SUPREME COURT OF INDIA

Reliance Telecom Ltd. & Anr.

Vs.

Union of India & Anr.

TP(Civil)No.43 of 2015

(Dipak Misra and Prafulla C.Pant,JJ.,)

12.01.2017

JUDGMENT

Dipak Misra,J.,

1. The three transferred cases, namely, Transfer Case (Civil) No. 43 of 2015, Transfer Case (Civil) No. 64 of 2015 and Transfer Case (Civil) No. 65 of 2015, had their origin in the High Courts of Delhi, Tripura and Karnataka respectively. The High Courts were moved under Article 226 of the Constitution challenging the terms and conditions of Notice Inviting Application-2015 (for short, 'NIA') for allocation of spectrums in various areas. The High Court of Tripura in W.P.(C) No. 52 of 2015 and W.P.(C) No. 53 of 2015 was prayed for grant of interim relief which included extension of permission to the participants in the NIA to be bidded for minimum 4.4 MHz, IN 900 MHz band in the North East service area. The High Court, while dealing with interim prayer, directed as follows:-

> "Therefore, at this stage, we feel that only the following order should be passed: Both the petitioners are permitted to submit 2 applications instead of one. One application may be for 4.4. MHz and the other application will be for a minimum of 5 MHz and may extend up to 8.8, if the petitioners so desire. We have been informed at the Bar that two applications may not be possible to be submitted because it is online. We are not sure whether the same because it may not be possible. Therefore, we direct that it is for the petitioners to decide what application they will submit online but they may also simultaneously submit one application offline in hard copy with the Secretary, Department of Telecommunication, Union of India on or before 16th February, 2015. The Union of India may proceed with the assessment of the applications but no final decision in the matter shall be taken without permission of this Court. Furthermore, any preliminary decision taken shall also be subject to the result of the present writ petition. Admittedly, the licences of the petitioners are expiring only in December, 2015, and, therefore, we would like to ensure that the writ petition is disposed of much earlier."

2. The said orders were assailed by the Union of India in S.L.P. (Civil) Nos. 5735-5736 of 2015. This Court issued notice and eventually on 26.2.2015 directed stay of the order passed by the High Court of Tripura at Agartala and permitted the auction to continue on the date fixed, but the same should not be finalized without the leave of the Court. The Court further directed that the said condition shall be put forth on the website so that all the bidders are aware of the order of this Court and no bidder shall claim equity because of his participation or success in the tendering process.

3. It needs to be stated here that by this time, certaintransfer petitions were allowed. Transfer cases were taken up on 26.3.2015 wherein this Court passed the following order:-

> "Mr. Mukul Rohatgi, learned Attorney General appearing for the Union of India, has submitted that there has been auction commencing 4th March, 2015 and ending 25th March, 2015, in respect of the bands, namely, 800 MHz, 900 MHz, 1800 MHz and 2100 MHz in respect of all the States and there has been a fierce and competitive auction and the entire revenue likely to be generated is Rs.1.09 lac crores. Learned Attorney General would further submit that if the order of stay is not modified, the Union of India will be facing grave fiscal difficulty as there is ample possibility of collecting at least Rs.28,000 crores by 31st March, 2015. It is urged by him that the auction itself would show that the "Notice Inviting Tender" has been a workable one and, therefore, sustainable in law. In this backdrop, submits, Mr. Mukul Rohatgi, that the interim order passed on the earlier occasion should be modified granting leave to the Union of India to finalize the auction, subject to the final decision of the special leave petition and the transferred cases. Mr. P. Chidambaram and Mr. Gopal Jain, learned senior counsel appearing for the contesting respondents, per contra, would contend that the competitive bidding was not really competitive, but a compulsive bidding as parties were obliged to bid because of their survival. In addition, it is put forth by them that the amount that has to be thought of being collected by the Union of India, is factually incorrect, inasmuch as the bidders who are successful have to deposit the amount within ten days from the completion of date of auction, that is, 25th March, 2015. Learned senior counsel would further submit that the entire design of the "Notice Inviting Tender" is gloriously faulty and solely because the auction has taken place and money is likely to be collected, would not be a justification for the modification of the interim order. Having heard learned counsel for the parties, we are inclined to modify the order to the extent that the Union of India would be at liberty to finalize the auction and proceed thereafter, but all the successful bidders shall be intimated that the said finalization is subject to the final result of the special leave petition, as well as the transferred cases."

4. At that juncture, Mr. Mukul Rohatgi, learned Attorney General undertook that the competent authority of the Union of India would intimate the successful bidders to get themselves impleaded as parties.

5. It was observed by the Court that the said impleaded parties are entitled to file respective affidavits stating their stand and stance in the said affidavits. On that day itself, the Court disposed of the special leave petitions as it was felt that nothing really was to be adjudicated in them as the whole controversy was to be addressed in the transferred case. When the matter was heard on the next date, the Court passed the following order:-

> "In course of hearing certain aspects have been highlighted which, we think, the competent authority of Union of India should put by way of an affidavit so that while deciding finally, this Court may take into consideration certain aspects for issuing appropriate directions or moulding the relief. The affidavit shall cover the following:-
>
> (a) After completion of the present auction, what is the quantum of spectrum available with the Union of India?
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> (b) What is the possibility of getting the non-vacating spectrum from the defence band and within what time?
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> (c) Whether an auction can be held in respect of the available spectrum, regard being had to what has been stated in (a) and (b) above?
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> (d) Whether in the auction that is going to be held, the concept of capping would still remain and, if so, what would be the formula and how it would be interpreted and applied? While calculating the cap, if that exercise is undertaken, whether the commercially available spectrum should be included in the computation of such caps?
>
> (e) The successful bidders who have got less than five and in case they fail in the next auction, how they would deal with the spectrum available with them? To elaborate, though they can surrender or trade the spectrum or share the same as per guidelines, do they have a choice to hold it back or the Union of India would take steps in that regard as per law?"

Be it stated, the Union of India filed an affidavit stating the position. The essence of the said affidavit is that:-

(a) After completion of the present auction, what is the quantum of spectrum available with the Union of India?

4.With reference to item (a) above, it is submitted that in the spectrum bands put to auction namely 800 MHz, 900 MHz, 1800 MHz & 2100 MHz in March 2015, the table below indicates the availability of spectrum post auction with the Government of India for commercial use:-

Band(MHz)	Quantum of Spectrum put on Auction (MHz)	Quantum provisionally won by bidders (MHz)	Remaining quantum of spectrum (MHz)
800	108.75	86.25	22.5
900	177.8	168.00	9.8
1800	99.2	93.80	5.4
2100	85	70.00	15.0
Total	470.75	418.05	52.7

b) What is the possibility of getting the non-vacating spectrum from the defence band and within what time?

5. With reference to query (b), it is humbly submitted that the Answering Respondent is making all sincere efforts for getting the spectrum vacated from Defence and other users. Historically, all the identified 75 MHz spectrum mobile services in 1800 MHz band in all 22 service areas was with defence and other users prior to 2001 when it was allocated for the first time for commercial mobile services in India after co-ordination with the then existing users. Spectrum in 1800 MHz band was coordinated by defence on a case to case basis either in the entire service area or in parts of the service area (i.e. District-wise). Based on the coordination received from Defence, spectrum in 1800 MHz band was allotted, from time to time, for commercial use by Telecom Service Providers. This spectrum is in spots over the complete 75 MHz. in January 2015, it has been decided in consultation with the defence, that, instead of the case by case approach adopted historically, out of above referred 75 MHz, 55 MHz will be allotted to telecom service providers (TSPs) and the rest will be used by defence. Within the 1800 MHz band, the exact frequencies to be allotted to TSPs and that to be used by defence have been earmarked. However, the process of allotting all the frequency identified to TSPs will require some time. This is because at present, there are operational networks of defence in the segment identified for telecom services in 1800 MHz band. Similarly frequency spots have been allotted to various TSPs in the segments identified for use by defence. The discussions have started with defence for harmonizing the spectrum in 1800 MHz band. TSPs have also been consulted as they also to shift their networks to new spots. The operational network of the defence is required to be continued until alternate arrangements are available for seamless operation of defence networks or else it would compromise the national security. Therefore, in the humble submission of the answering respondent, no time frame can be put as to when the defence would vacate.

6. Telecommuncation sector's evolution is a continuous process world-wide. New bands and technologies are being identified for providing commercial services. For example Wide Band Code Division Multiple Access (WCDMA) technology, commonly known as 3G technology, have been developed and was deployed in our country in 2100 MHz band. 456 MHz spectrum in this band was co-ordinated from defence and got released for telecom commercial services in 2010 and was auctioned. Further, as per the decision of the Government in January 2015 an additional 85 MHz of spectrum in this band was released by defence and was part of the auction conducted in March 2015. It is also submitted that efforts are being made to get released 15 MHz of spectrum in each of 22 service areas in 2100 MHz band also from Defence. Although in this case also no time frame can be put as to when it would be made available but it is expected to be released during the process of completion of harmonization of 1800 MHz band spectrum. This will make 345 MHz of spectrum available in this band. Therefore, it is proposed to be included in the next auction.

7. As a part of identifying new brands & technologies and releasing for providing commercial services 880 MHz spectrum in Time Division Duplex (TDD) mode was also included in 2300 MHz band for auction conducted in 2010 and 320 MHz of spectrum in this band is proposed to be included for the next auction. Similarly 440 MHz spectrum in 2500 MHz band was allocated to BSNL and MTNL in 2007-08. However 160 MHz spectrum was surrendered by them. TRAI has been requested to expedite recommendations for reserve price and associated conditions. A total quantum of 600 MHz of spectrum in this band, including that surrendered by the BSNL/MTNL is available. It is humbly submitted that channeling plan adopted in India for 2500 MHz band is not as per standard International Mobile Technology (IMT) band considering the issues relating to techno-economic feasibility and availability of commercial eco-systems. The feasibility of inclusion of spectrum in 2500 MHz band in the forthcoming auction appears to be poor. (All bands other than 2300 MHz and 2500 MHz are in Frequency Duplex Division (FDD) mode).

