

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 11.08.2016

CORAM

THE HONOURABLE MR. JUSTICE HULUVADI G.RAMESH  
AND  
THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

W.A. NOS. 1454 & 1455 OF 2014  
against WP 9221 of 2014 & 9220 of 2014  
W.P. NOS. 2165 TO 2167 OF 2013  
W.P. NOS. 585 TO 588 OF 2012  
M.P. NOS. 1 TO 3 OF 2014  
M.P. NOS. 1 OF 2012  
AND  
M.P. NOS. 3 & 4 OF 2013

Aircel Cellular Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai, Chennai - 600 002  
rep. By Mr. Vijay Krishnan .. Appellant in WA 1454/2014

Aircel Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai, Chennai - 600 002  
rep. By Mr. Vijay Krishnan .. Appellant in WA 1455/2014

- Vs -

Union of India  
Thro' Secretary  
Department of Telecommunication  
Ministry of Communications  
Sanchar Bhavan, 20 Ashoka Road  
New Delhi 110 001. .. Respondent in both appeals

Aircel Cellular Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai  
Chennai - 600 002. .. Petitioner in WP 2165/2013

Aircel Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai  
Chennai - 600 002. .. Petitioner in WP 2166/2013

Dishnet Wireless Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai  
Chennai - 600 002.

.. Petitioner in WP 2167/2013

- Vs -

1. The Union of India  
rep. By the Secretary to Govt.  
Ministry of Communications & IT  
Dept. of Telecommunication  
Sanchar Bhavan  
No.20, Ashoka Road  
New Delhi 110 001.

2. Assistant Wireless Advisor  
Ministry of Communications & IT  
Dept. of Telecommunication  
Sanchar Bhavan  
No.20, Ashoka Road  
New Delhi 110 001. .. Respondents in all the petitions

Aircel Cellular Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai  
Chennai - 600 002. .. Petitioner in WP 585 & 586/12

Aircel Ltd.  
5<sup>th</sup> Floor, Spencer Plaza  
769, Anna Salai  
Chennai - 600 002. .. Petitioner in WP 587 & 588/12

- Vs -

1. The Union of India  
rep. By the Secretary to Govt.  
Ministry of Communications & IT  
Dept. of Telecommunication  
Sanchar Bhavan  
No.20, Ashoka Road  
New Delhi 110 001.

2. The Principal Controller of  
Communications Account  
Tamil Nadu Circle  
Ministry of Communications & IT  
Dept. of Telecommunications  
RK Nagar Telephone Exchange  
No.238, 7<sup>th</sup> Floor, RK Mutt Road  
Mandaveli, Chennai 600 028.

.. Respondents in all the petitions

W.A. Nos.1454 & 1455 of 2014 filed under Clause 15 of the Letters Patent, against the order dated 10.10.2014 passed by the learned Single Judge in W.P. 9220 & 9221 of 2014.

WP 9221/2014 & 9220/2014: These Writ petitions filed under Article 226 of the constitution of India praying for a Writ of certiorarified mandamus to call for the records and quash the impugned conditions imposed vide Order F.No. 842-1119/2011-AS-IV-Volume (3) dated 3.10.2013 passed by the respondent as reiterated vide consequent communication dated 23.1.2014 and consequently direct the respondent to grant an unconditional formal approval to the petitioners to merge their Chennai and RoTN Licenses for the merged service area i.e. the Tamilnadu Service Area (including Chennai).

W.P. Nos. 585 & 587 of 2012 have been filed praying this Court for the issuance of a Writ of Declaration declaring that the first proviso to Section 4 of the Indian Telegraph Act, 1885, insofar as and to the extent that it confers unguided power upon the Dept. of Telecommunications to claim a revenue share in respect of non-telecom activities of petitioner, as violative of Articles 14 and 19 (1) (g) of the Constitution of India.

W.P. Nos.586 & 588 of 2012 have been filed praying for the issuance of a Writ of Declaration declaring that the Department of the respondents can charge only License Fee/AGR (Adjusted Gross Revenue) from revenue earned from licensed activities.

W.P. Nos.2165 to 2167 of 2013 have been filed praying this Court to issue a writ of certiorarified mandamus to call for the records comprised in the impugned order bearing Reference P-11014/19/2008-PP (Pt-I) dated 28.12.2012 issued by the 2<sup>nd</sup> respondent and demand notice bearing Ref. No.1022/06/2011-WR dated 8.1.2013 issued in consequence thereof by the 2<sup>nd</sup> respondent and quash the same as being wholly illegal and unconstitutional and further directing the respondents to forbear from unilaterally imposing One Time Spectrum Fee or any levy of like nature upon the petitioners.

For Appellants/  
Petitioners : Mr. Gopal Subramaniam, SC &  
Mr. Satish Parasaran, SC for  
Mr. R.Parthasarathy

For Respondents : Mr. G.Rajagopalan,  
Addl. Solicitor General  
assisted by Mr. Su.Srinivasan  
Assistant Solicitor General

|               |            |
|---------------|------------|
| RESERVED ON   | 05.07.2016 |
| PRONOUNCED ON | 11.08.2016 |

#### COMMON JUDGMENT

While the writ appeals, W.A. Nos.1454 and 1455 of 2014 have been filed against the order passed by the learned single Judge directing the appellants to comply with the conditions imposed in the order of the respondent; W.P. Nos.585 to 588 of 2012 have been filed against the imposition of share on Adjusted Gross Revenue (for short 'AGR') even on income earned in relation to non-telecom activities and W.P. Nos. 2165 to 2167 of 2013 have been filed by the petitioners against the levy of One Time Spectrum Charge (for short 'OTSC'). Since all the matters are intertwined with each other, they are taken up together and disposed of by this common judgment.

PRAYER IN W.P. NOS. 585 TO 588 OF 2012 :

2. While W.P. Nos.585 & 587 of 2012 have been filed by the petitioner to declare the first proviso to Section 4 of the Indian Telegraph Act, 1885 as violative of Articles 14 and 19 (1) (g) of the Constitution alleging that it confers unguided power upon the Dept. of Telecommunications to claim a revenue share in respect of non-telecom activities carried on by the petitioners; W.P. Nos.586 & 588 of 2012 have been filed for a declaration that the respondents can only charge License Fee/AGR from the revenue earned from licensed activities.

PRAYER IN W.P. NOS. 2165 TO 2167 OF 2013 :

3. W.P. Nos. 2165 to 2167 of 2013 have been filed by the petitioners against the demand notice issued by the respondents imposing One Time Spectrum Fee on the petitioners in respect of the licenses issued to them.

PRAYER IN W.A. NOS. 1454 & 1455 OF 2014 :

4. These writ appeals have been filed by the petitioners in W.P. Nos. 9220 and 9221 of 2014, wherein, the order dated 3<sup>rd</sup> Oct., 2013 and the consequential communication dated 23<sup>rd</sup> Jan., 2014, of the respondents directing the petitioner, Aircel Ltd., to give an undertaking to clear all the dues of Aircel Cellular Ltd., for the purpose of issuance of amendment of the Cellular Mobile Telephone Service, consequent upon the merger of Aircel Cellular Ltd., with Aircel Ltd., was challenged, wherein learned single Judge had directed the petitioners to comply with the conditions imposed in the order of the respondent dated 3.10.2013 without prejudice to their rights and contentions in the writ petitions already pending on the file of this Court, with further directions.

5. An overview of the entire factual matrix, which are

intertwined with each other and necessary for the better understanding and disposal of the matter are culled out hereinbelow :-

(i) In pursuance of notification for grant of license for Cellular Mobile Telephone Service (for short 'CMTS'), Aircel Cellular Limited (for short 'ACL') was granted CMTS License for Chennai Metro Service Area (for short 'Chennai Area'), for a period of 10 years on 30.11.1994. Similarly, for the Rest of Tamil Nadu Circle (for short 'RoTN Area'), CMTS licence was granted to Aircel Limited (for short 'AL') for a period of 10 years from 22.5.1998 and the effective date for the licence was changed from 24.4.98 to 31.12.98.

(ii) With the introduction of National Telecom Policy, 1999 (for short 'NTP, 1999'), migration package for all the existing licensees of cellular and basic telecom services were proposed. By the said proposal, payment of one time entry fee and license fee as a percentage of gross revenue under the licence was imposed and that the period of license was to be 20 years from the effective date of the existing license agreement. Through various amendments to the licenses, annual license fee, AGR and spectrum charges on revenue share basis were ordered, including amendment relating to transfer/assignment of license. On 15.9.05, circular was issued by the Government for merger of Chennai Area and RoTN Area into Tamil Nadu Service Area (for short 'TN Area'), wherein option was given to the licensees to apply for merger of both the licenses. Further, group companies having separate licenses were permitted to transfer their existing license to any one of the companies as a special case.

(iii) In the year 2010, the respondent issued Notice Inviting Applications (for short 'NIA') for the auction of 3G and Broadband Wireless Access (for shore 'BWA') Spectrum. In addition to other conditions, spectrum charge for 3G spectrum was made payable on total AGR of 2G and 3G services and further condition was imposed that in case of group bidding entity being successful in the auction for Tamil Nadu, they shall merge the licenses for Chennai Area and RoTN Area in accordance with the circular dated 15.09.2005. Consequent upon the said condition in the NIA, ACL and AL furnished undertakings. On the appellant being announced as one of the successful bidder in the 3G auction as well as BWA auction, the Department of Telecommunication (for short 'DoT') issued Letter of Intent to AL in respect of TN Area.

(iv) Further to the condition imposed in the circular dated 15.9.2005, the Boards of AL and ACL approved the scheme of amalgamation, wherein ACL was to amalgamate with AL. After communications between Aircel and DoT, AL addressed pre-intimation letter to DoT along with relevant undertakings and Board Resolutions in respect of the proposed amalgamation.

(v) Accordingly, a scheme of amalgamation was submitted before this Court by AL and ACL in Company Petition Nos.215 & 216 of 2010 under Sections 391 to 394 of the companies Act. In the interregnum, vide insertion of Condition 24.16 in the licence agreement of AL, authorisation was given to AL to use the 3G spectrum for a period of 20 years from 22.9.2010 and it was stated therein that the amendment was subject to all the terms and conditions of NIA and the Licensee shall comply with all the terms and conditions unless amended by the licensor by amending the licence agreement from time to time.

(vi) In the meantime, vide order dated 1.10.2010 in C.P. Nos.215 & 216 of 2010, this Court approved the scheme of amalgamation of the transferor company (ACL) with the transferee company (AL) and directed that the transferor company shall stand dissolved without it being wound up.

(vii) Vide amendment dated 7.10.10, DoT issued license to ACL granting right to use BWA spectrum for a period of 20 years. Vide communication dated 13.10.2010, DoT was informed by Aircel about the approval given by the High Court for the Scheme of Amalgamation and, therefore, sought merger of the licenses. Reminders were also sent by Aircel for merger of the licenses on various dates. DoT, vide communication dated 8.4.2011, sought certain compliance certificates from AL for the purpose of merger of the licenses, which were duly furnished by AL.

(viii) In the meantime, certain company applications were filed in this Court for certain directions on which this Court had passed certain orders, which are not disputed by the parties. Further reminder letters were sent by AL seeking merger of the licences. To put it more clearly, since 23.11.2010, AL has been seeking for merger of the licenses till March, 2012.

(ix) Pursuant to certain charges levied by DoT, ACL and AL filed W.P. Nos.585 to 588 of 2012 praying to restrain DoT from charging AGR from revenue earned on non-telecom activities. This Court, vide order dated 22.6.2012, passed an interim order restraining DoT from taking any coercive steps to recover the license fee payable in respect of non-telecom activities.

(x) Vide amendment dated 25.6.2012, DoT modified the Annual License fee in respect of Tamil Nadu Service Area, wherein from 1<sup>st</sup> July, 2012 to 31<sup>st</sup> March, 2013, the Annual License Fee was fixed at 9% of AGR while from 1<sup>st</sup> April, 2013 onwards, it was fixed at 8% of AGR.

(xi) Since there was no positive response from DoT for the merger of the license pertaining to Chennai Area and RoTN Area,

AL & ACL approached the Telcom Disputes Settlement & Appellate Tribunal (for short 'TDSAT') for a direction to DoT to transfer ACL's Chennai license to AL by issuing a license for TN merged service area in accordance with the Merger Circular dated 15.9.2005 with a further prayer to restrain DoT from taking any coercive steps till the final disposal of the petition.

(xii) DoT, pending the adjudication, vide show cause notice dated 12.10.2012, while alleging violation of Clause 9 and Condition 15.7 of the License Agreement as well as conditions of license amendment regarding transfer/assignment dated 2.6.03, called upon ACL to show cause within 60 days as to why penalty of Rs.10 Crore should not be imposed and/or the license should not be terminated by invocation of Condition 15.1 of the License.

(xiii) TDSAT, while taking cognizance of the above show cause notice issued by DoT, passed an order dated 31.10.12 directing ACL to file reply to the show cause notice and further directing DoT to dispose of the same after giving opportunity of personal hearing to the petitioner. Further direction was also given to DoT to pass orders on the merger of licenses within three weeks from the date of passing orders on the show cause notice.

(xiv) Pursuant to the above direction, ACL filed reply dated 7.11.12 to the show cause notice and personal hearing was also afforded to ACL by DoT.

(xv) In the meantime, the respondent issued circular dated 28.12.12 for payment of 'One Time Spectrum Charge' for GSM/CDMA spectrum holders and the appellants were served with demand letter for payment of OTSC.

(xvi) ACL and AL approached this Court by filing W.P. Nos.2165 and 2166 of 2013 challenging the order dated 28.12.12 passed by the DoT and the consequent demand dated 8.1.13 and this Court, vide order dated 28.1.13 restrained DoT from proceeding further. In furtherance of the order of TDSAT, DoT, pursuant to the show cause notice dated 12.10.12 and subsequent personal hearing, passed order dated 26.4.13, holding that ACL was in contravention of Clause 9 and Condition 15.7 of the License Agreement as pointed out in the show cause notice and, accordingly, imposed a penalty of Rs.10 Crores payable within 15 days from the receipt of the notice. However, no order was passed on the merger of the license as ordered by TDSAT.

(xvii) Without prejudice to its rights and contentions, ACL deposited the penalty amount on 6.5.13, while reminding DoT of the order of TDSAT, wherein direction was issued to pass necessary orders on the merger of licenses within three weeks of DoT's order on the show cause notice.

(xviii) Subsequently, by order dated 3.10.13, DoT conveyed an in-principle approval to amend AL's RoTN License dated 22.5.98 to include ACL's Chennai License dated 30.11.94. While granting the said in-principle approval, certain conditions were put forth as under :-

a) All spectrum allocation and numbering resources under Chennai License shall stand transferred to AL and the extension of spectrum held in Chennai Area and its terms and conditions will be subject to the decision of the Government on the opinion of the learned Attorney General.

b) Chennai License will be cancelled simultaneously and all liabilities shall stand transferred to AL's RoTN License.

c) The above will be subject to AL clearing all dues in respect of both licenses.

d) The above is further subject to clearance of demands to be issued by WPC/WPF wing relating to payment of One Time Spectrum Charges for the spectrum held for the erstwhile two service areas by the licensees and also payment for the spectrum holding of the erstwhile Chennai Area license for extended period from 29.11.2014 to 29.11.2018, as per the decision of the government.

e) AL shall furnish unconditional and unequivocal undertaking in the prescribed format to pay all the demand with respect to extension of spectrum for Chennai Area from 2014 to 2018.

f) Spectrum Usage Charges in terms of rates applicable at present shall be payable by AL at the rates of slab corresponding to 9.8 MHz from the date of transfer of license.

(xix) AL, inter alia responded vide letter dated 25.10.2013 that it was entitled to an unconditional approval and that no new conditions could be imposed once the companies had complied with the circular dated 15.9.05 and the NIA dated 25.2.2010 and that AL was conferred with the right of an unconditional merger with ACL. AL also submitted that it could not be imposed with penalties and other adverse consequences on account of the delay on the part of DoT and highlighted that the conditions being vague and onerous could not be accepted. AL, vide letter dated 31.10.2013 also brought to the notice of DoT the interim order of stay granted by the Madras High Court and, therefore, urged DoT to drop the said condition relating to levy of OTSC.

(xx) While AL, vide letter dated 18.12.2013, offered to execute an undertaking in terms of Conditions (d) (i) and (ii) stipulated in the Merger Order dated 3.10.2010 regarding clearance of demands, which included One Time Spectrum Charges,

subject to its final determination by this Court, DoT rejected all submissions made by AL and reiterated the conditions stated in the Merger Order dated 3.10.2013. On receipt of the said letter, AL, vide letter dated 4.3.2014, withdrew the concessions made by it in the letter dated 18.12.2013.

