

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

+ **COMPANY APPEAL 42 OF 2011, CM 12437/2011**

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COMPANY APPEAL 67 OF 2011

% *Judgment Reserved on: 29.3.2012*
Judgment Delivered on: 13.7.2012

IDEA CELLULAR LIMITED

... APPELLANT

Through: Mr. Harish N. Salve, Sr. Advocate,
Dr. A.M. Singhvi, Sr. Advocate, Mr.
C.S. Vaidyanathan, Sr. Advocate
with Mr. Sandeep Singhvi, Mr.
Gopal Jain, Mr. Mahesh Agarwal,
Mr. Rishi Agrawala, Mr. Rajiv
Kumar, Mr. Arnav Kumar and Mr.
Ankit Shah, Advocates.

VERSUS

UNION OF INDIA

...RESPONDENT

DEPARTMENT OF TELECOMMUNICATIONS

Through: Mr. A.S. Chandhiok, ASG with Ms.
Maneesha Dhir, Mr Piyush Sanghi
and Ms. Shweta, Advocates for
UOI.
Mr. Saket Singh, Advocate for
TRAI.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. To put straight the controversy in focus, which is the subject matter of the present appeal, we may mention that a Scheme of

Amalgamation of Spice Communication Limited (hereinafter referred to as the Spice, for short) with Idea Cellular Limited (hereinafter referred to as the appellant) was allowed by the learned Company Judge vide orders dated 5.2.2010. As per the Scheme of Amalgamation (hereinafter referred to as 'the Scheme') as approved, all the affairs including business, assets and liabilities of Spice were taken over by the appellant. Spice was also having certain licenses namely UAS-Unified Access Service License for Punjab, by the Union of India, Department of Telecommunication (hereinafter referred to as the respondent) under Section 4 of the Indian Telegraph Act, 1885 (hereinafter referred to as the Act). There was a clause in the Scheme, as per which this licence also stood transferred to the appellant.

2. According to the respondent, such a course of action was not permissible without specifically taking its prior approval and the amalgamation of Spice with the appellant was resorted to without the knowledge of or taking consent of or notice of the proceedings to the respondent. On coming to know of the sanctioning of the Scheme, the respondent moved an application for recall of orders dated 5.2.2010 and de-merger of the two companies. This application alongwith other miscellaneous application filed by the respondent has been decided by the learned Company Judge vide orders dated 4.7.2011. The learned Company Judge has recorded a finding that non-disclosure and suppression of material facts from the Court, while seeking sanction of the Scheme, amounts to fraud played upon the Court and the sanction of the Scheme was in contravention of the licence condition and merger guidelines.

Notwithstanding this finding, the learned Company Judge has taken a view that it would not be feasible or plausible to recall orders dated 5.2.2010 vide which the scheme of amalgamation was sanctioned in its entirety as it was not possible to '*unscramble the eggs*'. Instead, vide impugned order the sanctioning order dated 5.2.2010 has been modified "to bring sanctioned scheme, in the present case, and in conformity with the Licence and Merger Guidelines, 2008". Consequently, the modification which is done is to the effect that;

- (i) The Six overlapping licenses of the Spice would not stand transferred or vested with the appellant till prior permission of DoT is obtained. Instead, till that time, these licenses shall stand transferred/vested with the respondent;
- (ii) The spectrum allocated for such overlapping licences shall also forthwith revert back to DOT;
- (iii) Since the appellant had used the overlapping licenses (which belonged to the Spice) without any permission of DoT from 5.2.2010 till date, in contravention of the License and Merger Guidelines, DoT (respondent) is permitted to pass any such order for breach.

Permission however, is given by the learned Single Judge to the appellant to challenge the order of the DoT/respondent in the event the DoT refuses or grant transfer of licenses by filing appropriate proceedings before the TDSAT. The permission is also granted to

challenge any order passed by the DoT/respondent qua the contravention of the License and Merger Guidelines by the appellant.

Since the overlapping licenses as well as spectrum allocated for such overlapping licenses has been reverted/transferred back to the DoT, in order to avoid inconvenience to public at large, the DoT is also directed to ensure cell phone customers of two overlapping company namely Punjab and Karnataka which provided regular and uninterrupted service like in the past. Some other incidental directions are also given as would be noticed at the appropriate stage.

3. The appellant feels aggrieved by the aforesaid findings of the learned Company Judge regarding modification carried out in the order imputing fraud upon the appellant and also carrying out aforesaid modification in the order dated 5.2.2010 vide which Scheme was sanctioned. For this reason, the appellant has challenged that part of the order by preferring Company Appeal 42/2011. The DoT, on the other hand, also feels dissatisfied with the outcome of the proceedings/demerger application filed by it as according to the DoT, once findings of fraud has been returned by the learned Company Judge itself, there was no other course of action left for the Court to recall sanctioning order dated 5.2.2010 inasmuch as fraud vitiates every action. This has prompted DoT to file Company Appeal 67/2011.
4. With these preliminaries, we now proceed to take note of the facts in detail.

