

## **DELHI HIGH COURT**

M And N Publications Ltd.

Vs.

Mahanagar Telephone Nigam Ltd.

Writ Petition 1872 of 1992.

(D.P. Wadhwa and R.L. Gupta, JJ.)

30.09.1992

### **JUDGMENT**

#### **D.P. Wadhwa, J.**

1. This writ petition has been filed against four respondents. First respondent *Mahanagar Telephone Nigam Limited (MTNL)* is a Government company within the meaning of section 617 of the Companies Act, 1956; second and third residents are respectively *United India Periodicals Ltd. (UIP)* and *United Database (India) Private Limited (UDI)* [UDI Is a wholly owned subsidiary of UIP] and were given the contract for the publication of telephone directories for Delhi and Bombay under an agreement dated 14 March 1987; and the fourth respondent is *Sterling Computers Limited (Sterling)*. The agreement dated 14 March 1987 was entered into between the MTNL and UIP, but then on the request of UIP its subsidiary company UDI was allowed to execute the job under the agreement on behalf of UIP.

2. An agreement dated 26 September 1991 called "supplemental agreement" was executed between all the respondents whereby Sterling got associated with UIP and UDI for publication of the directories for Delhi and Bombay. As to what are the terms of the original agreement and the supplemental agreement we will examine a little later as a great deal of arguments had been addressed on the effects and purport of these agreements and particularly the supplemental agreement which is being challenged.

3. The petitioner pray as under:-

- (a) Issue a writ and or order and or direction declaring that the sub contract dated 26.9.91 entered into by MTNL with back date with 2nd,

3rd and 4th respondents herein for purportedly subcontracting the printing of the telephone directories for Delhi and Bombay for the period from 1991 to 1996- 1997 to be illegal, null and void and unconstitutional;

(b) Issue a writ and order or direction in the nature of mandamus calling upon the first respondent to perform its public duty to act fairly, to quash the so called supplemental agreement dated 26.9.91 (Annexure P-3) as also the tripartite agreement dated 19.7.91;

(c) To issue a writ and or order in the nature of prohibition, prohibiting the first respondent from entering into any franchise or other franchise with the second, third and 4th respondent for publishing of telephone directories at Delhi or Bombay without following a fair and proper procedure namely wide advertisement, inviting tenders and ensuring that the best offers are obtained in respect of publishing of telephone directories.

4. Government of India in the Ministry of Communications, Department of Telecommunications, took a policy decision regarding publication of telephone directories and conveyed the same to all General Managers Telephones by letter dated 12 June 1986. In this letter difficulties faced by the department in publishing telephone directories of its own were pointed out. Paras 4 and 5 of this letter spell out the policy decision. These are:-

"4. Of late certain offers have been received from private parties for undertaking the complete job of printing of telephone directories including supply of paper and collection of advertisements. Discussions were also held with some of these parties and it appears, that at least for large telephone systems, the advertisement revenues will not only cover the total cost of bringing out the directories but also bring in some surplus which could be made available to the Department.

5. The Telecom Board has considered the matter in the light of the difficulties experienced in the past and the proposals received now. It has now been decided that a new policy be adopted for all the Telephone Districts, the main features of which would be as follows:

(i) The telephone directory shall be printed once a year.

(ii) Offers should be invited for comprehensive contracts for printing,

binding and supply of paper, advertisement and delivery of adequate number of directories. The notice inviting tender should clearly bring out the specifications as also the usual contractual conditions including the penalty clauses for delays and inferior performance, as per conditions given in Annexure.

(iii) The tenders may be invited for five issues for Metro and Major Districts and three issues for Minor Districts.

(iv) The advertisements in the telephone directory shall conform to the norms of decency and refined taste and should not be obscene or offensive in any manner."

A new concept of yellow pages in the telephone directories was introduced by the MTNL/Department of Telecommunications. These yellow pages were to contain advertisements under different headings. The private contractor was to collect revenue from the advertisements in yellow pages as well as in white pages of the main telephone directory. Out of the revenue so received the contractor was to get the directory printed and supply the same free of cost to the MTNL for its subscribers and also pay certain amount of royalty to MTNL.

5. MTNL as a State instrumentality in pursuance to the aforesaid policy decision invited tenders for publication of directories in the metropolis of Delhi and Bombay. Tender of the UIP (respondent No.2) being the highest was accepted and an agreement dated 14 March 1987 (original agreement) duly entered into. As noted above, on the request of UIP permission was granted by the MTNL to get the agreement executed by UDI (the third respondent). Under the original agreement UIP was to publish directories every year from 1987 to 1991 for Delhi and Bombay separately and was to pay a total amount of Rs 20.16 crores as royalty to MTNL and to supply to the MTNL certain number of directories free of cost which depended upon the number of subscribers. The details as to the free copies of the directories and the amount of royalty payable each year on issue of directories were as under:-

Year of Delhi Issues (in lac)	Free Copies of Bombay Issues (in crores) (in lac)	Free Copies of (in payable)	Amount of Royalty
1987	6	7.60	0.18

1988	7	9.00	0.36
1989	8.25	10.05	4.23
1990	9.50	11.75	5.22
1991	11.00	13.05	10.17
		Total Payable :	20.16 Crores

(for five issues and supplementary copies)

Under the original agreement UIP furnished a performance guarantee in the sum of rupees one crore. Apart from the number of free directories to be supplied by UIP to the MTNL, UIP was also to supply same number of supplementary directories to MTNL as well. Supplementary directory was to be brought out between two issues of the directory, i.e. six months after the publication of the annual issue. This supplementary directory was to indicate the changes that had taken place during this interval. The original agreement also mentioned that first issue of the telephone directory shall be published in November/December 1987. UIP was given right to print any additional directory and also to sell the same to any other person including any government department. If UIP was required to publish any additional supplementary directory it was to charge certain amount as mentioned in the agreement but that is not quite relevant for our purpose. It may, however, be mentioned that on the issue of new directory, old directories were to be arranged to be collected by the General Managers concerned and these were to be given to UIP. In case of short fall of old directories below 85%, MTNL was to pay Rs. 6.00 per copy of short fall for the main directory and rupee one for the supplementary directory to UIP. UIP was given exclusive right for procurement of the advertisements included in the yellow pages as well as strips, bold and extra entries in the white pages. The rates of advertisements were to be fixed by the UIP in each issue of the directory and these rates were to be printed in a place allotted in the directory for general information. Any revision in the rates were to be intimated to MTNL. The UIP was to ensure that before any advertisement was accepted for printing in the directory the advertiser was to be

made fully aware of the fact that MTNL was not a party to the agreement between the UIP and the advertiser and any liability, claim or charge arising out of the advertisement was to be the sole responsibility of UIP. The clauses of the agreement were to be published in the directory by the UIP in bold letters and UIP was to indemnify MTNL against any litigation or damages that it might suffer on account of breach of any of the terms of the agreement. The amount of royalty was payable by the UIP to MTNL within ten days of the publication of the directory each year. The original agreement also had an annexure which contained more terms and conditions of printing of the directories. Some of these terms specified that the UIP shall clarify to all the individual advertisers that MTNL would not be a party to any agreement between UIP and the advertiser. Further, on account of default of UIP paying the royalty within the due date an interest was to be charged at the rate of 18% per annum. If UIP still failed to pay the royalty and interest as accrued thereupon within 20 days of the publication of the directory, this amount was to be adjusted against security deposit in these circumstances, MTNL was also authorized in its discretion to terminate the contract. This power was without prejudice to any of MTNL' rights or legal remedies under the original agreement or any other law for the time being in force. Then UIP was to execute all the work on its own cost and it specifically said that it had made the offer under the original agreement after taking into consideration all the cost factors including future escalation in cost of material required for printing, shortage of such material in the market, cost of labor, compilation, etc., procurement and use of paper of approved quality, procurement of advertisement, and supply and delivery of the required number of copies free of cost to MTNL. Clause 16 of Annexure 'A' to the original agreement also provided that without prejudice to the rights and remedies of the MTNL against any of the provisions of the contract or otherwise in law, if UIP committed any default or breach of the terms and conditions of the contract and/or failed in the due performance thereof within the time fixed by the contract (which was the essence of the contract) and did not complete the entire work on the stipulated due date, the MTNL shall be entitled to recover from the UIP, to which the UIP agreed to be bound to pay to the MTNL, as and by way of compensation or liquidated damages an amount calculated at the rate of Rs. 1,00,000.00 for every day or part thereof of the delay beyond the stipulated date in respect of the item which was not completed or finished and delivered completely to the MTNL on the stipulated date as mentioned in the contract.