(xxi) Subsequently, AL and ACL approached this Court by filing W.P. Nos. 9220 and 9221 of 2014 challenging the conditions imposed in the merger order dated 3.10.2013. In the meanwhile, on 23.4.2014, in respect of renewal of ISP License for Dishnet Wireless Ltd., one of the group companies of AL, DoT clarified that the dues/demands, which had been stayed by Tribunals/Courts of competent jurisdiction will not be counted as enforceable demands.

(xxii) Learned single Judge, vide common order dated 10.10.2014, while directed AL to comply with the conditions as imposed in the order of DoT dated 3.10.13, without prejudice to their rights and contentions in the pending writ petitions relating to OTSC and non-telecom activities, further held that in the event of the petitioners succeeding in the writ petitions, the undertaking given by them will automatically lapse and that the compliance of the conditions by the petitioners will not preclude the petitioners from taking recourse to legal remedies available under law.

(xxiii) The above sequence of facts, starting from 30.11.1994 till the culmination of the order of the learned single Judge dated 10.10.2014, as has been detailed above, are not in dispute. Further, insofar as the petitions relating to AGR for non-telecom related activities and the petitions relating to levy of OTSC, the facts, as narrated above, covers the entire issue.

6. In the backdrop of the facts as narrated above, while direction to maintain status quo as on 5<sup>th</sup> Nov., 2014 was granted in the writ appeals, further interim directions were issued regarding the compliance of the conditions as mentioned in the order dated 3<sup>rd</sup> Oct., 2013. Further, this Court had directed the tagging of all the issues covered in the various writ petitions along with the writ appeals for a comprehensive hearing and to give a quietus to the issues and, accordingly, all the writ petitions and writ appeals are heard and disposed of by this common judgment.

CONTENTIONS ADVANCED IN W.P. NOS. 2165 TO 2167 OF 2012

7. Mr.Gopal Subramaniam, learned senior counsel appearing for the appellants/petitioners submitted that as per NTP 1994, ACL and AL were granted CMTS licenses dated 30.11.94 and 22.5.98 for Chennai Area and RoTN Area, the license fee was on fixed basis and spectrum fee was charged as per a stipulated formula.

However, due to various issues, NTP 1999 was promulgated, which introduced the the revenue share concept in respect of payment of licence fee. It is further submitted that NTP 1999 provided for payment of (i) Entry Fee and (ii) Licence fee on revenue share basis, which is a percentage of revenue of the operator agreed upon. On the promulgation of NTP 1999, migration package was given to the service operators, which provided for payment of entry fee and licence fee on revenue share basis with a further option that on such condition being accepted, the period of license shall be 20 years from the effective date of the existing license agreement.

8. It is also submitted by the learned senior counsel for the appellants/petitioners that when the term of license was extended for a period from 10 years to 20 years from the effective date of the existing license agreement, on account of NTP 1999, the same was agreed upon mutually by the service providers as well as DoT on the condition that such extension will be on the basis of the entry fee and licence fee on revenue share basis and no other tags or conditions other than the above were laid. When such being the case, imposition of OTSC, that too with retrospective effect from 2008, after a lapse of more than 9 years, is totally untenable.

9. It is the further submission of the learned senior counsel for the appellants/petitioners that at the time of entering into the contract for grant of license, spectrum was allocated to AL and ACL for which requisite entry fee was paid and that no separate fee/charge needs to be paid by AL and ACL for getting the spectrum as the spectrum was bundled with the license. Learned senior counsel drew the attention of this Court to the letter of DoT dated 22.7.99, more particularly, clause (ii) of the said letter, wherein it is mentioned that the licensee will be required to pay one time Entry Fee and License Fee as percentage share of gross revenue.

10. Learned senior counsel appearing for the appellants/petitioners submitted that after initial allotment of spectrum of 4.4 MHz, additional spectrum was allotted to ACL, AL and DWL starting from 1.3.00 to 1.12.06. From the above, it is evident that the licensee has been paying spectrum usage charges under the terms of the license agreement without fail.

11. Learned senior counsel, adverting to the letter of DoT dated 15.9.05, submitted that as per the said letter, Chennai Area and RoTN Area were proposed to be merged into a single area, viz., the Tamil Nadu Service Area and that the licensees, who were having licenses in both the service areas of Tamil Nadu were permitted to apply for issuance of a single license for the Tamil Nadu Service Area in lieu of two licenses without payment of any additional entry fee. Thus, it clear that the

appellants/petitioners were not required to pay any additional fee for the purpose of getting the two licenses merged into a single license and, anything to the contrary, would be against the letter issued by the respondent.

12. It is the further submission of the learned senior counsel for the appellants/petitioners that vide NIA dated 25.2.2010, applications were invited for the auctioning of 3G and BWA spectrum. Reliance was placed on Clause 3.5 of the said NIA, wherein 'Spectrum Usage Charges' have been mentioned, wherein it is found that the spectrum usage charge shall be payable by the successful bidders, which is to be calculated as a percentage of the AGR and the said charge will be over and above the spectrum auction price and the applicable licence fees. In the above backdrop, it is submitted by the learned senior counsel, when a spectrum usage charge has been levied by the respondent coupled with the fact that vide letter dated 22.7.99, the respondent having mentioned that the licensee will be required to pay an entry fee and license fee as a percentage of AGR, the stand of the respondent that OTSC can be levied retrospectively does not have legs to stand.

13. It is the further submission of the learned senior counsel appearing for the appellants/petitioners that only in the year 2007, at or about the time of filing of the 2G Spectrum Scam cases before the Supreme Court, the issue of OTSC was raised for the first time by TRAI. TRAI had, suo motu, without any consultation with the service providers and in violation of the contractual understanding that the spectrum charges will be exclusively on revenue share basis, recommended imposition of additional acquisition fee, which is impermissible and against the terms of the contract. Learned senior counsel stressed that even if the recommendations of TRAI is being accepted by the Government, the said OTSC can only be imposed for future allocations beyond 10 Mhz. To substantiate the said submission, learned senior counsel placed reliance on the recommendations of TRAI, as found in Page-107 of the typed set in furtherance to the consideration of the proposal forwarded by DoT vide its letter dated 9.7.08, wherein TRAI has noted enhanced spectrum usage charge has already been implemented for 6.2 MHz and 5 MHz for GSM and CDMA licences and since higher levels of usage charges have already been agreed to and are being collected by the Government, charging OTSC for spectrum below 10 MHz may not be feasible.

14. Learned senior counsel also submitted that since inception of the licenses, charge towards spectrum usage has been charged for by DoT and being paid by the licensees in the form of spectrum usage charges under the terms of the licence agreement, which is binding on both the parties. That being the case, levy of OTSC constitutes a double levy by DoT, which is

impermissible in law. Reliance is placed upon the counter affidavit filed by the respondent to drive home the point that OTSC and spectrum usage charge are one and the same and that the appellants/petitioners are already paying spectrum usage charges and, therefore, charging OTSC is untenable.

15. It is further submitted by the learned senior counsel that when DoT itself has, by its letter dated 22.7.99, in clause (ii) has prescribed the entry fee and licence fee, which is a percentage share of the gross revenue and has further stated that the terms and conditions for the migration to NTP 1999 has to be accepted as a package in its entirety, it is not open to the respondents/DoT to levy OTSC, that too, belatedly, after a period of 13 years from the date of grant of the original license.

16. It is further submitted by the learned senior counsel for the appellants/petitioners that ACL and AL having acted upon the licence entered into between AL and ACL and DoT, more particularly in terms of the migration package offered and licence fee and spectrum charges based on the said licence and having organised their commercial operations accordingly, the arbitrary action of the respondent/DoT in levying OTSC detriment to the interests of the petitioners/appellants is against the well settled principles of Promissory Estoppel. In this regard, reliance was placed on the judgment of the Supreme Court in *Jai Narain Parasrampuriah - Vs - Pushpa Devi Saraf & Ors.* (2006 (7) SCC 756).

17. Learned senior counsel further placed reliance on the judgment of the Supreme Court in *Reliance Energy Ltd. - Vs - Maharashtra State Road Development Corporation Ltd.* (2007 (8) SCC 1) and *Vodafone International Holdings B.V. - Vs - Union of India & Anr.* (2012 (6) SCC 613), wherein the Supreme Court held that the rule of law and the heart of parliamentary democracy is 'legal certainty', as mandated by the Indian Constitution and the said concept is not alien to contractual matters.

18. Learned senior counsel further submitted that the levy of OTSC de hors the provisions of the license agreement, which is binding between the parties, is in no manner authorised by the provisions of Section 4 of the Telegraph Act and any levy against the said provisions would amount to undermining the sanctity of the contract entered into between the parties. It was submitted that any contract entered into in exercise of statutory powers constitutes a valid fetter on subsequent exercise of such powers as has been held by the Supreme Court in *Indian Aluminium Co. - Vs - Kerala State Electricity Board* (1975 (2) SCC 414).

19. It is the further submission of the learned senior

counsel for the appellants/petitioners that the impugned levy, being a compulsory exaction of money and not backed by any element of quid pro quo between the parties is clearly in the nature of levy of tax and the same sought to be effected by way of an executive action is against the mandate of Article 265 of the Constitution. Further, the said amendment of the license agreement, being not consensual and being unilateral is untenable and cannot be countenanced.

20. Learned senior counsel submitted that such arbitrary exercise of power jeopardizes the integrity of the contract. It was further contended that the provision of unilateral right to amend the terms has to be read in an implied term restricting exercise of such right so that that contract is not rendered unviable, which would not have been the intention of the parties. Reliance was placed on the decision of the High Court of Justice of England & Wales Queen's Bench Division, Commercial Court in *Esso Petroleum Co. Ltd. - Vs - David & Christine Addison & Ors.* (2003 EWHC 1730 (Comm)).

21. It was further submitted by the learned senior counsel that the term 'public interest', as found in Clause 14 (ii) of the License Agreement, being vague and having unduly wide import, has to be necessarily read in the context of the categories following suit, viz., 'proper conduct of telegraphs' and 'security consideration'. It is submitted by the learned senior counsel that neither of the categories are met in the impugned order and, therefore, a harmonious reading of clause 14 (ii) would not definitely bring in within its ambit levy of OTSC in public interest. Further, levy of OTSC would be more against the public interest, as the levy being to the tune of over Rs.1300 Crores, and in no manner envisaged in the license agreement, the service providers having not taken the same into consideration in their financial outlay, would only result in closure of the business of most of the existing operators, thereby destabilising the telecom sector, else, the same has to be passed on to the subscribers, leading to increase in the cost of service in the form of higher tariff and, therefore, would be very much against the avowed policy of the Government in promoting growth through affordable telecom service.

22. Without prejudice to the above contentions, it is further submitted that the rate of OTSC derived for the entire State of Tamil Nadu has been arbitrarily applied to compute OTSC for Chennai Area as well as RoTN Service Area and, thereby, the same overlaps each other creating unjust inflation in both the service areas.

23. Lastly, it is submitted by the learned senior counsel for the petitioners/appellants that the reliance placed by the respondents on the judgment of the Supreme Court in *Centre for*

Public Interest Litigation - Vs - Union of India (2012 (3) SCC 1) (for short '2G Spectrum case') is misplaced and not sustainable, as the said judgment deals with Telecom Service Providers, who were granted licence on or after 10.01.2008, more specifically the judgment dealt with 122 licences. It is submitted that the licenses of the appellants were issued in the year 1994 and 1998 (ACL and AL) respectively. Therefore, reliance placed on the abovesaid judgment for imposition of OTSC on the petitioners is arbitrary and against all the cannons of well established principles of law and the judgments of the Courts.

24. Learned senior counsel appearing for the petitioners placed reliance on the following decisions :-

- (i) M.S.Anirudhan - Vs - The Thomco's Bank Ltd. (1963 Supp. (1) SCR 746);
- (ii) Central Inland Water Transport Corporation - Vs - Brajo Nath Ganguly (1986 (3) SCC 156);
- (iii) Indian Aluminium Co. - Vs - Kerala State Electricity Board (1975 (2) SC 414;
- (iv) Mahabir Auto Stores - Vs - Indian Oil Corporation (1990 (3) SCC 752);
- (v) Biman Krishna Bose - Vs - United India Insurance co. Ltd. (2001 (6) SCC 477);
- (vi) Build India Construction System - Vs - Union of India (2002 (5) SCC 433);
- (vii) City Bank - Vs - Chartered Bank (2004 (1) SCC 12);
- (viii) Reliance Energy Ltd. - Vs - Maharashtra State Road Development Corporation Ltd. (2007 (8) SCC 1);
- (ix) BSNL - Vs - BPL Mobile Cellular Ltd. (2008 (13) SCC 597);
- (x) Global Energy Ltd. & Anr. - Vs - CERC (2009 (15) SCC 570);
- (xi) Centre for Public Interest Litigation - Vs - Union of India & Ors. (2012 (3) SCC 1);
- (xii) Vodafone International Holdings B.V. - Vs - Union of India & Ors. (2012 (6) SCC 613);
- (xiii) In re: Special Reference No.1 of 2012, Natural Resources Allocation (2012 (10) SCC 1);
- (xiv) Bharti Airtel - Vs - Union of India (2015 (12) SCC 1);
- (xv) Jai Narain Parasrampur - Vs - Pushpa Devi Saraf (2006 (7) SCC 756);
- (xvi) Matter of Cross Brown Co. (Nelson), 4 A.D. 2D 501 (N.Y. Appl. Div. 1957);
- (xvii) Esso Petroleum Company Ltd. - Vs - David Christine Addison & Ors. (2003 EWHC 1730);

CONTENTIONS ADVANCED IN W.P. NOS. 585 TO 588 OF 2013

25. Mr.Gopal Subramaniam, learned senior counsel, in respect

of the above batch of cases by which the petitioners have challenged the validity of proviso to Section 4 of the Telegraph Act, which confers unguided power to DoT to claim a share of revenue even in respect of non-telecom activities, submitted that while the facts, as narrated above, are common, submitted that the Supreme Court, while setting aside the order of the Tribunal, has decided the matter only with reference to the jurisdiction of the Tribunal to decide the validity of the conditions of license and the validity of the definition of 'Adjusted Gross Revenue' and has not gone into the merits of the matter.

26. It is the submission of the learned senior counsel that initially the petitions filed before TDSAT were allowed against which the Government preferred appeal to the Supreme Court. However, the Supreme Court, without going into the matter for the reason that fresh recommendations have been given by TRAI, dismissed the appeal with liberty to raise all contentions in the civil appeal before TDSAT. After hearing the matter, TDSAT, vide order dated 30.8.07 allowed the appeal against which the Government filed batch of Civil Appeals before the Supreme Court, which were allowed by the Supreme Court.

27. It is the further submission of the learned senior counsel for the petitioners that the scope of the appeal before the Supreme Court requires to be seen in the context of the questions of law formulated therein and the answers to the said issues by the Supreme Court. Learned Senior Counsel submitted that vide the said judgment, the Supreme Court has only decided on the jurisdiction of TRAI to decide upon the validity of the terms and conditions of the license and not the validity of the terms per se. The Supreme Court, vide the said judgment, held that TDSAT had no jurisdiction to decide upon the validity of the terms and conditions of license but only disputes with regard to the interpretation of such terms and, therefore, the said observations cannot be treated as final or binding.

28. It is further submitted by the learned senior counsel that the terms and conditions imposed by the State while parting with its exclusive privilege must be reasonable and rational. The State must act fairly and reasonably and cannot adopt a 'take it or leave it approach', which is an equitable relief enshrined under Article 14 of the Constitution. The State, under the guise of bargaining, cannot impose conditions, which are arbitrary and illegal and violates the right of the other party. Reliance was placed on the decision of the Supreme Court in Kerala Samsthana Chethu Thozhilali Union - Vs - State of Kerala (2006 (4) SCC 327).

29. It is further submitted by the learned senior counsel that the concept of quid pro quo is an essential ingredient even

in respect of fee being levied by the State, though being regulatory in nature, and not being compensatory, the fee levied must bear a reasonable co-relation to the license and must not be arbitrary or unreasonable. Reliance was placed on the decision of the Supreme Court in A.P. Paper Mills Ltd. - Vs - Government of A.P. (2000 (8) SCC 167).

30. It is the submission of the learned senior counsel that the issue would squarely fall within the scope of Article 19 (1) (g) of the Constitution. The activities that do not fall within the ambit of Article 19 (1) (g) have been enumerated by the Supreme Court in the case of Bombay - Vs - RMD Chamarbaugwala (1957 SCR 874), wherein gambling and trade in liquor were prohibited. Supreme Court, even in the matter of licensing liquor has held in State of Madhya Pradesh - Vs - Nandlal Jaiswal (1967 (1) SCR 1) that Article 14 would stand attracted. In the above backdrop of the binding precedents of the Supreme Court, the activity of telecom services carried on by the petitioner cannot be termed to be an obnoxious activity to be excluded the entitlement guaranteed under Article 19 (1) (g) of the Constitution.

