SUPREME COURT OF INDIA

Subramanian Swamy

Vs.

A.Raja

S.L.P.(Crl.)No.1688 of 2012

(G.S.Singhvi and K.S.Radhakrishnan,JJ.)

24.08.2012

ORDER

K.S. Radhakrishnan,J.

1. Common questions arise for consideration in both these applications; hence they are being disposed of by a common order. SLP (Crl.) 1688 of 2012 arises out of an order dated 04.02.2012 in CC No.01(A)/11 passed by the Special Judge, CBI (04) (2G Spectrum Cases), New Delhi. I.A. No. 34 of 2012 has been filed by the appellants in Civil Appeal No. 10660 of 2010 claiming almost identical reliefs.

2. Dr. Subramanian Swamy, the petitioner in special leave petition filed a criminal complaint on 15.12.2010 before the Special Judge, CBI of Central/Delhi to set in motion the provisions of Prevention of Corruption Act (for short 'the PC Act') against A. Raja, the then minister of Telecommunications and to appoint him as a prosecutor under Section 5(3) of the PC Act. The complaint was numbered as CC No.1 of 2010 and was heard on several occasions. The case was later transferred to the Special Judge, CBI (04)(2G Spectrum Cases), New Delhi. CBI, after investigation, filed a charge sheet in that complaint on 2.4.2011 regarding commission of offences during 2007-2009 punishable under Sections 120B, 420, 468, 471 IPC and also punishable under Section 13(2) read with Section 13(1)(d) of the PC Act, against A. Raja and others. Special Judge took cognizance on 2.4.2011. CBI's further investigation disclosed that the monetary involvement was much more and charge was laid. Special Judge took cognizance of the aforesaid charge sheet on 25.4.2011. Both the charge sheets were clubbed together vide order dated 22.10.2011 under Section 120B read with Sections 409, 420, 468 and 471 IPC and day to day trial began from 11.11.2011. Dr. Subramanian Swamy's complaint case No.CC 01/2011 was also taken on file and renumbered as CC.No.1(A)/2011.

3. Dr. Subramanian Swamy, the petitioner, herein, while he was being examined under Section 200, Code of Criminal Procedure in CC No. 01(A)/11 had deposed on 17.12.2011 as well as on 07.01.2012 that Shri A Raja, the first accused, could not have alone committed the offences alleged against him, but for the active connivance of Shri P. Chidambaram, the then Finance Minister. So far as the various charges were concerned, it was alleged that both Shri A. Raja and Shri P. Chidambaram were jointly and severely responsible. Reference was also made to documents including Ext. CW 1/1 to CW 1/28 with an emphasis that all those acts were done by the accused - Shri A Raja in connivance, collusion and consent of Shri P. Chidambaram and hence Shri P. Chidambaram was also guilty of commission of the offences under the P.C. Act for which Shri A. Raja was already facing trial. Further, it was also pointed out that Shri P. Chidambaram was also guilty of breach of trust on the question of national security for not disclosing that Etisalat and Telenor were black-listed by the Home Ministry. Further, it was pointed out that there was enough incriminating materials on record for carrying out the investigation against Shri P. Chidambaram and for making him an accused in the case. Further, it was also alleged that Shri P. Chidambaram had played a vital role in the subversion of the process of issuance of Letter of Intent (for short 'LOI'), Unified Access Service (for short 'UAS') Licenses and allocation of spectrum in the year 2007-08. Further, it was also alleged that Shri P. Chidambaram was also complicit in fixing the price of the spectrum licence at 2001 level and permitting two companies, which received the licence that is Swan Tele Communication (P) Ltd. (for short 'Swan') and Unitech (T.N.) Ltd. (for short 'Unites') and to dilute their shares even before roll-out of their services.

4. Learned Special Judge, after referring to the various documents, produced found no substance in the allegations raised against Shri P. Chidambaram and found that he had no role in the subversion of the process of issuance of the LOI, UAS Licenses and allocation of spectrum in the year 2007-08. Learned Judge concluded that there was no evidence on record that he was acting in pursuant to the criminal conspiracy, while being party to the two decisions regarding non-revision of the spectrum pricing and dilution of equity by the two companies. Consequently, the prayer made for carrying out the investigation against Shri P. Chidambaram and to make him an accused was rejected vide order dated 04.02.2012, against which SLP (Crl.) No. 1688 of 2012 has been filed.

5. Dr. Swamy appeared in person and elaborately referred to Annexure P- 1 Final Report dated 03.04.2011 submitted by CBI before the Special Judge especially Para E, charge dealing with "Cheating the Government Exchequer by Non¬Revision of Entry Fee". Reference was also made to the summary of his arguments raised before the Special Judge for carrying out investigation against Shri P. Chidambaram and to array him as an accused in the pending criminal case. Reference was also made to the meetings that Shri P. Chidambaram had with Shri A. Raja on 30.01.2008, 29.05.2008, 12.06.2008 and later with

the Prime Minister on 04.07.2008 and submitted that in those meetings both of them conspired together for a common object and purpose in fixing the pricing of spectrum at the year 2001 level and permitting distribution equally by two companies Swan and Unites. Further, it was also pointed out that Shri P. Chidambaram was fully aware, at least, on 09.01.2008 as to what Shri A Raja was planning to do on 10.01.2008. Referring to several documents placed on record, it was pointed out that in fact Shri P. Chidambaram did not pay heed to the opinions expressed by the officials of his own Ministry and abeted to commit various illegal acts.

6. Dr. Swamy referred to various ingredients of Section 13(1)(d)(iii) of PC Act and pointed out that a bare reading of the above mentioned provision shows that mens rea or criminal intent was not an essential ingredient of that Section. Reference was made to the judgment of this Court reported in Indo *China Steam Navigation Co v.Jasjeet Singh*[1]*State of Maharashtra v. Hans George*[2]*and R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Ltd. and Another*[3]and submitted the ratio of above judgments indicate that certain criminal offences imposing punishment of incarceration need not require mens rea instead strict liability as enumerated in the statute itself. Dr. Swamy pointed out that the above mentioned statutory provision would indicate that the emphasis is on "obtains" and "public interest". Dr. Subramanian Swamy submitted that the learned trial judge had failed to notice those vital aspects and has wrongly rejected the prayer for conducting investigation against Shri P. Chidambaram and to array him as an accused.

7. Shri Prashant Bhushan, learned counsel appearing for the applicants in I.A. No. 34 of 2012 has indicated the necessity of conducting a thorough investigation by the CBI into the role of the then Finance Minister Shri P. Chidambaram in the matter of fixing the spectrum pricing and allowing the sale of equity by Swan and Unitech. Learned counsel pointed out that in that process, Shri P. Chidambaram had over-ruled the officers of his own Ministry who favored auction / market- based pricing of spectrum and instead allowed various companies to make windfall profits. Further, it was also stated that he had allowed the above-mentioned companies to sell off their shares without charging any Government's share of its premium on account of spectrum valuation and without enforcing his own agreement with the then Telecom Minister.

8. Learned counsel made specific reference to para 2.1.2(3) and submitted that the Group of Ministers (GoMs) had in their recommendation dated 30.10.2003 stated that the Department of Telecom (DoT) and the Ministry of Finance (MoF) would discuss and finalise spectrum pricing formula which would include incentive for efficient use of spectrum as well as disincentive for suboptimal usages. Learned counsel pointed out that the above recommendation would clearly indicate that MoF officials were fully aware that unless such

'concurrence' based on discussion and finalization of spectrum pricing formula between the DoT and the MoF had been established, the DoT could not have moved ahead and spectrum could have been allocated at 2001 rates in the year 2007-08.

