
(2010) 12 SC CK 0042

Supreme Court of India

Case No: Civil Appeal No. 10660 of 2010 (Arising out of S.L.P. (C) No. 24873 of 2010)

Centre for Public
Interest Litigation and
Others

APPELLANT

Vs

The Union of India
(UOI) and Others

RESPONDENT

Date of Decision: Dec. 16, 2010

Acts Referred:

- Central Vigilance Commission Act, 2003 - Section 8, 8(1)
- Constitution of India, 1950 - Article 136, 151
- Penal Code, 1860 (IPC) - Section 120B
- Prevention of Corruption Act, 1988 - Section 13(1), 13(2)

Citation: (2011) 2 ACR 1912 : (2011) 3 MLJ 1084 : (2011) 4 SCALE 51 : (2011) 1 SCC 560 : (2011) 1 SCC(Cri) 463 : (2011) 1 UJ 211

Hon'ble Judges: G. S. Singhvi, J; Asok Kumar Ganguly, J

Bench: Division Bench

Advocate: Prashant Bhushan and Pranav Sachdeva, for the Appellant; Gopal Subramanian, S.G., Harin P. Raval, A.S.G., K.K. Venugopal, Mukul Gupta, T.R. Andhyarujina, Balaji S., Sheweta Verma Gopal, Sankara Narian, A.K. Sharma, Rajiv Nanda, Anand Verma, Anitha Shenoy, Rashmi Nandkumar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G.S. Singhvi, J.
Leave granted.

2. Feeling aggrieved by refusal of the Division Bench of the Delhi High Court to entertain the writ petition filed by them for a court monitored investigation by the Central Bureau of

Investigation (for short, "the CBI") or a Special Investigating Team into what has been termed as "2G Spectrum Scam" for unearthing the role of Respondent No. 5-Shri A. Raja, the then Union Minister for the Department of Telecommunications (DoT), senior officers of that department, middlemen, businessmen and others, the Appellants have invoked the jurisdiction of this Court under Article 136 of the Constitution.

3. After issue of notice by this Court on 13.9.2010, the parties have filed affidavits and large number of documents including performance audit report (draft and final) prepared by the Comptroller and Auditor General of India (CAG) on the issue of licences and allocation of 2G Spectrum by the Department of Telecommunications, Ministry of Communications and Information Technology for the period from 2003-04 to 2009-10, which has been submitted to the President of India as per the requirement of Article 151 of the Constitution, a compact disc allegedly containing conversation of Ms. Niira Radia with some public representatives, businessmen, journalists and alleged middlemen and written submissions.

4. On 29.11.2010, Shri K.K. Venugopal, learned senior counsel appearing for the CBI produced two sealed envelopes containing status report prepared in relation to Case No. RCDAI 2009 A0045 (2G Spectrum case).

5. On 8.12.2010, Shri Harin P. Raval, learned Additional Solicitor General representing the CBI and the Directorate of Enforcement produced before the Court the report prepared by the Enforcement Directorate in a sealed envelope, which was opened in the Court. After going through the report, the report was placed in the sealed cover and returned to Shri Raval.

6. For detailed examination of the issues raised by the Appellants, it will be useful to notice the background in which spectrum licences were given to different parties in 2008. These are:

(i) Till 1994, telecommunication services were absolute monopoly of the Government of India. In November, 1994, the Central Government framed National Telecom Policy (NTP) permitting private sector involvement in the telecommunication sector.

(ii) In the first phase, two Cellular Mobile Telephone Services (CMTS) licenses were awarded in each of the four metro cities i.e. Delhi, Mumbai, Kolkata and Chennai to the private entrepreneurs, who satisfied a predetermined set of criteria. The license fee payable by the operators was also predetermined and there was no bidding.

(iii) In the second phase, two CMTS licenses were awarded in 18 telecom circles sometime in December, 1995 through bidding process.

(iv) In January, 1995, tenders were invited for award of Basic Service Operator (BSO) licenses for license fee payable over a period of 15 years.

