

IN THE SUPREME COURT OF BANGLADESH
(Appellate Division)

Present :

Mr. Justice Syed J.R. Mudassir Husain, Chief Justice
Mr. Justice Mohammad Fazlul Karim
Mr. Justice Amirul Kabir Chowdhury

CIVIL PETITION FOR LEAVE TO APPEAL NO.815 OF 2005

(From the judgment and order dated 23rd April 2005 passed by the High Court Division in Writ Petition No.5135 of 2004).

World Tel Bangladesh Limited :Petitioner
-Versus-
Bangladesh represented by the :Respondents
Secretary, Ministry of Post and
Telecommunications, Bangladesh
Sachibbalaya, Ramna, Dhaka and
others

For the Petitioner : Dr. Kamal Hossain, Senior Advocate, (Mr. Mahmudul Islam, Senior Advocate with Mr. Rakanuddin Mahmud, Senior Advocate and Ms. Nihad Kabir, Advocate with him), instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For Respondent No.2 : Mr. Rafique-Ul-Huq, Senior Advocate, instructed by Mvi. Md. Wahidullah, Advocate-on-Record.

For Respondent No.7 : Mr. Annek R. Haque, Advocate (Mr. Joynal Abedin, Advocate with him), instructed by Mr. A.K.M. Shahidul Huq, Advocate-on-Record.


Respondent Nos.1, 3-6 : Not represented.

Date of hearing : The 23rd day of August, 2005.

(JUDGMENT)

Mohammad Fazlul Karim, J. This petition for leave to appeal is directed against the judgment and order dated 23.04.2005 passed by the High Court Division in Writ Petition No.5135 of 2004 discharging the Rule challenging the Memo No.BRTC/LL-Sec/WordTel/2002-1032 dated 20.04.2004 issued by respondent No.2 under the signature of respondent


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No.3 so far as it omits/deletes the "exclusive clause 2.3" of the License Agreement dated 12.07.2001 between the respondent No.1 and the petitioner and the Memo No.BRTC/LL-Se/WorldTel/2002-1177 dated 07.08.2004 issued by respondent No.2 under the signature of respondent No.6 declining to rescind the aforesaid Memo dated 20.4.2004 (Annexure-A and A-1 respectively to the writ petition).

The petitioner moved the High Court Division under Article 102 of the Constitution impugning the aforesaid Memos stating, inter alia, that the petitioner is a company incorporated under the Companies Act, 1994. On 22.11.1998, the Ministry of Posts and Telecommunications (hereinafter referred to as the "MOPT"), the Government of the People's Republic of Bangladesh issued "Request for Proposals" (hereinafter referred to as RFP) (Annexure-C to the writ petition) for installation of 3 lac Public Switching Telephone commonly known as land phone in private sector in Dhaka Multi-Exchange Area (hereinafter referred to as MEA). Accordingly, the MOPT published an invitation for international tender in The Financial Times, London on 1.12.1998 (Annexure-B to the writ petition). Article 4.2.2 of "RFP" provided that during the first four years of the licence term, MOPT would not issue any licence for fixed public wireline or wireless service operator to serve the Dhaka MEA other than the Licensee and the Bangladesh Telegraph and Telephone Board (hereafter referred to as BTTB). Pursuant to that invitation, Word Tel Holding Ltd, a company incorporated in London submitted bid which was successful. MOPT entered into a Memorandum of Understanding (Annexure-D to the writ petition) with World Tel Holding Ltd on 20.3.2000 for issuing licence for operation of 3 lac land phones in favour of a company to be incorporated in Bangladesh by World Tel Holding Ltd. Accordingly, World Tel Holding Ltd. together with World Tel Mauritius Ltd formed the petitioner-company on 12.6.2000 which was incorporated under the Companies Act, 1994. After that MOPT signed the License Agreement with the petitioner-company on 12.7.2001 (Annexure-B to the writ petition). Clause 2.3 of the License Agreement provides that until the fourth anniversary of the effective date,

