

**idea Cellular Ltd Vs. Uoi and Another**

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**SooperKanoon Citation :** [sooperkanoon.com/941395](http://sooperkanoon.com/941395)

**Court :** Telecom Disputes Settlement and Appellate Tribunal TDSAT

**Decided On :** Jul-18-2011

**Judge :** S.B. Sinha, Chairperson, the Honourable Mr. G. D. Gaiha, Member & the Honourable Mr. P.K. Rastogi, Member

**Appeal No. :** Petition No.51 of 2011

**Appellant :** idea Cellular Ltd

**Respondent :** Uoi and Another

**Advocate for Pet/Ap. :** For the Petitioner: Dr. Abhishek Manu Singhvi, Senior Advocate and Mr. C.S. Vaidyanathan, Senior Advocate with Mr. Manjul Bajpai, Mr. Gopal Jain, Mr. Aneesh Patniak, Mr. Sandeep Singh, and Mr. Navin Cha

**Judgement :**

S.B. Sinha

The petitioner is a licensee; the license having been granted by the respondent herein in terms of Section 4 of the Indian Telegraph Act, 1885 on or about 27.02.2008 with effect from 25.01.2008.

Indisputably, licenses were issued to one Spice Communications Ltd., by the respondent in terms of the said provisions to establish Cellular Telecom Services on or about 09.09.1996 with effect from 04.04.1996. The said company floated a scheme for amalgamation with the petitioner, for approval whereof an application

was filed before the High Court of Gujarat.

By reason of an order dated 26.11.2009, sanction to the said scheme was granted with effect from 01.3.2010. For the said purpose, the Delhi High Court was also moved and by an order dated 05.02.2010, it also sanctioned the scheme of merger of the said Spice Communication with petitioner.

The respondent issued a notice inviting applications purporting to allot the right to use spectrum frequencies in the 2.1 GHz Band (3G Spectrum) by auction in various telecom service areas including the Punjab Circle.

Clause 4.1 of the said NIA reads as under:-

IV Auction Details General conditions 4.1.1 Confidentiality Confidential Information means any non-public information which, if known to other Bidders, would be likely to affect the price that the other Bidders would be prepared to bid in the Auctions or the bidding strategy that other Bidders would adopt. Such Confidential Information shall include (but not necessarily be limited to) the Bidder's business case, auction strategy and the highest price it is willing to bid for spectrum in any service area. Any party to whom Confidential Information in relation to a Bidder is disclosed is deemed to be an Insider in relation to that Bidder. Bidders and Insiders must not convey Confidential Information to any other person, including another Bidder or its Insiders.

Bidders shall also not be permitted to disclose the status of their participation, including whether they continue to bid in any or all service areas, in any of the Auctions, until the completion of the relevant Auction.

4.1.2 Directors, employees and advisers No person, whether individual or corporate, can act for or on behalf of or advise of more than one Bidder that is participating in any of Auctions (the 3G Auction or the BWA Auction) in respect of the Auctions.

4.1.3 Anti-competitive activity Bidders must not enter into any arrangements with suppliers of equipment or software that would restrict the supplier's ability to supply such equipment or software to other Bidders for the purposes of planning,

building or operating a network utilising the frequencies to be auctioned. Bidders are also not permitted to agree with suppliers of equipment or software any form of restriction as to the prices charged or other terms and conditions that such suppliers may agree with any other Bidder.

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4.8 Mergers and Acquisitions MandA guidelines, as prescribed and amended by DoT from time to time, will apply to Successful Bidders. Unless otherwise notified by DoT in due course, if two or more licensees holding 3G Spectrum blocks in a service area merge, then they shall be allowed to retain only one 3G Spectrum block and surrender the remaining 3G Spectrum blocks in that service area. Unless otherwise notified by DoT in due course, if two or more licensees holding BWA Spectrum blocks in a service area merge, then they shall be allowed to retain only one BWA Spectrum block and surrender the remaining BWA Spectrum blocks in that service area.

On the same date, a document containing answer to the queries and clarifications was also issued, the relevant clauses whereof are as under :-

No. Query Response 356 What is the duration during which UAS license need to be acquired, post winning the bid for a circle, where the entity does not have a UASL/CMTS?

The Successful Bidder would need to submit its completed UAS application form within 3 months of being declared as Successful Bidder. 357 Will the winning bidders of 3G auction in a circle be released the spectrum at the same time? Or will it be determined on some preferences? Is there any clarity on whether all the auctioned spectrum

bands are available for release immediately? Please refer Section 4.6 of the Notice Inviting Applications. Subject to a separate application for the

spectrum having been made in the prescribed format, the Government

intends to allocate the specified spectrum to all the Successful Bidders or the relevant licenses, within 15 days of the receipt of the Successful Bid Amount. The Successful Bidders will be allowed to commercially use such spectrum from 1<sup>st</sup> September 2010. 360 Since BWA and 3G are basically data-oriented services, whether availability of data services while moving in a car at a speed of 80km/hr will be mandated for rollout obligations. If so, then what data speed is expected and what will be the testing procedure? There is no such requirement at present.

For participation in the said auction, the petitioner subscribed its bid for several service areas including Punjab with some notes which would be noticed a little later.

The petitioner filed a Compliance Certificate as per the requirements of Clause 4.2.2 of the NIA before the cut-off date as indicated in the auction time table.

Clause 4.2.2 of the NIA and 4.2.3 (c) thereof reads as under:-

“4.2.2 Ownership compliance certification After the last date of submission of Applications, the Government shall publish the ownership details submitted by the Applicants, who have not otherwise been disqualified before then, on the Auctions website. After this, an Applicant, who has not otherwise been disqualified before then, shall be required to submit an undertaking confirming that it complies with the ownership restrictions (the “Ownership Compliance Certificate”) before the deadline indicated in the auction timetable. The Government reserves the right to modify this deadline by giving Applicants notice through the Auctions website.

#### 4.2.3 Pre-qualification tests xxx

c) General power of inclusion The government shall retain a general power to exclude any Applicant, without providing any reason for such action. Further, the Government may exclude any Applicant, if in its opinion:

i) the holding of a UAS license or an ISP-category ‘A’ license by that Applicant would be prejudicial to the interests of national security; or

ii) the Applicant would not be a fit and proper person to hold a UAS license or an ISP-category 'A' license. During the pre-qualification stage, the Government may ask Applicants to provide additional information or documentation relating to their Applications. The government reserves the right to withdraw the prePage 7 of 52 qualification of any Bidder at any stage even after the initial pre-qualification.

Pre-qualification for any of the Auctions or declaration as Successful Bidder does not guarantee a Bidder that the UAS license or ISP-category 'A' license application of this Bidder (if applicable) shall be approved. Prospective Bidders who are not existing UAS/CMTS/ISP -category 'A' license-holders must satisfy themselves that they meet the criteria for award of a UAS license or an ISP category 'A' license (as applicable).”

According to the petitioner, the respondent could exclude the petitioner from taking part in the auction, but it did not. It is not in controversy that the petitioner's name found place in the list of prequalified bidders published on 30.3.2010 with maximum 350 eligibility points.

In the auction, which took place from 09.04.2010 to 19.05.2010, the petitioner was declared successful in eleven service areas including the Punjab service area, pursuant where to the petitioner deposited a sum of Rs.5768.59 crores towards 3G spectrum acquisition price including a sum of Rs.323.01 crores for the Punjab service area on 31.05.2010. Details of the operating license No. and respective dates of issuance of the license by respondent in favour of Spice Communications were also communicated.

