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

\+ **W.P.(C) 11738/2018**

UNION OF INDIA ..... Petitioner

Through Mr Vikramjeet Banerjee, ASG,
Mr Abhay Prakash Sahay, CGSC.

versus

BHARTI AIRTEL LIMITED & ANR ..... Respondents

Through Mr Ramji Srinivasan, Senior Advocate with Mr Harsh Kaushik, Mr Abhay Chattophady, Ms Sylona Mohapatla, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **30.11.2018**

CM No. 45415/2018

1. Allowed, subject to all just exceptions.

2. The application is disposed of.

W.P.(C) 11738/2018 & CM No. 45414/2018

3. The petitioner (Union of India) has filed the present petition impugning an order dated 30.08.2018 passed by the Telecom Disputes Settlement & Appellate Tribunal (hereafter 'TDSAT') whereby the concerned authorities of the petitioner have been directed to take the merger of the respondent companies, M/s Bharti Airtel Limited (hereafter 'BAL') and Bharti Digital Networks Pvt. Ltd.(hereafter 'BDNPL'), and the licences on record subject to the final result of the petition before the TDSAT.

4. The controversy between the parties relates to the conditions imposed by the petitioner for accepting the merger of the respondent companies.

5. It stated that on 09.09.2008, the BDNPL (then known as *Tikona Digital Networks Private Limited*) was granted an Internet Service Provider (ISP) licence for all over India. The said licence was valid for a period of 20 years.

6. Thereafter, in the year 2010, BDNPL won Broadband Wireless Access (BWA) spectrum in 2300 MHz band in certain Licensed Services Areas (LSAs) – Rajasthan, Gujarat, Himachal Pradesh, Uttar Pradesh (East) and Uttar Pradesh (West). Subsequently, on 25.04.2017 a Unified Licence for ISP Category-A (all India) and Access Service for Rajasthan LSA was granted to BDNPL. This licence was valid for a period of 20 years.

7. BAL, *inter alia*, holds Unified Access Service (UAS) licences in 14 LSAs including Gujarat, UP (East) and UP (West) along with spectrum in 900 MHz, 1800 MHz, 2100 MHz and 2300 MHz band.

8. A scheme of Merger and Arrangement was propounded by the respondent companies (BAL and BDNPL) and the same was approved by the National Company Law Tribunal (NCLT) on 04.07.2018.

9. Thereafter, on 16.07.2018, BDNPL requested the petitioner to approve the transfer/merger of its licences to the corresponding UAS/Unified Licence of BAL.

10. The petitioner agreed to accede to the aforesaid request subject to certain conditions, as stated in its letter dated 17.08.2018.

11. The principal dispute between the parties appears to be with regard to the additional fee demanded by the petitioner for accepting the merger of the respondent companies/ their corresponding licences. It is the petitioner's case that BWA spectrum in 2300 MHz band, as available with BDNPL, cannot be used for voice services. The petitioner contends that with the merger of the two companies and the licences as sought, the BWA spectrum in 2300 MHz band – which could not be used for voice services by BDNPL – could potentially be used by BAL for such services.

12. The petitioner claims that in terms of the Guidelines for Grant of Unified Licence dated 19.08.2013, an ISP service provider with BWA spectrum is required to pay an additional entry fee to migrate to the Unified Licence Regime. The petitioner claims that such additional fee is equal to the difference between the entry fee for UASL and the entry fee paid for ISP Licence. The petitioner states that since BAL has a Unified Licence, with the acceptance of the merger, BAL is also liable to pay the entry fee as applicable for a migration of an ISP to Unified Licence Regime.

13. In view of the above, the petitioner has, *inter alia*, imposed a condition that requires the respondent companies to pay a sum of ₹185.625 crores for the petitioner to accept the said merger. In addition, the petitioner has also called upon respondent no.1 company to submit a bank guarantee towards one time spectrum charge for ₹1,441.27 crores.

14. The respondent companies are, essentially, aggrieved by certain conditions imposed by the petitioner for accepting the merger as stipulated in the communication dated 17.08.2018. Accordingly, the respondent companies have challenged the same before the TDSAT. The conditions, as

stipulated in the letter dated 17.08.2018, are set out below:-

> "(a) Payment of Rs. 185.625 Crore towards the difference between the entry fee payable for UASL in Gujarat, Himachal Pradesh, Uttar Pradesh (East) and Uttar Pradesh (West) service areas and the entry fee paid by M/s BDNPL for ISP Category 'A' service authorization under Unified License so as to facilitate the proposed merger along with the BWA spectrum in 2300 MHz band in Gujarat, Himachal Pradesh, Uttar Pradesh (East) and Uttar Pradesh (West) service areas with the respective UAS Licenses/ Unified License, which enables M/s Bharti Airtel Limited to provide mobile voice services also using the afore-mentioned BWA spectrum in 2300 MHz band in these service areas.
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> (b) M/s BAL shall submit a Bank Guarantee towards One Time Spectrum Charge (OTSC) for Rs. 1441.27 Crore towards the spectrum holding beyond 4.4 MHz in GSM band as per the clause 3(i) and 3(m) of the Merger & Acquisition Guidelines dated 20.02.2014 in the prescribed format as Annexure-I. Details of the afore-mentioned OTSC enclosed as Annexure-II.
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> (c) All demands relating to the licenses of the merging entities (viz. M/s BDNPL and M/s BAL) shall be cleared by any of the merging entities before taking the merger on record.
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> (d) M/s BAL shall be responsible for clearance of all demands which maybe raised by any Wing of the Department including the penalties imposed/to be imposed on M/s BDNPL and M/s BAL.
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> (e) M/s BAL shall submit an undertaking to pay all past demands inclusive of anything remained unpaid of the past period in respect of M/s BDNPL and M/s BAL subject to the outcome of judicial process as per the prescribed format enclosed as Annexure-III.
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> (f) Retention of Spectrum by resultant entity(viz. M/s BAL)

