



In the Supreme Court Bangladesh  
High Court Division  
(Special Original Jurisdiction),

**Writ Petition No. 12564 of 2016**

**In the matter of:**

An application under Article 102 of the  
Constitution of the People's Republic of  
Bangladesh.

-And-

**In the matter of:**

Bangalion Communications Limited.

..... Petitioners.

Vs.

Bangladesh Telecommunication  
Regulatory Commission and others.  
..... Respondents.

Mr. Aneek R Haque, Advocate with  
Mr. Md. Omar Farouq, Advocate  
..... For the petitioner.

Mr. Khandaker Reza-E-Raquib with  
Mr. Meharunnessa with  
Mr. Sayed Mahsib Hossain, Advocates  
..For the respondent No.1.

**Present:**

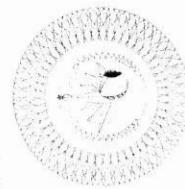
Mr. Justice Sheikh Hassan Arif  
And  
Mr. Justice Md. Badruzzaman

**Heard on 29.10.2017 and 05.11.2017.**  
**Judgment on: 11.12.2017.**

**SHEIKH HASSAN ARIF, J**

Rule Nisi was issued calling upon the respondents to show cause as to why the notice dated 18.09.2016, signed by the respondent No.2 (Annexure-O), for demanding Tk. 62.62 crore from the petitioner for spectrum fees, should not be declared to have been issued without any lawful authority and is of no legal effect, and as to why they should not be directed to amend Spectrum Charge and Exchange Rate of Dollar as per the direction of respondent No.3 dated 24.12.2014 and/or such other or further order or orders passed as to this Court may seem fit and proper.

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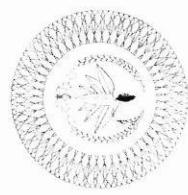
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Short facts, relevant for the disposal of the Rule, are that, the petitioner, being a limited company, obtained Broadband Wireless Access (BWA) License through a process of auction in 2008, being License No. BTRC /LL/BWA(11)/2008-2 as issued by the Bangladesh Telecommunication Regulatory Commission (BTRC), in order to provide internet services in this country as per the terms of the said License. In obtaining the said license, the petitioner had to pay an amount of Tk. 215 Crore as license acquisition fee and, accordingly, it started operation in 2010 upon investing huge amount of money. That, as per Clause 12.06 of the said license, the petitioner is required to pay spectrum charges in accordance with a formula as contained in BTRC Memo No. BTRC/SM/3-4/2009/1873 dated 12.10.2009. According to the said formula, the Area Factor (AF) is to be taken as the whole geographical area of Bangladesh. However, it is stated, the petitioner was only given a partial area of Bangladesh, namely region A covering Zones 1 and 4. Therefore, the case of petitioner is that, it is not liable to pay spectrum charges for the entire geographical area of Bangladesh and, accordingly, the said license as well as formula should be amended to make it commensurate with the actual benefit given to the petitioner. It is further stated that, according to the said formula, the US\$ rate has been fixed as BDT rate as published by the Bangladesh Bank on the last day of each quarter, though other telecom operators in Bangladesh are given the benefit of 1 US dollar = BDT 70 and, as such, according to the petitioner, the same benefit should also be given to the petitioner in so far as the said dollar rate is concerned. However, it is stated, the BTRC has been issuing notice after notice demanding various amounts of spectrum charges on the wrong premises that the petitioner has been given the entire geographical area of Bangladesh and that the

