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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Dr. Dhananjaya Y. Chandrachud, J; Surya Kant, J; Vikram Nath, J.

March 03, 2022

Civil Appeal Nos. 1447-1467 of 2016 and with Civil Appeal No. 893 of 2019

Loop Telecom and Trading Limited *Versus* **Union of India and Anr.**

Indian Contract Act, 1872 - Section 65 - Restitution - In adjudicating a claim of restitution, the court must determine the illegality which caused the contract to become void and the role the party claiming restitution has played in it. If the party claiming restitution was equally or more responsible for the illegality (in comparison to the defendant), there shall be no cause for restitution. *(Para 52)*

Indian Contract Act, 1872 - Section 56 - Doctrine of Frustration discussed - The applicability of Section 56 of the Indian Contract Act is not limited to cases of physical impossibility. *(Para 41)*

Policy decisions - A greater free play in the joints must be accorded to decisions of economic policy where the legislature or the executive is called upon to make complex choices which cannot always conform to a straitjacket or doctrinaire solution. *(Para 58)*

Summary - Appeal against TDSAT order dismissing appellant's refund claim - Dismissed - In Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1, the 2G licences which were granted by the Union of India, including to the appellant, were quashed - The appellant was the beneficiary of the "First Come First Serve" policy which was intended to favour a group of private bidding entities at the cost of the public exchequer. The contention of the appellant that it was exculpated from any wrongdoing by the judgment of this Court in CPIL (supra) is patently erroneous.

For Appellant(s) Dr. Abhishek Manu Singhvi, Sr. Adv. Mr. Huzefa Ahmadi, Sr. Adv. Mr. Prateek Gupta, Adv. Ms. Madhavi Agrawal, Adv. Ms. Anwesha Padhi, Adv. Ms. Parul Shukla, AOR

For Respondent(s) Mr. Vikramjit Banerjee, ASG Mr. Nachiketa Joshi, Adv. Mr. Apoorv Kurup, Adv. Mr. Akshay Amritanshu, Adv. Mr. T.S. Sabarish, Adv. Mr. Mohd. Akhil, Adv. Mr. Saransh Kumar, Adv. Mr. Nring Chamwibo Zeliong, Adv. Mr. Siddhartha Sinha, Adv. Mr. Tathagat, Adv. Mr. Aditya Mishra, Adv. Mr. Gurmeet Singh Makker, AOR

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

A The Appeals

1. These appeals under Section 18 of the Telecom Regulatory Authority of India Act 1997[1] arise from the judgments dated 16 September 2015 and 11 December 2018 of the Telecom Disputes Settlement and Appellate Tribunal[2]. The appellant claimed a refund of Rs 1454.94 crores representing the Entry Fee (together with interest) paid by it for 2G licences for twenty-one service areas. By the judgment of this Court in **Centre for Public Interest Litigation** v. **Union of India**[3], the 2G licences which were granted by the Union of India, including to the appellant, were quashed. The appellant claims to be entitled to the refund of its Entry Fee on, as it contends, "well settled principles of civil, contractual and constitutional law".

2. The appellant applied for the grant of Unified Access Service Licences[4] for twenty-one service areas on 3 September 2007. A Letter of Intent was issued. The appellant paid the circle wise Entry Fee of Rs 1.1 crores and furnished a Performance Bank Guarantee and Financial Bank Guarantee for the twenty-one areas. The appellant entered into UASL agreements on 3 March 2008 for the twenty-one service areas with the respondent, which came into effect from 25 January 2008. Among the conditions which were stipulated in the UASL agreements, those governing the duration of the licence and the Entry Fee were in the following terms:

[1] "**TRAI Act**"

[2] "**TDSAT**"

[3] (2012) 3 SCC 1 ("**CPIL**")

[4] "**UASL**"

"3. Duration of License

3.1 This LICENCE shall be valid for a period of 20 years from the effective date unless revoked earlier for reasons as specified elsewhere in the document.

[…]

18. FEES PAYABLE

18.1 Entry Fee:

One Time non-refundable Entry Fee of Rs 1.1 crore has been paid by the LICENSEE prior to signing of this License agreement."

3. On 2 February 2012, this Court by its judgment in **CPIL** (supra) declared that the policy of the Union government for allocation of 2G spectrum on a "First Come First Serve" basis was illegal. As a consequence, the UASLs which were granted by the Union government were quashed. On 25 May 2012, the appellant instituted a petition[5] before the TDSAT seeking, among other things, a refund of the Entry Fee of Rs 1454.94 crores, inclusive of interest. The appellant has stated that on 1 June 2012 it

shut down its operations after porting out all its subscribers.

[5] Petition No 329 of 2012 ("**First Telecom Petition**")

4. By its judgment dated 16 September 2015, the TDSAT dismissed the First Telecom Petition holding, *inter alia*, that:

(i) The quashing of the appellant's licences by this Court in its judgment in **CPIL** (supra) cannot be equated with the UASL agreements becoming void within the meaning of Section 65 of the Indian Contract Act 1872[6]. This Court quashed the UASLs since it found the Union government's policy of "First Come First Serve" to be illegal and arbitrary. Hence, the appellant cannot claim restitution under Section 65;

[6] "**Indian Contract Act**"

(ii) The quashing of the appellant's licences by this Court in its judgment in **CPIL** (supra) cannot be brought under the Indian Contract Act, since the UASL agreements had not become void under Sections 23 and 56 of the Indian Contract Act; and

(iii) Even assuming that the appellant's UASL agreements became void under the Indian Contract Act, its claim for restitution under Section 65 would be governed by the principle of *in pari delicto potio rest condition defendentis* (in equal fault, better is the condition of the possessor). A refund of the Entry Fee could not be made until the possibility of the appellant being *in pari delicto* was completely effaced. When the TDSAT delivered its judgment, the appellant was facing trial before the Special Judge, CBI for charges under Section 120-B and 420 of the Indian Penal Code 1860 in a case relating to the grant of UASLs.

By a judgment dated 21 December 2017, the appellant was acquitted of criminal charges by the Special Judge, CBI. The Central Bureau of Investigation has filed a petition for leave to appeal against the order of acquittal, which is presently pending before the Delhi High Court.

5. Aggrieved by the judgment of the TDSAT dated 16 September 2015, the appellant moved this Court in Civil Appeal Nos 1447-1467 of 2016. On 13 May 2016, the appellant sought liberty of this Court to withdraw the civil appeals, and to approach this Court once again if it became so necessary. Leave was accordingly granted by this Court.

6. The appellant then instituted another petition before the TDSAT[7] raising the issue of a refund of the Entry Fee, on the ground that it had been exonerated by the Special Judge, CBI. By its judgment dated 11 December 2018, the TDSAT dismissed the Second Telecom Petition noting that the appellant had made a second attempt for claiming the same relief which had been sought earlier in the First Telecom Petition. It further held that had the TDSAT sought to provide the appellant with the remedy of approaching it after the conclusion of the trial before the Special Judge, CBI, it would have indicated it in its judgment. Finally, it was also noted that this Court, through its order dated 13 May 2016, did not grant the appellant the leave to approach the TDSAT but only to approach this Court.

[7] Telecom Petition No 63 of 2018 ("**Second Telecom Petition**")

The judgment dated 11 December 2018 has given rise to the filing of the second set of civil appeals[8] by the appellant. The appellant also moved a Miscellaneous Application[9] in Civil Appeal Nos 1447-1467 of 2016 seeking permission for the revival of the earlier civil appeals, which had been permitted to be withdrawn on 13 May 2016.

[8] Civil Appeal No 893 of 2019

[9] Miscellaneous Application Nos 198-218 of 2019

7. By an order dated 7 January 2020, the Miscellaneous Applications seeking the revival of the first set of civil appeals were allowed, keeping open all the contentions including the contentions of the respondents based on the earlier order dated 13 May 2016. This judgment will accordingly govern both, the original set of civil appeals which stand revived in pursuance of the order dated 7 January 2020 and the second set of civil appeals.

B Submissions of Counsel

8. Dr A M Singhvi, learned Senior Counsel appearing on behalf of the appellant, has urged the following submissions:

(i) Since the licences of the appellant were quashed by the judgment of this Court in **CPIL** (supra), the appellant is entitled to a refund of its Entry Fee based on civil, contractual and constitutional principles;

(ii) The appellant paid an Entry Fee of Rs 1454.94 crores for twenty-one service areas and the licences were valid for a period of twenty years. The appellant was prevented from providing services under the licences because:

(a) This Court held that respondent's "First Come First Serve" policy for grant of licences was flawed, arbitrary and illegal; and

(b) As a consequence, licences which were granted under said the policy (including the licences of the appellant) were quashed;

(iii) The quashing of the licences by this Court amounted to a frustration of each licence, which was in the nature of a contract, in terms of Section 56 of the Indian Contract Act. Consequently, the appellant is entitled to a restitution of the Entry Fee paid in terms of Section 65, as the licences were quashed not on account of the fault of the appellant but due to the culpability of the Union government;

(iv) The well settled principle is that no person can be prejudiced because of an act of a court (*actus curiae neminem gravabit)*;

(v) The substratum of TDSAT's decision which disallowed the claim of the appellant in view of the pending criminal proceedings has been wiped off by the acquittal of the appellant by the Special Judge, CBI;

(vi) The set off policy of the Union government, in terms of which a set off of the Entry Fee which was paid was granted only to those entities who participated in the fresh round of auction which took place after the judgment of this Court in **CPIL** (supra), is based on incorrect classification which lacks intelligible differentia and nexus to its

object. Further, the set off policy suffers from manifest arbitrariness and is discriminatory. Thus, it should be struck down as being violative of Article 14 of the Constitution;

(vii) The set off policy of the Union government allowing the grant of a set off of the Entry Fee, albeit to certain bidders, is an admission of a debt that is due and payable:

(a) On 12 October 2012, the respondent issued "Queries and Responses to an NIA" and in answer to Query Number 74 regarding the set off of Entry Fee, it was stated as follows:

"A set-off is allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount."

