

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 4th March, 2010

Decision on : 16th April, 2010

W.P.(C) No. 8989 of 2009 & CMs 6454, 13362/2009

BYCELL TELECOMMUNICATIONS INDIA P. LTD.

& ANR.

..... Petitioners

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Mr. Sanjay Mishra and
Mr. Pramod Kumar, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. A.S. Chandhiok, ASG with
Mr. Ravinder Aggarwal and
Mr. Manikya Khanna, Advocates.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether reporters of local paper may be allowed to see the judgment? | No |
| 2. To be referred to the reporter or not? | Yes |
| 3. Whether the judgment should be referred in the digest? | Yes |

J U D G M E N T

1. The challenge in this writ petition is to the decision taken by the Foreign Investment Promotion Board ('FIPB'), Ministry of Finance, Government of India at its meeting held on 11th May 2009 (which decision was communicated by a letter dated 13th May 2009) revoking an approval dated 14th February 2008 granted to the Petitioner to undertake activities of GSM based cellular telephone services all over India. The challenge is also to a communication dated 1st May 2009 issued by the FIPB withdrawing the security

clearance granted to the Petitioner. A consequent relief is for a mandamus to the FIPB and the Union of India ('UOI') through the Ministry of Home Affairs ('MHA') (Respondent No.3 herein) to reconsider withdrawal of the security clearance and for a direction to the Department of Telecommunication ('DoT'), Government of India not to cancel the letters of intent ('LOIs') granted to the Petitioner on 27th February 2008.

2. Petitioner No.1 ByCell Telecommunications India Private Ltd. ('ByCell'), a private limited company having its registered office at New Delhi was incorporated on 13th October 2005 and is involved in the business of telecommunication in India. ByCell is a joint venture company with M/s. ByCell Holding AG ('ByCell AG'), a company incorporated under the laws of Switzerland having its registered office in Zug Switzerland and M/s. Bitcorp Private Limited ('Bitcorp'), an Indian company. ByCell AG holds 73.79% of the total shareholding of the ByCell and Bitcorp holds 26.19%. Mr. Andrey Polouektov ('AP') and Ms. Maxim Naumchenko ('MN') hold 0.0121% each of the total shares of ByCell. 97% of the shareholding of ByCell AG is held by a company called Tenoch Holdings Ltd. ('THL') incorporated in Nicosia, Cyprus and the remaining 3% is held by Mr. Philippe Bare, Mr. Geogette Guilmain and Mr. MN in the ratio of 1% each. THL, in turn, is held by Quallis Inc., incorporated in the Republic of Panama, and Kynance Business Ltd. ('KBL'), incorporated in the British Virgin Islands both of

which hold 50% of the shares of THL. Quallis Inc. is a 100% owned company of MN and KBL is a 100% owned company of AP.

3. The UOI through the Ministry of Communications and Information Technology ('MCIT') issued guidelines for Unified Access Service Licence ('UASL') on 14th December 2005. Clause 5D of the guidelines provided that if the foreign direct investment ('FDI') inflow is more than 49%, approval of the FIPB is a must. The admitted position is that ByCell, acting within the confines of the UASL guidelines, entered into a joint venture with ByCell AG and sought an investment from the foreign collaborator to the tune of 73.79% of the total share holding of ByCell.

4. Under the UASL guidelines, the FIPB is responsible for granting approval for FDI. One of the parameters is that the investment is not routed through an unfriendly country or countries of concern. The above FIPB approval is subject to the guidelines issued by way of Press Note 5 of 2005 and also the amended Press Note 3 of 1997, both of which require the FIPB to ensure that the investment is not coming from "countries of concern/unfriendly countries."

5. ByCell was desirous of starting telecom operations in India and applied to the DoT for issuance of UASL. The FIPB on 17th January 2006 granted permission to ByCell AG to purchase 74% equity in

ByCell for the operation of GSM based telecom services in five telecom circles namely Assam, Bihar, North-East, Orissa and West Bengal. On 31st January 2006, ByCell filed five applications for grant of UASL for the said five telecom circles. On 26th September 2007, ByCell approached the FIPB for increasing the scope of the operation area to 22 telecom circles so that ByCell could become a Pan India Operator.