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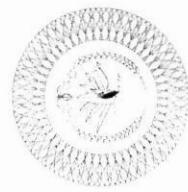
petitioner is required to pay such charges as per the dollar rate as published by Bangladesh Bank on the last day of each quarter, which is admittedly higher than the rate as given in favour of other telecom operators. In response to the said letters and demands, the petitioner has made partial payment on different occasions and has been trying to resolve the dispute with the BTRC through different representations and negotiation. Finally, the BTRC agreed to resolve the said dispute and started holding meetings with the petitioner and the other BWA operators. In such a meeting held on 02.05.2013, BTRC decided to change the guidelines in order to incorporate the demands of the petitioner by changing the meaning of the 'area factor' from entire Bangladesh to the actual coverage area and also to make the dollar rate equal as enjoyed by other telecom operators, namely 1 US\$= 70 BDT. The said meeting was also followed by another meeting dated 27.05.2013 and in the said meeting as well same decisions were adopted by BTRC. However, it is stated that, in spite of such agreement with the BTRC on principle as regards the change of area factor and rate of dollar, BTRC has still been demanding the same spectrum charges on the basis of the earlier misconceived Area Factor definition and dollar rate, on the ground that, since the petitioner initially obtained license on the basis of the then applicable formula and guideline, the petitioner is required to pay the spectrum charges and other charges as per the said terms and conditions. Against this backdrop, the petitioner approached the government and impressed upon them to hold a meeting on 30.11.2014 which decided to change the Area Factor and dollar rate in line with the petitioner's demand and forwarded the said decision to the BTRC vide memo dated 24.12.2014 to take necessary steps in this regard. However, it is stated,



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though the petitioner has paid several amounts as against such spectrum charges and other charges in the meantime, BTRC is yet to take any steps for amending the said guidelines or formula in so far as the same is related to the spectrum charges and exchange rate of dollar. Accordingly, the petitioner started making representations again. However, it is stated, without complying with such direction of the government as adopted in the said meeting dated 30.11.2014 as communicated vide memo dated 24.12.2014, BTRC has issued the impugned demand dated 18.09.2016 demanding Tk. 62.62 crore from the petitioner as outstanding spectrum charges. By the said demand, it was also communicated to the petitioner that the bandwidth of the petitioner would be reduced by 10% in every fifteen days if the petitioner failed to pay the said demand. The petitioner, after giving a reply to such demand vide reply dated 02.10.2016, approached this Court and obtained the aforesaid Rule. At the time of issuance of the Rule, this Court, vide ad-interim order dated 13.10.2016, directed the respondents authority to dispose of the said representation of the petitioner dated 02.10.2016 (Annexure-P) within seven days.

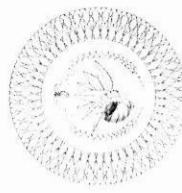
By filing affidavit of compliance, the respondent No.1-BTRC has informed this Court that, the said representation of the petitioner has in the meantime been disposed of against the petitioner on the ground that the petitioner is required to pay spectrum charges and other charges as per the formula agreed upon by the parties at the time of issuance of license and that respondents are in the process of amending the said guideline as per instruction of the government.



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Thereafter, when the respondent authority took steps for reducing the bandwidth capacity of the petitioner, the petitioner came up with an application for stay, whereupon this Court, vide order dated 05.04.2017, stayed operation of the said memo dated 29.03.2017 (Annexure-R to the said application) for a period of 06(six) months subject to payment of Tk. one crore per month by the petitioner along with regular bills. It is stated by the petitioner that, the said amount has regularly been paid by the petitioner as directed by this Court. As against above backdrop, when the petitioner came with another application seeking direction of this Court upon the BTRC to issue 'no objection certificate' for importing modems and Mi-Fi routers, which are capital machineries, this Court, instead of passing such direction, fixed this matter for hearing. Accordingly, the Rule has been taken up for hearing by this Court.

The Rule is opposed by the respondent 1-BTRC by filing affidavit-in-opposition as well as supplementary-affidavit and affidavit-in-reply, mainly contended that, knowing everything about the formula including the Area Factor and dollar rate, the petitioner willfully obtained the said license through auction and, accordingly, it was given Region A (Zones 1 and 4) covering a partial area of Bangladesh to provide BWA services. However, it is stated, when the time for payment of spectrum charges and other charges arose, the petitioner, on different pretexts, refrained from paying such charges. It is further stated by this respondent that, as per the amended provision of Section 39 of the Bangladesh Telecommunication Control Act, 2001 ("the said Act"), which is the controlling act of the respondent's activities in so far as the relationship with the petitioner is concerned, BTRC authority cannot amend the guide line or formula



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without prior approval of the government. Therefore, according to this respondent, though it has taken initiatives for amendment of the formula or guideline and, accordingly, government has also given positive nod, till such formula and license of the petitioner are amended, the petitioner is required to pay charges etc as per the terms and conditions of the said license obtained by it. Therefore, according to this respondent, the petitioner has no case before this Court and as such the Rule should be discharged.