(b) The Empowered Group of Ministers[10] held a meeting on 18 October 2012, at which a decision was taken in the following terms:

10 "**EGoM**"

"13. The EGoM considered the letter dated 12.10.2012 from the Minister of Information and Broadcasting regarding set-off of entry fee against the earnest money and payment due in the event of spectrum being won and noted that the entry fee paid by TSPs whose licenses were quashed was for a period of 20 years. While on one hand, the TSPs could be expected to have paid a pro-rata amount for the period of operation of the license, i.e. 2008-2012, on the other hand, there could be a claim for refund with interest for the pro-rata amount for the balance period. **Therefore, the EGoM decided to allow such TSPs to adjust an amount equivalent to their full entry fee, without any interest, against the auction payments, both for participation and/or final payment on successful conclusion. It was clarified that the set-off would be permitted only to the quashed license holders participating in the auction. Such set-off would be allowed to the extent of total entry fee paid for all quashed licenses on an aggregate basis without consideration of the expired period of license, only if they succeed in the auction**…"

(**emphasis supplied**)

(c) Pursuant to the above policy of granting a set off, the Union government has granted a set off of the Entry Fee to Telewings (formerly Uninor), Videocon, Idea Cellular Limited and Sistema Shyam. In particular, a set off has been granted to Telewings despite there being grave criminal charges against it including, *inter alia*, charges under the Prevention of Corruption Act 1988;

(viii) The proposition that the policy of the Union of India to permit the grant of a set off of the Entry Fee amounts to an admission that a refund of the Entry Fee is payable and due, finds support in the decision of this Court in **Union of India** v. **Karam Chand Thapar and Bros. (Coal Sales) Ltd.**[11];

11 (2004) 3 SCC 504

(ix) The non-refund of the Entry Fee to the appellant is discriminatory for the following reasons:

(a) A set off towards the fee payable for the spectrum has been permitted to those Telecom Service Providers[12] who participated in and won spectrum in the subsequent auction after the judgment of this Court in **CPIL** (supra);

12 "**TSPs**"

(b) The licences of eight TSPs were quashed by this Court by its judgment in **CPIL**

(supra). There cannot be any distinction or classification in law between the said eight TSPs and similar treatment must be afforded to all. The classification based on their decision to participate in the subsequent auction for refund of Entry Fee is discriminatory and has no nexus with the object sought to be achieved by the set off policy;

(c) Out of the eight TSPs, four TSPs participated in the subsequent auction and were permitted a set off of their Entry Fee towards payment for the auction allotted spectrum. Details of the cases where a set off was granted are:

Name of Company	**Year of Auction**	**Amount set off**	**Status in the 2G Judgment**
M/s Telewings (formerly Uninor) (bought Unitech Licenses)	Nov, 2012	1658.57 Crores	Respondent No 3; Penalty of Rs 5 Crores
M/s Videocon	Nov, 2012	1506.82 Crores	Respondent No 5; No Penalty Levied
M/s Idea Cellular	Nov, 2012	684.59 Crores	Respondent No 8; No Penalty Levied
M/s Sistema Shyam	March, 2013	1626.32 Crores	Respondent No 10; Penalty of Rs 50 Lakhs

The remaining four TSPs, including the appellant, did not participate in the subsequent auction for spectrum. Their details are tabulated below:

Name of Company	**Entry Fee Paid**	**Status in the 2G Judgment**	**Action taken for refund of Entry Fee**
M/s S Tel Pvt. Ltd.	25 Crores	Respondent No 6; Penalty of Rs 50 Lakhs	Due to low amount, it did not seek refund of Entry Fee.
M/s Tata Teleservices	9 Crores	Respondent No 9; Penalty of Rs 5 Crores	Due to low amount, it did not seek refund of Entry Fee.
M/s Etisalat DB (Swan Telecom)	1564 Crores	Respondent No 2; Penalty of Rs 5	Refund Claimed. Civil Appeal No.7331/2016 pending

		Crores	
M/s Loop Telecom Ltd. (Appellant)	1454.94 Crores	Respondent No 10; Penalty of Rs 50 Lakhs	Refund Claimed. Present Civil Appeal against the order of TDSAT

(d) TDSAT afforded differential treatment to the appellant due to the pendency of criminal proceedings against it. In any event, this ground ceases to exist in view of the acquittal of the appellant of criminal charges on 21 December 2017 by the Special Judge, CBI. Following the appellant's acquittal, there is no rationale for denying refund of Entry Fee to the appellant;

(x) The set off policy penalises a business entity for taking a commercial decision not to participate in the subsequent auction. Whether or not an entity should have participated in the auction of spectrum following the decision of this Court in **CPIL** (supra) was entirely for each of them to determine and this cannot form the basis for granting or denying a set off;

(xi) The non-refund of the Entry Fee to the appellant suffers from manifest arbitrariness:

(a) The set off policy creates a separate class between similarly placed TSPs whose licences were quashed, on the basis of whether or not a bidder or entity has chosen to participate in the fresh auction; and

(b) A business entity may have valid reasons not to participate in the fresh auction, for which it cannot be penalized;

(xii) The appellant ought not to be punished for the wrongdoing of the respondent:

(a) In the judgment in **CPIL** (supra), this Court held that the "First Come First Serve" policy of the Union government for the grant of telecom licenses was flawed, arbitrary and illegal;

(b) This Court further imposed costs of Rs 5 crores upon those licence holders before it who had benefitted at the cost of the public exchequer and had offloaded their stakes for thousands of crores in name of fresh infusion of or transfer of equity. On the other hand, costs of only Rs 50 lakhs were imposed on those licence holders (including the appellant) who had allegedly benefited by the wholly arbitrary and unconstitutional action of the Department of Telecommunication[13] for the grant of UASLs and the allocation of the 2G spectrum band. Hence, no role was attributed to the appellant for quashing of its licenses;

[13] "**DoT**"

(c) In any event, the appellant has been acquitted of criminal charges on 21 December 2017 by the Special Judge, CBI;

(d) Even otherwise, the pendency of criminal proceedings is not an impediment to proceed with civil proceedings; and

(e) The respondent has already auctioned spectrum which was allocated earlier to the appellant for Rs 10,400 crores and has thus benefited twice from the same spectrum. The respondent cannot be allowed to unjustly enrich itself by usurping the Entry Fee paid by the appellant. The principles underlying the doctrine of unjust enrichment are duly fulfilled in the present case;

(xiii) The provisions of the Indian Contract Act would be applicable to the claim of the appellant:

(a) TDSAT has wrongly held that the licences were quashed by this Court in the exercise of its constitutional powers, thereby ousting the provisions of the Indian Contract Act;

(b) The licence granted under the proviso to Section 4(1) of the Indian Telegraph Act 1885[14] is in the nature of a contract between the Government and its licensees. This proposition finds support in the judgment of this Court in **Union of India** v. **AUSPI**[15];

[14] "**Telegraph Act**"

[15] (2011) 10 SCC 534 ("**AUSPI**")

(c) Once the contracts were held to be void and were quashed in **CPIL** (supra), the consequences which are envisaged in the Indian Contract Act must follow. When a contract is discovered to be void, the benefit/advantage received by one party under the contract ought to be returned to the other party;

(d) The appellant, when it entered into the contract with the respondent, had no knowledge of the fact that the "First Come First Serve" policy of the Union government would be quashed by this Court. The Union government defended its policy before this Court, and thus ought to be directed to refund the Entry Fee;

(e) In the absence of any legislative intervention precluding the grant of the refund, the rights of the parties would be governed by the law of contract. Thus, the doctrine of frustration under Section 56 and the principle of restitution under Section 65 of the Indian Contract Act would stand attracted in the present case;

(f) Judicial orders are declaratory and retrospective in nature. The judgment in **CPIL** (supra) relates back to the validity of the licences. The appellant had only six thousand subscribers before the licences were quashed and was in the phase of rolling out and investing capital as a result of which it did not acquire any substantial benefit;

(g) Since the licences were provided on a representation that they would have a tenure of twenty years but were declared to be void within four years due to the flawed policy of the Union Government, the appellant will be entitled to refund of the Entry Fee with interest; and

(h) The respondent is estopped from relying upon the UASL Guidelines and UASL agreements, which provide that the Entry Fee is non-refundable. This is because the licences were not quashed either due to a default on part of the appellant or its withdrawal, but due to the policy of the Union government being found to be illegal and arbitrary; and

(xiv) The decisions[16] of this Court in the relation to the payment of Adjusted Gross Revenue[17] have no relevance to the present case.

[16] **Union of India** v. **Association of Unified Telecom Service Providers of India and Ors.**, (2020) 3 SCC 525; and **Union of India** v. **Association of Unified Telecom Service Providers of India and Ors.**, Civil Appeal Nos 6328-6399 of 2015

[17] "**AGR**"

9. Opposing the submissions which have been urged on behalf of the appellant, Mr Vikramjit Banerjee, learned Additional Solicitor General, appearing on behalf of the Union of India has urged the following submissions:

(i) The Entry Fee paid by the appellant is specifically made non-refundable by the UASL Guidelines which were issued by the DoT on 14 December 2005. Once the Letters of Intent were issued to the appellant for twenty-one service areas, the appellant deposited the Entry Fee for each circle in accordance with the UASL Guidelines on 10 January 2008. The appellant became eligible for the issuance of UASLs for each of the twenty-one service areas only thereafter. The UASL agreements which were entered into between the Union Government and the appellant on 4 March 2008 expressly contemplated that the Entry Fee was a one-time non-refundable fee. The Entry Fee being non-refundable in nature, the appellant cannot now seek a refund;

(ii) The issues which are sought to be raised in the present civil appeals are squarely governed by the judgment in **CPIL** (supra). The judgment of this Court examined the validity of the licences and spectrum allocation made to the licensees including the appellant. The judgment in **CPIL** (supra) found that the licensees had unfairly gained access to the then Minister in-charge as well as certain officers of the DoT in order to gain preferences. This Court found that the grant of licences was "*stage-managed*" to favour specific licensees, including the appellant, as a result of which costs of Rs 50 lakhs were also imposed on them;

(iii) While quashing the grant of the licences, the judgment in **CPIL** (supra) did not grant any refund of the Entry Fee. The claim for restitution not having been allowed by this Court in **CPIL** (supra), the appellant cannot seek to do so at this stage;

(iv) After the judgment in **CPIL** (supra) quashing the UASLs granted to the appellant, the appellant has ceased to be a licensee for the purposes of Section 14(1)(a) of the TRAI Act, which empowers the TDSAT to adjudicate disputes between a licensor and a licensee. The TDSAT did not have jurisdiction under the provisions of Section 14(1)(a). In any event, the TDSAT by its judgment dated 16 September 2015 rejected the appellant's claim for refund on the ground that it was incompetent to do so, the licences having been quashed by the judgment of this Court. Having moved this Court in the first set of civil appeals, the appellant withdrew the civil appeals on 13 May 2016, though with liberty to move this Court again, if it became so necessary. Thus, in view of the order dated 13 May 2016, the appellant could have only moved this Court and not TDSAT. However, it instituted a Second Telecom Petition before the TDSAT. The TDSAT by its judgment dated 11 December 2018 rejected the second

attempt of the appellant for claiming the same relief, since this would essentially amount to a review of the judgment in **CPIL** (supra). Thus, moving the Second Telecom Petition was not only contrary to Section 14 of the TRAI Act but also in violation of the text and spirit of the order dated 13 May 2016 of this Court;