9. Learned counsel also referred to the "Position Paper on Spectrum Policy" prepared by the Department of Economic Affairs (revised on 03.01.2008) which was forwarded along with covering letter dated 09.01.2008. The Telecom Commission meeting which was to take place on 09.01.2008 was postponed to 15.01.2008. Further, it was pointed out that before the scheduled meeting of the Telecom Commission on 15.01.2008, DoT had already issued 122 LOIs for UAS licenses on 10.01.2008 and that LOIs were converted into licenses during 27.02.2008 to 7.3.2008 and the spectrum allocation was started from 22.4.2008 and completed 6.5.2009. Learned counsel pointed out that, the then Finance Minister had enough time to stop the scam, since the price was not fixed by the DoT and MoF as authorized by the GoMs (2003).

10. Further, it was also stated that before the Telecom Commission could meet, then Finance minister made a note on 15.01.2008 to the Prime Minister of India pointing out that the note did not deal with the need, if any, to revise entry fee or the rate of revenue share, and also indicated the said note dealt with spectrum charges for 2G spectrum. Further, it was also stated by Shri Prashant Bhushan that then Finance Minister and Shri A Raja had met on 30.01.2008 to discuss the issue of licensing and spectrum pricing. In that meeting, then Finance Minister had announced the issue of revising entry fee of 122 LOIs already issued by DoT and that they were not seeking to revisit the current regimes for entry fee or for revenue share.

11. Shri Bhushan also referred to the approach paper by Department of Telecom Commission, which was forwarded by the Secretary, DoT to the Finance Secretary, MoF, which would indicate that the officials of Finance Ministry were keen to stop the allocation of spectrum of 4.4 MHz and were suggesting the allocation of spectrum by way of auction.

12. Learned counsel also referred to the sequel note to the Department of Economic Affairs dated 11.02.2008 which according to the learned counsel, would indicate that the MoF had deferred from the position of Dot and stated that there was no contractual obligation to allot a start-up spectrum of 4.4 MHz to every licensee free of cost and that the entire range of the spectrum allotted should be priced and that the issue of level playing field could be addressed by charging the price even on existing operators. Learned counsel pointed out that in spite of objection raised by the officials of Ministry, the Finance Minister acted in connivance with Shri A Raja and Shri A Raja went ahead and issued 122 licenses which could have been prevented by Shri P. Chidambaram, had he stood with the views of his officials.

13. Learned counsel also referred to note dated 07.04.2008 sent by the Finance Secretary after discussion with the Finance Minister wherein it was noticed that DoT was agreeable for pricing of spectrum beyond 4.4 MHz but wanted that to be deferred till auction of 3G and WIMax was completed. Reference was also made by the learned counsel to the note dated 03.04.2008 of the Additional Secretary (EA) and pointed out that then Finance Minister had agreed that spectrum usage charge should be increased reflecting the scarcity value of spectrum as indicated in their note dated 11.02.2008. Further, the note also indicated the Finance Minister's view that they should insist, in principle, on pricing spectrum beyond 4.4 MHz although details could be worked out after the auction of 3G spectrum.

14. Shri Prashant Bhushan also referred to the Office Memorandum, MoF dated 8.4.2008 prepared by Shri Govind Mohan, Director which, according to the learned counsel reflected the MoF's original position of 11.2.2008 on the issue of subjecting the entire spectrum to specific pricing. Learned counsel alleged that the note issued was later withdrawn and the officer was reprimanded and a fresh Office Memorandum was issued by the same Director. Learned counsel compared the original Office Memorandum dated 08.04.2008 and the new Office Memorandum and submitted that the original Office Memorandum had required the entire range of spectrum to be specifically priced and the revised Office Memorandum which was prepared on 9.4. 2008 had presented with a date of 8.4.2008, specifically sought to exclude start-up spectrum upto 4.4 MHz from being specifically charged, ensuring the entry fee of 2001 that was fixed by the then Telecom Minister in 2008, was not revised. Shri Bhushan submitted that the officer had to apologize for his deeds and on 16.04.2008, the then Finance Minister accepted the apology of the officer.

15. Learned counsel also referred to letter dated 21.4. 2008 sent by the then Finance Minister to Shri A Raja and submitted that the spectrum issue "non paper" was silent on the issue of entry fee for start-up spectrum for 122 licenses already issued and the discussion mainly concentrated on the charging for spectrum beyond 4.4 MHz. Reference was also made to the Finance Secretary's updated note dated 29.04.2008 which, according to the learned counsel, reflected the same position preferred by MoF. Both Shri A Raja and Shri P. Chidambaram met on 29.05.2008 as well as on 12.06.2008. Learned counsel also pointed out that on 4.7.2008, the then Finance Minister, Shri A Raja along with Finance Secretary met the Prime Minister. By the time, LOIs were already issued which were converted to licenses, allocation of start-up spectrum was started. Learned counsel also made reference to the CAG report and the pointed out the reference made to Shri P. Chidambaram. Reference was also made to the briefing made by the Prime Minister, to the Media on 16.2.2011 and also the address made by the Prime Minister in Rajya Sabha on 24.2.2011.

16. Learned counsel also pointed out that there was no justification, in any view, in allotting the start-up spectrum 4.4 MHz to every licensee free of cost and submitted that the entire range of spectrum allotted should have been priced. Learned counsel pointed out that one price of spectrum between 4.4 MHz and 6.2MHz and different price for spectrum between beyond 6.2 MHz would be nontransparent and illegal. Learned counsel pointed out that in fact the MoF had initially objected the above stand of Dot but subsequently yielded after the meeting Shri P. Chidambaram had with Shri A Raja.

17. Learned counsel pointed out all those facts which would clearly indicate that Shri P. Chidambaram the then Finance Minister was also equally responsible. Non-revision of spectrum price though specifically recommended by the GoMs in the year 2003 would indicate, according to the counsel, that Shri P. Chidambaram colluded up with Shri A Raja in non- auctioning of the spectrum and went on for allotment of first come first served basis at 2001 rates. Further, it was also pointed out that Shri P. Chidambaram had not revised his position from giving away 4.4 MHz of spectrum at 2001 prices and giving away 6.2 MHz of spectrum at 2001, thus causing huge loss to the exchequer. Further, he was also instrumental along with Shri A. Raja for allowing companies like Swan and Unitech to sell off their shares without charging any Government's share of its premium. Counsel therefore prayed for a direction of CBI to conduct a thorough investigation / further investigation into the role of Shri P. Chidambaram in 2G spectrum scam under the close scrutiny of this court.

18. We heard Dr. Subramnian Swamy, appearing in person and Shri Prashant Bhushan, learned counsel at length. Arguments raised give rise to the following questions:

> "1) Whether Shri P. Chidambaram has conspired with Shri A Raja in fixing the price of the spectrum at 2001 level thereby committed the offence of criminal misconduct.
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> 2) Whether Shri P. Chidambaram by corrupt and illegal means obtained for himself or for Shri Raja any valuable thing or pecuniary advantage.
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> 3) Whether Shri P. Chidambaram has deliberately allowed dilution of equity by Swam Telecom Pvt. Ltd. and Unitech Wireless (Tamil Nadu) Ltd. at the cost of public exchequer.
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> 4) Whether Shri P. Chidambaram has conspired with Shri A. Raja in fixing one price of spectrum between 4.4 MHz and 6.2 MHz and another price for spectrum beyond 6.2 MHz for unlawful gain, for benefiting the licensees.
>
> 5) Whether the above mentioned acts fall within the scope of Section 13(1)(d)(i) to (ii) of the P.C. Act and the materials on record are sufficient to conclude so."