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MOPT shall ensure that no person other than BTTB or its successors and the operator shall build, own or operate a Local Fixed Network in the Dhaka MEA. Clause 1.1.10 of the Licence Agreement provides the effective date as the date of issuance of the Operator Licence which will be issued on the 90th day after signing of the licence Agreement provided that in case of any delay in frequency allocation or signing of the Interconnection Agreement for reasons attributable to the first party then the effective date may be shifted by mutual agreement. According to the terms of the Agreement, the Operator Licence was not issued and 'Interconnection Agreement' has not yet been signed. As a result, effective date has not started to run. Meanwhile, the Bangladesh Telecommunication Act, 2001 (hereinafter referred to as the BT Act) was enacted by the Parliament. Section 1(2) of the Act provides that it would come into force when the Government publishes notification for commencement of the Act in the official Gazette. The Bangladesh Telecommunications Regulatory Commission (hereinafter referred to as the BTRC) was constituted on 31.1.2002 after the BT Act came into force. BTRC, however, expressed its unwillingness to accept the 'co-exclusivity clause' of the Licence Agreement. As a result, discussion took place but in spite of objections of the writ-petitioner, BTRC by memo dated 20.4.2004 (Annexure-A to the writ petition) in exercise of power under section 90 of the BT Act deleted "co-exclusivity clause" from the Licence Agreement permitting the writ-petitioner to implement the project in terms of the Licence Agreement but in spite of protests by the writ-petitioner, BTRC by the letter dated 7.8.2004 (Annexure-A) reiterated its earlier stand.

Writ-respondent Nos.1, 2 and 7 filed separate affidavits-in-opposition. The contention of respondent Nos.1 and 2 are identical. Their case, in short, is that the 'exclusivity clause' of the Licence Agreement is against public policy and is, therefore, void. The writ petition is ex-facie not maintainable for non-exhaustion of efficacious remedy of arbitration. The writ petitioner obtained the 'exclusivity clause' fraudulently. The Licence Agreement is unenforceable for non-compliance with the provisions of Article 145 of the Constitution of Bangladesh. The exclusivity clause is inconsistent with the

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objectives of BT Act and therefore, the BTRC was entitled to delete that clause from the Licence Agreement. The prime objective of the BT Act is open competition in the market of telecommunication and the 'exclusivity' clause contained in the Licence Agreement is inconsistent with the provisions of BT Act. In view of the provision of section 5 of the BT Act, the 'exclusivity clause' of the Licence Agreement cannot be operative. In addition, because of the non-obstante clause in section 5 of the BT Act, the provision of BT Act shall prevail in case of inconsistency with any other law in force. Clause 4.2.15 of the Agreement is to uphold the 'exclusivity' clause (clause 2.3) is void in the eye of law, because under section 23 of the Contract Act, such an agreement is not enforceable in view of the prevalent law. The BTRC did not unilaterally omit clause No.2.3 of the Agreement. On 18.10.2003, a meeting was held between the parties. Considering all the aspects, and hearing the petitioner, the BTRC amended the impugned clause.

Respondent No.7, BTTB, also filed an affidavit-in-opposition. This respondent did not state anything about the merit of the case, but stated that no interconnection Agreement was finalised; rather some informal discussions at the request of the petitioner were held between the BTTB and the petitioner.

Dr. Kamal Hossain, the learned Counsel appearing for the petitioner submitted that on December 1, 1998 international advertisement with a 'request for proposal' having been made for issuance of licence for setting up of 3 lac lines of land phone telecommunication for Dhaka MEA area, the petitioner having been selected on adopting a protective procedure and entered into an license agreement on 12th July, 2001 between the petitioner and the Ministry of Post and Telegraph under section 4 of the Telegraphy Act in the absence of BTRC on that date having no other competent authority in this regard under the Bangladesh Telecommunication Act, 2001 to grant the license agreement before 31.1.2002 when the Commission were constituted inasmuch as section 4 of the Bangladesh Telecommunication Act, 2001 provides that the provision of Telegraph Act would apply in case of conflict between the two, the aforesaid 'exclusivity' clause shall prevail