(v) The decision of the EGoM dated 31 October 2012 granting set off to those bidders who had participated and were found to be successful in the fresh round of auctions was a one-time concession offered to TSPs whose licences were quashed earlier, in order to ensure that telecom services were provided to consumers in an uninterrupted manner. The decision in **CPIL** (supra) did not bar licensees from participating in the subsequent auction. Since the Entry Fees paid by licensees covered by the judgment in **CPIL** (supra) could not have been refunded, the EGoM decided to adjust their Entry Fee in the subsequent auction in the event that they were declared successful. It was believed that this would encourage the participation of all TSPs in the subsequent auction and increase the prospects of a higher price discovery, thereby ultimately benefitting the public exchequer. This set off policy was uniformly applied to all licensees covered by the judgment in **CPIL** (supra), including the appellant, and thus is not discriminatory. No TSP covered by the decision in **CPIL** (supra) was compelled to participate in the subsequent auction being conducted by the DoT by the virtue of the set off policy. Rather, the policy only sought to increase participation in the subsequent auction by offering a concession in the form of set off of the previously paid Entry Fee, in case they emerged successful in the fresh auction. Being a policy decision involving industry specific issues, this Court should be circumspect in interfering with this decision of the Union government;

(vi) The acquittal of the promoters of the appellant in the criminal case has no bearing on the refund of the Entry Fee. The judgment of the Special Judge, CBI acquitting the promoters of the appellant was only concerned with the alleged violation of Clause 8 of the UASL Guidelines issued by DoT. The acquittal has no bearing on the findings of this Court in **CPIL** (supra), according to which UASL and allocation of spectrum was held to be "*stage managed*" and violative of the principles of public law. This precludes the appellant from claiming any refund or restitution; and

(vii) As a matter of fact, the judgment of this Court in **CPIL** (supra) has imposed costs of Rs 50 lakhs on the appellant for wrongly benefitting from the wholly arbitrary and unconstitutional exercise of licence and spectrum allocation. Consequently, even under the contract law, the appellant is disentitled from claiming any refund or restitution of the Entry Fee based on the principle of *in pari delicto*.

10. In the submissions made in the rejoinder, both Dr A M Singhvi and Mr Huzefa A Ahmadi, learned Senior Counsel, have submitted that the judgment in **CPIL** (supra) does not expressly or impliedly bar the refund of Entry Fee. As a matter of fact, the TDSAT held that the decision of this Court was not conclusive in ruling out a refund. The judgment in **CPIL** (supra) was reserved on 17 March 2011 and was delivered on 2 February 2012, and the quashing of the licences could not have been contemplated by any of the litigants. Theoretically, even if the claim for restitution could have been

made before this Court at that stage, the appellant is not precluded from raising the claim before this Court in the present proceedings. Further, Sections 14 and 15 of the TRAI Act confer a plenary remedy before the TDSAT. Hence, the appellant moved the TDSAT within a few weeks of the judgment in **CPIL** (supra). It was urged that for the principles of constructive *res judicata* to apply , the bar must be clearly evident. In a Public Interest Litigation petition, it would not be appropriate to apply the principles of constructive *res judicata* against the respondent (the appellant herein) save in an exceptional case. Elaborating on the above submissions, Mr. Huzefa Ahmadi urged that:

(i) The right to claim restitution would arise only after the licences were quashed by this Court and hence, the decision in **CPIL** (supra) does not operate as constructive *res judicata*;

(ii) The relief sought before this Court in the public interest petition under Article 32 of the Constitution which led to the decision in **CPIL** (supra) was the setting aside of the auction and damages. This Court did not grant damages *per se* while it imposed costs on the licensees. Hence, in terms of Section 11 of the Civil Procedure Code 1908, the prayer for damages must be deemed to have been refused; and

(iii) The ultimate direction in **CPIL** (supra) was that its observations would not apply to other proceedings and hence, there was no intent to foreclose other rights under the law.

In view of these premises, it has been urged that the petition under Article 32 which led to the decision in **CPIL** (supra) did not seek the forfeiture of the Entry fee and hence, the principles of constructive *res judicata* would find no application at all. This Court having imposed costs of Rs 5 crores on one set of licensees and Rs 50 lakhs on another group of licensees (which included the appellant), it would be wholly disproportionate to forfeit an amount of Rs 1454.94 crores in the absence of an implied forfeiture in terms of the earlier decision of this Court.

11. The rival submissions will now be analysed.

C The CPIL judgment

12. The decision of this Court, which was rendered on 2 February 2012, arose from petitions under Article 32 of the Constitution. The petitions questioned the grant of UASLs to the private respondents in those proceedings (which included the appellant), on the ground that the procedure which was adopted by DoT was arbitrary, illegal and in violation of Article 14 of the Constitution. Among the grounds of challenge, it was urged that:

(i) Since the cut-off of 25 September 2007 fixed for considering the applications had been held to be arbitrary by the Delhi High Court (which was approved by this Court), the procedure adopted by DoT with the approval of the Minister for Communications and Information Technology was liable to be declared as arbitrary and illegal;

(ii) The DoT had violated the recommendations made by Telecom Regulatory

Authority of India[18] that there should be no cap on the number of access service providers in any service area;

[18] "**TRAI**"

(iii) As noted in the report of the Comptroller and Auditor General, the consideration of a large number of ineligible applications and the grant of licences to them was illegal and arbitrary;

(iv) The method adopted by DoT for grant of licences was flawed because it was based upon the recommendations made by TRAI, which were arbitrary and contrary to public interest, since they recommended the granting of licences at the entry fees which were determined in 2001;

(v) While granting licences which were bundled with the spectrum at a price which was fixed in 2001, the DoT did not consult the Finance Ministry and violated the decision taken by the Council of Ministers in 2003;

(vi) The "First Come First Serve" policy violated Article 14, and its distortion by the then Minister of Communications and Information Technology and the consequent grant of licences was liable to be annulled; and

(vii) The Union government did not take any action to cancel the licences of a number of licensees who had failed to fulfil the roll-out obligations and violated the conditions of the licences.

13. While dealing with the grounds of challenge, in the course of the judgment, this Court underscored that natural resources, such as spectrum, are public goods and the doctrine of equality and public trust must guide the State in determining the actual mechanism for their distribution. After analysing the rationale adopted by TRAI for recommending the allocation of the 2G spectrum on the basis of 2001 prices, this Court held:

"91. To say the least, the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then Minister of Communications and Information Technology and the officers of DoT who virtually gifted away the important national asset at throw-away prices by wilfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers. This becomes clear from the fact that soon after obtaining the licences, some of the beneficiaries offloaded their stakes to others in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits. We have no doubt that if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores."

14. This Court found a basic flaw in the "First Come First Serve" policy, holding:

"94. There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim."

15. This Court held that an auction conducted after due publicity was perhaps the best method for fulfilling the constitutional requirement of preserving equity in the alienation of natural resources. In the absence of such a mechanism, this Court held that alienation of natural resources/public property is likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for constitutional ethos and values.

16. In the course of its decision, this Court held, in no uncertain terms, that the then Minister for Communications and Information Technology had acted to favour some companies at the cost of the public exchequer:

"97. The exercise undertaken by the officers of DoT between September 2007 and March 2008, under the leadership of the then Minister of Communications and Information Technology was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of Communications and Information Technology wanted to favour some companies at the cost of the public exchequer and for this purpose, he took the following steps:

(*i*) Soon after his appointment as Minister of Communications and Information Technology, he directed that all the applications received for grant of UAS licence should be kept pending till the receipt of the TRAI recommendations.

(*ii*) The recommendations made by TRAI on 28-8-2007 were not placed before the full Telecom Commission which, among others, would have included the Finance Secretary. The notice of the meeting of the Telecom Commission was not given to any of the non-permanent members despite the fact that the recommendations made by TRAI for allocation of spectrum in 2G bands had serious financial implications. This has been established from the pleadings and the records produced before this Court which show that after issuance of licences, 3 applicants transferred their equities for a total sum of Rs 24,493 crores in favour of foreign companies. Therefore, it was absolutely necessary for DoT to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.

(*iii*) The officers of DoT who attended the meeting of the Telecom Commission held on 10-10-2007 hardly had any choice but to approve the recommendations made by TRAI. If they had not done so, they would have incurred the wrath of the Minister of Communications and Information Technology.

(*iv*) In view of the approval by the Council of Ministers of the recommendations made by the Group of Ministers in 2003, DoT had to discuss the issue of spectrum pricing with the Ministry of Finance. Therefore, DoT was under an obligation to involve the Ministry of Finance before any decision could be taken in the context of Paras 2.78 and 2.79 of the TRAI's recommendations. However, as the Minister of Communications and Information Technology was very much conscious of the fact that the Secretary, Finance, had objected to the allocation of 2G Spectrum at the rates fixed in 2001, he did not consult the Finance Minister or the officers of the Finance Ministry.

(*v*) The Minister of Communications and Information Technology brushed aside the suggestion made by the Minister of Law and Justice for placing the matter before the Empowered Group of Ministers. Not only this, within few hours of the receipt of the suggestion made by the Prime Minister in his letter dated 2-11-2007 that keeping in view the inadequacy of spectrum, transparency and fairness should be maintained in the matter of allocation thereof, the Minister of Communications and Information Technology rejected the same by saying that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants because it will not give them level playing field.

(*vi*) The Minister of Communications and Information Technology introduced the cut-off date as 25-9-2007 for consideration of the applications received for grant of licence despite the fact that only one day prior to this, a press release was issued by DoT fixing 1-10-2007 as the last date for receipt of the applications. This arbitrary action of the Minister of Communications and Information Technology though appears to be innocuous, actually benefited some of the real estate companies who did not have any experience in dealing with telecom services and who had made applications only on 24-9-2007 i.e. one day before the cut-off date

fixed by the Minister of Communications and Information Technology on his own.

(*vii*) The cut-off date i.e. 25-9-2007 decided by the Minister of Communications and Information Technology on 2-11-2007 was not made public till 10-1-2008 and the first-come-first-served policy, which was being followed since 2003 was changed by him on 7-1-2008 and was incorporated in press release dated 10-1-2008. This enabled some of the applicants, who had access either to the Minister or the officers of DoT to get the demand drafts, bank guarantee, etc. prepared in advance for compliance with conditions of the LoIs, which was the basis for determination of seniority for grant of licences and allocation of spectrum.

(*viii*) The meeting of the full Telecom Commission, which was scheduled to be held on 9-1-2008 to consider issues relating to grant of licences and pricing of spectrum was deliberately postponed on 7-1-2008 so that the Secretary, Finance and Secretaries of three other important Departments may not be able to raise objections against the procedure devised by DoT for grant of licence and allocation of spectrum by applying the principle of level playing field.

(*ix*) The manner in which the exercise for grant of the LoIs to the applicants was conducted on 10-1-2008 leaves no room for doubt that everything was stage-managed to favour those who were able to know in advance the change in the implementation of the first-come-first-served policy. As a result of this, some of the companies which had submitted applications in 2004 or 2006 were pushed down in the priority and those who had applied between August and September 2007 succeeded in getting higher seniority entitling them to allocation of spectrum on priority basis."

This is a clear indicator of the complicity between the Minister and the business entities he was acting to favour on the basis of the "First Come First Serve" policy.