19. Shri P. Chidambaram was the Finance Minister of the Union of India from 22.5.2004 to 31.11.2008. Brief reference to facts prior to 22.5.2004 has already been made by this Court in its judgment in Centre for Public Interest Litigation and Others etc. v. Union of India and Others (2012) 3 SCC 1 and hence not repeated, but reference to few facts is necessary to appreciate and understand the alleged involvement of Shri P. Chidambaram in the 2G Scam

20. The Telecom Regulatory Authority of India (for short „TRAI'), a statutory authority constituted under the Telecom Regulatory Authority of India Act, 1997 (for short "1997 Act"), had made certain recommendations on 27.10.2003 on UAS Licence for the allocation of spectrum under Sections 11(1)(a)(i), (ii), (iv) and (vii) of the 1997 Act. Para 7.30 of the recommendations emphasized the necessity of efficient utilisation of spectrum by all service providers and indicated that it would make further recommendations on efficient utilisation of spectrum, spectrum pricing, availability and spectrum allocation procedure and that the Dot might issue spectrum related guidelines based on its recommendations.

21. A Gomes was constituted on 10.9.2003 with the approval of the then Prime Minister to consider various issues as to how to ensure release of adequate spectrum for the telecom sector, including the issues relating to merger and acquisition in the telecom sector and to recommend how to move forward. Gomes made detailed recommendations on 30.10.2003. Para 2.1.2(3) of the recommendations reads as follows:

> "(3) The Department of Telecom and Ministry of Finance would discuss and finalise spectrum pricing formula which will include incentive for efficient use of spectrum as well as disincentive for sub- optimal usages."
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> Para 2.1.2(4) stated that the allotment of additional spectrum would be transparent, fair and equitable, avoiding monopolistic situation regarding spectrum allotment usage. Para 2.4.6(ii) of the recommendations reads as follows:
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> "(ii) The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted."

22. The recommendations of the GoMs were accepted by the Council of Ministers on 31.10.2003, the meeting of which was chaired by the then Prime Minister. The then Minister of Communications on 24.11.2003 accepted the recommendations that entry fee for new UAS licensees would be the entry fee of the fourth cellular operator and where there was no fourth cellular operator, it would be the entry fee fixed by the Government for the basic operator. A decision was also taken by the then Minister for Communications for the grant of spectrum licenses on first- come-first served basis. Shri Dayanidhi Maran became the Minister for Telecommunications on 26.5.2004.

23. TRAI later made comprehensive recommendations on 13.5.2005 on various issues relating to spectrum policy i.e. efficient utilisation of spectrum, spectrum allocation, spectrum pricing, spectrum charging and allocation for other terrestrial wireless links. On 23.2.2006, the Prime Minister approved the constitution of a GoMs consisting of the Minister of Defence, Home Affairs, Finance, Parliamentary Affairs, Information and Broadcasting and Communications, to look into issues relating to vacation of spectrum. Deputy Chairman, Planning Commission was a special invitee. The Terms of Reference of GoMs, inter alia, suggested a spectrum pricing policy. Shri Dayanidhi Maran, the then Minister of Telecommunications wrote a letter dated 28.2.2006 to the Prime Minister indicating that the terms of reference of the GoMs would impinge upon the work of his Ministry since wider in scope and requested that they be modified in accordance with the draft enclosed along with his letter. The draft forwarded by the Minister, however, did not contain any formula for spectrum pricing. However, on 7.12.2006, the Cabinet Secretary conveyed the approval of the Prime Minister to the modified terms of reference which did not contain any formula for spectrum pricing.

24. Dot, later, vide its letter dated 13.4.2007 requested TRAI to furnish its recommendations under Section 11(1)(a) of the 1997 Act on the issues of limiting the number of access providers in each service area and for the review of the terms and conditions in the access provider licence mentioned in the letter. Shri Dayanidhi Maran had by the time resigned on 14.5.2007 and Shri A. Raja became the Minister for Telecommunications on 16.5.2007.

25. Trai made its recommendations on 28.8.2007. One of the recommendations made by TRAI was that in future all spectrums excluding the spectrum in 800, 900 and 1800 MHz bands in 2G services should be auctioned. Para 2.73 of the recommendations is of some importance and hence extracted hereunder:

> "2.73 The Authority in the context of 800, 900 and 1800 MHz is conscious of the legacy i.e. prevailing practice and the overriding consideration of level playing field. Though the dual charge in present form does not reflect the present value of spectrum it needed to be continued for treating already specified bands for 2G services i.e. 800, 900 and 1800 MHz. It is in this background that the Authority is not recommending the standard options pricing of spectrum, however, it has elsewhere in the recommendation made a strong case for adopting auction procedure in the allocation of all other spectrum bands except 800, 900 and 1800 MHz."
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> Paras 2.74, 2.75, 2.76, 2.77, 2.78 and 2.79 are also relevant for determining the various issues which arise for consideration in this case and hence given below for ready reference:

“2.74 Some of the existing service providers have already been allocated spectrum beyond 6.2 MHz in GSM and 5 MHz in CDMA as specified in the license agreements without charging any extra one time spectrum charges. The maximum spectrum allocated to a service provider is 10 MHz so far. However, the spectrum usage charge is being increased with increased allocation of spectrum. The details are available at Table 8. 2.75 The Authority has noted that the allocation beyond 6.2 MHz for GSM and 5 MHz for CDMA at enhanced spectrum usage charge has already been implemented. Different licensees are at different levels of operations in terms of the quantum of spectrum. Imposition of additional acquisition fee for the quantum beyond these thresholds may not be legally feasible in view of the fact that higher levels of usage charges have been agreed to and are being collected by the Government. Further, the Authority is conscious of the fact that further penetration of wireless services is to happen in semi- urban and rural areas where affordability of services to the common man is the key to further expansion. 2.76 However, the Authority is of the view that the approach needs to be different for allocating and pricing spectrum beyond 10 MHz in these bands i.e. 800, 900 and 1800 MHz. In this matter, the Authority is guided by the need to ensure sustainable competition in the market keeping in view the fact that there are new entrants whose subscriber acquisition costs will be far higher than the incumbent wireless operators. Further, the technological progress enables the operators to adopt a number of technological solutions towards improving the efficiency of the radio spectrum assigned to them. A cost- benefit analysis of allocating additional spectrum beyond 10 MHz to existing wireless operators and the cost of deploying additional CAPEX towards technical improvements in the networks would show that there is either a need to place a cap on the maximum allocable spectrum at 10 MHz or to impose framework of pricing through additional acquisition fee beyond 10 MHz. The Authority feels it appropriate to go in for additional acquisition fee of spectrum instead of placing a cap on the amount of spectrum that can be allocated to any wireless operator. In any case, the Authority is recommending a far stricter norm of subscriber base for allocation of additional spectrum beyond the initial allotment of spectrum.The additional acquisition fee beyond 10 MHz could be decided either administratively or through an auction method from amongst the eligible wireless service providers.In this matter, the Authority has taken note of submissions of a number of stakeholders who have cited evidences of the fulfillment of the quality of service benchmarks of the existing wireless operators at 10 MHz and even below in almost all the licensed service areas. Such an approach would also be consistent with the Recommendation of the Authority in keeping the door open for new entrant without putting a limit on the number of access service providers. 2.77The Authority in its recommendation on Allocation and

pricing of spectrum for 3G and broadband wireless access services had recommended certain reserve price for 5 MHz of spectrum in different service areas. The recommended price are as below:

|Service areas |Price (Rs. in | | |million) for 2 MHz| x 5 MHz | |Mumbai, Delhi and Category A |800 | |Chennai, Kolkata and Category |400 | |Category C 1150 | The Authority recommends that any licensee who seeks to get additional spectrum beyond 10 MHz in the existing 2G bands i.e. 800,900 and 1800 MHz after reaching the specified subscriber numbers shall have to pay a onetime spectrum charge at the above mentioned rate on prorata basis for allotment of each MHz or part thereof of spectrum beyond 10 MHz. For one MHz allotment in Mumbai, Delhi and Category A service areas, the service provider will have to pay Rs. 160 million as one time spectrum acquisition charge.