31. It is the submission of the petitioners that for the grant of largessee by way of grant of telecom licenses, the licensor, viz., the State, could fix a price as it may deem fit, but the same can only be in relation to telecom activities/services and by no stretch of imagination could it be deemed to include any other activities, not related to telecom activities, that are being carried on by the service providers.

32. It is the submission of the learned senior counsel for the petitioners that the Government can only put reasonable restrictions in the levy of fee and any unreasonable restriction in violation of Article 19 (1) (g) of the Constitution in relation to the conditions of license, which is ultra vires Section 4 of the Telegraphy Act and the unbridled power granted to the Government under Section 4 of the Telegraph Act is definitely ultra vires Article 14 of the Constitution and on the principle of ubi jus ibi remedium, the petitioners are left open with a remedy to challenge the same before this Court, which is the appropriate forum for transgression of Article 14 and 19 (1) (g) of the Constitution.

33. It is further pointed out by the learned senior counsel for the petitioners that the Supreme Court granted time to the parties to approach the Tribunal and in pursuance thereto, the Tribunal has passed interlocutory order that the demands, original/revised shall not be enforced without the leave of the Tribunal. Learned senior counsel submits that the proceedings before the Tribunal is confined only in relation to the issue as to whether the demand raised by DoT is in consonance with the

license agreement and it is the contention of the petitioners that demand of revenue share on non-telecom activities are outside the purview of the licenses. It is submitted by the petitioners that inclusion of revenue earned from activities not related to telecom in the computation of AGR would be unconstitutional and, thereby, rendering the source of power under Section 4 of the Telegraph Act ultra vires the provisions of the Constitution.

34. In a nutshell, it is submitted by the learned senior counsel for the petitioners that the appropriate forum, being this Court, in relation to dealing with the vires of the Section 4 of the Act vis-a-vis Article 19 (1) (g), the petitioners have approached this Court by filing the present petitions. Though the petitions have been filed, it is submitted that till date no counter has been filed by the respondent denying the above averment and, considering the entire gamut of facts, learned single Judge has granted stay of the order. It is further submitted that even as on date, no counter has been filed by the respondent disputing the above contentions advanced by the petitioners. In the above backdrop, it is prayed that adverse inference has to be drawn against the respondent.

35. Learned Senior Counsel for the petitioners placed reliance on the following judgments :-

(i) Dwarka Prasad Laxmi Narain - Vs - State of Uttar Pradesh & Ors. (AIR 1954 SC 224);

(ii) State of Bihar - Vs - Mangal Sao (AIR 1963 SC 445);

(iii) Mahabir Prasad Santosh Kumar - Vs - State of U.P. (1970 (1) SCC 764);

(iv) Godhra Electricity Co. & Anr. - Vs - State of Gujarat & Anr. (1975 (1) SCC 199);

(v) Indian Aluminium Co. - Vs - Kerala State Electricity Board (1975 (2) SCC 414);

(vi) Tata Cellular - Vs - Union of India (1994 (6) SCC 651);

(vii) Delhi Science Forum & Ors. - Vs - Union of India (1996 (2) SCC 405);

(viii) A.P. Paper Mills Ltd. - Vs - Government of Andhra Pradesh (2000 (8) SCC 167);

(ix) Cellular Operators Association of India & Ors. - Vs - Union of India & Ors. (2003 (3) SCC 186);

(x) Kerala Samsthana Chethu Thozhilai Union - Vs - State of Kerala (2006 (4) SCC 327);

(xi) Hotel & Restaurant Association & anr. - Vs - Star India (P) Ltd. (2006 (13) SCC 753);

(xii) BSNL - Vs - BPL Mobile Cellular Ltd. (2008 (13) SCC 597);

(xiii) Union of India & anr. - Vs - Association of Unified Telecom Service Providers of India & Ors. (2011

(10) SCC 543);

(xiv) Centre for Public Interest Litigation - Vs - Union of India & Ors. (2012 (3) SCC 1);

(xv) Avishek Goenka - Vs - Union of India (2012 (5) SCC 275);

(xvi) Subramanian Swamy - Vs - A.Raja (2012 (9) SCC 257);

(xvii) Bharat Sanchar Nigam Ltd. - Vs - Telecom Regulatory Authority of India (2014 (3) SCC 222);

(xviii) Association of Unified Telecom Service Providers of India & Ors. - Vs - Union of India & Ors. (2014 (6) SCC 110); and

(xix) Bharti Airtel Ltd. - Vs - Union of India (2015 SCC Online SC 487 :: CA No.2803/2014).

#### CONTENTIONS ADVANCED IN W.A. NOS. 1454 & 1455 OF 2014

36. Mr.Gopal Subramaniam, learned senior counsel appearing for the appellants, while submitted that the facts, as narrated above, are not in dispute, submits that the learned single Judge had directed the appellants herein to comply with the conditions as imposed in the order of the respondents dated 3.10.2013, which is the subject matter of challenge in one of the batch of writ petitions above and wherein order of stay has been granted, is wholly unreasonable, arbitrary and ultra vires the terms of NIA dated 25.2.2010 and circular dated 15.9.05 issued by the respondent and is also in blatant violation of the interim order of stay granted by this Court in the above writ petitions.

37. It is the contention of the learned senior counsel for the appellants that while the order dated 3.10.13 demanding payment of charges and recovery of the same having been stayed by this Court, the order passed by the learned single Judge in directing the appellants to pay the amount demanded vide the above order is per se impermissible and against the rule of law.

38. It is further submitted by the learned senior counsel for the appellants that when the coercive demand and recovery has been stayed by this Court, the finding of the learned single Judge that stay granted by this Court against the coercive demand and recovery stands on a different footing from the imposition of a condition for renewal or transfer of license is per se unfathomable when the condition has been put forth by DoT itself that group entity holding licenses should be merged into one entity for the purpose for renewal of license.

39. Learned senior counsel for the appellants further submitted that pursuant to the auction notice for 3G and BWA dated 25.2.2010, merger was made mandatory insofar as successful group bidding entities were concerned and only in terms of the said condition imposed by DoT, the appellants went ahead with the scheme of amalgamation of ACL with AL. In such

circumstances, it cannot be said that the renewal or transfer of license was at the instance of the appellants as has been held by the learned single Judge and, therefore, no condition can be imposed by DoT for granting approval for merger and subsequent grant of license for the merged area. When merger has been made mandatory by the respondent/DoT, any tags/conditions attached for grant of approval of the merger would be bad in law and is liable to be struck down.

40. It is further submitted on behalf of the appellants that on account of the condition in the NIA regarding merger, which is in consonance with the circular dated 15.9.05, merger was contemplated by DoT itself in public interest and in connection therewith the appellants have taken steps for the merger of ACL with AL and all along, the DoT was kept in the loop about the steps being taken by the appellants for merger, it cannot be said that for grant of approval, conditions imposed by DoT ought to be complied with. Learned single Judge has not appreciated this aspect of the matter while dealing with the writ petitions.

41. It is the further submission of the learned senior counsel for the appellants that when condition 9 of the license agreement postulates prior application for merger being sanctioned by DoT on a valid scheme being presented before the High Court and the same have to be sanctioned and approved by the High Court and the appellants having scrupulously followed the condition to the letter and acted in a dutiful manner in fulfilment of the conditions of license, the said fact has not been appreciated by the learned single Judge in proper perspective.

42. Learned senior counsel appearing for the appellants further submitted that pursuant to the approval of scheme of amalgamation of ACL with AL in terms of clause 9 of the conditions of license, the only formality remaining was the furnishing of suitable certificate of compliance in accordance with condition 1.4 (ii) and 6.3(iii), which, as required by DoT vide their letter dated 28.4.2011, has been furnished by the appellants vide letter of even date. This clearly shows that as required by DoT, only certain formal compliances were left to be completed, fulfillment of which would entitle grant of approval of merger by DoT, which they failed to grant, thereby allowing AL and ACL to operate the telecommunication services in accordance with the 2G as well as 3G and BWA licenses and, thereby, violation of the condition has only been on the part of DoT and not on the part of the appellants.

43. Learned senior counsel further contended that inspite of the appellants following the conditions as laid down in NIA, approval was not granted for merger and inspite of repeated reminders, DoT did not pass orders on the merger of licenses

and, therefore, the appellants were constrained to move before the TDSAT for appropriate relief. Though the appellants filed petition before the TDSAT, no counter was filed in the said petition. However, curiously, a show cause notice was issued alleging violation of clause 9 and Condition 15.7 of the License Agreement. However, TDSAT disposed of the appellants petition with directions to the appellants to file reply to the show cause notice while further directing DoT to dispose of the said proceeding and also to pass order on merger of licenses within three weeks time from the date of passing of the order on the show cause reply. Learned senior counsel laid much emphasis on the findings of TDSAT in the interim order, where TDSAT specifically held that the appellants did not, prima facie, commit any illegality and that they had not violated any of the guidelines relating to merger. Further TDSAT also observed that the parties were governed by NIA dated 25.2.2010 and further has stated that AL and ACL have complied with the guidelines prescribed in NIA. In the above context, it is the contention of the learned senior counsel for the appellants that though TDSAT has held that the appellants herein have not committed any illegality nor violated the merger guidelines and have complied with all the formalities as laid down in the NIA dated 25.2.2010, wherein merger was one of the condition for participating in the 3G and BWA auction, the stand of DoT that the scheme of amalgamation filed by the appellants before this Court for merger, without its approval, is a violation of condition of license cannot hold water. When merger is condition for participating in the 3G and BWA auction, which condition has been laid down by the DoT itself, and the appellants, in the course of fulfilling its part of NIA for the purpose of participating in the auction, have moved this Court with a scheme of amalgamation and have further kept DoT in the loop by their pre-intimation letter dated 15.7.2010 informing DoT about the proposed amalgamation, the stand of the DoT that no prior approval was taken before the filing of the scheme of amalgamation before this Court is in violation of the terms of the license cannot be sustained.

44. Learned senior counsel further contended that while the circular dated 15.9.05 clearly establishes that the Chennai Area and RoTN Area were merged into one area, option was offered to the service providers for the merger of licenses unconditionally without any further obligation being imposed including payment of any additional entry fee. The above circular reveals that not only the rights of DoT were protected, but the rights of the licensees were also protected by the said circular dated 15.9.05. In the above backdrop, it is the contention of the learned counsel that when NIA mandates that the successful group bidding entities shall furnish an undertaking for merger of their UAS/CMTS licenses of Chennai and RoTN Area, which is implicit from the circular dated 15.9.05, which clearly shows

that it is the proposal mooted out by DoT and, therefore, it is the rule of law that no new conditions can be imposed while granting merger of the licenses.

45. It is the submission of the learned senior counsel that only in pursuant to the above proposals of DoT vide their circular dated 15.9.05 and NIA dated 25.2.2010, the appellants, after requisite intimation to DoT have proceeded with the scheme of amalgamation and for which they sought the approval of DoT and also subsequent of merger, any condition imposed for the purpose of grant of approval, which is automatic, is per se bad in law and is liable to be struck down.

46. It is the further submission of the learned senior counsel for the appellants that in contravention of their own conditions, which the appellants have tried to fulfill, DoT having imposed a penalty of Rs.10 Crores, which the appellants have honoured, though they are not at fault, the further onerous conditions put forth by DoT vide their impugned order dated 23.1.14, much against the circular dated 15.9.05 and NIA dated 25.2.2010 is not enforceable.

47. It is submitted by the learned senior counsel for the appellants that without following the directions issued by TDSAT dated 31.10.2012, wherein direction was given to pass order on the merger of licenses within three weeks from the date of passing order in the show cause notice, DoT, for reasons best known to it, has not passed any order inspite of numerous reminders by the appellants, which only shows the callous attitude of DoT to comply with the order passed by TDSAT. However, more curiously, for merging the licenses, which is a condition as imposed by DoT itself vide the circular dated 15.9.05 and NIA dated 25.2.2010, onerous conditions have been imposed by DoT and calling upon the appellants to give an undertaking, which is unsustainable in law.

48. It is the submission of the learned senior counsel that the demand of OTSC having been stayed by this Court vide its order dated 22.06.2012, the action of DoT to demand the said amount by means of an obtaining an undertaking in a matter pertaining to grant of approval of merger, would go against the very spirit of the stay order and would tend to make the order of this Court a nullity, which is impermissible in law and against the judicial dicta laid down by Courts in a catena of cases.

49. It is the further submission of the learned senior counsel that it is well settled law that what cannot be done directly is not permitted to be done obliquely. It is contended that what is prohibited by law cannot be legally effected by an indirect and circuitous method and it violates the principle of

"quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud". It is the law of this land and no authority can be permitted to evade the law by shift or contrivance. Reliance in this regard is placed on the decisions of the Supreme Court in Jagir Singh - Vs - Ranbir Singh & Anr. (AIR 1979 SC 381) and M.C.Mehta - Vs - Kamal Nath & Ors. (AIR 2000 SC 1997). It is the submission of the learned senior counsel that inspite of the stay order passed by this Court against the levy of OTSC, DoT is trying to nullify the order by forcing the appellants to give an undertaking, an undertaking, which in effect would make the very writ petitions challenging OTSC infructuous. It is the submission of the learned senior counsel that the very purpose of the grant of the said stay order was to put a stop to the coercive action that might follow, if not for the stay. By the said undertaking, which is sought to be obtained from the appellant, the Government, by means of an executive order is trying to undermine the judicial order, which is unheard of in the constitutional setup.

50. It is submitted by the learned senior counsel that associatively, this Court has a necessity to consider whether the Government, through an executive order can undermine the judicial order, which has been passed by this Court and would that not amount to contempt of court. It is the further submission of the learned senior counsel for the appellant that the incidental core issue that arises is in a constitutional set up, can the executive Government act in derogation of the judicial proceedings. The act of the Government in trying to subvert the orders of this Court is a contemptuous act and needs to be deprecated for the reason that the last resort in a democratic country is the Judiciary and if the orders of the judiciary are sought to be undermined by such executive orders, the rule of law needs to be upheld by issuance of suitable directions to the Government.

51. Incidentally, learned senior counsel also brought to the notice of this Court a letter dated 23.4.2014 addressed by DoT to Dishnet Wireless Ltd., a subsidiary of the appellant, wherein DoT has clarified that the dues/demands raised by the licensor (DOT), which have been stayed by the Tribunals/Courts of competent jurisdiction in India will not be counted to the extent of such stay for the purpose of encashing PBG/FBG on account of non-payment of the raised dues/demands. In the context of the above letter of DoT, learned senior counsel submits that the appellants also have the benefit of the order of stay passed by this Court insofar as it relates to the demands/dues raised by DoT. Such being the position, what is sauce for the goods should be sauce for the gander as well and similar treatment is to be meted out to the appellants as well. In the above circumstances, when DoT has issued such a communication to Dishnet Wireless Ltd., clarifying that they

will not be enforcing the dues/demands which are under orders of stay granted by the Tribunals/Courts, the demand raised on the appellants, having been stayed by this Court, should also not be enforced and, accordingly, the approval for merger as sought for along with the merger of licenses should be granted without insisting on any undertaking insofar as the above demand is concerned.

52. Learned senior counsel further assailed the order of the learned single Judge by submitting that though the prayer as made by the appellants/petitioners therein was a direction to the respondent to grant an unconditional formal approval to the petitioners to merge their Chennai and RoTN licenses for the merged service area, i.e., Tamil Nadu Service Area, learned single Judge has gone beyond the scope of the writ petition and has given a direction to the petitioners/appellants herein to comply with the conditions imposed in the order of the respondent dated 3.10.2013. By the said order, learned single Judge had, technically, vacated all the interim orders granted by this Court, though the said matters in which interim orders were granted were not on the Board of the learned single Judge. This, according to the learned senior counsel, is an overreach of judicial decorum, which is not in conformity with the well established precedents of judicial ethics.

53. It is further submitted by the learned senior counsel for the appellants that the finding of the learned single Judge is misconceived. In that, the learned single Judge has held that the interim order passed only injuncts the DoT from taking any coercive steps for recovery, but has further held that coercive steps for recovery stands on a different footing from the imposition of a condition for renewal or transfer of a license. It is the submission of the learned senior counsel that once an undertaking is given, irrespective of any stay order, if any amount is demanded from the appellants, the appellants are bound to pay the said dues/demand consequent upon the undertaking given by them. Refusal to pay the said amount would amount to violation of the terms of the license agreement, which would render the license susceptible for termination. Therefore, it cannot be said that the injunction and undertaking stands on different footings so as not to direct the appellants herein to execute the undertaking as sought for by DoT.

