DoT had consciously decided not to levy one time charge and prescribe increased revenue share instead. Mr. Banerjee submits that subscriber linked criteria (SLC) at relevant point of time only prescribed the qualification criteria for allocation of additional spectrum. SLC had nothing to do with spectrum allocation charge and is also different and distinct from spectrum usage charges. Therefore, the criteria for allotment of spectrum from 4.4 MHz to 6.2 MHz being the same as that used for allotment beyond 6.2 MHz does not in any way make the later as contracted spectrum or as part of the license. He further submits that the internal file notings cannot be relied upon and cites ***Shanti Sports Club and Another vs. Union of India and Others, (2009) 15 SCC 705.*** In any case, the noting does not mean that it is an option exercised forever and that the Union cannot consider the levy of fixed charge later.

20. From the Table in para 3 we notice that a lot of spectrum was allotted after the UASL guidelines came in 2003. Guidelines for migration to UASL came in 2003 and the petitioner actually migrated in and around October 2008. Mr. Maninder Singh refers to the UASL migration guidelines to make few points. The relevant part from DoT's UAS guidelines dated 11-11-2003 provides, inter alia, that:

"……

(i) existing operators had the option to either continue under the present licensing regime(with present terms & conditions) or migrate to new Unified Access Services License (UASL) in the existing service areas, with the existing allocated/ contracted spectrum.

....

(ii) service providers migrating to Unified Access Services License will continue to provide wireless services in already allocated/contracted spectrum and no additional spectrum will be allotted under the migration process for Unified Access Services License.

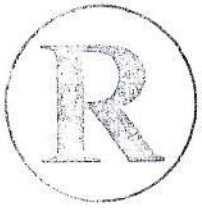
...

(vi) No additional entry fee shall be charged from CMSPs for migration to UASL. For Basic Service Operators (BSOs), the entry fee for migration to the Unified Access Services License for a Service Area shall be equal to the entry fee paid by the Fourth Cellular Operator for that Service Area, or the entry fee paid by the BSO itself, whichever is higher. While applying for migration to UASL, the BSO will pay the difference between the said entry fee for UASL and the entry fee already paid by it."

21. Mr. Maninder Singh submits that the allotted and contracted spectrum terms have been used interchangeably. Since migration to UASL was with the existing allocated/contracted spectrum and no additional entry fee was to be charged to CMSPs for migrating to UASL, it meant that all the spectrum of existing CMSP became part of the license and also no further OTSC could be levied. Mr. Banerjee on the other hand submits that the clause 43.5 of the UASL talks of spectrum allotment to the new UAS licensee as 6.2 MHz, showing that contracted spectrum remains 6.2 MHz in UASL. For CMSPs holding existing spectrum, status quo remains, i.e.

contracted and allotted spectrum continue to be governed by earlier terms and conditions and the manner of their allotment. The allotted and contracted spectrum terms are separately and distinctly used and not interchangeably. The condition that no additional entry fee will be charged only signifies that the spectrum beyond 6.2 MHz is not part of the license agreement. There is no mention either in the UASL guidelines or the license that all the allotted spectrum becomes part of the license and will be governed by the terms and conditions of the migrated UAS license.

22. From the submissions so far, we have not been persuaded to conclude that the additional spectrum beyond 6.2 MHz is the contracted spectrum under license agreement. We also agree with Mr. Banerjee's submission that license and spectrum allotted beyond 6.2 MHz are not co-terminus and that additional spectrum allotment is in exercise of respondent's exclusive privilege. Accordingly, spectrum allotment process creates two classes; spectrum holding up to 6.2 MHz which CMSP is entitled to and which is covered by the license terms and conditions, the other class being the holding beyond 6.2 MHz which CMSP has no vested rights to receive. In respect of this other class, citing exclusive privilege, Mr. Banerjee claims unfettered power in



terms of pricing. We are however of the opinion that even such a claim should pass the test of reasonableness and natural justice.

23. Mr. Maninder Singh submits that for the spectrum beyond 6.2 MHz, the respondent has asked for and received consideration in terms of increased usage charge. Such charges were regularly paid by the petitioner since 2002. As such, any further demand in the guise of OTSC is a case of double charging. Moreover, no reason has been given for raising such demand. He also points out that the respondent has ignored the element of 'time' and that spectrum allotted earlier cannot be priced just because the spectrum allotted later has been charged. He also suggests that the whole OTSC exercise is a case of after-thought and that raising such demand in 2012 is arbitrary. Demand has been made applicable from 1-7-2008 and no reason has been advanced for making the demand retrospectively. He also invokes the principle of legal certainty to show that the OTSC demand for spectrum beyond 6.2 MHz is arbitrary and unreasonable. He submits that legal certainty would also include that any rate of monetary extraction must be known to the person upon whom the levy is placed at the given point of time when the extraction is levied. Even in the case of a tax permitted by law, it has been held by Hon'ble Supreme