2.78 As far as a new entrant is concerned, the question arises whether there is any need for change in the pricing methodology for allocation of spectrum in the 800, 900 and 1800 MHz bands. Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favor 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-a-vis incumbents in the wireless sector will go against the principle of level 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.

2.79 In the case of spectrum in bands other than 800, 900 and 1800 MHz i.e. bands that are yet to be allocated, the Authority examined various possible approaches for pricing and has come to the conclusion that it would be appropriate in future for a market based price discovery systems. In response to the consultation paper, a number of stakeholders have also strongly recommended that the allocation of spectrum should be immediately delinked from the license and the future allocation should be based on auction. The Authority in its recommendation on Allocation and pricing of spectrum for 3G and broadband wireless access services has also favored auction methodology for allocation of spectrum for 3G and BWA services. 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/900 MHz/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 to 2X10 MHz for GSM technology and 2X2.5 MHz to 2X5 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.

26. The Internal Committee of DoT considered the above recommendations made by TRAI and its report was placed before the Telecom Commission on 10.10.2007. The Finance Secretary and other three non-permanent members were not informed of that meeting, but attended only by the officials of DoT and the report of the Internal Committee was approved by the Telecom Commission. Shri A. Raja accepted the recommendations of Telecom Commission. Consequently, the recommendations of TRAI dated 28.8.2007 stood approved by the Internal Committee of Dot, Telecom Commission and Dot. Dot, it may be noted, did not get in touch with the Ministry of Finance to discuss and finalize the spectrum pricing formula which had to include incentive for efficient use of spectrum as well as disincentive for suboptimal usage in terms of the Cabinet decision of 2003.

27. Above facts would indicate that neither Shri P. Chidambaram nor the officials of MoF had any role in the various decisions taken by TRAI on 28.8.2007, decision taken by the Internal Committee of DoT and the decision of the Telecom Commission taken on 10.10.2007.

28. Dot then went ahead to process applications received for UAS licenses. Between 24.9.2007 and 1.10.2007, over 300 applications were received. The Member (Technology), Telecom Commission and ex-officio Secretary to the Government of India sent a letter dated 26.10.2007 to the Secretary, Department of Legal Affairs, Ministry of Law and Justice seeking the opinion of the Attorney General of India/Solicitor General of India for dealing with those applications for licenses. The Law Secretary placed the papers before the Minister of Law and Justice on 1.11.2007 who had recommended that the entire issue be considered by an Empowered GoMs and, in that process, opinion of the Attorney General of India be obtained. When the note of the Law Minister was placed before Shri A. Raja, he recorded a note on 2.11.2007 calling for discussion. Shri A. Raja, however, on the same day, ordered the issuance of LoIs to new applicants as per the then existing policy and authorised Shri R. K. Gupta, ADG (AS-1) for signing the LoIs on behalf of the President of India. Shri A. Raja had also ordered for the issuance of LoI to the applicants whose applications had been received up to 25.9.2007and also sent a letter bearing DO No. 20/100/2007-AS-I dated 2.11.2007 to the Prime Minister and took strong objection to the suggestion made by the Law Minister by describing his opinion as totally out of context.

29. The Prime Minister, however, vide his letter dated 2.11.2007 had requested Shri A. Raja to give urgent consideration to the various issues raised with a view to ensuring fairness and transparency and requested him to inform the Prime Minister of the position before taking any further action. On the same day, Shri A.Raja sent a reply to the Prime Minister brushing aside the suggestions made by the Prime Minister pointing out that it would be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it would not give them a level playing field. The relevant portion of Para 3 of Shri A. Raja's letter is extracted below:

> "Processing of a large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand The issue of auction of spectrum was considered by the TRAI and the Telecom Commission and was not recommended as the existing licence holders who are already having spectrum upto 10 MHz per Circle have got it without any spectrum charge. It will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them level playing field. I would like to bring it to your notice that DoT has earmarked totally 800 MHz in 900 MHz and 1800 MHz bands for 2G mobile services. Out of this, so for a maximum of about 35 to 40 MHz per Circle has been allotted to different operators and being used by them. The remaining 60 to 65 MHz, including spectrum likely to be vacated by Defence Services, is still available for 2G services. Therefore, there is enough scope for allotment of spectrum to few new operators even after meeting the requirements of existing operators and licensees. An increase in number of operators will certainly bring real competition which will lead to better services and increased teledensity at lower tariff. Waiting for spectrum for long after getting licence is not unknown to the Industry and even at present Aircel, Vodafone, Idea and Dishnet are waiting for initial spectrum in some Circles since December 2006.

30. Shri P. Chidambaram, it is seen, had no role in the exchange of those communications or the expression of opinions of the decisions taken between Shri A. Raja and the Prime Minister's Office, a situation created by Shri A. Raja and the officials of DoT. Neither Shri P. Chidambaram nor the officials of the MoF did figure in those communications and hence the allegation of involvement of Shri P. Chidambaram in the 2G Scam has to be examined in that background.

31. The Secretary, DoT made a presentation of the spectrum policy on 20.11.2007 to the Cabinet Secretary. Finance Secretary, Dr. Subbarao, who had witnessed the presentation sent a letter dated 22.11.2007 to the Secretary, DoT to know whether proper procedure had been

followed with regard to financial diligence. The operative portion of the letter reads as follows:

> "2. That purpose of this letter is to confirm if proper procedure has been followed with regard to financial diligence. In particular, it is not clear how the rate of Rs.1600 crore, determined as far back as in 2001, has been applied for a license given in 2007 without any indexation, let alone current valuation. Moreover, in view of the financial implications, the Ministry of Finance should have consulted in the matter before you had finalized the decision. I request you to kindly review the matter and revert to us as early as possible with responses to the above issues. Meanwhile, all further action to implement the above licenses may please be stayed. Will you also kindly send us copies of the letters of permission given and the date?"

32. Dot replied to the Finance Secretary vide letter dated 29.11.2007. the operative portion of the same reads as follows:

> "As per Cabinet decision dated 31st October, 2003, accepting the recommendations of Group of Ministers (GoM) on Telecom matters, headed by the then Hon'ble Finance Minister, it was inter alia decided that "The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted. DoT may be authorized to finalize the details of implementation with the approval of the Minister of Communications and IT in this regard including the calculation of the entry fee depending on the date of payment based on the principle given by TRAI in its recommendations"

33. Dot also pointed out in that letter that the entry fee was also finalised for UAS regime in 2003 based on the decision of the Cabinet and it was decided to keep the entry fee for the UAS license the same as the entry fee of the fourth cellular operator, which was based on a bidding process in 2001. Further, it was also pointed out that the dual technology licenses were licenses based on TRAI recommendations of August 2007 and that TRAI in its recommendations dated 28.8.2007 had not recommended any changes in entry fee/ annual license fee and hence no changes were considered in the existing policy.