This clause imposed further stringent conditions on the UIP and again it was without prejudice to all the rights and remedies available to MTNL under clause 22 *ibid.* Terms of Annexure 'A' also provided for resolving all disputes and reference to arbitration as well. Under clause 22, MTNL, without prejudice to other rights, could by notice in writing absolutely determine the contract in any of the following cases:-

"(i) If the Contractor having been given by the MTNL or his authorized representative a notice in writing to rectify, replace any defective work or that the work is being performed in an inefficient or otherwise improper or unworkmanlike manner shall omit to comply with the requirements of such notice for a period of seven days of such notice thereafter or if the contractor shall delay or suspend the execution of the work so that in the judgment of the MTNL (which shall be final and binding) he will be unable to secure completion or he has already failed to complete the work by that date.

(ii) If the contractor being a company shall pass a resolution or the Court shall make an order that the company shall be wound up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

(iii) If the Contractor commits breach of any of the terms and conditions of this contract.

When the Contractor has made himself liable for action under any of aforesaid cases in any case in which under any conditions of this contract, the Contractor shall have rendered himself to forfeiture of their security deposit or in cases of abandonment of work or in case of any other breach of contract by the contractor for any cause whatsoever, the MTNL shall have powers to adopt any or all of the following courses as the MTNL may deem best suited to their own requirements:

(a) The (to) rescind the contract (of which rescission notice in writing to the Contractor under the hand of the General Manager or (of) MTNL, shall be conclusive evidence) and in that case the security deposit of the Contractor shall stand forfeited and be absolutely at the disposal of the

MTNL.

(b) To employ any other contractor or labor, to supply materials, to carry out the work or any part of the works, debiting the Contractor with all costs including cost of the labor and the price of the materials. As to the correctness of the cost and price, the certificate of the MTNL shall be final and conclusive against the Contractor. It is also agreed that if MTNL exercises this option to employ any other contractor car labor or resends the contract, all printing material or printed material or any other work prepared by the contractor or given by MTNL to the contractor in relation to the work under this contract shall be handed over to the MTNL within 8 days of a demand.

In the event of any one or more of the above courses being adopted by the MTNL, the Contractor shall have no claim to compensation for any loss sustained by them by reason of their having purchased or produced any materials or entered into any engagements or made any advance on account or with a view to the execution of the works or the performance of contract and shall be further liable for any additional expenses, loss or damage which MTNL may incur or sustain."

6. Clause 25 provided for the situation of insolvency of UIP and in that eventuality any of the courses specified in clause 22 could be resorted to. We may also note that the petitioner had also given his tender but as he was lowest his tender was not accepted.

7. The UIP defaulted and committed breach of the terms of the agreement and the MTNL took no action. UIP brought out only two directories for Delhi for the year 1987 and 1988 and one directory for Bombay for the year 1987 and that too after a great deal of delay. No directory was brought out for any other years, and meanwhile UIP, it appears, went on collecting advertisements from the public. UIP did not pay even a single penny towards royalty. 1987 Delhi issue was brought out after a delay of seven months and that of Bombay after six months. Both these directories were published in June 1988. Delhi issue of directory of 1988 was brought only in August 1990 after delay of one year and two months.

8. Then comes the supplemental agreement dated 26 September 1991. The petitioner calls it "sub contract" but the nomenclature is not relevant. This

agreement has been entered into between the UIP and UDI as the first part, MTNL as the second part, and Sterling as the third part, making it a tripartite agreement. By this agreement Sterling was introduced to carry out the unexecuted portion of the original agreement with UIP and was also awarded contract for publication of three more issues of Delhi and Bombay directories. Before we refer to the terms of the supplemental agreement it will be useful to see the relevant minutes of the Board of the MTNL (Board) which were produced before us during the course of hearing as to how the supplemental agreement was brought about.

9. First meeting of the Board is 28th meeting held on 28 December 1990. The meeting note points out about the original agreement which MTNL had entered into with UIP. It says that since then two issues of the Delhi and one issue of Bombay telephone directory with yellow pages had been published but the subsequent issue of Bombay directory which was to come in October/November 1989 had not come out yet and that it was "understood that they (UIP) have run into financial difficulties and cash flow problem. The banks who have advanced loans to them have yet not received back the payments. The paper mills are not willing to supply paper on credit. The printing presses are also likewise not willing to print the directories without getting advance payments." How this was all "understood" the note does not mention. Perhaps it was on account of some letter of UIP sent to MTNL in January 1990. Then the note records that UIP had approached the MTNL with a request that MTNL should advance unsecured loan to them for purchase of paper from the paper mills and also for payment of printing charges to the printing presses. The note then points out that grant of unsecured loan is quite risky since UIP is under heavy debt and had created a charge over its properties and future earnings in favor of the banks. Then the note says that directory is required to be brought out quickly for Bombay because it was now more than one year since last directory was published and that various options available to MTNL were:-

- (1) To invoke the penalty clause and print the Directory by ourselves at the risk and cost of UIP;
- (2) To provide the necessary loan secured or unsecured to print the directory;
- (3) To terminate the contract and award the work to some other contractors;

It was pointed out that provisions in the contract in regard to the non-

performance of the contract were detailed under clause 22 and in particular clause 22 (iii) a and b. Then the note lists the difficulties if the contract is terminated and MTNL publishes the directories of its own and also difficulties if there is re-tender. Then the merits and demerits of grant of loan are discussed in the note and case is made out for option No. (2). Para 12 of the note is relevant and is reproduced below:

*Approval Sought:* In the circumstances explained above, MTNL feels that grant of unsecured loan appears to be plausible solution. As per agreement there is no provision to give unsecured loan. In case loan is not granted, the interests of MTNL in bringing out the directory on its own and serving the customers will suffer a set back; first it will be much more expensive and secondly the publication of the directory will be inordinately delayed.

10. In view of these facts, approval of the Board is sought to release the unsecured loan of Rs. 4 cores to M/s. UIP for specific purpose of printing and polishing the telephone directories for Delhi and Bombay. MTNL, M/s UIP, Printers and Paper suppliers as selected by M/s. UIP shall enter into a tripartite agreement and MTNL will pay the amount on behalf of M/s.UIP directly to paper suppliers and printers. "

11. The note was considered in the 28th meeting of the Board and the Board felt that the MTNL had no alternative but to consider the issue regarding release of unsecured loans to UIP seriously and sympathetically on the fines indicated in the agenda note. Due to paucity of time the decision was not taken and it was said that final decision would be taken "in a week or so either at the next Board Meeting or by way of Circulation, keeping in view the larger interests of the Nigam (MTNL)".

12. The matter was then again discussed in the 29th Meeting of the Board held on 22 March 1991. A revised agenda note was prepared for this meeting incorporating the latest developments in the matter". Clause 22 of the original agreement was extracted and was enclosed with the agenda note. The note examines the problems that may arise if the original agreement is terminated and MTNL exercises the option to print the directory directly. These are paras 9 and 10 of the note and may be reproduced as under:-

"(9). If we terminate the contract and go in for a fresh tender the following problems may arise;

(i) The UIP/UDI may put legal obstacles in re-tendering as it has invested a lot of 'money for the execution of the contract. It may result in enormous delay in entrusting this work to the new parties.

(ii) The response for printing and delivering the directories free of cost and also paying royalty may be poor from the parties considering the failure of the present experiment and prohibitive increase in the cost of paper and printing. In fact, in the present tender, except for M/s. UIP other tenderers had asked for the reimbursement of enormous cost from MTNL. The next lowest tenderer wanted the net payment of Rs. 29.01 crores which indicated a gap of Rs. 49 crores between the first and the second tenderer.

(iii) The concept of the yellow pages may suffer a big set back and may make it unattractive to the advertisers because of the loss of confidence. This may result in MTNL never getting sufficient response from the public and continuing with huge expenditure on the printing of the directories for Delhi and Bombay.

10. If we exercise the second option and undertake printing directly, the following has to be kept in view:

(i) It will not only entail an expenditure of approximately Rs. 9 crores for the 2nd issue of the Bombay directory but also consume a lot more time in organizing the publication. MTNL in the present circumstances can at best encash a non performance bank guarantee of Rs. 1 crore.

(ii) In view of huge stakes of UIP, they might create legal problems in our way as well.