(v) In 1997, Parliament enacted the Telecom Regulatory Authority of India Act (for short, "the Act") for facilitating establishment and incorporation of Telecom Regulatory Authority of India (TRAI). Section 11 of the TRAI Act, which enumerates the functions of Authority, reads as under:

11. Functions of Authority. - (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of license to a service provider;

(iii) xxx xxx xxx

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) xxx xxx xxx

(vi) xxx xxx xxx

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely:

(i) ensure compliance of terms and conditions of license;

(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) xxx xxx xxx

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) xxx xxx xxx

(vi) xxx xxx xxx

(vii) xxx xxx xxx

(viii) xxx xxx xxx

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act;

Provided that the recommendations of the Authority specified in Clause (a) of this Sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in Sub-clauses (i) and (ii) of Clause (a) of this Sub-section in respect of new license to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under Sub-clauses (i) and (ii) of Clause (a) of this Sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a license to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt or further recommendation if any, the Central Government shall take a final decision.

(2) to (3) xxx xxx xxx

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

(vi) On 20.11.1998, Government of India constituted a high level group on telecom matters for making recommendations on three major issues including formulation of new telecom policy. The group recommended changes in the existing telecom policy and resolution of the problem of the existing operators. These recommendations were considered by the Union Cabinet, which approved the New Telecom Policy, 1999 (NTP 1999).

(vii) In July, 1999, the Central Government decided to offer migration package to the existing licensees to the revenue sharing regime under the new policy.

(viii) In 1999-2000, the Central Government granted CMTS licenses to MTNL and BSNL as third CMTS operator.

(ix) The CAG in his Report No. 6 of 2000 - P&T severely criticized the concession granted by the Department of Personnel as also the offer of migration to the existing licensees. However, no concrete action appears to have been taken except that the DoT had made available para-wise reply to the CAG.

(x) In September/October, 2001, the Government accepted the recommendations of TRAI and 17 new CMTS licenses were issued to private companies as fourth operator (one each in 4 metro cities and remaining 13 in other telecom circles).

(xi) On 25.1.2001, DoT issued guidelines for issue of license for basic telephone service.

(xii) On 27.10.2003, TRAI forwarded its recommendations on Unified Licensing Regime. Paragraphs 7.15 to 7.19 and 7.37 to 7.39 of those recommendations are extracted below:

Recommendations on Entry Fee, Rollout obligations and Performance Bank Guarantee:

7.15 To decide the benchmark for the entry fee for Unified Access Licensing Regime three alternatives could be considered which are discussed in the subsequent paragraphs.

7.16 The first alternative could be inviting bids from existing operators as well as from the new prospective Unified Access Licensing Operators. This is possible since additional spectrum is now being made available by Ministry of Defence and the existing contractual commitments to existing cellular and WLL players can easily be met, leaving out a balance for more players. The benchmarks fixed through this process will be up-to-date based upon the current market situation and will be done through a transparent process. The problems associated with the bidding process are as follows:

i) The fixing of the benchmarks through a bidding process could be more time consuming and hence delay the implementation of Unified Licensing.

ii) While inviting bids the question will be whether it should be done with spectrum or without any spectrum, i.e. only for migration to Unified Licensing Regime. If the bids are invited without spectrum, the new prospective Unified Licensing operators will not be able to roll out their wireless services in the absence of spectrum. If the separate bids are invited for Unified Licensing and spectrum, the bidding process will become even more time consuming and complicated. In case additional spectrum is given for Unified Licensing operators, the existing operators, while migrating to Unified Access Licensing Regime, may also demand additional spectrum which may not be available immediately. This will stall migration to the Unified Access Licensing Regime.

iii) Unless the revised spectrum pricing and allocations guidelines are finalised, there is no guarantee that the spectrum would be made available to existing operators willing to migrate to the Unified Licensing Regime.

Considering all these problems, the Authority is of the opinion that the bidding process for fixing up of the benchmarks for migration to Unified Licensing Regime may not be preferable.

7.17 The second alternative could be that basic service operators willing to migrate to Unified Access Licensing Regime should pay the difference in entry fee of average of 1st and 2nd cellular operators and entry fee paid by Basic Service Operators. This argument is not sustainable due to the following reasons:

i) CMSPs in pre NTP'99 era before migration did not pay any license fee (revenue share).

ii) 1st and 2nd CMSPs got the advantage of early entry to the market in a duopoly regime.

