

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 14th February, 2019

Telecommunication Petition No.178 of 2018
(with M.A.No.366 of 2018)

Sistema Shyam Teleservices Ltd.Petitioner
Versus
Union of India ... Respondent

BEFORE:

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

For Petitioner : Mr. Amarjit Singh Chandhiok, Sr. Advocate
Mr. Ritesh Kumar, Advocate
Ms. Vibha Dhawan, Advocate
Ms. Alvia Ahmed, Advocate
Mr. Tejasvi Chaudhary, Advocate
Mr. Rushabh, Advocate

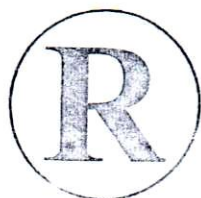
For Respondent : Mr. Apoorv Kurup, Advocate
Mr. Avnish Rathi, Advocate
Ms. Isha Mital, Advocate

ORDER

By S.K. Singh, Chairperson – The petitioner had a Basic Service Licence in Rajasthan Service Area/Circle in the year 1998. From that, it migrated to the Unified Access Service Licence (UASL) with effect from 14.11.2003. As a licensee, petitioner furnished Performance Bank Guarantees



(PBGs) and also Finance Bank Guarantees (FBGs). In 2008, petitioner was granted Unified Licence (UL) in 21 Service Areas. As a licensee under these licences, petitioner furnished another set of PBGs and FBGs. The details of all the bank guarantees have been mentioned in tabular form as a part of Para 4 of the petition. However, grant of Unified Licences was challenged before the Hon'ble Supreme and the Hon'ble Court vide judgment dated 02.02.2012 in what is popularly known as "2G case", cancelled 122 licences including 21 licences of the petitioner. On 03.10.2013, the petitioner was granted Unified Licences in 8 Circles for which it had won the Spectrum in the auction of March, 2013. The details of the PBGs and FBGs furnished by the petitioner under the Unified Licences for 8 circles have been furnished in a tabular chart as part of Para 7 of the petition. The various demands made upon the petitioner towards licence fee and Spectrum Usage Charges (SUC) for the 21 licences which were cancelled and for the subsequent Unified Licences in 8 Circles and also adjudication in respect thereof shall be noticed later. At this stage it is sufficient to note that petitioner ceased to be a licensee with effect from 20.10.2017 because after all the formalities, its licenses stood cancelled and all its assets and liabilities in respect of the licences stood transferred to M/s Reliance Communications Ltd. (RCOM). Petitioner claims that it has met all its liabilities and has paid all the ascertained dues which it was liable under law to pay as per demands made by the respondent and therefore, the respondent and the Department of Telecommunication (DoT) has no right to retain the bank



guarantees of the petitioner and such retention is illegal, unjust, arbitrary and in violation of settled law and orders passed by this Tribunal as well as contrary to known policy of the respondent.

2. In the aforesaid background, the prayer in this petition is to quash the communication dated 18.07.2018 (Annexure P-45). This communication is in response to petitioner's request for providing the calculations and basis for the claim of Rs.212.20 crores and Rs.32.06 crores as dues of Licence Fee (LF) and Spectrum Usage Charges (SUC), respectively. The other prayer is for a direction to the respondent to return/release the original PBGs and FBGs for an amount of Rs.296.45 crores and Rs.154.35 crores (in total Rs.4,50,80,29,554 crores) respectively, as per the details given in Annexure P-1.

3. At the outset it is noticed that there is no dispute about the total value of bank guarantees furnished by the petitioner from time to time. Under different licences, since 1998, petitioner had furnished PBGs and FBGs for the total value of Rs.922.61 crores. Additionally, the petitioner had furnished bank guarantee for Rs.32,14,65,243 towards OTSC demand which was *sub judice*, in compliance of TDSAT's order dated 17.05.2017. As a result, the total value of bank guarantees of the petitioner lying with DoT as on 10.05.2018 has been shown as Rs.954.76 crores. Admittedly, out of this amount, DoT has returned/ released FBGs worth Rs.390 crores on 23.07.2018 for the reasons that these