Mr. Aneek R Haque, learned advocate appearing along with Mr. Md. Omar Farouq, learned advocate, for the petitioner, after placing before this Court the said operator license dated 18.11.2008 itself as obtained by the petitioner (Annexure-A) along with the annexures and enclosures as well as the formula as declared by the BTRC pursuant to Clause 12.06 of the said license, submits that, admittedly, the petitioner was not given the capacity to cover the entire area of Bangladesh. However, in a very misconceived way, the formula as formulated by the BTRC has defined the term Area Factor as geographical area of Bangladesh. According to him, this definition is the crux of the dispute between the parties in so far as the spectrum charge is concerned. Learned advocate further submits that, BTRC (respondent no.1) in their affidavit has not made a single statement that the petitioner has been given the capacity to cover entire geographical area of Bangladesh. Rather, admittedly, the petitioner was given partial region, namely region A (Zones 1 and 4), he continues. According to him, the respondent authority however has been charging spectrum charges from the petitioner for the entire geographical area of Bangladesh. Therefore, he submits, even if the license in question as well

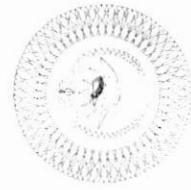


as the guideline or formula is not amended, the petitioner, under no reasonable circumstances, can be compelled to pay charges for a particular area for which the petitioner was not given any spectrum. Learned advocate further submits that, if there is any inconsistency in the license or formula declared by the BTRC, the same has to be corrected by the BTRC itself upon taking approval from the government. However, he submits that, the petitioner has been making representations since 2009 for correction of the said mistake with no positive response from the BTRC until 2016 only when the BTRC took such initiative only after issuance of the Rule by this Court.

Further referring to the Spectrum Tariff Unit (STU), as defined by the said formula, learned advocate further submits that, while other telecom operators are enjoying the benefit of dollar rate 1USD-BDT 70, the BTRC has compelled the petitioner to pay at a rate which is much higher than that rate. Therefore, for the sake of equal treatment in accordance with law, he submits, BTRC, being a statutory body, is also required to amend the said definition of STU so that a level playing field is ensured. Further drawing this Court's attention to the decisions adopted in the meeting held jointly by BTRC and BWA operators including the petitioner on 30.04.2013 (Annexure-G), learned advocate submits that, after long time, the BTRC finally agreed to amend the license and formula in line with the petitioner's demand. However, it refrained from taking any effective steps for having the same amended with the prior approval of the government.

Further drawing this Court's attention to the minutes of a meeting held in the concerned ministry on 30.11.2014, attended by BWA operators and

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the concerned officials of the government, Mr. Haque submits that, it was decided unanimously in the said meeting that the said definition of 'area factor' and dollar rate should be amended and, accordingly, BTRC should take effective steps for such amendment. According to the learned advocate, though such decision of the Ministry has been communicated to the BTRC vide memo dated 24.12.2014, it was only after issuance of Rule by this Court it issued memo dated 24.10.2016 by which the BTRC has sought approval from the government in favour of such amendment. Learned advocate finally submits that, though the concerned officials of the BTRC initially realized that the said formula, license and dollar rate should be amended in line with the petitioner's demand, they deliberately delayed the said process thereby accumulating further charges against the petitioner. Therefore, according to him, the petitioner is not bound to pay the said demand of Tk. 62.62 crore as demanded by BTRC vide impugned memo dated 18.09.2016. Learned advocate further submits that, though there is a stay order from this Court against actions of the BTRC for reducing the spectrum capacity of the petitioner, the respondent no.1-authority is still not issuing any 'no objection certificate' in favour of the petitioner for importing capital machineries like modems and Mi-Fi routers and thereby causing huge damages to the petitioner's ongoing business and services provided by it.