5. The appellant is a Cellular Mobile Telephone Service (CMTS) License holder in the services areas of Haryana, Maharashtra, Andhra Pradesh and Delhi and is licensed to establish, install, operate and maintain Cellular Mobile Services under the Licenses granted to it by the DoT under the first proviso to Section 4 of the Indian Telegraph Act, 1885. The respondent no.1 is the Department of Telecommunication under the Government of India which issued Licenses under Section 4 of the Indian Telegraph Act, 1885 to the appellant herein. The appellant has been operating Cellular Mobile Services claims that it is one of the pioneers in the field of mobile telephony service in India. Erstwhile Spice Communications Limited (Spice) was a public listed company and was a Telecom Service provider in the service areas of Punjab and Karnataka. The license was amended on 2.6.2003. The amended Clause 6.3 of the said License stipulates that the Licensee may transfer or assign the License Agreement with prior written approval of the Licensor to be granted on fulfillment of certain conditions. On 21.2.2004, the Department of Telecommunications issued guidelines for intra service area merger of CMTS/UAS Licenses. The appellant applied for UAS Licenses for Punjab and Karnataka in 2006. Spice applied for UAS Licenses for Haryana, Andhra Pradesh, Maharashtra and Delhi in 2006. After about 18 months from the date of the aforesaid applications, the appellant was granted UAS Licenses in the remaining service areas, which included UAS License in Spice Service Areas of Punjab and Karnataka with effect from 25.1.2008. In or around the same time, Spice was granted UAS License in Idea Service Areas i.e Haryana, Maharashtra, Andhra Pradesh and Delhi with effect from 25.1.2008. The appellant in respect of Punjab and

Karnataka Service area and Spice in respect of Haryana, Maharashtra, Andhra Pradesh and Delhi service area paid in total a sum of ₹ 842.75 crores towards Entry Fee and furnished the bank guarantees totaling ₹ 350 crores to DoT.

6. At the stage of using the UAS licenses to Idea and Spice with effect from 25.1.2008, Idea and Spice were both independent and unconnected companies. Consequent to the new licenses issued the licenses of Idea and Spice became overlapping in certain Service Areas.
7. It would be pertinent to point out some of the relevant clauses of the standard form licenses. Clause 3 of the above UAS license provides that the Licensee hereby agrees and unequivocally undertakes to fully comply with all terms and conditions stipulated in this License. Clause 1.3 of the UAS provides that “the merger of Indian companies may be permitted as long as competition is not compromised as defined in condition 1.4 (ii)”. Clause 1.4 of the UAS License also provides as under:
 - “(i) Any change 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. ‘Substantial equity’ herein will mean equity of 10% or more’. A promoter company/Legal person cannot have stakes in more than one Licensee Company for the same service area.”

Clause 6 provides for 'Restrictions on 'Transfer of License'. Clause 6.1 provides as under:-

“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 matter of the Licensee to any third party either in whole or in part i.e. no sub-leasing/partnership/third party interest shall be created..”

Clause 6.2 provides as under:-

“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 Service in a Service Area to ensure healthy competition as per the guidelines issued on the subject from time to time.”

Clause 6.3 of the UAS License provides as under:-

“Further, the Licensee may transfer or assign the License Agreement with prior written approval of the Licensor to be granted on fulfillment of the following conditions and if otherwise, no compromise in competition occurs in the provisions of Telecom services:

- (i)
- (ii) Whenever amalgamation or restructuring i.e. merger or de-merger is sanctioned and approved by the High Court or Tribunal as per the law in force; in accordance with the

provisions; more particularly Section 391 to 394 of Companies Act.”

Clause 16.1 of the UAS License Agreement provides that ‘Licensee shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/regulations of TRAI Act as amended from time to time and instructions as are issued by the Licensor/TRAI. On 22.4.2008, DoT issued guidelines for inter service area Merger of Cellular Mobile Telephone Services (CMST)/United Access Services (UAS) Licenses (hereinafter referred to as the Merger Guidelines, 2008). Clause 1 of these Guidelines read as under:-

- “1. Prior approval of the Department of Telecommunications shall be necessary for merger of the licence.
2. Merger of licenses shall be restricted to the same service area.”

Clause 10, 17, 18 of the Merger Guidelines, 2008 are also relevant and are reproduced below:-

“10. Consequent upon the Merger of licences in a service area, the post merger licensee entity shall be entitled to the total amount of spectrum held by the merging entities, subject to the condition that after merger, licensee shall meet, within a period of 3 months from date of approval of merger by the Licensor, the prevailing spectrum allocation criterion separately for GSM & CDMA technologies, as in case of any other UAS/CMTS licensee(s).

In case of failure to meet the spectrum allocation criterion in the above mentioned period of 3 months, post merger Licensee shall surrender the excess spectrum, if any,

failing which it may be treated as violation of terms & conditions of the licence agreement and action accordingly shall be taken. In action, after the expiry of above mentioned period of 3 months, the applicable rate of spectrum charge shall be doubled every 3 months in case of excess spectrum held by post merger licensee.

Further, the spectrum transfer charge, as may be specified by the Government, shall be payable within the prescribed period.”

“17. Any permission for merger shall be accorded only after completion of 3 years from the effective date of 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 licensees whoever 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’ whoever is less will be applicable for the merged entity in the respective service area.”

8. On 25.6.2008 the appellant and the Spice announced their proposed merger. The respective Board of Directors of these companies in their meetings held on 25.6.2008 approved the proposed merger of the Spice with the appellant. On the same day, the appellant sent communication dated 25.6.2008 to the DoT informing about the proposed merger. Correspondence was exchanged between the appellant and the DoT, reference to which would be made at a later stage where it is more appropriate. Suffice it to state that on the basis

of those correspondences the stand of the DoT is that even as per the appellant, merger was to be resulted and made effective only on receipt of specific approval was granted, the Spice and the appellant went ahead with by filing scheme of amalgamation before the Company Court suppressing these facts and obtaining the order of sanction to the scheme of amalgamation.