(iii) M/s. UIP have already collected advertisements for the next issue of Delhi/Bombay directories. The advertisements collected by the contractor and revenue collected by them are difficult to estimate and as such the involvement of public is not known. In case the directory is printed by the MTNL directly, two modes of operations could be possible:

(a) To print the directories with the advertisements and collect the remaining revenue due from the advertisers directly. The details of the revenue already collected by M/s. UIP could be obtained though with some difficulty from M/s. UIP but realisation of the same from them

seems almost impossible. Or

(b) To print the directories without the advertisements. That will require the UIP to refund the advance collections already made. In view of their financial position this is unlikely.

(iv) Allegations may, however, be made against the MTNL that instead of taking action against the defaulter contractor MTNL has advanced assistance to them.

Thus either way confusion will be caused and a large number of subscribers might be put to loss thereby putting MTNL in bad light. "

13. Again in the note case is made out for grant of loan of Rs. 6 crores though note for the 28th Meeting sought approval for the loan of Rs. 4 crores for UIP. The Board in its 29th Meeting discussed this agenda note. The Board after examining the matter in depth felt, as per the minutes, that MTNL had no option but to grant loan to UIP/UDI to help them to bring out the directories. The Board also felt that grant of loan to UIP/UDI was quite risky but that this distress measure had to be taken to avoid any stalemate and in the larger interests of the MTNL. The minutes also record that "at the same time, the helplessness of the Nigam (MTNL) should not be taken advantage of by the UIP/UDI." As to how the Board felt helplessness of the MTNL is not clear. Perhaps it was on account of the agenda note. Then the Board approved grant of loan of Rs. 6 crores to UIP and stipulated various conditions to secure the same. The Board also stated that it should be ensured that copies of the directories were made available by 30 June 1991 and that the MTNL might consider rescinding the contract as soon as the second issue of Bombay directory and third issue of Delhi directory were published. The Board also felt that UIP/UDI might be blacklisted for future contracts by MTNL.

14. It appears UIP/UDI spurned the offer of the MTNL for grant of loan in the sum of Rs. 6 crores. It rather came up with a request that it be given an interest free loan of Rs. 15 crores as long term measure to cover all issues of the telephone directory. This was considered in the 30th Meeting of the Board dated 26 April 1991. Minutes of this meeting show that it was brought to the notice of the Board that considering the past dealings with UIP/UDI and their present management it would not be feasible for MTNL to extend a long term loan of Rs. 15 crores. The Board was also informed that the alternative of printing the

directory by MTNL would not only be costlier but also time consuming. The Chairman and Managing Director of MTNL also expressed his fear that under the present circumstances, UIP/UDI might not hand over the management to any good business house to come out of the stalemate. He also felt that MTNL had no alternative but to initiate severe action of rescinding the contract to pressurise the UIP/UDI to discharge their obligations. The Board thereafter took the following decision:-

"(a). The Nigam may initiate action for issuance of a legal notice for termination of the contract in view of the various violations of the agreement by UIP/UDI and their inability to print the directory in spite of Nigam's having agreed to their proposal for grant of a loan of Rs. 6 crores.

(b). If, as a consequence of the legal notice, the UIP/UDI come forward with a viable proposal to complete the job, the Board may consider the same and thereafter take a final decision in the matter."

15. The matter was further considered in the 31st Meeting of the Board held on 6 August 1991. The agenda note for this meeting points out that UIP/UDI wrote two letters dated 1 August and 5 August 1991 informing MTNL that they had run into financial difficulties and had complex problems making it almost impossible for them to operate in the market with their badly sullied image. It was also noted that UIP had, therefore, approached MTNL once again with a package of proposals in super session of their all requests/proposals made hitherto for, setting out the areas they needed the assistance of MTNL to bail them out of their financial problems and assuring uninterrupted supply of directories for the revised period of contract. The note records the stipulations made in that behalf by UIP/UDI. One of these stipulations was reassignment of the contract for Delhi and Bombay to Golden Pages Pvt. Ltd. It was stated that this was a subsidiary of UIP which would in turn enter into a management and financial agreement with Sterling. Yet another stipulation was advance of Rs. 6 crores for Bombay directory payable in two sums of Rs. 4.25 crores and Rs. 1.75 crores against delivery of four lakhs and three lakhs directories respectively and further advance of Rs. 4 crores for Delhi directory payable against delivery of five lakhs directories. This advance was sought at substantially subsidized rate of interest in the form of L/Cs, with UIP/Golden Pages Pvt. Ltd. providing a bank guarantee for such advances. The meeting

note recorded that the assignment of work to M/s. Golden Pages Pvt. Ltd. would require the consent of MTNL, UIP as well as bankers/creditors who had instituted legal proceedings against UDI and then four party agreements would have to be entered into to implement the proposed assignment. Then the note recorded that proposal had also been received from M/s. Sterling Computers Ltd., Madras, through UDI to print and publish the telephone directories of the MTNL with their financial support. Then the note also recorded that with regard to the extension of the contract MTNL had received letter dated 16 July 1991 from M/s. Tej Press (which would mean the petitioner) offering to print the directories. The offer which Tej Press made was recorded as under:-

"(1).They will publish the telephone directories for 1991 on actual cost basis and in that event they will have no claim with regard to the revenue generated both from Yellow and White Pages.

(2). They will deliver the copies of Delhi and Bombay within seven months from the date of procurement of paper. They have also offered to enter into an agreement with MTNL for supply of main and supplementary directories for the next five issue starting from 1992 and have offered to pay MTNL the same royalty amount which was offered by UIP/UDI for past two issues contract beginning from 1987 to 1992."

16. The Board in its 31st Meeting held on 6 August 1991 examined only the proposals received from UIP as the minutes of that meeting would show. The Board in this meeting felt that instead of giving UIP/UDI additional loan, as requested, it would be better to allow them to tie up with another party for managerial and financial support. The minutes record that UIP/UDI brought into picture another company by the name M/s. Sterling Computers who are stated to be reputed in the management of finances and manpower, and that company was willing to associate whole heartedly with UDI and bail them out of financial crises. Then the Board said that "in order to enable the MTNL to salvage the contract and get the job executed without further delay and avoid consequent inconvenience to the customers", it agreed to the second option, in principle, but suggested that Chairman, MTNL, might set up a Negotiation Committee consisting of senior MTNL officers to negotiate revised terms of agreement with UIP/UDI/Sterling Computers. Then the Board set out four major guidelines for the Committee for negotiation as under:-

"(i) No loan whatsoever should be given by MTNL to the party as the new partner/ associate is expected to raise the liquidity to the extent required for delivering the committed goods to MTNL.

(ii) Only if he delivers the committed goods of a quality acceptable to MTNL and, more importantly within the stipulated time of delivery, then as a reward for performance, we may agree to the proposed extension of the contract for three more issues during which the contractor will be able to recover losses so far accrued.

(iii) At this stage the Board would not favor anew subsidiary of UIP namely Golden Pages Ltd. to take over the implementation of the original contract with UIP. The implementation of the contract should be carried out by UIP/UDI themselves though they can draw upon managerial, financial and other support from their new associates.

(iv) Price escalation of paper shall not be allowed in the present contract because they can increase the advertisement rates to compensate increase in cost of paper,"

The Board also examined 13 points proposal given by UIP in its letter dated 5 August 1991 and decided as under:-

(1) Regarding the extension of contract for further three issues of Delhi and Bombay, the proposal of UIP may be accepted subject to Board's stipulation as at (ii) above.

(2) The proposal for re-assignment of contract cannot be accepted as stated at (iii) above.

(3) Regarding their request for loan it may be made clear to them that MTNL would not grant any loan whatsoever, as the new partner/associate is expected to raise the liquidity to the extent required for delivering the directories to MTNL within the stipulated time schedule. However, L.C. equal to the white page revenue can be opened in favor of the supplier of the directory and the same can be encashed only after satisfactory delivery of the required number of directories.

(4) The proposal for establishing rates for bold and extra entries may be agreed to.

(5) Regarding reduction of charges for billing of bold and extra entries, it was left to CMD to decide the matter.

(6) Regarding the number of telephone directories to be supplied, it was agreed that this would depend on the anticipated off take of directories plus the new connections to be given by the Nigam for a particular issue.

(7) Regarding the printing of supplementary directory, it was decided that no change is called for.

(8) UIP's proposal for reformatting alpha pages in four columns with surname suppression may be agreed to.

(9) Regarding their request for force majeure clause, it may be made clear to them that price escalation on paper cannot be allowed.

(10) The Nigam may accept their proposal to fix the price of each directory and receive all revenue on this account (past and future) regardless of whether sale is made by UIP,UDI,MTNL or DOT.

