

# Telecom Hotline

October 21, 2015

## TELECOM TRIBUNAL DENIES RIGHT TO REFUND OF ENTRY FEES FOR QUASHED 2G LICENSES

The Telecom Disputes Settlement and Appellate Tribunal ("TDSAT"), issued an order denying refund of entry fee/license fee to Loop Telecom Ltd. ("Petitioner"). By virtue of the judgment in the 2G case<sup>1</sup> ("2G Case"), the Supreme Court had quashed 122 telecom licenses. 21 licenses of the Petitioner were quashed as a result of this order. The Petitioner had approached the TDSAT to claim refund of INR 14, 549,400,000 (approximately USD 224,859,376) and interest which it had paid as entry fee / license fee for the grant of the 21 licenses which were quashed. The TDSAT sited pending criminal trials against the Petitioner and refused to classify their claim as valid grounds for restitution under the Indian Contract Act, 1872 ("Contract Act").

### FACTS

- The Supreme Court, in the 2G case quashed 122 Unified Access Service ("UAS") licenses granted to telecom licensees on grounds of irregularity and arbitrariness in the method of allocation of the 2G spectrum<sup>2</sup>.
- 21 licenses of the Petitioner were among these licenses that were quashed in the 2G case. The Petitioner accordingly shut down its operations in the 21 service areas.
- Parallel to the judicial review of the grant of the 2g spectrum in the 2G Case, there were criminal proceedings underway with respect to the highly unusual manner in which the licenses were granted. The report of the Comptroller and Auditor General of India dated November 8, 2010 *inter alia* reported that 85 of the 122 licenses granted by the DoT had gone to applicants who did not fulfill the eligibility criteria. In connection with this, the Central Bureau of Investigation had submitted a charge sheet alleging that the Petitioner was ineligible for the grant of the 21 UAS licenses. The Central Bureau of Investigation ("CBI") claims that the Petitioner was in violation of the then prevailing UAS license guidelines which prohibited an entity from having substantial equity holding in more than one telecom licensee in the same service area<sup>3</sup>: the CBI claims that the Petitioner was a front of the an entity which held substantial equity in another pan-India licensee. On the basis of the charge sheet, on December 20, 2011 the special judge framed charges against the Petitioner and the trial is underway since then ("Criminal Matter").
- The Petitioner approached the TDSAT seeking a direction to the Department of Telecommunications, Union of India ("UoI") to refund INR 14,549,400,000 (approx. USD 224,069,780) and interest paid as entry fee/license fee for the grant of 21 UAS licenses A direction for discharge of bank guarantees given to the DoT in terms of the 21 UAS license was also sought. During the pendency of the case, the bank guarantees had expired and by an interim order passed on February 7, 2014, the Petitioner was permitted to not renew the guarantees subject to giving an undertaking that it would pay the demands raised by the DoT depending upon the outcome of the case.

### SUBMISSIONS ON BEHALF OF THE PETITIONER

- The Petitioner' basic claim was that the TDSAT should review the matter from a contractual point of view. The Petitioner claimed that it was forced to pay a very large amount of money for the grant of the UAS licenses which was taken away from it as a result decision in the 2G Case. The Petitioner relied upon the provisions of the Contract Act (Section 56 and 65) which provide for restitution for void contracts or contracts which become impossible to perform. . It is the contention of the Petitioner that the decision in the 2G Case made the performance of their license impossible due to which it became void, and hence the UoI is liable to refund the license fee. While making this claim, the Petitioners submitted that unlike a Constitutional Court, a tribunal cannot decline exercise of its jurisdiction on the grounds of larger public interest and the Tribunal is bound to strictly follow the provisions of the Contract Act.
- The Petitioner also denied that there was any link between the Petitioner's restitutionary claim before the Tribunal and the Criminal Matter against the Petitioner. It was submitted that if any of the criminal charges against the Petitioner are proved, it would face the consequences for it but that did not mean that restitution could be denied to the Petitioner on the ground of pendency of the Criminal Matter.
- It was also submitted by the Petitioner that it had complied with clause 8 of the UAS guidelines by providing certification to the effect that it was not in violation of the restriction which prohibited an entity from having substantial equity holding in more than one telecom licensee in the same service area. The facts that formed part of the Criminal Matter were fully known to the DoT through several complaints from members of parliament. These complaints were examined by DoT and the Department of Corporate Affairs and the Petitioner claims that there was no violation of clause 8 of the UASL guidelines in the Petitioner's applications for licenses.