The WPC Wing of the respondent issued a Letter of Intent earmarking 3G spectrum for all the eleven service areas, the relevant portions whereof reads as under :-

“No. L-14047/03-2010-3G 11th June 2010 To M/S Idea Cellular Limited,

1005-6, Kailash Building, 26 K.G. Marg, New Delhi-110001 Sub: Letter of intent (LOI) FOR EARMARKING OF 3G Spectrum under Unified Access Service/ CMTS License-reg

In pursuance of your application dated 31/5/2010 on the above subject, the following spectrum is earmarked to you for provision of licensed services. S.No. Type of Service License Telecom Service Area Spectrum earmarked in MHz (Uplink/Down Link) Amount Paid(Rs in crore) 1. CMTS Maharashtra 1969-1974/ 2159-2164 1257.82 2. CMTS Gujarat 1974-1979/2164-2169 1076.06

3. CMTS Andhra Pradesh 1969-1974/ 2159-2164 1373.14 4. CMTS Kerala 1959-1964/ 2149-2154 312.48 5. CMTS Haryana 1959-1964/ 2149-2154 222.58 6. CMTS U.P(E) 1969-1974/ 2159-2164 364.57 7. CMTS U.P(W) 1969-1974/ 2159-2164 514.04 8. CMTS Madhya Pradesh 1959-1964/ 2149-2154 258.36 9. CMTS Himachal Pradesh 1969-1974/

2159-2164 37.23 10. UASL Jammu and Kashmir 1959-1964/ 2149-2154 30.30 11. UASL Punjab 1959-1964/ 2149-2154 322.01

## 2. Technical Parameter:

Emission: 5 M00G7W Power: 2/20 Watts House of Operation: H24 3. The above earmarking of spectrum is only for taking steps towards import of equipment, obtaining SACFA clearance, network planning, testing etc. Commercial launch of services using the above spectrum is permitted only after 1st September 2010.

4. Annual spectrum Usage Charge are payable as per rates and conditions in clause 3.5 of the Notice Inviting Applications dated 25.2.2010.

5. You are requested to approach Access Service (AS) division of DOT to get necessary amendments made in the UAS/CMTS Licenses of the above Telecom Access Services before commercial launch and submit the same to this office for issue of regular assignment/ Wireless Operating license.

6. This LOI is subject to all the terms and conditions of the Notice Inviting Applications for auction of 3G and BWA spectrum No. P-11014/13/08-PP dated 25th February 2010.

7. You are requested to submit the deployment plan of the BTSs in the prescribed format available on website ([www.wpc.dot.gov.in](http://www.wpc.dot.gov.in)) for acceptance.”

A request was made by the petitioner for amending the license authorizing use of 3G spectrum. A reminder thereof was sent on 01.9.2010. On the same date, the petitioner's license agreements were amended permitting commercial use of 3G spectrum for providing telecom access service in 10 out of 11 areas, but no permission was accorded for the Punjab service area.

On the aforementioned premise, the petitioner by a letter dated 13.09.2010 stated as under :-

“Sub: 3G spectrum .... We write further to our letter dated 1st September 2010. Subsequently, we received license amendments and WPC letter confirming commercial usage of spectrum for only 10 of our 11 winning service areas, but no confirmation was received with regard to our Punjab Service Area. It would appear that the apprehension surfaced in our above-mentioned letter was real. No reason has been ascribed for not providing license amendment/ confirmation on spectrum usage for Punjab Service area.

Having been declared eligible winners and paid money in full, allocation of spectrum is our right. Withholding the same is discriminatory and illegal. Complete details on licenses needing amendment have been with the DoT with the application, the request for Letter of Intent to WPC and again to the licensing Cell of DoT. At no stage has the DoT raised an issue; indeed there can be no issue. Sir, the 3G auctions were simultaneous auctions and all winners have equal rights for spectrum availability and usage. Granting spectrum to other operators and withholding the same for us is discriminatory and a contractual breach. Further delay in the requisite approvals, would amount to mocking and subverting the auction process, and we will be constrained to hold the DoT responsible.

We request your personal urgent intervention to issue directions for necessary amendment for the commercial usage of spectrum for the Punjab service area.” The respondent, however, asked the petitioner to use 3G spectrum in the name of 'Idea', stating:- “No.: L- 14047/03/2010-3G Date: 13/09/2010 To M/s Idea Cellular Limited 1005-6, Kailash Building 26 K.G. Marg, New Delhi1 Sub: Letter of Intent (LOI) for earmarking of 3G spectrum in Punjab Service Area Ref: 1. Your letter No. NIL dated 31/05/2010

2. This office LOI No. of even No. dated 11/06/2010 Sir, With reference to the subject mentioned above, I am directed to state that you have requested WPC Wing for issue of LOI for 3G spectrum for Punjab Service Area in the name of M/s Idea against M/s Spice Communications Limited Services License. Accordingly, LOI has been issued to you on 11/06/2010.

2. Now, during the examination of your case for amendments in the service license, it has been decided by the competent authority to issue LOI in the name of M/s Idea's Service License. Hence, you are requested to submit a revised application to WPC Wing for issue of revised LOI in Punjab Service Area, quoting M/s Idea's Service License No. and date." The petitioner by a letter dated 13.9.2010, agreed to the said proposal, stating:-

"2. Now, during the examination of your case for amendments in the service license, it has been decided by the competent authority to issue LOI in the name of M/s. Idea against M/s. Idea's Service License. Hence, you are requested to submit a revised application to WPC Wing for issue of revised LOI in Punjab Service Area, quoting M/s. Idea's Service License No. and date."

However, by a letter dated 17.09.2010, it stated as under:-

".....In this regard, you would kindly appreciate that complete details on licenses needing amendments have been with the DoT and WPC from the very beginning-with the application submitted as per NIA, the request for Letter of Intent to WPC and again to the licensing Cell of DoT. At no stage has the DoT or WPC raised an issue; indeed there can be no issue. Thus the raison d'être of your letter is not understood. DoT is aware that Spice Communications stands amalgamated into Idea Cellular through the Court process (the same was also explicitly stated in our 3G application and in various other communications given to DoT from time to time) the details of Court approvals on merger and RoC certification are on record with the DoT. The request for transfer of license and acknowledging the change in name is pending with DoT. Meanwhile, in line with the spirit of the telecom policy, Idea has always kept the Spice license as the operational license, and the Idea licenses was scrupulously non operational. Vide our various letters we have confirmed that the treatment of overlapping licenses would be as per applicable

policy.

In view of the above, we request DoT/WPC to issue us the necessary license amendment/earmarking of spectrum for our Punjab Service Area in favour of license held by erstwhile Spice Communication Limited which is the operational license viz. license no. 842-65(B)/95-VAS dated 9th September 1996, at the earliest. We request that DoT may treat the issue of license amendment/earmarking, independent of its final decision on amalgamation/change of name. We confirm that the same would be as per our request/consent and the same would be without prejudice to our/DoT submissions on the subject.”

As despite the same, the licenses were not amended, the petitioner by a letter dated 24.11.2010, contended as under:-

“.....Complete details on licenses needing amendment have been shared transparently with DoT since the time application was made for 3G auction, at the time for Letter of Intent to WPC and again when request was made to the licensing Cell of DoT. Vide our letter of 15th October 2010, we had again requested DoT/WPC to issue us the necessary license amendment/ earmarking of spectrum for our Punjab Service Area in favour of license held by erstwhile Spice Communications Limited which is the operational license viz. license no. 842-65(B)/95-VAS dated 9th September 1996. We had requested DoT to treat the issue of license amendment/earmarking, independent of its final decision on amalgamation/ change of name and had also confirmed that the same would be as per our request/ consent and the same would be without prejudice to our/ DoT submissions on the subject.

