Bharti Airtel Ltd vs Union Of India on 14 May, 2015

Equivalent citations: AIR 2015 SUPREME COURT 2583

Bench: R.K. Agrawal, J. Chelameswar

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.2803 OF 2014

Bharti Airtel Ltd. … Appellant

Versus

Union of India … Respondent

WITH

CIVIL APPEAL NO.1969 OF 2014

Vodafone Mobile Services Ltd. & Others … Appellants

Versus

Union of India … Respondent

CIVIL APPEAL NO.2072 OF 2014

Loop Mobile India … Appellant

Versus

Union of India … Respondent

CIVIL APPEAL NO.5376 OF 2014

Idea Cellular Ltd. … Appellant

Versus

Union of India … Respondent

CIVIL APPEAL NO.9116 OF 2014

Idea Cellular Ltd. … Appellant

Versus

Union of India … Respondent

WRIT PETITION (CIVIL) NO.1056 OF 2014

Bharti Airtel Ltd. & Others … Petitioners

Versus

Union of India … Respondent

WRIT PETITION (CIVIL) NO.971 OF 2014

Vodafone Cellular Ltd. & Others … Petitioners

Versus

Union of India … Respondent

AND

WRIT PETITION (CIVIL) NO.180 OF 2015

Reliance Telecom Ltd. & Another … Petitioners

Versus

Union of India & Another … Respondents

J U D G M E N T

Chelameswar, J.

1. These five civil appeals under Section 18 of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the "TRAI Act") and three writ petitions raise common questions. Each of the appellants or the petitioners, as the case may be, in these matters (hereinafter collectively referred to as 'LICENSEES') is a licensee holding a licence granted under Section 4 of the Indian Telegraph Act, 1885 for providing TELEGRAPH services in the various earmarked service areas.

2. It appears from the judgment of this Court in Centre for Public Interest Litigation & Others v. Union of India & Others, (2012) 3 SCC 1, hereinafter referred to as 2G case, that the first telegraph link in India was experimented in 1839 between Calcutta and Diamond Harbor separated by a distance of 21 miles. By an act of the British Parliament, known as the Indian Telegraph Act, 1885, the privilege of "establishing, maintaining and working of telegraphs" within the territory of British India was exclusively conferred under Section 4 upon the Central Government – an expression which bore different meanings at different points of time in this country, the details of which may

not be necessary for the purpose of this case. However, proviso to the said section enabled the Central Government to licence any person to exercise the privilege which is otherwise exclusive to the Central Government.

3. The advancement of technology made wireless communication[1] possible which led to the enactment of the Indian Wireless Telegraphy Act, 1933.

4. On 28th January, 1882, Major E. Baring, Member of the Governor General's Council declared open three telephone[2] exchanges in Calcutta, Bombay and Madras, marking the beginning of telephone communications in India. Over the next 133 years, there has been a mind boggling advancement in the telecommunication technology. Strangely, there is no enactment in this country dealing with the establishment and working of telephones. The 160 year old telegram system in this country was officially closed on 14th July, 2013. Ironically, the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 still continue on the statute book. By virtue of the various amendments made from time to time, these two enactments still continue to govern the entire activity of establishment, maintenance and working of telephones and various other telecommunication services.

Electromagnetic Radiation - Waves - Frequencies - Spectrum

5. `Electromagnetic (EM) radiation is a phenomenon which occurs in the universe. Sunlight is a familiar example of EM radiation. So is the light from stars. EM radiation travels in waves at different frequencies. Frequency of a wave and its length are inversely proportional. Generally, EM radiation is classified on the basis of wavelength into radio wave, microwave, terahertz (or sub-millimeter) radiation, infrared, the visible region is perceived as light, ultraviolet, X-rays and gamma rays. Waves with frequencies ranging from 300 GHz to 3 kHz (corresponding wave length ranging from 1 millimeter to 100 kilometers) are called radio waves. Radio waves have the longest wave lengths in the electromagnetic spectrum. The entire range of frequencies in EM radiation is called EM spectrum. "EM radiation interacts with matter in different ways across the spectrum. These types of interaction are so different that historically different names have been applied to different parts of the spectrum, as though these were different types of radiation. Thus, although these "different kinds" of EM radiation form a quantitatively continuous spectrum of frequencies and wavelengths, the spectrum remains divided for practical reasons related to these qualitative interaction differences."

6. Any EM radiation (including radio waves) travels with the speed of light in vacuum i.e. 299,792,458 meters per second. The distance is called the wavelength of a Hertz radio signal (HZ). Megahertz (MHz) radio signal has a wavelength of 984 feet. Wave length of radio waves is measured in units called Hertz -a name given to the unit after Heinrich Hertz a German scientist who in 1887 demonstrated the reality of radio waves the existence of which was theoretically predicted earlier in 1867 by James Clerk Maxwell (a Scottish mathematical physicist).

7. Radio waves can be generated artificially and used for the transmission of sound or for passing information. Radio frequencies are divided into groups called bands which have similar

characteristics. Artificially generated radio waves are used for fixed and mobile radio communication broadcasting, radar and other navigation systems, communication satellites, computer networks etc.

8. To prevent interference between different users, the artificial generation and use of radio waves is strictly regulated by law, coordinated by an international body called the International Telecommunications Union (ITU). The radio spectrum is divided into a number of bands on the basis of frequency and allocated to different users.

9. Till 1991, the activity of establishment, maintenance and working of telephones was completely controlled by the Government of India. Pursuant to the New Economic Policy announced by the Government of India on 24.7.1991, some of the services in telecommunication sector were opened up to the private investment in 1992.

".....the following services: (a) Electronic Mail; (b) Voice Mail; (c) Data Services; (d) Audio Text Services; (e) Video Text Services; (f) Video Conferencing; (g) Radio Paging; and (h) Cellular Mobile Telephone. In respect of services (a) to (f), the companies registered in India were permitted to operate under a licence on non-exclusive basis. For services covered by (g) and (h) mentioned above, keeping in view the constraints on the number of companies that could be allowed to operate, a policy of selection through a system of tendering was followed for grant of licences." [Para 5 of 2G case (supra)]

10. All services, which were opened up to private investment referred to above, are EM wave based services. Therefore, they fall within the definition of the expression "TELEGRAPH"[3] occurring under Section 3(1)(AA) of the Telegraph Act. Since the privilege to conduct the activity of establishment, maintenance and working of a TELEGRAPH could be permitted by the Government by private parties under a licence, there arose a need to regulate utilization of frequencies by the LICENSEES for carrying on the business in TELEGRAPHS.

11. Some of the frequencies are exclusively reserved for the defence and security operations of India which, for obvious reasons, cannot be made accessible to private parties.

12. The New Telecom Policy 1994 (NTP 1994) was announced by the Government of India on 13.5.1994. In furtherance of the said Policy, 22 Cellular Mobile Telephone Service (CMTS); 6 Basic Telephone Service (BTS) licences were granted to operators:

13. In addition, paging licences were awarded in 27 cities and 18 State circles.

14. These licences were bundled with spectrum within which a licensee was entitled to operate. The licences were granted on the basis of selection through a system of tendering.