(11) UIP's proposal for releasing the space on covers and spine for advertisement cannot be agreed to. However, in case the negotiations fail on this account, then they may be used as a bargaining point.

(19) Their suggestion regarding super bold entries may be agreed to.

(13) Their suggestion for providing correct projection of DELs by MTNL for the next Five years may be agreed to."

17. The Negotiating Committee had three officers of MTNL as its representatives and had discussions with representatives of UDI, UIP and Sterling Computers. The meeting was held on 12 August 1991. The minutes of the Negotiating Committee form part of the agenda papers of 32nd Meeting of the Board held on 19 August 1991. The meeting note described this agenda as "Agreement between MTNL and UIP for Printing and Publishing of Telephone Directories for Delhi and Bombay -Negotiated Settlement", and desired the Board "to approve the new terms and conditions under which telephone directories of Bombay and Delhi will be published by UIP". The Board approved the terms and conditions arrived at in the meeting of the Negotiating Committee. The Negotiating Committee had agreed for extension of the original contract for further three years for Delhi and Bombay subject to payment of

additional royalty commensurate with the size of the extended contract. This amount was agreed to be Rs. 10 crores. It was decided that the payment of royalty would be rescheduled by MTNL over the 13 issues of the two directories and payment would be made to MTNL accordingly. Subject to approval of the Board, MTNL agreed to open L/Cs in favor of the suppliers of directories for one issue of Bombay and one issue of Delhi equal to the amount of white page revenue less billing charges and other charges. UDI/UIP/Sterling Computers agreed to bear the L.C. charges and interest @ 16.5% or the rate of interest at which MTNL raised the money, whichever was higher. The interest was to be payable from the date L.C liability arose to the date of recovery of white page revenue from the advertisers. The Negotiating Committee further agreed to recover billing charges at the rate of Rs. 10.00 per bill for Delhi and Rs. 12.00 per bill for Bombay for the advertisements published in the white pages of the directories. Regarding the number of telephone directories to be supplied it was agreed that this would be dependent upon the anticipated off take of the directories plus the new connections to be given by MTNL for a particular issue. Request of UIP that supplementary directory be not published was not acceded to. It was also agreed that any compensation on account of price increase of paper would not be allowed by MTNL and that UIP/UDI/Sterling should get compensated by increase in rates of advertisement. UIP's proposal to fix the price of each directory and receive all revenue on this account (past and future) regardless of whether sale was made by UDI, or not was agreed to. It was also agreed that it would be put up before the Board if the back cover could be used for in house advertising. Proposal of UIP/UDI/Sterling for super bold entries was also agreed to. The Board in its 32nd Meeting held on 19 August 1991 while approving the new terms and conditions made the following observations:

"(1) It maybe made clear in the agreement now to be entered into by the Nigam with UIP, UDI and Sterling Computers that the extension of the contract for further three issues of Delhi and Bombay would depend upon their successful performance of the job for the said two issues within the quickest possible time and of a quality accept able to MTNL. This period should be four months from the date of LOI but can be extended up to six months at the most.

(2) The payment through the LCs would be released only after the

delivery of the entire lot of stipulated number of directories in Bombay & Delhi to the Nigam.

(3) The in-house advertisements will be subject to the Government norms/guidelines about the publication of advertisements and will need prior approval of the Nigam.

(4) In case the above proposal fails to materialize, the MTNL will have no option but to rescind the existing contract.

"The Board also approved the schedule of payment of royalty by UIP/UDI/ Sterling to MTNL as under:-

Amount of Royalty		Director issue		Break up of royalty	
	Delhi	Bombay	Delhi	Bombay(RU PEES IN CRORES)	
16.8	3	2	148	.20	
2.25		4	3	.99	1.26
4.22		5	4	1.85	2.37
4.78		6	5	2.09	2.69

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As per the chart showing contractual obligations filed before us by the learned Attorney General, royalty amount payable under the supplemental agreement both for Delhi and Bombay telephone directories is as under:-

Year	Delhi	Bombay	Royalty Amount Payable (IN CRORES)
1992	3rd	2nd	1.68
1993	4th	3rd	2.25

1 9 9 4	5 t h	4th	4.22
1 9 9 5	6 t h	5th	4.78
1 9 9 6	7 t h	6th	5.63
1 9 9 7	8 t h	7th	7.04
1 9 9 8	-	8th	4.22
		TO TA L :	30.16 Crores

(This total appears to be wrong. It should be Rs. 29.82 crores)

The next step was entering into the controversial supplemental agreement which is dated 26 September 1991. As noted above this is a tripartite agreement with UIP/UDI of the one part, MTNL of the second and Sterling of the third. By this date the original agreement dated 14 March 1987 had expired. This supplemental agreement states that subject to UIP/UDI and Sterling successfully completing the unexecuted job

relating to printing of Bombay and Delhi Telephone directories within the stipulated time frame and other stipulations in the agreement MTNL shall extend the original contract for three more issues each for Delhi and Bombay, i.e., seven main issues of Bombay and six main issues of Delhi of the said directories to be brought out hereafter." Again it is stated that all the terms and conditions and stipulations contained in the original agreement and the memorandum of understanding (this refers to the terms agreed upon in the Negotiating Committee) would be the integral part of the supplemental agreement and all obligations of UIP/UDI and rights and privileges and powers provided for MTNL there under and under the law shall be applicable and available to and binding on the parties to the supplemental agreement as if the same were the part of the supplemental agreement. It was also stated that in case of any inconsistency or contradictions vis-a-vis the original agreement, the memorandum of understanding read with supplemental agreement shall prevail and would have overriding effect. Then subject to all these, the Sterling shall print and publish 13 main issues of the Delhi and Bombay directories within a period of seven years including 1991 on payment of additional royalty of Rs. 10 crores over and above the royalty stipulated in the original agreement by the First party and/or the Sterling jointly or collectively to MTNL. The original royalty payment figures were mentioned as Rs. 20.16 crores and it was stated that the royalty would, thus, stand increased to Rs. 30.16 crores and the time shall be deemed to be an essence of the contract. The supplemental agreement then refers to the opening of letters of credit and that payment regarding escalation in the price of paper shall not be borne by the MTNL nor MTNL would pay any compensation whatsoever in that regard to UIP/UDI and/or Sterling and an obligation was put on UIP/UDI to ensure the said printing and completion of job by Sterling. Clauses 6 and 7 of this supplemental agreement are interesting and are as under:-

"(6) The First Party and/or the Sterling shall not allow their business to be wound up nor shall allow any receiver to be appointed and shall not allow any restraint/ constraint order of attachment order to be passed in respect of any part of the said unexecuted job or their assets as a result whereof MTNL may suffer and may not obtain the said copies of telephone directories and supplemental from the Sterling.

(7) Neither the parties of the First Part nor the Sterling shall cease to carry on its/their business till the said printing job is fully completed with such number of directories as shall be specified by MTNL to the First Party and/or the Sterling and all their obligations hereunder are fully satisfied and shall apprise MTNL of all developments from time to time which may have a bearing on the successful implementation of the understanding/agreement reached between the parties as recorded in this Agreement to be read with the said Memorandum of Understanding."

18. There is also provision for printing and publishing of supplementary directories at the cost of UIP/UDI and/or Sterling. It is then left to UIP/UDI to fix the price of each of the directories who shall also be entitled to receive all revenue earnings on that account (past and future) though the MTNL shall be made known of the prices so fixed. The entire back cover of each telephone directory shall be allowed to be used for in house advertisements of Sterling and/or the UIP/UDI.

