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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE 2G SPECTRUM SCAM: AN IN-DEPTH ANALYSIS OF LEGAL AND CRIMINAL PROCEEDINGS

AUTHORED BY - ESHAN BORIKAR

I. INTRODUCTION

The spectrum is like other resources available with the government of India. The government can sale the spectrum either through auction or through direct sale at a fixed price. The process of auction ensures more transparency and higher competitive bids. A Raja, the then telecom minister, decided to invite bids for the 2G spectrum. He allocated 122 licenses to various entities for the use of spectrum.

In the second tenure of the UPA government, there was an upsurge of massive fraud. It took place in the telecom sector of the country. On 16th October 2010, the Comptroller auditor general of India released a report stating that second-generation licenses for mobile networks were given at throwaway prices by the government of India. The telecom minister of that time, A raja, denied all the charges and claimed the prime minister was informed about the said dealings. The Central Bureau of Investigation and Enforcement directorate registered a conspiracy and forgery case against the then minister. Agencies alleged that the minister received bribes from private entities to allot second-generation licenses at throwaway prices. The amount of bribe was 217 crores, and as per CAG, the demand drafts were backdated; it implies that bidders were aware that licenses would be issued. Later Public Interest Litigation was filed in Hon'ble Delhi High Court against the wrongdoings of A Raja, the then telecom minister. In 2011 A Raja was arrested by the authorities. The Hon'ble Supreme court of India cancelled all the allotted licenses. Further Hon'ble Supreme Court of India imposed a fine of 5 crores on each private entity.

II. LEGAL BACKGROUND

The charges levied against A Raja, the then telecom minister, were of criminal breach of trust under section 409 of the Indian Penal Code, criminal conspiracy under section 120B of the Indian Penal Code, cheating and forgery under sections 420 and 468 of IPC and booked under the prevention of corruption act. MK Kanimozhi member of parliament was also charged with all the above offences.

The charges were also levied against the telecom secretary and private secretary of A raja. The charge sheet filed by the Enforcement directorate named nine companies that are Kalaignar TV, STPL (now Etisalat DB Telecom (P) Ltd), Kusegaon Realty (P) Ltd, Cineyug Media & Entertainment (P) Ltd. The other companies are Dynamix Realty, Eversmile Construction Company (P) Ltd, Conwood Construction & Developers (P) Ltd. It also included DB Realty Ltd and Mystical Construction (P) Ltd (earlier known as NiharConstructions (P) Ltd).¹

III. ANALYSIS

Prime Minister Suggestions were disregarded

The Prime Minister of India, Manmohan Singh, wrote a letter to the telecom minister expressing his concerns over the extraordinary number of uses in crisp license and insufficient range. The office of the prime minister requested the telecom ministry to revisit its decision. Telecom ministry disregarded the suggestions tendered by the prime minister's office and floated the tender for receiving bids.

Procedural lapse

The procedure undertaken by the telecom ministry was unfair and proper due diligence was not carried out before issuing the licenses to the applicants. Later it was found that more than 85 allottees out of 122 were ineligible for the said allotment. These allottees did not satisfy the basic eligibility required and submitted fabricated documents to obtain a license from the government of India.

Telecom commission

The authorities conducted a detailed investigation of all the data and records available with them. After a detailed investigation, it was found that the ministry of telecom did not consult the telecom commission. The telecom commission comprised representatives from the ministry of finance, industry, and members from the planning commission of India.

Bribe in the form of loan

The authorities allege that the telecom minister and other accused received gratification or bribe from the allottee company in the form of a loan to the company of the accused in the case. The authorities found that some public sector banks had provided large sums of money to allottees of licenses.

¹ 2G Scam Case: Special CBI Court Acquits All 19 Accused In <https://www.livelaw.in/2g-scam-case-special-cbi-court-acquits-19-accused-money-laundering-case-also/>

CAG and its role in 2G scam

The audit report was prepared by CAG and placed before the Hon'ble President of India. The Hon'ble President of India placed the said report before the parliament as per the procedure prescribed under Article 151 of the Constitution of India. The report covers the assessment of consequences of the 2G spectrum allotted inappropriately. The CAG in 2010 alleged that the telecom ministry reduced the time period for filing applications for spectrum. The telecom minister ignored the suggestions of TRAI, Finance ministry and law ministry. The spectrum was sold at fixed prices, wherein TRAI recommended auctioning the spectrum at market rates. It clearly shows that the ministry of telecom ignored the suggestions of all the concerned government departments.

Critical analysis of Legality VS Criminality

The 2G scam case can enable us to understand the difference between legality and criminality. The Supreme court of India tested the legality of 122 licenses issued by the telecom ministry and later struck down all the licenses allocated by the ministry. The Supreme court of India stated that the allocation was arbitrary and proper procedure was not followed. wherein criminality is a different process. Under criminality, the penal laws may punish the people who have taken the decision after accepting the bribe or in the promise of bribe. So, in this situation, if a person takes the right decision after accepting the bribe or gratification, then such person should be punished. However, if a person takes a wrong decision without accepting a bribe, he is not liable for any punishment. The court held all the accused not guilty for criminal misconduct under Sec 13(1) of the Prevention of Corruption Act of 1988, criminal breach of trust under section 409 of IPC, cheating under section 420 of IPC and fraud under section 468 of IPC because the judge looked at the case from the point of criminality. It was observed that giving of loan is not equal to giving a bribe. In the absence of a bribe or any gratification, the accused cannot be punished.