54. Learned senior counsel further contended that the decision of the Apex Court in Centre for Public Interest Litigation & Ors. - Vs - Union of India (2012 (3) SCC 1) which was relied upon by DoT before the learned single Judge has no relevance to the case on hand as the licenses with which the Apex Court was concerned relates to the period between 2007 and 2008, whereas the licenses of the appellants were granted as back as in the year 1994. The charges mandated by the Supreme

Court to be collected only pertains to licensees, who are to be granted fresh licenses and not to the licensees, who were granted licenses way back in the year 1994 and 1998. It is further pointed out by the learned senior counsel for the appellants that in para-72 of the above judgment, the Supreme Court has observed that based on the suggestions given by the one-man Committee, the Government of India has taken a decision to segregate spectrum from licence and allot the same by auction in future. Such being the stand of the Government, the imposition of OTSC based on which the present undertaking is sought to be taken from the appellants is not sustainable.

55. Learned senior counsel appearing for the appellants submitted that the reliance placed on the decisions in S.M.Amarchand Sowcar's case (1999 (2) LW 47) and Vishnuvardhan Paper Mills case (W.P. (MD) No.12507 of 2011 dated 23.11.2011) are not applicable to the facts of the present case. It is contended that those cases relate to matters arising out of the Electricity Act, which is a self-contained statute, wherein powers have been vested with the authority to disconnect any electricity connection relating to a single individual/entity in the event of the individual/entity defaulting payment for any other connection. However, the present case falls under the law of contracts, whereby lawfully entered contract is being bent to suit the needs of the licensor, which is per se impermissible and, therefore, the above decisions relied on by the learned single Judge will not in any way advance the case of DoT. In any view of the matter, the reliance placed on the above decision is totally misconceived and is totally not relatable to the facts of the present case.

56. It is further contended on behalf of the appellants that the essence of the circular dated 15.9.05 having formed part of the NIA dated 25.2.2010 and having been expressly understood and agreed between the appellants and DoT, it is now not open to the DoT to impose the impugned conditions, which were not part of the terms of the NIA dated 25.2.2010 coupled with the circular dated 15.9.05. Any unilateral alteration of the license agreement, without the consonance of the licensee by imposing conditions, which are alien and that too with retrospective effect and outside the scope of NIA and the circular dated 15.9.05 is impermissible. Further, trying to wriggle out from under by adopting tactics, which are against the rule of law, by imposing conditions for merger, which was mandatory under the NIA, the action of DoT is deprecable and the said impugned order imposing conditions, which are against the judicial orders, is liable to be set aside. In this regard, reliance is placed on the decisions of the Supreme Court in Power Corporation Ltd. - Vs - Sant Steel & Alloys (2008 (2) SCC 777) and Sunil Pannalal Banthia - Vs - City and Industrial Corporation of Maharashtra (2007 (10) SCC 674).

57. It is further submitted by the appellants that though crucifying conditions have been imposed on the appellants vide the impugned order, DoT has not imposed any such conditions on similar operators for the merger of their two licenses and in effect, DoT has violated the doctrine of 'level playing field' as enshrined under Articles 14 and 19 (1) (g) of the Constitution. To buttress the above argument, learned senior counsel placed reliance upon the decision of the Apex Court in Reliance Energy Ltd. - Vs - Maharashtra State Road Development Corporation Ltd. (2007 (8) SCC 1).

58. It is further submitted on behalf of the appellants that any action of the State must be free from the vice of arbitrariness, which is the crux of Article 14 of the Constitution and it is therefore the duty of every government instrumentality/public authority to act fairly and reasonably and exercise of power must not be in an arbitrary, unjust or unfair manner and should be in consonance with the Article 14 of the Constitution. It is further submitted that non-arbitrariness is a significant facet of Article 14 and, therefore, it is necessary for DoT to give due weightage to the reasonable and legitimate expectations of the appellants as any unfair action would only amount to an abuse of power. In this regard, reliance is placed on the decision of the Apex Court in Ramana Dayaram Shetty - Vs - International Airport Authority of India & Ors. (1979 (3) SCC 489).

59. Learned senior counsel for the appellants submitted that on the merger of the two licenses, as per the condition in the license agreement, the effective date would be the later of the dates as mentioned in the license, which would practically be 30.12.2018 as the license for the RoTN Area was dated 22.5.98 and effective date being 31.12.1998. In such a case, on the merger, the license would expire only after 20 years terms on 30.12.2018. The rights accrued in favour of AL and ACL by virtue of the terms of the existing licenses read with the terms of NIA dated 25.2.2010 and the circular dated 15.9.05 and the said accrued right cannot be taken away by DoT by imposing additional onerous conditions, which abrogates and curtails the right of the appellant. The non-grant of the approval, which is formal in nature, as is evident from NIA dated 25.2.2010 and the circular dated 15.9.05, infringes on the vested right of the appellants to exploit the 3G and BWA spectrum, which right accrued on their paying huge sums of money in terms of the licence agreement.

60. In fine, it is the submission of the learned senior counsel for the appellants that what the respondent/DoT could not do directly, it is trying to do indirectly and trying to defeat the rights of the appellants by making the judicial order

of stay obtained by the appellants a nullity in making the demand for the payment of the dues, by dangling the Damocles sword on its head in the form of approval for merger, would per se amount to an contemptuous act. Such a condition for merger, by no stretch of imagination, could be termed to be reasonable and lawful, as it is against the very spirit of the license agreement and it is against the well accepted rule of law, which falls way short of unreasonableness. The act of DoT in trying to enforce the demand at the time of merger, which is also a mandatory condition imposed by DoT itself, shows the arbitrary nature of its act, which requires the powerful claws of the judiciary to cut across the vicious web in order to protect and preserve the rights accrued on the appellants as enshrined in the Constitution.

61. In support of the above contentions, learned senior counsel for the appellants placed reliance on the following decisions :-

- (i) Centre for Public Interest Litigation - Vs - Union of India (2012 (3) SCC 1);
- (ii) State of Tamil Nadu - Vs - K.Shyam Sunder (2011 (8) SCC 737);
- (iii) Assistant Commissioner of Income Tax - Vs - Hotel Blue Moon (2010 (3) SCC 259);
- (iv) State of Kerala - Vs - Kurian Abraham (2008 (3) SCC 508);
- (v) Commissioner of Central Excise, Mumbai - Vs - Rajpurohit GMP India Ltd. (2008 (231) ELT 577 (SC));
- (vi) Shankara Co-op. Housing Society Ltd. - Vs - M.Prabhakar & Ors. (2011 (5) SCC 607);
- (vii) India Household & Healthcare Ltd. - Vs - LG Household & Healthcare Ltd. (2007 (5) SCC 510);
- (viii) K.M.Nanavati - Vs - State of Bombay (AIR 1961 SC 112);
- (ix) The Aligarh Municipal Board & Ors. - Vs - Ekka Tonga Mazdoor Union & Ors. (1970 (3) SCC 98);
- (x) Mottur Hajee Abdul Rahman & Co. - Vs - Deputy Commercial Tax Officer, Vaniyambadi (1969 (2) MLJ 168);
- (xi) The Chief Engineer (Distribution), Tamil Nadu Electricity Board - Vs - M/s.Best Cotton Mills (W.A. No.1913 of 2011 & M.P. No.1 of 2011);
- (xii) Best Cotton Mills - Vs - The Chief Engineer (Distribution), Tamil Nadu Electricity Board (AIR 2013 Mad 8);
- (xiii) A.T.Kearney India Pvt. Ltd. - Vs - Income Tax Officer (W.P. (C) No.1937/2014);
- (xiv) Hutchison Telecom East Ltd. - Vs - Alapan Bandyopadhyay & Anr. (2009 SCC Online Cal 2002 - W.P. No.183/2003);
- (xv) Kishan R. Bhatijha & anr. - Vs - The Deputy Director, Enforcement Directorate, Govt. of India &

Anr. (1995 (2) CTC 230);  
(xvi) Delhi Development Authority - Vs - Skipper Construction Co. & Anr. (1996 (4) SCC 622);  
(xvii) All Bengal Excise Licensees' Association - Vs - Raghabendra Singh (2007 (11) SCC 374);  
(xviii) Anil Ratan Sarkar & Ors. - Vs - Hirak Ghosh & Ors. (2002 (4) SCC 21);  
(xix) Manohar Lal - Vs - Ugrasen (2010 (11) SCC 557);  
(xx) Surjit Singh & Ors. - Vs - Harbans Singh & Ors. (1995 (6) SCC 50);  
(xxi) Ashwapati - Vs - State of U.P. (2014 SCC Online All 5003 - Writ © No.62617 of 2009);  
(xxii) State of Bihar - Vs - Rani Sonabati Kumar (AIR 1961 SC 221);  
(xxiii) Hoshiar Singh & anr. - Vs - Gurbachan Singh & Ors. (AIR 1962 SC 1089);  
(xxiv) Nalla Senapathi Sarkari Manradia - Vs - Sri Ambal Mills (P) Ltd. (AIR 1966 Mad 53);  
(xxv) Satyabrata Biswas & Ors. - Vs - Kalyan Kumar Kisku & Ors. (1994 (2) SCC 266);  
(xxvi) Mulraj - Vs - Murti Raghonathji Maharaj (AIR 1967 SC 1386);  
(xxvii) Vidya Charan Shukla - Vs - Tamil Nadu Olympic Association (AIR 1991 Mad 323);  
(xxviii) All India Regional Rural Bank Officers Federation & Ors. - Vs - Govt. of India & Ors. (2002 (3) SCC 554);  
(xxix) Advocate General, State of Bihar - Vs - Madhya Pradesh Khair Industries & Anr. (1980 (3) SCC 311);  
(xxx) Ravi S.Naik - Vs - Union of India & Ors. (1994 Supp. (2) SCC 641);  
(xxxi) Tayabbhai M.Bagasarwalla & anr. - Vs - Hind Rubber Industries Pvt. Ltd. & Ors. (1997 (3) SCC 443);  
(xxxii) Rama Narang - Vs - Ramesh Narang & Anr. (2006 (11) SCC 114);  
(xxxiii) Kapildeo Prasad Sah & Ors. - Vs - State of Bihar & Ors. (1999 (7) SCC 569);  
(xxxiv) Gurunath Manohar Pavaskar - Vs - Nagesh Siddappa Navalgund (2007 (13) SCC 565);  
(xxxv) Bunna Prasad & Ors. - Vs - State of U.P. & anr. (AIR 1968 SC 1348);  
(xxxvi) Ramana Dayaram Shetty - Vs - International Airport Authority of India & Ors. (1979 (3) SCC 489);  
(xxxvii) U.P. Power Corporation Ltd. - Vs - Sant Steel & Alloys (2008 (2) SCC 777);  
(xxxviii) Sunil Pannalal Banthia - Vs - City & Industrial Corporation of Maharashtra (2007 (10) SCC 674);  
(xxxix) Motilal Padampat Sugar Mills - Vs - State of Uttar Pradesh (1979 (2) SCC 409);  
(xl) Express Newspaper Pvt. Ltd. - Vs - Union of

India (1986 (1) SCC 133);

(xli) Y.S. Vivekanand Reddy - Vs - Government of Andhra Pradesh (1996 (1) Andh LT 760 FB);

(xlii) Avishek Goenka - Vs - Union of India & Anr. (2012 (5) SCC 275);

(xliii) Reliance Energy Ltd. - Vs - Maharashtra State Road Development Corporation Ltd. (2007 (8) SCC 1);

(xliv) Entertainment Network (India) Ltd. - Vs - Super Cassette Industries Ltd. (2008 (13) SCC 30);

(xlv) Tamil Nadu Generation & Energy - Vs - Sevorit Ltd. (K.A. (MD) No.246 of 2013 & M.P. No.1 of 2012); and

(xlvi) The Chairman, Tamil Nadu Generation & Distribution Corporation Ltd. - Vs - T.T. Ltd. (W.A. No.1652 & 1653 of 2013);

62. Mr. G.Rajagopalan, learned Additional Solicitor General appearing for the respondent/Dot, at the threshold, submitted that the writ petitions in W.P. Nos.9220 and 9221 of 2014 itself were not maintainable, so also the writ appeals which is an off-shoot of the writ petitions. It is the contention of the learned Addl. Solicitor General that Section 14 (a) (i) of the Telecom Regulatory Authority of India Act, 1997 (for short 'TRAI Act') prescribes that in respect of any dispute arising between a licensor and a licensee the same shall be adjudicated upon by the TDSAT. Such being the position, it is the submission of the learned Addl. Solicitor General that without availing the remedy before TDSAT, the petitioners/appellants have approached this Court under Article 226. Further, as against any order passed by TDSAT, the petitioners/appellants have a right of appeal to the Supreme Court under Section 18 of the TRAI Act. Without exhausting the remedy, the petitioners/appellants having approached this Court under Article 226 of the Constitution, the writ petitions and the consequent writ appeals are not maintainable. In this regard, reliance has been placed on the decision of the Supreme Court in Association of Unified Telecom Service Providers of India case (supra) to submit that license having been granted to the licensee, it is the Tribunal, which has to adjudicate the dispute between the licensor and a licensee with regard to the interpretation of the terms and conditions of the license.

63. It is submitted by the learned Addl. Solicitor General that the above being the position of law, though the learned single Judge has held that the petitioners have an alternative remedy to approach the TDSAT, however, erroneously held that since this Court is seized of the matter, it is not possible to relegate the petitioners to the TDSAT. This, according to the learned Addl. Solicitor General is an erroneous finding and the learned single Judge should have directed the petitioners to approach TDSAT and ventilate all their grievances. Learned

Addl. Solicitor General submitted that the efficacious alternative remedy being available to the petitioners/appellants before the TDSAT, this Court should relegate the petitioners/appellants to approach the TDSAT by holding that the petitions and the consequent appeals are not maintainable.

64. On the legal provisions advanced on behalf of the appellants, learned Addl. Solicitor General appearing for DoT submitted that Section 4 (1) of the Telegraph Act, the constitutional validity of which has been upheld by the Supreme Court, provides exclusive privilege to the Central Government for the establishment, maintaining and working of telegraphs. Proviso to Section 4 (1) empowers the Central Government to grant of licence on such conditions and in consideration of such payments as it thinks fit to any person to establish, maintain or work a telegraph within the Indian dominion. In pursuant to the power conferred by Section 4 (1) of the Telegraph Act, the Central Government has granted license to the appellants herein for establishment of telecom activities on the conditions stipulated in the license.

65. It is further submitted by the learned Addl. Solicitor General that it is only the Central Government which has exclusive privilege over the establishment and maintenance of telegraphs and no one else has authority over it. Proviso to Section 4 (1) of the Telegraph Act further empowers the Central Government to part with the privilege on receipt of such payments as it thinks fit. By virtue of the said power, DoT had entered into license agreements with the appellants and granted them license on certain terms and conditions.

66. Learned Addl. Solicitor General placed reliance on 13 (ii) of the License Agreement dated 30.11.94 entered into with the licensee, wherein the authority has reserved the right to modify at any time the terms and conditions of licence covered under Schedules 'A', 'B', 'C' and 'D' if in the opinion of the authority it is necessary or expedient to do so in the interests of the general public or for the proper conduct of telegraphs or on security consideration. On the basis of the said license, ACL and AL were granted licenses during 1994 and 1998, initially for a period of 10 years on payment of licence fee and entry fee. The licensees, by paying the fee as contemplated in the license agreement, were granted license agreements.

67. After execution of the license agreements, NTP 1999 was introduced which provided for a migration package, wherein the licensees were to pay a one time entry fee and license fee as percentage share of gross revenue and on the licensees agreeing for the migration, the period of license was extended to 20 years from the effective date of license agreement. It is contended by the learned Addl. Solicitor General that by

invocation of power Clause 13 (ii) of the license agreement, the said migration package was arrived at to which the appellants had no quarrel and had accepted the same. Having accepted the same, now it is not open to them to contend that DoT cannot levy OTSC by invocation of the abovesaid clause 13 (ii) of the license agreement. It is not permissible for the appellants to blow hot and cold over the said license agreement to suit their needs.

68. It is contended by the learned Addl Solicitor General that as early as 2008, Union of India was in consultation with TRAI regarding collection of OTSC for those licensees, who are holding spectrum above 6.2 MHz. It is submitted that TRAI had also in principle proposed levy of OTSC, which was accepted by DoT. Further, pursuant to the judgment of the Supreme Court in the 2G Spectrum case (2012 (3) SCC 1), wherein the Supreme Court has held that spectrum is a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation and which has high economic value on account of the demand and also in view of the tremendous growth in the telecom sector and, therefore, adequate compensation should be made for the transfer of the resource to the private domain. Keeping the guidelines issued by the Supreme Court above in mind and also on the basis of the consultation between DoT and TRAI, DoT had decided to issue demand for OTSC by invoking Clause 13 (ii) of the License Agreement and, therefore, it is not open to the appellants to contend that since OTSC has not been provided for in the license agreement, DoT is not empowered to collect OTSC.

