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Why is the Centre seeking a 'clarification' of the 2G spectrum scam verdict? | Explained

The top Court in its 2G spectrum scam verdict had advocated for scarce natural resources like spectrum to be allocated only through auctions in the interest of transparency. Here is why the Centre has challenged it.

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More than a decade after the Supreme Court cancelled 122 telecom licenses in the landmark 2G spectrum scam judgment, the Union government has moved an application for a "certain class" of spectrum to be allocated through administrative processes instead of competitive auctions.

Spectrum considered to be a scarce natural resource was ordered by the top Court to be allocated through the “fair and impartial” process of auction. An administrative allocation would mean that the government will have the final say in deciding the procedure for selecting operators.

On Monday, Attorney General R. Venkataramani, appearing for the Centre made a plea for urgent listing of the application before Chief Justice of India (CJI) D.Y. Chandrachud. Accordingly, the Chief Justice asked him to circulate an email with the request following which it would be considered.

The development comes a month after the Delhi High Court admitted the appeal filed by the Central Bureau of Investigation (CBI) against the acquittal of A Raja, K Kanimozhi and 15 other high-profile politicians, businessmen and bureaucrats in the ₹1.76 lakh crore 2G spectrum allocation scam.

2G spectrum scam verdict

The alleged 2G spectrum allocation scam is said to have originated in 2008 when the then Congress-led United Progressive Alliance (UPA) government sold 122 2G licences on a first-come-first-serve (FCFS) basis to specific telecom operators. In its charge sheet filed in April 2011, the CBI alleged that there was a loss of ₹ 30,984 crore to the exchequer as a result of discrepancies in the allocation process.

In the meantime, the Centre for Public Interest Litigation and Subramanian Swamy filed petitions in the top Court alleging a ₹70,000 crore scam in the grant of telecom licenses in 2008. In February 2012, a division Bench of the Supreme Court cancelled the licenses while cautioning that an FCFS basis for the allocation of scarce natural resources can be prone to misuse.

Advocating for competitive auctions instead, the Court said, “In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values.”

It further emphasised that the burden lies on the state to ensure that the “non-discriminatory method” of auction is adopted “by giving wide publicity so that all eligible persons can participate in the process”.

Centre's plea

In its plea, the Centre has pointed out that the assignment of spectrum is required not only for commercial telecom services but also to discharge sovereign and public interest functions such as security, safety, and disaster preparedness.

“There are also sui generis categories of usage owing to the characteristics of the spectrum, or the nature of use, or international practices, etc, in respect of which auctions are not technically or economically preferred or optimal [eg: in the case of captive, backhaul or one time/sporadic use]”, it said.

The Centre further elaborated that administrative allocation is required when demand is lower than supply or for space communication. In such cases, it would be “more optimal and efficient for spectrum to be shared by multiple players, rather than being broken up into smaller blocks for the sole purpose of exclusive assignment”, it said.

Importantly, the Court was apprised that following its 2012 ruling, the administrative assignment of non-commercial spectrum has been on a purely interim basis, subject to the government's final decision on pricing and policy. However, it was now time to “firm up a spectrum assignment framework, including methods of assignment of spectrum, other than auction, in suitable cases to best subserve the common good”, the government said.

Accordingly, the plea envisages the following prayer — “(a) Issue appropriate clarifications that the Government may consider the assignment of spectrum through administrative process if so determined through due process in accordance with law, and if such assignment is in pursuit of governmental functions or the public interest so requires, or auction may not be preferred due to technical or economic reasons”.

2012 Presidential reference

The Union government has also placed reliance on the observations made by a Constitution Bench while deciding a Presidential reference made to it concerning the

February 2012 verdict. The Bench pointed out that the auction method prescribed in the verdict was not to be considered a “constitutional mandate” for the alienation of natural resources excluding spectrum.

“..when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word “perhaps” gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in the disposal of natural resources. The choice of the word ‘perhaps’ suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable”, the Bench said while scrutinising the verdict.

However, “spectrum, which according to the law declared in the 2G case, is to be alienated only by auction and no other method”, it cautioned.

The Telecommunications Act, 2023

The law passed by the Parliament last year empowers the government to assign spectrum for telecommunication through administrative processes other than auction for entities listed in the First Schedule. These include entities engaged in national security, defence, and law enforcement as well as Global Mobile Personal Communication by Satellites such as Space X, and Bharti Airtel-backed OneWeb.

The government can also assign part of a spectrum that has already been assigned to one or more additional entities, known as secondary assignees, and even terminate assignments where a spectrum or a part of it has remained underutilised for insufficient reasons.

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