Unfolding of a Saga

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(I)

While we are still recovering from the shock verdict in the 2G Scam, arguably one of the crudest examples of crony capitalism in independent India, the former Minister of telecommunications Mr A Raja, who was acquitted by the Special judge Mr O P Saini of all criminal liabilities in the case, has now come out with his own version of events in his just released prisoner's diary: "2G Saga Unfolds". In this, he has accused the former PM Mr Manmohan Singh, whose advise he had blatantly ignored at the crucial time, of silence, and levelled no-holds barred allegations against the former CAG Mr Vinod Rai. And not only Mr. Raja, his erstwhile ministerial colleague Mr Kapil Sibal has also joined the fray, demanding an apology from Mr Rai, while another former colleague, Mr Manish Tewari has gone one step further, declaring that the verdict has established that "Rai and the then officers of CAG were possibly in the hands of forces which were inimical to the UPA government", a serious allegation against the integrity of officers of the CAG institution which he must be asked to prove. It is this same Mr Tewari who had once said that Mr Anna Hazare was steeped in corruption from "head to toe. He has also demanded that all reports tabled by Mr Rai require to be "revisited by an independent body", calling for an independent audit of the 2G report submitted by Rai. So we now need another public audit institution to audit the CAG reports!

It is no wonder that Mr Raja's version is no different from the ruling of the Special Judge. In a veiled reference to the presumptive loss of Rs 176,000 crore caused to the exchequer as stated in the CAG report and highlighted by the media –a stigma that had branded the previous regime as one of the most corrupt in India's history, Special Judge Saini had said, "some people created a scam by artfully arranging a few selected facts and exaggerating things beyond recognition to astronomical levels" and "a huge scam was seen by everyone where there was none". Mr Raja echoed much the same in his comments against the former CAG, though in an outrightly abusive manner beyond the bounds of civility and decorum in public discourse. He equated Mr Rai's actions as "Malicious vigilantism that makes a mockery of his constitutional responsibilities; Disgraceful purchase of self-promotion at the cost of truth and integrity; Wanton sacrifice of national progress... corrupt commercialism couched in moral rhetoric... reports of auditors like Shriman Vinod Rai are mere trash... It is my contention that the sanctity of the CAG was severely compromised... Mr Rai clearly had ulterior motives in overreaching the bounds of his constitutional function." Mr Raja could not point out any such motive though, being probably unaware of the multi-layered processes that every CAG report has to pass through to inoculate them from the kind of errors Mr Raja associates them with. In indicting the CAG, he has actually indicted the institution, an institution towards which all governments have shown unconcealed contempt and annoyance, and which have only enhanced the credibility of the institution. Maligning institutions is in the DNA of all Governments; it was a hallmark of the UPA also, in which Mr Raja had an intimidating presence, riding roughshod over the decisions of his seniors and often ignoring their sensible advices with utter disdain in order to distribute favours to his crony friends.

Regarding the former PM, Mr Raja had wondered, “I do not know why he could not muster the resolve even though truth was on his side to stand against the verbal abuses of the opposition, unwarranted criticism of the 2G bench and the staged outbursts of the biased media.” He claimed that he had got the PM’s “approval to go ahead” for allocating 2G telecom spectrum to new players after explaining the whole process. According to him, the former PM was repeatedly misinformed by his advisers and the PMO was under the influence of telecom lobbies. "The UPA government's and even more so Dr Manmohan Singh's palpable silence in relation to defending my wholly justified actions" was like "silencing of our nation's collective conscience", he said. Mr Saini had also said the same in his judgment**:** “I do not find any merit in submission of the prosecution that the Hon’ble Prime Minister was either misled by Sh A Raja or that the facts were misrepresented to him. The arguments have been taken up by the prosecution just to prejudice the mind of the court by invoking the high name and authority of Hon’ble Prime Minister of the country.”

The case involved the allegations of Mr Raja misleading the Prime Minister; fixation of an arbitrary cut-off date; violation of the First Come First Serve policy in issuing Letters of Intent; granting of Unified Access Service Licences to two ineligible companies **-** Unitech and Swan Telecom; and payment of Rs 200 crore bribe to Kalaignar TV Pvt. Ltd, promoted by the family of DMK patriarch Mr Karunanidhi.