15. On 20th November 1998, a Group was constituted by the Government of India to review the then existing telecom policy and suggest reforms. Based on the report of the said Group, the New Telecom Policy 1999 (NTP 1999) was formulated which became effective from 1.4.1999.

16. It took note of the fact situation as it existed on that day in the following words:

> "The Government invited private sector participation in a phased manner from the early nineties, initially for value added services such as Paging Services and Cellular Mobile Telephone Services (CMTS) and thereafter for Fixed Telephone Services (FTS). After a competitive bidding process, licenses were awarded to a CMTS operators in the four metros, 14 CMTS operators in 18 state circles, 6 BTS operators in 6 state circles and to paging operators in 27 cities and 18 state circles. VSAT services were liberalized for providing data services to closed user groups. Licences were issued to 14 operators in the private sector out of which only nine licencees are operational. The Government has recently announced the policy for Internet Service Provision (ISP) by private operators and has commenced licensing of the same. The Government has also announced opening up of Global Mobile Personal Communications by Satellite (GMPCS) and has issued one provisional license. Issue of licenses to other prospective GMPCS operators is under consideration."

17. The NTP 1999 took note of the existence of various licences granted under the NTP 1994 and made a policy statement that the Government intends to resolve the problems of existing operators in a manner "which is consistent with their contractual obligations and is legally tenable".[4]

18. Pursuant to the policy statement, the Government of India devised a scheme for the migration of existing LICENSEES under the NTP 1994 to the new regime under the NTP 1999. The Scheme known as Package for Migration of Existing LICENSEES of Cellular and Basic Telecom Services to New Telecom Policy. The terms of the policy insofar as relevant for our purpose are as follows:-

> "….. the following Package is proposed to migration of the existing Cellular (Metros and Telecom Circle) and Basic Telecom Service Operators to NTP-99 regime:-
>
> The cut off date for change over to NTP-99 regime will be 1.8.1999. The licensee will be required to pay one time Entry fee and License Fee as a percentage share of gross revenue under the license. The Entry Fee chargeable will be licence fee dues payable by existing LICENCEES upto 31.07.1999, calculated upto this date duly adjusted consequent upon notional extension of effective date as in para (ix) below, as per the conditions of existing licence.

The Licence fee as a percentage of gross revenue under the licence shall be payable w.e.f. 1.8.99. The Government will take a final decision about the quantum of the revenue share to be charged as licence fee after obtaining recommendations of the Telecom Regulatory Authority of India (TRAI). In the meanwhile, Government have decided to fix 15% of the gross revenue of the Licensee as provisional license fee. The gross revenue for the purpose would be the total revenue of the Licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax collected by the licensee on behalf of the Government from their subscribers. On receipt of TRAI's recommendation and Government's final decision, final adjustment of provisional dues will be effected depending upon the percentage of revenue share and the definition of revenue for this

purpose as may be finally decided.

xxx xxxx xxxx xxxx

(xi) The period of licence shall be 20 years starting from the effective date of the existing licence agreement."

19. In the year 2003, the Central Government came out with an Office Memorandum dated 11.11.2003 which contained guidelines for Unified Access (Basic & Cellular) Services Licence (UAS Licences). The relevant portion of the document reads as follows:-

> "Government, in the public interest in general and consumer interest in particular and for the proper conduct of telegraphs and telecommunications services, has decided to move towards a Unified Access Services Licensing regime. As a first step, as recommended by TRAI, Basic and Cellular services shall be unified within the service area. In pursuance of this decision, the following shall be the broad Guidelines for the Unified Access Services License.
>
> The existing operators shall have an option to continue under the present licensing regime(with present terms & conditions) or migrate to new Unified Access Services Licence (UASL) in the existing service areas, with the existing allocated/ contracted spectrum.
>
> The license fee, service area, rollout obligations and performance bank guarantee under the Unified Access Services Licence will be the same as for Fourth Cellular Mobile Service Providers (CMSPs)."

20. Some of the LICENSEES migrated to the UAS Licensing regime. Even under the said regime, the validity of licence was initially for a period of 20 years from the effective date and extendible by 10 years.[5]

21. Under the National Telecom Policy-2012 (for short "NTP-2012"), the Government of India decided to "de-link" licence and the spectrum for the purpose of grant of fresh licences.

22. In the meanwhile, the grant of licence and allotment of spectrum by the Union of India pursuant to the two press releases issued on 10.01.2008 became subject matter of litigation before this Court which eventually culminated into 2G Case. By the said judgment, this Court set aside all the licences granted pursuant to the abovementioned press releases.

23. Union of India announced the NTP–2012 in which it sought to de-link the licences and allocation of spectrum in respect of future licences. Shortly thereafter on 2.2.2012, the judgment of this Court in 2G case was pronounced. On 15.02.2012, the Minister of Telecommunication & Information Technology issued a statement. Insofar as the existing UAS, CMTS and Basic Services Licences are concerned, it is stated therein that (i) no more UAS licences linked with spectrum will

be awarded, (ii) all future licences will be Unified Licences, (iii) allocation of spectrum will be delinked from the licence, (iv) The validity of existing UAS (& CMTS and Basic services) licences may be extended for another 10 years at one time, as per the provisions of the extant licensing regime with suitable Terms & Conditions so as not to imply automatic continuance of existing licence and related conditions including quantum and price of any spectrum allocated. The relevant portion of the full text of the statement would be considered later in this judgment.

24. The licences granted to the various LICENSEES are due to expire on various dates in 2014-2015.

25. Pursuant to the judgment in 2G case, the Union of India took steps to conduct an auction of the 900 MHz band and 1800 MHz band insofar as they pertain to the certain operators whose licenses were coming to an end in 2014.

26. Each of the LICENSEES herein hold licences for different service areas. It appears from the impugned order of the TDSAT dated 31.01.2014, which is a common order in the four petitions filed by four different LICENSEES (Vodafone Mobile Service Ltd., Loop Mobile India, Bharti Airtel Ltd. & Idea Cellular Ltd.). Some of the LICENSEES hold Cellular Mobile Telephone Service licence (CMTS licence) while others hold Unified Access Service license (UAS licence). Both the classes of licences stipulated that the licences are valid for a period of 20 years and provide that the Licensor may extend the period of licence for another 10 years subject to certain conditions specified in the licence. The relevant conditions contained in both the classes of licences are broadly similar with certain minor variations in the language employed.

|CMTS |UAS | |Period of Licence: The period of |The LICENSE shall be valid for a | |license shall be twenty years from|period of 20 years from the | |the effective date of the existing|effective date unless revoked | |license agreement unless |earlier for reasons as specified | |terminated for the reasons stated |elsewhere in the document. | |therein. The Licensor may extend | | |the period of license, if |The LICENSOR may extend, if deemed| |requested during 19th year from |expedient, the period of LLICENCE | |the effective date for a period of|by 10 years at one time, upon | |10 years at a time on mutually |request of the LICENSEE, if made | |agreed terms and conditions. The |during 19th year of the Licence | |decision of licensor shall be |period on terms mutually agreed. | |final in regard to grant of |The decision of the LICENSOR shall| |extension. |be final in regard to the grant of| | |extension. | Whether the minor variations in the language employed by the LICENSOR make any difference in the context of the right of the LICENSEES to seek an extension of a licence is one of the aspects which is required to be examined by us.

