

City University of Hong Kong

From the Selected Works of Shubhankar Dam

January, 2013

Public Law and Public Resources in India

Shubhankar DAM, *City University of Hong Kong*



Available at: https://works.bepress.com/shubhankar_dam/10/

PUBLIC RESOURCES AND PUBLIC LAW IN INDIA

By

Shubhankar Dam

Reprinted from
Law Quarterly Review
January 2013

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

PUBLIC RESOURCES AND PUBLIC LAW IN INDIA

Do principles of public law require that state-owned natural resources must necessarily be sold in a particular manner? India's Supreme Court was confronted with this question in *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1. The following set of facts led to the question. In August 2007, the Department of Telecommunication (DoT) initiated the process of allotting second-generation (2-G) spectrum along with universal access service licences to qualified mobile operators in India. On September 25, 2007, a press note was issued fixing October 1, 2007 as the deadline for submitting applications. 575 applications were received during that window. Little over three months later, on January 10, 2008, eligibility for licences was retrospectively revised by the Union Telecom Minister, Andimuthu Raja. First, the DoT fixed September 25, 2007 as the new cut-off date, and declared that only companies that had already applied by then were eligible. Secondly, on the same day an announcement was posted on the DoT's website mentioning that licences would be allotted to eligible companies on a first-come-first-served basis provided they were able to produce demand drafts worth INR 16,000 million (US \$306.63 million) within an hour. Nine companies did so, and 122 licences were granted to them. Three years later, the Centre for Public Interest Litigation along with Dr Subramanian Swamy, a former cabinet minister and economist, approached the Supreme Court asking for the cancellation of all 2-G licences. In February 2012, the court agreed.

In coming to that conclusion, the Supreme Court focused on two sets of issues. First, the court looked into the implementation of the policy to sell 2-G spectrum. The Government argued that its actions were based on the recommendations of the Telecom Regulatory Authority of India (TRAI), and the court was not entitled to question that expert opinion. Relying on *DS Nakara v Union of India* AIR 1983 S.C. 130, the Government argued that it had substantial discretion to determine the date of eligibility. The court rejected both arguments. The TRAI recommendations, Singhvi J. said, were in "gross violation" of the New Telecom Policy 1999 which called for spectrum to be "utilized efficiently, economically, rationally and optimally." Because prices were fixed at 2001 levels, these goals could not be attained: the DoT "virtually gifted away [an] important national asset

at throw away prices.” The Comptroller and Auditor General’s report estimated the loss to the exchequer at about INR 17,66,450 million (US \$35.24 billion). It is unclear if this finding effectively elevates Cabinet policies to the status of “law”. Regarding the date of eligibility, the court upheld the High Court’s view on the matter. While the government has considerable discretion in setting the original date by which applications must be submitted, discretion subsequently to change an already publicised date with retrospective effect is necessarily limited. To hold otherwise, the High Court had said, would amount to authorising a change in the rules of a game after it has begun. With no rational explanation forthcoming from the government, the court cancelled all licences on the ground that the change of dates was arbitrary and irrational, and designed to promote the interests of specific parties.

Secondly, the court looked into the very nature of the first-come-first-served policy, and concluded that it was incompatible with India’s “constitutional ethos and values.” The following line of reasoning led to that conclusion. Spectrum is a scarce public resource, and like other natural resources is held in “public trust” by the state: *MC Mehta v Kamal Nath* (1997) 1 SCC 388. Next, equality requires that procedure adopted for distribution of such resources be just, non-arbitrary and transparent. In fact, equality requires that every action of the state

“to give largesse or confer benefit must be founded on ... well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity ... and be done without [any] element of favoritism or nepotism” (*Akhil Bharatiya Upbhokta Congress v State of MP* (2011) 5 SCC 29 at [65]).