69. It is submitted by the learned Addl. Solicitor General that based on the Supreme Court Judgment, OTSC was sought to be levied and it was decided to collect the same retrospectively in respect of those holding spectrum on and over 6.2 MHz from 1.7.08. The respondents, being licensees, have no fundamental right to deal with the spectrum and it is the exclusive privilege of the Central Government and in public interest, if the Central Government thought it fit to levy OTSC, the appellants cannot have any quarrel over the same.

70. It is further submitted that as early as on 29.1.01, wherein amendment was made to the license agreement on the acceptance of the migration package by the licensees, license fee as a percentage of the share of gross revenue was levied and in the said amendment, clause (4) stipulated that the other terms and conditions of the license agreement would remain unchanged and this was accepted by the licensees. In such a backdrop, it is submitted by the learned Addl. Solicitor General that Clause 13 (ii) of the license agreement dated 30.11.1994 prevails by which unbridled powers have been vested with the Central Government to modify any terms and conditions of the

license agreement.

71. Learned Addl. Solicitor General, in fine, submitted that by virtue of the powers vested under Section 4 (1) of the Telegraph Act coupled with Clause 13 (ii) of the License Agreement dated 30.11.1994, the Central Government having decided to levy OTSC from the licensees holding over and above 6.2 MHz of spectrum with retrospective effect from 1.7.08 vide the impugned order dated 23.01.2014, the grievance expressed by the licensee that DoT cannot levy OTSC is unsustainable.

72. Learned Addl. Solicitor General submitted that demand of OTSC was made in terms of Clause 13 (ii) of the License Agreement in public interest. It is the submission on behalf of DoT that on the basis of the decision and advice of the Supreme Court in the 2G Spectrum case (supra), DoT, in consultation with TRAI, had levied OTSC, more specifically on account of the fact that the spectrum was a rare, finite and valuable commodity and that it is the duty of the Central Government not to while away the resources, which are for the public at large. Therefore, the Central Government thought it fit to impose the levy, which would in turn be beneficial for the public at large, more so, the resource has to be used for the welfare of the public. It is only through such levy, welfare of the people can be taken care of by the use of natural resources. Therefore, it cannot be said that the levy of OTSC is against public policy and interest and not in consonance with the decision of the Supreme Court in the 2G Spectrum case (supra).

73. It is the submission of the learned Addl. Solicitor General since 1994, i.e., the date of entering into the license agreement, the service providers have been paying only license fee and no other charges were collected, which was amended vide NTP 1999 and the service providers were required to pay entry fee and licence fee, which would be a percentage of the gross revenue, which condition has been accepted by the appellants when the migration package was contemplated. No other fee was charged until the time the Supreme Court directed collection of charges for the allotment of spectrum. Further, based on the consultation with TRAI, OTSC was levied in respect of the various bands of spectrum from various effective dates and, therefore, it cannot be said that there is violation of Article 14, in that charges have not been levied for spectrum bands. The only spectrum band, which was left out of OTSC was the 4.4 MHz band. Therefore, the contention of the appellants that OTSC cannot be levied, more so, from a retrospective date, is not sustainable and non-levy of the same would be against the judgment of the Supreme Court in the 2G Spectrum case (supra). On the question of retrospective levy, learned Addl. Solicitor General placed reliance on the judgment of the Supreme Court in Bharti Airtel Ltd. - Vs - Union of India (2015 (12) SCC 1).

74. Learned Addl. Solicitor General, on the contention of the appellants that DoT cannot enforce revenue sharing on activities of the appellants, insofar as it relates to non-telecom activities, submitted that vide NTP 1999, migration package was offered to the licensees wherein the license period was extended from 10 years to 20 years from the effective date of the licence on the condition and the license fee payable will be a percentage on the Adjusted Gross Revenue of the service provider. The appellants accepted for migration to the revenue share regime. Once the appellants have accepted the migration package and have opted for the revenue share on the adjusted gross revenue, now it is not open for the appellants to contend that DoT is not entitled for the prescribed percentage of share in the revenue on the basis of some of the activities performed by the appellants. It is contended by the learned Addl. Solicitor General that the definition of "Adjusted Gross Revenue" has been defined in amendment to the license agreement dated 25.9.01 at clause 2, wherein the gross revenue was provided to include installation charges, late fees, sale proceeds of handsets (or any other terminal equipment, etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue without any set off for related item of expense, subject to exclusions as defined under clause 2.2 of the said amendment. The appellants, being signatories to the agreement, cannot now come out and say that DoT is not entitled to have share in the gross revenue of the appellants.

75. Insofar as the contention of the appellants that merger of the two licenses into one license is a mandatory condition imposed by DoT vide its circular dated 15.9.05 and NIA dated 25.2.2010 and, therefore, approval is automatic and for grant of the said approval, DoT cannot impose onerous conditions, which is against the circular and NIA is concerned, it is the submission of the learned Addl. Solicitor General that for certain irregularities committed by the appellants, one of which being that the appellants, without reference to DoT have merged ACL with AL and, thereby, the name of ACL was removed from the rolls of the Registrar of Companies, which is in violation of the license agreement, show cause notice was issued and after hearing the parties, the company was directed to pay a fine of Rs.10 Crore, whereinafter AL approached the Company Court to have ACL restored in the rolls of the Registrar of Companies. Subsequent to the order of TDSAT relating to merger, DoT had permitted the merger of the companies on certain conditions, one of which condition was the payment of OTSC of the transferor company, viz., ACL.

76. It is the submission of the learned Addl. Solicitor General that when OTSC has been levied in exercise of powers conferred under Section 4 (1) of the Telegraph Act as also Clause 13 (ii) of the License Agreement and the appellants having accepted the same, though the said levy of OTSC is under orders of stay before this Court, which DoT is honouring and have not demanded OTSC, however, if certain conditions are imposed for merger, it cannot be said that it is against the spirit of the stay order passed by this Court and is a contemptuous act, whereby DoT is trying to achieve something indirectly, which could not be achieved directly. The said argument is a fallacious argument on account of the fact that imposition of condition for merger could in no way be termed as violating the orders of stay granted by this Court. Further, it is submitted that what DoT is trying to achieve is a balance in the spectrum allocation amongst the various operators to have a level playing field and in furtherance to the same, if conditions, which are in consonance with the license agreement, are imposed, the licensee is bound to abide by the same and cannot come out and contend that since their licenses dates back to 1994 and 1998, they are not entitled for payment of any OTSC.

77. Concluding his submissions, learned Addl. Solicitor General submitted that all the actions taken by the Government are in tune with the license agreement and the powers vested with the Government under Section 4 of the Telegraph Act and there has been no violation, but for violations by the appellants for which action was taken by DoT and, therefore, for the approval sought for by the appellants, conditions imposed by DoT have to be complied with. Further, levies as made in the different writ petitions are also in terms of Clause 13 (ii) of the license agreement to which the petitioners are signatories and they cannot try to wriggle out of the same by contending that those levies are not provided for in the license agreement.

78. Replying to the submissions of the learned Addl. Solicitor General, Mr. Satish Parasaran, learned senior counsel for the appellants/petitioners submitted that the contentions of DoT are per se unsustainable in view of the fact that Supreme Court in the 2G Spectrum case (supra) has held that though exclusive use of resources is vested in the Central Government, the Central Government is within its powers to allow private parties the right to use the resources upon conditions. While it is submitted that the appellants are not liable to be put under conditions, it is the submission of the learned senior counsel that what has not been envisaged in the license agreement and not agreed upon, cannot be unilaterally thrust upon the appellants/petitioners. OTSC, which is not a term in the license agreement cannot be thrust upon the appellants, more so in a piecemeal manner, when the appellants/petitioners have all along been paying all the charges levied in terms with the

license agreement, viz., licence fee as well as spectrum usage charges.

79. It is the submission of the learned senior counsel that when the appellants/petitioners have been paying the spectrum usage charges since the date of the license agreement, once again imposing a similar charge for spectrum is impermissible as it would amount to a double levy of the same charge, which was not one of the terms of the license agreement. It is further submitted that as per the migration package, entry fee as well as license fee as a percentage of the gross revenue was collected and once an entry fee has already been collected, which is accepted by DoT, once again charging OTSC is impermissible.

80. It is the further submission of the learned senior counsel that though exclusive privilege in respect of telegraphs is granted to the Central Government and power is vested with the Central Government to grant license on such conditions and in consideration of payments as it thinks fit, it should be within the periphery of reasonableness and legal certainty. The word "as it thinks fit" should be read harmoniously, meaning thereby that it should be at the point of entry and not as and when the Central Government chooses it can impose conditions for fresh payments. That is not the purport of the said Section and power granted thereunder. Learned senior counsel placed more emphasis on the interpretation of the word "as it thinks fit" by referring to the words of Ruma Pal, J. in the case of State of U.P. - Vs - Devi Dayal Singh (2000 (3) SCC 5), wherein dealing with the similar words relating to a matter under the Tolls Act, 1851, learned Judge held that it should reference to the meaning of the above words should be taken in relation to the word "toll" and, therefore, the State Government must justify the levy on the public. In this context, learned senior counsel submits that the Central Government cannot levy any charges off hand and it is bound to justify such levy.

81. It is further urged by the learned senior counsel for the appellants/petitioners that even assuming without admitting that the levy of OTSC is sustainable, there is no relevance as to the fixation of date from which OTSC is payable. DoT has not placed any credible material to justify the date of levy of OTSC and in that view of the matter, the arbitrary fixation of date is not sustainable.

82. It is also submitted by the learned senior counsel that no differentiation has been placed by DoT with regard to SUC and OTSC. Charges for allocation of spectrum has been paid in the form of entry fee and for the grant of licence, license fee is being paid by the service providers and pursuant to the migration package, licence fee is made as a share of the gross

revenue. Such being the case, entry fee having been paid by the service providers as a part of the migration package, levy of OTSC is impermissible.

83. It is further submitted by the learned senior counsel that what was under consideration of the Supreme Court in the 2G Spectrum case (supra) was the grant of 122 licenses during the period 2007-2008, without there being any auction and not the licenses granted previously and that Supreme Court has made it clear in its order that they are not dealing with other licenses than the 122 licenses. That being the case, the grant of licenses of the appellants/petitioners dating back to 1994 and 1998, cannot in any manner be said to be wrong and that the Supreme Court has also made it clear that charges to be levied for the scarce resource in future only, levy of OTSC on the petitioners is wholly unjustified, arbitrary and impermissible.

84. Insofar as the issue of maintainability raised by the learned Addl. Solicitor General is concerned, learned senior counsel for the appellants/petitioners placed reliance on the judgment of the Bombay High Court in Idea Cellular Ltd & Anr. - Vs - Union of India & Ors. (W.P. No.2029 of 2013 - 24.2.2014), wherein the Bombay High Court held that the dispute cannot be adjudicated by TDSAT as the issue raised by the petitioners relates to the powers exercised under Section 4 of the Telegraph Act. The Bombay High Court was also of the view that in respect of an existing contract, imposition of OTSC in exercise of powers under Section 4 of the Telegraph Act requires consideration and, accordingly, held that the petition before the High Court was maintainable. Learned senior counsel submitted that the issue covered in one of the batch of writ petitions is similar and, therefore, it cannot be said that the writ petitions are not maintainable.

85. In the above backdrop of facts, learned senior counsel submitted that while the writ petitions are very much maintainable, the unilateral levy of OTSC, in the absence of consensus between the parties, is void ab initio and DoT cannot enforce such a levy and a levy, which is void ab initio, cannot form the basis for an undertaking to be given by the appellants for honouring their part of the contract, which has been mandatory by the Government vide its circular dated 15.9.05 and NIA dated 25.2.2010 and, therefore, insistence on the said undertaking is not justified, more so in view of the order of stay of OTSC granted by this Court. Further, the levy of AGR on non-telecom activities is also bad in law as AGR is payable only on the activities, which are covered by the license and for which purpose the license has been issued and any other activity carried on by the petitioners, not covered by the license, which has yielded returns, AGR cannot be enforced on the said returns, which would be highly deplorable and demand of such

payment citing license conditions, which do not contemplate such payment could only be termed as colourable exercise of power and high-handedness on the part of DoT. Accordingly, learned senior counsel prayed for allowing the writ petitions and the writ appeals in toto on the above set of facts and contentions.

86. Heard the learned senior counsel appearing for the petitioners/appellants and the learned Addl. Solicitor General appearing on behalf of the respondents and also perused the voluminous records placed before this Court.

PLEA OF MAINTAINABILITY :

87. Before advertng to the merits of the matter, it would be just and fair to deal with the preliminary objection raised by the respondent with regard to the maintainability of the petitions before this Court in view of the alternative remedy available to the petitioners/appellants.

88. It is contended by the learned Addl. Solicitor General that Section 14 (a) (i) of the TRAI Act prescribes that in respect of any dispute between a licensor and a licensee, the remedy lies before the TDSAT. It is the contention of the learned Addl. Solicitor General that without availing the remedy before TDSAT, the petitioners have approached this Court. Further, as against any order that may be passed by TDSAT, an appeal lies only to the Supreme Court under Section 18 of the TRAI Act. That being the case, it is contended by the learned Addl. Solicitor General that the writ petitions and the writ appeals filed before this Court under Article 226 of the Constitution are not maintainable. It is the submission of the learned Addl. Solicitor General that an alternative remedy, in case of any dispute between a licensor and a licensee, having been provided to the petitioners under the statute, without exhausting the same, the petitioners having rushed to this Court, the writ petitions should have been dismissed in limine. Reliance has been placed on the decision of the Supreme Court in Association of Unified Telecom Service Providers of India case (supra), to drive home the point that licence having been granted to the licensee, any dispute as to the interpretation of the terms and conditions of licence has to be agitated before the TDSAT.

89. To sustain the plea that the writ petitions/writ appeals are not maintainable, learned Addl. Solicitor General relied on Sections 14, 15 and 18 of the TRAI Act, wherein remedy has been provided to the aggrieved persons/service providers to approach the Tribunal at the first instance and remedy of appeal is provided to the Supreme Court.

90. Controverting this objection, learned senior counsel for the petitioners submitted that the decision of the Supreme Court

in Association of Unified Telecom Service Providers of India case (supra) has categorically laid down that insofar as interpretation of the terms and conditions of license is concerned, TDSAT is vested with power, but the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider. It is the submission of the learned senior counsel that since OTSC is not a levy, which finds place in the license agreement, there is no question of interpretation of any of the terms and conditions, as the said levy is a fresh levy and, therefore, it strikes at the root of the validity of the license agreement, in that the moot point to be addressed whether the DoT has power to amend the license agreement by incorporating a new levy, which is not what has been agreed between the parties to the agreement. Learned senior counsel submits that insofar as modification of the terms and conditions of the licence, the TDSAT may have power to adjudicate, but not a fresh levy made invoking clause 13 (ii) of the licence agreement, as the fresh levy is an addition, which is easily distinguishable from modification.

91. In Unified Telecom Service Providers of India case (supra), the Supreme Court has held that the dispute between a licensor and a licensee referred to in Section 14 (a) (i) of the TRAI Act is a dispute after a person has been granted a licence by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act. Therefore, it is clear that only a person, who has been granted a licence, would fall within the ambit of licensee and only disputes arising between such licensee and the licensor can be adjudicated by the Tribunal. It has also been further held that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider, but it will have the jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence. Therefore, it is clear from the above decision of the Supreme Court that while the Tribunal has jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence, it has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider.

92. In the above backdrop, on the contentions raised by the parties, the core issue that arise before this Court is "whether Section 14 of the TRAI Act bars the jurisdiction of this Court under Article 226 to entertain writ petitions and if so, whether the petitioners/appellants can be relegated to approach the Tribunal under Section 14 (a) (i) of the TRAI Act".

93. Section 14 of the TRAI Act, on which reliance has been

placed by Addl. Solicitor General, to contend that the writ petitions are not maintainable, reads as under :-

"14. Establishment of Appellate Tribunal. - The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to -

(a) adjudicate any dispute -  
(i) between a licensor and a licensee;  
(ii) between two or more service providers;  
(iii) between a service provider and a group of consumers:

PROVIDED that nothing in this clause shall apply in respect of matters relating to -

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 ;

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 ;

(C) the dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 ;

(b) hear and dispose of appeal against any direction, decision or order of the authority under this Act.

सत्यमेव जयते

94. The other relevant provisions are extracted hereunder :-

15. Civil court not to have jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

\* \* \* \* \*

18. Appeal to Supreme Court. - (1)

Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, riot being an interlocutory order, of the appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

PROVIDED that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time."