17. This Court found that "*everything was stage-managed to favour those who were able to know in advance the change in the implementation of the first-come-first served policy*". It was in the backdrop of the above finding, that this Court issued the following directions:

"102. In the result, the writ petitions are allowed in the following terms:

(*i*) The licences granted to the private respondents on or after 10-1-2008 pursuant to two press releases issued on 10-1-2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

(*ii*) The above direction shall become operative after four months.

(*iii*) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 service areas by auction, as was done for allocation of spectrum in 3G band.

(*iv*) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(*v*) Respondents 2, 3 and 9 who have been benefited at the cost of public exchequer by a wholly arbitrary and unconstitutional action taken by DoT for grant of UAS licences and allocation of spectrum in 2G band and who offloaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay costs of Rs 5 crores each. Respondents 4, 6, 7 and 10 shall pay costs of Rs 50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by DoT for grant of UAS licences and allocation of spectrum in 2G band. We have not imposed costs on the respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.

(*vi*) Within four months, 50% of the costs shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% costs shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

(*vii*) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by CBI, Directorate of Enforcement and other agencies or cause prejudice to those who are facing prosecution in the cases registered by CBI or who may face prosecution on the basis of

charge-sheet(s) which may be filed by CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under the Income Tax Act, 1961, the Prevention of Money-Laundering Act, 2002 and other similar statutes."

18. Reading the judgment of this Court in **CPIL** (supra), it is impossible to accept the submission which has been urged on behalf of the appellant that the fraud in the "First Come First Serve" policy lay at the doorstep of the Union government alone and that the appellant was free from taint or wrong doing. The decision of this Court held that the "First Come First Serve" policy was writ large with arbitrariness, and was intended to favour certain specific entities at a grave detriment to the public exchequer. Undoubtedly, the authors of the "First Come First Serve" policy were the official actors comprised within the Union government. But equally, the decision did not exculpate the private business entities who obtained UASLs and became the beneficiaries of their decision. The decision of this Court concludes in no uncertain terms that the then Minister of Communications and Information Technology wanted to favour some companies at the cost of the public exchequer, and that as a matter of fact the entire process was "*stage-managed*" to favour those who had access to the nitty-gritties of the policy in advance. As a result, the Court found that companies which had submitted applications in 2004 or 2006 were side-lined by favouring those who had applied between August and September 2007 and who "*succeeded in getting higher seniority entitling them to allocation of spectrum on priority basis*".

19. In the concluding part, the judgment in **CPIL** (supra) imposed costs of Rs 5 crores each on three licensees on the ground that they had benefited at the cost of the public exchequer by a "*wholly arbitrary and unconstitutional action*" taken by DoT for the grant of licences and allocation of spectrum, and who had subsequently offloaded their stakes for many thousand crores in the name of fresh infusion or transfer of equity. On the other hand, the appellant was amongst the four licensees who were directed to pay a cost of Rs 50 lakhs each "*because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by DoT for grant of UASL and allocation of spectrum of 2G band*".

20. The beneficiaries of the patently unconstitutional mechanism deployed for the allocation of spectrum were corporate entities who were favoured under the "First Come First Serve" policy. The appellant is one of them. The distinction made by the judgment of this Court between the three licensees who were subjected to costs of Rs 5 crores and four licensees, including the appellant, who were subject to costs of Rs 50 lakhs was because in the case of a former their stakes had been offloaded ostensibly in the name of a fresh infusion or transfer of equity. However, it is evidentthat all these licensees were complicit in the illegal exercise of obtaining favours for themselves by the indulgence of those in power. That, above all, was the foundation of the decision in **CPIL** (supra) and the justification for quashing licences and the allocation of the 2G spectrum. This Court then directed the TRAI to frame fresh recommendations for the grant of licences and for the allocation of spectrum in the 2G band in twenty-two service areas by auction, as was done for the allocation of

spectrum in the 3G band. Thus, the decision in **CPIL** (supra) leaves no manner of doubt that the appellant was *in pari delicto* along with the Union government.

D The claim for refund of Entry Fee

21. The nature of the Entry Fee has to be understood from the UASL Guidelines which were issued by the DoT on 14 December 2005. Clause 6[19] of the Guidelines required each applicant seeking a UASL for a given service area to deposit a "non-refundable entry fee" in accordance with Annexure 1, which elucidated the quantum of the fee which was payable for different service areas. Clause 14[20] indicates that the Entry Fee was payable in addition to the annual licence fee which was payable for holding a UASL.

[19] "6 The detail of non-refundable Entry fee, Category of service area, Financial bank guarantee, performance bank guarantee, Net worth and Paid up equity capital required under the Unified Access Services Licence for each service area is as per Annexure-I. The prescribed paid-up equity capital shall be maintained during currency of the licence."

[20] "14 In addition to the non refundable Entry fee described above, the Licensee shall also pay Licence fee annually @ 10/8/6% of Adjusted Gross Revenue (AGR) for category A/B/C service areas respectively excluding spectrum charges."

22. Letters of Intent were issued to the appellant for providing unified access service to twenty-one service areas. The appellant deposited the circle wise Entry Fee, in terms of the UASL Guidelines, on 10 January 2008 in the amount of Rs 1454.94 crores. It is only upon the payment of this Entry Fee that the appellant became eligible to be issued UASLs in the twenty-one service areas. Clause 18.1[21] of the UASL agreement acknowledged the payment of a "onetime non-refundable entry fee" prior to the signing of the agreement. Thus, the Entry Fee was a onetime non-refundable fee payable. According to the Union government, this was payable by an applicant for participating in the process of obtaining the UASL and was distinguishable from the licence fee under Clause 10.1[22], which was relatable to the actual operation of the licence.

[21] "18.1 Entry Fee:

One Time non-refundable Entry Fee of Rs .1.1 Crore has been paid by the LICENSEE prior to signing of this Licence agreement."

[22] "10.1 The LICENSOR reserves the right to suspend the operation of this LICENCE in whole or in part, at any time, if, in the opinion of the LICENSOR, it is necessary or expedient to do so in public interest *or* in the interest of the security of the State or for the proper conduct of the TELEGRAPH. Licence Fee payable to the LICENSOR will not be required to be paid for the period for which the operation of this LICENCE remains suspended in whole. If situation so warrant, it shall not be necessary for Licensor to issue a notice for seeking comments of the LICENSEE for this purpose and the decision of the Licensor shall be final and binding.

Provided that the LICENSOR shall not be responsible for any damage or loss caused or arisen out, of aforesaid action. Provided further that the suspension of the licence will not be a cause or ground for extension of the period of the LICENCE and suspension period will be taken as period spent."

"To us it appears that submissions based on section 4 of the Telegraph Act or the characterisation of the entry fee in the UASL guidelines and the licence as "non-refundable" is really begging the question. The submissions would have carried weight if the petitioners' licences were cancelled or terminated for any violation of the term of the licences or were surrendered by it by its own accord. In the facts of the present case the petitioner failed to get entry into…the exclusive domain reserved by law for the State..."

23. In the course of its judgment dated 16 September 2015, the TDSAT dealt with the submission of the Union of India that the Entry Fee was "non-refundable" in terms of

the UASL Guidelines. Dealing with the submission, the TDSAT observed:

24. There is much to commend in the above line of reasoning of the TDSAT. The Entry Fee, under the terms of the UASL Guidelines and the UASL agreements, was a one-time non-refundable fee. The TDSAT held that the submission of the Union of India would have credence if the licences were terminated for breach or if the licensee were to voluntarily surrender the licence. However, this was a case where the licence was held to be unlawful, due to its grant being in breach of the constitutional mandate under Article 14. All the licences and the allocation of spectrum came to be cancelled by the decision in **CPIL** (supra) on the ground that the policy and the process followed by the Union government were arbitrary, and unjustified benefits had been granted to the licensees. Thus, the TDSAT held that, strictly speaking, the contractual term stipulating that the Entry Fee was non-refundable would not by and in itself preclude the claim for refund on the basis of the judgment of this Court in **CPIL** (supra), which held that the entire process leading up to the award of the licences was arbitrary and constitutional. The TDSAT having entered the above finding, for the rest of the discussion, this judgment will also proceed on that premise.

PART E

E Jurisdiction of TDSAT

25. The appellant has objected to TDSAT's conclusion that the appellant's remedy does not fall in the contractual realm between itself and the Union of India. Since the public law remedy of restitution was neither claimed before nor granted by this Court in **CPIL** (supra), the TDSAT went into the genesis of the dispute and consequential reliefs granted by this court. . The TDSAT held that since the challenge was focused on the arbitrary and *mala fide* actions that were embodied in the policy of allotting 2G spectrum licences, the quashing of the licences was a necessary consequence of the grant of the licences being vitiated. Thus, the TDSAT held that "*a direction for refund* [is] *outside the purview of the Contract Act and an exercise of Constitutional powers is clearly beyond the authority of this Tribunal* [TDSAT] *and in that regard the petitioner must approach the Court that quashed its licenses, that is, Supreme Court and seek appropriate reliefs*".

26. This Court will analyse whether the TDSAT had the jurisdiction to entertain the claim for a refund of the Entry Fee. The TDSAT is an adjudicatory body constituted under the TRAI Act. Initially, the TRAI was empowered to regulate the telecom sector in India and adjudicate upon disputes. The adjudicatory powers of TRAI, specifically with respect to issuing directions to DoT, were placed in issue before the Delhi High Court in **Union of India** v. **Telecom Regulatory Authority of India**[23]. The Delhi High Court held that TRAI did not possess the authority to issue directions to DoT. In order to overcome the effect of this position, the TRAI Act was amended in 2000 and the TDSAT was established. TDSAT's website[24] elaborates on the Statement of Objects and Reasons to the Telecom Regulatory Authority of India (Amendment) Act 2000 and notes:

[23] (1998) 46 DRJ 557

24 Available at <https://tdsat.gov.in/admin/introduction/uploads/TDSAT%20INTRO.pdf> accessed on 28 February 2022

25 "14. Establishment of Appellate Tribunal.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to—

(*a*) adjudicate any dispute—

"In order to bring in functional clarity and strengthen the regulatory framework and the disputes settlement mechanism in the telecommunication sector, the TRAI Act of 1997 was amended in the year 2000 and TDSAT was set up to adjudicate disputes and dispose of appeals with a view to protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector…"

The TRAI Act governs the functioning of the TDSAT. The jurisdiction of civil courts has been ousted by Section 15. Section 16 enables the TDSAT to regulate its own procedure, guided by the principles of natural justice. An appeal on a substantial question of law lies to this Court under Section 18 of the TRAI Act. In the above statutory context, the jurisdiction of TDSAT will be evaluated below.

27. Section 14(a)25 of the TRAI Act empowers the TDSAT to adjudicate any dispute:

(*i*) between a licensor and a licensee;

(*ii*) between two or more service providers;

(*iii*) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to—

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) the dispute between telegraph authority and any other person referred to in sub-section (1) of Section 7-B of the Indian Telegraph Act, 1885 (13 of 1885);.."