9. We may also like to point out that as per the appellant, the merger of the company was in pursuance of the Companies Act which was/is distinct from the merger of licenses and further that the Merger Guidelines do not bar transfer of licenses consequent upon the merger of the companies. After the decision on merger of two companies on 25.6.2008, on 17.10.2008 the appellant acquired 41.09% equity holding in Spice w.e.f. that day. While this correspondence between the appellant and DoT was going on, in May, 2009 the appellant and Spice had filed four 'mirror schemes' in the High Courts of Gujarat and Delhi. While two schemes were filed seeking sanction of scheme of amalgamation of Spice with the appellant, the other two demerger schemes were filed with a view to transfer the overlapping six licences to independent third parties namely, Vitesse Telecom Private Limited and Claridges Communications Pvt. Ltd. Admittedly, neither in the merger application being CA(M) 99/2009 nor in the demerger application being CA(M) 98/2009 filed in this Court copies of licenses or Merger Guidelines, 2008 or correspondence exchanged between the appellant and DoT was placed on record.

10. On 18.5.2008, this Court allowed the first motion demerger application being CA(M) 98/2009 by directing convening of meetings of equity shareholders, secured and unsecured creditor of Spice. The said meetings were directed to be convened on 11.9.2009. On 26.11.2009, the Gujarat High Court approved the merger scheme between the appellant and the Idea. On 28.1.2010 the learned Company Judge of this Court reserved its judgment in the second motion petition for amalgamation in CP 403/2009 and ultimately vide orders dated 5.2.2010 the said merger petition was allowed and the scheme of amalgamation sanctioned.

11. The scheme as sanctioned, *inter alia*, provided vide clause 17 thereof that overlapping licenses would be transferred in accordance with the scheme of demerger. The relevant portion of the Clause 17 of the Scheme sanctioned by this Court is reproduced herein below:-

“17. Scheme Conditional on approvals/sanctions
The Scheme is conditional and subject to:

XXX XXX XXX XXX

17.3 the sanction of the Scheme of Demerger-Spice and the sanction of the Scheme of demerger-Idea by the Courts and the same being made effective in terms of the Scheme of Demerger-Spice and the Scheme of demerger-Idea, respectively, or such other arrangement being made by Idea and Spice with respect to overlapping Idea UASLs and Overlapping Spice UASLs, respectively, in accordance with the prevailing UASL conditions and applicable regulations in the event in the Scheme of Demerger-Spice and the Scheme of Demerger-Idea is not pursued or that the

said Scheme of Demerger-Spice and the Scheme of Demerger-Idea do not become effective for any reason whatsoever.”

12. On 11.5.2010, petitioner-companies withdrew the demerger scheme being CA(M) 98/2009. Thereafter, various petitions were filed by the appellant challenging penalty and termination orders passed by DoT in Telecom Disputes Settlement and Appellate Tribunal (for short ‘TDSAT’). Further the appellant has also challenged before the TDSAT the validity and legality of the letters dated 7.1.2010 and 18.1.2010 issued by DoT rejecting their merger proposal. Subsequent to this Court’s order dated 5.2.2010, the petitioner companies took the stand in correspondence and legal proceedings that upon the merger scheme being sanctioned by this Court, overlapping licenses stood vested in the appellant and that DoT had no other option but to grant its formal approval for transfer of licences. In March, 2011 the application for recall and stay of this Court’s order dated 5.2.2011 were filed. In these applications, the impugned order dated 4.7.2011 as mentioned above, have been passed.
13. It is now right stage for recording the gist of communication that was exchanged between the appellant and the DoT seeking approval of the merger of the two companies in the light of Merger Guidelines. As pointed out above, in the meeting of Board of Directors of two companies on 25.6.2008 the mode of merger of the two companies was approved. On the same day, letter dated

25.6.2008 was addressed by the appellant to the DoT. In the said letter, the appellant stated that scheme will entail:-

- Purchase by Idea of 40.8% of the shares held by MCorpGlobal Communications in Spice.
- A merger of Spice with Idea pursuant to section 391 to 394 of the Companies Act on the receipt of all necessary approvals.
- The merger will result in the vesting of the Spice Licenses in Idea. In this connection while Clause 17 of the DoT Merger Guidelines of April 22, 2008 regulates merger of licenses within first 3 years of the license, this will not apply to the present transaction since both Spice and Idea have existing licenses pursuant to which they have been providing services of over 12 years.
- Moreover, as the shares of Spice held by TMI will be necessary extinguished by the Merger, the restrictions on a single company do not apply.

From the above letter dated 25.6.2008 following admissions are made:-

- (i) Merger of companies will only happen after necessary approvals.
- (ii) The merger will result in the vesting of the Spice Licenses in India with means that merger of companies would mean transfer of license.
- (iii) Moreover, Idea admitted that Merger guidelines 2008 would be applicable in this case but it contended that since Idea and Spice are providing

services from last 12 years, 3 years restrictions will not be applicable.

- (iv) Idea also contended that after merger the violation of substantial equity clause would cease to exist.