Court that the rate / quantum of tax (the rate and multiplier etc. to arrive at a definite amount of levy and the transaction and the entity etc. should also be clearly identifiable for payment of levy) is one of the essential components of tax, in the absence of which the levy would be invalid – ***Govind Saran Ganga Saran Vs. Commissioner of Sales Tax & Ors. (1985) Supp. SCC 205 (Para 6).*** Prescribing of even a maximum rate of levy has been held to be insufficient to meet the aforesaid requirement as laid down by Hon'ble Supreme Court in ***Federation of Indian Mineral Industries Vs. UOI & Anr. – (2017) 16 SCC 186, paras 32-38***. Applying these principles in the present case would mean that all service providers operating their business are to be assured the 'legal certainty' of the exact charges that would be levied upon them for operating their businesses. Not doing so will also vitiate the legal regime since operators conduct their business on the basis of this legal certainty. Any retrospective enhancement / introduction of new charges and / or condition therefore would be unreasonable, impermissible and ultra vires.

24. Mr. Banerjee counters that while the respondent charged and received spectrum usage charge, it never received any upfront charge for the additional spectrum to which it is entitled to. It is therefore not a case of double charging. He

further elaborates that such a demand has been arrived at after due internal deliberation, consultation with TRAI as per TRAI Act and decision of the cabinet preceded by deliberations within Telecom Commission and a committee of EGoM. He therefore asserts that the decision is not abrupt or arbitrary. On the issue of 'certainty', he submits that for allotment of spectrum beyond 6.2 MHz, no promise had been made that such spectrum will not be priced. Therefore when the spectrum is priced, CMSPs cannot say that it creates uncertainty and hide behind 'legal certainty' principle purely on the basis of presumptions.

25. Mr. Banerjee further informs us that for all operators, who were allotted spectrum beyond 6.2 MHz after May 2008, a condition was mentioned in the allotment letter itself that allotment of additional spectrum beyond 6.2 MHz is subject to pricing as may be determined by the government in future. This fact is evident from the letters dated 30-7-2008 (for TN circle), 21-1-2009 (for UP-East) and 9-3-2009 (for Gujrat circle) (at Page 1364 – 1369). The relevant part from para 5 of the abovementioned letter is extracted below:

"...

5. The spectrum charges for such trial spectrum/frequencies will be levied as per the Government orders from the date of earmarking. Further, the allotment of additional spectrum is subject to:

(a) Pricing as determined in future for spectrum beyond 6.2+6.2 MHz and

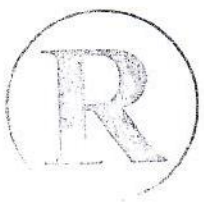
(b) The outcome of court orders"

According to Mr. Banerjee, these letters show that the petitioner was aware in 2008 of additional spectrum being charged and cannot turn back and plead that the demand from July 2008 is without notice. Mr. Banerjee also argues that since spectrum allotted after July 2008 was to be charged as a matter of policy, doing so for the rest of the spectrum beyond 6.2 MHz would put all the spectrum on same footing, would be non-discriminatory and thereby will actually provide level playing field. Thus, according to Mr. Banerjee levy of OTSC with effect from 1-7-2008 on all spectrum beyond 6.2 MHz is justified and not arbitrary.

26. Looking at the abovementioned documents dated 30-7-2008, 21-1-2009 and 9-3-2009, we find that while allocating the spectrum beyond 6.2 MHz, the respondent had indeed indicated that in addition to its right to receive usage charge, such spectrum will be priced and had also reserved its right to quantify it in future. The respondent being the owner of the spectrum and entitled to ask for a price and the allotment not being governed by its obligations under the license agreement,

such condition cannot be held unreasonable or arbitrary. Moreover, the petitioner has been duly put on notice and the prospect of imposing pricing has been duly conveyed as well, at the time of allotment itself. This future price determination has been done by due process and intimated through impugned order. In view of this and the discussions in abovementioned paras, we find no difficulty in holding that for spectrum beyond 6.2 MHz allotted after 1-7-2008, the respondent is entitled to levy OTSC from the date of allocation of such spectrum.

27. Having held that the respondent is entitled to ask for OTSC for additional spectrum allotted after certain date, can the spectrum allotted earlier also be charged? This question has already been answered in the negative in respect of contracted spectrum. In our judgment dated 4-2-2019, we had also held that within the same class of contracted spectrum, there cannot be different pricing treatment for two sets of allotments, i.e. up to 4.4 MHz and from 4.4 MHz to 6.2 MHz. Similarly, spectrum allotted beyond 6.2 MHz forms a different class altogether, characterized by SLC but not bound by the rigors of license agreement, as stated earlier. Within this same class, generally there should not be different pricing treatment for two sets of allotments from a given point of time.