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
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inasmuch Bangladesh Telecommunication Act 2001 recognizes two distinct authorities with distinct functionaries and thus section 33(1) of Bangladesh Telecommunication Act 2001 read with National Telecommunication Policy 1988 clearly provides that the Government would determine the general policy and would be the sole authority to determine the number of operators and as such after the signing of the said agreement between the petitioner and respondent, the BTRC has no authority to delete the 'co-exclusive' clause in clause 2.3 of the license agreement dated 12.7.2001 and accordingly the High Court Division erred in holding that under the said provision of Bangladesh Telecommunication Act 2001 read with National Telecommunication Policy the Government having the choice to decide upon co-operation for the time being in Dhaka Multi Exchange Area, the BTRC is not the authority to decide otherwise.

The learned Counsel has further submitted that the Telecommunication Act having aimed at gradually shifting from monopolistic situation for market oriental situation and the 'co-exclusive' clause is a vehicle towards shifting away from the monopoly of BTTB, the High Court Division erred in law in finding that 'co-exclusivity' clause tend to monopoly which is not permitted by the Bangladesh Telecommunication Act 2001 as under section 34 thereof the Government is obliged/duty bound to discharge any obligation entrusted upon it by International agreement regarding Telecommunication inasmuch as there could not be conflict between the provision of the Foreign Private Investment Act and the Bangladesh Telecommunication Act 2001 and as such neither the Government nor the BTRC can vary the term of the license agreement without consent of the petitioner.

Mr. Mahmudul Islam, the learned Counsel appearing for the petitioner has joined issue in submitting that the question is as to whether the license agreement is void being inconsistent with law on ground of public policy as the Act does not give any authority to give monopoly but in the instant case the clause not being severable of the rest of the agreement, the contract cannot survive inasmuch as the competent authority at the time having

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entered into a lawful agreement with the petitioner along with the said clause as to 'co-exclusiveness' which is consistent with the National Telecommunication Policy and could also be saved by the provision of Foreign Private Investment (Permission and Protection) Act, 1980, the High Court Division erred in law in maintaining the impugned orders unilaterally varying the terms of the agreement which along with the licensing agreement containing 'co-exclusivity' clause is liable to be declared to have been passed without any lawful authority. The learned Counsel has lastly submitted that the provisions of sections 29, 30(2)m and 37(3)g, 89 and 90 have no manner of application in the instant case as under the law prevalent the said provisions are not attracted in the facts and circumstances of the case to delete the clause of 'co-exclusivity' duly incorporated by the parties in the license agreement upon proper and protracted negotiations.

Mr. Rafique-ul-Huq, the learned Counsel appearing for the respondents has submitted with reference to "Request for proposal" and the Telecommunication regulatory Commission reforms that the agreement containing 'exclusivity clause' being against public policy and the objectives thereof and being opposed to monopolistic policy has been lawfully deleted by the BTRC in accordance with the provisions of law inasmuch as the same is designed to provide undue advantage and monopoly to the petitioner as opposed to public policy and as such the High Court Division was correct to hold the impugned order valid.

Mr. Annek Huq, the learned Advocate appearing for the respondent No.2 while adopting the submission of the learned Counsel for the respondent No.1, has submitted with reference to the guideline for telecommunication that under section 90(3) of the Bangladesh Telecommunication Act, 2001 the commission was satisfied that the agreement with the petitioner by the MOPT contained the inconsistent clause of 'co-exclusivity' giving rise to the monopoly and accordingly, amended the said agreement deleting the inconsistent condition for which the impugned judgment did not suffer from any illegality.

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Certain facts detailed hereunder are relevant to resolve the issue involved in the case.


The respondent No.1 in its Ministry of Posts and Telecommunication advertised on December 1, 1998 in the Financial Times a "Request for proposals" for licence to build, own and operate a new telecommunications network in Dhaka with a capacity of 300,000 access lines authorizing the Licensee to provide telecommunications services to the public in the Dhaka Multi-Exchange Area (MEA). The 'request for proposals' contained one of the clauses namely, 4.2.2 'Exclusivity' i.e. "During the first four years of licence term, MOPT will not licence a fixed public wireline or wireless service operator to serve the Dhaka MEA other than the licensee and BTTB". It may be mentioned here that BTTB has already been operating as such in the said area.