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In view of the above and inexplicable intransigence on the part of DoT to allocate spectrum in favour of operational license of Idea in Punjab Service Area (erstwhile Spice Communication Limited), we have no issues in DoT making the license amendment/ allowing commercial use of spectrum under IDEA Cellular License no. 20-215/2008- Idea-AS-1 dated 25th January 2008, since in any case license would be united post necessary confirmation on merger (which the Honourable

Courts have already approved). In any case the 3G spectrum would remain with the merged entity. As informed on several occasions earlier, the overlapping license remain non-operational in conformity with the letter and spirit of Government policy.

We accordingly request for your personal and urgent intervention to issue direction for necessary amendment/ earmarking of commercially usable spectrum for the Punjab Service Area under Cellular license no. 20- 215/2008- Idea-AS-1 dated 25th January 2008 viz. for at the earliest.”

As even then no order was passed on the said application, the petitioner has filed the present petition, praying inter-alia for the following reliefs:-

“(a) Direct DoT to forthwith issue necessary amendments in the UAS / CMTS License of either erstwhile Spice - being No. 842-65(B)-95-VAS dated 09.09.1996 or License of Idea - being No. 20-215/2008 -Idea-AS-1 dated 25.01.2008 for authorization to use the 3G spectrum for provision of Telecom Access Services in Punjab Service Area;

(b) Direct DoT / WPC Wing to forthwith earmarked 3G spectrum for commercial use in Punjab Service Area allowing the Petitioner to utilize the 3G spectrum for commercial operations either under the License of erstwhile Spice - being No. 842-65(B)-95-VAS dated 09.09.1996 or License of Idea - being No. 20-215/2008 - Idea-AS-1 dated 25.01.2008.

(c) Direct DoT / WPC Wing to forthwith issue the necessary Equipment import licences, permit applications for siting clearances for 3G spectrum from SACFA, allow application for wireless operating license for 3G spectrum either under erstwhile Spice license - being No. 842-65(B)- 95-VAS dated 09.09.1996 or License of Idea - being No. 20-215/2008 -Idea-AS-1 dated 25.01.2008. (d) Direct DoT to pay to Idea interest @ 18% per annum on the said amount of Rs. 322.01 Crores computed from 01.09.2010 until the date of DoT finally allowing the commercial use of 3G spectrum to Idea in Punjab Service Area.

(e) pass ad-interim / interim / ex-parte order(s) in respect of the above payers;”

The matter relating to grant of interim relief in favour of petitioner was heard on 10.02.2011. It was directed:-

“...Although, we have heard the matter at great length including the merit of the matter thereof, we are of the opinion that the Competent Authority of the DoT may be given an opportunity to determine the issues in regard to the petitioner’s prayer for amendment of the license of the petitioner in respect of the Punjab Circle one way or the other by 16.2.2011.”

An order was passed on or about 23.02.2011, a copy whereof was handed over to this Tribunal on 24.02.2011, stating:-

**SUBJECT: AMENDMENT OF UNIFIED ACCESS SERVICES (UAS) LICENCE AGREEMENT(S) TO USE 3G SPECTRUM FOR PROVISION OF TELECOM ACCESS SERVICES IN PUNJAB SERVICE AREA.**

In pursuance of the order dated 17.02.2011 of the Hon’ble TDSAT in petition number 51 of 2011 in the matter of ‘Idea Cellular Limited Vs. Union of India and another’, I am directed to convey the following decision of the competent authority of the Department of Telecommunications (DoT):

(i) Show cause notice for Punjab Services Area is being issued to M/s Idea Cellular Limited for termination of UAS license number 20-215/2008- IDEA-AS-I dated 27.02.2008 for violation of ‘substantial equity’ Condition and violation of the conditions related to restrictions on ‘Transfer of License’ of the UAS License and guidelines/ instructions issued on that behalf.

(ii) Demand notice is being issued to M/s Spice Communication Limited for Punjab Service Area in respect of UAS License No. 842-485/2004-VAS dated 19.11.2004 (which was migrated from CMTS License No.842-65(B)/95- VAS dated 09.09.1996) for violation of ‘substantial equity’ Condition and violation of the conditions related to restrictions on ‘Transfer of License’ of the UAS License and guidelines/ instructions on that behalf.

(iii) In view of the above, at present no amendment of M/s Spice Communication Limited UAS license number 842-485/2004-VAS dated 19.11.2004 or M/s Idea

Cellular UAS License No. 20-215/2008-IDEA-AS-I dated 27.02.2008 to use 3G spectrum for provision of telecom access services in Punjab service area can be made.”

On a query made by this Tribunal as to whether the petitioner intends to question the validity of the said order, the learned Senior Counsel appearing on behalf of the Petitioner, stated as under :-

“Mr.C.S. Vaidyanathan, the learned senior counsel states that the show cause notice as also the demand notice referred to in the said order have been received by the petitioner only today by e-mail. The learned counsel states that the petitioner need not question the authority or otherwise of the said order in this proceeding but it may, if so advised, question the validity and/or legality of the said order in an appropriate proceeding. However, the learned counsel states that an additional affidavit shall be filed in regard to the said order dated 23.2.2011 vis--vis the prayers made in the petition. An affidavit along with relevant documents may be filed by tomorrow. The Union of India may file its reply thereto by 1.3.2011.”  
The respondent filed an application for adjournment. It was directed:-

”The learned ASG further showed us a letter where the files related to the subject relating to dispute before us have been asked for investigation.”

The petitioner moved the Supreme Court of India for requisite clarification and by order dated 22.3.2011 passed in I.A. No. 7 of 2011, the Apex Court directed:-

“I.A.No.7 of 2011

This application has been filed by Idea Cellular Limited in the context of order dated 04.03.2011 passed by the Telecom Disputes Settlement and Appellate Tribunal, New Delhi in Petition No.51 of 2011.

We have heard Dr.A.M.Singhvi, learned senior counsel appearing for the applicant. In our view, order dated 16.12.2010 passed by this Court in C.A.No.10660 of 2010 has nothing to do with the auction of 3-G Spectrum. The application is accordingly disposed of.”-

In the aforementioned factual backdrop, the matter has been heard by us.

The respondent in its reply inter-alia contended:-

1. So far as the Punjab area is concerned, the petitioner's service license has not been amended so far;
2. So far as the amendment of service license is concerned, the same being connected with merger of service licenses is subject matter of another proceeding, stating :

“5. After necessary amendments of service license only, 3G spectrum will be earmarked on commercial basis. It is stated that M/s IDEA has been earmarked 3G spectrum on commercial basis in ten other service areas where they have declared successful bidders after amendment to their respective service licenses. In Punjab service area, M/s IDEA has not amended their service license so far.”

An additional affidavit has been filed on behalf of the petitioner. It was inter-alia stated therein:-

“13. DOT accepted that Idea wanted the 3G spectrum under erstwhile Spice License:

- In Idea's application dated 18.03.2010,
- In Idea's payment letter dated 31.05.2010,
- In Idea's letter dated 31.05.2010 requesting for earmarking of spectrum,
- In Idea's letter dated 12.07.2010 requesting for amendment after payments have been made under erstwhile Spice's License

However, suddenly on 13.09.2010 (Volume II page 365), DoT intimated that DoT had decided to issue LOI in the name of Idea against Idea's Service License. Even at this stage, no objection, whatsoever, was raised with respect to any substantial equity violation.