(c) Whether an auction can be held in respect of the available spectrum, regard being had to what has been stated in (a) and (b) above?

8. With reference to query (c), it is submitted that the next auction would be held as and when reasonable quantity of spectrum is available and the answering respondent is making all efforts to make available sufficient quantity of spectrum for auction apart from complying with the statutory process of seeking TRAI's recommendations, where applicable.

9. In the above context, it is submitted that six access service licences of private service providers are expiring in 2017-18. The details of spectrum which will be released by these providers is as follows:

800 MHz band 20.0 MHz

1800 MHz band 22.0 MHz

It is proposed to include the spectrum in 800 MHz band in the next auction of spectrum.

10. Further, the Cellular Mobile Service licences of Mahanagar Telephone Nigam Limited (MTNL) are expiring in 2017-18 and holding 12.4 MHz of spectrum 900 MHz band and 4.4 MHz in 1800 MHz band. MTNL has represented to the Licensor for extension of effective date of their licences as MTNL could not operate license in the initial period due to various reasons including stay by Telecom Regulatory Authority of India (TRAI) in 1997-98.

The representation is under consideration of the Government.

11. It is respectfully submitted that 770 MHz spectrum in 700 MHz band is available. However, the feasibility of its inclusion in the proposed auction appears to be poor due to techno-economic feasibility and the current status of commercially available eco-system.

12. In addition, TRAI has been requested on 9th July, 2015 to provide recommendations on applicable reserve price and associated conditions for auction of spectrum in 700 MHz, 800 MHz, 900 MHz, 1800 MHz and 2100 MHz bands for all the service areas under the terms of Clause 11(1)(a) of TRAI Act, 1997, as amended and expedite the recommendations on applicable reserve price for 2300 MHz and 2500 MHz bands for all the service areas. Presently, the matter is with TRAI and after consideration of the recommendations of TRAI in respect of the reserve price and associated terms and conditions, the next auction would be conducted and the available spectrum will also be included in the auction.

13. It is humbly re-iterated that the availability of spectrum in all the bands may vary vis-a-vis the quantum of spectrum indicated above, as a result of harmonization exercise with Defence, taking into consideration the requirements of Defence and/or the policy decisions by the Government on related matters.

(d) Whether in the auction that is going to be held, the concept of capping would still remain and, if so, what would its formula and how it would be interpreted and applied? While calculating the cap, if that exercise is undertaken, whether the commercially available spectrum should be included in the computation of such caps?

(e)The successful bidders who have got less than five and in case they fail in the next auction, how they can deal with the spectrum? To elaborate, though they can surrender or trade any spectrum or share the same as per guidelines, they do have a choice to hold it or the Union of India would take steps in that regard as per law.

14. The Telecom Regulatory Authority was also consulted with reference to query (d) and (e) as posed by the Hon'ble Court in the order dated 14.5.2015. The TRAI had furnished its comments upon the same vide its letter dated 2 nd July 2015. The relevant extracts are reproduced below:-

"1.14 The Authority examined the views of all the TSPs and the provisions of various NIA issued till date. The Authority is of the opinion that at present there is no need to modify the existing spectrum cap (50% of the spectrum assigned in each of the 800/900/1800/2100/2300/2500 MHz and 25% of the total spectrum assigned in all these bands put together in each service area).

1.15 On the methodology of calculating the spectrum cap, the Authority is of the opinion that all spectrum assigned to the TSPs including any spectrum which was put to an auction but remains unsold, spectrum which was assigned but subsequently surrendered by the TSP or taken back by the Licensor and spectrum put to auction should be counted. However, any spectrum out of the above will not be taken into calculation, if the Government assigns it for non-commercial purpose e.g. assignment to Defence.

1.16 The Authority is also of the view that the spectrum which may become available to the WPC/DoT for commercial use after its reframing from other users such as Defence at different point of time should not be counted for determining the spectrum caps until it is put to auction by the DoT.

1.17 The Authority is also of the view that telecom being an evolving sector, review of such policy decisions such as spectrum cap is a continuous process. The Authority may review it at an appropriate time like introduction of new spectrum bands, additional spectrum released for commercial purpose or if any major development takes place.

1. 22 The Authority is of the opinion that Licensees should be able to decide for themselves whether or not there is a business case for them to hold on to the spectrum. Moreover, once the guidelines of the spectrum sharing and spectrum trading are notified by the Government, the TSPs will have alternate options to manage their spectrum holding. Therefore, the Authority is of the opinion that the Government should not take back spectrum assigned to TSP even if it is less than 5 MHz in any band."

15. The above comments of TRAI are under consideration of the answering respondent.

16. In the above context with reference to query (d), it is humbly submitted that before the next auction, the answering respondent
will take a considered decision on the comments of TRAI as stated above with reference to the methodology of calculating the CAP for future periods.

17. With reference to query (e), it is humbly submitted that as already indicated that the successful bidders who have got less than 5 MHz of spectrum and in case they fail in the next auction, they can share the spectrum or trade the spectrum, the guidelines for which are being formulated and likely to be in place shortly. At present, there is no rule/statute to take back the spectrum which has been awarded after participating in a competitive process and as per commercial decisions of the bidder taking into consideration the techno-economic requirements in a service area. Presently, the aforesaid comments of TRAI are under consideration of the Government of India."

The said affidavit that was filed meeting the issues framed by the Court was countered by the petitioners stating, inter alia, that the respondent No. 1 has, in its affidavit, remained silent on the Chart which was submitted by the petitioners and by not responding to the chart/table of the petitioners, the respondent No. 1 has really not met the issue. It is put forth that the respondent No. 1 does not dispute the submission of the petitioners that out of the 75 MHz of Spectrum, 55 MHz has been earmarked for commercial use and it is also apparent that the respondent No. 1 has not consulted Telecom Regulatory Authority of India (TRAI) on the availability of spectrum, especially since TRAI's recommendation dated 15.10.2014 contained a statement on the availability of spectrum which contradicts the statement made by the respondent No.1 in the affidavit.

6. Eventually, the matter was heard at length and learned counsel for the parties had filed the written notes of submission.

7. At this juncture, it is necessary to state that learned counsel for the respondent in the transferred cases have separately put forth written submissions but we shall enumerate them together as we are disposed to think that there is commonality of grievance and attack on the Notice Inviting Application (NIA) is also similar. The submissions, which are separately set forth qua each transferred case, if required, shall be adverted to at the appropriate stage.

8. Learned counsel appearing for the petitioners have raised various contentions and for appropriate appreciation, it is necessary to enumerate them.

9. The minimum bidding criteria of 5 MHz in the spectrum band of 900 MHz for different categories of bidders as adopted in NIA is arbitrary, anti-competitive, onerous and contrary to the TRAI recommendations dated 15.10.2014. The minimum bidding criteria for different categories of bidders under different bands, i.e., 800 MHz, 900 MHz, 1800 MHz and 2100 MHz, is discriminatory and runs counter to the TRAI recommendations dated 15.10.2014. The Department of Telecommunications (DoT) has not accepted the TRAI recommendations dated 15.10.2014 and not allowed the new/expiring licensees in the 900 MHz band to bid for a minimum of 2 x 3.6 MHz in those Licensed Service Areas (LSAs) where spectrum put to auction was 10 MHz or more and 2 x 2.4 MHz in the remaining LSAs. Similarly, in 1800 MHz band, DoT has not allowed the new/expiring licensees to bid for a minimum of 2 x 0.6

MHz spectrum. This condition that relates to the eligibility criteria invites the frown of Article 14 of the Constitution.

10. The NIA dated 9.1.2015 suffers from over-classification between different categories of bidders inasmuch as the minimum bidding criteria for different classes of bidders, as has been set out in the NIA, has no nexus with the object which the NIA seeks to achieve. The criteria adopted by the DoT is in stark contrast to the TRAI recommendations dated 15.10.2014, which recommended that the minimum quantity that a bidder is required to bid for should be kept as 2 x 3.6 MHZ in the LSA where spectrum availability is 10 MHz or more in the 900 MHz band; and the minimum quantity may be kept as 2 x 2.4 MHz in the remaining LSAs which would be applicable for expiring licensees as well as new entrants. Though these recommendations were reiterated by TRAI in its response dated 24.11.2014 to the back-reference received from DoT on the recommendations of TRAI dated 15.10.2014, yet they were not accepted without any fathomable reason. The NIA has fixed different minimum bidding criteria for different spectrum bands and classified the bidders into "existing licensees", "expiring licensees" and "new entrants" and fixed different bidding criteria for each category and such classification does not indicate that there is any intelligible or discernible basis for the fixation of the criteria and there is no nexus between the criteria and the object sought to be achieved through the auction and, hence, the criteria is a case of "suspect classification". It is so because no reason or justification has been furnished in support of the innumerable classes created by the criteria; and it is a case of classification and micro-classification which will inevitably favour one or more bidders in certain service areas and disfavour other bidders. In this regard, learned counsel for the petitioners has relied on *Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others*[1], *Association of Unified Tele Services Providers and others v. Union of India and others*[2] and *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*[3]

11. The auction of spectrum ought not to have been conducted with inadequate spectrum in a scarcity-driven situation in defiance of the TRAI recommendations dated 15.10.2014. The Government holds spectrum in public trust and, hence, cannot hoard spectrum (which is an inexhaustible resource) depriving the public of its use. It is obligatory for the authorities to disclose the quantity of unutilized spectrum it holds and why the whole quantity was not put to auction.