19. Defending the supplemental agreement on behalf of the MTNL Mr. G.Ramaswamy, learned Attorney General for India, submitted that it was a *bona fide* commercial decision. He said the whole controversy was in the realm of administrative law and there has not been any violation of Article 14 of the Constitution to make the impugned decision violative of that Article. He said the impugned decision was not arbitrary and was backed by reason. He said the principle behind the award of the original contract which was awarded to UIP/UDI for the year 1987 to 1991 was for the purposes of "earn and pay". UIP having gone bankrupt no money could have been realized by the MTNL from it and termination of the original contract was no remedy and the arbitration as envisaged in the original agreement even if resorted to could not have made MTNL realize even a single penny. Mr. Ramaswamy also said that after the entering into of the supplemental agreement MTNL has been able to collect Rs. 54 lakhs and leaving the balance of Rs. 19.06 crores though still payable under the original contract. Commenting on the stand of the petitioner that supplemental agreement was (1) a complete sell out and smacked of favoritism shown by MTNL to UIP, UDI and Sterling, and that (2) the performance guarantee of Rs. 1 crore was not invoked and penalty at the rate of Rs. 1 lakh per day for the delay was not levied, and that (3) before entering into the supplemental agreement open tenders were not invited, and lastly (4) offer

made by the petitioner in its letters dated 11 July 1991 and 25 July 1991 not properly considered, the Attorney General said that the decision taken in the matter was a commercial decision considered as a viable method to salvage Rs. 20 crores and odd and considering also the consequences of cancelling the original agreement; the delay in resolving the disputes through arbitration and prospects of the court granting any injunction against the MTNL; consequent delay in inviting fresh tenders; and UDI having already collected over Rs. 14 crores as advance for publication of advertisements in the telephone directories, were the considerations which weighed in the mind of the MTNL and particularly keeping in view the delay which was being caused in expeditious printing of the directories. Then the stand of the MTNL has been that printing of yellow pages and paying of royalty to the MTNL was a new concept introduced for the first time and the cost of paper having escalated over 100 times put UIP/UDI in acute Financial straits which made them unable to execute the original contract. Mr. Ramaswamy also said that offer of the petitioner in its letters dated 16 July 1991 and 25 July 1991 was not serious and even now its offer to execute the supplemental contract by paying Rs. 35 crores was merely a "kite flying". Mr. Ramaswamy also said that there were only about four or five parties in the country which were in the Field of printing of the telephone directories. He said the Board of MTNL took into consideration all the relevant circumstances and then resolved to enter into the supplemental agreement. He said he will be producing the relevant minutes of the Board (copies of the relevant minutes were subsequently filed and these have been referred to in detail above). He also said that right of the MTNL to proceed against the UIP/UDI under the original agreement remains and Sterling had come forward to salvage the position. Mr. Ramaswamy admitted that MTNL in the whole deal may not have acted as a model company and some leniency appeared to have been shown, and it could even be said that MTNL was not prudent enough to take action, but nevertheless MTNL acted *bona fide* and in the interest of the subscribers and was not motivated by any extraneous consideration. He said any other method would have delayed in bringing out the telephone directories much to the inconvenience of the subscribing public. He then said that bringing out of the directory by the Sterling for Bombay in March 1992 and Delhi in May/June 1992 justified the decision of the MTNL and it could not, therefore, be said that it was so arbitrary as to shock the conscience of the court. He also commented on the delay on the part of the petitioner in

filing the writ petition and said laches on the part of the petitioner made the petition not maintainable. Concluding Mr. Ramaswamy said that by entering into supplemental agreement MTNL was getting better revenue; avoided litigation; got expeditious publication of directories; brought in a new entrepreneur and so avoided monopoly, and but for the supplemental agreement MTNL would have lost not only Rs. 20 crores but also Rs. 14 crores which UIP/UDI had collected as advertisements for yellow pages, and lastly, all employees of the UDI had been taken over by Sterling and so also Financial liability of UIP/UDI to the tune of Rs. 25 crores to various other public institutions including Rs. 12 crores of the nationalized banks had been taken over. Mr. Ramaswamy also asserted that supplemental agreement was an extension of the original contract and for extending the original contract principles would not be same as for entering into the original contract. He also said that by entering into the impugned transaction the MTNL did not lose even a single pie and that showed that "proof of pudding was in the eating".

20. Mr. Sibal appearing for UIP/UDI submitted that they were the first persons to give royalty to the Government offering Rs. 20 crores while any other tenderer who gave his tender did not offer even a rupee. He said in fact the other tenderers wanted MTNL to pay money to them for bringing out directories. This was so because it was a new venture and no one wanted to take a risk as no one knew the response of the public to yellow pages. Mr. Sibal said that the original contract could not be executed due to the abnormal rise of the cost of the paper and the whole planning of the UIP/UDI went hay wire. He said these were the harsh facts and were properly taken into account by the MTNL and subsequent events showed that the supplemental agreement was entered into in the best interest of all concerned. He said UIP/UDI went to MTNL in 1989 for grant of loan and when they collected a revenue of Rs. 14 crores for publication of the advertisements. He detailed the circumstances with reference to the affidavit of the UDI as to how UIP/UDI could not generate more revenue and were in dire financial circumstances leading to filing of winding up petition by Bank of India in February 1991. He said, firstly, entering into the supplemental agreement was not a favor shown to any one but to salvage the situation, secondly, Bombay directory published in March 1992 and the third of Delhi published in May/June 1992 were given free to the MTNL. This showed the *bona fide* of the whole transaction and then Mr. Sibal said that till the supplemental agreement was entered into negotiations went on and on and it

could not be said that MTNL acted mindlessly. Mr. Sibal also stressed that the petition was not maintainable on the ground of laches. He concluded by saying that supplemental agreement had worked well upto now. The whole project was put on wheels and next issues of the telephone directories for both Delhi and Bombay were on their way out to be published. Finally, Mr. Sibal proposed a proposition that in a field where the Government enters into which is new the Government should be free to adopt any proper procedure for achieving its commercial needs subject to the caveat that to award contract without calling for tenders should not be the result of favoritism or prejudice either in favor of or against any one.

21. Mr. Arun Jaitley who appeared for Sterling supported the arguments of other respondents and also stressed that printing of yellow pages and giving royalty and giving free copies of the directories to MTNL was a new experiment. He said Sterling came in the fray only in order to salvage the whole situation and to help bring out the directories expeditiously. Most of his arguments were directed on the maintainability of the petition on the ground of delay. He said supplemental agreement had already been partly performed and Sterling was in the process of collecting advertisements for further issues of the directories as per the agreement. Mr. Jaitley said that the considerations which weighed with every one in entering into supplemental agreement were: (1) expeditious publication of directories; (2) avoidance of litigation and dead lock; (3) to encourage competition; (4) to avoid employees of UDI from being retrenched; (5) liability towards bank and financial institutions was saved; (6) Rs. 14 crores worth of pending advertisement claims were to be settled by publication; and (7) the offer of Sterling was better than that given by the petitioner in its two letters. Mr. Jaitley also said that the policy for giving contract for telephone directory was of the Government of India and not that of the MTNL which was a statutory body and not either a part of or a Government department. He, therefore, said that MTNL was not bound by the contents in the letter dated 12 June 1986 of the Government of India in the Ministry of Communications, Department of Telecommunications.

22. Mr. K.K. Venugopal, learned counsel for the petitioner, said that too much was made of alleged laches on the part of the petitioner when in fact it was not so, and said this plea was being advanced to divert the attention of this Court from the illegalities committed by the respondents in bestowing largess by

MTNL on UIP/UDI and Sterling and causing tremendous loss of public revenue running into crores of rupees. He said that act of the MTNL in entering into supplemental agreement was unconstitutional; it was arbitrary and in the circumstances was mala fide. Mr. Venugopal said that failing to invite tenders before entering into supplemental agreement was violative of Article 14 of the Constitution and he queried: could departure from normal rule be justified on the basis of commercial considerations? He said in the facts and circumstances of the case the action on the part of the MTNL was *mala fide* and was actuated by a desire to render pecuniary benefits to UIP/UDI and Sterling at the cost of public revenue. He said the petition could not be dismissed on the ground of laches when there were none and also it were the respondents who were to blame. He said the respondents mainly pleaded three exceptions to the normal rule of equality which required open tender and these being: (1) long delay that would be because by inviting tenders which would ultimately hurt the subscribers; (2) need to avoid litigation and dead lock; and (3) to create competition and avoid monopoly. He said none of these exceptions existed and failure to invite tenders was fatal, arbitrary and discriminatory. According to the petitioner supplemental agreement was not an extension of the original agreement. As the original agreement having lapsed by efflux of time and also expired as per period prescribed in the contract, there was no question of extending the same and the case of the petitioner was that this was a new contract altogether though in the garb of supplemental agreement Sterling, an independent party, was introduced by back door method. This was so particularly when UIP and UDI had expressed their inability to perform the original contract. MTNL could not have gone to the aid of UIP/UDI and act against public interest. It could not avoid calling of tenders for the period 1992 to 1998 for Bombay directory and up to 1997 for Delhi directory as per the policy decision when the original agreement expired much prior to the entering into the supplemental agreement.