As against above submissions, Mr. Khandaker Reza-E-Raquib, learned advocate appearing for the BTRC (respondent 1), mainly submits that, admittedly the petitioner obtained the license in question knowing very well that it would have to comply with the formula to be declared by BTRC as regard spectrum charges and other charges. According to him, since

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the said terms were incorporated in the very license itself under Clause 12.06, and, pursuant to such Clause, the BTRC has declared the formula vide memo dated 12.10.2009, the petitioner is liable to pay the entire spectrum charges and other charges as per the said formula. Further drawing this Court's attention to the amended provisions under Section 39 of the Bangladesh Telecommunication Control Act, 2001, learned advocate submits that, amendment of license or formula is no more within the jurisdictional domain of BTRC. Rather, according to him, the same can only be done with prior approval of the government. Therefore, learned advocate submits that, though the BTRC authority has in the meantime taken initiatives for amendment of the said formula and dollar rate, till such amendment is approved and taken into effect, the petitioner is liable to pay spectrum charges etc. as per the present unamended license and formula.

It appears from materials on record, in particular the license in question, which was obtained by the petitioner in the year 2008 and on the basis of which the petitioner started its operation in 2010, that, as per Clause 12.6 of the said license, the petitioner is apparently bound to pay the spectrum charges etc as per the formula declared by the BTRC authority. Now, when the BTRC authority has declared said formula in 2009 vide memo dated 12.10.2009 (Annexure-B), it appears that, the formula for calculation of spectrum charges has been determined by it on the basis of various factors, which is quoted below:

"Spectrum Charges in Taka=STU x CF x BW x AF x BF".

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In defining the terms, namely the factors on the basis of which the

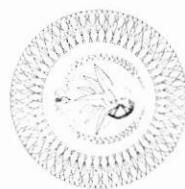
spectrum charges are to be calculated, the BTRC defined the term 'AF' as

*"Area Factor for Access Frequency=Geographical area of Bangladesh".*

At the same time, while defining the term 'STU', the same was defined as follows:

*"STU=Spectrum Tariff Unit=1 US Dollar equivalent BDT @ published by Bangladesh Bank on the last day of each quarter."*

These two definitions of the concerned factors as provided by BTRC have created the entire dispute between the parties. According to the petitioner, since it is not providing service, or since it is not allowed to cover the entire region of Bangladesh, it cannot be compelled to pay charges for the entire region.



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said formula has some inconsistent or unreasonable definition, the question is whether that licensee can be compelled for payment of such charges even though such charges are on the face of it unreasonable and arbitrary. This Court holds that, being a statutory authority, the BTRC cannot act in such an arbitrary way. Had it been the case between two private individuals, probably the argument could have been otherwise. However, BTRC cannot act unreasonably and arbitrarily.

When the learned advocate for BTRC admits that, the petitioner was not given the entire area of Bangladesh as its coverage area, we find it difficult to accept the submissions of the said learned advocate that the petitioner is bound to pay the spectrum charges for the entire area of Bangladesh just because it obtained a license agreeing to pay charges on the basis of formula to be declared by BTRC. Therefore, even if the formula itself is not amended for whatever reason, under no circumstances, BTRC can claim such unreasonable amount on such arbitrary basis against the petitioner just because the petitioner had obtained the license agreeing to pay spectrum charges on the basis of the said formula. Accordingly, we do not find any substances in the arguments of the learned advocate for respondent no.1 in so far as the issue of spectrum charges demand is concerned. We are of the view that, since the impugned demand has been issued on the basis of such unreasonable and arbitrary concept of the respondent no.1, the same should be reduced to an amount for which the petitioner is actually liable for the area given in its favour, namely Region A (Zone 1 and 4).

