

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 9th December, 2011.

+ **LPA 673/2010**

% **BYCELL TELECOMMUNICATIONS INDIA
PVT. LTD. & ANR.**

.....Appellants

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Satinder Kapur, Mr. Manish
Gandhi & Mr. Dhiraj Philip,
Advocates.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ravinder Agarwal, CGSC for
UOI.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The appellants being dissatisfied with the dismissal on 16th April, 2010 by the learned Single Judge of W.P.(C) No.8989/2009 preferred by them have filed this appeal. Notice of the appeal was issued and the respondents directed to produce the original files for perusal of this Court. Though no reply was filed (neither required), the appellants filed an

additional affidavit to bring on record certain additional documents. The counsels have been heard and we have also perused the original files produced by the respondents. The counsel for the respondents has also shown to us the complete minutes of the meetings of the Foreign Investment Promotion Board (FIPB). The appellants after the close of hearing, have handed over a short note of arguments.

2. The writ petition was filed impugning the order dated 13th May, 2009 of the FIPB of revocation of the approval earlier accorded on 14th February, 2008 to the appellants to undertake activities of GSM based Cellular Telephone Services all over India. The FIPB withdrew the approval for the reason of security clearance having not been granted to the appellants. Consequently, relief in the petition was also claimed for re-consideration of the refusal of security clearance to the appellants.

3. The learned Single Judge in his detailed judgment has set out the facts and need is thus not felt to reiterate the same.

4. The learned Single Judge was also shown the files containing the

information received by the Security Agencies from secret sources and found the decision reached on assessment of the inputs contained therein to be not interfereable by the Court and has expressed satisfaction of the said assessment having been made on objective criteria. The learned Single Judge has also expressed satisfaction that the material available with the respondents justified the withdrawal of security clearance earlier granted to the appellants.

5. The plea of the appellants, of the appellants being entitled to disclosure of such information before the same could be used to affect them, was negated by the learned Single Judge expressing satisfaction with the defence of the respondents that the disclosure of the information was likely to jeopardize and expose the sources of information of the respondents. It was further held that the material on the files of the respondents was not of such a nature that the respondents could be asked to disclose the same to the appellants. Reference was made to *Indo China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Addl. Collector of Customs* AIR 1964 SC 1140 holding that foreign investors have no fundamental right to carry on business in India

and to *Star India Pvt. Ltd. Vs. Telecom Regulatory Authority of India* 146 (2008) DLT 455 (DB). Mention was also made by the learned Single Judge of *People's Union for Civil Liberties Vs. Union of India* (2004) 2 SCC 476 and *Vishnu Ram Borah Vs. Parag Saikia* (1984) 2 SCC 488.

6. The learned Single Judge has held that though the appellants may have satisfied the other requirements of the policy concerning FDI, the security angle was a crucial factor and lack of security clearance in the instant case was a valid ground for withdrawal of the FIPB approval. It was further held that in matters of foreign investments in the country, what the decisive parameters should be, is part of the policy decision and some of the inputs that go into the decision-making process are bound to be of a confidential nature and unless the decision is shown to be *mala fide*, there can be no basis to doubt that the assessment of information received on the security aspects is, both relevant and sufficient to support the decision taken.

7. We have not only perused the files containing the intelligence inputs but also the minutes of the meetings of the FIPB. We affirm the findings of the learned Single Judge that neither any case for *mala fides* or victimization

is pleaded or made out, nor is any found to be borne out from the files. The FIPB itself has evaluated the various inputs received from the Security Agencies and has on the basis thereof objectively reached a conclusion that the clearance earlier given to the appellants needs to be revoked. Once the Agencies of the Government having expertise and vested with the powers to take decision in such matters have reached a conclusion that it is risky to open the telecommunication channels of the country to a certain set of foreigners and such conclusion is found to have been reached on the basis of material available on record, it is not for this Court to in the exercise of its powers of judicial review, sit in appeal over such decision. The Supreme Court in *Fertilizer Corporation Kamgar Union (Regd.) Sindri v. UOI* (1981) 1 SCC 568 held that judicial interference with the administration cannot be meticulous in our montesquien system of separation of powers and the Court cannot usurp and the parameters of judicial review can never be exceeded. The Apex Court in *Balco Employees Union (Regd.) v. UOI* (2002) 2 SCC 333 extended the said principle further to spheres of economic policy and disinvestment.

8. The senior counsel for the appellants has of course taken us through the developments since the year 2005 and to the work done and expenditure incurred by the appellants and to the approvals, licenses and letters of intent given to the appellants from time to time but all this in our opinion, is irrelevant qua the reasons which prevailed with the respondents for revoking the clearance earlier granted to the appellants.

9. The senior counsel for the appellants has also reiterated before us that no opportunity was given to the appellants to clarify/rectify the objections. However, as aforesaid, the said aspect has been sufficiently dealt with by the learned Single Judge and we are unable to take a different opinion.

10. The senior counsel for the appellants further contended that the appellant no.1 company has changed its structure and in view thereof is entitled to a fresh opportunity.

11. We are again not satisfied. Once the appropriate agencies have found it unsafe to allow inroads in the country to a particular foreign entity, merely because such foreign entity undergoes a mutation would not change the

position. Such mutation cannot wash away the taint with which the investment was found to be suffering.

12. The senior counsel for the appellants on the basis of the information gathered and filed by way of the additional documents has lastly urged that the conclusions against the appellants remain inconclusive and the appellant is entitled to a direction for further inquiry. However on the basis of the intelligence inputs which have been shown to us, we are not inclined to direct any further investigation when the respondents themselves have not deemed the same necessary.

13. We therefore do not find any merit in the appeal and dismiss the same.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

DECEMBER 09, 2011

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