12. The bidding criteria and the scheme of auction as a whole are not consistent with the mandate of law. As a result of the flawed approach of the Government keeping the minimum bidding criteria in the 900 MHz band as 5 MHz for new entrants/expiring licences, 4.6 MHz of spectrum in the Bihar service area remained unsold as the existing operator bid for only 1.6 MHz, whereas the total spectrum available in the area was 6.2 MHz. Similarly, in the West Bengal service area, 4.4 MHz was the minimum bidding criteria for new entrants/expiring licensees but the existing operators could bid for 0.6 MHz of spectrum. In North East service area also, the total spectrum put up for auction was 8.8 MHz, but because

of the condition of bidding for a minimum of 5 MHz, only one successful bidder would have been able to win the bid and others were bound to be unsuccessful.

13. If minimum bidding criteria is different for different categories, it will create a dent in the level playing field. For example, where the minimum bid for Bidder A is 0.6 MHz and the Bidder B, it is 5 MHz and the block size is 0.2 MHz, Bidder A can enter the arena with funds sufficient to bid for 3 blocks (3 x 0.2 MHz), whereas Bidder B can enter the arena only if he has funds to bid for 25 blocks (25 x 0.2 MHz). Bidder A can also artificially push up the price per block because he will have to pay for only 4 blocks. As such, Bidder B will be forced to match the price of Bidder A or quit the race, which brings out the arbitrariness and discrimination in the minimum bid criterion as stipulated in the NIA.

14. Spectrum is a natural resource which is held by the Government in public trust for the benefit of the people. The Government is obliged under law to ensure that there is most efficient utilization of the spectrum available as has been held in *Centre for Public Interest Litigation and others v. Union of India and others*[4]. A corollary of this is that the Government should disclose the spectrum that is available with it and that too with specific reference to each service area. Rule of law and the principle of transparency demand that the Government should make public the time schedule and the periodicity with which it intends to hold the auction. As per the spectrum chart for 1800 MHz furnished by the petitioners and not objected to by the Government, there was 216.4 MHz spectrum in the 1800 MHz commercial band which had been unaccounted for, which is neither lying with the Defence nor with the Telecom Operators and such an action is contrary to law. DoT itself admitted in January, 2015 that 55 MHz of spectrum out of total 75 MHz in 1800 MHz band is available for commercial use to the TSPs, but failed to take any effective measures for releasing the said spectrum despite repeated requests of the telecom operators.

15. TRAI has requested the information in terms of the proviso to Section 11 of the Telecom Regulatory Authority of India Act, 1997 (for short, "TRAI Act") regarding 'reserve price and associated conditions for the auction of spectrum', which has not been made available despite the fact that the proviso to Section 11 mandates supply of information within seven days. Under the scheme of Section 11 of the TRAI Act, certain parameters have to be satisfied by the Government while acting on the recommendations of TRAI, especially keeping in view the first, third and fifth proviso to Section 11 and Section 11(4) of the TRAI Act.

16. The aforesaid submissions have been resisted by Mr. Rohatgi, learned Attorney General for India and Mr. Ranjit Kumar, learned Solicitor General of India appearing for the Union of India and their submissions are encapsulated to sustainability of the combat.

17. The grievance raised by the petitioners do not survive as they have participated in the auction and have been successful in some of the areas and the question of alteration of bid condition does not survive. The present petitions have been deliberately kept alive by the telecom service providers only to retain their dominant positions to the detriment of the

market and the subscribers. The challenge by the petitioners pertaining to tender conditions formulated by the Union of India invoking the power of judicial review is not tenable as no valid grounds for interference, as postulated in *Tata Cellular v. Union of India*[5] and *Delhi Science Forum and others v. Union of India and another*[6] have been made out.

18. The statutory requirement of seeking TRAI's recommendations and the procedure to be followed is set out in Section 11 of the TRAI Act. The proviso to Section 11 has been interpreted by this Court in Association of Unified Tele Services Providers (supra) wherein it has been held that the recommendations of TRAI are not binding on the Government. In the case at hand, the Government, after deliberating on the recommendations of TRAI and sending it back to TRAI for reconsideration, has chosen not to accept the recommendations of TRAI. Keeping in view the concept of minimum availability of spectrum with a bidder and regard being had to allow space to the new entrants to compete, it is urged that Government has always given due weightage to the recommendations of TRAI. Further, the Government of India does not want to compromise quality to be offered by the service providers in consumer interest and, therefore, did not accept the recommendations of TRAI. The endeavour of the Government contained in the NIA for the auction conducted in March, 2015 is not based on any classification except that all service providers must have a minimum of 5 MHz if they want to deploy any mobile technology benefitting the consumer and even TRAI concurred with the view that minimum 5 MHz quantum was the appropriate minimum quantum to be set. Reduction of minimum quantum of spectrum to 3 MHz instead of 5 MHz for new entrants would be contrary to TRAI's own recommendations on the issue of spectrum auction, wherein TRAI has been consistently holding that 5 MHz is the minimum amount of spectrum required to ensure that any technology can be deployed with the allocated spectrum.

19. Fragmented spectrum allocation to address the present issues in few service areas will only be a short term solution but will have long term negative impact for the sector as the objective is to have broadband solution that offers the most affordable devices and ecosystem to connect the billion people and as such, the minimum quantum of spectrum is prescribed as 5 MHz. After deliberating on the recommendations of TRAI, the Government differed with the view of TRAI and kept the minimum bid quantity at 5 MHz on the grounds that the present and future technology scenarios and the need for making the spectrum contiguous would only benefit the consumer which is the essential objective of the National Telecom Policy (NTP); that in the previous three auctions, new entrants/licensees whose licences were expiring were required to bid for minimum 5 MHz spectrum; that there was no substantial change in the market and eco-system scenario since the last auction of February, 2014; that there is a need to induct new technologies to meet the requirements of the ever growing demand for data; and the number of mobile users stands at approximately 960 million consumers whose need has to be catered keeping in view the development of technology in next twenty years. Thus, taking a long-term view, the decision of the Government after giving due weightage to the recommendations of TRAI is justified. The plea that the auction is non-competitive and security driven has no basis.

20. The classification of entities is on the basis of whether an entity is a new entrant or an existing service provider as the Government has always been consistent with the trend that new entrants would have to bid a minimum of 5 MHz and the existing service providers have to 'top up' (capacity enhancement) their present holding of spectrum to achieve a goal of maximizing efficiency and avoid any restraint for the consumers and the service providers. In the NIA for auction of spectrum in 2015, across all bands, a new entrant is required to bid for a minimum of 5 MHz and this requirement has always been the same for earlier auctions also conducted in 2012, 2013 and 2014. The minimum bid quantum is reduced only in those cases where 5 MHz is not available in a LSA or contiguous 5 MHz is not available. An existing licensee has to bid for a minimum of 0.6 MHz of spectrum in order to 'top up' so as to come to the level of 5 MHz (as minimum administratively allocated spectrum in 900 MHz/1800 MHz band is 4.4 MHz) and be in a position to provide services compatible with new technology. Moreover, the existing licensee, who will be bidding for a minimum of 0.6 MHz so that he may come to the level of 5 MHz, may also bid for more than that. The idea would be that he has to bid as a new entrant for the next time when his licence would expire and his allocated 4.4 MHz spectrum is put to auction.

21. The endeavour of DoT is that everybody should have minimum 5 MHz as less than 5 MHz will not be good for the consumer keeping in view the evolution and innovation and in order to achieve the same, DoT has to be far-sighted as the spectrum is being allotted for a period of 20 years. Assuming that there is classification, then, that is based on an intelligible differentia between two sets of people, i.e., (1) new entrants including the expiring licensees and (2) existing licensees, both of whom ought to have minimum 5 MHz so as to be able to deploy on any mobile technology. An existing licensee may not require 5 MHz to meet the traffic requirements and only a fraction of 5 MHz would meet the requirements, and small chunk addition would improve traffic handling capabilities and reduce call drops due to congestion. Moreover, in case an existing licensee chooses to only retain what it has in terms of spectrum before, then it will, as aforesaid, only be able to provide the bare 2G service and no more and, therefore, he would lose out on his consumers who can change to a better service provider in terms of number portability. Therefore, the classification, if any, contained in the NIA for the auctions conducted in March, 2015 is based on intelligible differentia having a nexus with the object sought to be achieved and there is no violation of Article 14.

22. There was no spectrum in 900 MHz band prior to the auction in March, 2013. The only existing licensees in 900 MHz band were MTNL/BSNL who did not participate in the auction (but paid the auction determined price since 2010) and, as such, practically, there was no existing licensee in Delhi, Mumbai and Kolkata. Therefore, there was no requirement to deal with existing licensees in 900 MHz band in March, 2013 auction & February 2014 auction. The argument of the petitioners that there are many operators across the country who are left with less than 5 MHz of spectrum and there is no obligation on the part of every service provider to being forced to purchase or top up to 5 MHz is unacceptable as it does not take into account why a service provider is required to have more than 5 MHz, and the fact that with the innovation in technology and the scientific development that may take place in

the next 20 years, if a service provider is satisfied with the technology that it is presently using and such service provider does not want to give to its customers/consumers better services, then he would remain within the realm of the already allotted spectrum without wanting to top up or go up to 5 MHz, in which case not only is he likely to suffer but his customers are also likely to suffer. The argument that the petitioner was 'knocked out' of availability of only 8.8 MHz in the North East and due to the term of minimum of 5 MHz for a new entrant including expiring licensees is incorrect. In the North East, while 8.8 MHz was available in 900 band, there were other spectrum available, i.e., 800 band (13.75 MHz), 900 band (8.8 MHz), 1800 band (8.4 MHz) and 2100 band (5 MHz) out of which the writ petitioner-Reliance has won 5 MHz in 800 band and 5 MHz in 1800 band at the auction as it already had spectrum in 2100 band. The trend of the 2015 auctions has shown that this company has substituted its 900 band with 1800/800 band in most circles where the bid was lower than the 900 band and it has also bid for the 900 band spectrum and remained unsuccessful, and that cannot form the basis to assert that there is any discrimination caused or that there is a flaw in the NIA. That apart, the investment already made in the past 20 years is an investment which will be used even with the 1800/800 band technologies and any future investment according to the needs of the time will be made by them in their commercial wisdom and to say that they were "knocked out of the auction because of the NIA design" is totally fallacious as they purchased spectrum in other bands. The submission that thousands of crores of investment have been made entirely overlooking the lakhs of crores revenue generated which is one of the fundamental purposes of auction especially of spectrum.