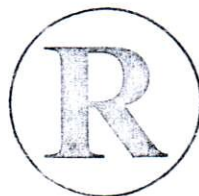
pertained to petitioner's deferred spectrum payment instalment liability and post-merger these were replaced by M/s Reliance Communications Ltd.(RCOM). The respondent has thereafter, under the orders of this Tribunal and with consent of the petitioner, encashed bank guarantees for Rs.107.78 crores towards dues of revised OTSC as decided by this Tribunal and towards interest thereon. The petitioner has further conceded that it is required to maintain PBGs in compliance of court's order for Rs.5.76 crores. After deducting the aforesaid figures, it has been shown that the balance bank guarantees are for an amount of Rs.450.8029554 crores and that is the subject matter of the present petition.

4. According to petitioner, it is entitled to return/release of bank guarantees for the aforesaid amount and in any case even the respondent admits that it is entitled to claim only Rs.32.06 crores as SUC dues with interest till March, 2018 and Rs.212.20 crores as licence fee dues with interest upto 31.07.2018, hence, against these two claims there can be no justification for retaining bank guarantees for Rs.450.80 crores approximately. According to petitioner, the aforesaid claims are also not recoverable from the petitioner and the bank guarantees for an amount of Rs.32.1465243 crores furnished pursuant to order dated 17.05.2017 in T.P.No.26/2017 instead OTSC claims is also liable to be returned in the light of final order passed in that petition by this Tribunal on 10.05.2018.

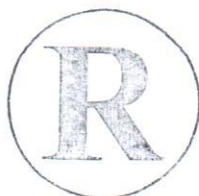


5. Before noting further arguments and submissions on behalf of the petitioner in support of the aforesaid claims, it will be useful to take note, in brief, of certain background facts and documents for appreciating the detailed submissions.

6. Various demands raised against the petitioner during 2012-2014 towards licence fee and SUC for the 21 Service Areas for the period 2008 onwards, were paid under protest by the petitioner but it challenged those demands through Petitions Nos.45-59 of 2013 and Petitions Nos.142-150 of 2013. Similar demands for Rajasthan Service Area were also challenged through Petitions Nos.140-149 of 2013 and Petition No.396 of 2013. Petitioner also claimed refund of various amounts paid towards licence fee and SUC through Petition No.480 of 2011 because it had made the payments under protest against computation of Adjusted Gross Revenue (AGR). This Tribunal through its judgment dated 23.04.2015 (AGR Judgment) disposed of the petitions including those of various other operators and set aside all the demands but granted liberty to the respondent to re-work the licence fee and SUC in the light of findings, observations and directions in that judgment. If required, fresh demands could be made by the respondent but no fresh demands for the said period have been raised so far.



7. The AGR judgment has been challenged by the respondent and the Appeal is pending before the Hon'ble Supreme Court but without any stay. In the interim order dated 29.02.2016, the Hon'ble Supreme Court recorded an undertaking on behalf of the respondent that it will not enforce any demand which it may raise as per its own understanding towards licence fee and Spectrum Usage Charges till the final decision by the Hon'ble Supreme Court.
8. On 02.11.2015, the petitioner and RCOM entered into an agreement for demerger, transfer and vesting of the telecom business of the petitioner to RCOM by way of a Scheme of Arrangement in terms of Sections 391-394 of the Companies Act, 1956. That Scheme was approved by the Hon'ble High Courts of Rajasthan and Bombay on 30.09.2016 and 07.10.2016 respectively. A copy of the Scheme of Arrangement is at Annexure P-4 and petitioner has placed strong reliance upon the said Scheme to submit that upon coming into effect of the Scheme, all identified liabilities of the petitioner stand transferred to and vested in RCOM, the transferee company, and have, by operation of law, become the debt and liability of the transferee company, on the same terms and conditions as were applicable to the petitioner, the transferor company.
9. The petitioner and RCOM applied for approval for transfer of the petitioner's telecom business to RCOM in terms of the merger guidelines dated



20.02.2014 (Annexure P-5). In addition to the terms of the guidelines, according to the petitioner, RCOM was asked by the respondent to submit undertakings to confirm that all demands for pre-merger period regardless of pending legal cases/disputes, relating to the licences of the merging identities shall be paid by RCOM. The undertakings dated 18.02.2016 and 05.07.2016 by RCOM are Annexures P-6 and P-7.