14. Vide letter dated 15.7.2008 the appellant again wrote to DoT stating that it believed that transaction qualifies as ‘permissible merger of Licenses’ under the merger guidelines 2008 and further sought answers from DoT whether merger of Licenses was permissible under Clause 17 of the merger guidelines. Thereafter, the appellant wrote to DoT vide letter dated 17.7.2008 stating that amalgamation would happen through a Court approved Scheme of Arrangement under Section 391/394 of the Companies Act and after this Spice would cease to exist. There would be only one company and the question of cross holding in two companies will not arise. Thereafter vide letter dated 1.8.2008, the appellant wrote to DoT in respect of amalgamation of Spice with the appellant wherein it stated that Idea will be filing a Scheme of Restructuring under Sections 391 to 394 of the Companies Act whereby the two overlapping licenses will be demerged into a separate legally entity... it was stated as under:-

“..We will of course additionally conform to all other license requirement in letter and spirit... The proposed action is strictly in accordance with Clause 6.3 of the UAS License Agreement and will require your prior written approval and the approval of the High Court. We will approach you with complete details shortly...”

15. On 7.8.2008, a meeting was held between the officials of M/s Idea and DoT in which DoT opined that overlapping licences should be surrendered and clarified that in the event of surrender, the entry fee for obtaining such licenses would be non-refundable and the spectrum allocated for such licences would have to be surrendered. From the minutes of meeting it is clear that the demerger proposal was not discussed in the said meeting. Vide letter dated 1.12.2008 the appellant sought prior approval of DoT before filing a scheme under section 391 of Companies Act for proposed demerger of two overlapping licenses. Thereafter, DoT vide its two letters dated 5.5.2009 wrote to appellant and Spice Communications that it has come to the notice of the Department that in the six monthly FDI compliance letter dated 28.1.2009 of Spice that appellant holds 41.09% equity stake in Spice Communication. Vide letter dated 12.5.2009 appellant informed that it is holding the 41.09% equity in Spice Communication w.e.f. 17.10.2008. Vide another letter dated 12.5.2009 the appellant wrongly stated that it was in compliance with the policy that no single entity will hold more than 10% equity in more than one licensed company. Vide another letter dated 12.5.2009 the appellant wrote regarding approval of de-merger by DoT and stated that it has filed the restructuring scheme (for de-merger) in Gujarat High Court on 11.5.2009. Vide letter dated 12.6.2009, DoT sought information regarding the scheme of de-merger and detailed equity structure of M/s Vitesse Telecom. Vide letter dated 23.6.2009 the appellant stated that the restructuring scheme for de-merger between the appellant and the Vitesse Telecom was filed in the High Court of Gujarat on 11.5.2009. The appellant also stated that it has filed on 11.5.2009, the Scheme for the

amalgamation of Spice with appellant in the high Court of Gujarat. Vide letter dated 24.6.2009 the Spice wrote a similar letter stating that it has filed a scheme for demerger Spicer and Claridges under Section 391 of the Companies Act on 15.5.2009 and also stated that it has filed the scheme for the amalgamation of Spice with the appellant in Delhi High Court on 15.5.2009. The appellant vide its letter dated 6.1.2010 stated that scheme of amalgamation of Spice Communication Ltd. with the appellant company was approved by the High Court of Gujarat on 26.11.2009. The DoT vide its letter dated 7.1.2010 regarding merger/amalgamation of companies M/s Idea Cellular Ltd. with Spice Communications Ltd. and regarding demerger of the overlapping UAS Licenses intimated its decision to Idea Cellular ltd. that since the merger was not permissible under Clause 17 of the Merger Guidelines, merger of companies cannot be permitted. Vide its letter dated 18.1.2010 reiterated that permission of the amalgamation of the companies of the Companies M/s Spice Communications Ltd. with Idea Cellular Ltd. cannot be acceded to. Vide letter dated 25.1.2010 the appellant requested DoT to withdraw the letters dated 7.1.2010 and to provide formal approval at the earliest. The appellant stated therein that all overlapping licences were non-operational and this is therefore not a merger of operating intra-circle licenses and clause 17 does not come in play. When the correspondence between the parties was at the stage, the arguments on company petition seeking sanction of the amalgamation scheme were heard by the learned Company Judge of this Court on 21.8.2008 and the sanction was granted on 5.2.2010.

16. Some correspondence ensued between the appellant and the DoT even thereafter which may have some bearing we take note of these events as well herein below.
17. On the basis of merger approved vide order dated 5.2.2010, the appellant approached DoT vide its letter dated 5.4.2010 requesting for transfer of license held by Spice Communication to Idea Cellular Ltd. Vide letter dated 26.4.2010 it again sought the formal approval for transfer of licences. Vide letter dated 28.4.2010 the appellant requested for transfer of licenses held by Spice to appellant/Idea. Till this time the de-merger scheme of Spice Communication with Claridges Communication was pending and meeting was not being called at the behest of appellant and Spice. In the said pending petition an application was moved stating as under:-

“...the application filed by Spice before this Hon’ble Court for the proposed demerger of its overlapping UASLs would not be maintainable as Spice has already merged into the applicant company and the overlapping UASLs of Spice now vest in the applicant company by virtue of the Scheme of amalgamation...”

However, in this application also there was no mention of letters dated 7.1.2010 and 18.1.2010 by which permission of de merger was rejected by the DoT. Vide order dated 11.5.2010, the scheme of demerger was allowed to be withdrawn with liberty to move any fresh scheme of arrangement. In a letter dated 31.5.2010 related to 3G auction the appellant wrote to DoT that;-

“for our Punjab Service area as stated in our application for 2.1 GHz auction, license held by Spice Communications Ltd. stands amalgamated into Idea Cellular Ltd. through a Court process as per provisions of License agreement, which process of amalgamation has been completed.”