34. Shri A. Raja then sent a letter dated 26.12.2007 to the Prime Minister, Paras 1 and 2 of that are extracted below:

> "1. Issue of Letter of Intent (LOI): DOT follows a policy of First-cum-First Served for granting LOI to the applicants for UAS licence, which means, an application received first will be processed first and if found eligible will be granted LOI. Issue of Licence: The First-cum-First Served policy is also applicable for grant of licence on

compliance of LOI conditions. Therefore, any applicant who complies with the conditions of LOI first will be granted UAS licence first. This issue never arose in the past as at one point of time only one application was processed and LOI was granted and enough time was given to him for compliance of conditions of LOI. However, since the Government has adopted a policy of No Cap on number of UAS Licence, a large number of LOI's are proposed to be issued simultaneously. In these circumstances, an applicant who fulfils the conditions of LOI first will be granted licence first, although several applicants will be issued LOI simultaneously. The same has been concurred by the Solicitor General of India during the discussions. DDG (AS), DoT, after a few days, prepared a note incorporating therein the changed first-come-first-served policy to which reference was made in the letter addressed to the Prime Minister.

35. We have no information as to whether the PMO had replied to the letter dated 26.12.2007 sent by A. Raja. After brushing aside the views expressed by Dr. D. Subbarao in his letter dated 22.11.2007, views expressed by the Minister of Law and Justice on 1.11.2007, as well as the views expressed by the Prime Minister on 2.11.2007,A. Raja and the officials of DoT went ahead in implementing the policy of first-come-first- served basis for the grant of UAS licenses for which it is seen, no further objection had been raised by the Prime Minister's Office.

36. Telecom Commission meeting was then scheduled to be held on 9.1.2008 to consider two important issues i.e. performance of telecom sector and pricing of spectrum but the meeting was postponed to 15.1.2008. But, on 10.1.2008, a press release was issued by DoT stating that TRAI on 28.8.2007 had not recommended any cap on the number of access service providers in any service area. Further, it was also stated that the Government had accepted the recommendations of TRAI and that DoT had decided to issue LoIs to all the eligible applicants on the date of application who applied up to 25.9.2007. Further, it was also stated in the press release that DoT had been implementing a policy of first-come- first-served for grant of UAS licences under which initially an application which was received first would be processed first and thereafter if found eligible would be granted LoI and then whosoever complied with the conditions of LoI first would be granted UAS licence.

37. Another press release was issued on 10.1.2008 by DoT requesting the applicants to submit compliance with the terms of LoIs. Soon after obtaining the LoI, three of the successful applicants offloaded their stakes for thousands of crores in the name of infusing equity, the details are as under:

"(i) Swan Telecom Capital Pvt. Ltd. (now known as Etisalat DB Telecom Pvt. Ltd.) which was incorporated on 13.7.2006 and got UAS Licence by paying licence fee of Rs. 1537 crores offloaded its 45% (approximate) equity in favor of Etisalat of UAE for over Rs.3,544 crores.

(ii) Unites which had obtained licence for Rs.1651 crores offloaded its stake 60% equity in favor of Telenor Asia Pte. Ltd., a part of Telenor Group (Norway) in the name of issue of fresh equity shares for Rs.6120 crores between March, 2009 and February, 2010.

(iii) Tata Tele Services transferred 27.31% of equity worth Rs. 12,924 crores in favour of Ntt Docomo.

(iv) Tata Tele Services (Maharashtra) transferred 20.25% equity of the value of Rs. 949 crores in favor of Ntt Docomo."

38. Materials made available would not indicate any role played by Shri P. Chidambaram on the steps taken by Shri A. Raja and DoT, reference of which have elaborately been made in the previous paragraphs of this judgment. The views expressed by Dr. D. Subbarao in his letter dated 22.11.2007 were already brushed aside by A. Raja and DoT officials and a communication dated 29.11.2007 was already sent to Dr. Subbarao followed by a letter to the Prime Minister on 26.12.2007.

39. MoF then sent a letter on 9.1.2008, following the letter of Dr. D. Subbarao dated 22.11.2007 as well as the reply received from Dot on 29.11.2007, which was prepared and sent as instructed by Shri P. Chidambaram for presentation in the meeting of the Telecom Commission which was held on 10.1.2008. Note referred to the recommendations of GoMs for discussing and finalizing the spectrum pricing formula by DoT and Ministry of Finance. Paras 6.3 and 8.4 of the note which was prepared as instructed by Shri P. Chidambaram are relevant and hence are extracted hereunder:

"6.3 Given the fact that there are reportedly over 575 applications pending with DoT (including 45 new applicants) there is a case for reviewing the entry fee fixed in 2001. This is an administratively fixed fee. Therefore any change should be governed by transparent and objective criteria applicable uniformly to all new entrants.

8.4The most transparent method of allocation of spectrum would be by auction. However, there are two caveats to the auction method.

a) The ways in which the existing licensees in GSM and CDMA would be eligible to participate in the auction vis-a-vis the new entrants; and

(b) The advantages and disadvantages of the method itself. A detailed table is placed at Annexure V."

40. Shri P. Chidambaram, following the views expressed by the Ministry of Finance on 9.1.2008, on his instructions, also sent a note to the Prime Minister on 15.1.2008 on spectrum charges. Noticeably, this letter was sent at a time when Finance Secretary's view was rejected by Shri A. Raja and the officers of the DoT and that Shri A. Raja's views were not overturned even by the Prime Minister's Office. Therefore, the allegation that the attempt of Shri P. Chidambaram was to hide the illegalities in the award of licences is unfounded. On the other hand, Shri P. Chidambaram was advocating the fact that the most important method of allocating the spectrum would be through auction. Shri P. Chidambaram also made a reference in the note of the recommendations made in the year 2003 by TRAI and GoMs and stated that the recommendations note did not deal with the need, if any, to revise entry fee or the rate of revenue share, but dealt with the spectrum charges for 2G spectrum. Para 10 of the note sent by Shri P. Chidambaram reads as follows:

"10. Spectrum is a scarce resource. The price for spectrum should be based on its scarcity value and efficiency of usage. The most transparent method of allocating spectrum would be through auction. The method of auction will face the least legal challenge, if Government is able to provide sufficient information on availability of spectrum, that would minimize the risks and, consequently, fetch better prices at the auction. The design of the auction should include a reserve price."

Further, para 13 of the note reads as follows:

"13. This leaves the question about licensees who hold spectrum over and above the start up spectrum. In such cases, the past may be treated as a closed chapter and payments made in the past for additional spectrum (over and above the start up spectrum) may be treated as the charges for spectrum for that period. However, prospectively, licensee should pay for the additional spectrum that they hold, over and above the start-up spectrum, at the price discovered in the auction. This will place old licensees, existing licensee seeking additional spectrum and new licensees on par so far as spectrum charges are concerned."

41. Shri P. Chidambaram had indicated his mind in the note sent to the Prime Minister. Prime Minister's Office, it is seen, had not taken any contrary view to that of Shri P. Chidambaram and, in any view, no materials were also made available when this Court was dealing with the case relating to cancellation of licenses, wherein Union of India was a party. In such circumstances, it is difficult to conclude, on the materials available, that P. Chidambaram had

conspired with A. Raja in subverting the process of issuance of LoI, UAS Licenses and allocation of spectrum.

42. Shri P. Chidambaram met Shri A. Raja on 30.1.2008 for discussions on spectrum charges and one has to appreciate the discussions held in the light of the facts discussed above. Meeting was held at a time, it may be noted, when Shri A. Raja and DoT officials had already brushed aside the views expressed by Dr. D. Subbarao in his letter dated 22.11.2007, the views expressed by the Department of Economic Affairs in the note dated 3.1.2008 and in the absence of any response from PMO on the note dated 15.1.2008 sent by Shri P. Chidambaram. Meeting dated 30.1.2008 and subsequent meetings Shri P. Chidambaram had with Shri A. Raja on 29.5.2008, 12.6.2008 and with the Prime Minister on 4.7.2008 have to be appreciated in the light of the facts already discussed.