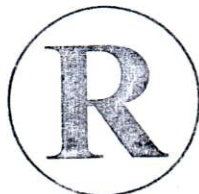
10. While the request for approval was kept pending the respondent raised a demand on the petitioner for Rs.820.5242 crores towards OTSC dues for rendering services in terms of the 2G judgment. That demand dated 22.09.2016 was challenged by the petitioner through T.P. No.63 of 2016. The demand was stayed by this Tribunal on 07.10.2016. Later, that demand was revised to Rs.926.5089 crores through a communication dated 14.02.2017. This Tribunal stayed the revised demand also on 20.02.2017 but required the petitioner to keep alive its bank guarantees till the disposal of the matter.

11. In the meanwhile, the respondent considered the request of the petitioner and RCOM to approve the acquisition of petitioner's telecom business by RCOM and issued a communication dated 22.03.2017. The approval to take on record the Scheme of Arrangement vide the aforesaid communication also contained some conditions like bank guarantees from the petitioner on account



of the licence fee dues, dues of SUC as well as for OTSC demand which was subject matter of Petition No.63 of 2016. These conditions were challenged by the petitioner through T.P. No.26 of 2017. The final judgment dated 17.05.2017 (**Annexure P-15**) shows that T.P. No.26 of 2017 was allowed in part. This Tribunal set aside two conditions which required the petitioner to pay licence fee dues including interest amounting to Rs.142.5960988 crores as well as SUC of Rs.94.8037428 crores by holding that respondent would be entitled to make such a demand only in the light of final judgment in the Appeal pending before the Supreme Court against AGR judgment of this Tribunal, if they succeed in the Appeal. In respect of OTSC demand of Rs.926.5089 crores, it was noted that the matter would be governed by the outcome of T.P. No.63 of 2016 in which there was already a direction to keep alive the bank guarantees till the disposal of the matter. Observation was made that respondent could ask for differential amount of bank guarantee in view of their stand that the revised demand was higher. It was also clarified that in relation to OTSC demand, appropriate orders shall be considered and passed in accordance with law in T.P. No.63 of 2016.

12. In view of observations for additional bank guarantee for the differential amount for OTSC dues the respondent asked the petitioner to submit additional bank guarantee for the differential amount of Rs.32.1465243 crores. This



included interest upto 30.06.2017 over the up-to-date OTSC demand of 2017. The petitioner furnished the additional bank guarantee.

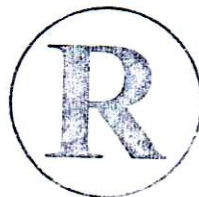
13. On 20.10.2017, the respondent gave its approval for transfer of the petitioner's telecom business including Spectrum to RCOM. That communication is Annexure P-18 and petitioner has relied heavily on the same to point out that according to respondent itself, the licences held by the petitioner "stand cancelled with immediate effect and simultaneously assets and liabilities of SSTL in respect of licences in various LSAs stand transferred to respective licences held by M/s RCOM". The respondent stated in Para 3 of that communication that the bank guarantees shall have to be kept alive as per TDSAT's interim order passed in Petition No.63 of 2016 and both parties shall comply with the outcome/judgment of TDSAT in that petition and appeals, if any, thereon. It is petitioner's understanding that the entire bank guarantees of Rs.922.6134757 crores lying with the respondent and also the additional bank guarantee of Rs.32.1465243 crores became relatable only to OTSC dues and was subject to outcome of T.P. No.63 of 2016.

14. This Tribunal vide judgment and order dated 10.05.2018 disposed of T.P. No.63 of 2016 by setting aside the impugned demands for OTSC dated 22.09.2016 and 14.02.2017 and directed the respondent to issue a revised



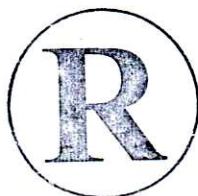
demand within four weeks on the basis of findings and principles indicated in the judgment.