14. Idea finally agreed and accepted the above in its letter dated 24.11.2010 (see Volume II page 368) and requested DoT to issue necessary amendment/

earmarking commercially usable spectrum in Idea's License. DoT still did not act despite their own decision.

18. As far as 3G spectrum is concerned, the crucial date is 18.03.2010 and onwards and not prior thereto. Admittedly, on 18.03.2010, Idea was not in violation of substantial equity Clause and, therefore, the said Show Cause Notice with reference to Idea's 2G License has no bearing on the 3G application and the substantially concluded contract.

19. With respect to alleged violation of conditions relating to restriction on "transfer of License" of UAS License and Guidelines etc. is concerned, it is reiterated that neither the relevant Clauses of UAS License (Clause 6.2) nor Clause of Intra Circle Merger Guidelines (Clause 17) deal with merger of companies but only deal with merger of license. Further, merger of companies is a pre-condition for applicability of the said Clauses. Admittedly, merger of License has not been taken on record by DoT. Since these clauses deal with merger of license and since merger of license has not been taken on record by DoT yet, therefore, there is no violation, whatsoever, of conditions of UAS conditions/ guidelines relating to "transfer of Licenses" either in case of Idea or in case of erstwhile Spice, as far as 3G spectrum issue is concerned.

22. Without prejudice to the Petitioner's right with respect to its challenging the said Show Cause/ Demand Notices in appropriate proceedings and though the Petitioner feels that these Notices need not be responded to/explained herein, it may still be noteworthy that:

(a) Petitioner had kept DoT fully informed about its proposed merger starting with its letter dated 25.06.2008 to DoT including proposal to purchase 40% equity in Spice. A copy of the said letter dated 25.06.2008 of Idea is annexed hereto and marked as Annexure- C.

(b) Petitioner had written several letters to DoT informing them about the progress of the merger and DoT was fully aware of all development.

(c) In fact, in a meeting dated 07.08.2008, it was DoT who had expressed the view and confirmed that the intent of Clause 17 and 18 of Merger Guidelines is not to bar the “transfer of license” consequent upon merger of companies, which are otherwise more than 3 years old.

(d) Also, vide its letter dated 05.05.2009. A copy of the said letter dated 05.05.2009 of DoT is annexed hereto and marked as Annexure- D. DoT had sought clarification and Idea had informed DoT, vide its letter dated 12.05.2009 that Idea was holding 41.09% equity in Spice. A copy of the said letter dated 12.05.2009 of Idea is annexed hereto and marked as Annexure- E. However, DoT had not raised any objection whatsoever thereto.

(e) It is also important to note that Idea had in fact offered to surrender its, inter alia, Punjab 2008 License. In this regard Idea had written to DoT. Copies of Idea’s two letters dated 25.06.2008 and 15.0.2008 are annexed hereto and marked as Annexure- F (colly).”

Along with the said additional affidavit, the said order dated 23.02.2011 was also annexed. Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the petitioner, would urge:-

1. The High Courts of Gujarat and Delhi having approved the merger scheme in terms of Section 394 of the Companies Act, 1956 the Corporate merger must be held to be complete as a result whereof only one entity exists;
2. The said order of merger, however, is subject to criminal and civil liabilities of the parties;
3. The High Court did not say that the licenses would also stand merged and in that view of the matter, the petitioner was not required to obtain prior approval of the DoT before applying for approval of the merger scheme.
4. The respondent has no jurisdiction to deny merger of license only on the ground that there exists some defect in the merger scheme.
5. The respondent itself having earmarked spectrum and directed the petitioner to use it in its own name, which proposal having been accepted, the respondent cannot now be permitted to turn round and contend that the permission for merger of license shall not be granted.

6. The merger guidelines providing for 3 years holding period cannot have any application in this case as the license was

granted in favour of Spice Communications on 04.4.1996 and in favour of Idea Cellular on 25.01.2008. (vii) The letters of the respondent dated 07.01.2010, 18.01.2010 alleging violation of the merger guidelines are by way of afterthoughts inasmuch as :-

(a) The proceedings before the learned Company Judges had been going on within the knowledge of the DoT and they did not raise any objection,

whatsoever;

(b) The respondent was all along aware that merger of licenses is not within the domain of the High Court;

(c) The license conditions/guidelines only would lead to one interpretation that the question of merger of license would arise only after the High Court passed an order, sanctioning merger;

(d) In any event, if the respondent intended to take any action against the petitioner for violation of the conditions of license, they could have done so;

(viii) In the proceeding for merger of a Corporate entity, the DoT was neither a necessary or a proper party;

(ix) In any view of the matter, the petitioner is entitled to operate either on the licenses in the name of Spice Communications, (which would have been an ideal situation) and/or the license in the name of the petitioner.

(x) Even if the petition on license of merger fails, one overlapping license only goes but the other remains and in that view of the matter, the Spice license would remain.

The petitioner is entitled to operate 3G spectrum on the license of Spice as a post merger Idea Cellular Ltd.;

(xi) Even if the petitioner's license is revoked, the Spice's license would remain. In any event the licenses granted for operating 2G spectrum remains, the 3G spectrum can be operated.;

(xii) The respondent, having accepted a huge amount as also having allocated 3G spectrum, is estopped and precluded from refusing the petitioner to operate thereupon.

(xiii) The respondent has a duty to allow the petitioner to operate on 3G license, which in view of the nature thereof, must be held to be mandatory in nature. So far as the alleged violation of the conditions of license by the petitioner is concerned, the respondent can take action in

due course but the same by no means would stand as a bar for operation on 3G license.

(xiv) The petitioner having become a successful bidder in the 3G auction and is also a license holder in respect of 2G spectrum, there is absolutely no reason as to why the DoT will not allow the petitioner to operate its 3G spectrum.

(xv) In any event even it was not necessary to have a 2G license as an application therefor could be filed even at a later stage.

(xvi) The petitioner having not violated any eligibility condition per se the respondent could not have refused to amend the licensees.

Mr.Vaidyanathan, learned Senior Counsel supplementing Dr. Singhvi submitted:-

(a) The petitioner having stood qualified and having not been found to be disqualified therefor uptill now and payments having been made in terms of the demand, the question of entitlement of the petitioner to operate on 3G license must be considered from the right perspective.

(b) Having regard to the decision taken by the DoT itself as communicated in its letter dated 13.9.2010, the issuance of license is merely a ministerial act.

Strong reliance in this behalf has been placed on *Edukanti Kistamma v. S. Venkatareddy* reported in 2010 (1) SCC 756, *Sagar Mahila Vidyalaya, Sagar v. Pandit Sadashiv Rao Harshe* reported in (1991) 3 SCC 588 and *Mithailal Dalsangar Singh v. Annabai Devram Kini* reported in (2003) 10 SCC 691.

(c) The auction having been conducted on the promise made on an international basis and the petitioner having altered its position pursuant thereto the respondent must be held to be bound by the doctrine of promissory estoppel.

Mr.Chandhiok, the learned Additional Solicitor General, at the outset, produced before us a copy of the order of the Delhi High Court dated 30.3.2011 to show that the operation of the order dated 5.2.2010 has been stayed by a learned Company Judge of the Delhi High Court and on that basis submitted:-

(i) the petitioner having rested its case only on the 2G license held by Spice as also the orders of amalgamation, the orders sanctioning the scheme of amalgamation by the Gujarat and Delhi High Courts, the petitioner cannot be heard to say now that it had an operational 2G license. The petitioner itself having relied on only one license which was operational i.e. of Spice and admittedly the license held by it saying not operational, the question of merger of license does not arise.