Meanwhile, the Bangladesh Telecommunication Act, 2001 (Act No.XVIII of 2001) establishing an independent Commission for the purpose of development and efficient regulation of Telecommunication System and Telecommunication services in Bangladesh and matters ancillary thereto came into being on 16.4.2001 to be effective on such date the Government may, by notification in the official Gazette shall specify.

The Act accordingly came into force by SRO No.185-Ain/2001 dated 8.7.2001 published in the official Gazette on 10.7.2001.

On 12.7.2001 the licence agreement between the petitioner and the respondent was signed incorporating the clauses in the request for proposal including the exclusivity clause in 2.3 for 4 years in relation to other private sector operators. On 31.1.2002 Bangladesh Telecommunication Regulatory Commission was constituted for the transfer of certain powers and functions of the Ministry of Posts and Telecommunication to the Commission and assumed all regulatory and licensing findings of the MOPT and pursuant to sections 80 and 90 of the Telecommunication Act 2001 the Commission was granted power to revalidate the license Agreement. Thereafter, respondent No.2 by its letter dated 19.01.2003 informed the petitioner to modify exclusivity clause 3.2 and asked the petitioner to propose how best to agree

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on the modification of the said clause. The petitioner by its letter dated 7.3.2003 agreed to arrange a meeting to discuss 'the co-exclusivity clause'.


On 18.10.2003 the parties held a meeting and it was decided to hold a meeting for a detailed examination of the license agreement along with the provisions of B.T. Act, 2001 to identify inconsistencies, if any, and to submit a report therein with recommendation as to modification to the licence agreement and intimated the petitioner of the said decision on 2.11.2003 requesting the petitioner to nominate a representative to participate in the process of scrutinizing the relevant documents for any amendment that may be made to any of the conditions of the license Agreement.

On 17.12.2003 a meeting was held between the parties wherein the petitioner was informed that clause 2.3 i.e. exclusivity clause in the license agreement, in the opinion of the Commission, is violative of the provision of the Bangladesh Telecommunication Act and as such liable to be revoked and deleted. It was further agreed therein that the petitioner would seek independent legal advice on the issue and submit the same to the Commission.

Two legal opinions, one by Syed Istiaque Ahmed and Associates dated 5.1.2004 and another by Dr. Kamal Hossain and Associates dated 6.1.2004 opining that clause 2.3 of the license Agreement was not inconsistent with the BTA requiring any amendment were submitted to the Commission on 15.1.2004, further requesting to consider the same and to proceed with the implementation of the Agreement.

After series of correspondences between the Commission and the petitioner, the Commission ultimately on 20.4.2004 issued the letter revalidating the license agreement deleting the 'exclusivity' clause 2.3 thereof pursuant to sections 89 and 90 of the B.T. Act, 2001 for ensuring healthy competitive environment, prohibition of anti-competitive and discriminatory practice in the telecom sector and in view of huge unmet demand for telephone currently prevailing to the tune of about 07 million in the Dhaka Multi Exchange area and having regard to the public interest but

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all other conditions of the license Agreement remained unchanged. By said letter the petitioner was requested to take step for implementation of the project and complete the remaining part of the obligations of the license Agreement. The petitioner, thereafter, by letter dated 15.5.2004 resented to the change of the clause terming the exclusivity clause as consistent to the license Agreement and by another letter dated 4.8.2004 requested the respondent Commission to rescind the unilateral deletion of clause 2.3 threatening legal action.