15. It appears that soon after that judgment on 14.05.2018 the respondent asked the petitioner to renew some of the bank guarantees. In return, the petitioner wrote back requesting for release of petitioner's PBGs and FBGs. According to petitioner, as per final judgment dated 10.05.2018 it was not required to maintain the bank guarantees and therefore, it asked for release of the bank guarantees. The request was reiterated. On 04.06.2018 the respondent threatened to encash the bank guarantees to which the petitioner objected. On 08.06.2018 respondent wrote to the petitioner that TDSAT had permitted DoT to raise revised demands within four weeks which the petitioner is required to pay within three weeks and therefore, the BGs should remain with DoT until the payment is received from the petitioner company. Petitioner treats the aforesaid stand to be an admission and/or concession that the BGs could be retained only till the petitioner paid the revised demands of OTSC. But soon a different stand was taken through a communication dated 09.06.2018 that there was no direction by TDSAT for release of the bank guarantees in the judgment dated 10.05.2018 and further the Department was to file an Appeal against that judgment in the Hon'ble Supreme Court and therefore, no order shall be passed for release of bank guarantees.



16. On 12.06.2018 the respondent issued a revised demand of Rs.106.05233 crores towards OTSC dues in terms of the judgment dated 10.05.2018. Thereafter, petitioner filed MA No.220 of 2018 in T.P. No.63 of 2016 for release of its bank guarantees. After notice on the MA, respondent filed its reply on 20.07.2018 disclosing that it shall release FBGs worth Rs.390 crores pertaining to petitioners deferred Spectrum payment instalment liability because same were replaced by RCOM after the merger. In the reply, respondent claimed that it was entitled to retain bank guarantees of the balance amount of Rs.564.76 crores. However, it claimed that an amount of only Rs.350.31 crores was outstanding against the petitioner. This included Rs.106.05 crores as the revised reserve price dues as per Tribunal's judgment dated 10.05.2018 and further amounts of Rs.32.06 crores and Rs.212.20 crores as dues with interest on account of SUC and licence fee, respectively.

17. MA No.220 of 2018 in T.P. No.63 of 2016 was disposed of on 26.07.2018. The Tribunal, on consent given by the petitioner, permitted the respondent to encash bank guarantees for realisation of revised dues of OTSC amounting to Rs.106.05 crores. Admittedly, that amount along with due interest has been realised by the respondent through encashment of bank guarantees. The Tribunal disposed of the MA with liberty to the petitioner to file a fresh petition, if so advised, to claim for return of the bank guarantees. In



the light of that observation, the present petition was filed on 20.08.2018. Since the respondent encashed and realised an amount of Rs.107.78 crores towards revised OTSC, the petitioner's stand is that now there is no surviving demand against the petitioner and hence, it is entitled to return/release of entire bank guarantees for the amount of Rs.450.80 crores approximately. The petitioner has disclosed that the bank guarantees lying with the respondent include in all, PBGs for Rs.296.45 crores, FBGs for Rs.122.21 crores and Rs.32 crores approximately furnished under order of this Tribunal dated 17.05.2017 towards differential amount of OTSC dues.

18. In the counter affidavit, the respondent-Union of India has not raised any dispute of fact. However, it has relied upon clause 3(i) and clause 3(m) of the 2014 Merger Guidelines. Clause 3(i) provides how the price of the spectrum is to be determined with reference to the Market Determined Price through auction on a pro-rata basis for the remaining period of the validity of the licence. It also contemplates for bank guarantee for an amount equal to the demand raised by the Department for a One Time Spectrum Charge (OTSC) in case of a judicial intervention, till the final outcome of the court case. Clause 3(m) stipulates that all demands, if any, relating to the licences of the merging entities will have to be cleared by either of the two licensees before issue of the permission for merger/transfer of licences/authorisation. It further requires an undertaking to be submitted by the resultant entity to the effect that any demand raised for pre-



merger period of transferor or Transferee Company shall be paid. It provides further that all demands except for OTSC, of transferor or Transferee Company stayed by the Court of Law shall be subject to outcome of such litigation. However, OTSC is payable as per para/clause 3(i) of the Guidelines.