The first-come-first-served approach, however, the court said, falls short of these requirements and often comes with “inherently dangerous implications.” In particular, those with easier access to Government officials or files are likely to benefit from such an approach over those with limited access. Therefore, when it comes to “alienation of scarce natural resources like spectrum etc., the state must always adopt a method of auction by giving wide publicity so that all eligible persons may participate in the process”. Any other methodology, the court added, would be incompatible with India’s Constitution.

Four things are worth pointing out. First, consider auction-related issues. The cancellation of contracts and a judicially-imposed auction requirement is not novel in India. In *Common Cause, A Registered Society v Union of India* (1996) 6 SCC 558, the Supreme Court cancelled the allotment of 15 petrol pumps and ordered that they be properly auctioned. Similar action has been taken in other cases too. The real novelty of the decision lies in *constitutionalising* the auction requirement. Now that other methods are *prima facie* unconstitutional, it is no longer open to parliament to reverse a judgment by enacting a piece of legislation. For example, after the Supreme Court invalidated an out-of-turn allotment of Government housing in *Shiv Sagar Tiwari v Union of India* (1996) 6 SCC 530, the Cabinet voided the decision by promulgating an ordinance, which in India, has the same force and effect as a piece of legislation. After *Centre for Public Interest Litigation*, that option is no longer available.

Also, the auction requirement is likely to bring a greater degree of transparency to the sale of other resources including land, natural gas, coal, iron ore and other mining projects. There have been allegations of high-level corruption in the sale of many of these resources recently, and they involve sums of money that vastly exceed the estimated loss in the 2-G case. For example, the latest report by the Auditor and Comptroller General points to a scam worth US \$350.7 billion involving the allocation of 155 coal acreages to 100 companies without auction. If applied rigorously, the precedential force of this decision would require the re-opening of a large number of government contracts. But even those sympathetic to the auction requirement have expressed reservations about its limiting effects. Their concerns have to do with the authority of the state to further social justice goals in awarding contracts. Can the State, for example, rely on its “dominium” (power of purse) to encourage the employment of women or persons belonging to the depressed castes? Or does the auction requirement privilege the goal of revenue maximisation to the exclusion of everything else? Auction, as the Supreme Court rightly pointed out, is a “methodology”. It is a means, and not an end in itself. While auctions are generally designed to maximise revenue, there is nothing in the mechanism per se that makes it incompatible with other social justice goals. If *Centre for Public Interest Litigation* is correct, auctioning public resources is the minimum constitutional requirement. However, in a clarifying opinion delivered recently (Special Reference No.1 of 2012 MANU/SC/0793/2012), the Supreme Court recoiled from this larger conclusion, holding that the auction requirement was limited to the facts of the 2-G case. In its revised view, the court held that the executive has discretion to deviate from the auction method. But such deviations, the court added, must be justified by some countervailing constitutional justifications. Without the latter, “non-auction” policies may be invalidated by courts.

Secondly, the court refused to invoke the doctrine of prospective overruling and, thereby, avoided diluting the strength of its reasoning. The Attorney General and counsels for the private respondents strenuously argued that huge investments had already been made and that the cancellation of licences would adversely affect public interest. Counsel for one of the companies that benefitted from the unlawful allocation of spectrum claimed, for example, that it had already spent INR 60,000 million (US \$1,197 million) and cancellation of the licence at this stage would be “totally unjust”. Singhvi J. did not address the point directly, and his silence is a healthy sign by implication. In *V. Purushotham Rao v Union of India* (2001) 10 SCC 382, the Supreme Court concluded that irregular allotments, including those that were made prior to its decision in *Common Cause* in 1996 were liable to be set aside. And it paid no heed to the argument that the appellant in that case had been running a petrol pump agency for eight years, having invested a significant sum of money. After *Centre for Public Interest Litigation*, the principle laid down in *Purushotham Rao* stands strengthened and arguments for invoking the doctrine of prospective overruling, especially in administrative matters, will have to clear a high threshold.