In the backdrop of the aforesaid facts it is apparent that the licence agreement clause 4.15.2 was never unmindful about the new reformative legislation i.e. Bangladesh Telecommunication Act that was in the process of being enacted but even than it has adopted the said clause as under:

"The Operator will be subject to any such new laws or regulations lawfully coming into force in Bangladesh from time to time to the same extent they apply to BTTB and all other Public Telecommunications Operators licensed to operate Local Networks in Dhaka, except to the extent such new laws and regulations specifically contradict those Sections of this Agreement specified in Section 7.1 in respect of which the Operator's consent to amendment is required, in which case the provisions of this Agreement shall continue to govern and prevail."

Clause 7.1 provides that this Agreement and the Operator Licence and the Radio Licence may be amended or modified only in accordance with the provisions of the Telegraph Act, provided however that no modification or amendment to the provisions of this Agreement may be made without the prior consultation with the Operator.

Mr. Mahmudul Islam the learned Counsel appearing for the petitioner before the Court below has candidly conceded that such provision in clause 4.15.2 is void in term of section 23 of the Contract Act. But he further submitted that on this count the entire contract shall not be void as when the void portion is severable from the rest of the Agreement, the contract shall survive and be workable without offending the said provision, following the general rule on the subject that where one could not severe the illegal part

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from the legal part of a covenant, the contract is altogether void, but where one can sever them whether the illegality is created by statute or by the common law, the illegal part is severed retaining the legal part.

High Court Division has relied upon decisions on the proposition including the case of Dip Narain Singh Vs. Nayasher Prased and others reported in AIR 1930 (Allahabad)1 (Full Bench).

We are in full agreement on the proposition of law profounded therein. Now the question before us as to if the offending aforesaid provision is struck down whether the agreement is affected in its material particular with all rights and obligations of the contracting parties under the valid part of the license agreement.

Dr. Kamal Hossain, the learned Counsel has submitted that the impugned deletion of 'exclusivity clause 2.3' is contrary to the provision in the License Agreement that no modification of license agreement could be possible without the mutual consent of the parties, which term can by no stretch of imagination be termed as illegal or unenforceable.

The B.T. Act came into being on 8.7.2001 but the license agreement was signed on 12.7.2001 between MOPT and the petitioner at a time when under the B.T. Act it is the authority of the Commission to enter into any such Agreement and MOPT had no such authority.

Although according to the Commission there is alleged infirmity as to very formation of the contract in entering into the license agreement in hot haste but the Commission has not taken exception to the other parts of the license agreement except the 'exclusivity clause 2.3' which reads as under:

Exclusivity clause 2.3: "During the first four years of the licence term, MOPT will not licence a fixed public wire line or wireless since operator to save the Dhaka MEA other than the licensee and BTTB."

The petitioner relying on clause 9.5 of the license agreement has submitted that the respondents unilaterally could not delete the 'exclusivity' clause and thus the impugned order has been passed illegally and without lawful authority.

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 Superior Assistant
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The original clause 9.5 of the 'RFP' at the floating of the advertisement was as under:

"The licence Agreement may not be amended, modified or supplemented without prior written consent of MOPT. No waiver of any breach of any provision of this license agreement shall be effective or binding unless made in writing and, unless otherwise specified, any such waiver shall be limited to the specific breach waived."

As per RFP the petitioners have bidden and ultimately at the time of entering into a contract it appears that the said clause has been changed in the final License Agreement as under:

"This Agreement shall not be amended, modified or supplemented without the prior written consent of both parties. No waiver of any provision of this license Agreement shall be effective or binding unless made in writing and unless otherwise specified, any such waiver shall be dioriated to the specific breach waiver."

In considering the point referred to above together with section 90 of the B.T. Act, the High Court Division accordingly found :-


"Since the BTRC is not bound by the terms of the Agreement, it had the authority to amend any of the clause of the Agreement. Therefore, BTRC deleted the exclusivity clause by issuing Annexure-A in exercise of its power under section 90 of the BT Act.

We have perused the BT Act in general and section 29 thereof in particular. Nowhere we find that the BT Act provides any provision for giving monopoly to a particular operator. If the agreement was entered into before the BT Act came into operation, the petitioner could not say that a vested right was created in its favour and that the BTRC did not have the authority to take away its vested right in exercise of power under section 90 of the BT Act."