26 (2003) 3 SCC 186

(i) Between a licensor and licensee;

(ii) Between two or more service providers; and

(iii) Between a service provider and a group of consumers.

28. The scope of the TDSAT's powers to adjudicate "any dispute" was interpreted in **Cellular Operators Association of India** v. **Union of India**26 by a three-judge Bench of this Court. The Court held that the powers envisaged by the TRAI Act for the TDSAT are wide and it would not be appropriate for this Court to impose limitations on them. Chief Justice G B Pattanaik noted:

"8…Chapter IV containing Section 14 was inserted by an amendment of the year 2002 and the very Statement of Objects and Reasons would indicate that to increase the investors' confidence and to create a level playing field between the public and the private operators, suitable amendment in the Telecom Regulatory Authority of India Act, 1997 was brought about and under the amendment, a tribunal was constituted called the Telecom Disputes Settlement and Appellate Tribunal for adjudicating the disputes between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers and also to hear and dispose of appeal against any direction, decision or order of the Authority. The aforesaid provision was absolutely essential as the organizations of the licensor, namely, MTNL and BSNL were also service providers. That being the object for which an independent tribunal was

constituted, the power of that Tribunal has to be adjudged from the language conferring that power and it would not be appropriate to restrict the same on the ground that the decision which is the subject-matter of challenge before the Tribunal was that of an expert body.

[…]

Having regard to the very purpose and object for which the Appellate Tribunal was constituted and having examined the different provisions contained in Chapter IV, more particularly, the provision dealing with ousting the jurisdiction of the civil court in relation to any matter which the Appellate Tribunal is empowered by or under the Act, as contained in Section 15, we have no hesitation in coming to the conclusion that the power of the Appellate Tribunal is quite wide, as has been indicated in the statute itself and the decisions of this Court dealing with the power of a court, exercising appellate power or original power, will have no application for limiting the jurisdiction of the Appellate Tribunal under the Act. Since the Tribunal is the original authority to adjudicate any dispute between a licensor and a licensee or between two or more service providers or between a service provider and a group of consumers and since the Tribunal has to hear and dispose of appeals against the directions, decisions or order of TRAI, it is difficult for us to import the self-contained restrictions and limitations of a court under the judge-made law to which reference has already been made and reliance was placed by the learned Attorney-General…"

Justice S B Sinha, in his concurring opinion, further elaborated on the jurisprudence surrounding tribunals constituted under regulatory statutes. The judgment noted that the TDSAT was a creature of statute and was empowered to determine its jurisdiction, subject to the constraints stipulated in the statute. The appeal to this Court under Section 18 has been confined to a "substantial question of law". Since no such constraints have been placed on the jurisdiction of the TDSAT under Section 14, the jurisdiction of the TDSAT was held to be broader:

"27. TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law…

[…]

29. If a jurisdictional question or the extent thereof is disputed before a tribunal, the tribunal must necessarily decide it unless the statute provides otherwise. (See Judicial Review of Administrative Law by H.W.R. Wade and C.F. Forsyth, p. 260.) Only when a question of law or a mixed question of fact and law are decided by a tribunal, the High Court or the Supreme Court can exercise its power of judicial review.

[…]

34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise Parliament thought of creating an independent expert tribunal which, if an occasion arises therefor, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the authority. Succinctly stated, the jurisdiction of the Tribunal is not circumscribed in any manner whatsoever…"

29. Section 14 of the TRAI Act has also been interpreted in **Union of India** v. **TATA Teleservices (Maharashtra Ltd)**[27] by a two-judge Bench of this Court. In that case, the respondent had moved the TDSAT seeking a declaration that the action of the Union of India (the licensor) in raising a claim and recovering the amount was

unlawful. The respondent also sought a declaration that a set-off made by invoking a condition of the licence in respect of the Maharashtra service area was illegal. The Union of India claimed that it was entitled to make the set-off and recover damages occasioned by the failure of the respondent to fulfil its obligations under a letter of intent issued in respect of the Karnataka Telecom circle. The TDSAT had rejected the claim of the Union of India that it was entitled to a legal or equitable set off and held that it had no jurisdiction to enter a counterclaim at the instance of the Union of India. In appeal, this Court held that either as a licensor or a service provider, the Union government could make an application to TDSAT regarding a dispute between it and the licensee, another service provider or a group of consumers. This Court noted that there was no reason to whittle down the right "*of the Union government to move the Tribunal for adjudication of its claim within the purview of Section 14(1)*". This Court observed that if the subject matter was capable of being raised by way of a claim under Section 14 of the TRAI Act, it would not be logical to exclude the power to raise a counterclaim. Having held that the TDSAT had jurisdiction to entertain a counter claim, the judgment dealt with the submission of the respondent that where a licence had not actually been issued to a party by the Union government, the dispute did not fall either under Clause (i) or (ii) of Section 14(a). The Court held that:

[27] (2007) 7 SCC 517 ("**Tata Teleservices**")

"19…In other words, a dispute commencing with the acceptance of a tender leading to the possible issue of a licence and disputes arising out of the grant of licence even after the period has expired would all come within the purview of Section 14(*a*) of the Act. To put it differently, Section 14 takes within its sweep disputes following the issue of a letter of intent, pre-grant of actual licence as also disputes arising out of a licence granted between a quondam licensee and the licensor."

The Court observed that though the bid submitted by the respondent had been accepted by the Union of India and a letter of intent was issued, the contract ultimately did not come into existence since the respondent was insisting on certain modifications and the licence was not actually granted. The Court held:

"22. We have already indicated that a specialised tribunal has been constituted for the purpose of dealing with specialised matters and disputes arising out of licences granted under the Act. We therefore do not think that there is any reason to restrict the jurisdiction of the tribunal so constituted by keeping out of its purview a person whose offer has been accepted and to whom a letter of intent is issued by the Government and who had even accepted that letter of intent. Any breach or alleged breach of obligation arising after acceptance of the offer made in response to a notice inviting tender, would also normally come within the purview of a dispute that is liable to be settled by the specialised tribunal."

This Court also held that there was no reason to restrict the expression "licensee" appearing in Section 14(a)(i) to exclude a person like the respondent to whom a Letter of Intent had been issued, when the Letter of Intent had been accepted but an attempt had been made to negotiate certain terms before a formal contract was entered into and work commenced. The Court held:

"23. We see no reason to restrict the expressions "licensor" or "licensee" occurring in Section 14(*a*)(*i*) of the Act and to exclude a person like the respondent who had been given a letter of intent regarding the Karnataka Circle, who had accepted the letter of intent but was trying to negotiate some further terms of common interest before a formal contract was entered into and the work was to be started. **To exclude disputes arising between the parties thereafter on the failure of the contract to go through, does not appear to be**

warranted or justified considering the purpose for which TDSAT has been established and the object sought to be achieved by the creation of a specialised tribunal."

(**emphasis supplied**)

30. Relying upon the judgment in **Tata Teleservices** (supra), the appellant claims that the refund of the Entry Fee falls within the purview of Section 14(a)(i) of the TRAI Act. While evaluating the submissions, it must be noted at the outset, that there is an inconsistency in the line of submissions urged on behalf of the appellant. The Union of India submitted that the Entry Fee which was paid by the appellant was a one-time non-refundable fee in terms of the UASL Guidelines and the UASL agreement. The response of the appellant to the above submission is that the licence was not terminated for a breach on the part of the appellant, nor did the appellant voluntarily surrender the licence. Hence, according to the appellant, the clause in the guidelines and the agreement precluding refund would not stand attracted. In other words, as a result of the decision of this Court in **CPIL** (supra), the entire process leading up to the award of licence for 2G spectrum was held to be vitiated and the licences were quashed. The TDSAT has accepted this line of submission of the appellant and held that the UASL condition in regard to the non-refundability of the one-time Entry Fee would not *per se* stand attracted where the licence was not terminated for a breach but was quashed by this Court by the exercise of its jurisdiction under Article 32 for the reason that the entire process was found to be vitiated and manifestly arbitrary. The basis of the claim which has been raised by the appellant for refund is not a dispute over the terms which govern the relationship between the parties following the issuance of a Letter of Intent but before the grant of an actual licence, or a dispute arising out of a licence granted between the licensor or a licensee. As a matter of fact, it is also important to note that the appellant, as will be analyzed in greater detail later, has placed reliance on the doctrine that an agreement which is void cannot be split up and none of the parties to the agreement can be permitted to seek part-enforcement of a contract through a court of law. In support of this proposition, reliance has been placed on the decision of this Court in **Tarsem Singh** v. **Sukhminder Singh**[28]. A two-judge Bench of this Court had held that if an agreement is held to be void, then none of the terms, "*except in certain known exceptions, specially where the clause is treated to constitute separate and independent agreement, severable from the main agreement*" can be enforced separately and independently.

[28] 1998 (3) SCC 471 ("**Tarsem Singh**")

31. The reliance on the principle embodied in **Tarsem Singh** (supra) is a clear indicator that the basis of the claim of the refund does not emanate from the relationship between the appellant and the respondent as licensor and licensee. The claim for restitution is based independently on the ground that upon the decision of this Court in **CPIL** (supra) holding the licence to be unlawful, the appellant is entitled to restoration of the benefit which has been obtained by the Union of India under an agreement which is held to be void.

32. Apart from what has been stated above, the earlier analysis of the decision in

CPIL (supra) indicates that when the controversy over the allocation of 2G spectrum and the licences was the subject matter of adjudication before this Court, the appellant as well as the Union government were defending the allocation of the spectrum and the grant of 2G licences. The appellant was on notice of the fact that the award of licences in pursuance of the "First Come First Serve" policy was under challenge and the main relief which was sought in the proceedings under Article 32 was for the setting aside of the auction and the award of damages. It is in this backdrop, that the conduct of the appellant assumes significance. The appellant did not, in the course of the adjudication before this Court, put forth the plea for refund of the Entry Fee in the event that the allocation of the spectrum or the grant of licences were to stand vitiated.