23. The supplemental agreement was entered on 26 September 1991 and this petition was filed on 19 May 1992. The petitioner says for Madras telephone directory similar tenders were invited and he being the highest tenderer was awarded contract and he successfully completed publication of Madras Telephone Directories with yellow pages for the years 1987, 1988, 1989, 1990 and 1991. He said he never defaulted and brought out telephone directories on time. After the expiry of that contract Madras Telephones issued public advertisements inviting tenders for subsequent years. The petitioner was again

awarded contract on payment of total royalty of Rs. 12 crores for the period of five years from 1992 to 1997. Sterling had also given its tender. The tender of the petitioner was in fact for a lesser amount than that of Sterling, but the Negotiating Committee which was constituted recommended that contract be given to the petitioner for Rs. 12 crores which amount was higher than what Sterling had offered. One of the grounds as to why the offer of Sterling did not find favor, it appears, was that it gave no evidence of its having any past experience. Thus was Rs. 12 crores to be distributed in five years as under:-

First year (1993)	:	Rs. 1.2 crores.
Second year (1994)	:	Rs. 1.4 crores.
Third year (1995)	:	Rs. 2.4 crores.
Fourth year (1996)	:	Rs. 3.4 crores.
Fifth year (1997)	:	Rs. 3.6 crores.
TOTAL	:	Rs. 12.0 crores.

24. It is the admitted case of the parties that Madras Telephone directory is much too smaller than telephone directories of Bombay and Delhi. Since the Sterling was not awarded the contract it filed a writ petition in the Madras High Court challenging the action of the Madras Telephones in awarding the contract to the petitioner. This was dismissed by judgment dated 27 April 1992 and the award of the contract to the petitioner was upheld. The High Court noticed that while giving its offer to Madras Telephones, Sterling did not specifically indicate about its previous experience and possession of printing machinery. It appears thereafter Sterling wrote a letter to Madras Telephones that a contract for printing of telephone directories for Delhi and Bombay for Rs. 17 crores was being execute by it for MTNL. The Madras Telephones on this addressed a letter dated 23 December 1991 to Sterling asking it to furnish immediately a copy of the order placed by MTNL as well as a copy of the terms and conditions and agreement entered into by MTNL with Sterling for the examination of the Madras Telephones and for taking further action. To this

Sterling sent in its reply dated 30 December 1991 stating as under:-

"Much as we would like to provide you a copy of the order of *Mahanagar Telephone Nigam Ltd.* we are unable to do so due to certain circumstances beyond our control. Please however accept our statement that we are in the final stages of executing the order of MTNL worth upwards of Rs. 19 crores for Bombay and New Delhi. The entire quantity of paper has been purchased and printing is in progress in seven leading presses in the country.

Should you wish, however, you are most welcome to contact The Chairman of MTNL for ascertaining the details of our contract. The sample copy of the Bombay Directory will be made available to you by middle of February 1992. Please bear with us until then. "

25. At the same time Madras Telephones had also addressed a letter to the Assistant General Manager (Directory), MTNL, Bombay, stating asunder:

"Tenders for printing and supply of Main Telephone Directories with Yellow Pages on Turnkey Basis are under finalisation. It is understood that the similar work for MTNL, Bombay & New Delhi is entrusted to M/s. Sterling Computers Ltd., Madras. Hence it is requested that a copy of the printing order placed on them along with a copy of the terms and conditions and the agreement entered into may please be supplied immediately."

Somewhat similar letter was also addressed on the same day, i.e. 23 December 1991, to the General Manager (Technical), Corporate Office of MTNL, Delhi. This letter reads as under:-

"Contract for the printing and supply of Main Telephone Directories with Yellow Pages on Turnkey Basis is under finalization. M/s. Sterling Computers Ltd. is one of the tenderers for the work and it is understood that the work for the printing of the Delhi and Bombay directories has been awarded to them. Hence it is requested that a copy of order for printing placed on them along with the terms and conditions and agreement entered into may please be forwarded for necessary examination and action at our end. "

On 2 January 1992 the Directory Officer of MTNL, New Delhi, wrote the

following letter to Madras Telephones:-

"Reference your letter No. ADS/PTG.DTY/Pvt.Agen/91-92 dated 23.12.1991. In this connection, it is stated that this office has not awarded any contract to M/s. Sterling Computers Ltd., Madras, for printing of English Telephone Directory with yellow pages. Perhaps, MTNL, Corporate Office have entrusted some job of printing of Telephone directories to M/s Sterling Computers Ltd. In this connection, you are therefore requested to contact Chairman-cum-Managing Director, MTNL, 12 Floor, Jeevan Bharti Bldg. Connaught Circus, New Delhi- 110 001 for further necessary action. "

26. Reading this letter Mr. Venugopal said that till this time the supplemental agreement was all kept secret. He said could a Directory Officer in the Office of the Chief General Manager Telephones, New Delhi, would not know till January 1992 that no contract had been awarded to Sterling. Mr. Venugopal said that it was a hush-hush affair. We have noted above that in the agenda note for the 32nd Board meeting it was mentioned that Board might kindly approve the new terms and conditions under which the telephone directories of Bombay and Delhi would be published by UIP. It was all well known by this time that it would be Sterling which would be executing the contract. It was only during the course of hearing of the petition filed by Sterling in Madras High Court that the supplemental agreement saw the light of the day on 6 March 1992. The agreement was filed only after the petitioner herein had moved an application before the Court there requiring the Sterling to bring on record the supplemental agreement. In fact the learned Judge of the Madras High Court in his judgment has severely commented upon the conduct of the Sterling in making claim that it had a past experience in publication of telephone directories. As noted above, the judgment of the Madras High Court was pronounced on 27 April 1992. This petition having been filed on 19 May 1992, it cannot be said to be barred by laches. It may also be noticed that in a letter dated 30 December 1991 marked as "confidential". General Manager (Technical), MTNL, writes to Madras Telephones that "as far as M/s. Sterling Computers is concerned, they have been allowed a sub contract by M/s. UDI for printing the directories for Delhi and Bombay". Nothing could be more misleading.

No mention is made of the supplemental tripartite agreement. The attempt appears to have been not to make the supplemental agreement public. In Delhi Telephone Directory which we have been shown during the course of arguments, UDI are still to be shown the official publishers of the directory. In the notices issued by UIP/ UDI and Sterling in various newspapers giving the rates of bold and additional entries in the telephone directory it is no doubt that the notices start with the words "UNITED Database (INDIA) PVT. LTD. and Sterling Computers Ltd have been able to make all necessary arrangements to ensure that every subscriber receives an up to date, accurate and comprehensive directory in Delhi and Bombay....." Then the rates have been mentioned and subscribers asked to give necessary instructions for changes by a particular date. But then the notices end up with the words "For your additions/changes/ cancellation please write to" and the addresses given are those of UDI both of Delhi and Bombay, such a notice nobody could say that Sterling had been awarded the contract as the respondents would like us to believe.

27. We are of the opinion that the contention that the supplemental agreement entered into between the MTNL and UIP/UDI and Sterling is for the purpose of extending the original contract when at the same time awarding contract for publication of three more issues of telephone directory both for Delhi and Bombay and further extending the period of contract to 1997-98 on the terms and conditions mentioned therein is indefensible. It is difficult to believe that contract for publication of directories under the original contract could be extended.

28. Take the example of second issue of Bombay directory which was due in 1988 but was published in March 1992, a delay of 4 years. Could it be said that the contract for publication of 1988 issue of Bombay directory was performed in March 1992. The original contract provided for publication of supplementary directory every six months of publication of the main directory. The Bombay issue of directory was, therefore, brought out after default had been committed in publication of almost four years of main telephone directories and almost the double number of supplementary directories. It is a matter of common knowledge that every day new telephone connections are provided; telephone numbers change because of shifting of areas to other or new telephone

exchanges; changes in addresses of subscribers; and changes in number of entries including bold and the like. Even changes in advertisements occur and more advertisements come with each directory. We have been shown 1992 issue of Delhi telephone directory which was brought out in May/June last. In this there is a letter addressed by the Chief General Manager, MTNL, to the customers. He has described in this letter how fast telephone exchanges have developed. He has claimed that during the First three months of the year 1992 he hoped to add 39000 lines of electronic exchanges and provide over 25000 new main telephone connections (it would be much more for Bombay directory). This is a long letter giving the list of achievements of the MTNL. Thus, it cannot be said that original contract for publication of directories could have been extended and that too by adding three more issues each for Bombay and Delhi particularly when the period of the original contract had expired.