Mr. Huq, the learned Counsel for the respondent has submitted that the 'exclusivity' clause in the license agreement was void as it gave the petitioner monopoly in the trade which is unenforceable being illegal and against public policy.

Dr. Kamal Hossain, the learned Counsel appearing for the petitioner though submitted that no provision could be made in the agreement which

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conflict with the law but in the instant case the parties willfully entering into an agreement with the 'exclusivity clause' which also existed in the 'request for proposal' could not be deleted as illegal or against public policy.

We propose to consider the issue with reference to the relevant provisions of law and the relevant polices governing the field.

Section 23 of the Contract Act reads as under :-

23. What considerations and objects are lawful and what not - The consideration or object of an agreement is lawful, unless - it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.


The section imposes a restriction on the absolute freedom of the parties while entering into contracts but the same is circumscribed by the overriding consideration of certain limitations including public policy.

The word 'public policy' is not easy to define but may include any injustice, oppression, restraint of liberty, commerce and natural or legal right, whatever tends to the obstruction of justice or to the violation of the statute and whatever against good morals when made the object of a contract and therefore void and not susceptible of enforcement.

In the instant case though apparently the license agreement may be unobjectionable but according to the Commission the 'exclusivity clause' is injurious or illegal sealing off all the possibility of expansion of telecommunication media through other Agencies, thereby putting off all the activities of the Commission set for attaining the objects of the Commission and to promote the causes of National Telecommunication Policy, 1998.

In the case of Kalavagunta Venkata Kristnayya and others Vs. Kalavagunta Venkatachalam and others reported in 32 Mad. 185 (DB) giving rise to a question whether a contract to make payment to father in consideration of his giving his daughter in marriage is to be regarded as

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immoral or opposed to public policy within the meaning of section 23 of the Contract Act, it has been held that:

"the question whether a contract or a term of a contract is opposed to public policy or not is to be decided on general principles only. Such a contract was immoral and opposed to public policy. Although a marriage when performed is valid, an agreement to pay money to the father in consideration of such marriage is not valid and the money cannot be recovered by suit. If the money had been paid and the marriage solemnised, the money cannot be the recovered back."

In the case reported in 4 Bombay Law Reports 948 (DB) it has been observed that"

"a transaction to be void as being against public policy, must be found as a fact, in its inception, to amount to or involve an illegality or be of such a nature that, if permitted, it will defeat the provision of law."


A contract or a term thereof may be invalid because its substance or purpose is contrary to public policy or because of its coercive method of procurement, which is contrary to public policy.

Similarly, any agreement or its term which is in conflict with the public policy in respect of public service is illegal and void.

It has been noticed in the impugned judgment that the Bangladesh Telecommunication Act, 2001 was given effect from 8.7.2001 and henceforth it is the duty and obligation of the Commission to enter into any license agreement but in spite of that prior to constitution of the Commission the parties (MOPT and the World Tel. Bangladesh Limited) have signed the agreement in hot haste on 12.7.2001 containing terms including the 'exclusivity' clause at a time when the Act was already in force, which the learned Counsel for the respondent termed to be the result of coercive mode of procurement in signing of the license agreement.

Our legislation in the field has been made keeping pace with the technological developments in the World. While all other developed countries have enacted laws specially governing the broadcasting media, we have been lagging behind centering round the Telegraph Act, 1885 which

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has to some extent become inadequate to meet the technical eventualities due to latest technological advancement and developments.

Thus in the interest of the "freedom of speech and expression" as guaranteed in the Constitution the Government has adopted National Telecommunication Policy, 1998 in order to boost up the telecommunication sector which has been characterized by a very low level of penetration, limited capability to meet the growing demand, low level of investment, and old outdated systems and technologies necessitating reactive remedial measures, and to develop a material serene telecommunication infrastructure to support the economy and welfare of the Country by providing telecommunication facilities on demand, assuring satisfactory quality of services and ensuring value to the customers.