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1. It was submitted on behalf of the UOI that the charge that the Petitioner was obliged to pay for was merely an entry fee and not for usage of spectrum for which there is a separate charge. A reference was made to a number of clauses in the UASL guidelines and the license itself where the entry fee is mentioned with the prefix "non-refundable".
2. It was further submitted that some of the grantees whose licenses were quashed by the 2G Case took part in a fresh auction and were able to win spectrum and they were allowed adjustment of the licence fee deposited by them for the quashed licenses. Some of these companies were even accused in the criminal case and were facing graver charges than the Petitioner. It was submitted that a self-induced frustration of contract was brought about by the Petitioner by not participating in the fresh auctions and hence the Petitioner could not claim any relief under the Contract Act.

## DECISION OF THE TDSAT

The claim for refund by the Petitioner was denied by the TDSAT. The salient points of the Tribunal's decision are :

1. *Whether Entry Fee can be refunded at all:* The TDSAT first addressed the point of whether the entry fees are non-refundable as claimed by the UoI. The Tribunal was of the view that the UoI's view could have been valid if the licenses were cancelled for violation of the terms of the license itself or were surrendered by the Petitioner on its own. In the instant case, the Petitioner's licenses were quashed by a judicial action via the 2G Case and therefore "*the license did not survive for placing reliance on its provisions*".
2. *Whether Petitioner had exhausted its rights by not participating in the fresh auctions:* The TDSAT noted that the soundness of the set off policy was not free from doubt especially since this policy does not find any mention, much less any approval or sanction by the Supreme Court in any of its orders relating to the 2G Case. In any case, it was difficult to reject the Petitioner's claim on the basis of non-participation in the auction or to allow it on the basis of parity.
3. *Whether the TDSAT can sustain a claim of refund on the basis of contract law in this case:* In order to determine whether the claim for refund by the Petitioner was sustainable, the TDSAT considered whether the decision of quashing of the 2G licenses by the Supreme Court in the 2G Case was one in the realm of contract law or whether it was in the exercise of the jurisdiction vested in the court by administrative and constitutional law principles.

The Petitioner's claim for refund is principally based on Section 65 of the Contract Act which provides as follows:

*When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.*

The question to be considered was whether the quashing of the 2G licenses by the Supreme Court had the effect of rendering the Petitioner's license agreement with the DoT void, in which case the Petitioner could claim refund on grounds of Section 65 of the Contract Act. However the Tribunal noted that the Supreme Court had not quashed the 2G licenses on account of any provisions of the Contract Act and instead, its decision was concerned with the arbitrariness in the allocation procedures followed by the DoT.

On the basis of the fact that the decision of quashing the 2G licenses was focused on arbitrariness and mala fide in the government policy, the TDSAT noted that it is debatable whether the provisions of the Contract Act would be applicable in such constitutional matters.

4. *Whether the Contract Act is relevant in this case:* The TDSAT considered various provisions of the Contract Act relating to enforceability of a contract and conditions rendering a contract void. For instance:

- The TDSAT considered Section 23 of the Contract Act which states that

*The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void*

The Supreme Court in the 2G Case had observed that the 2G spectrum was given to the applicants at very low prices. The TDSAT considered whether this could mean that the consideration was opposed to public policy and hence the agreement was void. The TDSAT, however, concluded that such an interpretation would be too far-fetched and highly contrived particularly because the observation was made by the Supreme Court in a completely different context and had no connection with the consideration being unlawful under Section 23 of the Contract Act. Thus, the Tribunal ruled out the possibility of the applicability of Section 23 of the Contract Act.

- The TDSAT considered whether there was frustration of contract as contemplated under Section 56<sup>4</sup> of the Act which states as follows:

*An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

The TDSAT considered the cause-effect relationship in this case. Under Section 56, the cause is the act becoming impossible either physically or legally and the result is the contract becoming void. In the instant case, the TDSAT noted, there is no question of the act under the license becoming impossible of performance either physically or legally. In the instance case, the cause is the quashing of the licenses and the effect is that the activities permitted under the license cannot be carried out. Section 56 contemplates an event which occurs outside of the contract that makes the performance impossible. In the instant case, however, the licenses were quashed and thus the works permitted under them became unlawful. The TDSAT, thus, concluded that Section 56 of the Contract Act was not applicable in this case.

- The TDSAT analyzed if and how restitution could be awarded under Section 65, assuming but not admitting that Section 23 and Section 56 of the Act were applicable. Section 65 states

*When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it.*

Section 65 contemplates a situation where an agreement becomes void after formation; thereby implying that it was valid at the time of formation. By this logic, where the agreement is unlawful since inception, it cannot be said that it was 'discovered' to be void or it 'became' void. In the instant case, if the Petitioner is convicted in the Criminal Matter, Section 65 would not be applicable.