19. Clauses 21.1 and 21.2 of the Licence Agreement relating to Performance Bank Guarantee (PBG) and Financial Bank Guarantee (FBG) respectively have been extracted and they show that such bank guarantees are required to be valid for one year. PBG is required to be maintained and kept valid by the licensee during the entire currency of the Licence Agreement. The licensor has the right to increase the value of PBGs to the extent of any demand for non-compliance, to the extent it is unsecured by the existing PBGs and these are required to be maintained till clearance of such demands by the licensee. The FBG is required to be of an amount equivalent to the estimated sum payable as licence fee for two quarters and other dues not otherwise secured.

20. The most important and relevant clause of the Licence Agreement in the context of the controversy at hand is clause 11.2 which reads as follows:

“11.2 On revocation or surrender or cancellation of License/Service Authorisation(s) due to reasons whatsoever or expiry of the License, the relevant Bank Guarantees(s) shall be released to the



Licensee only after ensuring clearance of all dues, which the Licensee is liable to pay to the Licensor. In case of failure of the Licensee to pay the amounts due to the Licensor, the outstanding amounts shall be realized through encashment of the Bank Guarantees without prejudice to any other action(s) for recovery of the amounts due to the Licensor without any further communication to the Licensee.”

21. The respondent has taken the stand that vide letter dated 22.03.2017, it approved the Scheme of Merger between the petitioner and RCOM with conditions, *inter alia*, of furnishing of bank guarantees by the petitioner for licence fee dues, Spectrum Usage Charge (SUC) dues and reserve price dues as well as an undertaking to the effect that RCOM would take over the liabilities of the petitioner herein.
22. The respondent has referred to the AUSPI judgment – **(2011) 10 SCC 543** to emphasize that this Tribunal has no jurisdiction to examine the validity of the terms and conditions in the licence of a service provider and can adjudicate only by interpreting such terms and conditions. It has also devoted few paragraphs to highlight that RCOM got involved in insolvency proceedings since May 2018 and its capacity to securitise the liabilities of the petitioner taken over by it stands reduced considerably.



23. The respondent has admitted that in Civil Appeal No.588 of 2015 and other related matters challenging the AGR judgment of this Tribunal in the Supreme Court, an undertaking has been given by the respondent that it will continue to raise demands as per its understanding but the same will not be enforced till final decision of the controversy by the Apex Court. It has also disclosed that against the judgment of this Tribunal dated 10.05.2018 passed in a case of the petitioner its appeal is pending only with a diary number. According to submissions, the order dated 10.05.2018 does not absolve the petitioner from the liability to renew the bank guarantees and that such liability and obligation still continues. According to respondent, the petitioner is obliged under clause 21 of the Licence Agreement which requires a licensee (the petitioner herein) to extend the period of validity of bank guarantees at least one month prior to the date of expiry on a year to year basis.

24. The respondent in its parawise reply has taken the stand that the statements made in paras 37 and 38 of the petition relating to the amount claimed by the respondent to be due against the petitioner need no reply. The contents of those paras of the petitions have already been noted earlier. They showed the amount claimed by the respondent to be outstanding dues against the petitioner as Rs.350.31 crores. Its break-up under three heads has also been noticed earlier.



25. According to respondent, the sum of Rs.107.788 crores recovered through the bank guarantees of the petitioner as reserve price dues is not final because the order of this Tribunal dated 10.05.2018 has been challenged before the Supreme Court. According to the respondent, the petitioner is still bound by the obligations under the Licence Agreement and its bank guarantees are being retained to safeguard the interests of the Union of India.

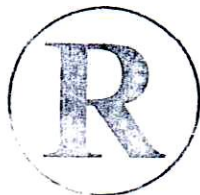
26. During the course of submissions, learned counsel for the petitioner has highlighted that DoT has admitted in its reply affidavit in respect of MA No.220 of 2018 in T.P. No.63 of 2016 that it is entitled to retain only SUC dues which along with interest upto March 2018 is Rs.32.08 crores and licence fee dues with interest upto 31.07.2018 for Rs.212.20 crores. It has been further submitted that these two claimed dues are also admittedly provisional and dependent upon the outcome of the AGR issue which is pending in the Hon'ble Supreme Court of India. It was pointed out that the dues on account of Reserve Price as per order of this Tribunal dated 10.05.2018 has already been demanded by the respondent and paid by the petitioner along with interest by permitting encashment of bank guarantees. According to the petitioner, against the provisional dues of Rs.240.26 crores, the respondent is arbitrarily retaining bank guarantees amounting to Rs.450.80 crores. Had the respondent acted as per its own case, it should have returned bank guarantees to the extent of Rs.206.54



crores. Since the claim for OTSC has been determined as per order of this Tribunal dated 10.05.2018 and paid by the petitioner as indicated above, it is entitled to return of bank guarantees for the amount of Rs.32.1465243 crores which was furnished pursuant to order of this Tribunal dated 17.05.2017 in T.P.No.26 of 2017.