6. On 18th October 2007, a complaint was filed by a Member of Parliament ('MP') raising doubts about the credentials of the Petitioner. In the meanwhile, on 24th October 2007 the FIPB transferred the approval granted to the ByCell AG to ByCell. By the same letter, the FIPB approved the Petitioner's proposal for operating from 22 telecom circles. On 6th November 2007, the MHA wrote to ByCell seeking additional information. Correspondences were exchanged from 7th to 13th November 2007. It is stated that thereafter on 29th December 2007, the MP in whose name the earlier complaint had been made wrote to the Respondent that his earlier letter was forged.

7. It is stated in the petition that MHA received the security clearance in respect of the Petitioner sometime around 29th January 2008 and also forwarded it to the FIPB. On 8th February 2008, the FIPB cleared the Petitioner's applications in respect of the remaining 17 telecom circles. Thereafter on 14th February 2008, the FIPB granted

ByCell AG permission to undertake activities of GSM based cellular telephone services all over India. It further permitted ByCell AG to invest US\$ 500 million in ByCell. On 27th February 2008, the MCIT issued LOIs to ByCell for 5 telecom circles. On the same date, the ByCell is stated to have made a deposit of 63 crores in terms of the LOIs.

8. On 4th August 2008, the Ministry of Finance sent a questionnaire to the Petitioner raising numerous questions regarding the foreign collaborator in ByCell and sought various personal details. These were provided by the Petitioner on 11th August 2008. When nothing was heard further from the Respondents, ByCell filed Writ Petition (C) No. 7733 of 2009 in this Court on 23rd March 2009. The said writ petition was disposed on 24th March 2009 directing the Respondents to decide the issue of grant of licence to the Petitioner as expeditiously as possible, and not later than four weeks. Even the time schedule was not adhered to by the Respondents. The Petitioner filed an application being CM No. 5851 of 2009 in which an order was passed by this Court on 1st May 2009 directing the Respondents to file an affidavit disclosing the position.

9. On that day i.e. 1st May 2009, FIPB informed the Petitioner that the MHA had withdrawn the security clearance granted to the

Petitioner and that this would be placed before the FIPB for its consideration at its next meeting on 15th May 2009.

10. On 5th May 2009, the Petitioner responded to the aforementioned letter of 1st May 2009 and explained the entire shareholding of THL and made a fresh proposal to change its shareholding. On 8th May 2009, the FIPB informed the Petitioner that the meeting scheduled for 15th May 2009 was advanced to 11th May 2009. Pursuant to the said meeting, a Press Release was issued by the FIPB stating that the foreign collaboration approval granted to ByCell had been revoked. A letter was also received by the Petitioner to this effect from the FIPB. Thereafter the present writ petition was filed.

11. When the present writ petition was listed on 15th May 2009, this Court recorded the submission of learned Senior counsel for the Petitioner that he would like to make a representation to the Government of India. This Court directed that any cancellation or action by the Government of India would be subject to the final outcome of the writ petition. At the hearing on 3rd November 2009, the learned Additional Solicitor General ('ASG') informed the Court that FIPB's approval granted to ByCell stood withdrawn/cancelled and that a communication would be sent to the Petitioner soon thereafter.

12. In its order dated 29th January 2010, the Court recorded the submission of learned Senior counsel for the Petitioner that the order dated 11th May 2009 withdrawing FIPB's approval did not deal with the explanation furnished to the Respondents by ByCell on 5th May 2009. This Court was informed that the further representation made by the Petitioner on 29th June 2009 had been rejected on 30th October 2009.

13. Since no reply had been filed, the Director (FIPB) was directed to remain present on the next date. A reply was filed to the CM Application No. 13362 of 2009 on 4th February 2010. It may be mentioned that the aforementioned application was filed for interim directions to restrain the MCIT from revoking the LOIs dated 27th February 2008 issued to ByCell for awarding of UASL for the 5 telecom circles. Thereafter the petition was finally heard.