Vide letter dated 22.12.2010 the appellant again reiterated that “after completion of Court process of amalgamation, the DoT ought to have issued formal orders forthwith”. On 15.1.2011 a petition was filed before TDSAT challenging the communications dated 7.1.2010 and 18.1.2010 of the DoT. The appellant vide its letter dated 27.1.2011 wrote to the DoT as under:-

“Further, we have also recently filed the petition No.35 of 2011 in the Hon’ble TDSAT on above issue, which is ending consideration of the Hon’ble Tribunal....Without prejudice to our rights and contentions in the above petition and in continuation to our earlier letters, and now that the licenses held by Idea & erstwhile Spice are more than three years old, we request the DoT to transfer the licenses and issue a formal letter in this regard, for Merger of licenses as per applicable intra Service merger guidelines dated 22nd April, 2008 of DoT and relevant license conditions.”

Vide communication dated 24.2.2011 a penalty of ₹ 50 crore was imposed on Spice for violation of condition 1.4, condition 61. And condition 6.2 of the UAS Licence and Clause 1 and 17 of the Guidelines dated 22.4.2008 for Intra Service Area Merger of

Licences. A show cause notice dated 24.2.2011 was also issued to the appellant as to why the UAS Licence issued to the company for Punjab Service Area should not be terminated for violation of condition No. 1.4 and condition no. 6.2. of the Unified Access Service Licence and Clause 1 and 17 of the Guidelines dated 22.4.2008. The appellant herein filed a petition before the TDSAT being petition No. 143/2011 challenging the imposition of a penalty of ₹ 50 crore on Spice.

18. According to the learned Company Judge suppression of the aforesaid information from the Court, while seeking sanction of the scheme, amounted to fraud played upon the Court. To state in brief, the following material withheld from the Court has weighed with the learned Company Judge to arrive at this finding:

- (a) Merger Guidelines, 2008 which required prior approval were not filed in the application for demerger or company petition seeking sanction of the scheme. Likewise, copies of the licenses or correspondence exchanged between the parties were not placed on record.

- (b) The appellant had itself informed the DoT about the proposed merger with Spice with it and stated that it would be on receipt of all necessary approvals in letter dated 25.6.2008. The appellant had admitted that merger of the companies will result in vesting of spice licenses with the appellant. In various communications the

appellant had reported that it would seek DoT prior written approval for transferring the overlapping licenses.

(c) On 17.10.2008 without getting any prior permission, the appellant acquired 41.09% equity in Spice. This fact was informed to the DoT for the first time vide letter dated 28.1.2009.

(d) Vide letter dated 12.5.2009 the appellant informed the DoT that it had filed a restructuring scheme for demerger between Idea and M/s Vitesse Telecom in the High Court of Gujarat on 11.5.2009 but the filing of amalgamation scheme of Spice with the appellant was not disclosed to DoT which was disclosed for the first time on 29.6.2009.

(e) On 7.1.2010 and 18.1.2010 the DoT had communicated to the appellant that merger and demerger as proposed was impermissible as some of the overlapping licenses were less than 3 years old. This fact was not brought to the notice of the Court on 28.1.2010 when the matter was argued and the judgment reserved.

However, we may point out that the appellant in its reply dated 25.1.2010 to the DoT had stated that the merger of licence was different from merger of companies and Clause 17 of the Merger Guidelines, 2008 was not

attracted. Prior permission of DoT for merger of companies were mandatory not only it was not taken but these facts were not placed before the Courts.

We may reproduce the summation of the fraud findings in the impugned order contained in paras 67 to 71 thereof which read as under:

“67. Keeping in view the aforesaid mandate of law as well as the facts of the present case, it is apparent that non-placing of DOT’s letters dated 7th January, 2010 and 18th January, 2010 was not an innocent act. Non-filing of the aforesaid letters was a part of design to misdirect and mislead this Court as would be apparent from non-filing of Licences as well as Merger Guidelines, 2008 and correspondence exchanged between the parties. It is pertinent to mention that the primary business of both the petitioner-companies pertain to telecommunication licences which were not produced before this Court. In fact, both the petitioner-companies did not bring to the notice of this Court that unlike any other case in the past decided by this Court, the present Scheme of Arrangement would result in transfer of some overlapping licences within the prohibited period of three years. Since this Court and the Regional Director were not aware of the prior permission and temporary prohibition contained in the licence conditions and merger guidelines respectively, the petitioner-companies reliance upon this Court’s observation with regard to post merger sanction/approval of DOT is irrelevant. Consequently,

withholding of relevant and material documents like licences, merger guidelines and DOT's letters dated 7th January, 2010 and 18th January, 2010 was deliberate, intentional and with a view to obtain an unfair advantage.

68. In the opinion of this Court it is also not necessary that there should be direct proof of fraud, the same can be inferred from various circumstances which are brought on record. Even if individual facts are not able to prove a fraud, it would be sufficient if all the circumstances taken together indicate a fraud.