(ii) Furthermore it had all along proceeded on the basis that only the license of the 'Spice' should be considered not only for the purpose of enabling it to take part in the 3G auction but also the amendment of the licenses; and thus, it does not lie in its mouth now to contend that it had all along being holding an effective license.

1. The petitioner having proceeded on the basis that the license held by it in the Punjab area was to be treated as surrendered, it cannot now contend that it was entitled to operate on the basis of its own license and not the one held by Spice.
2. The petitioner having not questioned the validity and/or legality of the orders passed by the DoT dated 7.1.2010 and 18.1.2010 as also the order dated 23.2.2011 should not be permitted to argue that the said orders must be ignored having been passed without jurisdiction.

3. The petitioner, having not pleaded the invocation of the doctrine of promissory estoppel in the petition, should not be permitted to raise the same.
4. The petitioner having accepted that it had more than 10% holding in Spice Communication from a long me, it is not entitled to an order of merger of license.
5. The Respondent had already rejected the petitioner's prayer for merger of licenses by orders dated 7<sup>th</sup> January 2010 and 18<sup>th</sup> January 2010, it must be held to have obtained the order of sanction of the scheme of merger by suppression of the material facts from the Delhi High Court.
6. The Respondent having the sole prerogative to direct merger of license, it is not bound to do so only because of the orders of Delhi High Court and Gujarat High Court approving the scheme of merger.
7. The restrictions put in the conditions of license and guidelines for merger had been provided to promote competition and avoid monopoly in any service area whatsoever, they must be followed.
8. The petitioner having admitted violation of conditions of license, the respondent was not even required to comply with the principles of natural Justice.
9. We may notice some of the conditions of license:-

#### 6. Restrictions on 'Transfer of Licence'

6.1 The LICENSEE shall not, without the prior written consent as described below, of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-Licence and/or partnership relating to any subject of the LICENCE to any third party either in whole or in part i.e. no sub-leasing/partnership/third party interest shall be created. Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.

6.2 Intra service area mergers and acquisitions as well as transfer of licenses may be allowed subject to there being not less than three operators providing Access Services in a Service Area to ensure healthy competition as per guidelines issued on the subject from time to time.

Xxx

6.3 (ii) Whenever amalgamation or restructuring i.e. merger or demerger is sanctioned and approved by the High Court or Tribunal as per the law in force; in accordance with the provisions; more particularly Sections 391 to 394 of Companies Act,1956”

The matter relating to competition has been dealt with in Clauses 1.4 (i) and 1.4 (ii) which read as under:

“(i) Any changes in share holding shall be subject to all applicable statutory permissions.

(ii) No single company/ legal person, either directly or through its associates, shall have substantial equity holding in more than one LICENSEE Company in the same service area for the Access Services namely; Basic, Cellular and Unified Access Service.

‘Substantial equity’ herein will mean ‘an equity of 10% or more’. A promoter company/ Legal person cannot have stakes in more than one LICENSEE Company for the same service area.”

The Respondent has issued merger guidelines, Clauses 17 and 18 whereof read as under:

17. Any permission for merger shall be accorded only after completion of 3 years from the effective date of the licences.

18. The duration of licence of the merged entity in the respective service area will be equal to the remaining duration of the Licence of the two merging licencees whichever is less on the date of merger.

For example, if licence of company ‘A’ is merging with Licence of company ‘B’, and the remaining duration of licence of ‘A’ or ‘B’ whichever is less will be applicable for the merged entity in the respective service area.

One of the principal questions which would arise for consideration, in view of the rival contentions of the parties would be the effect of the order of merger and whether for that purpose the licensee company was bound to seek prior approval therefor.

Sections 391 and 394 of the Companies Act provide inter alia for amalgamation of the company. Section 391 provides for power to compromise or make arrangement with creditors and members; whereas

Section 394 provides for provisions for facilitating reconstruction and amalgamation of companies.

Amalgamation of two or more companies is permissible. A scheme therefor is required to be made. In terms of Section 394 (1) (a), an application for approval thereof has to be filed before the Learned Company Judge.

Before however such a scheme is sanctioned, it is obligatory on the part of the court to obtain a report from the Registrar that the affairs of the company is not conducted in a manner prejudicial to the interest of its members or public interest. It is also necessary to obtain a report from

the official liquidator who would submit the same on scrutiny of the books and papers of the company that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest.

Sub Section (2) of Section (394) provides for the effect/consequence of sanctioning of the scheme for amalgamation of the company.

It reads as under:

“Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order; that property shall be transferred to and vest in and those liabilities shall be transferred to and become the liabilities of the transferee company and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.”

Sub Section (4) of Sec. 394 defines the terms 'property' and 'transferee company' in the following terms:

“(a) “Property” includes property rights and powers of every description; and “liabilities” includes duties of every description; and

(b) “transferee company” does not include any company other than a company within the meaning of this Act; but “transferor company” includes any body corporate, whether a company within the meaning of this Act or not.”

What would be the effect of sanctioning of the scheme has been considered in *Re: Europlast India Ltd. A Company Incorporated Under Companies Act, 1956* reported in 2010 (112) Bom LR 281 stating the law thus:

“36. The question as to what is the scope of power of the Company Court while exercising jurisdiction under Section 391 and 392 of the Act is no more *res integra*. The Apex Court in *S.K. Gupta's Case (Supra)* had occasion to observe, while interpreting the said provisions which are in

*pari materia* with the provisions occurring in the U.K. Act. The Apex Court went on to observe that the Parliament has, in its wisdom, conferred a power of wide amplitude on the High Court in India to provide for its continuous supervision of carrying out of compromise and/or arrangement and also the consequential power to make the supervision effective by removing the hitches, obstacles or impediments in working of compromise or arrangement by conferring power to give such directions in regard to any matter or for making such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise and/or arrangement. It is further observed that the scheme sanctioned under Section 391 of the Act does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even the dissenting creditors or members as the case may be. While referring to the decision in the case of *J.K. (Bombay) Pvt. Ltd. v. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd.* AIR 1970 SC 1041 the Court has observed that the

effect of the sanctioned scheme is to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity. It is also observed that scheme represents a contract sanctified by Court's approval between the company and the creditors and/ or members of the company. It is equally well established that the rights which are enshrined in the scheme of the class of creditors cannot be impaired or superseded unless it is by a new scheme approved in the same way as the earlier one. Further, sanction of the Court operates as a judgment in rem. In the case of Smt. Pramila Devi v. Peoples Bank of Northern India Ltd. (1939) 9 Com Cases page 1 : AIR 1938 PC 284, the Court held that the scheme when sanctioned acquires statutory force and has greater sanctity than a mere agreement between the parties affected. It cannot be varied by a mere agreement of the parties. In the case of Krishnanath Sen v. Dinajpur Loan Office AIR 1938 Cal 337, it is observed that the scheme when sanctioned has the force of judicial pronouncement.

It no more remains in the domain of contract but becomes an order of the Court.”

Yet again in Sterlite Industries (India) Limited Vs. Department of

Telecommunications reported in 2006 (3) ARBLR24 (Delhi), the Delhi High Court has held as follows:

“28. ...It is trite to say that the effect of the approval of the scheme by the High Court of judicature at Bombay would be that the same applies in rem and there would be a legal incapacity to proceed against the petitioner in respect of the subject matter.”