14. Mr. Sudhir Nandrajog, learned Senior counsel appearing for the Petitioner submits that the Petitioner has not been made aware of the reasons for withholding of the security clearance till date. It is only at the meeting held with the Home Minister on 2nd February 2009 that the Petitioner was verbally informed that the documents submitted by it required authentication as per law. It is submitted that all documents submitted with its letter dated 11th February 2009 through the Cellular Operators Association of India and 13th March

2009 had been apostilised as per the Hague Convention. The details given in the representations dated 5th May 2009 and 29th June 2009 had not even been considered by the Respondents. The letter dated 30th October 2009 rejecting the Petitioner's representation was of two lines and did not disclose any reasons. The offer made by the Petitioner to change its ownership pattern was also not considered by the MHA.

15. The principal submission of the Petitioner is that the withdrawal of the security clearance and the consequent decision of the FIPB to revoke the approval granted earlier on 14th February 2008 are violative of the principles of natural justice. According to the Petitioner, a meaningful compliance of those principles would require intimation of reasons for the decision. It is submitted that from the communication received from the Respondents, the only reasons discernible are that there is a lack of authentic information and, therefore, security clearance was being withdrawn. It is submitted that since the requisite information has since been provided this reason was no longer valid. It is further submitted that on the basis of the information provided, approval had already been granted on 14th February 2008. If, on the basis of any information subsequently gathered, the MHA was seeking to withdraw the security clearance then it had to share the said information with the Petitioner, seek its clarification and then take a decision. It is submitted that the mere allegation of the funds being tainted could not obviate the necessity

of an enquiry and compliance of the principles of natural justice. With the Petitioner being given clearance to bring in the investment, it had a vested right which could be denied only for cogent reasons. The investment had been brought in after due verification and due diligence. It is submitted that the application had been made by ByCell, an Indian company, which has a right to carry on business under Article 19(1)(g) of the Constitution of India. If the only issue was regarding the holding pattern of ByCell, then adequate clarifications had been provided. The mere submission that there is lack of authentic information was not sufficient to revoke the earlier approval granted. Unless the Petitioner was made aware as to what part of the information was lacking, it could not be expected to clarify the position. Referring to the decision in *A.K. Sharma v. Director General of Civil Aviation, Delhi AIR 2002 Delhi 357* it is submitted that mere apprehension and the use of words “there is a security angle” cannot by itself provide justification for withdrawal of the earlier approval. There has to be material on record to justify such a decision. Reliance is also placed on the decision of the Supreme Court in *Baraka Overseas Traders v. Director General of Foreign Trade (2006) 8 SCC 103*.

16. It requires to be noted that pursuant to an application made under the Right to Information Act, 2005 (‘RTI Act’), ByCell has been provided information concerning an Office Memorandum (‘OM’) dated 29th January 2008 of the MHA and OM dated 22nd April 2009

of the FIPB addressed to the DoT, noting the portion with respect to the meeting of the Finance Ministry on 15th July 2008 and the proceedings of all meetings that discussed the original proposal of ByCell as well as the amended proposal of the ByCell. Copies of these documents have been filed by the Petitioner. These documents do reflect the deliberations at different levels of the central government and the considerations that went into the decision under challenge.

17. Mr. Chandhiok, learned ASG submits that the withdrawal of security clearance was based on relevant material. The MHA received adverse inputs from the security agencies in respect of the documents and activities of the entities and their Directors i.e. Quallis and KBL both of which have 50% shareholding in THL and which in turn had a controlling interest in ByCell AG. It may be recalled that ByCell AG holds 73.99% shares of ByCell.

18. The learned ASG refers to questions 2(b), 2(c), 4(b) and 5(b) of the questionnaire sent to the Petitioner on 4th August 2008 and the replies to those questions submitted by the Petitioner on 11th August 2008. The replies were sent to the MHA for analysis. Comments from the security agencies were called for. The letters sent by the Petitioner on 5th/8th May 2009 were considered at the meeting of the FIPB held on 11th May 2009. The learned ASG refers to the