27. Since both the classes of licences contemplate seeking of an extension by the LICENSEE during the 19th year of the currency of the licence, the LICENSEES approached the Government of India seeking an extension/renewal of their licences. Alleging that there was no response from the Government of India, some of the LICENSEES went to the Delhi High Court filing writ petitions seeking appropriate directions to the Government of India. The said writ petitions were disposed of by an order dated 22.02.2013 of the Delhi High Court directing the Government of India to dispose of the applications of the writ petitioners within a stipulated time frame. The High Court also observed that in the event of the Government of India's decision going adverse to the interest of the

petitioners, the petitioners would be "at liberty to take recourse to appropriate remedy".

28. Pursuant to the directions of the Delhi High Court, the applications of the petitioners were considered and rejected by the Government of India on different dates. Aggrieved by the same, the LICENSEES approached the TDSAT. Their petitions were dismissed by an order dated 31.01.2014. Hence, the appeals under Section 18 of the TRAI Act. Some of the LICENSEES approached this court directly without going to the TDSAT by filing writ petitions invoking the jurisdiction of this court under Article 32 of the Constitution of India.

29. TDSAT recorded that "the right to extension of the licence is undeniably a valuable right of the licensee" but held that such a right is not an absolute right. If the LICENSOR (Union of India) does not deem it expedient to grant such licence, it is under no such obligation to grant such extension. The expression 'expedient' in the context of the licences only means "public interest and for public good". Therefore, the tribunal opined that it is open to the Central Government to refuse the extension if it is of the opinion that the grant of extension would not be in public interest or sub-serve public good. The tribunal also opined that "….. for the purpose of grant of extension it is Central Government alone that is the judge of public interest and public good. The Central Government may frame a policy or revise and existing policy in larger public interest and in case the extension of the existing licences militates against the new policy it would be a valid and acceptable ground for refusing extension". The tribunal also opined that the absence of the employment of the expression "if deemed expedient" in the relevant clause of UAS licence, made no difference insofar as the authority of the Government of India for rejecting the extension of the licences.

30. In coming to such a conclusion, the tribunal took note of the judgment of this Court in 2G case and also the subsequent opinion of this Court dated 27.9.2012 in Natural Resources Allocation, In Re. Special Reference No.1 of 2012, (2012) 10 SCC 1 and the Press Statement made by the then Telecom Minister on 15.2.2012. The tribunal also noted certain recommendations made by the TRAI on Spectrum Management and Licensing Framework dated 11.5.2012 alongwith certain other regulations and clarifications and concluded that:

> "…… show that after deep and careful consideration of the matter, in consultation with the expert statutory authority in the sector, the Government has framed a policy for management and dispensation of spectrum in the larger public interest. Any extension of the expiring licenses is bound to undermine the implementation of the policy and that is justification enough and sufficient for the Government to decline the extension for the licenses."

31. On behalf of the licensees, the following submissions are made:

> 1. The licences, such as the one under consideration in this batch of matters, are nothing but contracts between the Union of India and the LICENSEES. They secured the licences in the year 1994-95 admittedly through a transparent process of bidding. Under the terms of the said licences/contract, the LICENSEES have a right to have their claim for extension appropriately considered in terms of the contract.

> Therefore, the respondents are neither entitled nor justified in calling upon the LICENSEES to participate in the auction of the spectrum to obtain the necessary spectrum to work their respective licences. Such a decision of the respondent is violative of the contractual rights of the LICENSEES.

It is also the case of the LICENSEES that under the terms of the licence, they are entitled to seek an extension, but not a 'renewal' of the licence. The employment of the word "extension" in the licence confers a higher right than the right to seek a renewal.

The principle that the State owned resources cannot be alienated except by a process of auction is not a principle applicable universally and is so clarified by this Court in Natural Resources Allocation, In Re, Special Reference No.1 of 2012, (2012) 10 SCC 1.

The decision of this Court in 2G case by which this Court found fault with the policy of the Government of India to grant licences on the basis of "first come first serve" without auctioning the spectrum is applicable only to the licences granted in 2008 but not to every licence granted under Section 4 of the Indian Telegraph Act, 1885.

Maximization of revenue shall not be the only consideration for the Union of India while deciding to hold the auction in question. Union of India was under an obligation to ensure continuity of telecom services to millions of people who are already utilizing services of the existing operators. Introducing new operators at this stage would cause disruption in the service to the customers and likely to create an unhealthy competition for access to spectrum which would eventually burden the ultimate consumer.

Each of the LICENSEES has made a huge investment in the infrastructure for the purpose of providing services to its customers. Such infrastructure is created by borrowing from various banks and financial institutions. If the licences of the LICENSEES are not extended, it would result in a huge wastage of the national financial and material resources. If the licences of the existing operators are not renewed, such infrastructure would simply go waste resulting into not only loss to the national resources but also lead to a situation in which the recovery of the loans obtained by various operators would become doubtful.

Under the TRAI Act, the authority, constituted under Section 3, is under an obligation to make recommendations either suo moto or on a request of the Central Government regarding the terms and conditions of licence to a service provider and efficient management of available spectrum. The authority also has a duty to "ensure compliance of terms and conditions of a license". The Government of India in violation of such statutory stipulation ignored the recommendation made by the authority and put the spectrum in auction.

32. On behalf of the Union of India, it is argued by the learned Solicitor General that none of the LICENSEES have any vested right for either renewal or extension of their respective licences. Under the terms and conditions of the licences, the LICENSEES are only entitled for a consideration of their claim for extension of their licences period. However, such a right is subject to the following

conditions:

> There must be a request from the licensee for such an extension of the period of licence;
>
> Such a request must be made during the 19th year from the effective date of the licence;
>
> The extension of the licence is at the discretion of the LICENSOR as is evident from the language of the relevant clauses of the license which states that the LICENSOR may extend;
>
> That condition of clause 4.1 which says that "the decision of the LICENSOR in regard to the grant of extension is final" indicates that the discretion vested in the LICENSOR is absolute.