Recently, the Calcutta High Court in Shrimati Bhavita Jitendra Mehta Vs. Sudera Enterprises Private Limited reported in [2004] 122 CompCas 361(Cal) has held:

“30. Moreover, the petitioner is only a tenant and she has no right to say 'no' to the amalgamation inasmuch as she is entitled only to the protections under the existing rent restrictions Act. It is settled law the order of amalgamation passed by the Company Court is a judgment in rem and as such the order of amalgamation is

binding on the tenant.”

We may at this juncture also notice some of the provisions of the scheme:

2.18 “Undertaking of the Transferor Company” means all the business, undertakings, properties and liabilities, of whatsoever nature and kind and wheresoever situate of the Transferor Company, on a going concern basis, together with all their assets and liabilities and shall mean and include (without limitation):

a) xxx

b) xxx

c) All properties and assets, movable and immovable, real and personal, in possession or reversion, corporeal and incorporeal, present and future, contingent or of whatsoever nature, wheresoever situate alongwith buildings, sheds, godowns, warehouses, offices, vehicles, investments, interests, current assets (including inventories, sundry debtors, bills of exchange, loans and advances, etc.), stocks and stores, furniture, fixtures, office equipments, appliances, computers, accessories, licences (including National Long Distance licence and International Long Distance licence issued by DoT), permits quotas, approvals, registrations, leasehold rights, tenancy rights including tenancy rights in relation to office and residential properties, incentives, claims, powers, authorities, allotments, consents, engagements, arrangements, rights, credits, titles, benefits, advantages, subsidies, municipal permission, brands, other intangibles, industrial and intellectual properties, trade secret, confidential information, domain names, powers of every kind, nature and description and all other permission, rights (including rights under any contracts, Government contracts, memorandum of understanding, etc.), all entitlements, deposits advances and/or monies paid or received by the Transferor Company, all statutory licences and/or permissions and any financial bank guarantees issued by the Transferor Company and the benefits of any bank guarantees, deferred tax benefits privileges, all other claims, rights

and benefits, powers and facilities of every kind, nature and description whatsoever, rights to use and avail of telephones, telexes, facsimile connections and installations and utilities, electricity and other services, provisions, funds, benefits of all agreements, contracts and arrangements and all other interest in connection with or relating to the Transferor Company;

## 5. TRANSFER AND VESTING OF UNDERTAKING OF TRANSFEROR COMPANY

5.1 Upon the Scheme being effective and subject to the provision of this Scheme in relation to the mode of transfer and vesting, the Undertaking of the Transferor Company shall, without any further act, instrument or deed, be and stand transferred to and vested in and/or be deemed to have been and stand transferred to and vested in the Transferee Company as a going concern so as to become on and from the effective date, the estate, assets, rights title, interest and authorities of the Transferee Company, pursuant to Section 394(2) of the Act, subject however, to all charges, liens, mortgages, then affecting the same or any part thereof, provided always that the Scheme shall not operate to enlarge the scope of security for any loan, deposit or facility created by or available to the Transferor Company which shall vest in the Transferee Company by virtue of the amalgamation and the Transferee Company shall not be obliged to create any further or additional security therefore after coming into effect of this Scheme or otherwise except in case where the required security has not been created and in such case if the terms thereof require, the Transferee Company will create the security in terms of the issue or arrangement in relation thereto.

Similarly, the Transferee Company shall not be required to create any additional security over assets acquired by it under the Scheme for any loans, deposits or other financial assistance availed/ to be availed by it.

5.2 In Particular, upon the Scheme being effective, the UASLs authorizations and any other licenses/approval granted to the Transferor Company, all municipal approvals, permission for establishing cellular towers (including cell site licenses) or receiving stations or any broadcasting approvals for bandwidth and forming part

of the Undertaking of the Transferor Company shall vest in the Transferee Company and the concerned licensor and granter of such approvals, clearances, permissions shall endorse, where necessary and record the Transferee Company on such approvals, clearances, permissions so as to empower and facilitate the approval and vesting of the Undertaking of the Transferor Company in the Transferee Company without hindrance or let on and from the effective date.

5.6 For the avoidance of doubt, it is clarified that upon the coming into effect of this scheme, in accordance with the provision of relevant laws, consents, permissions, licenses, certificates, authorities (including for the operation of bank accounts), powers of attorneys given by, issued to or executed in favour of the Transferor Company, and the rights and benefits under the same shall, and all quality certifications and approvals, trademarks, brands, patents and domain names, copy rights, industrial designs, trade secrets and other intellectual property and all other interests relating to the goods or services being dealt with by the Transferor Company, be transferred to and vested in the Transferee Company.

The bid The notice inviting application was issued on 25.2.2010 in terms whereof the DoT was not only entitled to publish a list of qualified bidders but also reserved its right to summarily disqualify any pre-qualified bidder at any stage on the ground of non-compliance with eligibility conditions, misrepresentations etc.

Clause 3.7 provides for revocation and surrender of the spectrum assignment stating that if the applicant did not have a relevant service license for a service area when it was declared as a successful bidder it must apply for a new license within three months for being declared as a successful bidder.

Clause 4.3 of the said bid documents provide for announcement of pre-qualified bidders. Clause 4.5 provides for payment methodology. Clause 4.6 which is of some importance may be noticed:-

“4.6 Assignment of spectrum Existing licensees \*Upon receipt of the Successful Bid Amount, the DoT (WPC) shall issue a Letter of Intent allocating the frequencies to the Successful Bidder (“allocation of frequency”);

- Necessary amendments to enable use of frequency allocated by WPC for provision of services under applicable license (including migration to ISP- category 'A' licence, if applicable) shall be made to the existing UAS/ CMTS/ ISP licence ("assignment of frequency") of the Successful Bidder or its nominated entity (as applicable), within 15 days of DoT receiving an application for such amendments;

\*In case of Bidders that have existing UAS/ CMTS licences in both Chennai and Tamil Nadu (excluding Chennai) service areas and in case the Group Bidding Entity is successful in the Auction for Tamil Nadu (including Chennai), then the Bidders have to provide Undertakings and Board Resolutions of both the licensee companies (as applicable) confirming that their UAS/ CMTS licences of Chennai and Tamil Nadu (excluding Chennai) service areas shall be merged as per DoT letter no. 842-503/2005-VAS/5 dated 15th September, 2005. A copy of the letter is available on the DoT website; \*It may be noted that after assignment of 3G Spectrum, the licensees shall be allowed to utilise the spectrum for commercial operations only from 1st September, 2010.

However, in the mean time, they can take steps to enable launch of commercial operations;

\* Successful Bidders in the BWA Auction can use the assigned frequency for commercial purposes immediately after assignment as per the terms of the applicable licence. New entrants

\*Upon receipt of the Successful Bid Amount, the DoT (WPC) shall issue a Letter of Intent allocating the frequencies to the Successful Bidder;

\*Upon the Successful Bidder obtaining a UAS licence or an ISP-category 'A' licence, as applicable, the DoT shall assign the specified spectrum;

\*In case the Successful Bidder acquires an existing licensee, necessary amendments to the licence of the acquired entity will need to be made prior to assignment of spectrum;

\*It may be noted that after assignment of 3G Spectrum, the licensee shall be allowed to utilise the spectrum for commercial operations only from 1st

September, 2010.

However, in the mean time, they can take steps to enable launch of commercial operations;

\*Successful Bidders in the BWA Auction can use the allocated frequency for commercial purposes immediately after assignment and obtaining the necessary licence, as per the terms of the applicable licence.”