If we closely evaluate, then the Supreme court of India had already held decision of government to allocate the licenses as arbitrary and flawed in law. The criminal liability could not be imposed due to lack of credible evidence to show that decision of the sale of licenses is connected to the acceptance of gratification or bribe.

Critical Analysis of the Verdict

The CBI court acquitted all the accused in the 2G scam case. Judge O.P. Saini stated that "...thus,

*"Proceeds of crime" is the essence and an indispensable element of the offence of money-laundering. It is the core constituent of the offence. Without the existence of proceeds of crime, there cannot be any commission of an offence of money laundering. It is only when "proceeds of crime" is projected or attempted to be projected as untainted property, the offence of money-laundering arises."*²

In the 2G case, the prosecution failed to prove the guilt of all the accused beyond a reasonable doubt. The prosecution could not produce substantial evidence to show that the then telecom minister received gratification or bribery from private entities for issuing spectrum licences.

Rejected the Instances of conspiracy

The court rejected the Instances of conspiracy and said there is no legally admissible evidence to show that conspiracy occurred. In paragraph 1284 of the judgement, the court recorded that mere renting out of the property to one of the allottee companies does not amount to conspiracy in the absence of legally admissible evidence.

IV. CASE LAW

State of Gujarat v Jayrajbhai Puniabhai Varu, (2016), to hold that the burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt. It is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the accused's guilt and the other towards his innocence, the view favourable to the accused should be adopted.³

Judicial Viewpoint on Bribe or Gratification in 2G scam

The prosecution failed to examine a single witness to substantiate that the accused accepted bribe or gratification for allowing 2G licenses to allottee companies in the form of a loan. The majority of other witnesses denied the transaction of the loan being sham or bogus. Further judge state that "*A bogus document by itself does not mean payment of illegal gratification.*

² Google Docs. (n.d.). ED Vs. A. Raja and others (1).pdf. [online] Available at: <https://drive.google.com/file/d/1kldnLVknHuZnICxY8bYPJ69FEEi30K8S/view>

³ LAW FOR ALL : Sec. 498 A . .304 B and 302 I.P.C ...

<https://freelegalconsultancy.blogspot.com/2014/07/sec-498-304-b-and-302-ipc-acquitted.html>

These transactions per se are not illegal. To make out a case of illegal gratification, these documents would have to be linked to a public servant, which is lacking in this case".⁴

Conclusion of verdict

The judge stated that "...A case is to be decided on the basis of evidence led by the parties and not based on arguments alone. Arguments are no substitute for evidence. The end result is that the prosecution failed to put its case to the witnesses indicating that it gave up its case during examination of witnesses itself⁵." In the above case, the investigation officer relied less on the admissible evidence. The court said the role of an officer is to collect evidence relating to the commission of the crime. A mere statement of an officer without any substantial evidence does not amount to the commission of an offence.

V. IMPACT ON LAW (PREVENTION OF CORRUPTION AMENDMENT ACT, 2018)

The **prevention of corruption act was amended in the year 2018** by the government of India. The newly inserted section 8 states that the bribe givers will also be held criminally liable. The giver or the recipient of the bribe can be a public servant or non-public servant. Section 9 was inserted to introduce corporate criminal liability. Wherein commercial organization provides an undue advantage to a public servant for obtaining any advantage or business from the concerned authority. Only a fine can be imposed on the company. Under newly inserted section 10, criminal liability was fixed on the director, manager, or secretary of the commercial organization. Section 17 A was inserted to initiate an inquiry or investigation of offences related to recommendations made or decisions taken by public servants.

According to **former justice V Ramkumar** there was no need to bring the massive change in the existing laws when the present laws were efficacious. The **Delhi high court** rejected the plea of the acquitted accused in the 2G scam case that there is no need to obtain the permission of the investigation body to file an appeal, and the 2018 amendment to the corruption act does not have retrospective effect.

⁴ I/b

⁵ I/b

Case law

In **Madhu Koda Vs State through CBI**, decided on 22nd May 2020, has observed that the amendments in PC Act cannot be applied to the offences prior to the changes in the provisions of the Act.

VI. SUGGESTION

We need to develop a special body for dealing with financial scams, and officers in this body should be aware of the financial intricacies. The government of India should increase the role of serious fraud investigation authority. The special body should work in collaboration with the investigation agency and SFIO to prevent such fraud. The special body can conduct a forensic audit and trace the payment trail of crime proceeds. Judiciary should conduct fast track trials for corruption-related cases.

VII. CONCLUSION

2G Scam was one of the most controversial frauds in India. The court's verdict in the said case is a part of legal analysis and learning for upcoming years. The said matter is now pending before the Hon'ble Delhi High court in the form of an appeal. We need to develop a robust system to avoid such frauds in future.

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