33. Learned Solicitor General also submitted that even the limited right of consideration created under the contract is always subject to change of policy by the LICENSOR (Union of India) and its statutory and constitutional obligations. The Union of India as a matter of policy took a decision not to extend the licenses of these LICENSEES, as the extension of a license would necessarily imply the extension of the privilege to use the spectrum which had been bundled with the original grant. The Government took such a decision in the light of the decision of this Court in 2G case. The prospect of the exchequer getting a huge amount by putting the spectrum for auction is a relevant consideration justifying the decision to put the spectrum for auction. So long as the decision to put the spectrum on auction is uniformly applicable to all LICENSEES across the Board, such a policy decision of the Government of India prevails over the right, if any of the LICENSEES to have their claim for extension of the license be considered either on the same terms on which the licenses were granted or on terms which the LICENSEES are suggesting. The learned Solicitor General submitted that even in terms of the license conditions, the extension can only be on "mutually agreed terms and conditions" or "on terms mutually agreed". It is not open for the petitioners to argue that the LICENSOR is bound to grant extension on terms which the licensee dictates.

34. Now, we proceed to examine the submissions of the LICENSEES.

35. At the outset, we agree with the LICENSEES that a licence granted under Section 4 of the Act is a contract between the Government of India and the LICENSEES.

36. In Union of India & Another v. Association of Unified Telecom Service Providers of India & Others, (2011) 10 SCC 543, relying upon an earlier Constitution Bench judgment of this Court in State of Punjab & Another v. Devans Modern Breweries Ltd. & Another, (2004) 11 SCC 26, which in turn relied upon two earlier decisions of this Court in Har Shankar & Others v. The Dy. Excise and Taxation Commissioner & Others, (1975) 1 SCC 737 and Panna Lal & Others v. State of Rajasthan & Others, (1975) 2 SCC 633, this Court held -

"40. ....Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the licence including the definition ..... are part of a contract between the licensor and the licensee."

37. Therefore, now it is the settled position of law that a license granted under Section 4(1) of the Telegraph Act such as the one granted to each of the LICENSEES herein is a contract between the LICENSOR and the LICENSEE.

38. If the licences in question are nothing but contracts, the next question would be, is there any right of extension of licence created in favour of LICENSEE under the contract?

39. From the language of the relevant clauses of the licences which are noted earlier, it is clear that the LICENSEES have no automatic right of renewal/extension on the expiry of the original tenure of the license. The contract only provided for extension of the period of license at the sole discretion of the LICENSOR subject to the condition that the LICENSEE makes an application seeking an extension during the 19th year of the currency of the licence. It appears that all of the LICENSEES did make such an application.

40. The question which requires examination is - what are the obligations of the LICENSOR on receipt of such an application? The obligations of the LICENSOR flow from two sources, (i) From the contract, (ii) from the Constitution of India and the relevant provisions of the statute (Indian Telegraph Act, 1885). In the event of any conflict between the said two sets of obligations, the further question would be which one of the conflicting obligations prevail?

41. Under the terms of the license, the LICENSOR is required to extend the license only on "mutually agreed terms and conditions", if such an extension is sought in the 19th year of the currency of the licence. To test the correctness of the submission that under the contract, the LICENSOR is under an obligation to consider the extension of licence, we take an example of a case where the LICENSEE does not make an application in the 19th year but makes it just a few days before the expiry of the 20th year. Does the LICENSEE still have a right of consideration? In our opinion, the answer should be 'No' for two reasons; (i) that such a claim is plainly unsupported by the text of the contract, (ii) the failure to seek extension in the 19th year, makes the continuance of the service to the public uncertain. The Government of India cannot afford to remain waiting without making alternative arrangements, Because the disruption in the communication in the modern world may lead to many undesirable consequences apart from causing inconvenience to the public. Take the alternative possibility of the LICENSEE not making an application for extension at all because he is not interested in the extension (a very unlikely scenario). Can the LICENSOR insist that the LICENSEE should continue to offer the service either on the same economic considerations or otherwise? The answer seems to be plain and 'No'. The language of the contract – "mutually agreed terms" – clearly indicates so. Though it requires an examination whether the LICENSOR i.e. the State can compel the LICENSEE in a given case in exercise of its authority either legislative or executive. Therefore, under the contract neither the LICENSOR nor the LICENSEE has a right to insist that other party should continue with the contract even if such other party is not willing to

continue except on such terms and conditions on which the other party may desire to continue. Such terms and conditions obviously include terms and conditions regarding the economic stipulations subject to which either of the parties is willing to be in the contract.

42. However, the LICENSOR being the Union of India, its discretion to stipulate terms and conditions is regulated by certain constitutional mandates apart from stipulations of any law applicable.

43. Insofar as the constitutional mandate in the context of a license under Section 4 of the Telegraph Act are concerned, this Court in 2G case at para 85 held as follows:

> "85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties."

44. The LICENSOR/Union of India does not have the freedom to act whimsically. As pointed out by this Court in 2G case in the above- extracted paragraph, the authority of the Union is fettered by two constitutional limitations; firstly, that any decision of the State to grant access to natural resources, which belong to the people, must ensure that the people are adequately compensated and, secondly, the process by which such access is granted must be just, non-arbitrary and transparent, vis-à-vis private parties seeking such access.

45. By a statutory declaration made under Section 4 of the Indian Telegraph Act, 1885, it is declared that the Government of India shall have the exclusive "privilege for establishing, maintaining and working telegraphs" (which includes telephones). The proviso to Section 4 of the said Act authorizes the Government of India to grant license to establish, maintain and work telegraphs (which includes telephones) "on such conditions and in consideration of such payments" as it thinks fit. Telephones include both wired and wireless telephones like cellular mobile phones, the establishment and working of which necessarily requires access to spectrum which again is controlled by the Government of India as it is already declared to be a natural resource by this Court. It can thus, be seen that no person other than the Government of India has any right to establish, maintain and work telephones. It is the exclusive privilege of the Government of India, which could be permitted to be exercised by others by a grant from the Government of India.

46. In other words, such licences are in the nature of largesse from the State. No doubt, the authority of the State to distribute such largess is always subject to the condition that the State must

comply with the conditions of Article 14 of the Constitution i.e. the distribution must be on the basis of some rational policy. Even the language of the proviso to Section 4 of the Telegraph Act, which stipulates that the grant of license should be "on such conditions and in consideration of such payments as it thinks fit", must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of license must be non-discriminatory. The conditions contained in the licenses in question stipulate that the term of the license could be extended on mutually agreed terms, if the Government of India deems it expedient. The obligations of the Government of India flowing from the Constitution as well as a statute necessarily require the Government of India to grant licences as rightly pointed by the Tribunal (TDSAT) only "in public interest and for public good".

47. This Court in 2G Case after elaborate discussion on the nature of the State's authority to deal with the natural resources held that "..... spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to the States as per international norms." (Para 77)

48. While recognizing the power of the State to distribute natural resources this Court held that the State is bound to "act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest". (Para 75)

49. In para 89, the Court concluded as follows:-

> "89. "In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."

50. This Court further held: ".....State and its agencies/instrumentalities must always adopt a rational method for disposal of public property .....". "It is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in national/public interest". (Para 95)

51. This Court opined that a "duly publicized auction conducted fairly and impartially is perhaps the best method for discharging the burden of the State to ensure protection of public interest."