> and the Spectrum charges payable shall be governed by the guidelines in force at the time of the transfer of the license. It is clarified that the validity period of the spectrum shall remain unchanged subsequent to the transfer of assets/license/authorisations.
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> (g) Pursuant to the completion of Share Purchase Agreement between BAL and BDNPL (formerly "TDNPL") in August 2017, the cross holding conditions as stipulated in clause 5 of Unified License guidelines dated 19.08.2013 (as amended from time to time) is applicable against M/s BAL and M/s BDNPL since August 2017 for holding Access Spectrum by both the Companies in same Service Area of Gujarat, Himachal Pradesh, Uttar Pradesh (East) and Uttar Pradesh (West) and accordingly the same shall be made consistent within a period of one year i.e. upto August 2018."

15. The respondent companies have challenged all the aforesaid conditions except the one stipulated in sub-paragraph (f) above. Admittedly, respondent no.1 company has also filed other petitions challenging similar conditions imposed by the petitioner.

16. It is not disputed that the issues involved in the petition filed by respondent no.1 company before TDSAT are similar to the issues involved in the other petitions pending before TDSAT, where interim orders similar to the impugned order have been passed. Considering the facts and circumstances, including that the TDSAT has passed similar orders in other petitions, TDSAT has passed the impugned order. The operative part of the impugned order is set out below:-

> "Having considered the entire facts and circumstances, we are persuaded to pass interim order in favour of the petitioner on the same terms as in the orders passed earlier

on three occasions. Accordingly, we direct the concerned authorities of the Union of India to take the merger of two companies and license on record, subject to the under mentioned conditions and the final result of this petition:

1.The petitioner will be free to operationalize the spectrum subject to filing of an undertaking before this Tribunal that in case the petition fails, it shall pay to the Union of India a sum of Rs.185.625 crores [(as demanded in para (a)] of the impugned communication dated 17.8.2018 along with interest as may be determined by this Tribunal, within eight weeks from the date of the final judgment.

2. The petitioner will abide by the rest of the terms and conditions imposed upon it by the impugned communication (Annexure P-1) subject to the following modifications;

(i) The stipulation as made in para (b) of the letter will remain stayed because it appears contrary to the order passed by the Bombay High Court.

(ii) The petitioner will submit the undertaking as demanded in para (c) and (e) of the impugned letter. But it made clear that any condition of the undertaking or any omissions therefrom shall be without prejudice to the rights and contentions of the parties before the Tribunal and the validity of the conditions of the undertaking / omissions the reform will abide by the final outcome of the petition.

(iii)The requirement indicated in para (g) of the letter will be treated to have been complied with till the matter is finally adjudicated.

This interim order shall govern the parties till it is vacated or modified after considering any further or new materials which may be brought on record on behalf of the respondent."

17. As noticed above, the petitioner is not opposed to the merger of the

respondent companies; on the contrary, it has conveyed that it is willing to approve the same subject to certain conditions. The principal controversy is with regard to the additional fees and bank guarantee demanded by the petitioner. Thus, there is no fundamental error in the directions issued by the TDSAT in directing that the concerned authorities act on the merger.

18. There is no dispute that BAL is solvent and would be in a position to pay the fee demanded if it does not prevail in the petition filed before TDSAT. It is also not the petitioner's case that it would be unable to recover the amount demanded if the respondent companies fail in their petition before the TDSAT. Thus, the petitioner's claim for additional fee is fully protected and TDSAT can always pass appropriate orders to compensate the petitioner for the delay in receipt of the amounts demanded, if found due to the petitioner.

19. The TDSAT had considered the facts and circumstances of the case and then had decided to pass the interim order in conformity with the orders passed in similar petitions. This Court is also informed that the petition filed by the respondent has been set down for final hearing on 15.01.2019.

20. It is urged on behalf of the petitioner that the impugned order was passed without affording the petitioner an opportunity to file a reply. It does not appear from the impugned order that any such request was made. More importantly, the petitioner was duly represented and was also heard.

21. There is no dispute that the order passed by the TDSAT is within its jurisdiction. This Court finds no ground to interfere with the discretion exercised by the TDSAT.

22. The petition is, accordingly, dismissed with cost quantified at ₹25,000/-. The same shall be deposited with the Delhi High Court Legal Services Committee within a period of two weeks.

23. The pending application stands disposed of.

VIBHU BAKHRU, J

NOVEMBER 30, 2018/pkv