Indisputably the petitioner was one of the successful bidders. It has deposited the bid amount. It had been allocated spectrum and in terms of Clause 4.6, it was entitled to obtain amendment of license within 15 days of DoT receiving application for such amendment by the petitioner as it invested a huge amount even before 1.9.2010.

We may also notice that under the provisions relating to merger and acquisition contained in Clause 4.8, guidelines as prescribed and as amended by DoT from time to time were to successful bidders.

We have noticed heretofore some clarifications issued by the respondent in this behalf.

We may notice paragraph 356 and 357 :-

No. Query Response 356 What is the duration during which UAS license need to be acquired, post winning the bid for a circle, where the entity does not have a UASL/CMTS?

The Successful Bidder would need to submit its completed UAS application form within 3 months of being declared as Successful Bidder.

357 Will the winning bidders of 3G auction in a circle be released the spectrum at the same time? Or will it be determined on some preferences? Is there any clarity on whether Please refer Section 4.6 of the Notice Inviting Applications. Subject to a separate all the auctioned spectrum bands are available for release immediately? application for the spectrum having been made in the prescribed format, the Government intends to allocate the specified spectrum to all the

Successful Bidders or the relevant licenses, within 15 days of the receipt of the Successful Bid Amount. The Successful Bidders will be allowed to commercially use such spectrum from 1<sup>st</sup> September 2010.

It is in the aforementioned backdrop, we may notice the relevant documents.

A list of pre-qualified bidders was published on 30.3.2010. The final results were published on 21.5.2010. The petitioner was asked to make payments by a letter dated 31.5.2010, within the time specified therefor. In terms of its letter dated 31.5.2010, the petitioner deposited payments for a sum of Rs.322.01 crores against license no.842-65 (B)/95-BAS dated 19.9.1996 (erstwhile Spice Communication Ltd.). It deposited the entire amount on 31.5.2010 on the same date. On the basis of the same license alone the petitioner asked for a letter of intent for Punjab in its own name on the ground that Spice Communication stood amalgamated with it through a process as per the provisions of the license agreement, which process of amalgamation has been completed.

The LOI was issued on 31.5.2010 wherein at Sl.No.11 the same license number was mentioned. The letter of intent earmarking 3G spectrum was issued on 11.6.2010. The petitioner applied for amendment of the license in the one held by Spice Communication which was an USA license migrated from CMTS.

The respondent in its letters issued on 1.9.2010, however, stated that the allocation letter is not to be treated as a license. It is on the aforementioned premise contents of the letter of the respondent dated 13.9.2010 should be considered. In terms of the said letter, a discussion is said to have been taken to grant a license in the name of the petitioner itself.

The petitioner by its letter dated 13.9.2010 requested the respondent to issue necessary license in respect of the Punjab Service area against the terms of the Spice Communication being an operational one. It was contended that the 3 G Spectrum shall remain with the merged entity.

This letter goes to show that the petitioner was conscious that no final decision had been taken on amalgamation. It, however, by its letter dated 24.11.2010 while

complaining about non-allocation of spectrum and/or withholding thereof to which it claimed a right.

Before, however, we consider the effect thereof we may notice that in its application for taking part in the 3G auction, the petitioner stated as under:-

“List of UAS/CMST License(s) held by the Applicant and its Associate Licensees, if any. Please mention operative licenses (i.e. licenses which are currently in force) only.

Types of license (UAS/CMTS) Service Area Name of company CMTS Andhra Pradesh Idea Cellular Limited CMTS Maharashtra Idea Cellular Limited CMTS Delhi Idea Cellular Limited CMTS Gujarat Idea Cellular Limited CMTS Haryana Idea Cellular Limited CMTS Kerala Idea Cellular Limited CMTS Uttar Pradesh

(w) Idea Cellular Limited CMTS Madhya Pradesh Idea Cellular Limited CMTS Rajasthan Idea Cellular Limited CMTS Himachal Pradesh Idea Cellular Limited CMTS Uttar Pradesh(E) Idea Cellular Limited UASL Mumbai Idea Cellular Limited UASL Jammu and Kashmir Idea Cellular Limited UASL Kolkata Idea Cellular Limited UASL North East Idea Cellular Limited UASL Orissa Idea Cellular Limited UASL Tamil Nadu Idea Cellular Limited UASL West Bengal Idea Cellular Limited UASL Bihar Idea Cellular

Limited[Refer Note(i)] UASL Karnataka Idea Cellular Limited[Refer Note(ii)] UASL Punjab Idea Cellular Limited[Refer Note(ii)] Notes:

(i) Pursuant of the scheme of the arrangement (the Scheme) between Aditya Birla Telecom Limited and Idea Cellular Limited, approved by the Hon'ble High Court of Gujarat vide its order dated 22nd January,2010, and the Scheme being made effective from 1st March,2010 by filling High Court Order with the Registrar of Companies, the entire telecom operations including Unified Access Service license (UASL) of Bihar service area held by Aditya Birla Telecom Limited (ABTL) has been de-merged from ABTL to Idea Cellular Limited. The DoT has already been informed about the same vide our letter dated March 3, 2010, with request kindly note the change of name of license.

(ii) DoT would kindly note our letter dated June 25, 2008; July 17, 2008; August 1, 2008; December 1, 2008, May 12, 2009, September 24, 2009, November 27, 2009, January 6, 2010 and January 25, 2010 with regard to amalgamation of Spice Communications Limited into Idea Cellular Limited through a Court process as per provisions of the license agreements, which process of amalgamation has been completed.

Treatment of 6 overlapping UAS licenses (currently in force) along with associated spectrum, would be as per applicable policy.”

It categorically stated that the license sent by its alliance was only the one which was granted in favour of the Spice Ltd. giving a similar note as note 2 in the similar letter. It is also important to notice that on 3.9.2010 the petitioner in a communication to the Secretary of the DoT stated :-

“...Sir, the 3G auctions were simultaneous auctions and all winners have equal rights for spectrum availability and usage.

Granting spectrum to other operators and withholding the same for us is discriminatory and a contractual breach. Further delay in the requisite approvals, would amount to mocking and subverting the auction process, and we will be constrained to hold the DoT responsible. We request your personal urgent intervention to issue directions for necessary amendment for the commercial usage of spectrum for the Punjab service area.”

It has been noticed heretofore that petitioner also in its application dated 31.5.2010 disclosed only one license. In its application dated 18.3.2010 which was the application relating to 3G auction also, petitioner did not refer to the license issued to it.

Even it did not do so in the bid document. In the aforementioned backdrop we may also notice the orders passed by the DoT rejecting the petitioner's application for merger dated 7.1.2010 and 18.1.2010

“....This has reference to M/s Idea Cellular Limited (ICL) and M/s Spice Communications Limited intimated to DoT vide their letter dated 25 June, 2008,

July 15, 2008, and ICL letter dated July 17, 2008, August 1, 2008, regarding proposed merger of Spice Communications Limited with

Idea Cellular Limited. Also letter dated December 1, 2008, May 12, 2009 and June 23, 2009 from ICL regarding demerger of 2 overlapping licenses.

2. M/s Spice Communications Limited having UAS License in Punjab and Karnataka, M/s Idea Cellular Limited also hold UAS licenses with effective date of 25 January 2008, which is less than 3 years and M/s ICL holds CMTS Licenses Andhra Pradesh, Maharashtra, Haryana and Delhi where M/s Spice Communications Ltd. (SCL) also holds UAS licence with effect dated 29.2.2008 and 03.03.2008, which is less than 3 years. Therefore as per licence condition 17 of intra merger dated 22.04.2008 merger of companies cannot be permitted.”