Some of the operators have said that they are incurring losses. In this business losses are incurred initially, e.g., Orange, one of the largest mobile operators in U.K., took almost seven years to break even. Even in India some of the Service providers have started making profits. A number of studies have shown that even at present tariff levels the addition of new subscribers is profitable.

7.18 The 3rd alternative is that the existing entry fee of the fourth Cellular Operator would be the entry fee in the new Unified Access Licensing Regime. BSOs would pay the difference of the fourth CMSP's existing entry fee and the entry fee paid by them. It may be recalled that, even in the past, entry to cellular and basic services has been on fixed fee basis, e.g., for metros in the case of cellular and for the second BSO.

7.19 It is recommended that the 3rd alternative as mentioned in para-7.18 above may be accepted for fixing the entry fee for migration to Unified Access Licensing regime for Basic and Cellular services at the circle level.

xxx	xxx	xxx
xxx	xxx	xxx
xxx	xxx	xxx

Competition

7.37 On the issue of introducing more competition, the TRAI has always been in favour of open and healthy competition. In its recommendations on the introduction of the 5th and 6th Cellular Mobile license, the TRAI opined that

Induction of additional mobile service providers in various service areas can be considered if there is adequate availability of spectrum for the existing service providers as well as for the new players, if permitted.

Taking cognizance of spectrum availability, the TRAI is in favour of introducing more competition. However, we feel that it in lieu of more cellular operators, it would be more appropriate to have competition in a Unified Licensing framework which will be initiated after six months.

Time and need of introduction of more service providers

7.38 As already mentioned earlier, with the continuing growth trend, the expected wireless subscriber base by December, 2005 will be 100 million. To achieve 100 million wireless subscribers (cellular & WLL both) the required investment is of the order of Rs. 50,000 crores. As brought out in para 6.5 this highlights a need at present itself for greater efforts by existing and new service providers to expand the investment and to meet the marked demand for telecom services and help achieve the objectives of telecom growth and development in the country.

7.39 As brought out in Para-7.37 above, the induction of additional mobile service providers in various service areas can be considered if there is adequate availability of spectrum. As the existing players have to improve the efficiency of utilisation of spectrum and if Government ensures availability of additional spectrum then in the existing Licensing Regime, they may introduce additional players through a multi-stage bidding process as was followed for 4th cellular operator.

(xiii) The recommendations of the TRAI were considered by the Group of Ministers (GoM), which, in turn, recommended the following course of action:

(i) ...The scope of NTP-99 may be enhanced to provide for licensing of Unified Access Services for basic and cellular licence services and unified Licensing comprising all telecom services. Department of Telecommunications may be authorised to issue necessary addendum to NTP-99 to this effect.

(ii) The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted.

(xiv) The recommendations of GoM were accepted by the Union Cabinet in its meeting held on 31.10.2003. Thereafter, NTP 1999 was amended vide office memorandum dated 11.11.2003. On the same day, guidelines were issued for Unified Access (Basic and Cellular) Services License (UASL).

(xv) On 14.11.2003, TRAI clarified that the entry fee of the new Unified Licensee would be the entry fee of the 4th cellular operator and in service areas where there is no 4th operator - the entry fee of the existing BSO fixed by the Government (based on TRAI's recommendations).

(xvi) In November, 2003, the DoT decided to accept and process UASL applications in the same manner as was done in the case of BSO applications.

(xvii) On 13.1.2005, TRAI recommended that till Unified Licensing comes into effect, the current regime of spectrum pricing will continue and the telecom services should not be seen as a source of revenue for the Government. On 14.12.2005, revised UASL guidelines were issued.

(xviii) On 13.4.2007, a reference was made to TRAI by the DoT stating that after finalisation of UASL policy, 159 licences had been issued for providing Access Services (CMTS/UASL/Basic) in the country and the Access Service Providers were mostly providing services by using the wireless technology (CDMA/GSM). It was also indicated that as per the existing policy of granting license, there was increase in the demand on spectrum in a substantial manner and the Government was contemplating review of its policy. A suggestion was also made that a limit can be put on the number of Access Service Providers in each service area because the spectrum is a scarce resource and to ensure that adequate quantity of spectrum is available to the licensee to enable them to provide their services and to maintain the quality of service. The issues on which opinion of TRAI was sought included transfer of licences, guidelines dated 21.2.2004 on mergers and acquisitions, to permit service providers to offer Access Service using combination of technologies (CDMA/GSM/Basic or any other) under the same license and rollout obligations.