69. The 'design' of the petitioner-companies is also apparent from their subsequent conduct, i.e., after this Court had sanctioned the merger scheme. It is pertinent to mention that before the amalgamation scheme was sanctioned by this Court, Idea in its own affidavit had confirmed that approval of DOT would be taken after approval of scheme of amalgamation by this Court, but post merger the stand of Idea has been that DOT has no further say in the matter and only a formal approval of transfer of licenses is required which DOT is obliged under law to give. To illustrate, Idea vide its letter dated 31st May, 2010 addressed to DOT stated _in this regard you may note that our Punjab Service area, as stated in our application for 2.1 GHz auction, license held by Spice Communications Limited stands amalgamated into Idea Cellular Limited through a Court process as per provisions of the license agreements, which process of amalgamation has been completed. The DoT has already been informed about the

same. Hence the Letter of Intent for Punjab too may be has to be in favour of IDEA Cellular Limited.'Further, Idea's Managing Director vide letter dated 21st December, 2010 addressed to DOT stated, therefore, we were surprised when we received a letter from the DoT dated 7thJanuary, 2010 saying the merger of the companies cannot be permitted (18 months after our merger announcement and 16 months after our meeting with DoT – this letter came soon after we confirmed the approval of Hon'ble High Court). The same was evidently wrong and uncalled for, considering the advise for approval given earlier and given that merger of companies is not in the DoT's domain, and was appropriately responded by us. In fact on the contrary, upon us informing DoT about completion of the Court process of amalgamation, the DoT ought to have issued formal orders forthwith.' Also, Idea in its petition bearing No. 143/2011 filed before TDSAT stated once the merger is approved it mandates the DoT to give its approval as it does not leave the DoT with any discretion to refuse the same.' Idea in its application for withdrawal of demerger application being Co. Appl.(M) 98/2009 stated in light of the aforesaid sanctioning of the Scheme of Amalgamation, the application filed by Spice before this Hon'ble Court for the proposed demerger of its overlapping UASLs would not be maintainable as Spice has already merged into the Applicant Company and the overlapping UASLs of Spice now vest in the Applicant Company by virtue of the Scheme of Amalgamation.

70. In any event, even if this Court were not to accept the plea of dishonest intent on the

part of petitioner-companies, this Court cannot lose sight of the fact that as the sanctioned scheme is binding on all shareholders, creditors of petitioner-companies, the Court is obliged to examine the Scheme in its proper perspective together with its various manifestations and ramifications with a view to finding out whether the scheme is fair, just and reasonable to the members concerned and is not contrary to any law or public policy. Though the expression 'public policy' is not defined in the Act, it connotes some matter which concerns the public good and public interest. Thus, the question that arises is whether the petitioners had disclosed sufficient information to this Court so as to enable it to arrive at an informed decision, that means, whether the information supplied was sufficient and whether the real issue was flagged before Court and whether all relevant documents were on record for the Court to arrive at a just decision. (See Sesa Industries Limited Vs. Krishna H. Bajaj & Ors., (2011) 3 SCC 218).

71. Even if this Court examines the present case from this narrow and limited perspective, this Court finds that non-filing of licenses as well as merger guidelines and correspondence exchanged between the parties amounts to non-production of requisite material as contemplated under the proviso to Sub-section 2 of Section 391 of the Act and further that sufficient information was not disclosed to this Court so as to enable it to arrive at an informed decision. Consequently, this Court is of the view that there has been suppression of material and relevant documents from this Court.”

19. It is not disputed, and cannot be disputed, that the material as pointed out above, was not placed before the Court by the appellant in the proceedings which led to the sanction of the scheme in question. Accepting this fact, the neat submission of Mr. Salve, learned Senior Counsel appearing for the appellant is that there was no necessity to disclose this material as it was not relevant in the proceedings under Section 391 read with Section 394 of the Companies Act. It was argued that the non-disclosure of each and every fact or material may not be treated as “fraud upon the Court” and it is only the suppression of material and relevant facts touching upon scope of the issue involved in the case that are to be taken into consideration for the purpose of adjudicating ‘fraud’ plea. It was argued that the learned Company Judge was conscious of the legal position adumbrated in *Hamza Haji Vs. State of Kerala and Anr.* (2006) 7 SCC 416 and *Meghmala & Ors. Vs. Narasmiha Reddy & Ors.* JT 2010 (8) SC 658 which are taken note of by the learned Company Judge himself in the impugned order on the basis whereof, it is observed in the order itself that the suppressed facts/documents cannot be irrelevant ones. It must be a matter which is material for consideration of the Court, whatsoever, the decision the Court may ultimately take.
20. It was the submission of Mr. Salve that the aforesaid material had no bearing on the sanctioning of the amalgamation scheme from the stand point of Section 391 to 394 of the Companies Act and, therefore was totally irrelevant. According to him, it is where the learned Company Judge committed an error treating the supply of

aforesaid information as relevant and determining the non-disclosure thereof as fraud upon the Court. His argument in this behalf was that the order under Section 391 read with Section 394 cannot and does not bind any party to any contract (other than a Transferor and/or Transferee) nor does it affect the rights of any person other than creditors and Shareholders. In relation to contracts, the order under Section 391/394 assigns as a matter of law, the benefits and obligations from the transferor to the transferee. Third party rights to such contracts (i.e. the rights of counter parties of the erstwhile transferor) would depend on:

- (i) The terms of the Contract relating to assignment, and
- (ii) The consent of such Third Parties.