52. The conditions of licences/contracts in whatever language provided for consideration for the extension of a licence are necessarily required to be interpreted in consonance with the obligation of the LICENSOR/Union of India under the Constitution and the laws. Otherwise, the contract would be rendered void for being inconsistent with public policy, the principle expressly incorporated under Section 23 of the Indian Contract Act, 1872.

53. The decision of the LICENSOR to conduct an auction for granting access to spectrum, obviously, complies with the second of the requirements specified by this Court in para 85 of the 2G Case judgment. The question whether such a decision also complies with the requirements of the first of the two facets mentioned therein is the issue in this batch of matters. In other words, the adequacy of compensation which the Government of India seeks to derive by holding an auction for allowing access to spectrum is just and fair in the circumstances.

54. The case of the LICENSEES is that such a procedure would promote an unhealthy competition among the persons aspiring to secure such a spectrum. The cost of such acquisition would eventually result in burdening the consumers, i.e. the users of the telephones. Because, higher the amount spent by the LICENSEE in securing the spectrum the greater the need for the LICENSEE to fix higher tariff for the telephone services in order to make the service commercially viable. Though the prospect of securing a larger amount for the exchequer is undeniable the same would be at the cost of the consumers, as the burden will ultimately be passed on by the LICENSEE to the consumers. The LICENSEES also submitted that in view of the fact that the LICENSEES invested huge amount running into thousands of crores in the last twenty years of the working of the licenses for building the infrastructure in order to provide necessary telecom services to the people of this country, not only the LICENSEE would suffer an economic damage but the Nation also would suffer damage in terms of the wastage of the resources already created.

55. We do not doubt that the LICENSEES would necessarily have to pass on their burden to the ultimate consumers. That need not necessarily mean that there should be an enhancement in the tariffs. There is always a possibility of maintaining the tariffs at a lower level if the consumers base is sufficiently large, i.e. more the consumers base, more the turnover. Therefore, the possibility of avoidance of the need to increase the tariffs. It all depends upon the facts and figures. Adjudicating the issue without concrete facts and figures in this regard only on some hypothetical basis is neither permissible nor justified.

56. Let us examine the alternative scenario. We shall assume for the sake of argument that the impugned procedure adopted by the Government of India would ultimately result in a situation where a LICENSEE would have no choice but to charge higher amounts from the consumers in order to be commercially viable. Whether such a result is desirable or not is a question which falls within the realm of policy choices of the Government of India. By all the established legal principles - this Court would not embark upon an examination of the wisdom of such policy choices.

57. At this stage, we must also deal with certain submissions made by Shri K.K. Venugopal, learned senior counsel appearing for one of the appellants. The phrase “if deemed expedient” occurring in Clause 4.1 of the Licence must be understood in the light of the interpretation of the expression “expedient” in Hotel Sea Gull v. State of West Bengal & Others, (2002) 4 SCC 1 wherein it was held by this Court to mean “whatever is suitable and appropriate for any reason for the accomplishment of the specified object”. It is argued that the question of extension of licence must be decided by the Government of India on the basis of objective and rational criteria by taking into account relevant materials and eschewing irrelevant material. Learned senior counsel in his written submission[6] gave certain facts and figures which according to him are relevant in coming to a conclusion whether

it would be expedient to extend the period of licence. It is also submitted that the phrase "on terms mutually agreed" must also be understood to mean that the Government of India's decision for extension of the licences be based only on relevant and objective criteria such as "the quality, affordability, reach of the services provided by the petitioner and the investments made by it during the initial 20 year period, being satisfactory, the license would be extended by 10 years at one time". (Written Submission)

58. We are of the opinion that the submissions of Shri Venugopal must carry a great weight if the LICENSOR'S (Government of India) obligations are regulated purely by the terms of the contract. But as already noticed by us, the LICENSOR'S obligations are not simply confined to the contract/license. They also flow from the Constitution and the laws of the land. Obviously, the obligations flowing from the Constitution stand on a higher footing and it is the Government of India's duty to satisfy the obligations flowing from the Constitution and the laws of the land in preference to obligations flowing from a contract. It is a well settled principle of law that where there is a conflict between obligations flowing from a contract and those flowing from the law, the obligations flowing from the contract must necessarily yield to obligations flowing from the Constitution and laws. We, therefore, reject the submission of Shri Venugopal.

The fifth submission of the licensees is required to be rejected on the ground that it is too vague and without any basis in the pleadings.

59. Last issue which requires examination is the Scheme of the Telecom Regulatory Authority of India Act, 1997 and the role of the Authority[7] created under the said Act and the legal efficacy of its recommendations.

60. Section 3 of the said Act contemplates the establishment of an authority called "the Telecom Regulatory Authority of India" (for short "TRAI")[8]. TRAI is declared to be a body corporate with all necessary and incidental powers under sub-section (2)[9]. The composition and the qualification required of the persons to be appointed as the Chairperson and the Members of TRAI, their respective powers and other incidental matters are prescribed in Chapter II of the Act.

61. Section 11 (which occurs in Chapter III) enumerates the functions of TRAI. The Section authorises the authority to make recommendations either suo motu or on requests made by the LICENSOR on the various matters enumerated therein. Relevant among them are: (i) terms and conditions of licence to a service provider; (ii) measures to facilitate competition and promote efficiency in the operation of telecommunications services so as to facilitate growth in such services; (iii) efficient management of available spectrum; and (iv) ensure compliance of terms and conditions of licence, are some of the functions which are relevant in the context of the present controversy.

62. On 16.06.2006, the Government constituted a Committee headed by Shri Subodh Kumar, Additional Secretary, Department of Telecommunications. The Committee consisted of technical experts from different institutions, the Ministry of Defence etc. and included representatives of the private mobile telephone service providers. The Committee submitted its report on 13.05.2009

which contained many recommendations. The Committee examined the role of the Government and the goals before the government and recorded as follows:

> "As the custodian of radio spectrum, the government must satisfactorily address a number of goals for spectrum management. These are: efficient utilization of the scarce resource, optimal revenue generation, for the public exchequer, sufficient competition in the telecom market, and rapid diffusion of telecom services. These goals are synergistic as well as conflicting." (emphasis supplied) It recommended delinking of the spectrum allocation from licensing and recommended that "the way forward should be to move away from an administratively determined criteria to a market-driven approach. A market- determined mechanism for spectrum allocation will ensure that spectrum goes to the entity that put the highest value on spectrum, and is best placed to ensure its optimal use".
>
> 63. The Government of India thought it fit to seek the opinion of TRAI on the recommendation of Subodh Kumar Committee by its letter dated 07.07.2009. In response, TRAI submitted a very detailed report dated 11.05.2010.
>
> 64. In the impugned judgment of the TDSAT, it is recorded[10] that TRAI radically differed with the report of Subodh Kumar Committee.
>
> 65. On 10.10.2011, the Government of India (Department of Telecommunications) referred the recommendations dated 11.05.2010 back to TRAI for reconsideration.
>
> 66. The TRAI reconsidered the matter and gave certain clarifications on 03.11.2011.
>
> 67. The judgment of this Court in 2G Case was pronounced on 02.02.2012.