(xix) In May, 2007, Respondent No. 5 took over as Minister for the Department of Telecommunications.

(xx) The TRAI submitted its recommendations on 28.8.2007, paragraphs 2.37, 2.78 and 2.79 whereof are as under:

Para 2.37: No cap be placed on the number of access service providers in any service area.

Para 2.78: "Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favour of changing the spectrum fee regime for a new entrant. Opportunity for equal competition has always been one of the prime principles of the Authority in suggesting a regulatory framework in telecom services. Any differential treatment to a new entrant vis-à-vis incumbents in the wireless sector will go against the principle of playing field. This is specific and restricted to 2G bands only i.e. 800, 900 and 1800 MHz. This approach assumes more significance particularly in the context where subscriber acquisition cost for a new entrant is likely to be much higher than for the incumbent wireless operators.

Para 2.79 It is therefore recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 bands should be auctioned so as to ensure efficient utilization of this scarce resource. In the 2G bands (800 MHz/900MHz/1800 MHz), the allocation through auction may not be possible as the service providers were allocated spectrum at different times of their license and the amount of spectrum with them varies from 2X4.4 MHz in CDMA technology. Therefore, to decide the cut off after which the spectrum is auctioned will be difficult and might raise the issue of level playing field.

(xxi) The recommendations of TRAI were placed before Telecom Commission sometime in October, 2007. However, none of the four non-permanent members of the Telecom Commission i.e. the Finance Secretary, Secretary, Department of Industrial Policy and Promotion, Secretary, Department of Information Technology and Secretary, Planning Commission were even informed about the meeting of the Telecom Commission. In that meeting, a committee of 6 officers all belonging to DoT was constituted and the committee submitted its report on 10.10.2007 virtually dittoing the recommendations of the TRAI.

(xxii) Three of the four companies, which were providing CDMA based mobile services under UAS licence had applied in 2006 for permission to use GSM technology. At the relevant time, combination of technologies (CDMA, GSM and/or any other) was not permitted. Therefore, the DoT did not accept their request. After receipt of the recommendations of TRAI, a decision was taken by the DoT on 17.10.2007 for use of alternate technology albeit without referring the matter to full Telecom Commission. DoT issued press release on 19.10.2007 on the issue of use of alternate technology. However, a day before that i.e., 18.10.2007, three operators who had applied for use of alternate technology were given "in principle" approval for using GSM technology.

(xxiii) In the meanwhile, a press note was issued by DoT incorporating therein the decision that new applications for UASL will not be accepted after 1.10.2007 till further orders. As on that date, 167 applications had been received. These included the applications which had not been processed since March, 2006. After publication of the press release, 408 more applications were received. Thus, as on 1.10.2007, 575 applications were received for UASL in respect of 22 service areas.

(xxiv) Member (Technology), Telecom Commission sent letter dated 26.10.2007 to the Secretary, Department of Legal Affairs, Ministry of Law and Justice for obtaining opinion of the learned Attorney General of India/Solicitor General of India on the issue of grant of new licences as well as grant of approval for use of dual technology spectrum to the existing operators so as to enable the DoT to handle the unprecedented situation in a fair and equitable manner, which will be equally tenable. The letter was accompanied by a statement of case.

(xxv) The Law Secretary prepared a note on 1.11.2007, which was placed before the Law Minister. The latter opined that keeping in view the importance of the case and various options indicated in the statement of case, the whole issue needs to be first considered by an empowered Group of Ministers and in that process legal opinion of the Attorney General can be obtained.

(xxvi) On the next day i.e. 2.11.2007, Respondent No. 5 dispatched D.O. letter to the Prime Minister in which he indicated that the suggestion of the Law Ministry was totally out of context and, at the same time, asserted that the department had decided to continue with the existing policy i.e. First-Come-First-Served for processing of applications received up to 25.9.2007 and the procedure for processing the remaining applications will be decided at the later stage, if any spectrum is available.