29. There has been complete non-application of mind by the MTNL in entering into the supplemental agreement. Sterling was one of the competitors for publication of Madras Telephone Directory as we have seen above. No attempt has been made by the MTNL to find out the financial status of Sterling or its arrangement vis-a-vis UIP/UDI. It is also not clear as to in what circumstances Sterling just came in the picture except that there is a letter of UIP dated 5 August 1991 wherein it wanted the reassignment of the original contract for Delhi and Bombay to Golden Pages Pvt. Ltd. claiming this company to be its subsidiary and further that Golden Pages Pvt. Ltd. would enter into a management and financial agreement with Sterling Computers Ltd. Earlier to this UDI wrote a letter dated 25 April 1991 to MTNL that it had been assured Financial assistance by M/s. Sterling Computers Ltd. who had agreed to provide bank guarantee in the sum of Rs. 15 crores to secure advance to be given by MTNL. With this letter, a letter of the same date addressed by Sterling Computers Ltd. to UDI was sent. Sterling in this letter to UDI said that contract of UIP/UDI with MTNL would continue and it will provide financial assistance on terms and conditions mutually agreed to and further that it would provide bank guarantee in the sum of Rs. 15 crores in favor of MTNL and MTNL would give an equivalent amount against the bank guarantee as advance to UDI. Then it was mentioned as to how the advance would be adjusted against white page revenue of the directory. Letter of Sterling also mentioned that it would give management and other support as may be required and it would not ask for any change in share holding of UDI. We have seen the agenda notes of

the relevant meetings of the Board of MTNL and we find that these notes do not bring out the correct picture and they rather appeared to be lop-sided and prepared with oblique motives to help UIP/UDI. It further appears to us that the Board has been bulldozed to agree to supplemental agreement on the ground that public was suffering as telephone directory was not coming out in time. The Board was, however, kept in dark as to what steps MTNL had taken to enforce the terms of the original contract. In one of p73 the agenda notes only clause 22 of the original agreement was referred to and Board was not apprised that there was a performance guarantee as well as penalty for delay in publication of any issue of the directory. But then Board also cannot escape its blame. It could certainly have asked for further information. Till the supplemental agreement was entered into, which was after the date of the expiry of the original contract, not even a single paisa had been paid to MTNL towards royalty by UIP/UDI, as the petitioner contends. The respondents, however, say Rs. 54 lakhs out of Rs. 20.16 crores under the original agreement have since been paid. When the Board said in one of its minutes to issue legal notice to UIP/UDI a letter dated 27 July 1991 was issued to both UIP and UDI. If we see this legal notice it is more an apology of a notice than a legal notice. When there was a blatant breach of the original agreement we have not been able to find even a lame excuse on behalf of the MTNL as to why at least performance guarantee was not invoked, and further why penalty was not levied. We have also not been able to find out from the record as to on what basis MTNL had taken the stand that UIP/UDI was in financial dole drum and the MTNL would not be in a position to recover the royalty or the amount of the penalty. During the period of the original contract UIP/UDI had all through been collecting revenue towards advertisements both for yellow and white pages from the public and no attempt appears to have been made by MTNL requiring them to stop collecting advertisements when there was flagrant breach of contract by UIP/UDI. The whole scenario makes us to believe that MTNL was hand in glove with the UIP/UDI and all through attempt has been made to bail out UIP/UDI and then to help them in a dubious method. It appears to us as if some ghost had been sitting in the office of the MTNL. MTNL also says that cost of paper had increased manifold and that printing of yellow pages was an experiment. In 1991 it was certainly not an experiment. Madras Telephone Directory contract had been performed by the petitioner and so also other Centre' directories were published with yellow pages. Moreover, yellow pages

in a telephone directory is internationally recognized. Increase in cost of paper was no concern of MTNL as escalation had been provided for in the terms of the contract. In any case if these things weighed with the MTNL now then MTNL should not have been finding fault with other tenderers whose tenders had not been accepted. Action of the MTNL in not proceeding under the contract is incomprehensible. Terms of the original contract were not farcical. MTNL had a legal remedy. Its contention that if it had gone to court it would have got involved in long litigation and dead lock might have been created is an argument in desperation to justify its action in entering into the supplemental agreement on any ground when that action is certainly indefensible.

30. As noted above, worth of Sterling was not examined. May be it has brought out two directories, one each for Bombay and Delhi though again late, but that does not justify that enquiry should not have been held into the worth of Sterling and its arrangement with UIP/UDI and the amounts collected by UIP/UDI towards advertisements both for yellow pages and white pages of the directory. MTNL could certainly have asked for accounts from UIP/UDI of all the collections so made before entering into supplemental agreement but it chose to ignore all the relevant factors as it was having only one point programmer to help UIP/UDI and to confer undue and uncalled for benefits on UIP/UDI and Sterling. Terms of supplemental contract confer more benefits on these parties than what were in the original contract. There has been variation of the terms and the effects of this on the performance guarantee and other terms of the original contract were not examined. Offer of the petitioner was just given a go bye and rather it was made a plank in the agenda note to enter into supplemental contract when the offer was totally ignored in the minutes of the Board of MTNL. Irrespective of any offer of the petitioner the action of the MTNL in entering into supplemental contract is against the law of land as laid by the Supreme Court. This action has caused great monetary loss to public revenue and it could not be justified on any ground.

31. Respondents also raised an argument that under the supplemental agreement Sterling agreed to supply first issue of Bombay and Delhi telephone directories free of cost which would cost around Rs. 17 crores. We do not think there can be a more pathetic argument. Who is going to supply tree copies unless he has opportunity to reap benefits much more than that? MTNL failed to note the revenue already collected for yellow and white pages. It was ignorant of any

arrangement between UIP/UDI and the Sterling and under the supplemental agreement advertisement charges could be increased to any extent by the Sterling supposedly to meet the increasing cost of paper. If we see the notices published by UDI and Sterling in various newspapers giving the increase in charges for bold and additional entries in while pages it will be seen for bold entry per line charge has been increased from Rs. 400.00 to Rs. 800.00 and for additional entry per line from Rs. 200.00 to Rs. 500.00 which is more than double what were the charges existing earlier. Similarly, charges for Fax have also been increased. No attempt has been made as to how much further revenue would have been collected by UIP/UDI and Sterling respecting advertisements in yellow and while pages of the first issues of telephone directories. Charges for advertisements in yellow pages are not known. It could be any amount. There are separate charges for strip entry and logo to be published as advertisements in the directories. Without there being anything on the record for the respondents to contend that Sterling would have incurred an expense of Rs. 17 crores and yet would supply the directories free to MTNL Is just atrocious. Petitioner, on the other hand, has contended that this increase in rate of advertisement would net a sum of over Rs. 14crores for the Sterling. In supplemental agreement right to advertisements on the back page of the directory was surrendered to Sterling. We wished respondents had given us full particulars of the revenue collected from the advertisements published in the first issues of directories for Bombay and Delhi. In absence of that they cannot be heard to say that issue was supplied free and that Sterling was made to incur any cost. MTNL did not even care to see if the increase in cost of advertisement rates was reasonable. There is nothing on record that the rates were fixed by UIP/UDI according to analysis of market and cost factors and when MTNL was advised accordingly as per the supplemental agreement. An argument was also raised by the respondent that by entering into supplemental agreement about six hundred employees of UIP/UDI were saved from being retrenched. This is again an atrocious argument only advanced to bolster a sagging case. We have seen the minutes of the Board meeting, the agenda note and the letters written by UIP/UDI and Sterling and there is no whisper of any employees having been taken over by Sterling or any attempt by any of the parties to protect their employment. It is really deplorable that such an argument should also come from MTNL.

32. We do not think interest of public was ever in the mind of MTNL. It could

certainly be not in the mind of UIP/UDI and Sterling. The way the rates of advertisements have been enhanced by Sterling and there being no check on it by MTNL and the fact that a right which was monopolistic was given to Sterling to charge any amount for advertisements in the telephone directories speaks of the volume of misconduct of the MTNL. It has not cared to see if the enhanced rates could at all be justified and now its talk that it acted in public interest is, therefore, revolting to the mind. The very fact that MTNL took no action under the original agreement and allowed it to lapse without even getting a penny out of over Rs. 20 crores of royalty promised to it and not enforcing the bank guarantee or levying penalty for breach of original contract would by itself show that it never acted in the interest of the public or in public interest. If we compare the royalty offered in the original contract and now being offered for the period from 1992 to 1997-98 for Delhi and Bombay directories and also compare it with the Madras Telephone Directory (which directory is much too small compared to metropolis of Delhi and Bombay), the loss of public revenue in awarding supplemental contract is just staggering. The stand taken by the MTNL is diabolical.