27. Petitioner has also referred to contents of letter dated 20.10.2017 whereby respondent communicated to the petitioner about taking on record the transfer and vesting of the telecommunication business of the petitioner to M/s RCOM. That letter shows that petitioner's licences in Rajasthan Service Area and other areas stand cancelled with immediate effect and simultaneously all assets and liabilities in respect of those licences are transferred to respective licences held by M/s RCOM. In Para 3 of that letter petitioner was warned that bank guarantees shall have to be kept alive as per this Tribunal's interim order in Petition No.63 of 2016. It is further submitted on behalf of the petitioner that after the transfer, M/s RCOM was asked to and has furnished all that was required on account of its taking over all the liabilities of petitioner herein.

28. According to learned counsel for the petitioner, the purpose of Performance Bank Guarantee was to ensure that the obligation to roll-out the facilities is carried out by the licensee. That phase is already over and the



obligations of the petitioner as a licensee stand fully transferred to M/s RCOM. Hence, petitioner's PBGs should be returned. Reliance has also been placed upon terms of the Licence Agreement for Unified Licence (**Annexure P-32**) to point out that mergers and acquisitions as well as the transfer of licences are to be as per the Guidelines issued on the subject. In terms of Clause 6.4 of the Licence Agreement, the respondent has already granted the written approval for transfer of licence and the only liability under the terms of Clause 6.4(iii), cast upon the petitioner is to pay the past dues till the date of transfer and thereafter M/s RCOM, the Transferee Company, is required to pay all future dues inclusive of anything remaining unpaid for the past period by the outgoing company.

29. Lastly, reliance has been placed upon Clause 11.2 of the Licence Agreement which has already been extracted earlier in Para 20. It is not in dispute that petitioner's licence stands cancelled and on account of such event, the bank guarantees of the petitioner are required to be released but after ensuring clearance of all dues which the petitioner, as a licensee, was liable to pay to the licensor. This, according to learned counsel for the petitioner, again refers only to the liabilities or dues "as a licensee", which would mean dues upto cancellation of the petitioner's licence, i.e. the past dues. For any amount which cannot be recovered right now as dues, the bank guarantees cannot be



retained and such dues along with future dues will be the liability of the transferee, M/s RCOM.

30. We have already noted the various contentions advanced on behalf of respondent. The liabilities of the petitioner after its licence has been cancelled and simultaneously transferred to the transferee have to be governed by provisions in the agreement governing past liabilities and return of bank guarantees qua an ex-licensee. The Guidelines governing cancellation/transfer or merger have already exhausted their purpose once the respondent has accorded approval for the transfer of petitioner's licence to M/s RCOM as per permissible conditions and their fulfilment. Now, they can be of limited use for interpretational purpose only. The relevant provisions in the agreement have also been noted above. The respondent can lawfully refuse to release the bank guarantees of petitioner only if they can show that it has not cleared all its past liabilities / dues which it was liable as a licensee to pay to the respondent till the date of cancellation of its license due to merger. The consequence of non-payment is not only non-release of the bank guarantee for the amount due but also of creating an entitlement in favour of the respondent. It can realise the outstanding amount through encashment of the bank guarantees without prejudice to any other action for recovery of the amounts due.



31. Read in totality, Clause 11.2 of the Agreement and other relevant provisions noted above clearly suggest that the petitioner can be liable only for the past outstanding till its licence was cancelled and simultaneously transferred to M/s RCOM. Before interpreting this clause further with a view to decide the prayer for return / release of all the Bank Guarantees of the petitioner, it is useful to recapture some established norms governing the telecom industry in the context of transfer / merger of licenses, imposition of conditions there for by the Licensor and consistent orders passed by this Tribunal in respect of such conditions.