21. Mr. Salve argued that the licences under Section 4 of the Indian Telegraph Act, 1885 are granted by the Union Government, and the terms and conditions of such a grant are governed by the Licence Agreement. The order under Section 391/394 would result in the assignment of the benefits and obligations of such license agreements from the Transferor to the Transferee company. The consequence of such a transfer and its effect on the rights of the Government would depend upon the terms of the Licence Agreement. The order of the Court cannot and does not result in the merger of the licences- where the Transferee already holds a licence under a separate licence agreement for the same circle. The acceptance of the Transferee as a Licensee in place of the Licensor (as a result of merger of the Licences) would be a matter for the Government to decide-which decision would be governed by the licence Agreement, the existing

policies and the law. It is emphatically asserted that as per the licence agreement (read in the light of the extant policy) the government is obliged to merge the existing licence of Spice (qua Punjab and Karnataka and four other non-operating licenses) with the existing Licence of the appellants, as per the licence agreement (read in the light of the extant policy), the Government now has to formally recognize the appellant as the licensee in place of Spice. Mr. Salve emphasized that as per the appellant, the Government has misdirected itself in law in the stand it has taken in the matter beginning with its letters dated 7.1.2010 and 18.1.2010. However, this difference and dispute between the Government and the appellant has to be resolved in a matter known to law and in appropriate fora. The order of the Court merges the companies, on account of which the appellant has become the party to the licence agreements executed between Spice and the Union of India. The future of such License Agreements and its consequences is a matter beyond the purview of proceedings before this Court. Equally the order of this Court sanctioning the Scheme would be of no avail to the appellants if the Government declines to continue the Licence Agreements between Spice and the Government, and any such dispute would have to be decided on the basis of the terms of the Licence agreements, the Government Policies and other matters of relevance and NOT the order of this Court sanctioning the merger. On this premise, it is submitted with great vehemence that in these proceedings was unnecessary as their rights to decline the continuance of any licence agreements and act as per the law and their policies is not in any manner impaired by this Order.

22. In order to appreciate the aforesaid contention, a peep into the language of Section 391 and 394 would be essential:

“391. Power to compromise or make arrangements with creditors and members.—

(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the 1[Tribunal] may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the 1[Tribunal] directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed 2[under the rules made under section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the 1[Tribunal], be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:

3[Provided that no order sanctioning any compromise or arrangement shall be made by the 1[Tribunal] unless the 1[Tribunal] is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the 1[Tribunal], by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 351, and the like.]

(3) An order made by the 1[Tribunal] under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to 4[one hundred rupees] for each copy in respect of which default is made.

(6) The 5[Tribunal] may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as

the 5[Tribunal] thinks fit, until the application is finally disposed of.

“394. Provisions for facilitating reconstruction and amalgamation of companies.

(1) Where an application is made to the Court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court-

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company"); the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out: 1[Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board, or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest: Provided further that no order for the dissolution of any transferor company under clause (iv). shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.]

(2) 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.

(3) Within 2[thirty] days after the making of an order under this section every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration. If default is made in complying with this sub- section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

(4) In this section-

(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 anybody corporate, whether a company within the meaning of this Act or not.”

23. Proviso to Section 391 (2) of the Act clearly mandates that the company or any other person by whom an application for sanctioning is made to disclose to the Court “all material facts relating to the company”. Example of these facts is given with the expression “such as” by specifically stipulating the latest financial position of the company, the latest auditor’s report on the accounts of the company and the pendency of any investigation proceedings in relation to the company under Section 235 to 351 of the Companies Act. It is made clear that this information is not exhaustive and other material facts are also to be given, the aforesaid specific information is suffixed by the words “and the like”. According to the

learned Company Judge, the expression “all material facts” and “and the like” mean all material facts relating to the affairs of the company. The task which is assigned to the Company Judge while sanctioning the Scheme is contained in the Judgment of the Supreme Court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.* (1997) 1 SCC 579 and para 29 delineate the scope and ambit of the jurisdiction of the Company Court in this behalf which reads as under:-

“29.....In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).
3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.
6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.
7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.
8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.
9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the

company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction.
(emphasis supplied)"

24. It is on this basis that the learned Company Judge had held that non-disclosure of the information was not an innocent act and rather it was part of the design to mislead the Court and, therefore, amounted to fraud. (Discussion contained in para 67 to 71 of the impugned order already reproduced above).
25. Mr. Salve may be right in his submission that the dispute as to whether as per the Licence Agreement, read in the light of the extent policy, the Government is obliged to merge the existing licence of Spice with that of the appellant or the Government can refuse the same as a matter which is to be resolved in a manner known to law and in appropriate fora, may be TDSAT. However, he is not entirely justified in his argument that it was not necessary to disclose this information at all in the Company Petition seeking sanction of the scheme. We are of the opinion that these facts were very much relevant and material facts for the purpose of Section 391 to Section 394 of the Companies Act. Position would have been

different, had the appellant disclosed these facts and taken the position that the Company Court is not required to go into the controversy generated by the DoT in refusing to grant permission for demerger. In that event, the Company Court could have issued notice to the DoT and heard on the issue as to whether non grant of such a permission for merger by the DoT was relevant or not. However, the appellant chose to disclose this information at all even when there was a specific provision in the scheme that upon the sanctioning of the scheme and resultant merger, the overlapping licenses of the Spice would stand transferred to the appellant. Further, Mr. Chandhiok is right in his submission that the appellant itself understood the implication of Licence Agreement and Merger Guidelines, 2008 as per which prior permission of DoT for merger of the companies was mandatory and for this reason simultaneously with the decision of amalgamation of the Spice with the appellant, the appellant itself had started communicating with the DoT seeking such prior permission. Whether the action of DoT in refusing to grant such a permission is valid or not is not the question. What is important is that all this becomes relevant information and material information casting an obligation upon the appellant to have disclosed the same. It is rightly pointed out by the learned Company Judge that sanction under Section 391 to 394 of the Companies Act is a 'single window clearance' for the purpose of said Act. There is no need to file application under the Act for consequential changes like for change of name of company or Alteration of Memorandum, Article of Association except for reduction of capital in certain circumstances which required a special procedure. It is well settled that Section 391 of the