The policy objectives designed in upholding the commitment of Government to resolve the promoting short-coming, outlines the objectives, strategies and other related aspects of telecommunications and ensure the orderly and rapid growth of telecommunication services, both in quality and quantity and the use of telecommunication technology in order to support the socio-economic development in line with the national aspirations.

Besides, one of the main objectives is for creation of an environment of competition in the field of telecommunication system and services enhancing rapid development in volume, efficiency and accessibility, shall be ensured to make telecommunication services available within the competitive affordable limit of the general users.

With aforesaid material objectives, inter alia, in view and perspective, the Bangladesh Telecommunication Act, 2001 was enacted for the establishment of an independent Commission for the purpose of development and efficient regulation of telecommunication system and telecommunication services in Bangladesh and matters ancillary thereto.

Section 29 of the Act 2001 provides, inter alia, the broad objectives of the Commission is to prevent and abolish discrimination in providing telecommunication services, to progressively effect reliance or competitive

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and market oriented system and in keeping with these objectives, to ensure effective control of the Commission.

Section 30(2)(m) provides for the functions and duties of the Commission to improve the competition scenario including the discharge of the responsibilities to protect the operator of a telecommunication system or a service provider from such activities of another operator or provider as are damaging to competition and to facilitate the access of a person intending to participate as an operator in the market of telecommunication system or services.

Section 37(3)(g) provides prohibition on showing any preference to or making any discrimination against a particular person or class of persons in case of providing services giving connection or permission by the license.

From the aforesaid provisions, it is clear that the Commission could amend any license agreement executed by the Government either under Telegraph Act, 1885 or Wireless Telegraphy Act, 1933 by invoking the provisions of section 89 and 90 of the B.T. Act if it considers that any condition or content in the license agreement is inconsistent with any provisions of the Act in order to ensure healthy competitive environment, prohibition of anti-competitive and discriminatory practices in the telecom sector and to meet the huge unmet demand for telephone to the tune of 07 millions in the DME area and in the overall public interest.

Another legal situation out of the provision of section 23 of the Contract Act has also arisen in the facts and circumstances of the case as the term regarding 'exclusivity' was contrary to the aforesaid provisions of law and the spirits and object of the 'National Telecommunication Policy', the condition in the Agreement is opposed to public policy and therefore void.

The aforesaid proposition finds support in the case of Janu Sait Vs. Ramaswami Naidu reported in AIR 1923 Madras 626. In the said case the defendant, under the terms of his licence, was forbidden to sell his rice to other wholesale merchants in the port on entry than those who were approved by the Collector of the District. The plaintiff who was not one of those approved dealers and was a wholesale merchant, contracted to

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purchase rice from defendant and paid the price. The contract was "I have settled price with you at the controller's rate for the rice coming for me by the Viravu Steamers and marked "N. R." If perhaps the Madras Director of Supplies should ask the said bags from me and if I should have to give the bags to him, I shall return to you the money you have given with one per cent interest. "The rates agreed upon were much higher than the controlled rates."


On the facts it was held that: "Plaintiff being a big merchant in the place must have known that he could not purchase rice except by permission from Government and, therefore, he was probably very willing to pay defendant these higher rates in order to secure the rice. When there was control of rice imports and rice sales set up in Negapatam as in other places, it is impossible to believe that the plaintiff, who was himself a big rice merchant did not know of these facts. The mention in the contract of the probability of the rice being taken by the Director of Civil Supplies is quite sufficient to put him upon notice of the control and of the various regulations which had been prescribed with reference to the sale of rice. And therefore under sections 23 and 24 of the Contract Act, the contract is void and the plaintiff can base no claim upon it."

'Exclusivity clause 3.2' having the object of allowing monopoly to the petitioner is also void as opposed to public policy under the provision of section 23 of the Contract Act, for monopolies being prejudicial to the public welfare.