(xxvii) It appears that even before the D.O. letter sent by Respondent No. 5 was received in his office, the Prime Minister sent a letter to him drawing his attention to the issues raised by the telecom sector companies and others on the processing of large number of applications in the backdrop of inadequate spectrum. The Prime Minister's letter was accompanied by a note in which five issues were identified. On the same day, Respondent No. 5 sent another letter to the Prime Minister stating that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them level playing field.

(xxviii) On 22.11.2007, the Finance Secretary wrote to the Secretary, DoT expressing his serious reservation on the decision of the DoT on the issue of determination of fee for grant of licences in 2007 at the rate determined in 2001. He emphasized that in view of the financial implications, the Ministry of Finance should have been consulted before finalizing the decision and requested that further action to implement the licences may be stayed. In reply, the Secretary DoT sent D.O. dated 29.11.2007 stating therein that entry fee was finalised for UAS regime in 2003 as per the decision of the Cabinet and the dual technology licences were issued on TRAI recommendations of 28.8.2007.

(xxix) On 3.1.2008, a meeting of full Telecom Commission was fixed for 9.1.2008 to consider the following issues:

(i) Performance of telecom sector.

(ii) Pricing of spectrum.

(iii) Any other item with the permission of Chairman.

However, vide letter dated 7.1.2008, Joint Secretary (T), DoT informed the members of the Commission that meeting scheduled for 9.1.2008 has been postponed to 15.1.2008.

(xxx) After three days of postponement of the meeting of Telecom Commission, a press release was issued by DoT that the department had decided to issue Letter of Intent (LOIs) only to those applicants, who had applied up to 25.9.2007. It was also indicated that the department has been implementing a policy of First-Come-First-Served for grant of UASL under which initially an application which is received first will be processed first and thereafter, LOI will be granted to those found eligible and UAS licence will be given to those whosoever complies with the conditions of LOI first. On the same day, the DoT issued another press release at 2.45 P.M. asking all the applicants to assemble at the departmental headquarter within 45 minutes to collect response of DoT. The eligible LOI holders were also asked to submit compliance of the terms of LOI within the prescribed period.

(xxxi) All the applicants, eligible or not, collected their LOIs and acceptance of 120 applications was also received on the same day. Compliance of the terms and conditions of LOI was also made for 78 applications on 10.1.2008.

(xxxii) Soon after obtaining the licences, Swan Telecom which had paid licence fee of Rs. 1537 crores only off loaded its 45% stake to Etisalat for Rs. 4,500 crores and Unitech, which obtained licence for Rs. 1651 crores off loaded 60% of its stake to Telenor for Rs. 6120 crores.

(xxxiii) S. TEL Ltd., which had submitted application pursuant to press note dated 24.9.2007 but whose application was not considered along with other applicants in view of the anti-dating of the cut off date, filed Writ Petition No. 636/2008 in the Delhi High Court for quashing first press release dated 10.1.2008. The learned Single Judge referred to the recommendation made by the TRAI that there should be no cap on the number of excess service providers in any service area and observed that on the one hand, the Government of India accepted the recommendation of the TRAI but acted just contrary by amending the cut off date and thereby limiting the service providers whose applications could be considered for grant of licence. The learned Single Judge held that there was no rational basis for fixing 25.9.2007 as the cut off date and there was no justification to change the rules of game after the game had begun. Accordingly, he allowed the writ petition and directed the Respondents to consider the application of the writ Petitioner for 16 circles.

(xxxiv) L.P.A. No. 388/2009 filed by the Union of India against the order of the learned Single Judge was dismissed by the Division Bench and the order of the learned Single Judge was upheld.

(xxxv) SLP No. 33406/2009 filed by the Union of India, which was converted into C.A. No. 2355/2010 was disposed of by this Court on 12.3.2010 after taking into consideration the additional affidavit filed by the writ Petitioner and suggestion made by the Attorney General. However, the finding recorded by the High Court on the issue of change of cut off date was not disturbed.