information on the source of funds as disclosed by the Petitioner on 21st July 2009. It appears that majority of the funds (more than 80%) were sought to be raised from loans from two Russian nationals. On the basis of this information, fresh inputs were called from the security agencies. It is submitted that calling of inputs from the security agencies, seeking information from the Petitioner on the basis of the inputs received and reviewing and assessing the information furnished was an exercise undertaken by the Government to formulate its subjective satisfaction. The said subjective satisfaction was based on relevant material and, therefore, did not call for any interference by this Court. The learned ASG referred to the minutes of the 134th and 136th meetings of the FIPB where the information provided by the Petitioner has been discussed. After the directions of this Court, the representations made by the Petitioner were considered by the FIPB at the 141st, 142nd, 144th and 145th FIPB meeting. It was on account of the specific rejection of the security clearance by the MHA that the Petitioner's representation was rejected and this was communicated to the Petitioner on 30th October 2009.

19. Relying upon the decision in *Indo China Steam Navigation Co. Ltd. v. Jasjit Singh, Addl. Collector of Customs AIR 1964 SC 1140*, it is submitted that ByCell, which is essentially controlled by foreign investors, has no fundamental right under Article 19(1)(g) to carry on business in India. Reference is also made to the decision of this Court

in *Star India Pvt. Ltd. v. Telecom Regulatory Authority of India* 146 (2008) DLT 455 (DB). Referring to the decisions in *People's Union for Civil Liberties v. Union of India* (2004) 2 SCC 476 and *Bishnu Ram Borah v. Parag Saikia* (1984) 2 SCC 488 it is submitted that the information provided by the security agencies cannot be disclosed on the ground of national security. Moreover, the information was received in confidence from a source, and its disclosure would jeopardise the security inputs and lead to losing the source itself. Finally, it is submitted that the LOI, by itself, does not give rise to a legal obligation. Reference is made to the decision in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.* (2006) 1 SCC 751.

20. This Court has considered the submissions of learned counsel for the parties and gone through the entire record of the case. The Court has also been shown the file containing the information received by the security agencies from secret sources. Mr. Nandrajog has urged that if the information available on the file was not of a secret nature, it should be provided to the Petitioner to enable it to respond to the said information. He submitted that if the information was only regarding the funds being tainted, that by itself cannot be secret as the Petitioner may be able to explain the sources of those funds.

21. Having perused the information received by the security agencies from secret sources, this Court does not consider it appropriate that a

direction should be issued to the Respondents to disclose that information to the Petitioner. There is merit in the contention of the Respondents that the disclosure of such information would compromise the confidentiality attached to those inputs. The assessment of the Respondents, that disclosure of the information is likely to jeopardize and expose the source cannot possibly be reviewed by this Court in exercise of its powers under Article 226 of the Constitution. This Court is also of the view that the material is not of such nature that it can be asked to be disclosed to the Petitioner. This Court also finds merit in the contention that the assessment of the inputs received from the intelligence and security agencies by the Respondent FIPB is a matter of subjective satisfaction over which this Court cannot sit in appeal. This Court is satisfied that such assessment is made on the basis of objective criteria and does not call for interference by this Court.

22. This Court is satisfied that there was material available with the Respondents to justify the withdrawal of the security clearance by the MHA granted earlier to ByCell. The inputs so gathered were on the basis of the information provided by the Petitioner in response to the detailed questionnaire. This Court is not, therefore, able to accept the submission of the Petitioner that the procedure adopted by the Respondents and the decision taken to revoke the approval earlier granted are violative of the principles of natural justice. This court does not find any ground having been made out for holding that the

impugned decision is violative of the Petitioner's right under Article 14 of the Constitution. While the petitioner may have satisfied other requirements of the policy concerning FDI and grant of UASL, the security angle was a crucial factor. The lack of security clearance in the instant case was a valid ground for withdrawal of the FIPB approval earlier granted.

23. In matters of foreign investments in the country, what the decisive parameters should be, is part of the policy decision of the UOI. Some of the inputs that go into the decision-making process is bound to be of a confidential nature. Unless the decision is shown to be malafide, which in the present case is not, there is no basis to doubt that the assessment of information received on the security aspects is both relevant and sufficient to support the decision taken.

24. For the aforementioned reasons, this Court is not inclined to interfere. The writ petition is dismissed. The pending applications are also dismissed.

S. MURALIDHAR, J.

APRIL 16, 2008

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