33. Law is well settled in various judgments of the Supreme Court on the issues raised in this petition. It is unnecessary to burden this judgment by referring to all these as these have been taken notice of in latest pronouncement of the Supreme Court in *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and Ors*, <sup>1</sup> This case was under the State Financial Corporation Act, 1951, and the action of the U.P. Financial Corporation constituted under the Act was under challenge. The court held that the Corporation was an instrumentality of the State and the Corporation and its employees or officers were bound to act reasonably and fairly in dealing with property of the debtor and the exercise of the power or discretion in its dealings would be subject to the same constitutional or public law limitations as the Government. In this case action of the Corporation in disposing of certain property of the debtor by sale was set aside and mandamus was issued to the Corporation to resume possession of the property and act in accordance with the directions given in the judgment. The court observed:

".....Every wide power, the exercise of which has far reaching repercussions, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the

responsibility is far graver. It demands purposeful approach. The exercise, of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become *bona fide* and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is *mala fide* if it is contrary to the purpose for which it was authorized to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason."

34. Court referred to its earlier observations in *Sachinand Pandey v. State of West Bengal*,<sup>2</sup> where it had also stated as under:-

"Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

After taking note of various judgments, the court finally observed as under:-

"The sale by public auction or tender or private negotiation should be *bona fide* action. First is universally recognized to be the best and most fair method. It is expected to fetch best competitive price and is beyond reproach. Second should be resorted to rarely only if first is an impossibility. Generally tenders would be calling quotation to execute public work or to award contracts etc. And third should always be avoided as it cannot withstand public gaze. It casts reflection on Corporation and its officials and is against social and public interest. In case transfer cannot be effected by public auction and it is necessary to resort to sale by tender it is both fair and necessary to inform the unit holder, if unit has been got valued for purposes of transfer of the estimated value for sale as he is as much interested as the Corporation. Sale of public property by calling tenders escape attention of many an intending participants. Every endeavor should, therefore, be made to give wide publicity and to get the maximum price. Bureaucracy feels that accountability is an impediment to efficient discharge of the duty. Accountability is no more and no less than, the concept of accountability of a private concern to their shareholders. There is a distinction between prying into details of day to day administration and of the legitimate

actions or resultant consequences thereof. To enthrone efficiency into administration, a balance between accountability and autonomy of action of management in public enterprises should be carefully maintained. Over emphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or *carte blanche* power to deal with the public property or of the debtor at whim or vagary. Whether the public authority acted *bona fide* and in the best interest as prudent owner in the given facts would do, be gazed from impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner. "

35. Keeping these observations in view the action of the MTNL in entering into supplemental agreement with UIP/UDI and Sterling cannot stand, it being illegal and against the provisions of the Constitution. Arbitrariness is writ large on the face of it. The impugned action is neither fair nor just nor reasonable. The supplemental agreement, therefore, has to be struck down. The only course open to MTNL was to invite fresh tenders as per the policy guidelines laid down by the Central Government which it had followed earlier while inviting the tenders for the period from 1987/10/1991.

36. After the arguments in the writ petition were heard we required the MTNL to file in scaled cover the relevant File of the department including the file containing letter dated 2 January 1992 sent by the Directory Officer of MTNL, New Delhi, to the Madras Telephones. Only the file containing letter dated 2 January 1992 was given. We, therefore, listed the case for directions and gave time to MTNL to submit the relevant file. Again this was not done and we were told that the relevant file had been seized by the C.B.I in connection with certain investigation and further that the return (counter-affidavit) of MTNL was filed without reference to that file as it had been taken away by the C.B.I, before the return was filed. It is slated that the return was based on the minutes of the Board meetings copies of which were filed and original also shown to us. This is really surprising that the relevant file of the MTNL was not available with it and no attempt made to have it produced in Court.

37. The supplemental agreement gave more benefits to UIP/UDI and Sterling than those agreed to in the original contract, and it cannot, therefore, be said that it was extension of the original contract. It appears to us it was a disingenuous method to confer benefits on UIP/UDI and Sterling without

calling for fresh tenders. The action of the MTNL in entering into the supplemental contract is so arbitrary that it smacks of mala fides. The supplemental agreement has been entered into in breach of the law of the land and in breach of the Constitution provisions. It cannot, therefore, be allowed to stand and has to be struck down. We order accordingly.

38. In conclusion, the so called supplemental agreement is in effect a new contract. It is no extension of the original agreement. It has been entered into without calling for fresh tenders as per policy laid in 1986 by the Government of India and the law as laid by the Supreme Court which is the law of the land. In the very nature of things telephone directory for the year 1988 could not be published in 1992 or that of the year 1989 in 1993 and so on. Extra and more benefits have been conferred on the UIP/UDI and Sterling under the supplemental agreement than contemplated in the original agreement. There was absolutely no justification for the MTNL not to enforce the terms of the original agreement. Undue favor has been shown to UIP/UDI and now also to Sterling, a competitor of the petitioner for publication of Madras telephone directory. A great deal of loss running into crores of rupees has been caused to public revenue by this illegal and unlawful act of the MTNL in entering into the new contract with the UIP/UDI and the Sterling. This act is arbitrary and *mala fide* as well. For Madras telephone directory royalty payable for the year 1997 is Rs. 3.6 crores while under the supplemental agreement for Delhi it is Rs. 3.07 crores and for Bombay Rs. 3.97 crores. Delhi and Bombay are much too bigger cities than Madras for the publication of telephone directories. Under the original agreement royalty payable for the year 1991 was Rs. 10.17 crores for two issues one each of Bombay and Delhi telephone directory. With the increase in number of subscribers and consequently of advertisements manifold much more revenue would have been generated for the advertisements in the year 1997 than what was in 1991. If we see the original agreement there has been a steep rise in the amount of royalty payable, but the royalty amounts now payable have dwindled in the supplemental agreement and particularly when under the new agreement royalty amount payable includes that which was payable under the original agreement and which has now been spread over the period of the new agreement. Could there be anything more perverse, it is difficult to imagine. Top it with loss of interest on the delayed payment of royalty under the original agreement and claim of damages as well. All this is not in the reckoning of the MTNL. In this background if we examine the

relevant facts, the offer of the petitioner to pay royalty amount of Rs. 35 crores for publication of directories as per the supplemental agreement is not illusory and certainly not "kite flying" as the learned Attorney General would like us to think. We are amazed at the conduct of the MTNL and its argument to justify the supplemental agreement is appalling. MTNL did not act in public interest or in the interest of the public. There could not be a more blatant case of favoritism shown by a Government company, an instrumentality of the State, to a private party at the cost of public revenue of such a staggering amount. MTNL, it is apparent, was never alive to its obligations under the original agreement. Had it acted with promptitude and honestly it would certainly have retrieved its position, floated new tenders and brought out the directories earlier than May/June 1992. As we have seen, its intentions were never well meaning. The agenda notes of the Board meetings did not give a true picture. They concealed more than what they told. The Board was abysmally kept ignorant of the whole thing. But then the Board also cannot escape its share of the blame.

39. The question that now arises is, if relief is to be modified and should the supplemental contract continue to hold field inasmuch as one issue each of Delhi and Bombay directory has already come out and UIP/UDI and Sterling are in the process of bringing out the next issue both of Bombay and Delhi directories and must have collected advertisements from public for publication in yellow pages as well as in white pages of the directories. This is certainly a vexed question as the interests of the public have to be safeguarded though the respondents have acted in blatant breach of law. But then at the same time the respondents cannot be allowed to reap advantage for their act which is palpably illegal and unconstitutional. The court cannot sit back and throw up its hands in despair in such circumstances and adopt an attitude of helplessness. We cannot at the same time modify the supplemental agreement to any extent as perhaps we could have ordered that next issue of directories could be brought out as per terms thereof. But then that would also be perpetuating an illegality. Respondents must suffer the consequences of their illegal act and they have no equities in their favor to claim. At the same time, however, we are of the opinion that unwary public should not suffer. While we set aside the supplemental agreement, we will, however, direct that MTNL will retain all the moneys collected by it from the advertisers and UIP/UDI and Sterling shall also pay to the MTNL all the revenue collected by them after the last issue of Bombay and Delhi directories from the advertisers within one month with

complete accounts. MTNL will call for fresh tenders as per policy and the money so collected shall be made over to the tenderer who ultimately succeeds as per the terms of the contract 23 that might be entered into.

40. Petitioner will be entitled to costs. Counsel fee Rs. 5,000.00.

Petition allowed.

Cases Referred.

1. JT 1992(2) SC 326.

2. JT 1987(4) SC 368,