23. As regards the submission of the petitioners for moulding of the relief and for laying down principles for the future, the prayers do not remotely so indicate and, furthermore, the policy of auction in such matters is a complex phenomenon, and the Court may not think of laying down guidelines for future. The argument that in case of a renewal of a licence, the licensee would have the legitimate expectation to be able to get back what it was surrendering is contradictory, for a renewal and surrender will not happen simultaneously since these licences are deemed to have been over by efflux of time and there is no renewal of licence because spectrum is required to be purchased in the open market. Hence, there is no renewal leading to any legitimate expectation.

24. In the auction, the entire available spectrum for commercial use in the 800, 900, 1800 and 2100 MHz band was put to action and the spectrum which could not be sold in this auction shall be included in the next auction. The submission that the Union of India has flouted the decision in Centre for Public Interest Litigation (supra) is entirely unfounded as the grievance raised was that the entire spectrum available on the cancellation of the licences which were the subject matter of that PIL were required to be put up for auction and the PIL related to grant of licences in the 1800 band category only and the spectrum that would have been released consequent upon the cancellation of the licence was required to be a part of the auction to be held after February 2013 in its totality. The issue of allotment of spectrum in the 900 band was not the subject matter of consideration of the said writ petition. The objectives of the present auction are in consonance with the National Telecom Policy-2012

(NTP-2012). These objectives are the same as in the previous auctions conducted in November 2012, March 2013 and February 2014. The objectives state that the primary objective of the NTP-2012 is maximizing public good by making available affordable, reliable and secure telecommunication and broadband services across the entire country. The main thrust of the Policy is on the multiplier effect and transformational impact of such services on the overall economy. It recognizes the role of such services in furthering the national development agenda while enhancing equity and inclusiveness. Availability of affordable and effective communication for the citizens is at the core of the vision and goal of the NTP-2012, at the same time as being investor friendly and attracting additional investments. The NTP-2012 also recognizes the predominant role of the private sector in this field and the consequent policy imperative of ensuring continued viability of service providers in a competitive environment. Pursuant to the NTP-2012, these principles have guided the decisions needed to strike a balance between the interest of users/consumers, service providers and government revenue. Revenue maximization is not the sole objective of the Government as alleged by the TSPs. The auction terms have been structured in a way keeping in mind the public interest and the fact that the TSPs have to serve the public (consumers) for the years to come, i.e., the spectrum is allotted in a transparent manner for a period of 20 years.

25. There are various factors that the DoT is required to take into account while determining the auction structure. Ultimately, the DoT should be permitted to determine the auction structure consistent with the scheme of the TRAI Act (as has been done in the earlier auctions and the instant one). It cannot be left to the option of the telecom service providers and their narrower self interest to determine the structure and timing of auctions. Capping has been kept in vogue to have a bigger field and it is based on a rational principle. For arriving at the cap, only two parameters are to be seen - (a) the total spectrum assigned in that service area; and (b) the total spectrum being put to auction. There is nothing mentioned in the definition as explained by the notes that the surrendered spectrum is also required to be added because there is no definition of a surrendered spectrum. Even if some capping rule is required to be altered, the Court would be required to go into the basis why a capping rule was provided for and why the TRAI and the Department have consistently followed the capping rule not from today but from 2012 itself. That is because no monopoly should be created and a healthy competitive bidding should be available. The relief of removal of the cap is only to enable the petitioners who are 'big players' to serve their cause but not the public interest and the government has been reviewing its policy from time to time. TRAI has made recommendations regarding compilation of the cap in future, and such recommendations are under consideration by the Government of India.

26. It is apt to note here, as has been earlier stated, after certain bidders became successful in the auction, their cases were withdrawn and they were permitted to be impleaded in these Transfer Cases. They have also filed their written notes of submissions. Though separate written notes have been filed, yet we are inclined to enumerate the contentions raised in a composite manner.

27. None of the operators have challenged the Spectrum Cap Clause [Clause 5.3.1.] in the NIA 2015. In the absence of such challenge, anything which flows out from that clause including the methodology/calculation cannot be questioned and/or not open to challenge and as a natural corollary, the arguments pertaining to the clause being arbitrary, discriminatory or contrary to public policy cannot be raised. Once the policy itself cannot be faulted, the method of implementation thereof would not be supervised by the Court and no mandamus can be issued in that regard. The methodology of ensuring the capping has to be left to the State and no direction should be issued as to how the capping is to be implemented.

28. So far as the interpretation of clause 5.3.1 is concerned, the said clause, as it stands, is unambiguous and clear, and therefore, the said clause ought to be literally interpreted. Furthermore, the NIA, being an invitation to offer, the rules of interpretation of contracts would apply and not the rules that may be applied in the case of interpretation of statutes.

29. The NIA, being an invitation to offer, and Clause 5.3.1 being one of the Clauses thereof, and the said Clause not being under challenge, any meaning other than the literal meaning of the said Clause would have to be by consent of both the parties. It is not open to one party to unilaterally, at the stage of NIA, seek an interpretation of a Clause in a manner of their choice and if there is a difference of opinion in the manner of interpretation, it is the interpretation of the party who is offering the contract that ought to be adopted. Should there be cause for the Court interpreting or thereby requiring, through mandamus, the Offering Party (i.e., the State) to interpret the Clause contrary to their way of interpretation or literal interpretation, this would only be done on the very limited grounds of judicial review, in which case, while a certiorari would issue to strike down the Clause as being arbitrary (which issue is not put in question before the Court), a mandamus will not issue to require the State to interpret the Clause in a given way and make an offer in accordance with the interpretation given by the Court, which is what the petitioners seek.

30. Clause 5.3.1, in ‘No uncertain terms’, provides for only two categories of spectrum, namely, (i) spectrum currently held by the operators; and (ii) spectrum put to auction by the Licensor/Respondent, to be counted/considered while calculating the Spectrum cap. This being the position under the Clause (both accepted and understood by all the operators), the contention that the surrendered spectrum of BSNL/MTNL and not currently held by the existing operators should have been included (whether or not put to auction) is clearly contrary to the unequivocal terms of Clause 5.3.1. The contention that the surrendered spectrum (which is neither assigned/held by any operator nor put to auction) ought to be included for calculating the Spectrum cap in the present auction is an effort to include/add another category of spectrum (i.e., surrendered spectrum not put to auction) which is not provided in Clause 5.3.1, and thereby effectively seek amendment of the Tender/NIA terms which is totally impermissible in law.

31. The objective behind Spectrum capping is to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum, which they may not require but only hoard to prevent the small operators from effectively competing in the market, and that is why, TRAI has recommended on 02.07.2015 that the basic objective of prescribing a spectrum cap is to prevent a TSP from acquiring large holdings of spectrum through auction, M&A or trading, as it may lead to non-level playing field thereby disturbing the competition in the market. It cannot be left to the market forces alone to decide the maximum spectrum holding as a TSP and, hence, the provision of cap should continue on the spectrum holding that a TSP may acquire or otherwise. The Argument that the Respondent should have notionally included the spectrum surrendered by BSNL/MTNL would result in creating a situation where though the spectrum put to auction remains the same (i.e., limited), yet a large/big player will be able to bid for the entire spectrum (which it otherwise could not have done due to Clause 5.3.1) thereby effectively giving a tool to the large/big operators to deprive/starve small operators, who quite avowedly, cannot match the buying power of larger operators of spectrum.

32. There cannot be any legitimate expectation based on the terms and conditions relating to NIA more so, in the sphere of auction of spectrum. The 2013 auction included the spectrum allegedly surrendered by BSNL/MTNL in calculating the Spectrum cap, while it has not been done so in the present auction (i.e., 2015 auction), and the fact that the surrendered spectrum was included earlier and not in the present year does not give rise to legitimate expectation, for it does not bind the State to follow the same because the fundamental principles of maximization of revenue and subserving of the public interest at large require change. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The court does not interfere with the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard that leaves to the deciding authority the full range of choice which the legislature is presumed to have intended.

33. The grievance raised by the petitioners is that the design of the auction skewed price discovery and resulted in artificial inflation of the price of spectrum. This grievance is to be viewed in the context in which the policy of auction of spectrum came to be implemented. This Court having held that public interest is served by maximizing the benefit to the public exchequer, a challenge premised on the admission that the method adopted by the State, in fact, maximized the generation of revenue from the auction of spectrum cannot succeed. Further, the present case may be usefully contrasted with the Center for Public Interest Litigation (supra) in which this Court quashed the licences issued to different telecom operators on a finding that the policy of 'first come first serve' (FCFS) was constitutionally suspect for the reason that it failed to maximize revenue. Additionally, it was found that the procedure for grant of licences was, in any event, vitiated by arbitrary application of the FCFS policy and by grant of licences to ineligible applicants. In such circumstances, the requirements of public interest were held to mandate a declaration that the process as a whole was legally non est. In the present case, declining to quash the auction

exercise as a whole would occasion no detriment to the public interest since the competing considerations can be balanced by directing remedial and forward-looking reliefs, even while preserving past actions. Further, there is neither allegation of any mala fide in the conduct of the auction, nor has it been alleged that the policy was structured so as to convey benefit to a particular player/players over others.