(xxxvi) On 4.5.2009, Appellant No. 2 - Telecom Watchdog submitted detailed representation to the Chief Vigilance Commissioner (CVC) pointing out irregularities committed in the grant of UASL. After 5 days, one Shri A.K. Agarwal made a complaint to the CVC to highlight how manipulations were made by some of the applicants for getting the licences and how the exercise undertaken by the DoT for grant of UASL has resulted in serious financial loss to the public exchequer.

(xxxvii) The CVC got conducted an inquiry u/s 8(d) of the Central Vigilance Commission Act, 2003 and noticed some grave irregularities in the grant of licences. On 12.10.2009, a copy of the report prepared on the basis of the said inquiry was forwarded by the CVC to the Director, CBI to investigate into the matter to establish the criminal conspiracy in the allocation of 2G Spectrum under UASL policy of DoT and to bring to book all wrong doers. On receipt of the aforesaid communication from the CVC, CBI registered FIR No. RC-DAI-2009-A-0045 dated 21.10.2009 against unknown officials of DoT and unknown private persons/companies and others for offence u/s 120B IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988.

Submissions:

7. Shri Prashant Bhusan, learned Counsel for the Appellants argued that the allocation of spectrum on 10.1.2008 has resulted in huge loss to the public exchequer and, therefore, a thorough probe is necessary by an independent agency so that all the persons who may be found guilty are brought before law and punished. Learned Counsel extensively referred to the documents produced by the parties before the High Court and this Court including letter dated 20.11.2009 of the Joint Secretary of Income Tax and the report of the CAG and argued that the Court should direct the CBI to conduct investigation on various issues including grant of permission for use of dual/alternate technology to three operators a day before the policy decision was announced to the public by means of press release dated 19.10.2007, the change of cut off date from 1.10.2007 to 25.9.2007, issue of LOIs by DoT on 10.1.2008, gross violation of the policy of first-come-first-served, non compliance of the rollout and other obligations by the licensees, failure of the TRAI and DoT to ensure that the licensee complied with the conditions on which they were permitted to use the spectrum and huge loss caused to the public exchequer by manipulative mechanism as also sale of equities by different licensees to foreign companies. Learned Counsel referred to para 6.31(iv) of the TRAI recommendation to show that no proposal for permission for merger and acquisition could be entertained till the fulfillment of rollout obligations but DoT acted contrary to the TRAI recommendation without complying with fifth proviso to Section 11 of the Act and as a result of that the

licensees violated the conditions of licence with impunity. Shri Bhushan submitted that the grant of licences on the basis of 2001 price in the garb of implementing the recommendations made by TRAI has resulted in loss to the public exchequer to the tune of more than Rs. 1,76,000 crores.

8. Learned Counsel submitted that since the spectrum was scarce, the grant of licences on the basis of 2001 price was ex facie contrary to public interest and a mala fide action on the part of Respondent No. 5 and officers of DoT who had connived with the private operators and others including those in realty and infrastructure sectors for extraneous considerations. Learned Counsel emphasized that majority of 122 applicants to whom the licences were granted were ineligible and, therefore, the TRAI has recommended cancellation of their licences. Shri Bhushan then submitted that the CAG has assessed the loss by using different methods and, therefore, the report prepared by him should constitute a basis for further investigation. Learned Counsel made a pointed reference to the finding recorded by the CAG that soon after getting licences for a price of Rs. 1600 crores or less, the licensees have transferred their stakes to the operators outside the country and made profits running into many thousand crores. Learned Counsel submitted that the mechanism adopted by the DoT, which was headed by Respondent No. 5 at the relevant time to hold meeting of Telecom Commission in October, 2007 without informing the non permanent members (four Secretaries of important Departments of Government) and postponement of the meeting of Telecom Commission scheduled for 7.1.2008, issuance of two press releases on 10.1.2008, grant of 45 minutes to the applicants to collect LOIs and the very fact that some of the applicants could submit bank drafts of Rs. 1600 crores within few hours shows that everything had been pre-fixed with a view to favour some operators at the cost of public revenue. Learned Counsel pointed out that the mechanism of auction adopted for allocation of 3G Spectrum has yielded more than 60,000 crores and if the same methodology was adopted for allocation of 2G Spectrum, the country would have been richer by more than a lac and half crores. Learned Counsel submitted that the investigation being conducted by the CBI should be monitored by the Court by appointing two independent investigators who should be persons of unimpeachable integrity and who should be conversant with the functioning of the CBI. He lamented that while the CAG has submitted the final report within few months from the receipt of relevant records from the CBI and the Directorate of Income Tax (Investigation), the CBI has not been able to make any tangible progress. Shri Prashant Bhushan also referred to the reports appearing in a section of media about grant of huge loans by public sector and other banks to the applicants to facilitate their participation in the allotment of UAS licences and submitted that the CBI should be asked to investigate this aspect as well to unearth the conspiracy between the companies engaged in realty and infrastructure sectors and the banks which enabled the former to earn huge profits without even complying with their obligations under the licence.