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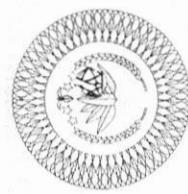
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It further appears that, BTRC has made the impugned demand on the basis of dollar rate, being 1 US\$= BDT as published by Bangladesh bank on the last day of each quarter. This rate, as declared by Bangladesh Bank, is admittedly higher than the rate enjoyed by other telecom operators. This statement of the petitioner is also not denied by the respondent authority. Therefore, on this admitted position, this Court is of the view that, there cannot be any discrimination between two operators operating in Bangladesh under BTRC. We also fail to understand as to why other operators are given such facility of 1 US\$= BDT 70 which is much less than the current prevailing US dollar rate. This Court holds that, by such determination of dollar rate, namely 1 US\$ = BDT 70, the BTRC has deprived the government exchequer and the people of Bangladesh of huge amount of revenues from the said telecom operators. Therefore, on this point, this Court is of the view that, until such rate US\$ 1= BDT 70 is revised in respect of other telecom operators to make it equivalent to the current prevailing US dollar rate, the petitioner should also get such benefit.

We further hold that, the dollar rate should be a uniform dollar rate applicable to each and every telecom operators, including the petitioner, operating in Bangladesh. Until such uniform dollar rate is fixed by the BTRC taking into consideration the current prevailing dollar rate, which is, under no circumstances, below Tk. 80, this Court is of the view that, the petitioner should also be given the benefit of enjoying the reduced rate of dollar as enjoyed by other telecom operators, namely 1 US\$= BDT 70. Therefore, on this point as well, on the ground of discrimination, we find merit in favour of the petitioner with the reservation that this dollar rate "1



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dollar = BDT 70" should be revised by BTRC immediately to make it at par with the current US dollar rate, so that the people of this country as well as the government exchequer are not deprived of huge foreign currency.

Apart from above, it appears from the minutes of Ministry's decision in the meeting held on 30.11.2014, as communicated vide memo dated 24.12.2014 (Annexure-K), that, the Ministry has finally adopted a decision to amend spectrum charges formula as well as dollar rate in line with petitioner's demand and has asked the BTRC authority to take steps in this regard. Therefore, this Court is of the view that, the BTRC should immediately act upon such instruction of the government. However, until such instruction is complied with materializing the expected amendment as decided by the parties in the meantime, we are of the view that, the petitioner cannot be compelled to pay such amount as spectrum charges for the area in Bangladesh for which it was admittedly not given coverage capacity. Therefore, the impugned demand cannot stand in the eye of law. Accordingly, we find merit in the Rule and as such the same should be made absolute.

In the result, the Rule is made absolute. Thus, the impugned demand is declared to be without lawful authority and is of no legal effect. The BTRC is directed to issue fresh demand upon the petitioner on the basis of actual area coverage as given in favour of the petitioner by the said license and upon taking into consideration the dollar rate "1 US\$= Tk. 70", within a period of 90 (ninety) days from receipt of the copy of this judgment. In the meantime, the petitioner will continue to pay taka one crore per month along with regular bills without any fail. The respondent authority is also

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directed to issue necessary NOC in favour of the petitioner for importation of capital machineries etc. BTRC should take immediate steps to increase the spectrum in favour of the petitioner if the same is in the meantime reduced because of the nonpayment of the impugned demand by the petitioner.

Communicate this.

S.H. Arif.  
(Sheikh Hassan Arif, J)

I agree.

M.B. Zaman.  
(Md. Badruzzaman, J).

Typed by: Mahfuz: 28.01.2018.

Read by: MM  
28-01-18

Exam by: Saifur  
28.01.18

Readied by: 28.01.18

SAF

অত্যাধিত আবিষ্কৃত প্রতিলিপি

সহকারী রেজিস্ট্রার  
বাংলাদেশ সুরক্ষা কোর্ট, হাইকোর্ট বিভাগ  
(১৮৭২ ইং সড়ের ১নং আইনের)  
(১৮৭২ ইং সড়ের ১নং আইনের)  
৭৬ ধারায়তে ক্ষমতা প্রাপ্ত

মোঃ আব্দুর রশিদ  
প্রায়ানিক কর্মকর্তা

মোঃ আব্দুর রহমান  
স্পারিনটেন্ডেন্ট