On 15.02.2012, the then Minister of Communications & Information Technology made a press statement announcing the policy of the Government of India regarding the grant of licences under the Telegraph Act, 1885 and the allocation of spectrum.

68. It may be mentioned here that the press statement mentions that such a policy statement is made after consideration of the recommendations of TRAI[11].

69. In view of the statement in the policy announced on 15.02.2012 to the effect that:

> "1. No more UAS licences linked with spectrum will be awarded.
>
> 2. All future licences will be Unified Licences and allocation of spectrum will be delinked from the licence. Spectrum, if required, will have to be obtained separately. A final view on implementation of the Unified License Regime would be taken after receipt of detailed Guidelines and Terms & Conditions from TRAI for Unified Licence including migration path for all existing licence(s) to Unified Licence.

3. In the event of any auction of spectrum pending finalisation of the Unified Licensing Regime, UAS licence without spectrum may be issued which could be subject to a requirement to migrate to Unified licence as and when the regime is put in place. Detailed guidelines for such UAS licence without spectrum would be finalised after receipt of recommendations of TRAI in this regard." XXX XXX XXX XXX XXX

8. The validity of existing UAS (& CMTS and Basic services) licences may be extended for another 10 years at one time, as per the provisions of the extant licensing regime with suitable Terms & Conditions so as not to imply automatic continuance of existing license and related conditions including quantum and price of any spectrum allocated.

9. On extension, the UAS licensee will be required to pay a fee which will be Rs.2 crore for Metro and 'A' Circles, Rs.1 crore for 'B' circles and Rs.0.5 crore for 'C' circles. This fee does not cover the value of spectrum, which shall be paid for separately. While extending the licence, the licensee shall be assigned spectrum only up to the prescribed limit or the amount of spectrum assigned to it before the extension, whichever is less. Spectrum assigned by the Government to the licensee in excess of the Prescribed Limit shall be withdrawn." the submission of LICENSEES is that the only clear decisions taken are that

(i) in future only unified licences will be granted and (ii) the allocation of spectrum will be delinked from the licence. It is clear that no final policy decision was taken by the Government regarding the method and manner of allocation of spectrum even with respect to licences to be granted in future. Insofar as the existing licences are concerned, the policy of the Government is that they are required to extended for another 10 years as per the provisions of the "extant licensing regime with suitable terms and conditions" etc. Therefore, the decision of the Government of India to auction the right of spectrum in the cases of those areas where the LICENSEES held licences so far is not only inconsistent with the terms and conditions of the policy announced on 15.02.2012 as the impugned decision is not only in consistent with the "extant licensing regime" but also a decision taken without consulting TRAI – a requirement which is mandatory under Section 11(1)(a)(ii)[12]. The TRAI Act mandates that the Government of India "shall seek the recommendations of the Authority" while stipulating the "terms and conditions to a service provider" and TRAI failed to discharge its functions stipulated under Section 11(1)(b)(i) which calls upon TRAI to "ensure compliance of terms and conditions of licence".

70. The LICENSEES also argued that the impugned decision of the Government of India to allocate spectrum by conducting an auction is contrary to the recommendations of the TRAI dated 15.10.2014[13] and also contrary to the policy statement of the Minister dated 15.02.2012. The tenor of the policy is clear that the delinking of spectrum from licence would only be with reference to future and the extension of the existing licence is required to be on the basis of the "extant licensing

regime". In other words, the policy is only prospective and applying the same to existing LICENSEES would not only be contrary to the tenor of the policy statement but also make it retrospective in operation.

71. On the other hand, learned Solicitor General argued as follows:

> "The reliance by the operators on stray observations by TRAI is entirely misplaced. The Petitioners have relied on observations of TRAI without placing its final recommendations. In its final recommendations dated 24.11.2014, TRAI did not recommend postponement of the auction. In any event, per the first proviso to Section 11(1) of the Telecom Regulatory Authority of India Act, 1997, even the final recommendations of TRAI are not binding on the Government." (written submission)

72. We shall first deal with the obligation of the Board on the "retrospectivity of the policy". We assume for the sake of argument that the impugned decision of the Union of India is in fact contrary to the tenor of the policy statement dated 15.02.2012. Even then, in our view, the impugned action cannot be faulted because the policy statement insofar as it seeks to apply only for the allocation of spectrum in future would be contrary to the decision of this Court in 2G case and void to that extent.

73. We now examine the other part of the submission of the LICENSEES. An analysis of the scheme of Section 11 of the TRAI Act is necessary. Section 11(1)[14] imposes two legal obligations on TRAI. Under sub-section (a) TRAI is obliged to make recommendations with respect to eight matters enumerated therein either suo motu or on a request of the LICENSOR. Under sub-section (b), TRAI is obliged to discharge various functions numbering nine specified thereunder.

74. For example, under Section 11(1)(a)(ii) while it is one of the functions of the TRAI to make recommendations regarding the terms and conditions of a licence to a service provider, whereas under sub-section

(b)(i), it is the function of the TRAI to ensure compliance of terms and conditions of the LICENSEES.

75. The first proviso to sub-section 11(1) makes a categoric declaration that the recommendations of the TRAI with respect to matters enumerated under sub-section (1)(a) "shall not be binding upon the Central Government".

PROVIDED that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

> No doubt, the second proviso to Section 11(1) mandates that the Government of India shall seek the recommendations of the TRAI in respect of certain matters specified under clause (a) in respect of new licence to be issued. One of such items with reference to which such consultation is mandatory is the terms and conditions of a license to a service provider [under Section 11(1)(a)(ii)].

"PROVIDED FURTHER that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub- clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations." The only other part of Section 11 which is relevant in the context of the present issue is the fifth proviso to Section 11(1) which reads as follows:

"PROVIDED also that if the Central Government, having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision." From the tenor of the said proviso, it can be seen that once recommendation is made by TRAI [with reference to matters enumerated in clause (a)], the Government of India may either accept the recommendation or may come to a prima facie conclusion that such a recommendation cannot be accepted or needs certain modifications. Upon reaching such prima facie conclusion, the Government of India is required to refer the matter back to TRAI and TRAI is obliged to reconsider its earlier recommendation and forward its opinion to the Government of India. On receipt of such a reconsidered opinion of TRAI, the Government of India is required to take a final decision. In our opinion, the fifth proviso only stipulates the procedure to be followed by both the bodies – TRAI and the Government of India – in the decision making process but it does not whittle down the vigour of the first proviso which in no certain terms declares that the Government of India is not bound by the opinion of the TRAI insofar as the recommendations made by TRAI with respect to matters falling under Section 11(1)(a).