28. However, in case of additional spectrum beyond 6.2 MHz that had been allotted to the petitioner before 1-7-2008, we note one significant difference, which is that a notice of intent to charge from this given date (1-7-2008) is missing. Petitioner's grievance is that if charges are levied without notice, they are not in a position to adjust their business plans so as to be able to recover the charges which are substantial. Mr. Banerjee of course maintains that such notice of intent was always there by way of respondent's actions. We reject respondent's submission that the letters of spectrum allotment post 2008 are sufficient notice for the petitioner to conclude that the existing and already allotted spectrum also would be charged and that the CMSP should have taken action in terms of their own business plans as if the notice had been served. We are of the opinion that awareness of such letters or participation in consultation process merely constitutes knowledge of the events as and when they happen without any consequent obligations cast upon the petitioner. Natural justice demands that actual notice is served and is not presumed to have been served. We also reject respondent's argument that petitioner cannot enjoy the benefit and not pay at the same time. Respondent has a right to put conditions for allotment and petitioner can rightfully enjoy the benefit on fulfilment

of those conditions. Respondent in exercise of its powers can further put additional conditions, but such conditions cannot have the effect of un-doing the past benefits that the petitioner has rightfully enjoyed. In other words, unless malafide or wrongdoing is shown, new conditions cannot be imposed with retrospective effect. Ms. Akshara Chauhan, learned counsel for Loop Mobile also submits that it is a well settled position in law that an executive order or subordinate legislation can only be prospective and not retrospective, unless the rule making authority has been vested with power under a statute to make rules with retrospective effect. In support of her argument that any new levy with retrospective effect is bad in law, she cites ***Director General of Foreign Trade & Ors. Vs. Kanak Exports & Ors., 2016 (4) SCJ 321.***

29. That the retrospective demand in this case is unsustainable can also be explained in another way. Keeping in view the requirement of natural justice, levy of any such demand has to be accompanied with an option to surrender the allotted spectrum. In this case such an option has been given in the condition (ii) of the impugned order dated 28-12-2012. However, we notice that the demand notice is given in 2012 to be effective from 2008, but option to surrender is from 2012 and not from 2008. Exercising the choice of surrender with effect from 2008 actually will

be an impossibility, since no notice for charging OTSC was given to the petitioner in 2008. Therefore, retrospectivity of demand in this case cannot be held to be sustainable. However, levy of such demand prospectively suffers no such infirmity. The impugned order dated 28-12-2012 is certainly an implicit order of demand and was to be effective from 1-1-2013. The prospective date therefore can be taken as 1-1-2013.

30. In view of the discussions above, we are of the opinion that in case of the spectrum beyond 6.2 MHz and allocated before 1-7-2008, respondent can levy OTSC demand prospectively, i.e. with effect from 1-1-2013.

31. Para 1(v) of the impugned order states that for calculating the upfront charges in the case of spectrum holding in multiple bands (900 MHz & 1800 MHz), spectrum in 1800 MHz Band will be accounted for first, towards the limit of 4.4 MHz. Mr. Maninder Singh submits that there is no basis or justification, nor has any reasoning been provided, for prescribing that for calculation purpose spectrum in the 1800 MHz will be counted first, while the fact is that in all cases of multiple holdings, the first allocation is in 900 MHz and not in 1800 MHz. He

suggests that this arbitrary condition has been put only to extract more money since the rate for 900 MHz band is substantially higher than that for 1800 MHz band. We are of the opinion that even if the objective is revenue maximization, it can be done only in lawful manner. It is easy to see that allocation of spectrum in one band or the other is a matter of fact and lawful calculations should be based on facts and not on the basis of arbitrary assumptions in facts. Doing so virtually amounts to vitiating the whole process of spectrum allocation. We are therefore of the considered view that the condition 1(v) in the impugned order dated 28-12-2012 is arbitrary and illegal and is accordingly set aside.

32. Finally, we summarize our findings below:

(i) Demands for OTSC on spectrum allotted beyond start-up spectrum and up to the contracted limit of 6.2 MHz are not sustainable and are accordingly set aside

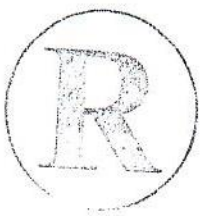
(ii) For spectrum beyond 6.2 MHz that has been allotted after 1-7-2008, the respondent is entitled to levy OTSC from the date of allocation of such spectrum.

(iii) In case of spectrum beyond 6.2 MHz and allocated before 1-7-2008, respondent can levy OTSC demand only prospectively, i.e. with effect from 1-1-2013.

(iv) Condition as contained in para 1(v) of the impugned order dated 28-12-2012 is arbitrary and illegal and is accordingly set aside

33. In view of the above, impugned orders are set aside and the respondent is directed to issue revised demands, if any, preferably within 3 months, in accordance with our findings summarized in para 32 above.

34. TP 19/2013 and TP 441/2015 along with all M.A. are disposed of in above terms. No order as to costs.



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(S.K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member