34. Having noted the contentions of the parties, we think it necessary to refer to the earlier decisions that have been rendered in the context of spectrum and the principle to be adhered to while disposing it by way of granting licence. The litigation relating to spectrum had a beginning. In Centre for Public Interest Litigation (supra), be it noted, the controversy had arisen in a different canvas. But it is necessary to allude to it. The two-Judge Bench framedfive questions:-

> "(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?
>
> (ii) Whether the recommendations made by the Telecom Regulatory Authority of India ("TRAI") on 28-8-2007 for grant of Unified Access Service licence (for short "UAS licence") with 2G Spectrum in 800, 900 and 1800 MHz at the price fixed in 2001, which were approved by the Department of Telecommunications (DoT), were contrary to the decision taken by the Council of Ministers on 31-10-2003?
>
> (iii) Whether the exercise undertaken by DoT from September 2007 to March 2008 for grant of UAS licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and mala fides and is contrary to public interest?
>
> (iv) Whether the policy of first-come-first-served followed by DoT for grant of licences is ultra vires the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as "the Minister of Communications and Information Technology"), without consulting TRAI, with a view to favour some of the applicants?
>
> (v) Whether the licences granted to ineligible applicants and those who failed to fulfil the terms and conditions of the licence are liable to be quashed?"

35. The Court referred to the new economic policy of India that was announced on 24.7.1991 which was aimed at meeting India's competitiveness in the global market, rapid growth of exports, attracting foreign direct investment and stimulating domestic investments. With a view to achieve standards comparable to international facilities, the sub-sector of Value Added Services was opened up to private investment in July 1992 for the services, namely,

(a) electronic mail; (b) voicemail; (c) data services; (d) audio text services; (e) video text services; f) video conferencing; (g) radio paging; and (h) cellular mobile telephone. The Court referred to the National Telecom Policy, 1994, New Telecom Policy, 1999, Establishment of Telecom Regulatory Authority of India, Policy on Spectrum Management as enumerated in NTP 1999, the role of TRAI, the factual matrix in hand, the stand of the respondent, the manner in which the allotments were made and, in that context, opined as follows:-

> "85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-a-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-a-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.
>
> Xxxxxxxxxx
>
> 89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."

36. Answering the question nos. 3 and 4, the Court held:-

> "95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/ instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.
>
> 96. In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound

to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.

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99. In majority of the judgments relied upon by the learned Attorney General and the learned counsel for the respondents, it has been held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters.

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101. Before concluding, we consider it imperative to observe that but for the vigilance of some enlightened citizens who held important constitutional and other positions and discharged their duties in larger public interest and non-governmental organizations who have been constantly fighting for clean governance and accountability of the constitutional institutions, unsuspecting citizens and the Nation would never have known how the scarce natural resource spared by the Army has been grabbed by those who enjoy money power and who have been able to manipulate the system. We are not referring to the directions given therein as we are not really concerned with the said directions in the present case.

37. After delivery of the said judgment, the President of India, on 12.4.2002, made a reference under Article 143(1) of the Constitution, which was answered in Natural Resources Allocation, In re, Special Reference No.1 of 2012 (supra). The issue of maintainability of reference was raised and the Court answered that the reference was maintainable as long as the lis in 2G case, inter parties, is left unaffected. On merits, the majority proceeded to hold as follows:-

"129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited

to that extent. Essentially, whenever the object of policy is anything but revenue maximisation, the executive is seen to adopt methods other than auction.

130. A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilisation of the resource discovered: a prudent business venture would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

131. Similar deviation from auction cannot be ruled out when the object of a State policy is to promote domestic development of an industry, like in *Kasturi Lal case* [7], discussed above. However, these examples are purely illustrative in order to demonstrate that auction cannot be the sole criterion for alienation of all natural resources."

38. Elaborating further, the Court held:-

"146. To summarise in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-a-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables: it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.

149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution."

39. Be it noted, pursuant to the judgment in 2G case, the Union of India had taken steps to conduct an auction of 900 MHz and 1800 MHz insofar as they pertained to certain operators whose licences were coming to an end in 2014. The licences had been granted in favour of certain licensees, namely, Vodafone Mobile Service Ltd., Loop Mobile India, Bharti Airtel Ltd. and Idea Cellular Ltd. who had Cellular Mobile Telephone Service licence (CMTS licence) and some had Unified Access Service licence (UAS licence) and they approached the Government of India seeking extension/removal of the licence. They approached the High Court of Delhi which directed the Government of India to dispose of the application within a stipulated time frame. Pursuant to the directions given by the High Court, the applications of the licensees were considered and rejected by the Government of India. Aggrieved by the said rejection, the licensees approached TDSAT, which dismissed the petitions vide order dated 31.1.2014.

40. After appeals were dismissed, the appellants therein preferred appeals under Section 18 of the TRAI Act. The grievance related to seeking of an extension of the period of licence.

The Court in *Bharti Airtel Limited v. Union of India*[8], relying on *Union of India and another v. Assn.. of Unified Telecom Service Providers of India and others*[9], came to hold that it is a settled position of law that a licence granted under Section 4(1) of the Telegraph Act such as the one granted to each of the licensees herein is a contract between the licensor and the licensee. Thereafter, the Court posed the question, whether there was any right of extension of licence granted in favour of the licensee under the contract. Analysing the terms of the clauses in the contract, referring to various passages from the 2G case and considering the view of TRAI and the pronouncement in Natural Resources Allocation, In Re (supra), the two-Judge Bench answered thus:-

> "In para 82 of Natural Resources Allocation, In re (supra), this Court was categorical that the findings of 2G Case (supra) were limited to the case of spectrum. Similarly, in para 146, this Court observed that this Court "respects the mandate and wisdom of the executive" in the matter of choosing the most suitable method of distribution of natural resources. This Court noted that this is clearly a matter of an economic policy entailing an intricate economic choice and the Court lacks necessary expertise to make such choice. In the light of the observation in para 82 that at least in the matter of disposal of spectrum, auction is the only "permissible and intra vires method for disposal". Therefore, the submission of the licensees is required to be rejected."

41. Having adumbrated to the previous litigations, we shall presently refer to the NIA and deal with the submissions keeping in view the law in the field. Clause 5.3 of the NIA which deals with spectrum cap, that is, the quantum of spectrum an operator can hold in a LSA, is extracted below:-

"5.3 Spectrum Holding Capping Rule

> For the purpose of this Auction the bidding by the bidders for each of the Service Areas in each of the bands will be restricted by a Cap which would depend on the Spectrum assigned in the respective band (1800 MHz/900 MHz/ 800 MHz) and also on the Total Spectrum assigned in all the bands namely 800 MHz/ 900 MHz/ 1800 MHz/ 2.1 GHz/ 2.3 GHz/ 2.5 GHz along with respective paired frequencies.
>
> 5.3.1 Overall Cap
>
> The Overall Cap for each of the Service Areas is calculated as 25% of the Total Spectrum Assigned for Telecom services in above mentioned frequency bands (including the Spectrum put for these auctions).
>
> ** For the purpose of arriving at Overall Cap, the Total Spectrum Assigned in a Service Area is considered as the sum total of the current holdings of all the Telecom Service Providers across all bands in the respective Service Area PLUS the Spectrum put to auction in that particular Service Area.

** It may be noted that the Spectrum which is expiring in 2015-16 will not be considered in the Current Holdings. The same spectrum will only be considered as the Spectrum put to auction.

5.3.3. Cap in 900 MHz band

The Spectrum Cap for each operator in each of the Service Areas in 900 MHz band is calculated as 50% of the Total Spectrum assigned, both uplink and downlink, for Telecom services in 900 MHz band.

** For the purpose of arriving at Spectrum Cap in 900 MHz band, the Total Spectrum Assigned in a Service Area in 900 MHz band is considered as the sum total of the current holdings of all the telecom operators in 900 MHz band in the respective Service Area PLUS the Spectrum put to auction in 900 MHZ band in that particular Service Area.

** It may be noted that the Spectrum which is expiring in 2015-16 will not be considered in the Current Holdings. The same spectrum will only be considered as the Spectrum put to auction."

42. The stipulations in the said Clause are criticized by the petitioners on the ground that it creates different classes of bidders without any justification and, in fact, the classification is absolutely unreasonable. As the Clause reflects, certain conditions have been envisaged by which three categories of bidders, namely, "existing licensees", "expiring licensees" and "new entrants" have been introduced. The submission is that there was no warrant to put a cap and further fix a minimum bidding criteria. The argument on behalf of the petitioners is that the above auction being non-competitive is vitiated. The proponement of the Union of India is that provisions had been provided by excluding some and permitting some to top up regard being had to the commercial interest and keeping in view the interest of the consumers. That apart, it has been urged that there is room for new entrants who may invest and allow better competition and also there would be avoidance of monopoly by the big players. The thrust of the matter is whether the clause is so arbitrary and erroneous as to invite the frown of Article 19. To put it differently, it is to be considered whether the classification is without any basis and whether the postulate is so unreasonable that a prudent sense of commerce will abhor to give it any space.

43. Having adumbrated to the previous litigations,we shall presently refer to the NIA. Clause 3 of the NIA deals with the eligibility and conditions. Clause 3.1 provides the eligibility criteria to participate in the auction and Clause 3.2 provides for associated eligibility conditions. The relevant part of Clause 3.2 is as follows:-

"3.2 Associated Eligibility Conditions

(i) Existing Unified Licence (Access Service)/Exiting UASL/CMTS/UL licensees shall be treated as 'New Entrant' in those service area(s) for the frequency bands in which they do not hold spectrum at present. In other words, UAS/CMTS/UL(AS)/UL licensees who hold spectrum only in a particular Service Area are also allowed to participate in the Auction as 'New Entrant' in that service area for the frequency band in which they do not hold spectrum at present*. Their eligibility to bid for spectrum blocks in that particular service area will be that of a new entrant. They will also need to comply with conditions for spectrum allotment and other prescribed conditions such as rollout obligations, FBG, etc.