95. While Section 14 (1) of the TRAI Act confers power on the Tribunal to adjudicate any dispute between (i) a licensor and a licensee, (ii) between two or more service providers and (iii) between a service provider and a group of consumers, as against any such adjudication, appeal is provided to the Supreme Court under Section 18. Section 15 bars the Civil Courts from entertaining any suit or proceeding in respect of any matter which could be determined by the Tribunal. In effect, the Tribunal is empowered to deal with any dispute as enumerated in Section 14 (1) of the TRAI Act. Such being the case, whether in respect of any matter in dispute, is the jurisdiction of this Court under Article 226 of the Constitution ousted?

96. In Whirlpool Corporation - Vs - Registrar of Trade Marks (1998 (8) SCC 1), the Supreme Court observed that the power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and is not limited by any other provision of the Constitution. In the facts of the particular case, the High Court has a discretion to entertain or not to entertain a writ petition, subject to self-imposed restrictions, one of which is that if an effective and efficacious remedy is available, the High Court would normally refrain to exercise its writ jurisdiction. However, the said alternative remedy cannot be consistently be held as a bar where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

97. In the case of Baburam Prakash Chandra Maheshwari - Vs - Antarim Zila Parishad (AIR 1969 SC 556) the Supreme Court observed as follows:-

"3. It is a well-established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed - Vs - The Municipal Board, Kairana, 1950 SCR 566=(AIR 1950 SC 163), "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In The State of Uttar Pradesh - Vs - Mohammad Nooh, 1958 SCR 595, 605, S.R Das, C.J, speaking for the Court, observed:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Laws of England, 3<sup>rd</sup> Ed., Vol. II, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory

remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the King - Vs - Postmaster-General Ex parte Carmichael [1928 (1) K.B 291] a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a court of summary jurisdiction. The case of Rex - Vs - Wandsworth Justices Ex parte Read [1942 (1) K.B 281] is an authority in point. In that case a man had been convicted in a court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction."

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well-settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the High Court under Art. 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. -- (See the decisions of this Court in Carl Still G.M.B.H - Vs - The State Bihar, AIR 1961 SC 1615 and The Bengal Immunity Co. Ltd. - Vs - The State Bihar, (1955) 2 SCR 603. In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice (See 1958 SCR 595, 605 :: (AIR 1958 SC 86, 93))."

98. In the case of Nivedita Sharma - Vs - Cellular Operators Association of India (2011 (14) SCC 337), the Apex Court while reiterating its views as expressed in the Whirlpool Corporation's case (supra), wherein it was observed that insofar

as the jurisdiction of the High Court under Article 226 or for that matter, the jurisdiction of the Supreme Court under Article 32, is concerned, the provisions of a statute cannot bar or curtail these remedies. However, while exercising the power under Article 226 or under Article 32, the legislative intent that manifested in the provisions of the Act should be adverted to by the Court while exercising their jurisdiction, which should be consistent with the provisions of the enactment.

99. In the case of Kartar Singh - Vs - State of Punjab (1994 (3) SCC 569), a Constitution Bench of the Supreme Court observed that extraordinary power is given to High Court under Article 226 not only for the purpose of correcting manifest errors but also to exercise the said jurisdiction for the sake of rendering complete justice. The High Court, being the highest court for the purposes of exercising civil, appellate, criminal or constitutional jurisdiction so far as that State is concerned in terms of the framework of the Constitution, the jurisdiction possessed by it before coming into force of the Constitution was preserved by Articles 225 and in terms of Articles 226 and 227, extraordinary jurisdiction was conferred on it so as to ensure that the subordinate authorities do not act against the rule of law, but to see that they function within the framework of law. That jurisdiction of the High Court cannot be taken away by legislation.

100. It is trite law that under Article 226 of the Constitution of India, untrammelled powers and jurisdiction has been vested with the High Court for the purpose of issuance of any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the Court of the constituent power engrafted under Article 226.

101. From the decisions discussed above, the rule of law postulates that the jurisdiction of the High Court under Article 226 of the Constitution of India does not stand ousted and it cannot be curtailed by any statutory provision. The availability of an alternative remedy is no bar to the maintainability of a writ petition. However, it is trite law that where an alternative efficacious remedy is available under a statute, High Courts normally refrain itself from exercising their jurisdiction under Article 226. However, the above restriction is only self-imposed restriction and the same in no way precludes the jurisdiction of the High Court under Article 226.

102. In the above backdrop, the prerogative writ jurisdiction of this Court under Article 226 having not been ousted or curtailed, this Court having granted stay of recovery/demand as made by the DoT in the above batch of writ petitions, relegating the petitioners to approach the Tribunal to have their grievance redressed would be a futile exercise as without vacating the interim orders granted by this Court, any order passed would serve no purpose as has been rightly pointed out by the learned single Judge that any order that may be passed by the Tribunal in conflict with the interim orders passed by this Court would amount to judicial anarchy, which should be avoided. Therefore, with a view to avoid multiplicity of proceedings, instead of relegating the matter back to the Tribunal to decide the issue as raised by the petitioners, it would be more appropriate to exercise the prerogative writ jurisdiction of this Court for deciding the issues as raised by the petitioners/appellants.

103. Accordingly, on the issue of maintainability, this Court holds that the writ petitions, at the instance of the petitioners, in the circumstances of the facts of case, are maintainable and the finding of the learned single Judge warrants no interference.

#### REVENUE SHARE ON NON-TELECOM ACTIVITIES :-

104. It is the contention of the learned senior counsel for the petitioners in W.P. Nos.585 to 588/2013 that though in terms of the Migration Package entered into between the licensor and the licensee vide amendment to the agreement dated 22.7.99 in the NTP 1999 regime, the licensee was to pay license fee as a percentage share of the gross revenue under the licence. It is the submission of the learned senior counsel that to calculate the share of gross revenue of the licensee company, the yardstick should be the licence based on which a link is created between the licensor and the licensee to enter into the above agreement. It is an undisputable fact that the licence pertains to running of telecom activities for a particular area. That being the case, the gross revenue of the licensee company should be only on the activities enumerated in the licence and not on all the activities of the licensee company, which includes activities, which are not covered by the licence. Therefore, it is the stand of the petitioners that any revenue generated through activities, which do not form part of the licence, the licensor cannot have a share of the same. It is the submission of the learned senior counsel that that is not the intent and purport of the agreement entered into between the parties. There should be a harmonious reading of the agreement and such reading would very much exclude revenue generated through non-

telecom activities. In the above backdrop, it is submitted that the share as sought for by DoT on the revenue generated through non-telecom activities is violative of Articles 14 and 19 (1) (g) of the Constitution of India as DoT can charge only License Fee/AGR (Adjusted Gross Revenue) from revenue earned from licensed activities.

105. Per contra, learned Addl. Solicitor General submitted that the licensee having accepted the terms and conditions vide amendment to the licence agreement dated 25.9.01, wherein 'Adjusted Gross Revenue' has been defined, cannot, at this point of time, claim that the share of revenue from non-telecom activities is not leviable. It is not open to the licensee to blow hot and cold, viz., to accede to one part of the agreement and defy another part of the agreement. The agreement should be accepted in toto, which the licensee has, with open eyes, accepted and, therefore, they are estopped from raising this plea. Learned Addl. Solicitor General also drew the attention of this Court to the decision of the Supreme Court in Association of Unified Telecom Service Providers of India case (supra), wherein the Supreme Court has held that once the licensee had accepted Clause (iii) of the letter dated 22.7.1999 that the licence fee would be a percentage of the gross revenue, which would be the total revenue of the licensee company and had also accepted that the Government would take a final decision with regard to the percentage of revenue share as also the definition of revenue, it is not open to the licensee to question the validity of the definition of adjusted gross revenue in the licence agreement not to include revenue from activities beyond the licence.

106. In a nutshell, the issue that arises for determination in this batch of writ petitions is --

"Whether the first proviso to Section 4 of the Indian Telegraph Act gives unbridled powers to DoT to claim a share of revenue from non-telecom activities vide the definition of 'Adjusted Gross Revenue', forming part of the amended licence agreement in No.842-2/2000-VAS (Vol.IV) (Part) dated 25.9.01 and whether such a power is violative of Articles 14 and 19 (1) (g) of the Constitution".

107. If the answer to the above query is in the negative, the ancillary query that arises is:

"Whether a writ of declaration can be issued that the respondents can charge only License

Fee/AGR (Adjusted Gross Revenue) from revenue earned from licensed activities".

108. Before this Court decides to address this issue, it would be prudent to have a look at the definition of "Adjusted Gross Revenue" as is found in the amended licence agreement dated 25.09.2001, which reads as hereunder :-

"2. Definition of Adjusted Gross Revenue :

2.1 Gross Revenue :

The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment, etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc.

2.2 For the purpose of arriving at the "Adjusted Gross Revenue" the following will be excluded from the Gross Revenue :

(i) PSTN related Call charges (access charges) actually paid to Bharat Sanchar Nigam Limited (BSNL)/Mahanagar Telephone Nigam Ltd. (MTNL) or other telecom service providers within India

(ii) Roaming revenues actually passed on to other telecom service providers, and

(iii) Service Tax on provision of service and Sales Tax actually paid to the Government, if gross revenue had included the component of Service Tax/Sales Tax."

109. The Supreme Court, in the decision in Association of Unified Telecom Service Providers of India case (supra), while deciding the issue as to whether TRAI and the Tribunal had jurisdiction to decide on the validity of the terms and conditions of licence, including the definition of adjusted gross revenue finalised by the Central Government and incorporated in the licence, held that while the Tribunal had no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider, however, will have jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license. The Supreme Court also further held that once the licensee had accepted that licence fee would be a percentage of the gross revenue, which would be the total

revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of adjusted gross revenue in the licence agreement on the ground that adjusted gross revenue cannot include revenue from the activities beyond the licence. For better clarity, the relevant portion of the order is extracted hereinbelow :-

"47. A dispute between a licensor and a licensee referred to in Section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a license by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a license agreement and become a licensee and the word "any" in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license.

48. Coming now to the facts of the cases before us, clause (iii) of the letter dated 22.07.1999 of the Government of India, Ministry of Communications, Department of Telecommunications, to the licensees quoted above made it clear that the license fee was payable with effect from 01.08.1999 as a percentage of gross revenue under the license and the gross revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax calculated by the licensee on behalf of the Government from the subscribers. It was also made clear in the aforesaid clause (iii) that the Government was to take a final decision after receipt of the TRAI's recommendation on not only the percentage of revenue share but also the definition of revenue. In accordance with this clause (iii) the Government took the final decision on the

definition of Adjusted Gross Revenue and incorporated the same in the license agreement. Once the licensee had accepted clause (iii) of the letter dated 22.07.1999 that the license fee would be a percentage of gross revenue which would be the total revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of Adjusted Gross Revenue in license agreement on the ground that Adjusted Gross Revenue cannot include revenue from activities beyond the license."

110. From the above decision of the Supreme Court it is abundantly clear that a licensee, having accepted Clause (iii) of the letter dated 22.7.1999, which stipulated that the licence fee would be a percentage of the gross revenue, which would be the total revenue of the licensee company and has also accepted that the Government would take a final decision not only with regard to the percentage of revenue share, but also with regard to the definition of revenue, is estopped from questioning the definition of adjusted gross revenue on the ground that it includes revenue from activities beyond the licence. The Supreme Court further held, in relation to the wide definition of adjusted gross revenue, if the licensee is really aggrieved that the activities that they undertake are outside the purview of telecom activities, which are outside the terms of licence, it was open to the licensee to transfer the activities to any other person or firm or company. However, the licensee having agreed to the terms regarding payment, which had been decided by the Central Government, which had the rights of exclusive privilege in respect of telecommunication activities, and availed the exclusive privilege to carry on telecommunication activities under the terms of a licence issued by the Central Government, it is not open to the licensees to plead for an alteration of the definition of adjusted gross revenue in the licence agreement.

111. The decision by the Supreme Court was on the issue whether the Tribunal had powers to decide on the validity of the terms and conditions, which the Supreme Court negatived and held that the Tribunal has jurisdiction only to interpret the terms and conditions of the licence. The Supreme Court did not go into the question of whether AGR would stand attracted even on revenue generated through non-telecom activities, which are not governed by the licence. On that ground the petitioners are before this Court on the issue as noted above, which is before this Court for consideration.

112. The rule of law as propounded by the Supreme Court on the jurisdiction of the Tribunal is clear. However, in the case on hand, the point that requires consideration is whether Section 4 of the Indian Telegraph Act gives unbridled powers to DoT to claim a share of revenue generated from non-telecom activities on the basis of the definition of "Adjusted Gross Revenue", which forms part of the licence agreement and whether such power is violative of Articles 14 and 19 (1) (g) of the Constitution.

113. For deciding this issue, it would be useful to look at the provisions of Section 4 of the Telegraph Act, which vests the Central Government with exclusive privilege in respect of telegraphs and power to grant licences and the relevant provisions of the TRAI Act, which, for better clarity, are quoted hereinbelow :-

"Section 4 (1) of the Telegraph Act:

4. Exclusive privilege in respect of telegraphs, and power to grant licenses. -- (1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India."

Relevant Provisions of the TRAI Act:

Section 2(e) "licensee" means any person licensed under sub-Section (1) of Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;

2 (ea) "licensor" means the Central Government or the telegraph authority who grants a license under Section 4 of the Indian Telegraph Act, 1885 (13 of 1885);"

114. Section 4 (1) of the Telegraph Act, in unambiguous terms, spells out that the Central Government is vested with exclusive privilege of establishing, maintaining and working telegraphs. Proviso to Section 4 (1) of the Telegraph Act enables the Central Government to part with this exclusive privilege in favour of any other person by granting a licence in his favour on such conditions and in consideration of such payments as it thinks fit. The above provision of law makes it clear that the Central Government owns the exclusive privilege of carrying on telecommunication activities and it alone has the right to part with its privilege in favour of any other person by grant of a licence on such conditions and in consideration of

such payment as it thinks fit. In effect, the licence granted by the Central Government under Section 4 (1) of the Act to any person to carry on telecommunication activity is in the nature of a contract between the licensor and the licensee.

115. In Association of Unified Telecom Service Providers case (supra), the Supreme Court, while placing reliance on the judgment of the Supreme Court in case of State of Orissa - Vs - Harinarayan Jaiswal (1972 (2) SCC 36), wherein while interpreting the expression "exclusive privilege" of the State Government under the State Excise Act to sell liquor, quoted with approval, the rule of law as enunciated by the Supreme Court, which is quoted hereunder :-

"13. .... The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19 (1) (g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government - nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

116. The above proposition has been reiterated by the Supreme Court in the case of Har Shankar - Vs - Excise & Taxation Commissioner (1975 (1) SCC 737) as well as its subsequent decisions. The Supreme Court, in the above cited decision, also had occasion to consider the case of State of Punjab - Vs - Devans Modern Breweries Ltd., wherein a Constitution Bench of the Supreme Court, relying on Har Shankar's case (supra) and Panna Lal - Vs - State of Rajasthan (1975 (2) SCC 633), held that issuance of liquor licence constitutes a contract between the parties.

117. What flows from the above proposition of law, as propounded by the Supreme Court is that once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee and, consequently, the terms and conditions of the licence including the definition of adjusted gross revenue in the licence agreement are part of a contract between the licensor and the licensee.

118. In the light of the above dictum of the Supreme Court, which categorically holds that the licence issued under Section 4 (1) of the Telegraph Act is a contract between the parties, the issue whether Section 4 (1) has given unbridled power to DoT to claim a share of revenue from non-telecom activities as

defined in "Adjusted Gross Revenue" is violative of Articles 14 and 19 (1) (g) of the Constitution needs to be answered.

119. "Adjusted Gross Revenue" and "Gross Revenue" have been defined in Clause 2, 2.1 and 2.2 of the licence agreement, which has been extracted above. However, at the risk of repetition, it is once again quoted hereinbelow for better appreciation :-

"2. Definition of Adjusted Gross Revenue :

2.1 Gross Revenue :

The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment, etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc.

2.2 For the purpose of arriving at the "Adjusted Gross Revenue" the following will be excluded from the Gross Revenue :

(i) PSTN related Call charges (access charges) actually paid to Bharat Sanchar Nigam Limited (BSNL)/Mahanagar Telephone Nigam Ltd. (MTNL) or other telecom service providers within India

(ii) Roaming revenues actually passed on to other telecom service providers, and

(iii) Service Tax on provision of service and Sales Tax actually paid to the Government, if gross revenue had included the component of Service Tax/Sales Tax."

सत्यमेव जयते (Emphasis supplied)

120. It is clear from the above definition that "Adjusted Gross Revenue" and "Gross Revenue", includes installation charges, late fees, sale proceeds of handsets (or any other terminal equipment, etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc.