Companies Act is a complete code under which the Court can sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out in the structure of the company for the purpose of carrying out the scheme, except reduction of share capital which requires a special procedure. The whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of application under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme. The learned Company Judge also rightly observed that if the same permission is required under separate statute or licence for completely affecting the amalgamation/merger, that would not mean that it is not to be obtained. These facts were relevant from one point of view. Had these facts been placed before the Court at the time of seeking sanction of the scheme, the Court could have put a stipulation by making conditional order namely the scheme will come into effect when other statutory permission have been obtained.

26. We thus are in agreement with the learned Company Judge to the extent that the appellant did not disclose material facts while obtaining sanction of the scheme. Next vital question would be: having regard to the nature of the controversy based on these facts, whether non-disclosure would amount to fraud or else what would be the effect of such a non-disclosure. This aspect would be considered by us while examining the plea of the DoT that the order

sanctioning the amalgamation should have been revoked in its entirety.

27. With this, we revert to the plea of the DoT in its appeal. It is argued by Mr. Chandhiok, learned ASG that since fraud vitiates all actions and the effect thereof is that order obtained on fraud is null and void, there was no other options for the learned Company Court except to recall the sanction order of amalgamation of Spice with the appellant resulting into the dismissal of the company petition filed by the Spice and the appellant seeking sanction of the Scheme. It was also argued that once this legal position is accepted namely suppressing vitiates everything, lack of time between the sanction of the scheme and the filing of the application for recall of the order was immaterial. In such a situation, there was no question of simply modifying the sanction order. Mr. Chandhiok referred to the following two judgments in support of this contention:

- (i) ***Thomal Cook India Ltd. Vs. Hindustan Thermo Prints Ltd. (In Liquidation)*** [(1999) 3 Com. LJ 1 (Del.)].
- (ii) ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others***, [2011 (5) SCC 532].

28. While dealing with this plea, it would now be necessary to examine the effect of non-disclosure of the material facts namely whether it would amount to fraud thereby vitiating the very order sanctioning the scheme.

29. We are of the opinion that had this fact been disclosed it would not have resulted in non sanction of the scheme of amalgamation of the two companies. Instead, the company Judge would have passed a conditional sanction order. We say so keeping in mind the following aspects.
30. As noted above, argument of the appellant is that as per the Licence Agreement, read in the light of the Merger Guidelines issued by the Government, the action of the government in refusing merger of the existing licences of Spice with the existing licences of the appellant is not appropriate. Thus, according to the appellant, even as per the terms of the Licence Agreement, the government is obliged to recognize the appellant as the licensee in place of Spice. The DoT contends otherwise. The DoT has refused the permission. It is a common case that this dispute is to be ultimately resolved by the TDSAT which is the appropriate forum. The matter is already before the TDSAT. At the same time, the scheme contains the class that on the amalgamation of Spice with the appellant overlapping licence of Spice would vest in the appellant. In such a situation, even with the production of the entire relevant material including Merger Guidelines, terms of the Licence Agreement as well correspondence exchanged between the parties, the Company Court could have imposed such other conditions. Here, Mr. Salve is right in his submission that the amalgamation of the companies would be different from the amalgamation of the licenses. Therefore, these material facts would have bearing on the sanctioning of the Scheme with certain conditions and would not have resulted into the dismissal of the competition petition seeking sanction. For this

reason, we hold that non-disclosure of the aforesaid facts would not amount to fraud resulting into vitiating the very action namely order sanctioning the scheme. Once it is found that implication of the disclosure of the opinion could have led to passing an conditional order of merger, that is precisely the course of action adopted by the learned Company Judge. Thus, apart from the reasoning given by the learned Company Judge that it is not possible to scramble the unscrambled eggs at this juncture, additionally on the aforesaid reason, we feel that there was no case made out by the DoT for recall of the orders dated 05.2.2010 sanctioning the scheme.

31. With this, we come to the various modification ordered by the learned Company Judge vide the impugned judgment to the sanctioning order dated 05.2.2010. These have already been reproduced above. We agree with all the modifications except one, viz., six overlapping licenses of Spice would vest with the DoT. No doubt, even as per the contention of the appellant itself, sanctioning of merger scheme amounts only the merging company and not the licenses and therefore, the appellant itself maintains that for transfer of these licenses, prior permission of DoT is required. It is also recognized that there is a dispute on this issue inasmuch as, as per the appellant, it is entitled to get the license transferred in its name and the refusal of the Government on this account is not appropriate. This is a dispute which has to be resolved by the TDSAT and parties are already before the TDSAT. Therefore, it is for the TDSAT to give directions, including interim orders in this behalf.

32. We, thus, modify the impugned orders of the learned Company Judge omitting the direction which states that overlapping licenses of Spice shall forthwith stand transferred with the licensor, i.e., DoT. Instead, we substitute this by the direction that insofar as dispute about transfer of licenses of Spice to Idea is concerned, the same shall be decided and determined by the TDSAT and the parties. It will also be open to the TDSAT to determine the arrangement in the interregnum.
33. The appeal of the appellant is partly allowed to the aforesaid extent and that of DoT. Parties are left to bear their own costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

JULY 13, 2012

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