*for the Purpose, 1800 MHz and 900 MHz Bands are considered as some band

(ii) Existing UASL/CMTS /UL(AS)/UL licensees shall be treated as 'Existing Licensee' in those service areas for the frequency band(s) in which they already hold spectrum. Their eligibility to bid for spectrum blocks will be that of an existing operator. For the limited purpose of this provision, 900MHz band, 1800 MHz band will be treated as the same band.

(iii) Bidders whose licences are due for expiry of 2015-16 and whose spectrum in 900 and 1800 MHz band has been put to auction will also be treated as 'New Entrants'

.

(iv) Entities (not an existing licensee) will be treated as 'New Entrants' and will have to obtain a Unified License.

(v) Licensees covered by the note under Clause 1.4 of UAS licence condition are allowed to bid only for the spectrum band which they currently hold. For the limited purpose of this provision, 900 MHz and 1800 MHz will be treated as same band.

(vi) For the purpose of this auction, a cap of 25% of the 'total spectrum assigned' in 800/900/1800/2100/2300/2500 MHz bands with applicable paired band put together and 50% within a given band in each of the access service area shall apply for total spectrum holding by each operator. For the purpose of calculation of the cap in this auction, the spectrum put to auction would be included in the 'total spectrum assigned'. This cap will be applicable as on the last date of application for participating in Auction. Total Spectrum assigned for unpaired and both unlink and downlink spectrum in case of paired spectrum is taken into account."

44. Clause 3.3 deals with unified licences, Clause 3.4 provides for associated licences, Clause 3.5 deals with prospective new entrants, Clause 3.6 speaks of roll out obligations and Clause 3.6.1 provides for roll out obligations for spectrums in 1800 MHz, 900 MHz and 800 MHz band in service areas other than metro service areas. Clause 4 provides for auction details which are categorized into various compartments, namely, confidentiality and anti-

competitive activity, application requirements, ownership compliance certificate, principal qualification conditions, earnest money deposit, payment terms and various other aspects. Clause 5 deals with spectrum in 1800 MHz, 900 MHz and 800 MHz bands - auction rules. Clause 5.1 deals with the conduct of auction and Clause 5.2 states about overview of the auction stages. Clause 5.3 provides spectrum holding capping rule. Clause 5.3.2 reads as under:-

> "3.2 Cap in 1800 MHz band The spectrum cap for each operator in each of the Service Areas in 1800 MH band is calculated as 50% of the total spectrum assigned, both uplink and downlink, for telecom services in 1800 MHz band.
>
> ** For the purpose of arriving at spectrum cap in 1800 MHz band, the total spectrum assigned in a service area in 800 MHz band is considered as the sum total of the current holdings of all the telecom operators in 1800 MHz band in the respective service area plus the spectrum put to auction in 1800 MHz band in that particular service area.
>
> It may be noted that the spectrum which is expiring in 2015-16 will not be considered in the Current Holdings. The same spectrum will only be considered as the spectrum put to auction. Spectrum cap for each operator in 1800 MHz band on the maximum spectrum for each of the service area is as given in Table 5-E below:

Table 5-E	Cap on Bidding for each Operator for each Service Area in 1800 MHz band Total spectrum assigned for both sides of spectrum in case of paired spectrum is taken into account

Service Area	Maximum Cap for each Operator (In MHz)*
Andhra Pradesh	54.60
Bihar	28.55
Gujarat	46.00
Haryana	47.10
Himachal Pradesh	43.05
Karnataka	50.60
Kerala	52.45
Kolkata	48.80
North East	48.80
Odisha	52.50
Punjab	43.45
Rajasthan	46.60
Tamilnadu	65.00

Uttar Pradesh (East)	47.25
Uttar Pradesh (West)	39.90

*50% of total assigned spectrum and spectrum put for auction in the band in a service area. It may be noted that for a service area in 1800 MHz band, the total of the current holding of spectrum in 1800 MHz band and the total spectrum for which the bidder is submitting the bid for a service area should not exceed the cap which is mentioned in the Table 5-E above. Total spectrum assigned for both sides of spectrum in case of paired spectrum is taken into account."

45. The principal grievances of the petitioners, as is lucent, are that the principle of capping adopted by the respondent keeps the petitioners away from bidding in respect of a particular quantum and further it makes the bid non-competitive; that the reduction of overall spectrum caps despite the available quantum of commercially viable spectrum amounts to hoarding; that the calculation of overall spectrum which has reduced the quantum of spectrum put to auction is erroneous; that though there is increase in the available spectrum which includes fresh spectrum and surrendered spectrum by some operators, yet there has been unjustified reduction in the available spectrum for commercial allocation instead of increasing proportionately; that some of the petitioners are debarred from holding what they are holding in praesenti; that the recommendation of TRAI should have been given adequate weightage by the respondents with regard to the principle of capping and availability of spectrum for commercial allocation by way of auction; that the available quantum should have been at least notionally added for the purpose of determining the cap which has not been done as a consequence of which the auction becomes wholly arbitrary; that the exclusion of the surrendered spectrum from the process of calculation is irrational and unreasonable and that there is no transparency in the auction. As noted earlier, on behalf of the respondent-Union of India, emphasis is laid on providing a cap as that would facilitate availability of minimum amount of spectrum for ensuring benefit to the consumers and also to allow new entrants who may require a certain minimum amount of spectrum for establishing a network with good coverage and sufficient capacity at a reasonable price. It is also put forth that it is reasonable that various bands of spectrum are not sold in small quantum so that a successful bidder has sufficient spectrum for deploying advance technology. The principle of top up is allowed so that the existing licensee can bid for the same for maximizing its efficiency which would ultimately benefit the consumers. Giving the examples of North East, it is contended that only 8.8 MHz spectrum is available and the term of minimum of 5 MHz is stipulated for new entrants including expiring licensees so that they can top up for efficiency and provide adequate service to the consumers. It has also been put forth that where 5 MHz is not available in the LSA in contiguous space, it has been decided that the minimum bid must be for 4.4 MHz. To buttress the said submission, example has been given of West Bengal where 5 MHz is not available in 900 MHz band and only 4.4 MHz is available in 800 MHz band.

Similarly, the said principle is followed in 800 MHz and 1800 MHz bands. The existing licensee has to bid for minimum 0.6 MHz spectrum in order to top up so as to come to the level of 5 MHz.

46. The interest of the consumer and the maximization of price has been highlighted. It has also been urged that the petitioners have participated in the auction and have been successful in certain areas and have failed in certain places and the whole intention is to monopolise the market. It is contended that the limit for acquisition of spectrum is intended to discourage the hoarding of spectrum and to encourage level playing fields and to advance healthy competition and keep at bay any kind of artificial escalation. Commenting on the transfer case of Reliance Telecom Ltd., it is argued that the spectrum available for the auction was 8.8 MHz in the 900 MHz band and the entire 8.8 MHz of spectrum in 900 MHz has been bid and the successful bidder is M/s. Bharti Hexacom Ltd. The other petitioner, M/s. Reliance, has been successful in 5 MHz of spectrum in 800 MHz band in North East area at the end of the auction. As far as 5 MHz in 2100 MHz band is concerned, M/s. Vodafone Ltd. has become the successful bidder and entered into the contract.

47. Mr. Rohatgi and Mr. Ranjit Kumar have submitted that there was free competition and any bidder was permitted to outbid the other and when a free competitive market was provided, there is no ground to attach the auction by calling it unfair or non-transparent. As far as the exclusion of the spectrum is concerned, it has been set forth that certain quantum of spectrum has been reserved for the defence. It is also put forth that subject to process and requirement of harmonization of available spectrum, it shall be put to auction in the future auctions. The process of harmonization, as is known, is quite complex and it is required to be carried with the defence in order that they may vacate spectrum without compromising their operational requirements. That apart, there is a requirement of contiguous chunk without clubbing it with auctioned spectrum. In any case, the petitioners cannot insist for re-writing the terms of the tender conditions and they cannot demand that the whole thing should be put to auction and no capping rule can be applied.

48. Capping rule is basically a formula which has worked out as an experimentation, as the completion of the auction as shown. The cap as compared has the aggregate of total spectrum assigned in the service area and the total spectrum being put to auction. If the cap is to be determined based on the "commercially usable spectrum", as put forth by the petitioners, as commercially assigned spectrum as postulated in the tender, it would be re-writing the tender conditions. Commenting on the non-inclusion of spectrum on surrender, it is pointed out that even if the said spectrum is actually surrendered, the petitioners cannot seek any relief for the availability of the spectrum and the auction thereof would be considered by the Union of India in a different auction for obtaining maximum revenue regard being had to the public interest.

49. At this juncture, it is necessary to state that as per the affidavit filed by the Union of India, after the leave was granted to conduct the auction, which commenced on 4.3.2015 and continued for 19 days except Sundays, 115 rounds were conducted for e-auction of 108.75

MHz of spectrum in 800 MHz band in 20 LSA, 177.8 MHz of spectrum in 900 MHz band in 17 LSA, 99.2 MHz spectrum in 1800 MHz band in 15 LSAs and 85 MHz of spectrum in 2100 MHz band in 17 LSAs. The estimated result of the auction has been brought by way of tabular chart, which we think it necessary to reproduce:-

Band (MHz)	Quantum of Spectrum put on Auction (MHz)	Value of the Spectrum put on offer at Reserve Price (in Rs. Crore)	Quantum provisionally won by bidders (MHz)	Value of the Spectrum provisionally won by bidders at Reserve Price (In Rs. Crore)	Value of the Spectrum provisionally won by bidders at Auction determined price (In Rs. Crore)
800	108.75	13562.50	86.25	9710.00	17158.79
900	177.8	40223.80	168.00	37841.00	72964.54
1800	99.2	8936.20	93.80	8292.40	9636.17
2100	85	17555.00	70.00	9620.00	10115.41
Total	470.75	80277.50	418.05	65463.40	109874.91

50. Having narrated the factual score, the process of NIA, the grievances articulated and the reply thereto by the Union of India and the successful bidders who have entered into contract and the result of the auction, it is necessitous to recapitulate the parameters for interference in respect of matters pertaining to decision of largesse by auction. Let it be stated at the beginning, as directed in the 2G case, spectrum as a natural resource has to be put to auction and it has been put to auction. Prior to referring to certain authorities with regard to the principles laid down by this Court as regards the fundamental principle of holding auction, we think it apt to deal with the contention pertaining to TRAI's recommendation and non-acceptance of the same. The Union of India sent the reference back to the TRAI. The question in this context that requires to be posed is whether the recommendations of TRAI are binding on the Central Government.