76. We do not propose to examine the submission of learned Solicitor General that the recommendation of TRAI dated 15.10.2014 relied upon by the LICENSEES are primary recommendations, are not final. Even assuming for the sake of arguments that the recommendations of TRAI are final, the Government of India is not bound by the same in view of the first proviso to Section 11(1) of TRAI Act. The obligation of the Government of India arising under the second proviso thereof to seek opinion of TRAI is only to ensure that there is a rational process of decision-making where the factors relevant are examined by an expert body before the Government takes a final decision on any one of the matters enumerated under Section 11(1)(a). As pointed out by Subodh Kumar Committee, the Government is required to address the multiple goals for spectrum management such as efficient utilisation, optimal revenue generation, sufficient competition, obviously to avoid monopoly in the telecom market etc. As rightly observed by Subodh Kumar Committee, these goals are simultaneously "synergistic as well as conflicting". Therefore, the Parliament stipulated that such issues are initially examined by an expert body leaving it open to the

Government to take a final decision as to which one of these various 'synergistic as well as conflicting' factors must outweigh by the other factors. Apart from that, from the language of the 2nd proviso (supra) the obligation to consult TRAI arises only in the case of "new licence" but not the renewal/extension of an existing licence.

77. The impugned decision of the Government, which in fact resulted in huge inflow of revenue in the auctions conducted during the pendency of this litigation, cannot be said to be a totally irrational or irrelevant consideration in the context of the spectrum management, more particularly, in the light of decision of this court in 2G case.

78. In this context, we need to examine two more decisions relied upon by the respondents. They are - Kerala State Electricity Board v. M/s. S.N. Govinda Prabhu and Bros. & Others, (1986) 4 SCC 198 and Natural Resources Allocation, In Re. Special Reference No.1 of 2012, (2012) 10 SCC 1. Learned counsel for the LICENSEES relied heavily on these two decisions in support of their submissions that: (i) alienation of assets owned or controlled by the State need not necessarily be only through the process of public auction, and (ii) profiteering should not be the prime consideration of the State or State-owned bodies.

79. In Kerala State Electricity Board (supra), this Court opined that "a public utility monopoly undertaking ..... may not be driven by pure profit motive – not that profit is to be shunned but that service and not profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit". It was a case where the enhancement of electricity tariffs under the Electricity Supplies Act, 1948 was challenged. The principal ground of attach which was accepted by the High Court was that the Kerala State Electricity Board acted outside its statutory authority[15]. The judgment essentially turned on the interpretation of the language of the Electricity Supplies Act.

80. The said Act stipulated the principles on the basis of which tariffs are required to be fixed and factors which are required to be taken into consideration. It also obliged the State Electricity Board to conduct its operations in an economical viable manner. Section 51 of the Act, as amended from time to time (in 1978 and 1983) eventually stipulated – "to provide that each Board shall have a surplus which shall not be less than three per cent, or such higher percentage as the State Government may specify, of the value of the fixed assets of the Board in service at the beginning of the year;" Interpreting the said section, this Court held "We are of the view that the failure of the Government to specify the surplus which may be generated by the Board cannot prevent the Board from generating a surplus after meeting the expenses required to be met. Perhaps, the quantum of surplus may not exceed what a prudent public service undertaking may be expected to generate with out sacrificing the interests it is expected to serve and without being obsessed by the pure profit motive of the private entrepreneur. The Board may not allow its character as a public utility undertaking to be changed into that of a profit motivated private trading or manufacturing house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable conclusion that the Board has shed A its public utility character. When that happens the Court may strike down the revision of tariffs as plainly arbitrary. But not until then. Not, merely because a surplus has been generated, a surplus which can by no means be said to be extravagant. The court

will then refrain from touching the tariffs. After all, as has been said by this court often enough 'price fixation' is neither the forte nor the function of the court."

81. We fail to understand as to how the general observation that the "public utility monopoly undertaking …….. may not be driven by pure profit motive" made while examining the tariffs fixed in exercise of the powers vested by a statute are relevant in the context of the present case. In our view, the decision is wholly inapplicable to the facts of the present case for the following reasons:

> (i) Even in the case of tariffs fixed pursuant to the powers conferred by a statute this Court held that it would not interfere unless such tariffs result in a generation of surplus revenue reaching "such heights as to lead to the inevitable conclusion that the Board has shed its public character" and the tariffs are "extravagant".
>
> (ii) Persons seeking to avail the benefit of the supply of electricity are left with no option but to make payments in accordance with the tariffs fixed by the Electricity Board, because the electricity board had a monopoly over the generation and distribution of electricity.

82. In the case in hand, the LICENSEES are not compelled to pay any specific tariffs fixed by the LICENSOR (Union of India), for availing the right to use the spectrum. If the price for securing allocation of spectrum is likely to go up because of the procedure of auctioning to have access to spectrum, it goes up because of the market forces. Because there are people who are willing to acquire such a right paying a higher price on the assessment that they would be able to carry on the business profitably even after paying higher amounts for acquisition of spectrum. The LICENSEES are corporate houses with enormous economic power, which enables them to secure adequate expert advice in the matter of financial planning. We cannot believe that they would make any investment without making a reasonable assessment of the possible return on such investment. There is no compulsion by the State in this regard. Therefore, in our view, the reliance placed on the Kerala State Electricity Board (supra) is wholly untenable.

83. Reliance is placed on the observations made in the Special Reference (supra) in paragraphs 82 and 146 in support of the submissions of the LICENSEES that auction is not the only method of disposal of natural resources. In our opinion, the LICENSEES' reliance on these paragraphs is wholly misconceived. These two paragraphs, instead of supporting the case of the LICENSEES, are destructive of their contention. "82. Further, the final conclusions summarized in paragraph 102 of the judgment (SCC) in 2G case make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited to the case of spectrum. In case the Court had actually enunciated, as a proposition of law, that auction is the only permissible method or mode for alienation/allotment of natural resources, the same would have found a mention in the summary at the end of the judgment.

146. To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It

respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are 135 Page 136 ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

(emphasis supplied)

84. In para 82, this Court was categoric that the findings of 2G case were limited to the case of spectrum. Similarly, in para 146, this Court observed that this Court "respects the mandate and wisdom of the executive" in the matter of choosing the most suitable method of distribution of natural resources. This Court noted that this is clearly a matter of an economic policy entailing an intricate economic choice and the Court lacks necessary expertise to make such choice. In the light of the observation in para 82 that at least in the matter of disposal of spectrum, auction is the only "permissible and intra vires method for disposal". Therefore, the submission of the LICENSEES is required to be rejected.

85. For all the above-mentioned reasons, we see no merit in these appeals and writ petitions. Therefore, all the appeals and writ petitions are dismissed. There shall be no order as to costs.