9. Shri K.K. Venugopal, learned senior counsel appearing for the CBI relied upon the judgments of this Court in 284257 , 284953 , 280673 , 259090 , 265746 , 263777 ,

259486 , 271677 , 260871 , 257897 , 266105 , 265181 , 300463 , 258809 and argued that the Court should not make any order which may cast any reflection on the ability of the CBI to conduct the investigation into a case in which allegations of corruption have been leveled against various functionaries of the Government including Respondent No. 5. Learned senior counsel emphasized that the CBI has always conducted investigations objectively and, therefore, there is no reason to think that the investigation in the present case will not be fair and impartial or that any attempt will be made to shield any one. Learned Counsel pointed out that after registering the first information report, the CBI has conducted raids, collected voluminous records and copies of the tapped conversation of Ms. Niira Radia and examined more than three dozen witnesses. He submitted that the CBI will submit further progress report to the Court within 8 weeks and try to complete the investigation by the end of March, 2011.

10. Shri Gopal Subramanian, learned Solicitor General argued that UAS licences were granted in 2008 on the price fixed in 2001 because the TRAI had recommended that the new entrant should not be subjected to discriminatory treatment and there should be level playing field for all the applicants. Learned Solicitor General submitted that the recommendations made by the TRAI were approved by the Government and as such the same cannot be termed as illegal or arbitrary. He submitted that the TRAI is an expert body established for rapid growth of telecommunication services and there is no reason to doubt the credibility of the recommendations made by it on 28.8.2007 for grant of licences on the principle of first-come-first-served basis by treating the 2001 price as the bench-mark. The learned Solicitor General submitted that the loss indicated in the report of CAG is based on assumptions and at this stage the Court may not make the said recommendations as the basis for recording a finding whether or not any loss has been caused to the public exchequer and/or magnitude of the loss. He submitted that the Central Government has, after considering the recommendation made by the TRAI, already initiated action for cancellation of the licences of the ineligible applicants and also those who failed to comply with the conditions of licence including rollout obligation.

11. Shri Harin P. Raval, learned Additional Solicitor General referred to the provisions of the Prevention of Money-Laundering Act, 2002 and the Foreign Exchange Management Act, 1999 and argued that soon after receiving complaint, which was forwarded by the Ministry of Finance, the Director General Income Tax (Investigation) sought permission from the Union Home Secretary for putting on surveillance the telephone lines of Ms. Niira Radia and her associates and on the basis of the approval granted by the latter, telephone lines of Ms. Niira Radia and her associates were put under surveillance. He submitted that after completion of the recording, a detailed investigation is being conducted under the supervision of the Director General Income Tax (Investigation). He invited the Court's attention to the report, which was produced in a sealed envelope to show that serious efforts are being made by the Department to find out whether there has been violation of the provisions contained in the two Acts and loss has been caused to the public exchequer. Learned Counsel assured that the Department will produce report

on the basis of further investigation conducted by it.

12. Shri T.R. Andhyarujina, learned senior counsel appearing for Respondent No. 5 submitted that the report of the CAG is flawed on various aspects and the estimation of loss is based on totally unfounded assumptions. Learned Counsel referred to various paragraphs of the CAG report and emphasized that till the completion of investigation no conclusion should be drawn by the Court on the culpability of Respondent No. 5. Learned senior counsel repeatedly emphasized that his client should not be condemned in the eyes of the public by unwarranted media publicity even before completion of the investigation by the CBI and the authorities of the Income Tax Department.