32. Because of pendency of disputes relating to AGR in the Supreme Court and undertaking by the Union of India not to realise its demands even if raised, demands / conditions requiring payment or even additional Bank Guarantees for License Fee (LF) and Spectrum User Charges (SUC) have not been permitted on the ground that such demands are not for crystallized legal dues payable by the telecoms. Petitioner wants the same principle to apply in respect of prayer for return / release of its Bank Guarantees. The issue, as noted, is whether this principle will flow from Clause 11.2 of the Agreement. This Tribunal has not accepted any plea in its earlier decisions / orders to ignore an interim or final order which continues to bind the parties. Demand for OTSC dues by Union has not been allowed in many matters on this score.



33. For interpretation purpose, Clause 3(m) of the 2014 Merger Guidelines needs to be noted because it clearly stipulates that all demands relating to the licenses of the merging entities will have to be cleared by either of the two licensees even before issue of permission for merger etc. Clearly the emphasis on such demands (prior to date of merger) is to treat them as liabilities payable jointly / severally by both the entities involved. FBG is required for LF for two quarters and other dues not otherwise securitised. "Dues" in this context has been interpreted to mean only ascertained and lawfully payable demand. On such views, demand for additional BGs' for demands stayed or quashed by Courts has generally not been permitted by this Tribunal. But return or release of BGs' already furnished is an altogether a different issue. For this, the purpose and intent of the parties needs to be ascertained in the light of relevant guidelines and the Agreement.

34. So long a pre-merger demand is finally not set aside by a Competent Court or Tribunal, it will not be possible to conclude that the liability stands extinguished for release of the BGs' already furnished. Clause 11.2 of the Agreement requires release only after ensuring clearance of all dues. For the Licensor, a demand for pre-merger period will remain due till it is either paid or finally set aside. Pendente-lite, the demand can only be under cloud or judicial eclipse. During such period, the licensor, Union of India is not obliged to return



the BGs' unless security of same value i.e., the pre-merger demand, is furnished by the other entity who is party to the merger or is the transferee. But the licensor cannot insist to retain BGs' for amount exceeding the liability of the merging entity on the date of permission for merger. If due to accrual of interest etc., the amount under litigation undergoes increase, in view of relevant provisions in the Guidelines and the Agreement, it can of course be realized as per law and Court's orders.

35. In view of aforesaid discussion, we find that petitioner, as per clear stand of the respondent, is liable for provisional dues quantified at Rs.240.26 crores approx. only which include Rs.32.08 crores on account of SUC with interest and Rs.212.20 crores as LF with interest. Against this, the respondent is retaining BGs' for Rs.450.80 crores. Therefore, it must release / return the BGs' for the differential amount of more than Rs.209 crores and odd. The fate of BGs' retained by the respondent shall be governed by orders passed by the Court and the outcome of pending litigation relating to AGR issues.

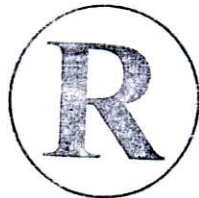
36. On behalf of respondent, it has been submitted that they should be permitted to retain the bank guarantees of the petitioner in larger public interest also and moreso when M/s RCOM has become financially unstable and it may not be able to meet the dues which may be found against the petitioner in future



and which may remain unpaid on account of uncertainties till the judgment of the Hon'ble Supreme Court. Although public interest may override private rights but such an analogy, in our considered view, is not attracted in the present matter which is to be governed by provisions in the Guidelines and the Licence Agreement.

37. For the reasons indicated above, the prayer made in this petition is allowed only in part. The respondent is directed to return/release the original Performance Bank Guarantees and Financial Bank Guarantees as per details mentioned in **Annexure P-1** for the value in excess of Rs.240.26 crores for which *sk* along they are entitled to retain some of the BGs' as security. This should be done by the respondent at the earliest and in any case within two months from today otherwise they would be liable for damages.

38. The petition along with pending M.As, if any, is disposed of. There shall be no order as to costs.



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 (S.K. Singh, J)
 Chairperson

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 (A.K. Bhargava)
 Member