The principle has been fully enunciated in the case of Somu Pillai Vs. The Municipal Council, Mayavaram reported in ILR Mad (1905) 520 wherein it has been held that:

"That under the English Common Law agreements having for their object the creation of monopolies are void as opposed to public policy is beyond dispute and the same is equally true under section 23 of the Indian Contract Act. The American cases to which we referred in the course of the argument are almost on all fours with the present case. In Logan v. Pyne it was held by the Supreme Court of Iowa that where a city had been authorized by its charter to license, tax and regulate omnibuses, it had no power to grant an exclusive right to run omnibuses within its limits. In In re Lowe the Supreme Court of Kansas ruled that an ordinance providing that the

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
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Mayor and Council may appoint two or more persons as scavengers who shall have the exclusive privilege of removing garbage not only from public premises but from private premises as well, was an attempt to create a monopoly and was therefore void; and in the City of Bloomington v. What it was laid down by the Supreme Court of Illinois that an ordinance of a city confining the sale of meats to two lots in the city was invalid as tending to create a monopoly. The general principles to be followed in cases like the present were stated in Logan v. Pyne cited above, thus :- "The power of Municipal Corporation is strictly confined within the limits prescribed by the statutes creating them and will not be extended by the Courts upon mere inference."

We may passingly quote a finding regarding efficacy and utility of "Exclusivity Vs. Non-Exclusivity" as appearing in the report dated 16.9.2003 on PSTN licensing regime on the document titled "PSTN Licensing Concept, Options and Recommendations for the Bangladesh Telecommunication Regulatory Commission as under:

"As pointed out in section 5.1, an important consideration for licensing conditions is whether exclusivity should be considered for new entrants because of the financial benefits in the form of charging higher licensing fees. Another consideration may be prior precedents set in contract agreements signed before the current licensing regime was put into place; for example, the MOU signed with WorldTel. Other reasons may be political, to ensure the successful entry of new service providers in certain markets in which case exclusivity may be considered for perhaps a short period of time. In general, however, the maintenance of exclusivity or monopoly rights reduces efficiency of competitive markets. This is best illustrated in the ITU report below which demonstrates that granting exclusivity slows down the speed of competition and hence the benefits that come when it.

As illustrated in Fig 7.1, both Chile and Argentina privatized their telecommunication operators around the same time. But while Chile moved ahead with competition, Argentina hesitated, allowing the incumbent a seven-year exclusivity period, later extended by three years. As a result of competition, Chile's fixed-line tele-density, which stood at only half that of Argentina's at the time of privatization, had overtaken Argentina by the time Argentina first introduced competition. In general, CIBC consultants would recommend against granting exclusivity as a licence condition.

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Superintendent
Appellate Division
Supreme Court of Bangladesh.

The absence of exclusivity can help demonstrate the "neutrality," "transparency," and lack of "political influence" on the regulator."

Though Dr. Kamal Hossain has referred to a passage 'Can a Sovereign Bind its Future Actions ?' from a treatise "protecting Foreign Investment under International Law - Legal Aspects of Political Risk" by Poul E. Comsavy and N. Stephen Kuisella, for the proposition that although International law does not require a State to allow the establishment of foreign direct investment (unless required by a Treaty), once a State has made certain international agreements they must, and in general, be kept and has relied upon a illuminating passage in the case of Sapphire International Petroleum Limited (Sapphire) V. National Iranian Oil Co. reported in 35 ILR 136 (1953) where Judge Calvin held:

"It is a fundamental principle of law, which is constantly being proclaimed by International Courts, that contractual undertakings must be respected. The rule "pacta sunt servanda" (contracts are to be observed) is the basis of every contractual relationship."

But for the reasons aforesaid and the circumstances in which the licensing agreement was arrived at and considering the national and the public interest being affected and the provisions of B.T. Act 2001, we are unable to apply the said principle in the facts and circumstances of the present case.

In view of the above discussion and the reasons assigned by the High Court Division in the impugned order, we do not find any illegality with the impugned judgment for our interference.

The petition is, accordingly, dismissed.

Sell- Syeed J. R. Muelassoin Hwarin C.J.
Sell- M. Faridul Karim, J.
Sell- Amirul Kabir Chowdhury J.

The 25th August 2005.
/jua/ word count "6,165"
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Superintendent
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