13. At this stage, we may mention that during the course of hearing, the learned Solicitor General and Shri K.K. Venugopal stated that the Government of India and the CBI would have no objection to a Court monitored investigation by the CBI, but submitted that there is no reason for appointment of a Special Investigation Team. The learned Solicitor General also stated that the present incumbent in the office of CVC will recuse himself from the supervision of the investigation being conducted by the CBI in connection with FIR No. RC-DAI-2009-A-0045 registered on 21.10.2009 or any other FIR, which may be registered in connection with grant of UAS licences. Shri K.K. Venugopal added that the investigation being conducted by the CBI can be supervised by the two Vigilance Commissioners subject to the limitation contained in proviso to Section 8(1) of the Central Vigilance Act.

14. We have considered the respective submissions and carefully scanned the record. We have also gone through the reports produced by Shri K.K. Venugopal and Shri Harin P. Raval. In our opinion, the Division Bench of the High Court committed a serious error by dismissing the writ petition at the threshold ignoring that the issues raised by the Appellants, whose bonafides have not been doubted, are of great public importance. We are, prima facie, satisfied that the allegations contained in the writ petition and the affidavits filed before this Court, which are supported not only by the documents produced by them, but also the report of the Central Vigilance Commission, which was forwarded to the Director, CBI on 12.10.2009 and the findings recorded by the CAG in the Performance Audit Report, need a thorough and impartial investigation. However, at this stage, we do not consider it necessary to appoint a Special Team to investigate what the Appellants have described as 2G Spectrum Scam because the Government of India has, keeping in view the law laid down in Vineet Narain's case and orders passed in other cases, agreed for a Court monitored investigation. The reports produced before the Court show that the CBI and the Enforcement Directorate have started investigation in the right direction. At the same time, keeping in view the statements made by the learned Solicitor General and the learned senior counsel representing the CBI and with a view to ensure that in a serious matter like this, comprehensive and coordinated investigation is conducted by the CBI and the Enforcement Directorate without any hindrance, we deem it proper to issue the following directions:

(i) The CBI shall conduct thorough investigation into various issues highlighted in the report of the Central Vigilance Commission, which was forwarded to the Director, CBI vide letter dated 12.10.2009 and the report of the CAG, who have prima facie found serious irregularities in the grant of licences to 122 applicants, majority of whom are said to be ineligible, the blatant violation of the terms and conditions of licences and huge loss to the public exchequer running into several thousand crores. The CBI should also probe how licences were granted to large number of ineligible applicants and who was responsible for the same and why the TRAI and the DoT did not take action against those licensees who sold their stakes/equities for many thousand crores and also against those who failed to fulfill rollout obligations and comply with other conditions of licence.

(ii) The CBI shall conduct the investigation without being influenced by any functionary, agency or instrumentality of the State and irrespective of the position, rank or status of the person to be investigated/probed.

(iii) The CBI shall, if it has already not registered first information report in the context of the alleged irregularities committed in the grant of licences from 2001 to 2006-2007, now register a case and conduct thorough investigation with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licensees/service providers and also on the issue of allowing use of dual/alternate technology by some service providers even before the decision was made public vide press release dated 19.10.2007.

(iv) The CBI shall also make investigation into the allegation of grant of huge loans by the public sector and other banks to some of the companies which have succeeded in obtaining licences in 2008 and find out whether the officers of the DoT were signatories to the loan agreement executed by the private companies and if so, why and with whose permission they did so.

(v) The Directorate of Enforcement / concerned agencies of the Income Tax Department shall continue their investigation without any hindrance or interference by any one.

(vi) Both the agencies, i.e., the CBI and the Directorate of Enforcement shall share information with each other and ensure that the investigation is not hampered in any manner whatsoever.

(vii) The Director General, Income Tax (Investigation) shall, after completion of analysis of the transcripts of the recording made pursuant to the approval accorded by the Home Secretary, Government of India, hand over the same to CBI to facilitate further investigation into the FIR already registered or which may be registered hereinafter.

15. The progress reports based on the investigations conducted by the CBI and the Enforcement Directorate shall be produced before the Court in sealed envelopes on 10.2.2011.

The case be listed for further consideration on 10.2.2011.