Thirdly, the decision is likely to refocus attention on the legislative steps necessary to deal with corruption in high offices in India. In 2011, in response to prolonged mass protests, the government reluctantly introduced a comprehensive

anti-corruption bill in Parliament but failed to bring it into law. The ruling coalition, opposition parties and various non-governmental organisations at the forefront of the anti-corruption campaign could not agree on a draft. Among other things, the parties could not agree on the need, if any, for prior sanction to prosecute Government officials on charges of corruption. But the Supreme Court is (impliedly) guiding the legislative process and, thereby, reducing the scope for substantial disagreements. In a companion decision delivered two days prior to the cancellation of all 2-G licences, the court in *Dr. Subramanian Swamy v Dr. Manmohan Singh* 2012 (2) SCALE 12 concluded that Government sanction was unnecessary to prosecute Andimuthu Raja, the Union Telecom Minister who allegedly masterminded the corrupt sale of spectrum. In November 2008, the appellant, Dr Swamy, wrote to Prime Minister Manmohan Singh asking that he be allowed to prosecute the minister in his private capacity. Such permission is necessary under the Prevention of Corruption Act, 1988 (49 of 1988) which states that, amongst others, persons “employed in connection with the affairs of the Union” cannot be prosecuted without the sanction of the government. Equating the right of a private citizen to pursue a corrupt public servant with the fundamental right to access to justice, the court clarified, that sanction is necessary only if a person *is* in employment as opposed to cases where the person has already resigned, retired or left office for other reasons: *RS Nayak v AR Antulay* (1984) 2 SCC 183. Because Mr Raja had resigned as a minister, sanction was no longer necessary. More importantly, Singhvi and Ganguly JJ. disapproved of the Prime Minister’s inordinate delay in responding to Dr Swamy’s letter and reiterated the three-month deadline that had been prescribed in *Vineet Narain v Union of India* (1996) 2 SCC 199. But the court went further holding that if no decision is made at the end of that period, “sanction will be deemed to have been granted to the proposal for prosecution.” Now that the court has tied matters relating to sanction to concepts of rule of law and non-arbitrariness in India’s Constitution, it is unlikely that a dramatically different legislative provision, if brought in by parliament, will pass constitutional muster.

Finally, it is unclear why the court chose not to delve into issues of exemplary damages. Three respondents—private companies that benefitted from a “wholly arbitrary and unconstitutional action”—were ordered to pay INR 50 million (US \$9.27 million) each as “costs”. Four other respondents were asked to pay INR 5 million (US \$0.92 million) each for having benefitted from the same action. Two things are troubling about this. The court neither explained the rationale for imposing this “cost” nor said anything about how it arrived at that amount. More importantly, despite finding the minister’s actions patently unconstitutional, it said nothing about his personal liability to pay damages. This is in contrast to the approach the court adopted in *Common Cause, A Registered Society v Union of India* (1996) 6 SCC 593 and *Shiv Sagar Tiwari*, when it ordered the relevant ministers to personally pay into the exchequer. In this latter *Common Cause* decision, the Supreme Court considered several English decisions including *Broome v Cassell & Co Ltd* [1972] A.C. 1027; *Rookes v Barnard* [1964] A.C. 1129 and *A.B. v South West Water Services Ltd* [1993] Q.B. 507 and concluded that the principle that exemplary damages can be awarded in a case where the action of a public servant is oppressive, arbitrary or unconstitutional was equally applicable

in India. The Union Telecom Minister's action in the 2-G matter, by the court's own findings, easily satisfied this standard. And yet, there was no mention of it. The law on exemplary damages is still in its rudimentary form in India, and *Centre for Public Interest Litigation* was tailor-made to further develop the jurisprudence in this area. The court's unwillingness to venture into it was a missed opportunity. [☞]

Shubhankar Dam
Singapore Management University School of Law

[☞] Constitutionality; India; Licensing; Mobile telephony; Public interest