33. This Court has noticed a rising trend of cases where parties have attempted to take another bite at the cherry by initiating proceedings over various forums, particularly to circumvent the jurisdiction of this Court which is *in seisin* of the matter. A purportedly ancillary remedy is urged in another forum as a dilatory tactic or as an attempt at forum shopping. One of us (Dr Justice D Y Chandrachud), speaking for a two-judge Bench of this Court in **Vedanta Ltd.** v. **The Goa Foundation & Ors.**[29] had disapproved of such tactics. In that case, the Court dismissed a review petition against the decision in **Goa Foundation** v. **Sesa Sterlite Limited & Ors.**[30] which had analysed a party's attempt to pursue litigation before the High Court in spite of a conclusive decision of this Court which had quashed its mining leases and directed issuances of fresh leases with fresh environmental clearances in the State of Goa. In **T P Moideen Koya** v. **Government of Kerala**[31], a three-judge Bench of this Court disapproved of the practice of vexatious litigation when the effect of a binding judgement is sought to be diluted or altered in a manner that deviates from the procedure for modification. The Court noted:

[29] Review Petition (Civil) Diary No. 18447 of 2020 (9 July 2021)

[30] (2018) 4 SCC 218

[31] (2004) 8 SCC 106

"13. It is well settled that a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by law. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. While hearing a petition under Article 32 it is not permissible for this Court either to exercise a power of review or some kind of an appellate jurisdiction over a decision rendered in a matter which has come to this Court by way of a petition under Article 136 of the Constitution. The view taken in *Bhagubhai Dullabhbhai Bhandari* v. *District Magistrate* [AIR 1956 SC 585 : 1956 SCR 533 : 1956 Cri LJ 1126] that the binding nature of the conviction recorded by the High Court against which a special leave petition was filed and was dismissed cannot be assailed in proceedings taken under Article 32 of the Constitution was approved in *Daryao* v. *State of U.P.* [AIR 1961 SC 1457 : (1962) 1 SCR 574] (see para 14 of the Report)."

34. The judgment in **CPIL** (supra) contains a detailed enumeration of the facts which were brought to the attention of the Court and all the submissions which were placed on the record by the contesting parties. The submissions bear expressly on the lack of transparency and the effort on the part of the authorities of the Union government to benefit a select group of persons/entities who were favoured under the "First Come

First Serve" policy. The decision dwelt on the benefits which the selected entities have received — both in terms of excluding others as well as in setting down the financial terms for the award of the licence. The determination of the Entry Fee was an integral element of the financial terms governing the award of the licence and was not a stand-alone feature which could be isolated from the overall process leading up to the award of licences. Therefore, the submission of the appellant that the right to appeal for a refund of the Entry Fee would enure after the decision in **CPIL** (supra) would be a simplistic understanding of the process and the ultimate decision of this Court. While directing the cancellation of the licences and ordering a fresh auction, this Court imposed costs of Rs 5 crores on one set of licensees and Rs 50 lakhs on another set, after assessing their culpability in wrongly benefitting from the "*wholly arbitrary*" and "*unconstitutional exercise*" of license and spectrum allocation. It would be an improper reading of the judgment to postulate that the decision leaves open a claim for the refund of the Entry Fee. The payment of the Entry Fee was one element in the overall financial conspectus which led to the award of licences. The adjudication before this Court in **CPIL** (supra) must be construed as a one composite whole from which its parts cannot be separated.

35. The appellant has argued that if the TDSAT's conclusion on the jurisdiction were to be accepted, it would impinge on the expanse of its jurisdiction and will exclude certain disputes falling within the ambit of public law. However, this argument is not a correct reading of the conclusion that TDSAT has arrived at. *De hors* the decision in **CPIL** (supra), the appellant's dispute over the terms of the license with the Union of India (licensor) would fall within the jurisdiction of the TDSAT under Section 14(a)(i), as affirmed by this Court in **Tata Teleservices** (supra). The respondent's argument that the appellant is no longer a "licensor" after the quashing of the licenses would be a restrictive reading of the jurisdiction of the TDSAT in view of the decision in **Tata Teleservices** (supra). However, since the policy on the allocation of spectrum and the licences were quashed on the grounds of *mala fides* and arbitrariness in the Union government's policy, the subsequent enquiry into viability of the refund of the Entry Fee would have to be agitated before the same Court.

36. Such practice has been previously followed by the TDSAT. In **AUSPI** (supra), a two-judge Bench of this Court considered the decision of the TDSAT on the definition of AGR which was upheld by this Court in the exercise of its appellate jurisdiction under Section 18 of the TRAI Act. This Court was called upon to decide whether a substantially similar question can be reagitated before the TDSAT after this Court's dismissal of the civil appeal against the TDSAT order holding that AGR will include only revenue arising from licensed activities and not revenue from activities outside the licence of the licensee. The Court observed that the TDSAT had jurisdiction, only after specifically noting the order of this Court granting the Union of India specific liberty to allege the issues before the TDSAT. This Court noted:

"32. The first substantial question of law which we have to decide is whether after dismissal of Civil Appeal No. 84 of 2007 of the Union of India by this Court on 19-1-2007 [*Union of India* v. *Assn. of Unified Telecom Service Providers of India*, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] against the order dated

7-7-2006 of the Tribunal, the Union of India can reagitate the question decided in the order dated 7-7-2006 that the adjusted gross revenue will include only revenue arising from licensed activities and not revenue from activities outside the licence of the licensee.

33. For deciding this question, we must first look at the language of the order dated 19-1-2007 [Union of India v. Assn. of Unified Telecom Service Providers of India, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] of this Court in Civil Appeal No. 84 of 2007. The order dated 19-1-2007 [Union of India v. Assn. of Unified Telecom Service Providers of India, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] is quoted hereinbelow:

"Heard the parties. Pursuant to the direction of TDSAT in the impugned order, a fresh recommendation has been made by TRAI. In view thereof, we see no reasons to interfere. *The appeal is dismissed. The appellant is, however, given liberty to urge the contentions raised in this petition before TDSAT*."

(emphasis supplied)

It will be clear from the language of the order dated 19-1-2007 [Union of India v. Assn. of Unified Telecom Service Providers of India, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] that while dismissing the appeal, the Court has given liberty to the appellant, namely, Union of India, to urge the contentions raised in Civil Appeal No. 84 of 2007.

34...Thus, as per the express language of the order dated 19-1-2007 [Union of India v. Assn. of Unified Telecom Service Providers of India, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] of this Court in Civil Appeal No. 84 of 2007, the Union of India could raise each of the grounds extracted above before the Tribunal. Hence, even if we hold that the order dated 7-7-2006 of the Tribunal got merged with the order dated 19-1-2007 [Union of India v. Assn. of Unified Telecom Service Providers of India, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] of this Court passed in Civil Appeal No. 84 of 2007, by the express liberty granted by this Court in the order dated 19-1-2007 [Union of India v. Assn. of Unified Telecom Service Providers of India, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] , the Union of India could urge before the Tribunal all the contentions covered under Grounds 1 to 6 extracted above including the contention that the definition of adjusted gross revenue as given in the licence could not be challenged by the licensees before the Tribunal and will include all items of revenue mentioned in the definition of adjusted gross revenue in the licence."

37. Apart from the above, it must be noted that the appellant made no effort to urge during the course of the submissions before the Court in **CPIL** (supra) that they should be allowed a refund of Entry Fee in the event that the Court were to quash the process and the award of licences. Significantly, the appellant did not seek the permission of this Court at that stage to reserve their liberties of agitating a claim for refund of Entry Fee in separate proceedings. Besides having such a course of action open to them before the judgment was delivered, the appellants had their remedies open in law even after the decision by seeking liberty of adopting independent proceedings for agitating the refund of the Entry Fee. Not having done this at any stage in, or in connection with, the proceedings relating to the decision in **CPIL** (supra), the appellant cannot be permitted to do so subsequently.

38. Attempting to get over this hurdle, the appellant urged before this Court that what could have been agitated in the course of the proceedings leading up to the decision in **CPIL** (supra) can well be agitated in the present proceedings since the coram in both cases would be the Supreme Court and the appellant is now in appeal before this Court against the decision of the TDSAT. Such a course of action would not plainly be open to the appellant since the jurisdiction which has been invoked presently in the civil appeal is the appellate jurisdiction arising out of the decision of the TDSAT to reject the claim for refund of the Entry Fee. The conduct of the appellant indicates that

on 13 May 2016, the appellant sought to withdraw the appeals against the order of the TDSAT. The Court had recorded – "*the appellant prays for liberty to withdraw the present appeals and instead approach this Court once again if it becomes so necessary".* The appellant ought to have obtained specific liberty of the Court on 13 May 2016 of pursuing proceedings before the TDSAT, something which is conspicuous by its absence in the order which was passed by this Court. Yet, the appellant chose to move the TDSAT by filing the Second Telecom Petition. The TDSAT noted that the petition was a "*second attempt*" by the Appellant "*for claiming the same relief*" which had been sought under the impugned order of the TDSAT. Thus, when the appellant failed in seeking relief on 11 December 2018, it filed an appeal against the order of TDSAT and then moved this Court for restoration of the first set of appeals which was allowed on 7 January 2020. The course of action which has been adopted by the appellant is anything but fair — withdrawing the civil appeals which were instituted against the first order of the TDSAT without obtaining specific liberty or permission to move the TDSAT, instituting a second round of litigation before the TDSAT, and then obtaining a revival of the first set of civil appeals. A party must not be allowed to conduct litigation in this manner. Such a course of action is subject to grave abuse since it lays bare an effort at forum-shopping and selectively deciding where and before whom it would pursue its remedies. It is in this backdrop, that the failure of the appellant to be fair with the Court when it addressed its submissions in the judicial process leading up to the decision in **CPIL** (supra) must be assessed. For the above reasons we are of the view that the TDSAT has correctly come to the conclusion that the claim by the appellant for refund of the Entry Fee could not have been entertained.

F The claim founded on frustration and restitution

39. In this section of the judgment, we will analyse the claim of the appellant that it is entitled to claim a refund of the Entry Fee on an application of the doctrine of frustration and the principle of restitution. The appellant has placed reliance on the provisions of Sections 56 and 65 of the Contract Act. The basic postulate of the appellant is that when a licence is granted under the proviso to Section (4)(1) of the Telegraph Act, the licence is in the nature of a contract between the government and licensee, thus bringing it within the ambit of the Indian Contract Act.

40. In **AUSPI** (supra), a two-judge Bench of this Court has held:

"39. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a licence in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a licence in his favour on such conditions and in consideration of such terms as it thinks fit, a licence granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee."

The principle which has been elucidated in the above extract is that when the Union government parts with the exclusive privilege which is conferred upon it by Section

4(1) of the Telegraph Act by granting a licence, the licence is in the nature of contract between the Union government and the licensee.

41. It is on the above premise that the appellant seeks to invoke the application of the doctrine of frustration of contract and of restoration. Section 56 of the Indian Contract Act provides as follows:

"56. **Agreement to do impossible act**.— An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

42. The doctrine of frustration is elucidated in the three-judge Bench decision of this Court in **Satyabrata Ghose** v. **Mugneeram Bangur & Co.**[32]. Justice BK Mukherjee, while explaining the doctrine of frustration, observed:

[32] 1954 SCR 310

"10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility…We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration…" **PART F** 53

Thus, it was held that the applicability of Section 56 of the Indian Contract Act is not limited to cases of physical impossibility. The Court also noted that in deciding cases in India, the only test which must apply "*is that of supervening impossibility or illegality of the act agreed to be contractually done*". Thus, the Court enunciated the doctrine underlying Section 56 by construing the word "impossible" in its practical sense, not just in its literal sense. Similarly, Section 20[33] of the Indian Contract Act envisages a situation where an agreement is void when both parties are under a mistake as to a matter of fact.