“ 18.01.2010

xxx

Undersigned has been directed to intimate that the permission of the amalgamation of the companies M/s Spice Communications Ltd. with Idea Cellular Ltd. can not be acceded to which has already been communicated to the company M/s Idea Cellular Limited and M/s Spice

Communications Ltd vide this office letter No.842- 1001/2008-AS-IV (Pt.)/44 dated 07.01.2010 and No.842- 1001/2008-AS-IV (Pt.)/45 Dated 07.01.2010.”

This Tribunal upon hearing counsel for the parties at great length on the question as to whether the respondent should be directed to issue the amended license by an order dated 10.02.2010 asked it to determine the issue one way or the other.

Only an additional affidavit was filed but no application was filed questioning the validity/ legality thereof.

It must also be placed on record that although the petitioner has filed a separate petition being Petition no.35/2011 against the respondent herein inter alia questioning the said orders dated 7.1.2010 and 18.1.2010.

In this proceeding also no application for amendment of the petition has been filed. The prayer for merger of license is indisputably different from merger of corporate bodies.

Although, there is a controversy as to whether the petitioner was bound to obtain prior approval of the respondent for merger of companies and/or merger of licenses, we may proceed on the assumption that it is permissible in law to file an application for merger of licenses and/or amendment of license subsequent to the sanctioning of the scheme of amalgamation by the competent Courts.

Participation in an auction is, of course, permitted when the applicant is not only an existing licensee but also in whose favour a license is yet to be issued.

The petitioner, however, at no point of time relied on or acted on the basis of the license held by it. It never had any operational license as being a shareholder of more than 10% in Spice Communication. The licenses was not made operational but the effect of surrender and/or proposed surrender of the license held by the petitioner in its own name, although, have been raised but for the purpose of the present petition we must proceed on the basis that the petitioner did not rely upon its own license at any stage. By reason of the aforementioned order dated 13.9.2010 the petitioner was asked to submit a revised application as a consequence of a decision taken by the competent authority that the LOI would be granted in the name of M/s Idea against its Service License. Whether before the said decision was taken the respondent took into consideration the petitioner's aforementioned letter dated 25.6.2008/15.7.2008 need not be considered in these proceedings.

How the said letters have been treated by the respondent would also be subject matter of different proceedings but the fact remains that the petitioner did not file a separate application questioning the validity

thereof.

It merely stated in its letter dated 24.11.2010 that it may be allowed commercial use of spectrum under Idea Cellular License No.20- 215/2008-Idea-AS-1 dated

25.1.2008. It was required to file a separate application for allocation of spectrum if in view of the aforementioned letters dated 14.6.2008, 25.6.2008 and 15.7.2008. Moreover, the orders dated 7.1.2010 and 18.1.2010 are subject matter of a decision in a different case.

Mr. Vaiydanathan would submit that by reason of the said orders the respondent has not granted approval so far as merger of corporate entities are concerned which is beyond the domain of the respondent.

It, however, is well known that even a void order is required to be set aside. We may, notice that in *Sultan Sadik v. Sanjay Raj Subb* reported in (2004) 2 SCC 377 the Supreme Court of India opined as under:-

“39. An order may be void for one and voidable for the other. An invalid order necessarily need not be non est; in a given situation it has to be declared as such. In an election petition, the High Court was not concerned with the said issue.

40. In *Wade H.W.R. and Forsyth C.F.:* Administrative Law, 8th Edn., at p. 309, it is stated:

“Effect on third parties If an act or order is held to be ultra vires and void it is natural to assume that, being a nullity, it is to be treated as non-existent by all who would otherwise be concerned.

But the judgment of a court binds only the parties to it, so that here also there are problems of relativity. Once again Lord Diplock has supplied the answer:

‘Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.’

In effect, therefore, the court’s judgment of nullity operates erga omnes i.e. for and against everyone concerned.

Patent and latent invalidity In a well-known passage Lord Radcliffe said:

‘An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.’

This must be equally true even where the ‘brand of invalidity’ is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects. Lord Diplock spoke still more clearly, saying that:

‘it leads to confusion to use such terms as “voidable”, “voidable ab initio”, “void” or “a nullity” as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction’.

(See also *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth* reported in (1996) 1 SCC 435 and *Nawabkhan Abbaskhan v. State of Gujarat* reported in (1974) 2 SCC 121)

We, however, need not go into the question as to what would be the effect of the said orders have not been brought to the notice of the Delhi High Court as the same has been considered by it. So far as the order dated 23.2.2011 is concerned, Mr.Vaidyanathan would submit that the same does not contain any direction or order as it is merely a decision not to decide as would be evident from the words “at present used therein”.

The said order, however, has to be read as a whole. It is preceded by two facts (i) a show cause notice issued to M/s Idea Cellular Ltd. for termination of its license; and (ii) a demand notice against M/s Spice Communication in regard to violation of substantial equity condition as also restrictions on transfer of license and guidelines/ instructions issued in that behalf. Naturally the respondent could take a decision only upon consideration of the said proceedings.

The auction might have been upon calling international bid. Any acceptance, thereof, is, however, subject to fulfillment of conditions thereof and/or the statutes operating in the field. In a situation of this nature, the doctrine of promissory estoppel cannot be said to have any application whatsoever.

The Delhi High Court has disposed of the said Company Application by a judgment dated 4.7.2011. The operative portion of the said judgment reads as under :-

“81. Consequently, to bring the sanctioned scheme, in the present case, in conformity with the Licence and Merger Guidelines, 2008 as well as in view of the fact that simultaneous demerger scheme has been withdrawn, it is directed that notwithstanding anything stated in the sanctioned scheme (in particular paras 5.2 as well as 10.2) and/or in the order dated 5th February, 2010, the six overlapping licences of the Transferor Company/Spice would not stand transferred or vested with Transferee Company/Idea till prior permission of DOT is obtained. In fact, till permission of DOT is granted, the overlapping licences of Spice shall forthwith stand transferred/vested with the Licensor, i.e., DOT. The spectrum allocated for such overlapping licences shall also forthwith revert back to DOT. In the event DOT refuses or grants conditional approval to transfer of licences, Idea would be entitled to challenge the same before TDSAT who would decide the same in accordance with law after hearing both the parties. Since the Transferee Company has used the overlapping licences without any prior permission of DOT from 5th February, 2010 till date in contravention of the Licence and Merger Guidelines, it is directed that it shall be open to DOT to pass any order for such breach. Needless to say, any order passed by DOT can be challenged by Idea before any competent court or tribunal. To avoid inconvenience to public at large, DOT is directed to ensure that cell phone customers of the two overlapping licence areas namely, Punjab and Karnataka are provided regular and uninterrupted services like in the past.

82. Moreover, as simultaneous demerger scheme has been withdrawn, paragraphs 2.4, 2.13, 2.14, 2.19, 17.3 as well as the last two sentences in para 1.7 of the sanctioned scheme are deleted.”

We, therefore, are of the opinion :-

1. In view of the order of the Delhi High Court the parties must act in terms thereof.
2. as things stand now no order in mandatory form can be passed in favour of petitioner and against respondent directing it to act on the license held by the petitioner (iii) in the facts and circumstances of this case it cannot be said that a conscious decision has been taken that license must be granted in the name of the petitioner by amending its own license

(iv) the doctrine of promissory estoppel has no application in this case.

(v) This order shall not prejudice the petitioner in any manner in Petition no.35./2011 which may have to be considered on its own merits as also the connected matters pending before the Supreme Court of India.

This petition is dismissed with the aforementioned observations without any order as to costs.

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