With respect to the Criminal Matter, the Petitioner had also claimed that they had provided due certification in accordance with the provisions of the then existing UASL Guidelines. However the TDSAT noted that the CBI was of the opinion that the Petitioner had obtained the licenses by submitting a false certificate regarding compliance with clause 8 of UASL Guidelines.

An important observation made by the Tribunal in this respect was that the defects that rendered the license illegal and liable to be quashed are totally different from the elements and causes contemplated under the Contract Act for rendering an agreement void or voidable.

Accordingly the Tribunal held that the quashing of the licenses did not fit into the provisions of the Contract Act. The principle of 'in pari delicto' rest condition defenditis (in equal fault, better is the condition of the possessor) was applied and the Tribunal stated that until the Petitioner was exonerated of the charges against it in the Criminal Matter that were pending, an order of refund could not be made in favor of the Petitioners.

With respect to the claim of discharge of bank guarantees, the TDSAT has noted that the UoI had a claim amounting to INR 58, 70, 00, 000 (approximately USD 9,072,020) plus the claim for license fee against the Petitioner up to June 1, 2012. The DoT was thus ordered to raise its demands against the Petitioner within two months from the date of the order in the instant case and in case the Petitioner made the payment, the bank guarantees/undertaking were to stand discharged.

## ANALYSIS

Principles of restitution are well settled that '*an act of court shall prejudice no man*' (Actus curiae neminem gravabit)<sup>5</sup>. It is also equally settled that a Plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act (Ex turpi causa non oritur actio)<sup>6</sup>.

It is pertinent to discuss the TDSAT's order of July 2015 in *S Tel Private Limited v. Union of India*<sup>7</sup>. In 2007, S Tel was awarded 3G spectrum pursuant to an auction process in three service areas for which S Tel paid INR 3,376,700,000 (approx. USD 52,003,273) as spectrum allocation charges. One of the pre-requisites for taking part in the 3G auction process was a UAS license. Pursuant to the quashing of the licenses in the 2G case, S Tel lost its UAS license in those areas for which it had also won 3G spectrum,. Therefore, S Tel lost the legal competence to use the 3G spectrum which it had acquired through a valid auction process. After representations before the government to permit an assignment of the spectrum to it or to allow use by creation of wholly owned subsidiaries were disregarded, the Government put the spectrum to auction again and allocated it to some other party. The TDSAT held that this made the performance of the contract impossible and hence by virtue of Section 56 of the Act, restitution was permissible. It is noteworthy, that the *S Tel* case mainly deals with the 3G spectrum unlike the instant case that deals with a company that is claiming refund of license fees paid for allocating the 2G spectrum. Furthermore, there were no criminal proceedings pending against S Tel with regard to the 2G spectrum as are pending against the Petitioner in the instant case. Hence the question of applicability of 'in pari delicto' does not arise.

In this case, the TDSAT has rightly denied the claim of the Petitioner to refund of entry fees in light of the pending Criminal Matter. If the Petitioner is convicted in the Criminal Matter, there is no ground for Petitioner to claim refund on the basis of any provision of the Contract Act.

— Rakhi Jindal & Vivek Kathpalia

You can direct your queries or comments to the authors

<sup>1</sup> *Centre of Public Interest Litigation v. Union of India* (2012) 3 SCC 1

<sup>2</sup> Our hotline on this judgment is available at [http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/cross-border-deal-making-india-and-uk.html?no\\_cache=1&cHash=df5ceb3665f2a1eff301f6c68db1f74b](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/cross-border-deal-making-india-and-uk.html?no_cache=1&cHash=df5ceb3665f2a1eff301f6c68db1f74b)

<sup>3</sup> Clause 8 of the Guidelines For Unified Access Services Licence dated December 14, 2005 (No.10-21/2005-BS.I(Vol.II)/49)

<sup>4</sup> Section 56- Agreement to do impossible act:

An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.-

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.-

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

<sup>5</sup> S.V.R. Mudaliar (Dead) by Lrs. and Ors. V Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Ors AIR1995SC1607

<sup>6</sup> Oswal Agro Furane Ltd. and Anr. V Oswal Agro Furane Workers Union and Ors. AIR2005SC1555

<sup>7</sup> Decided by the TDSAT on July 7, 2015. Our analysis of this order is available at [http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/telecom-tribunal-orders-union-of-india-to-refund-entry-fee-as-restitution.html?no\\_cache=1&cHash=cb88e14217663a043e55b365646dd617](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/telecom-tribunal-orders-union-of-india-to-refund-entry-fee-as-restitution.html?no_cache=1&cHash=cb88e14217663a043e55b365646dd617)

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