

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

SMC(C) No(s). 1/2020

IN RE MANDAR DESHPANDE

(FOR ADMISSION)

WITH

Diary No(s). 2450/2020 IN C.A. NO.5882/2015 (XVII)

(FOR MODIFICATION ON IA 11628/2020

FOR PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES ON IA 18291/2020

IA No. 11628/2020 - MODIFICATION

IA No. 18291/2020 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Diary No(s). 2458/2020 IN C.A. NO.8493/2015 (XVII)

(FOR MODIFICATION ON IA 11657/2020

IA No. 11657/2020 - MODIFICATION)

Diary No(s). 2461/2020 IN C.A. NO.8496/2015 (XVII)

(FOR MODIFICATION ON IA 11674/2020

IA No. 11674/2020 - MODIFICATION)

Diary No(s). 2476/2020 IN C.A. NO.5832/2015 (XVII)

(FOR MODIFICATION ON IA 11730/2020

IA No. 11730/2020 - MODIFICATION)

Diary No(s). 2578/2020 IN C.A. NO.8646/2018 (XVII)

(FOR MODIFICATION ON IA 12036/2020

IA No. 12036/2020 - MODIFICATION)

W.P.(C) No. 238/2020 (PIL-W)

(FOR EX-PARTE STAY ON IA 17942/2020

FOR APPROPRIATE ORDERS/DIRECTIONS ON IA 38673/2020

FOR CLARIFICATION/DIRECTION ON IA 43664/2020

FOR CLARIFICATION/DIRECTION ON IA 45217/2020

IA No. 38673/2020 - APPROPRIATE ORDERS/DIRECTIONS

IA No. 45217/2020 - CLARIFICATION/DIRECTION

IA No. 43664/2020 - CLARIFICATION/DIRECTION

IA No. 17942/2020 - EX-PARTE STAY)

MA 725-796/2020 in C.A. No. 6328-6399/2015 (XVII)

(FOR EXEMPTION FROM PERSONAL APPEARANCE ON IA 45607/2020

FOR EXEMPTION FROM PERSONAL APPEARANCE ON IA 45620/2020

FOR EXEMPTION FROM PERSONAL APPEARANCE ON IA 45629/2020

IA No. 45629/2020 - EXEMPTION FROM PERSONAL APPEARANCE

IA No. 45620/2020 - EXEMPTION FROM PERSONAL APPEARANCE

IA No. 45607/2020 - EXEMPTION FROM PERSONAL APPEARANCE)

Diary No(s). 9887/2020 IN C.A. NO.6328/2015 (XVII)
(FOR MODIFICATION ON IA 45207/2020
IA No. 45207/2020 - MODIFICATION)

Date : 11-06-2020 These matters were called on for hearing today.

CORAM :

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HON'BLE MR. JUSTICE S. ABDUL NAZEER
HON'BLE MR. JUSTICE M.R. SHAH

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UPON hearing the counsel the Court made the following
O R D E R

We have heard learned counsel for the parties at length.

An additional affidavit has been furnished today on behalf of Ms. Vandana Gupta, Deputy Director General (LFP), Department of Telecom, Govt. of India, New Delhi, which is taken on record.

We have posed a query to Mr. Tushar Mehta, learned Solicitor General of India, how the demand was raised on the basis of our judgment with respect to Public Sector Undertakings when the licences were different and the judgment never dealt with the issue of Public Sector Undertakings and their agreements are quite

different.

The affidavit filed on behalf of Department of Telecom also indicates that there are different kinds of licences. Paragraphs 5 and 6 of the affidavit on behalf of Union of India are relevant, which are extracted below:-

"5. That the AGR dispute was initiated by the licensees who were granted a 'migration package' in July/August, 1999, allowing them to migrate from a fixed LF regime to a revenue sharing regime. The relevant clauses of the Universal Access Service Licence (UASL) defining Gross Revenue and Adjusted Gross Revenue are:

"19.1 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.

19.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:

- I. PSTN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;***
- II. Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;***
- III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax.***

The relevant clauses in UL-Access are reproduced as under:

"3.1 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.

3.2 Adjusted Gross Revenue (AGR) For the purpose of arriving at the "Adjusted Gross Revenue (AGR)", following shall be excluded from the Gross Revenue to arrive at the AGR:

I. PSTN/PLMN/GMPCS related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;

II. Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;

III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax."

The relevant clauses in ISP License are reproduced are:

"18. Definition of 'Adjusted Gross Revenue':

18.1 Gross Revenue: The Gross Revenue shall be inclusive of revenue from Internet access service, revenue from internet contents, revenue from Internet Telephony service, revenue from activation charges, revenue from sale, lease or renting of bandwidth, links, R&G cases, Turnkey projects __, revenue from IPTV service, late fees, sale proceeds of terminal equipments, revenue on account of interest, dividend, value added services, supplementary services, 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.

18.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:

(i) Charges from pure Internet service, activation charges from pure internet subscribers. Pure Internet Services shall mean any method/device/technology to provide access to Internet unless explicitly prohibited and all content available including web-hosting, web-colocation which is

available on internet without access restriction.

(ii) Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax.

(iii) Roaming revenue actually passed on to other eligible/entitled telecom service provider.”

Relevant clauses of UL-ISP license are:

“3. Financial Conditions:

3.1 Gross Revenue: The Gross Revenue shall be inclusive of all types of revenue from Internet services, revenue from Internet access service, revenue from internet contents, revenue from Internet Telephony service, revenue from activation charges, revenue from sale, lease or renting of bandwidth, links, R&G cases, Turnkey projects, revenue from IPTV service, late fees, sale proceeds of terminal equipment, revenue on account of interest, dividend, value added services, supplementary services, interconnection charges, roaming charges, revenue from permissible sharing of infrastructure etc. allowing only those deductions available for pass through charges and taxes/levies as in the case of access services, without any set-off for related item of expense etc.