43.Shri P. Chidambaram, it is seen under the above-mentioned circumstances, had taken up the stand in the meeting held on 30.1.2008 that the Finance Minister was not seeking to revisit the current regimes for entry fee or for revenue share and for the regime for allocation of spectrum, however, it was urged that the following aspects had to be studied:

> "(i) The rules governing the allocation of additional spectrum and the charges thereof, including the charges to be levied for existing operators who have more than their entitled spectrum.
>
> (ii) Rules governing trade in spectrum. In particular, how can Government get a share of the premium in the trade?
>
> (iii) The estimate of the additional spectrum that may be available for allocation after taking into account: (a) the entitlement of entry spectrum of fresh licenses; (b) the spectrum that needs to be withdrawn from existing operators who do not have the subscriber base corresponding to the spectrum allotted to them; and (c) the spectrum that may be released by Defense.
>
> (iv) We also need to check the current rules and regulations governing withdrawal of spectrum in the event of: (a) not rolling over; (b) merger and acquisition; (c) trading away spectrum."
>
> Salient points discussed in the meeting held on 30.1.2008 are given below:
>
> "2. Spectrum Usage Charges for Initial allotment of spectrum of 4.4 MHz.
>
> 2.1 Secretary (Finance) was of the opinion that auctioning is legally possible for initial allotment of spectrum of 4.4 MHz. Secretary (DoT) explained that auction of spectrum of 4.4 MHz though may be legally possible but it would not be practical

proposition to auction or fixing a price for 4.4 MHz spectrum due to following: 2.1.1 As per clause 43.5 (i) of UAS License, which provides that: "initially a cumulative maximum of up to 4.4 MHz +4.4 MHz shall be allocated in the case of GSM based systems. It implies that when a service provider signs UAS License he understands that and contractually he is eligible for initially a cumulative maximum of 4.4 MHz subject to availability. 2.1.2 120 LoIs have been issued and the Department is contractually obliged to give them start up spectrum of 4.4. MHz under UASL. 2.1.3 As auctioning does not assure the operators to get initial spectrum of 4.4 MHz as per UAS License provision, auctioning and the clause 43.5 (i) of the UASL are contradictory. 2.1.4 If the new entrants get spectrum by auctioning, they may be paying more as compared to the existing players. Hence (a) auction will not ensure level playing; (b) also, as the cost to the new entrants would be more, they may not be able to offer competitive tariff.

2.1.5 Also 4.4. MHz is a part of the license agreement; no spectrum acquisition charge is proposed to be levied. Even if it is priced, it will also disturb the level playing field and the present LOI holders, who have already paid entry fee, are likely to go for litigation. Initial entry fee for license may be construed as the defector price of initial spectrum i.e. Rs.1650 crore approximately for pan-India license."

Para 3 of the Approach Letter deals with the spectrum usage charges for additional spectrum of 1.8 MHz beyond 4.4. MHz. The relevant portion of para 3 is extracted below:

"3. Spectrum Usage Charges for additional spectrum of 1.8 MHz beyond 4.4 MHz The issue of levying price for additional spectrum of 1.8 MHz beyond 4.4 MHz including auctioning was also discussed. Secretary (Finance) desired to know whether this additional spectrum can be priced / auctioned and if not then why. 3.1 The issue of levying price for additional spectrum of 1.8 MHz would not be practical due to following:

3.1.1 As per clause 43.5(ii) of UAS License which provided that "Additional spectrum beyond the 4.4 MHz may also be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account of all types of traffic and guidelines / prescribed from time to time. However 6.2 + 6.2 MHz in respect of TDMA (GSM) based system shall be allocated to any new Unified Access Services Licensee".

3.1.2 It implies that an operator is eligible for consideration of additional 1.8 MHz spectrum (making total of 6.2 MHz) after ensuring optimal and efficient utilization of

the already allocated spectrum taking into account all types of traffic and guidelines / criteria prescribed from time to time.

3.1.3 The matter was internally discussed with Solicitor General, who opined that he is defending the Government cases in various courts, where one of the main contentions is that auction would lead to reduction of competition and will not help in reducing the tariff and hence it would be against increase of teledensity and affordability. These being public interest concerns, it would be difficult to change the track at this juncture.

3.1.4 It is, however, proposed to price the spectrum of 1.8 MHz beyond 4.4 MHz upto 6.2 MHz. The TRAI in its report of August 2007 has recommended that any licensee who seeks to get additional spectrum beyond 10 MHz in the existing 2G bands, i.e. 800, 900 and 1800 MHz after reaching the specified subscriber numbers shall have to pay a onetime spectrum charge at the below mentioned rates on pro-rata basis for allotment of each MHz or part thereof of spectrum beyond 10 MHz ”

Para 4 of the Approach Paper deals with the price of spectrum beyond 6.2 MHz. Relevant portion of para 4 reads as under:

“4. Price of spectrum beyond 6.2 MHz

The UASL does not explicitly provide any provision or spectrum beyond 6.2 MHz and upto 10 MHz, however the UASL clause 43.5(iv) provides that “the Licensor has right to modify and / or amend the procedure of allocation of spectrum including quantum of spectrum at any point of time without assigning any reason”. Hence the spectrum beyond 6.2 MHz should be properly priced keeping in mind the market value of spectrum. 4.1 Auction Path. Since we are not auctioning startup spectrum of 4.4 MHz and only pricing additional allocation of 1.8 MHz as explained earlier, therefore, we can take 6.2 MHz as threshold for consideration for auction as this also falls beyond the provisions of the license agreement. The following points are brought out:

• 2G GSM Spectrum bands are 890-915 MHz paired with 935-960 MHz, 1710-1755 MHz paired with 1805-1890 MHz i.e., 2.5 MHz is available in 900 75 MHz band is available in 1900 MHz band making a total of 100 MHz. Out of this more than 37 MHz stand allocated to the GSM service providers in different service areas. Remaining 63 MHz, major portion of the spectrum in 1800 MHz band is being used by Defence.

• 120 LOIs have been issued and startup spectrum is to be allotted to them as well as for the growth; existing operators should be given 6.2 MHz, subject to availability.

• After this allotment, hardly any identifiable free spectrum will be available, which is a pre-requisite for auction.

• At any given time one or two operators will be eligible for beyond 6.2 MHz based on the subscribers linked criteria. Hence if an auction is to be held, competition would be limited.

• Hence auctioning may not be successful in providing optimum value due to (a) limited availability of spectrum (b) limited competition.

TRAI has also not recommended for auctioning of 2G spectrum in view of the following:

• Service providers were allocated spectrum at different times of their licenses and the amount of spectrum with them. Therefore, to decide the cut off after which spectrum is auctioned will be difficult and might raise issue of level playing field.

• Penetration of mobile service is to happen in semi urban and rural areas, where affordability of the services to the common man is the key for further expansion:

In view of all these factors, auction 2G spectrum at this juncture does not appears to be viable solution."

4.2 Fix Price for spectrum beyond 6.2 MHz The following two options were considered: Option 1 For this purpose it may be desirable to index, the entry fee of Rs.1650 crores in the year 2003-04 (for initial 4.4 MHz) i.e. Rs.375 crore per MHz, for inflation, potential for growth of tele-density and revenue etc. appropriately. If we take an inflation of about 5% per year for 4 years upto 2007-08, which would mean about 20% compounded inflation till 2007. Therefore, additional charges can be levied at 20% of Rs.375 crores for one MHz of spectrum i.e. Rs.425 Crores. This option is not favoured in view of the low value of spectrum. Option 2 The service area wise AGR figures per MHz for the years 2003-04, and anticipated figure were calculated and is given at Annexure 1. It may be seen that there is an increase of about 3-5 times, if the figures of 2007-08 with 2003-04 is compared. It is for consideration to charge „x' times of base price of Rs.375 crore/MHz, where „x' is to be decided. This will be charged to existing as well as new entrants. Those who decide not to pay may be asked to surrender the excess spectrum beyond 6.2 MHz."