[33] "**20. Agreement void where both parties are under mistake as to matter of fact.**—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact."

43. In **Tarsem Singh** (supra), this Court was confronted with a contract being void under Section 20 of the Indian Contract Act as the parties were under a mistake of fact regarding the metric for assessing the area of land that was the subject of the contract. This Court, while interpreting the expression "discovered to be void", held

that these words comprehend a situation in which parties were suffering from a mistake of fact from the very beginning but had not realized at the time of entering into the agreement or signing of the documents that they were suffering from any such mistake and had therefore acted *bona fide* while entering into such agreements. The agreement, as the Court held, in that case was void from its inception and was discovered to be so at a much later date.

44. The appellant, besides placing reliance on **Tarsem Singh** (supra), has urged that all judicial decisions are retrospective (unless in a particular case this Court makes its judgment prospective) and hence, the voidness which attaches to its UASLs would relate back to their very inception. It is on this basis that the appellant stakes its claim for a refund of the Entry Fee based on the principle of restitution.

45. Section 65 of the Indian Contract Act recognizes the principle of restitution, particularly when a contract is discovered to be or becomes void. It stipulates thus:

"**65. Obligation of person who has received advantage under void agreement, or contract that becomes void**.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

46. In *Pollock & Mulla's* seminal treatise on the Indian Contract Act[34], it has been noted that Section 65 does not operate in derogation of the maxim *in pari delicto potior est conditio possidentis*:

[34] R Yashod Vardhan and Chitra Narayan, *Pollock & Mulla The Indian Contract and Specific Relief Acts Volume I* (16th edition, LexisNexis)

"Section 65 is not in derogation of the common law maxims *ex dolo malo non oritur actio* and *in pari delicto potior est conditio possidentis*; and only those cases as are not covered by these maxims can attract application of the provision of section 65 on the footing that when an agreement in its inception was not void and it was not hit by the maxims but is discovered to be void subsequently, right to restitution of the advantage received under such agreement is secured on equitable consideration. The section has been held not to apply where both parties knew of the illegality at the time the agreement was made, and were *in pari delicto*."

Thus, the application of Section 65 has to be limited to those cases were the party claiming restitution itself was not *in pari delicto*.

47. In *The Principles of Law of Restitution*[35], it has been noted that all claims for restitution are subject to a defence of illegality. The genesis of this defence is in the legal maxim *ex turpi causa non oritur actio* (no action can arise from a bad cause). A court will not assist those who aim to perpetuate illegality. This rule was initially recognized by the House of Lords in its decision in **Holman** v. **Johnson**[36]. Lord Mansfield held:

[35] Graham Virgo, *The Principles of the Law of Restitution* (3rd edition, OUP) pg 710

[36] (1775) 1 Cowp 341, 343; 98 ER 1120, 1121

"The objection, that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so. The principle of public policy is this; *ex dolo malo non oritur actio*. **No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff 's own stating or otherwise, the cause of action appears to**

arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

(**emphasis supplied**)

The Principles of Law of Restitution subsequently notes that *in pari delicto potior est conditio possidentis* is a way of qualifying the *ex turpi causa* defence[37]:

[37] *Supra* at 35, pg 711

[38] [2016] 3 WLR 399

"This in pari delicto principle enables the court to analyse the particular circumstances of the case to determine whether the claimant is less responsible for the illegality than the defendant, for then, as between the claimant and the defendant, the just result is that the claimant should not be denied relief, since the parties are not *in pari delicto*. **But where the claimant is more responsible for the illegality or the parties are considered to be equally responsible, the *in pari delicto* principle applies and restitution will be denied.**"

(**emphasis supplied**)

Thus, when the party claiming restitution is equally or more responsible for the illegality of a contract, they are considered *in pari delicto*.

48. In the decision of the UK Supreme Court in **Patel** v. **Mirza**[38], Lord Sumption JSC has succinctly explained the nature of the inquiry to determine whether a party is *in pari delicto*:

"241 To the principle that a person may not rely on his own illegal act in support of his claim, there are significant exceptions, which are as old as the principle itself and generally inherent in it. **These are broadly summed up in the proposition that the illegality principle is available only where the parties were *in pari delicto* in relation to the illegal act. This principle must not be misunderstood. It does not authorise a general inquiry into their relative blameworthiness. The question is whether they were *legally* on the same footing.** The case law discloses two main categories of case where the law regards the parties as not being *in pari delicto*, but both are based on the same principle.

242 One comprises cases in which the claimant's participation in the illegal act is treated as involuntary: for example, it may have been brought about by fraud, undue influence or duress on the part of the defendant who seeks to invoke the defence…

243 The other category comprises cases in which the application of the illegality principle would be inconsistent with the rule of law which makes the act illegal. The paradigm case is a rule of law intended to protect persons such as the plaintiff against exploitation by the likes of the defendant. Such a rule will commonly require the plaintiff to have a remedy notwithstanding that he participated in its breach…"

(**emphasis supplied**)

Thus, in determining a claim of restitution, the claiming party's legal footing in relation to the illegal act (and in comparison to the defendant) must be understood. Unless the party claiming restitution participated in the illegal act involuntarily or the rule of law offers them protection against the defendant, they would be held to be *in pari delicto* and therefore, their claim for restitution will fail.

49. The position is in India is similar to that of the case of **Kuju Collieries Ltd.** v. **Jharkhand Mines Ltd.**[39], where a Bench of three learned judges of this Court relied on a judgment of a five-judge bench of the then Hyderabad High Court. While construing the provisions of Section 65, this Court held:

[39] (1974) 2 SCC 533

"8. A Full Bench of five Judges of the Hyderabad High Court in Budhulal v. Deccan Banking Company [AIR 1955 Hyd 69 (FB) : ILR 1955 Hyd 101] speaking through our brother, Jaganmohan Reddy, J. as he then was, referred with approval to these observations of the Privy Council. **They then went on to refer to the observations of Pollock and Mulla in their treatise on Indian Contract and Specific Relief Acts, 7th Edn. to the effect that Section 65, Indian Contract Act does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English Law will be the best guide. They then referred to the reasoning of the learned authors that if the view of the Privy Council is right namely that "agreements discovered to be void" apply to all agreements which are ab initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are in pari delicto.** The Bench then proceeded to observe:

"In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words "when an agreement is discovered to be void" means nothing more nor less than: when the plaintiff comes to know or finds out that the agreement is void. The word "discovery" would imply the pre-existence of something which is subsequently found out and it may be observed that Section 66, Hyderabad Contract Act makes the knowledge (Ilm) of the agreement being void as one of the pre-requisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in Section 65, Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.

A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage over the plaintiff — in pari delicto potior est conditio defendentio.

Section 84, Indian Trust Act, however, has made an exception in a case — where the owner of property transfers it to another for illegal purpose and such purpose is not carried into execution or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor.

This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that Section 65, Contract Act, is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for the subsequent discovery of that fact."

We consider that this criticism as well as the view taken by the Bench is justified. It has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them."

(**emphasis supplied**)

While upholding the view of the Hyderabad High Court, this Court held "*it* [the Full Bench of the Hyderabad High Court] *has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them*".

50. In an earlier decision of this Court in **Inmani Appa Rao** v. **Gollapalli**

Ramalingamurthi[40], a three-judge Bench held that where both the parties before the Court are confederates in the fraud, the Court must lean in favour of the approach which would be less injurious to public interest. Justice P B Gajendragadkar (as he then was), speaking for the Court, held:

[40] (1962) 3 SCR 739 ("**Inmani Appa Rao**")

"12. Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The appellants emphasised that the doctrine which is pre-eminently applicable to the present case is ex dolo malo non oritur actio or ex turpi causa non oritur actio. In other words, they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies in pari delicto potior est conditio possidentis; where each party is equally in fraud the law favours him who is actually in possession, or where both parties are equally guilty the estate will lie where it falls. On the other hand, Respondent 1 argues that the proper maxim to apply is nemo allegans suam turpitudinum audiendum est, whoever has first to plead turpitudinum should fail; that party fails who first has to allege fraud in which he participated. In other words, the principle invoked by Respondent 1 is that a man cannot plead his own fraud. In deciding the question as to which maxim should govern the present case it is necessary to recall what Lord Wright, M.R. observed about these maxims in Berg v. Sadler and Moore [(1937) 2 KB 158 at p. 62] . Referring to the maxim ex turpi causa non oritur actio Lord Wright observed that "this maxim, though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities". Therefore, in deciding the question raised in the present appeal it would be necessary for us to consider carefully the true scope and effect of the maxims pressed into service by the rival parties, and to enquire which of the maxims would be relevant and applicable in the circumstances of the case. **It is common ground that the approach of the Court in determining the present dispute must be conditioned solely by considerations of public policy. Which principle would be more conducive to, and more consistent with, public interest, that is the crux of the matter. To put it differently, having regard to the fact that both the parties before the Court are confederates in the fraud, which approach would be less injurious to public interest. Whichever approach is adopted one party would succeed and the other would fail, and so it is necessary to enquire as to which party's success would be less injurious to public interest.**"

(**emphasis supplied**)

51. The principle which was enunciated in the judgment in **Inmani Appa Rao** (supra) has been more recently applied in a decision of a three-judge Bench of this Court in **Narayanamma** v. **Govindappa**[41]. The Court held:

[41] 2019 (19) SCC 42

"28. Now, let us apply the other test laid down in *Immani Appa Rao* [*Immani Appa Rao* v. *Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] . At the cost of repetition, both the parties are common participator in the illegality. In such a situation, the balance of justice would tilt in whose favour is the question. As held in *Immani Appa Rao* [*Immani Appa Rao* v. *Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] , if the decree is granted in favour of the plaintiff on the basis of an illegal agreement which is hit by a statute, it will be rendering an active assistance of the court in enforcing an agreement which is contrary to law. As against this, if the balance is tilted towards the defendants, no doubt that they would stand benefited even in spite of their predecessor-in-title committing an illegality. However, what the court would be doing is only rendering an assistance which is purely of a passive character. As held by Gajendragadkar, J. in *Immani Appa Rao* [*Immani Appa Rao* v. *Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] , the first course would be clearly and patently inconsistent with the public interest whereas, the latter course is lesser injurious to public interest than the former."

52. Hence, in adjudicating a claim of restitution under Section 65 of the Indian Contract Act, the court must determine the illegality which caused the contract to become void and the role the party claiming restitution has played in it. If the party

claiming restitution was equally or more responsible for the illegality (in comparison to the defendant), there shall be no cause for restitution. This has to be determined on the facts of each individual case.

53. The appellant before us has relied upon the decision of TDSAT in **S Tel Pvt. Ltd.** v. **Union of India**[42] to establish that the blame for quashing of the UASLs lies with the Union government alone. The issue which came up for decision before the TDSAT in that case was whether the petitioner was entitled to the refund of the money which it paid for allocation of 3G spectrum under licences which were later quashed by the judgment of this Court. In that case, the petitioner had applied for UASLs in six circles/service areas on 7 July 2007. The Government issued a press note on 24 September 2007 prescribing a cut-off date of 10 October 2007 for submissions of applications for a fresh UASL. On 28 September 2007, the petitioner applied for UASLs in sixteen circles in addition to its earlier application for six circles.