51. Section 11 of the TRAI Act deals with the functions of the authority, that is, TRAI. The said provision empowers it to make recommendations either suo motu or on a request from the licensor on certain matters. The provisos appended to the said Section, being relevant, are extracted hereunder:-

> "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 licence 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 licence 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 of further recommendation if any, the Central Government shall take a final decision."

52. In Association of Unified Telecom Service Providers of India (supra), the Court has held that notwithstanding sub-section (1) of Section 4 of the Telegraph Act vesting exclusive privilege in the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of licence including the payment to be paid by the licensee for the licence, TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the licence to a service provider and the Central Government is bound to seek the recommendations of TRAI on such terms and conditions at different stages, but the recommendations of TRAI are not binding on the Central Government and the final decision on the terms and conditions of a licence to a service provider rests with the Central Government. The legal consequence is that if there is a difference between TRAI and the Central Government with regard to a particular term or condition of a licence, as in the present case, the recommendations of TRAI will not prevail and instead the decision of the Central Government will be final and binding. The Court has further laid down that TRAI, being an expert body, discharges recommendatory functions under clause (a) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act and it being an expert body, the recommendations of TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government but the recommendations of TRAI are not binding on the Central Government. The Court has further ruled that the regulatory and other functions

under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject only to an appeal in accordance with the provisions of the TRAI Act. Thus, the interpretation made in the said case makes it clear that the recommendations given by TRAI are not binding but deserve to be given due weightage. Certain areas have been separated regard being had to the nature of the language employed in the TRAI Act where the authority can act independent of the Central Government. We are only concerned with the part that pertains to recommendation. In the case at hand, the Central Government had sought the recommendation and then referred it back. Ultimately, it formulated the policy for auction of the spectrum. Therefore, the criticism that is advanced that once there is a reference back, the Central Government should have been guided by the recommendations has no justification inasmuch as the Central Government has the ultimate authority to take a decision. Of course, such a decision, especially a decision relating to frame a policy for NIA has to be in accord with the norms of Article 14 of the Constitution.

53. Presently, we shall refer to certain authorities in the field and, thereafter, adjudge the grievances so eloquently articulated by the learned counsel for the petitioners.

54. In Tata Cellular (supra), a three-Judge Bench, after extensive consideration of the earlier decisions in the matter of judicial review and its scope of applicability to government contracts and tenders, ruled that the modern trend points to judicial restraint in administrative action and the court does not sit as a court of appeal but merely reviews the manner in which the decision was made. It further opined that the court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. The Court further expressed that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. It was also observed that the decision must not only be tested by the application of Wednesbury principle of reasonableness but must also be free from arbitrariness and must not be affected by bias or actuated by mala fides and while quashing decisions, heavy administrative burden on the administration and increase on expenditure have to be kept in view.

55. In *Raunaq International Ltd. v. I.V.R. Construction Ltd. and others*[10], it has been held that the award of a contract, whether it is by private party or by a public body or the State, is essentially a commercial transaction and prudent principle of commerce do weigh while making a commercial decision.

56. In *Monarch Infrastructure (P) Ltd. v. Ulha.sna.gar Municipal Corpn. and others*[11], this Court was concerned with the question relating to NIT issued by Ulhasnagar Municipal Corporation for appointment of agents for collection of octroi and revision of terms and conditions thereof. The Court held that it cannot say whether the conditions are better than

what were prescribed earlier, for in such matters, the authority calling for tenders is the best judge. The Court declined to restore status quo ante.

57. In *Cellular Operators Association of India & Others v. Union of India & Others*[12], this Court, after referring to *Tata Iron & Steel Co. Ltd. v. Union of India and another*[13], held that where legal issues are intertwined with those involving determination of policy and a plethora of technical issues, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws. It has been further ruled that on matters affecting policy and those that require technical expertise, the court should show deference to, and follow the recommendations of the Committee which is more qualified to address the issues.

58. In *Union of India v. International Tra.ding Co. and another*[14], this Court held that non-renewal of permit by the Government to a private party on the ground of change in its policy cannot be faulted if such change is founded on reasonableness and is otherwise not arbitrary, irrational and perverse. It was observed that if the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies and the ultimate test is whether, on the touchstone of reasonableness, the policy decision comes out unscathed. It further ruled that reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of the general public and not from the standpoint of the interests of the persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing condition at the relevant time enter into the judicial verdict. The Court further held that the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question and canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.

59. In *Directorate of Education v. Educomp Datamatics Ltd. and others*[15], this Court, applying the principles enunciated in Tata Cellular (supra) and Monarch Infrastructure (P) Ltd. (supra), held that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract; that the Government must have a free hand in setting the terms of the tender; that it must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere and the courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias and the courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

60. In *Bannari Amman Sugars Ltd. v. Commercial Tax Officer and others*[16], this Court was concerned with the question relating to withdrawal of benefits extended to the appellant therein as subsidy and it was held that while taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn.

61. In *Global Energy Ltd. and another v. Adani Exports Ltd. and others*[17], this Court reiterated the principles that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

62. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another*[17], the Court, after referring to the principles stated in Tata Cellular (supra), observed that the government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated and the Government has discretion to adopt a different policy or alter or change its policy calculated to serve the public interest and make it more effective as the choice in the balancing of the pros and cons relevant to the change in policy lies with the authority, but change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

63. In *Michigan Rubber (India) Limited v. State of Karnataka and others*[18], the Court, after referring to *Jagdish Mandal v. State of Orissa and others*[19] and *Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa and another*[21], expressed the view that the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play and actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose and if the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities. It further observed that fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers and greater latitude is required to be conceded to the State authorities in the matter of formulating conditions of a tender document and awarding a contract. The Court also laid emphasis on public interest and the prudence in applying the principle of restraint where the action is fair and reasonable and does not smack of mala fide. It was also emphasized that the courts cannot interfere with the terms of the tender prescribed by the Government simply because it feels that some other terms in the tender would have been fair, wiser or logical.

64. In *Maa Binda Express Carrier and another v. North-East Frontier Railway and others*[22], this Court held that the scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court which clearly recognize that the power exercised by the Government and its instrumentalities in

regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, and the submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept and, therefore, the bidders participating in the tender process cannot insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. It further ruled that all that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders and it is well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision and, hence, the terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. The Court further held that in the matter of award of contracts, the Government and its agencies have to act reasonably and fairly at all points of time and to that extent, the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.

65. In *Census Commissioner & Others v. R. Krishnamurthy*[23], a three-Judge Bench of this Court, after noting several decisions, held that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved and the courts can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. It further observed that in certain matters, as often said, there can be opinions but the court is not expected to sit as an appellate authority on an opinion.

66. The present controversy has to be tested on the touchstone of the aforesaid parameters of judicial review. We have enumerated the submissions advanced by the petitioners, recorded the contentions of the Union of India and stated the proponements of the impleaded parties so that the assail and the resistance to the same become clearly evident. Though the grounds of attack have been stated in a manifold manner, yet they are really founded on certain basic assertions, namely, that the entire spectrum available has not been put to auction which tantamounts to hoarding by the Central Government; that an endeavour has been made by the authorities to keep the real competitors away by providing a cap and resultantly making the bid non-competitive; that the classification made in the NIA is hit by unreasonableness with no objective to serve because the condition of buying of 5 MHz of spectrum is not applicable to the existing/non-expiring licensees and providing minimum bidding option for different categories is wholly discriminatory; and that the surrendered spectrum or unused spectrum should have been notionally added so that there would have been fairness in auction, and that would have met the concept of legitimate expectation.

67. As the factual score depicts, the NIA had stipulated capping and simultaneously allowed certain categories to bid for a lesser quantum to enhance the existing spectrum with them so that they can reach a particular level. The reason shown by the respondents is that a

minimum spectrum is determined to enhance the efficiency and capability of the service providers so that the arrangement can be beneficial to the consumers and they can avail requisite benefit and have better service. The licensees who do not have the specific quantum can bid for the balance so that the efficiency of service is enhanced. If a minimum is provided for a particular area or zone having regard to the necessity and the interest of the consumers, we are of the considered opinion that it subserves the larger public interest. The said stipulation might have affected the individual interest of certain categories of licensees or aspirants but that cannot weigh over the public interest.

68. As far as the classification is concerned, it is noticed that some bidders have not been allowed to participate in respect of certain areas. The argument on behalf of the Central Government is that it has been done to curtail the monopoly and to encourage a broad based competition and further to allow certain entities who do not have the adequate spectrum so that there is augmentation of revenue as well as enhancement of efficiency in providing the service. It is further explained that it has been done keeping in view the commercial interest and the holistic concept of public interest. Learned counsel for the petitioners would contend that it is demolition and ruination of public trust because the State holds spectrum in trust and it cannot be allowed to hoard by adopting such a subterfuge. It is apt to note here that after holding of the auction, what is available is 52.7 MHz in various bands. Explaining the same, the Union of India has submitted that historically, all the identified 75 MHz spectrum for mobile services in 1800 MHz band in all 22 service areas was with the defence and other users prior to 2001 when it was allocated for the first time for commercial mobile services in India after co-ordination with the then existing users. The spectrum in 1800 MHz band was coordinated by the defence on a case to case basis either in the entire service area or in parts of the service area (i.e., district-wise). It is further put forth that based on the coordination received from the Defence, the spectrum in 1800 MHz band was allotted, from time to time, for commercial use by Telecom Service Providers. In January, 2015, a decision was taken in consultation with the defence that instead of the case by case approach adopted, 55 MHz out of 75 MHz available in spots will be allotted to telecom service providers (TSPs) and the rest will be used by the defence. Within the 1800 MHz band, the exact frequencies to be allotted to TSPs and those to be used by the defence have been earmarked. It is the stand of the Central Government that, the process of allotting all the frequencies identified to TSPs will require some time since there are operational networks of the defence in the segment identified for telecom services in 1800 MHz band. Similarly, frequency spots have been allotted to various TSPs in the segments identified for use by the defence. It has been averred that the discussions have started with the defence for harmonizing the spectrum in 1800 MHz band and TSPs have also been consulted as they too have to shift their networks to new spots. According to the respondent-Union of India, the operational network of the defence is required to be continued until alternate arrangements are available for seamless operation of defence networks or else it would compromise the national security and regard being had to the same, no time frame can be set as to when the said quantum would be available for public auction.