Para 6 deals with the Merger and Acquisition (MA) is also relevant and the same reads as under:

6. Mergers and Acquisition (MA) In the context of intra-circle merger and acquisition, TRAI in their report of August 2007 have considered various factors, namely Definition of Market Assessment of Market Power criteria and Methodology, Determination of minimum number of access service providers in a post merger scenario and spectrum cap of the merged entity. The TRAI Recommendations had been considered by Telecom Commission. Some of the issues have been referred back to TRAI for consultation. In view of very large number of new players, it is expected that consolidation is likely to take place in the industry in future.

6.1 In view of this, we need to have clear guidelines relating to MA. We also need to consider fees on account of transfer of spectrum to the merged entity. In the event of MA the transfer charge to the Government has not been considered by TRAI in their recommendation of August 2007. This is a complex issue requiring detailed deliberation and consultation. Therefore, the issue of quantum of fees which the Government would get on account of transfer of spectrum during MA needs to be referred to TRAI. Based on the Recommendations of TRAI on the above issue, DoT will take appropriate decision with a specified time period and issue clear and transparent guidelines for MA including transfer charges for spectrum."

44. The Secretary, DoT then vide letter dated 8.2.2008, forwarded the Approach Paper with regard to the meeting held. Minister of Finance vide note dated 11.2.2008 acknowledged the note dated 8.2.2008 which was the summary of the four rounds of discussion they had and a Sequal note setting out the then existing position regarding telecom fees and charges and pricing of spectrum and the issues for decision were high-lighted. Paras 16 to 18 of the Sequal note read as under:

"Auction of Spectrum

16. Auctioning spectrum suggests itself is as a clear first choice. It has several merits.

i) Best method of discovering price

ii)Is more transparent and provides a level playing field iii) Promotes competition

17. However, it will be problematic for us to adopt the auction route at this late stage mainly for 'historical legacy' reasons. A number of operators have already been given spectrum free of charge. The spectrum available for auction, therefore, will be quite limited (DoT has not been able to indicate the precise quantum of spectrum that will

be available for allotment). Efficient price discovery becomes possible only if the supply is large and there are a number of potential buyers: a thin market has clear limitation in signalling a price. It may turn out that the 'discovered price' is either too low or too high. In its August 2007 report (para 2.79), TRAI too advised against auctioning of spectrum on the ground that it will trigger issues of level playing field.

18. Auction will be viable if we can increase the quantum of spectrum available. This can be done by withdrawing the spectrum already allotted to existing operators and putting all of it on auction. Both existing and new license will then bid on a clean slate. This is evidently an extreme measure, and has significant practical and legal implications. On the subject of market based price determination, the MoF in paras 19 20 stated as follows:

"Market Based Price Determination

19. If auction is ruled out, what are the alternatives for determining an appropriate market based price for spectrum?

20. The value of spectrum embedded in the entry fee provides a possible reference frame for pricing spectrum. Currently, 4.4MHz of spectrum is allotted at the entry level on payment of an entry fee of Rs. 1650 crores for pan-India operation. This translates to an embedded price of Rs.375 crores/MHz. This price was discovered in 2001 and fixed in 2003/04. Using this reference frame price, there are two options for determining the current price of spectrum. On the question of pricing of spectrum beyond 4.4 MHz, the views expressed by the Ministry of Finance in the above letter read as follows:

28. DoT is of the view that it is not advisable / possible to price the start-up allocation of a 4.4 MHz on the following argument. Allocation of 4.4 MHz spectrum is part of the licence Agreement. This start-up spectrum was given free of cost in the past. The new entrants who were given licenses in January 2008 paid the entry fee on the understanding that they would get this start-up spectrum would be a breach of this understanding. It will also disturb the level playing field between the existing operators and the new licencees. This may also trigger litigation.

29. Dot is agreeable to pricing of spectrum beyond 4.4MHz. However, they have suggested a differentiated pricing regime. According to them, there should one price of spectrum between 4.4 MHz and 6.2 MHz (1.8 MHz), and another price for spectrum beyond 6.2 MHz. In August 2007, TRAI recommended a price for licensees who seek spectrum beyond 10 MHz. DoT wants to apply this price for spectrum

between 4.4 MHz and 6.2 MHz for spectrum beyond 6.2 MHz, DoT is agreeable to using the price determined as at paragraph 22 above.

30. Ministry of Finance differs from the above position of DoT. There is no contractual obligation to allot a start-up spectrum of 4.4 MHz to every licensee free of cost. The entire range of the spectrum allotted should be priced. The issue of level playing field can be addressed by charging this price even on existing operators.

31. Moreover, the differentiated pricing suggested by DoT, viz. One price for spectrum between 4.4 and 6.2 MHz and a different price for spectrum beyond 6.2 MHz will be clumsy, non-transparent and legally questionable. It will be neat and transparent to fix a single circle- specific price for spectrum across the entire bandwidth.

On Merger and Acquisition (MA), the views expressed by the Finance Minister read as follows:

"32. It is likely that the market will see considerable MA activity over the next few years. It should be Government's endeavour to ensure that this consolidation happens in an efficient and healthy manner. One question that arises is whether the Government should get a premium out of an MA transaction. Since spectrum has not been auctioned but priced juristically, it is likely that the rent, if any, involved in the price of spectrum will form part of the MA transaction which would typically involve a host of other assets and liabilities, is a complex task. TRAI is best positioned to think through and advise on this issue. The ToRs to TRAI in the regard should be: (i) What should be guidelines for MAs between UASL operators? (ii) Should Government get a premium out of MA activity? And (iii) if yes, how can this premium be determined?

45. Ministry of Finance (Department of Economic Affairs) also prepared a note on 7.4.2008 after discussing the matter with the Minister of Finance, which shows that the Minister of Finance had also agreed that spectrum usage charges should be increased reflecting the scarcity value of spectrum as indicated in Ministry's note dated 11.2.2008. On pricing of spectrum, the Ministry of Finance was of the view that they might insist in principle on pricing spectrum (beyond 4.4. MHz) although details could be worked out after the auction of 3G's spectrum.

46. Mr. Govind Mohan, Director, Ministry of Finance had prepared a detailed office memorandum on 8.4.2008, wherein after referring to the DoT letter dated 29.1.2008, t h e following amendments were suggested: "4.0 Union Cabinet, in its meeting on October 31,

2003 had, inter alia, decided that spectrum pricing would need to be decided mutually between DoT and MoF so as to provide incentive for efficient use of spectrum as well as disincentive for sub-optimal usage. In the context of this decision, the following amendments are being suggested in Pricing of Spectrum, its allotment among Access providers and Spectrum Usage Charges:

> "1. Any Allotments of Spectrum to access subscriber licensees under UASL regime may henceforth be specifically priced and charged for. The charge may be determined, circle wise, by adopting the Entry Fee, fixed for that circle in 2003-04, and thereafter inflating it by the multiplier, which represents the growth in aggregate AGR per MHz between 2003- 04 and 2007-08; hence, for a Pan India operator, the Circle fee fixed in 2003-04 (Rs.375 crore per MHz) would be inflated by a multiple of 3.5 (which represents the growth in AGR/MHz between 2003-04 and 2007-08) to yield the new spectrum price of Rs.1,312 Crore per MHz (approximately);
>
> 2. The price determined as above may be made applicable to both the new and existing operators; moreover, the entire range of spectrum allotted may be charged, for both new and existing operators; such operators who do not
>
> intend to pay the new charges may be given the option of surrendering the Spectrum allotted to them;"