[42] 2015 SCC OnLine TDSAT 1 ("**S Tel**")

On 10 January 2008, by another press note, the deadline for fresh licences was retrospectively advanced to 25 September 2007. On the same day, the government granted licences to 122 applicants, including the petitioner's previous application for six circles, whose applications had been received prior to 25 September 2007. Against the denial of licences for sixteen circles on the ground that the application was made beyond the cut-off date, the petitioner moved the Delhi High Court challenging the action of the government in retrospectively advancing the last date for submission of applications as arbitrary. The High Court held that the decision to fix the cut off-date for making applications, with a view to limit the number of service providers was contrary to the decision of the TRAI which the government had purported to accept. The government was accordingly directed to consider the petitioner's application which was submitted on 28 September 2007. The Division Bench having dismissed an *intra* court appeal, led to proceedings before this Court. The Attorney General stated that the application submitted by the petitioner was not rejected but was held in abeyance and it would be considered on a first-come-first-serve basis in terms of the then prevailing policy in consultation with the TRAI. This Court disposed of the appeal while sustaining the findings recorded by the Delhi High Court in regard to the change in the cut-off dates. For the purpose of the present discussion, it would not be necessary to advert to the detailed analysis in the above case, save and except to note that the petitioner moved the TDSAT claiming a refund of the amount which it had paid for the 3G spectrum in three service areas. Significantly in that case, the TDSAT observed:

"In course of hearing of the case we repeatedly asked Mr. Banerjee what blame, if any, for the quashing of its licences extends to the petitioner. Mr. Banerjee was unable to show anything from the Supreme Court judgment in *Centre for Public Interest Litigation* or from the Government records that might show that the petitioner was in any way responsible for the quashing of its licences.

It is thus clear that though the petitioner's UAS licences were declared illegal and quashed, that was not due to any fault by the petitioner but on account of the illegalities committed by the Government in the issuance of those one hundred and twenty two (122) licences. While discussing the provisions of clauses 3.6 and 3.7 of the NIA it is noted above that those clauses deal with a situation where the licence is cancelled/terminated

at the instance of the licensor for some fault on the part of the licensee. The quashing of the petitioner's licences in the present case thus clearly does not fall under the two clauses in the NIA. Further, as a result of the quashing of the petitioner's licences its contract with the Government relating to 3G spectrum got discharged on account of frustration, as provided under section 56 of the Contract Act, leaving it open to the petitioner to seek the relief of restitution in terms of section 65 of the Contract Act."

The decision of the TDSAT to allow a refund is thus clearly postulated on the principle that the petitioner was not at fault, but the UASLs were quashed because of the illegalities committed by the government. Therefore, there is a clear distinction between the facts as they emerged before the TDSAT in **S Tel** (supra) and the facts of the present case.

54. In the present case, the appellant has been held to be *in pari delicto*. The decision of this Court in **CPIL** (supra) leaves no manner of doubt that the appellant was among the group of licensees who were found to be complicit in obtaining benefits under the "First Come First Serve" policy of the Union government at the cost of the public exchequer. In such a situation and following the well-settled principles which have been enunciated above, the appellant could not be held entitled to claim a refund of its Entry Fee.

55. On behalf of the appellant, it is sought to be urged that in the auction which followed the decision in **CPIL** (supra), the Union government granted fresh licences including for the areas which were governed by the licences in favour of the appellant at a much higher value. This argument is completely unacceptable for the simple reason that if the Union government had held a transparent and objective process of conducting an auction when the initial licences were granted in favour of the appellant, a much higher value would have been realized by the public exchequer. The appellant has been the beneficiary of a manifestly arbitrary policy which was adopted by the Union government and which was quashed in the decision of this Court in **CPIL** (supra). That being the position, the appellant would not be entitled to a refund of the Entry Fee even on the principle of restitution embodied in Section 65 of the Indian Contract Act.

G The policy of set off

56. According to the appellant, the set off which was granted by the Union government in pursuance of the decision of the EGoM on 31 October 2012, constitutes an admission of liability. In this backdrop, it has been submitted that the policy which was adopted by the Union government by allowing a set off to licensees whose licences have been quashed subject to their participating in and being found successful in the fresh auction, suffers from manifest arbitrariness.

57. By the judgment of this Court in the **CPIL** (supra), the licensees whose licences had been quashed were not barred from participating in the subsequent auction for the grant of fresh licences. On 12 October 2012, the Ministry of Communications and Information Technology issued a document titled "Queries and Responses to the NIA for competitive bids for allocation of spectrum issued by the DoT". Among the queries, which were in the nature of Frequently Asked Questions, Query Numbers 74 and 75

and the response were in the following terms:

"74. i) **The original entry level Pan India license fee of Rs. 1506.82 crore (along with interest from the date of payment of such license fee) which was paid for acquiring the licenses, which are quashed by the Hon'ble Supreme Court for no reason attributable to a licensee, should be allowed to be set off against the earnest money required to be paid for participating in the new auction and against the successful bid amount, in the event of a successful bid. In the event there would be any shortfall in the money required to be paid by *xxx* on successful bid and the licensee fee already paid to you in respect of the quashed 21 UASL, *xxx* shall obviously pay such additionally.**	**A set off is allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount.**
ii) The bank guarantees originally submitted with the DoT in respect of the 21 USA licenses which are quashed by the Hon'ble Supreme Court for no reason attributable to *xxx* should be allowed to be used for the acquisition and allotment of new licenses and spectrums towards the requirement of the same, in the event of a successful bid by *xxx.* In the event there would be any shortfall in the bank guarantees required to be submitted by *xxx* on successful bid and the bank guarantees already submitted with DoT in respect of the quashed 21 UASL, *xxx* shall obviously submit such bank guarantees additionally.	Required bank guarantees in the event of winning of spectrum/acquisition of Unified License (Access Services) will need to be furnished.
75. i) We would like to seek clarity with regards to Government's position on levying "One Time Charge" on the incumbent Operators before the auction, so that we could arrive at a well-informed decision with regards to our participation in the auction.	This cannot be clarified at this stage
ii) **The price already paid by xxx at the time of issuance of licenses in 2008 should be adjusted in totality towards the auction price in case we are successful in auction else it should be refunded in totality. (Not to be linked Circle wise)**	**Please refer to response to query at Sl.no. 74."**

(**emphasis supplied**)

58. On 31 October 2012, the Cabinet Secretariat of the Union government circulated the Minutes of the Meeting of the EGoM held on 18 October 2012. The Minutes contain the rationale for the adoption of a policy of set off in the following terms:

"13. The EGoM considered the letter dated 12.10.2012 from the Minister of Information & Broadcasting regarding set-off of entry fee against earnest money and payment due in the event of spectrum being won and noted that the entry fee paid by TSPs whose licenses were quashed was for a period of 20 years. While on the one hand, the TSPs could be expected to have paid a pro-rata amount for the period of operation of the license, i.e. 2008-2012, on the other hand, there could be a claim for refund with interest for the pro-rata amount for the balance period. Therefore, the EGoM decided to allow such TSPs to adjust an amount equivalent to their full entry fee, without any interest, against the auction payments, both for participation and

for final payment on successful conclusion. It was clarified that the set-off would be permitted only to the quashed license holders participating in the auction. Such set off would be allowed to the extent of total entry fee paid for all quashed licenses on an aggregate basis without consideration of the expired period of license, only if they succeed in the auction. The set off will be permitted against the Earnest Money Bank Guarantee amount initially and later against the amount payable for auction price, irrespective of the number of Local Service Areas (LSAs) in which the holder of quashed license is successful in the auction and without requiring correlation between LSAs in which licenses were held earlier and the LSAs in which the holder of the quashed licenses is successful."

The Union government has submitted before this Court that the set off policy was formulated in order to encourage participation of all telecom operators in the subsequent auction, increasing the possibility of higher price discovery to the benefit of the public exchequer. It has been urged that the set off policy was aimed at the revival of the telecom industry in a manner which encouraged uninterrupted supply of services. The policy sought to increase participation at a subsequent auction by offering a concession in the form of a set off of the previously paid Entry Fee, in case the bidder had emerged successful in the fresh auction.

The appellant did not challenge the policy *per se* at that stage, nor did it attempt to enter into the fray at that stage when a fresh auction was held. In these circumstances, the policy decision adopted by the Union government cannot be allowed to be questioned at the behest of the appellant who sought a refund simpliciter in proceedings before the TDSAT. As held by a Constitution Bench in **R K Garg** v. **Union of India**[43], a greater free play in the joints must be accorded to decisions of economic policy where the legislature or the executive is called upon to make complex choices which cannot always conform to a straitjacket or doctrinaire solution.

[43] (1981) 4 SCC 675

59. For the above reasons, we do not find any reason to entertain the challenge to the set off policy at this stage at the behest of the appellant.

H Conclusion

60. For the above reasons, we have come to the conclusion that the appellant was *in pari delicto* with DoT and the then officials of the Union government. The appellant was the beneficiary of the "First Come First Serve" policy which was intended to favour a group of private bidding entities at the cost of the public exchequer. The contention of the appellant that it was exculpated from any wrong doing by the judgment of this Court in **CPIL** (supra) is patently erroneous. The process leading up to the award of the UASLs and the allocation of the 2G spectrum was found to be arbitrary and constitutionally infirm. The need for an open and transparent bidding process for the allocation of natural resources was substituted by a process which was designed to confer unlawful benefits on a group of selected bidders by which the appellant benefitted. The appellant has tried to obviate these findings by relying on its acquittal by the Special Judge, CBI. It is important to note that the criminal trial before the Special Judge, CBI was limited to the question as to whether the promoters of the appellant had cheated the DoT by providing a false representation of its compliance with Clause 8 of the UASL Guidelines, since it was allegedly being controlled by the

Essar group. The Special Judge, CBI acquitted the promoters of the appellant since the prosecution was unable to prove that: *(i)* officers of DoT considered the representation of the appellant to be false; *(ii)* the appellant was engaging in a sham transaction; or *(iii)* the appellant was actually controlled by the Essar group. Hence, the acquittal of the promoters of the appellant of these criminal charges does not efface or obliterate the findings which are contained in the final judgment of this Court in **CPIL** (supra). Hence, as a beneficiary and confederate of fraud, the appellant cannot be lent the assistance of this Court for obtaining the refund of the Entry Fee. In any event, such a course of action before the TDSAT was clearly in the teeth of the judgment of this Court in **CPIL** (supra).

61. For the above reasons, we have come to the conclusion that there is no merit in the appeals. The appeals are accordingly dismissed.

62. Pending application(s), if any, stand disposed of.