121. It is not the case of the petitioners that they are not signatory to the migration package in which definition was defined. The migration package dated 25.9.2001, was entered into between the licensor and the licensee, wherein while the

licensor was granted the benefit of revenue sharing towards licence fee, the period of licence was extended from 10 years to 20 years in favour of the licensee. Therefore, on consensus the licence agreement was amended. While the licensee had the benefit of extended term, the licensor had the benefit of revenue share. That being the case, it is not open to the licensee to contend that DoT cannot claim a share of the revenue from non-telecom activities vide the definition of AGR as violative of Articles 14 and 19 (1) (g) of the Constitution. The licensee, with open eyes, had accepted the terms of the agreement, which was to their advantage as well and now their contention that revenue generated from other activities, which are not part of the licence agreement, stands demarcated and would not fall within the definition of AGR is far fetched.

122. The definition of AGR, as quoted supra, brings within it "any other miscellaneous revenue without any set-off for related item of expense, etc.", barring certain items of expenditure as defined therein. The natural presumption that follows is that any other expense or income, barring the exclusion, would fall well within the miscellaneous revenue as defined under the "Gross Revenue" without set-off and that would very well attract the definition. It is an accepted facet of law that a person taking advantage under an instrument, which both grants a benefit and imposes the burden, cannot take the benefit without discharging the burden. The petitioners, with open eyes, having accepted the extension of term from 10 years to 20 years and also accepted that the licence fee will be a percentage of share of the revenue, without any embargo, cannot now come before this Court and plead that what is accepted by them is violative of Articles 14 and 19 (1) (g) of the Constitution.

123. A contract has to be read in its true spirit and it cannot be sought to be diluted for the purpose of benefit of one of the party. A contract is a culmination of consensus of two minds and is supposed to be executed in its true and right sense without intention to defraud each other. The above migration package dated 25.9.2001 has been accepted by both the licensor and the licensee and after consensus, the contract has been executed, which provides for the licensor to levy licence fee as a percentage of share on the AGR with a clear understanding that any other miscellaneous revenue would also form part of the gross revenue of the licensee and that there would be no set off for related item of expense, etc. The licensee, being a company with legal expertise, would have had occasion to read through the licence agreement before signing and the company, at this point of time, cannot plead ignorance that its understanding was that the share would only be on the revenue that is covered by licensed activities. The purport and language so also the unambiguous language of the definition spells out that it

includes all the revenue without set-off. That being the case, the petitioners cannot plead that the revenue earned from non-telecom activities would not fall within the ambit of the above definition of AGR.

124. As has been held by the Supreme Court in Harinarayan Jaiswal's case (supra), the Central Government, being the seller has exclusive right to deal with the privileges flowing from Section 4 (1) of the Telegraph Act and once the exclusive privilege of the Central Government is conceded, violation of Articles 14 and 19 (1) (g) cannot be pressed into service by persons citing fundamental right to trade or carry on business, when such right belongs to the Government and there cannot be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The contract executed between the licensor and the licensee above is in the realm of the Government trying to get the best available price for parting with its valuable rights and, therefore, this Court is of the considered view that violation of Articles 14 and 19 (1) (g) of the Constitution does not merit acceptance. Accordingly, this Court holds that first proviso to Section 4 of the Indian Telegraph Act is not violative of Articles 14 and 19 (1) (g) of the Constitution.

125. The primary question of Section 4 (1) of the Telegraph Act having been held to be not violative of Articles 14 and 19 (1) (g) of the Constitution, the incidental issue as to grant of declaration that respondents can charge only licence fee/AGR from revenue earned from licensed activities has to necessarily fail. Accordingly, the incidental issue also merits no consideration.

#### LEVY OF ONE TIME SPECTRUM CHARGES :-

126. It is the contention of the learned senior counsel for the petitioners that on the basis of a bilateral contract entered into between DoT and the petitioners, spectrum was allocated on payment of entry fee. At that point of time, while allocating spectrum, there was no separate fee/charge which was required to be paid as spectrum was bundled with licence. At that point of time, licence fee as also spectrum usage charges were levied in addition to one time entry fee. It is the contention of the learned senior counsel that any contract should be stable and certainty in the policy is crucial for making economic choices, which would satisfy the legitimate expectation. The usage of the spectrum by the petitioners having been on the premise that they have been paying all the charges as envisaged under the licence agreement as also the further amended migration package, which was on a mutual understanding, the levy of OTSC in an arbitrary and unreasonable manner by DoT is against the constitutional obligations imposed on the Government and against the rule of law as enunciated by

the Supreme Court in a catena of decisions. It is further contended on behalf of the petitioners that the Government having enjoyed the benefits of AGR as also the spectrum usage charges, cannot at this point of time, under the guise of power vested under Clause 13 (ii) of the licence agreement impose upon the petitioners an altogether new levy, which was hitherto fore not envisaged under the licence agreement. Such an imposition is per se bad in law and would go against the very spirit of the contract, which has been mutually agreed between the parties. DoT cannot enrich themselves at the cost of the petitioners.

127. It is the further contention of the petitioners that though the date for charging OTSC has been fixed from 1.7.08 for service providers holding above 6.2 MHz to 10 MHz, however, no reason whatsoever has been adduced for fixing the said date. It is the further contention of the petitioners that though DoT has taken a stand that OTSC has been levied in terms of the judgment of the Supreme Court in the 2G Spectrum case (supra), it is pointed out that the Supreme Court did not deal with licences prior to 2007 and it pertained only to 122 licences of which the petitioners were not a party. Further, the Supreme Court had also directed TRAI to make fresh recommendations for grant of licence and allocation of spectrum in the 2G band in 22 service areas by auction as was done for allocation of spectrum in 3G band and direction was issued to the Central Government to consider the recommendations of TRAI and take appropriate decision for grant of fresh licences through auction. It is therefore contended by the petitioners that when the direction of Supreme Court as above is explicit, which is only in relation to future/fresh licences, the reliance placed on the said judgment for imposition of OTSC on the petitioners cannot be sustained.

128. It is further submitted by the learned senior counsel for the petitioners that it is a well accepted proposition that Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. So also the policy makers, who are guided by the opinion of the experts in the field. That being the case, TRAI, being an expert body in matters of this sort, had made recommendation not to charge OTSC for spectrum allocation below 10 MHz, however, without any justification or reason, the Government having brushed aside the recommendation and imposed OTSC is against the well accepted proposition of law. It is further submitted that when already spectrum usage charge is being levied as a percentage of AGR and when TRAI had opined that already higher levels of usage charges have been agreed and are being collected from the service providers by the Government, the rationale behind the levy of OTSC, which is against the contract, is indiscernible, more so, when TRAI had

further opined that penetration in rural areas and affordability of telecom services to the common man, being key to further expansion, imposition of OTSC would further add to the burden of the common man. It is further contended on behalf of the petitioners that when already spectrum usage charges is being levied, levy of OTSC would be nothing but equivalent to double taxation for the same spectrum/allocation. It is further contended that as the name OTSC suggests, it is supposed to be a one time fee. However, it is being charged over a period of time with differential rates over the said period. When differential rates are being charged over a period under the colour of OTSC, the concept of one time charge does not fructify as the name goes, it should be a fixed charge and it cannot vary based on periods.

129. Learned senior counsel for the petitioners placed emphasis on the order of the Supreme Court in Civil Appeal No.9603 of 2010, wherein the statutory obligation of TDSAT to decide the matter on merits insofar as the validity of the charge fixed was on issue. It is the contention of the learned counsel for the petitioners that the writ petitions are very well maintainable, as the Attorney General, in the said case, has sought time to get instructions with regard to the validity of the charge. However, as per the decision of the Supreme Court in Association of Unified Telecom Service Providers case (supra), the Tribunal is not vested with jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider and, therefore, writ petition is very well maintainable.

130. Countering the said stand, it is contended by the learned Addl. Solicitor General that the Central Government having been vested with the exclusive privilege to deal with telegraph and for the grant of licences, which has been approved by the Supreme Court and the Supreme Court having held that spectrum is a scarce national resource which should be used both economically for the benefit of the public as well as sub-optimal usage also needs to be avoided, burden has been cast on the Central Government to ensure protection of national/public interest. In the above backdrop, the Government, in consultation with TRAI, the expert body, thought it fit to impose OTSC on all the service providers in exercise of power vested in it under Clause 13 (ii) of the licence agreement, whereby, the Central Government is conferred with power to modify at any time the terms and conditions of the licence, if in the opinion of the authority it is necessary or expedient to do so in the interests of the general public or for the proper conduct of telegraphs or on security consideration. With the avowed object of safeguarding the public interest by better utilisation of the scarce national resource, OTSC was imposed on the service providers in consonance with the decision of the

Supreme Court in the 2G Spectrum case (supra). The petitioners, being signatories to the licence agreement, having accepted the terms of the said agreement are bound by it and they cannot, at this distant point of time, question the terms of imposition of OTSC when the Central Government is vested with power under Section 4 (1) of the Telegraph Act r/w Clause 13 (ii) of the Licence Agreement.

131. This Court has considered the rival contentions advanced on either side and perused the materials available on record as also the relevant provisions of the Act and the clause on which reliance has been placed and the authorities referred on behalf of the parties.

132. It is well settled proposition of law, through the decision of the Apex Court in Association of Unified Telecom Service Providers of India case (supra) that the Central Government is vested with exclusive privilege to deal with telegraph and power is vested in it to grant licences for establishing, maintaining and working telegraphs on such conditions and in consideration of such payments as it thinks fit to any person, the relevant portion of which has already been quoted above. Therefore, the right of the Government to deal with the said exclusive privilege and to grant licences is not in issue. However, the issue that is sought to be raised by the petitioners is --

"Whether in exercise of powers of exclusive privilege conferred under Section 4 (1) of the Telegraph Act, the Central Government is empowered to impose new conditions/payments, in the form of OTSC, unilaterally, on the petitioners, in respect of a concluded contract?"

133. For the purpose of imposition of levy of OTSC, DoT relies upon Clause 13 (ii) of the Licence Agreement, which empowers the DoT to "modify" the terms of the licence. For better clarity, the relevant portion of the clause reads as under :-

"13. It is further agreed and declared by the parties that notwithstanding anything contained hereinbefore, that

\* \* \* \* \*

(ii) The Authority reserves the right to modify at any time the terms and conditions of the licence covered under Schedules "A", "B", "C" and "D", annexed hereto, if in the opinion of the Authority it is necessary or expedient to do so in the interests of the general public or for the proper conduct of telegraphs or on security consideration."

134. The interpretation on the word "modify" appearing in the above clause, as per the petitioners is that, the DoT has no power to make any additions to the existing provisions, and the levy of OTSC, which doesn't form part of the licence agreement, being an addition is impermissible, whereas according to the DoT, the interpretation should be expansive and should not curtail the power of the Department to levy OTSC, when the intention of the Government at the time of entering into the agreement was to alter the contract so that the interests of the public are safeguarded, which has been emphasised by the Supreme Court in the 2G Spectrum case (supra).

135. Though very many contentions have been advanced on the side of the petitioners, all the contentions are relatable and are consequential to the validity of the levy of OTSC by this Court. Therefore, the moot question that arises before this Court for answering the issue raised by the petitioners is "whether the modification power provided under clause 13 (ii) of the licence agreement confers power on the DoT to levy OTSC". If the answer to the above question is in the affirmative, all the other incidental questions raised would not be required to be answered, else, it has to be dealt with. Therefore, this Court now proceeds to consider the issue as to whether the word "modify" would include "addition" and whether power is vested with the Government to make any additions as it thinks fit.

136. As has been held by the Supreme Court, the exclusive privilege in respect of telegraphs and grant of licences is vested with the Central Government and the Government may grant licence on such conditions and in consideration of such payments as it thinks fit. In exercise of the above power, the Government had granted licence on certain terms and conditions, which has been agreed between the licensor and the licensee. Incidentally, power has also been vested with the Government to fix payments as it thinks fit for grant of such licence. On the basis of the said power, while the licensor had granted licence to the licensee initially, at a later point of time, a migration package was also offered wherein the licence fee was modified as a percentage of the share of the AGR of the service provider with a benefit to the service provider wherein the initial term of 10 years of the licence was extended to 20 years from the effective date. The said migration package was accepted by the licensee. The above position is not in dispute. However, pursuant to the judgment in the 2G Spectrum case (supra), the Supreme Court had elaborated on what a natural resource is and its value to the country. The relevant portion of the judgment is extracted hereinbelow :-

"74. At the outset, we consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements

having intrinsic utility to mankind. They may be renewable or non renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural, form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value.

\* \* \* \* \*

77. Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms.

\* \* \* \* \*

In Jamshed Hormusji Wadia's case, this Court held that the State's actions and the actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods."

137. In fine, on broader principles, the Supreme Court held that natural resource should be utilised for the public good and that the State and its instrumentalities should see to it that it is not wasted. On the question of spectrum, the Supreme Court held that spectrum is internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. In the light of the demand on account of the tremendous growth of the telecom sector, it has high economic value.

138. In the backdrop of the above observations of the Supreme Court, the exclusive privilege to deal with telegraphs, more particularly, spectrum, in this case, and grant of licence for establishment and maintaining of telegraphs by private entities, assumes importance. The Central Government being the legal owner of the natural resource, as a trustee of the people, is empowered to distribute the said resource to private entities in the larger interests of the public. While the State is duty bound to protect the natural resource and utilise the same for public good, equally, the alienation of the same through issue of licences to private entities assumes significance as the revenue it generates also invariably goes towards the overall improvement of the country.

139. In the light of the above categorical observations and binding views of the Supreme Court, the emphasis placed on clause 13 (ii) of the licence agreement for the purpose of OTSC by DoT needs to be addressed.

140. The respondent submits that in view of the power vested under clause 13 (ii) of the licence agreement, whereby the Government has been empowered to modify the terms of the agreement in select situations, the Government, pursuant to the above observations of the Supreme Court and its binding nature, thought it fit to levy OTSC. The term "modify", which is the fulcrum on which the lever, viz., OTSC moves, is interpreted by the Government to mean that it has the power to add terms in the licence agreement, while this imposition of levy is being opposed by the petitioners as is against the spirit of the bilateral contract.

141. The meaning of the term "modify" needs to be basically understood to tilt the scale in favour of either of the parties. The ordinary meaning of modification in concise Oxford Dictionary 11<sup>th</sup> Edn. At Page 918 is "to make partial changes/transform". In Black's Law Dictionary 10<sup>th</sup> Edn., at Page 1157, the term "modify" is defined as "to make somewhat different", "to make small changes by way of improvement, suitability or effectiveness".

142. Reference can be made to the Law Lexicon (P. Ramanatha Aiyar), wherein the meaning of "modify" is shown thus : To change, or vary, to qualify or reduce. The expression 'modify' must be construed to be a change or an alteration which may introduce some new elements regarding the details or cancels some of them without touching the general purpose and effect of the subject-matter.

143. The word "modify" means - "to change slightly,

especially in order to make it more suitable for a particular purpose" (as per the Concise Oxford Dictionary 7<sup>th</sup> Edn.) and "a change and alteration or amendment, which introduces new element into the details or cancel some of them but leave the general purpose and effect of the subject-matter intact" (as per the Judicial Dictionary - by Justice L.P.Singh and P.K.Majumdar) .

144. In *Stevens - Vs - General Steam Navigation Co. Ltd.* (1908 (1) KB 890), which was relied on by the Supreme Court in *Western Theatres Ltd. - Vs - Municipal Corporation of the City of Poona* (AIR 1959 SC 586), it has been held that the word 'modify' has been introduced in the said section with some purpose and the purpose could only have been to use an expression of wider connotation so as to include not only reduction but also other kinds of alterations. It has been further held that the word 'modify' also means addition.

145. In *Puranlal Lakhanpal - Vs - President of India* (AIR 1961 SC 1519), the power of modification under Article 270 (1) (d) of the Constitution of India came to be considered, wherein it was held that the Court must give the widest effect to the meaning of word modification in the said article to include an amendment. It was observed that there was no reason to limit the word "modification" therein to only such modification as do not make any radical transformation.

146. In the case of *S.K Gupta - Vs - K.P Jain* (AIR 1979 SC 734) Sections 391 & 392 of the Companies Act were considered. An application for the scheme of the compromise or an arrangement necessitates a modification under Section 2(29) of the Companies Act (1 of 1956). The modification included additions and omissions. The Court considered that in an inclusive definition the word would not only bear an ordinary, popular and natural sense, but also its extended statutory meaning. Such an expansive definition should be construed as not to cut down the enacting provision of the Act. The Court further considered that in construing such a definition in an enactment that provision would have to be seen along with other provisions found in the legislation connected with it which may throw light upon it and afford an indication that the general words employed in it were not intended to be applied without some limitation. Accordingly in that case considering the inclusive definition of the term modification in Section 2(29) the Court held that it would include additions and omissions holding that when a sponsor was substituted by another creditor the Court construed that as an addition allowing the substitution of the sponsor.