47. Letter, it is seen, was issued with the approval of the Minister of Finance.

48. Noticing some mistakes in that office memorandum, an amended office memorandum was issued by Mr. Govind Mohan, on the same date. The reason is obvious, because the Finance Secretary D. Subbaroa, had made a note on 7.4.2008 stating that the FM's view was that the Ministry must insist in principle on pricing of Spectrum (beyond 4.4.MHz), although details could be worked out after the auction of 3G Spectrum. Evidentially it was a bona fide mistake committed by Dr. Govind Mohan, because the original Memo dated 8.4.2008 was contrary to the note prepared by the Finance Secretary, and hence he had to issue a corrected OM the operative portion of the same reads as follows:

> '4. Union Cabinet in its meeting on October 31, 2003, inter alia, decided that spectrum pricing would need to be decided mutually between DoT and MoF so as to provide incentive for efficient use of spectrum as well as disincentive for sub-optimal usage. In the context of this decision, the issues that need to be decided in respect of 2G spectrum were discussed by Finance Secretary in three rounds of meetings with Secretary (Telecom) in February, 2008. Accordingly, the following amendments are

being suggested in Pricing of Spectrum, its allotment among Access providers and Spectrum Usage Charges:

1. Any allotments of spectrum to access subscriber licensees under UASL regime - beyond the initial "start-up" allocation of 4.4 MHz - may henceforth be specifically priced and charged for. Details in this regard can be worked out;

2. The price determined as above may be made applicable to both the new and existing operators; such operators who do not intend to pay the new charges may be given the option of surrendering the spectrum allotted to them;

3. Spectrum Usage Charge, instead of being charged as a fixed percentage of Adjusted Gross Revenue (AGR) for different spectrum bands, may henceforth be charged as a percentage of AGR based on volume of business categorization, so as to better reflect and capture the circle specific scarcity value of spectrum. The revised charges proposed for various Circles are as per the table annexed to this OM and as agreed in the discussions between Finance Secretary and Secretary, Department of Telecom;

4. The recommendations of TRAI for revising the subscriber base criteria for allotment of spectrum may be considered for implementation in the interest of enhancing efficiency of spectrum usage and encouraging technological innovations.

49. Shri P. Chidambaram, wrote a letter dated 21.4.2008 to Shri A. Raja, forwarding a non-paper containing Finance Minister's views on issues relating to 2G Spectrum and issues relating to 3G (Wi Max Spectrum). After discussions, it was pointed out that the conclusion be presented to the Prime Minister.

50. The Finance Secretary, as instructed by the Finance Minister, met the Secretary DoT on 24th April, 2008 and a hand written note was prepared by the Finance Secretary on 29.4.2008 on all outstanding issues. The recommendations of the MoF were as follows:

"Pricing of Spectrum 3.We may recommend the following principles for pricing of spectrum:

(i) The start-up spectrum of 4.4 MHz for GSM (2.5 MHz for CDMA may be exempted from upfront pricing both for new and existing operators.

(ii) Under the UASL Licensing regime, there appears to be an implicit, indirect contractual obligation to allow further allotment of spectrum, beyond 4.4 MHz for GSM (2.5 MHz for CDMA), and upto 6.2 MHz for GSM (5MHz for CDMA) after payment of 1% additional spectrum usage charges and ensuring that already allocated spectrum has been optimally and efficiently utilized. This may effectively protect

operators who have existing allocations upto 6.2 MHz for GSM (5MHz for CDMA) from payment of any other charges, including the "up front" spectrum price. Since it may not be possible to charge operators already having allocations upto this range, the principle of equity and "level playing field" would require that the operators, who get fresh allotment of spectrum upto 6.2 MHz for GSM (5MHz for CDMA) too should not be charged for spectrum upto 6.2 MHz for GSM (5 MHz for CDMA).

(iii) Spectrum beyond 6.2 MHz in case of GSM (5MHz in case of CDMA) should be priced. This is defensible on the following grounds. First, as per the terms of the UAS license, there is no contractual obligation on the part of the Government to necessarily allot spectrum beyond 6.2 MHz (beyond 5MHz in case of CDMA); and, secondly, Government retains the sovereign right to modify the terms of license as also the procedure for allocation of spectrum, including quantum of spectrum, at any point of the time without assigning any reason." (Emphasis supplied)

Issues relating to merger and acquisition have been dealt with in Paras 16 to 18 and the same read as follows:

"Issues relating to Mergers and Acquisitions

16. Dot have issued a notification on April 22, 2007 on "Guidelines for intra service merger of Cellular Mobile Telephone Service (CMTS)/Unified Access Services (UAS) Licensees".

17. The guidelines derive substantially from the recommendations made by TRAI on this subject vide Report of August, 2007. The guidelines mandate a "spectrum transfer charges" to be payable as specified by Government.

18. Dot may be advised that fixation of "spectrum transfer charges" shall be in consultation with DEA."

51. Shri P. Chidambaram and Shri A. Raja met on 29.5.2008 and 12.6.2008 for resolving the then outstanding issues relating to the allocation and pricing 2G and 3G Spectrums. Meeting of two Ministers would not by itself be sufficient to infer the existence of a conspiracy. Even before those meetings, as instructed by the Finance Minister, the Finance Secretary and Telecom Secretary had already met on 24.4.2008, had agreed that it might not be possible to charge operators already having allocation upto 6.2 MHz and the principle of equity and level playing field would require that the operators who get fresh allotment of Spectrum upto 6.2MHz for GSM too should not be charged for Spectrum upto 6.2 MHz for GSM.

Therefore, the allegation that Shri P. Chidambaram had over-ruled his officers' views and had conspired with Shri A. Raja is without any basis.

52. Criminal conspiracy cannot be inferred on the mere fact that there were official discussions between the officers of the MoF and that of DoT and between two Ministers, which are all recorded. Suspicion, however, strong, cannot take the place of legal proof and the meeting between Shri P. Chidambaram and Shri A. Raja would not by itself be sufficient to infer the existence of a criminal conspiracy so as to indict Shri P. Chidambaram. Petitioners submit that had the Minister of Finance and the Prime Minister intervened, this situation could have been avoided, might be or might not be. A wrong judgment or an inaccurate or incorrect approach or poor management by itself, even after due deliberations between Ministers or even with Prime Minister, by itself cannot be said to be a product of criminal conspiracy.

53. We are of the considered view that materials on record do not show that Shri P. Chidambaram had abused his position as a Minister of Finance or conspired or colluded with A. Raja so as to fix low entry fee by non- visiting spectrum charges fixed in the year 2001. No materials are also made available even for a prima facie conclusion that Shri P. Chidambaram had deliberately allowed dilution of equity of the two companies, i.e. Swan and Unitech. No materials is also available even prima facie to conclude that Shri P. Chidambaram had abused his official position, or used any corrupt or illegal means for obtaining any pecuniary advantage for himself or any other persons, including Shri A. Raja.

54. We are, therefore, of the considered opinion that no case is made out to interfere with the order dated 4.2.2012 in C.C. No. 01 (A) / 11 passed by Special Judge CBI (04) (2G Spectrum Cases), New Delhi or to grant reliefs prayed for in I.A. No. 34 of 2012. Special Leave Petition (Crl.) No. 1688 of 2012 is, therefore, not entertained, so also I.A. No. 34 of 2012 in Civil Appeal No.10660 of 2010 and they are accordingly stand rejected.

Judgment Referred

[1]1964 6 SCR 0594
[2]1965 1 SCR 0123
[3]1977 4 SCC 0098