69. Additionally, it is put forth that the evolution of the telecommunication sector is a continuous process world-wide. New bands and technologies are being identified for

providing commercial services. For example, Wide Band Code Division Multiple Access (WCDMA) technology, commonly known as 3G technology, has been developed and was deployed in our country in 2100 MHz band. 465 MHz spectrum in this band was co-ordinated from the defence and got released for telecom commercial services in 2010 and was auctioned. Further, as per the decision of the Government in January 2015, an additional 85 MHz of spectrum in this band was released by the defence and was part of the auction conducted in March 2015. It is also submitted that efforts are being made to get 15 MHz of spectrum released in each of the 22 service areas in 2100 MHz band also from the Defence. Although in this case also, no time frame can be set as to when it would be made available, yet it is expected to be released during the process of completion of harmonization of 1800 MHz band spectrum and it will make 345 MHz of spectrum available in this band; and accordingly, there is a proposal to include the same in the next auction. It is further canvassed that as a part of identifying new bands and technologies and releasing for providing commercial services, 880 MHz spectrum in Time Division Duplex (TDD) mode was also included in 2300 MHz band for the auction conducted in 2010 and 320 MHz of spectrum in this band is proposed to be included for the next auction. Similarly, 440 MHz spectrum in 2500 MHz band was allocated to BSNL and MTNL in 2007-08. However, 160 MHz spectrum was surrendered by them. TRAI has been requested to expedite recommendations for reserve price and associated conditions. A total quantum of 600 MHz of spectrum in this band, including that surrendered by BSNL/MTNL, is available. It is projected that the channeling plan adopted in India for 2500 MHz band requires further development to reach up to the International Mobile Technology (IMT) band considering the issues relating to techno-economic feasibility and availability of commercial eco-systems. That apart, it is also put forth that efforts are being made to make the spectrum reasonably available for auction and they will be included in the subsequent auctions. It has further been highlighted by the learned Attorney General that the availability of spectrum would be determined after it is harmonized with the need of the defence and feasibility of its inclusion due to techno-economic facets.

70. As we find, the decision taken by the Central Government is based upon certain norms and parameters. Though criticism has been advanced that it is perverse and irrational, yet we are disposed to think that it is a policy decision which subserves the consumers' interest. It is extremely difficult to say that the decision to conduct the auction in such a manner can be considered to be mala fide or based on extraneous considerations.

71. The grievance that has been stressed upon by the petitioners is that they had spent quite a sum at the time of grant of initial licence and they had a legitimate expectation to participate in the auction in every aspect and not to be kept at bay in certain areas for some unfathomable reason as a consequence of which they have not been able to get what they earlier had. According to them, the doctrine of "legitimate expectation" cannot be curtailed in this manner. The aforesaid argument has a basic fallacy. The principle of "legitimate expectation" can never override public interest and when there is larger public interest, the question of legitimate expectation does not arise; and in any case, in the present case, if we allow ourselves to say so, this contention is absolutely sans merit. We are inclined

to think that when auction is held in respect of spectrum after taking into consideration certain range of facts and circumstances which are founded on economic and social policy factors, it is difficult to unsettle the NIA and the consequential effect thereof by applying the principle of judicial review. The procedure adopted in this kind of auction is neither to be equated nor compared with the process meant for grant of ordinary largesse. It is because of its complexity, technical expertise, enormous financial impact and the larger public interest. Recently, in *Tamil Nadu Generation and Distribution Corporation Ltd (TANGEDCO) Rep. by its Chairman & Managing Director and Anr. etc. v. CSEPDI - Trishe Consortium, Rep. by its Mana.ging Director & Anr*[24], the Court, while discussing the role of fiscal evaluation, has observed that:-

> "At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd."

72. In this context, a passage from *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd*[25]. is worth reproducing:-

> "We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

73. The said decision has been concurred with by another two-Judge Bench in *Montecarlo Ltd. v. NTPC Ltd*[26] stating thus:-

> "24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity.

> Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

74. It is necessary to add a clarification. In TANGEDCO (supra), the question arose with regard to grant of contract of a particular work and it involved a complex situation. In Montecarlo Ltd. (supra), the question was relating to technical evaluation and comparison. In the present case, we are concerned with putting certain natural resources into auction. In that regard, a decision has been taken. The grievances that have been adroitly accentuated are that the entire available spectrum should have been put to auction; that there should not have been any cap; that all could have been permitted to bid for everything; and that apart, the principle of legitimate expectation ought to have been kept in view. The counter argument, as has been placed before us, is founded on two underlined principles, namely, to hold the auction which would serve collective consumer interest thereby serving the public interest, and second, to get the maximum revenue. On one hand, the submission of the petitioners is that the auction is anti-competitive and on the other, the submission of the Central Government is that it is a healthy competition and avoidance of any kind of monopoly. There is also assurance in the reply that whatever has been left will be put to auction after getting the clearance from the defence and further keeping in view the aspect of techno-economic and commercial eco-system feasibility. As far as the allocation to the defence and its need is concerned, it can be said that it is always in the realm of public interest and it subserves the interest of the nation. As far as the economic feasibility is concerned, multifold economic aspects have to be taken into consideration and as a resultant effect, as shown during the process of auction, the bids became higher and higher and there has been real competition whereby the offers have been raised. There is remotely any allegation that attempt has been made to scuttle the competition. On the contrary, bidders have been allowed to bid and

enhance their offer as a prudent commercial men would do. Therefore, it cannot be said that there has been no attempt to maximize the revenue. It will not be inapposite to note that the bidders who had preferred writ petitions and special leave petitions after having been successful in certain areas withdrew the petitions and in other areas where they were not able to bid because of the conditions in the tender, they have agitated their grievances.

75. We have already discussed that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. It allowed new entrants and enabled the existing entities to increase their cap to make the service more efficient. The Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. As the stipulation in the tender was reasonable and not based on any extraneous considerations, the Court cannot interfere in the NIA in exercise of the power of judicial review. The contention is that the State cannot hoard the spectrum as per the 2G case. We are disposed to think that in the case at hand, it cannot be said that there has been hoarding. The directions given in the 2G case had been complied with and the auctions have been held thereafter from year to year. The feasibility of communication, generation of revenue and its maximization and subserving of public interest are to be kept in view. The explanation given by the Union of India for not putting the entire spectrum to auction is a reasonable one and it is put forth that an endeavour would be made to put it to auction when it becomes available in sufficient quantum. The Court cannot interfere with the tender conditions only on the ground that certain amount of spectrum has not been put to auction. The submission is that whatever has been put to auction and is available should have been notionally added so that the entities which have certain quantum of spectrum in praesenti could have participated in the auction and put forth their bids for a higher quantum. This argument may look attractive on a first blush but pales into insignificance on a studied scrutiny. As is evincible, one of the petitioners had earlier more than 65 MHz in a band and because of the limited auction and non-addition of available spectrum on notional basis, it has obtained less quantum. With this submission, the contention of legitimate expectation has been associated. We have already repelled the submission pertaining to legitimate expectation. If there has been a reduction for a particular entity because of the terms and conditions of the tender, it has to accept it, for he cannot agitate a grievance that he could have obtained more had everything been added notionally. Notionally adding up or not adding up, we think, is a matter of policy and that too a commercial policy and in a commercial transaction, a decision has to be taken as prudence would command. In this regard, reference to the decision in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and others*[27] would be apt. In the said case, the Court referred to the authority in Tata Cellular (supra) and thereafter opined that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in the NIA. In the absence of the same, to exercise the

power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service.

76. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the Courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable.

77. In view of the aforesaid analysis, we do not perceive any merit in these Transfer Cases and consequently, they are dismissed with no order as to costs.

Judgment Referred.

[1]*(2007) 8 SCC 0001*
[2]*(2014) 6 SCC 0110*
[3]*(2012) 10 SCC 0001*
[4]*(2012) 3 SCC 0001*
[5]*(1994) 6 SCC 0651*
[6]*(1996) 2 SCC 0405*
[7]*(1980) 4 SCC 0001*
[8]*(2015) 12 SCC 0001*
[9]*(2011) 10 SCC 0543*
[10]*(1999) 1 SCC 0492*
[11]*(2000) 5 SCC 0287*
[12]*(2003) 3 SCC 0186*
[13]*(1996) 9 SCC 0709*
[14]*(2003) 5 SCC 0437*
[16]*(2005) 1 SCC 0625*
[17]*(2005) 4 SCC 0435*
[18]*(2005) 6 SCC 0138*
[19]*(2012) 8 SCC 0216*
[20] *(2007) 14 SCC 0517*
[21]*(2012) 6 SCC 0464*
[22]*(2014) 3 SCC 0760*
[23]*(2015) 2 SCC 0796*
[24]*(2016) 10 SCALE 0069*
[25]*(2016) 8 SCALE 0765*
[26]*(2016) 10 SCALE 0050*
[27]*(1997) 1 SCC 0738*