147. On an overall understanding of the meaning attributed to the word "modify" as is available in the above celebrated literatures, what emerges is that the meaning of the term

"modify" would also take within itself the meaning of "addition", however subject to the intention of the makers of the enactments/agreements.

148. The preamble to the General Clauses Act speaks about the way in which the words should be construed. Useful reference can be had to the following :-

"(c) Words not Defined

Where the definition of a word has not been given, it must be construed in its popular sense if it is a word of everyday use. 'Popular sense' means that sense which people, conversant with the subject matter with which the statute is dealing, would attribute to it.

(d) Words Judicially Interpreted

It is well-settled that where the legislature uses a legal term which has received judicial interpretation, the courts must assume that the term has been used in the sense in which it has been judicially interpreted. It would be hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so, when such statute or statutory instrument does not deal with any cognate subject.

(e) When Meaning is plain

There is no need to call to aid any of the rules of construction when the meaning of any term or expression given in the statute is plain and unambiguous.

A definition clause does not necessarily, in any statute, apply in all possible contexts in which the word which is defined may be found therein."

149. It is clear from the above terminologies used in various literatures as to how interpretation to be made of the words, which are ambiguous. In the case on hand, there exists a difference in understanding as to what the word "modify" exactly means in the overall context of the above licence agreement, which requires judicial interpretation.

150. The interpretation given by the Department is based on the decision of the Apex Court in the 2G Spectrum case (supra), wherein the Apex Court held that spectrum has been accepted as a scarce, finite and renewable resource and susceptible to degradation in case of inefficient utilisation and due to its high economic value and high demand on account of the tremendous growth of the telecom sector, it has to be utilised efficiently in the larger interest of the public, since 2007, discussions were held between the Central Government, TRAI and the service providers for imposition of OTSC and in tune with the decision

of the Supreme Court, OTSC was demanded.

151. In the above context, it is for this Court to ascertain whether the term "modify" as appearing in clause 13 (ii) of the licence agreement connotes "addition". When a word is ambiguous, as could be seen, capable of interpretation in more than one way, a judicial interpretation of the word in the context of the overall provision is what would be more relevant and suitable to address the issue.

152. Cue to the interpretation of the term "modify" in the context of the present licence is evident from the terminology used in Black's Law Dictionary, wherein the term "modify" is defined as "to make somewhat different", "to make small changes by way of improvement, suitability or effectiveness". From an overall reading of the licence agreement in the context of the 2G Spectrum case (supra), the intention of the Government would be and should be to maximise the benefit achieved through the grant of licence in the interest of the general public. The intention is more manifest through the migration package offered by the Government during NTP 1999, where the concept of AGR was introduced. Reading of the licence agreement along with the migration package and NTP 1999 with reference to the decision of the Supreme Court in the 2G Spectrum case (supra), the word "modify" unambiguously includes the power to add terms and conditions to the contract.

153. Once the term "modify" occurring in clause 13 (ii) of the licence agreement brings within itself the power of addition, more specifically in the interest of general public, the levy of OTSC by the Government on the service providers cannot be held to be in violation of the licence agreement or against the contractual obligations. The word "modify" as depicted in the above clause could only be termed as changes made by way of improvement for the effectiveness and overall benefit of the public at large. Once the interest of the public at large is taken into consideration, any revenue generation contemplated by means of imposition of OTSC, in exercise of the right vested under clause 13 (ii) of the licence agreement would very well stand the test of legal scrutiny, as such imposition is within the power of the licensor. It cannot, by any yardstick, be treated as an imposition of levy which is not authorised by the clause, more so the rule of law.

154. Therefore, on a harmonious reading of the said clause 13 (ii) of the licence agreement, what follows is that the licensor reserves the right to modify (inclusive of addition and subtraction) at any time the terms and conditions of licence covered under the schedules in the interests of the general public. When a change by extension/improvement of the term of the licence could be increased to 20 years from 10 years in

exercise of power under clause 13 (ii) of the licence agreement, equally so the modification of payment terms by means of addition by way of OTSC is also permissible. When the petitioners have enjoyed the fruits of the extended term by virtue of the migration package, they cannot, at this point of time, claim that the licensor is prohibited from adding anything to the contract.

155. The agreement, which is a concluded contract, has given one of the parties the power to unilaterally vary the obligations under the contract. There is nothing repugnant in the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone, though the extent of power to vary is a matter of construction. Unilateral variation, unless permitted by the contract, or by rules, may amount to breach of contract, and entitle the other party to damages or repudiate the contract as the case may be. In the present case, unilateral variation has been permitted under clause 13 (ii) entitling the licensor to modify the terms of the licence agreement. Such being the case, the petitioners having accepted the said clause with open eyes and also further accepted changes made to the contract, including extension of term and change in the prescription of licence fee, cannot, cry out loud at this point of time pleading denial of rights vested on them under the contract. The petitioners have no vested right to carry on telegraph activity, but for the licence, which has been granted by the exclusive privilege holder, viz., the Central Government. Such being the case, if the Central Government thought it fit to impose OTSC on the service providers, it cannot be deemed to be against the vested rights of the service providers, as no vested rights accrue to them on the grant of licence to carry on the licensed activities.

156. Further, it is evident from the record that discussions/consultations on the imposition of OTSC was going on between the Government and TRAI since 2007, wherein TRAI had recommended imposition of OTSC. Though according to the petitioners, TRAI had recommended not to impose OTSC on service providers holding less than 10 MHz of spectrum, the Government had imposed OTSC on service providers, holding in excess of 6.2 MHz upto 10 MHz of spectrum retrospectively, while OTSC has been levied on service providers holding spectrum from 4.4 MHz to 6.2 MHz prospectively. Though over all imposition of OTSC is submitted to be bad, it is further submitted on behalf of the petitioners that differentiation of service providers based on the amount of spectrum held by them for the purpose of levy of OTSC on different dates is per se unsustainable. Further, the date fixed for the imposition of OTSC retrospectively is also arbitrary and no reason has been adduced by the Central Government for fixation of the said date.

157. Though the above plea has been raised by the petitioners, the same cannot be sustained for the simple reason that the petitioners were aware of the consultation between the Central Government and TRAI on the imposition of OTSC. However, for reasons best known to them, either they have not objected to such imposition, or no documents portraying their objection in this regard is placed before this Court. Loud plea without any documentary evidence cannot partake the character of proof. Had the petitioners submitted their objections to the said demand during the consultation process, then the matter could be looked at from a different angle. But that plea is only made before this Court. Though TRAI had recommended not to charge OTSC for spectrum holdings below 10 MHz in exercise of the power under 11 (1) (a), however, the said recommendation is only recommendatory in nature and is not binding on the Central Government as per the ratio laid down by the Supreme Court in Association of Unified Telecom Service Providers of India case (supra). When the Central Government thought it fit to reject the said recommendation of TRAI with regard to levy of OTSC in the interest of the public at large, it cannot be said to be arbitrary or unreasonable and against the provision of the Telegraph Act and the TRAI Act. Fixing of cut-off date for imposition of levy is within the discretion of the licensor and the licensee cannot have any quarrel on the same as they being party to the licence agreement have agreed for modification of the terms and conditions as is evident from clause 13 (ii) of the licence agreement.

158. For the reasons stated above and the foregoing discussions, this Court holds that the levy of OTSC by the Central Government, in exercise of powers conferred on it by Section 4 (1) of the Telegraph Act r/w Clause 13 (ii) of the Licence Agreement, is not arbitrary, and in fact justified and enforceable.

**MERGER OF LICENCES OF AL & ACL :-**

159. The last of the issue relates to the writ appeal, which is against the order passed by the learned single Judge, wherein the learned single Judge had directed the appellants to comply with the conditions imposed by DoT for grant of approval of merger.

160. Initially the licence was granted to two different entities, viz., ACL and AL, though they being group companies, through two separate licences. In terms of the circular dated 15.9.2005, the service providers were offered a option of getting their licences merged into a single licence without payment of any additional entry fee, which the appellants did not opt at that point of time. However, at the time of 3G auction, vide NIA dated 25.2.2010, merger of the licences was

made mandatory in case of group bidding entities in terms with the circular dated 15.09.2005, if the service providers were desirous of participating in the 3G auction. Accordingly, the appellants submitted their undertaking that on their being successful, they will merge their licences. The appellants, being successful in the 3G auction, to honour their undertaking, took steps for the merger of the company by submitting scheme of amalgamation before this Court, which was approved subject to requisite approval from DoT. However, the matter got dragged due to some errors, though not on the part of the appellants, but still and after some prolonged legal battle, DoT issued communication dated 3.10.2013, calling upon the appellants to submit undertaking that on the approval of the merger, the outstanding due on the transferor company will be cleared by the transferee company. This undertaking contained the undertaking to be submitted by the transferee company relating to clearing of OTSC, which was due and payable by the transferor company. However, as the recovery of OTSC and payment of share on non-telecom activities were under stay by this Court, our predecessor while slecting it was submitted by the appellants that as the matter was sub-judice and stay was there, DoT cannot enforce the recovery as any coercive action in the form of demand by DoT would be a contemptuous act on the part of DoT, which would be against the stay order. However, DoT being relentless in their pursuit of getting an undertaking in the terms as mentioned above, the appellants approached this Court by filing the writ petition.

161. Learned single Judge, distinguishing the grant of stay vis-a-vis consideration of application for grant of fresh licenses/transfer of licenses, held that both stand on different scales and the grant of stay would not preclude the respondent/Department from ignoring their claim completely. Learned single Judge further held that success in the other writ petitions, where they are protected by orders of stay, would automatically entitle them to refund of payment made/adjustment of payment, which they pay in terms of the orders impugned. In effect, learned single Judge directed the the petitioners to comply with the conditions imposed in the order impugned without prejudice to their rights, with a further rider that in case of the petitioners succeeding in the petitions where they are protected by orders of stay, the undertaking given in pursuant to the impugned order would stand lapsed automatically. The order of the learned single Judge is quoted hereinbelow for better clarity :-

"48. In view of the above, both the writ petitions are disposed of, to the following effect:

(i) the petitioners shall, within two weeks from the date of receipt of a copy of this order, comply with the conditions as imposed in the order

of the respondent dated 03.10.2013, without prejudice to their rights and contentions in the writ petitions already pending on the file of this Court;

(ii) insofar as condition (b) in the impugned order dated 03.10.2013 is concerned, the effective date shall be read as 31.12.1998;

(iii) in the event of the petitioners succeeding in the writ petitions W.P.Nos.585 & 587 of 2012 and 2615 to 2617 of 2013, the undertaking will automatically lapse;

(iv) the compliance by the petitioners of conditions (e) and (f) will not preclude the petitioners from taking recourse to legal remedies available under law; and

(v) all observations herein may not be taken to be a seal of approval of the demand."

As against the above order, the appellants are before this Court by filing the above appeals.

162. When the appeals were taken up, after hearing the counsel for the parties, this Court, by our predecessors, passed the following order :-

"Interim Order:

33. (i) There shall be an interim direction to maintain status quo as on 5 November 2014 both in respect of demands as contained in the proceeding dated 3 October 2013 and provision of Telecommunication Services by the petitioners subject to the conditions indicated herein.

(ii) There shall be an interim direction in view of the In Principle approval granted by the respondent to amend the CMTS Licence No.842-92/97 -VAS - Dated 22 November 1998 for Tamil Nadu (Excluding Chennai) Service Area issued to M/s. Aircel Ltd., to include the erstwhile Chennai Service Area which was served by M/s. Aircel Cellular Ltd., the merging company holding CMTS Licence No.842-21/93 -TM dated 30 November 1994, to permit M/s. Aircel Ltd., to continue to provide its telecommunication services for Tamil Nadu including Chennai subject to the conditions enumerated below:

(a) M/s. Aircel Ltd., shall pay all charges as per NIA.

(b) M/s. Aircel Ltd., shall pay 10% of AGR Provisionally as indicated in the circular dated 15 September 2005 on account of one time Spectrum charges for the quantum of

Spectrum held by erstwhile Aircel Cellular Ltd., in Chennai Service Area for the extended period from 29 November 2014 to 29 November 2018. Such payment shall be made on or before 5 December 2014. The petitioners are permitted to adjust vthe amount paid if any, pursuant to the demand dated 20 November 2014, while making payment.

(c) The petitioners are directed to furnish an undertaking on or before 5 December 2014 to comply with the conditions (a), (b), (d) (ii), (e) and (f) as indicated in the proceedings dated 3 October 2013.

(d) The petitioners are further directed to give an undertaking within the above period, to comply with the conditions (c) and (d) (i) and pay the amount covered by the demand notice dated 20 November 2014 in case the pending writ petitions and intra court appeals are decided against them.

(iii) There shall be an interim stay of the conditions as contained in para 48(i) of the order dated 10 October 2014 in W.P.Nos.9220 and 9221 of 2014 in view of the payment and undertaking to be given by the petitioners as indicated above.

(iv) This interim relief is subject to the outcome of writ petitions and writ appeals and without prejudice to the contentions of both the parties."

163. From the abovesaid order, it is evident that the appellants were directed to comply with the payments as contemplated in the NIA and also to pay AGR as per quantification with further direction to give an undertaking of conditions (c) and (d) (i) to pay the dues in case the pending matters are decided against them. Further, the order of the learned single Judge was also stayed.

164. This Court having held that levy of OTSC is sustainable and DoT can levy the said charge on the service providers, in effect, the stay granted by this Court in the writ petitions automatically gets vacated. In such view of the matter, it is not necessary to decide whether the coercive action of the respondent/DoT in demanding an undertaking is per se contemptuous when those levies are under orders of stay granted by this Court as those orders of stay stands automatically vacated in view of the dismissal of the writ petitions.

165. In the result, this Court passes the following order :-

(i) W.P. Nos.585 to 588 of 2012 are dismissed holding that the petitioners are bound to pay the amount, which is due to the department as a share of AGR on the non-telecom activities. It is for the respondent/Department to quantify the share of AGR on non-telecom activities, which remains unpaid, and issue a fresh demand notice within a period of one month from the date of a receipt of a copy of this order. On receipt of such notice, the petitioners shall pay the amount demanded by DoT within a period of one month from the date of receipt of the demand notice. In case of any dispute as to the quantification of the demand or the period of demand, the petitioners are granted liberty to take up only that portion of the dispute before the Tribunal. It is brought to the notice of this Court that the issue relating to Adjusted Gross Revenue is pending before the Supreme Court at the instance of the Central Government in Civil Appeal No.5882/2015. In such view of the matter, it is open to the Department to proceed further in the matter after adjudication of the matter by Supreme Court.

(ii) W.P. Nos.2165 to 2167 of 2013 are dismissed sustaining the levy of OTSC made by DoT on the service providers. It is informed by the learned Addl. Solicitor General that an amount to the tune of approximately more than Rs.3273 Crores is due from the petitioners to the DoT. The respondent/DoT shall issue fresh notice within one month from the date of receipt of a copy of this order quantifying the amount and the petitioners shall pay the same as per the demand and schedule furnished in the notice within a period of one month from the date of receipt of the said notice. In case of any grievance with regard to the quantification of the amount, it is open to the petitioners to approach the Tribunal/Supreme Court, as the case may be, if so advised.

(iii) W.A. Nos.1454 and 1455 of 2014 are dismissed and the appellants shall comply with the order passed by the learned single Judge quoted above. The appellants are directed to furnish an undertaking as sought for by the Department vide their letter dated 3.10.2013 within a period of one month from the date of receipt of a copy of this order and on the appellants furnishing the said undertaking, the respondent/Department shall grant

necessary approval for the merger of the licences of the transferor and the transferee companies and issue a fresh licence in terms with the NIA dated 25.2.2010.

(iv) Consequently, the interim orders already granted are vacated and the miscellaneous petitions are closed.

Sd/-  
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Secretary to Govt.  
Ministry of Communications & IT  
Dept. of Telecommunication  
Government of India  
Sanchar Bhavan  
No.20, Ashoka Road  
New Delhi 110 001.
2. Assistant Wireless Advisor  
Ministry of Communications & IT  
Dept. of Telecommunication  
Sanchar Bhavan  
No.20, Ashoka Road  
New Delhi 110 001.
3. The Principal Controller of  
Communications Account  
Tamil Nadu Circle  
Ministry of Communications & IT  
Dept. of Telecommunications  
RK Nagar Telephone Exchange  
No.238, 7<sup>th</sup> Floor, RK Mutt Road  
Mandaveli, Chennai 600 028.

1 cc to Mr.Su.Srinivasan, Advocate, sr.46380

2 ccs to Mr.Sathish Parasaran, Advocate, sr.46123

W.A. NOS. 1454 & 1455 OF 2014  
W.P. NOS. 2165 TO 2167 OF 2013  
W.P. NOS.585 TO 588 OF 2012

rk co  
kra 30.08.2016