.....J. (J. Chelameswar) .....J. (R.K. Agrawal) New Delhi;

May 14, 2015

---

[1] Section 2.(1) 'wireless communication' means any transmission, omission or reception of signs, signals, writing, images and sounds, or intelligence of any nature by means of electricity, magnetism, or Radio waves or Hertzian waves, without the use of wires or other continuous electrical conductors between the transmitting and the receiving apparatus; [2] Alexander Graham Bell is commonly credited with the invention of telephone. He obtained a patent in 1876 for an apparatus for transmitting vocal or other sounds electrically. There is some controversy as to who was the real inventor of telephone. There is a very strong claim by an Italian scientist called Antonio Meucci. A resolution was passed by the United States House of Representatives in 2002 recognising that Meucci did pioneering work on the development of telephone and "if Meucci had been able to pay $ 10 fee to maintain a caveat after 1874, no patent could have been issued to Bell".

[3] 3.(1AA) 'telegraph' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.

Explanation.—'Radio waves' or 'Hertzian waves' means electromagnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide;

-Substituted and re-numbered for Section 3(1) by the Act 15 of 1961

[4] Resolution of problems of existing operators

The New Policy Framework which seeks to significantly redefine the competitive nature of industry, would be applicable to new LICENCEES.

There are, however, multiple licences that have been issued by the Government for cellular mobile services, basic services, radio paging services, internet services etc. It is the Government's intention to satisfactorily resolve the problems being faced by existing operators in a manner which is consistent with their contractual obligations and is legally tenable.

[5] 3. Duration of Licence 3.1 This LICENCE shall be valid for a period of 20 years from the effective date unless revoked earlier for reasons as specified elsewhere in the document.

4. Extension of Licence 4.1 The LICENSOR may extend, if deemed expedient, the period of LICENSE by 10 years at one time, upon request of the LICENSEE, if made during 19th year of the License period on terms mutually agreed. The decision of the LICENSOR shall be final in regard to the grant of extension.

[6] It is submitted that through the past 19 years and even now on a continuing basis, Writ Petitioners have been faithfully operating their UAS license and have, as of 30 of June 2014, invested over Rs.19,545 crores setting up a state of the art mobile network in these 6 circles; in three months period between April and June of financial year 2014 – 15 alone, the investments made by the Petitioner was Rs.544 crores, the Petitioners are providing world class service to over 717 lakh subscribers as of June 2014, the Petitioner has built an average subscriber market share of 23# (average for six circles – the shares range between 19# and 32# for various circles), the petition is offering affordable tariffs and innovative services to consumers, the Petitioner is providing direct and indirect employment to thousands of people, in last 3.5 years alone the Petitioner has contributed over Rs.11,035 crores to the government exchequer by way of licence fee, Spectrum charges, direct and indirect taxes, etcetera between financial year 2011-12 and financial year 2014-15 (upto June 2014). Petitioners have thus altered their position and invested thousands of Crores based on Government promise/contract.

[7] Section 2(b). "Authority" means the Telecom Regulatory Authority of India established under sub-section (1) of section 3. [8] "Section 3. Establishment and incorporation of Authority.— (1) With effect from such date as the Central Government may, by notification appoint, there shall be

established, for the purposes of this Act, an Authority to be called the Telecom Regulatory Authority of India.

[9] Section 3(2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

[10] See para 32 of the impugned order [11] "Recommendations of TRAI on 'Spectrum Management and Licensing Framework' of May 11, 2010 along with its further recommendations of February 08, 2011, clarifications of May 03, 2011 and response dated November 03, 2011 were considered by the Telecom Commission. After consideration of the recommendations of the Telecom Commission, the Department of Telecommunications has taken following decisions: ... " [12] Section 11. Functions of Authority—(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to—

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:—

(ii) terms and conditions of license to a service provider;" [13] "2.5 ..... In sum, the two crucial facts are:

> (i) The supply of spectrum is constrained; and
>
> (ii) The auction is unusual in that licences are expiring and this knowledge is a priori known to all TSPs, enabling strategic decision-making on the latter's part.

2.6 This has important consequences. First, in any situation of short supply, market prices will rise. If any new entrant or another existing licensee enters the fray, one outcome is certain; there will be frenzied bidding viz. a race to the top. A similar escalation of prices was witnessed in the May 2910 auction when 3G spectrum was auctioned; the short supply of 3G spectrum led to a massive increase over the reserve price. But, as pointed out above, in the upcoming auction, the short supply of spectrum is but one dimension of the problem. The other is that incumbent operators would be willing to pay huge sums to retain their spectrum so as to protect their investments made in the LSA and ensure continuity of business. And, all industrial rivals know this; whish is why even a non-serious bidder is potentially in a position to push up the final auction price.

2.7 Second, there are only two possible outcomes of such an auction: (a) the incumbents win back the 900 MHz spectrum albeit at significantly high prices; or, (b) one or both incumbent operators lose the 900 MHz spectrum which is won by two or more other bidders. If an incumbent operator wins back the 900 MHz spectrum but at a very high price, it will seriously limit its ability to invest viz. given the indebtedness of most TSPs and the availability of just a limited amount of resources, whatever extra is paid for spectrum, in effect, reduces the amount available for investment in the LSA. The second possibility is that the incumbent loses the spectrum. The implications here are

even graver. There will be immediate discontinuation of service in the LSA. And a huge loss in terms of the value of investment already made in that LSA.

2.8 Once services are discontinued, and a new entrant(s) come into the LSA, they will need time to roll-out services. This will obviously pose problems for consumers. Moreover, if existing consumers port out under Mobile Number Portability (MNP) to another TSP in the same LSA, then, in effect, the auction would have led to a consolidation of market power (dominance) of that TSP. (Leave aside the fact that it effectively deprives consumers of choice of service provider).

2.9 What is more, there are potential spillover effects to other sectors. Given the larger indebtedness of many TSPs to public sector banks (and private sector banks), an exit from an LSA raises the prospect that some part of that TSP's debt could become a Non-Performing Asset (NPA). So, what the Government gains in terms of higher prices of spectrum because of short supply, may also lead to large NPAs of public sector banks which will ultimately require Government budgetary support viz. the socialization of public costs.

2.10 to sum up; there is a very real risk that bidding could lead to an escalation of auction prices far beyond any reasonable value. Further, even if the incumbents win back the spectrum, there will be serious limit to the investment ability of incumbents. And, if an incumbent operator loses out to a new entrant (or, another licensee), the discontinuation of services would pose problems for consumers leave aside the losses on capital investment made by the incumbent TSP in the LSA……." [14] 11 Functions of Authority (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 , the functions of the Authority shall be to –

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely: -

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely: -

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000 , fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations; (viii) keep register maintained under clause

(vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

[15] The principal ground of challenge and that which was accepted by the High Court was that the Kerala State Electricity Board acted outside its statutory authority by formulating a price structure intended to yield sufficient revenue to offset not merely the expenditure properly chargeable to the revenue account for the year as

contemplated by Section 59 of the Act but also expenditure not so properly chargeable. Had Section 59 been strictly followed and had items of expenditure not chargeable to the revenue account for the year been excluded, the revised tariff would have resulted in the generation of a surplus far beyond the contemplation of Section 59 of the Act.