3.2 For the purpose of arriving at the “Adjusted Gross Revenue (AGR)” the following shall be excluded from the Gross Revenue to arrive at the AGR:

(i) Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax. 66

(ii) Roaming revenue actually passed on to other eligible/entitled telecom service provider.”

The NLD and IP-II licenses in relation to the definition of the Revenue contain clauses that are worded differently from those of the UAS (and ISP) licenses. The IP-II license has the following relevant clauses:

5.1 The License Fee in the form of revenue share @ 10% (cap) plus prescribed contributions, from time to time by the LICENSOR towards the Universal Service Obligation Fund (hereinafter called USO fund) with a total cap of 15% of annual revenue share is payable. Provisionally at present the rate of USO is 5% of the revenue for this LICENCE.

'REVENUE' for the purpose of levying license fee as a percentage of revenue shall mean the Gross total Revenue accruing to the licensee by way of providing the SERVICE under this LICENSE including the revenue on account of interest and dividend etc. It is clarified that any lease or rent charges for hiring of infrastructure shall not be deducted from the REVENUE. Service Tax and Sales Tax, if any, collected and passed on to the Government(s) from the customers of the LICENSEE shall not form part of the REVENUE. (emphasis added)

The relevant clauses in the NLD license are:

5.2 In addition to the Entry Fee described above, the LICENCE FEE in the form of Revenue Share @ 10% (cap) plus prescribed contributions from time to time by the LICENSOR towards the Universal Service Obligation Fund (hereinafter called USO fund) with a total cap of 15% of the annual Revenue Share is payable. Provisionally at present rate of USO is 5% of the Revenue for this License.

Definition of Revenue:

'REVENUE' for the purpose of levying LICENCE fee as a percentage of revenue shall mean the Gross total Revenue income accruing to the LICENCEE by way of providing NLD service under the LICENCE including the revenue on account of supplementary/value added services and leasing of infrastructure, interest, dividend etc. as reduced by the component part of a pass-through nature payable to other service providers to whose networks the LICENCEE's NLD network is interconnected, for carriage of calls. The Gross Revenue shall also include previous debits (e.g. bad debts recovered, of excess provisions in earlier years.) It is clarified that any lease or rent charges for hiring of infrastructure shall not be so deducted. Service tax and sales tax collected and passed on to the Government(s) from customers of the LICENCEE shall not form a part of the Revenue. (emphasis added)

The relevant clauses of UL-NLD are reproduced as under:

3.1 Gross Revenue & Adjusted Gross Revenue

'REVENUE' for the purpose of levying License fee as a percentage of revenue shall mean the Gross total Revenue income accruing to the Licensee by way of providing NLD service under the License including the revenue on account

of supplementary/value added services and leasing of infrastructure, interest, dividend etc. as reduced by the component part of a pass-through nature actually paid to other telecom service providers to whose networks the Licensee's NLD network is interconnected, for carriage of calls. The Gross Revenue shall also include previous debits (e.g. bad debts recovered, of excess provisions in earlier years.) It is clarified that any lease or rent charges for hiring of infrastructure shall not be so deducted. Service tax and sales tax collected and passed on to the Government(s) from customers of the Licensee shall not form a part of the Revenue.

6. That it would appear from the text of the above definitions that the definition of revenue used in UASL/ISP licenses as against the phrases used for the NLD/IP-II licenses are different. Specifically, the phrase 'by way of providing the service under the license' has been used in the NLD and IP-II licenses to qualify the term 'revenue', while this is not the case of the UASL/ISP. Further, from a bare perusal of the aforesaid, it is clear that the terminology "other miscellaneous" do not form part of the License Agreement for IP-II and NLD licenses. It is submitted that most of the Public Sector Undertakings, therefore hold licenses, under which the relevant terms and clauses, may not be similar to the Access Service license apparently analysed and interpreted by this Hon'ble Court in judgment dated 24.10.2019 passed in Civil Appeal Nos. 6328-6399 of 2015.

8. It is submitted that Public Sector Undertakings form a class in themselves as they substantially discharge governmental functions and represent public funds. It is submitted that a liability of more than Rs.4 lakh crores, which would fall upon the PSUs, may not be in larger public interest, more particularly when these PSUs are not providing mobile services the way in which commercial service providers are providing. The requirement of license by these PSUs may be based upon some of their own internal requirements and not for commercial exploitation the way in which other telecom service providers require the services except the two PSUs not mentioned in the list stated above."

It is apparent that the licences are different and our judgment in this case could not have been made the basis for

raising the demand against Public Sector Undertakings. Even otherwise, the Public Sector Undertakings are not in the actual business of providing mobile services to the general public.

In the circumstances, let the Department of Telecom reconsider the demand that has been sprung, within three days from today, and on the next date of hearing report the compliance of the action taken on the basis of this order.

For consideration of prayer with respect to reasonable time to be fixed, as per the prayer made on behalf of the Union of India, and thus we have heard learned Solicitor General of India as well as learned senior counsel appearing for various Telecom Service Providers. There are several issues which are to be considered. Firstly, the reasonable time-frame, secondly, how to ensure the payment of the amount even within that time-frame and what kind of securities, undertakings and guarantees should be furnished to ensure that the amount is paid by the Telecom Service Providers.

Time was prayed on behalf of the Telecom Service Providers to file a joint affidavit with respect to their proposal to secure the amount, which is to be paid under the orders passed by this Court. Let a joint affidavit be filed within five days from today.

List the matters on 18.06.2020.

(NARENDRA PRASAD)
ASTT. REGISTRAR-cum-PS

(JAGDISH CHANDER)
ASSISTANT REGISTRAR