The judge lamented that public perception was “created by rumour, gossip and speculation”, that “for the last about seven years, on all working days, summer vacation included, I religiously sat in the open court from 10 am to 5 pm, awaiting for someone with some legally admissible evidence in his possession, but all in vain… Not a single soul turned up. This indicates that everybody was going by public perception created by rumour, gossip and speculation. However, public perception has no place in judicial proceedings.”

The least the judge could have done was to wake up from his stupor of seven years and ask for the evidence that was not placed before him, which was his bounden duty. As pointed out by Dhananjay Mahapatra quoting a Supreme Court judgment, while giving a fair trial to the accused, a judge must “appreciate evidence with the sole aim of arriving at the truth. A seasoned trial judge knows the difficulties in gathering evidence in a crime after a time lapse, especially when committed by high public functionaries like ministers. He must know how to separate the chaff from the grain to arrive at the truth.” Mr Saini has miserably failed in this job.

Defective investigation and shoddy prosecution case is not uncommon at all, especially where the CBI is involved. But again, as observed by the Supreme Court (C Muniappan vs Tamil Nadu, 2010), “defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in criminal justice administration would be eroded.” Therefore, in such cases, “there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend

solely on the probity of investigation." Mr Saini probably has no knowledge of this judgment nor of his obligations that follow from it to gather and weigh evidence in an important case that has far reaching implications on the institutional probity and personal integrity of public officials occupying high positions.

Let us try to separate chaff from the grain and facts from fiction. CAG's institution is not a criminal investigating agency, its job is also not to question Government policy, but to examine and point out any procedural lapses and other deviations in implementing the policy, and whether it was applied in fairness. To probe and establish criminal intent in any action of the executive is not CAG's job, neither does it fall within his mandate. That is the job of the CBI and other law enforcement agencies; their failure to do so does not reflect upon CAG's findings in any way. And unlike what Mr Raja would have us believe, CAG is not a colonial ruler presiding over a colonial empire that gives him unfettered powers over his reports; these reports follow a robust laid down procedure, passing through several stages before reaching the final stage when they are signed by the CAG, at which there is hardly any scope for altering them fundamentally. The process ensures this, and that is what gives the CAG's report so much of respect and credibility among the public. The process also ensures that credible and acceptable documentary evidence exists to support even the most trivial of observations, which is testified by the fact that in the 150 plus year old history of the institution, the evidences presented in its reports were never found to be false, fabricated or concocted. So let us first see what the CAG report says.

(II)

A large part of the confusion arises from the fact that few people have read or understood the CAG report - Report No. 19 of 2010 on the "Performance Audit of Issue of Licences and Allocation of 2G Spectrum of Union Government, Ministry of Communications and Information Technology" tabled in Parliament in November 2010. All we know about it is from the media that was interested more in sensationalisation than dispassionate, factual reporting. The facts and the supporting evidence are all available in the CAG report which is accessible to every citizen in the CAG website.

Let us recall the circumstances leading to this audit. 0n 10th January 2008, Department of Telecommunications (DoT) issued 120 new licences for Unified Access Services on the same day at prices determined in 2001, far below what would have been the correct market price in 2008, which drew widespread criticism. It was in this context that CAG had felt that there was a sufficient justification to review the entire process of issuance of licences, award of spectrum and the implementation of the Unified Access Service Licence (UASL) regime.

A DoT Press Release on 24th September 2007 had given a week's time to companies to apply for licenses; this had set off a mad scramble among prospective applicants and by October 1, as many as 575 applications were received from companies big and small, aspiring for a share in the booming telecom market of India. Licenses were to be issued following the DOT's First Come First Serve (FCFS) policy to eligible applicants. But on Jan 10, 2008, DoT added a twist by issuing two press releases in the afternoon, first to advance the cut-off date to September 25 from October 1, 2007. Later the same day, it posted another release on its website asking companies to complete their paperwork, including submission of

demand drafts pertaining to bank guarantees, between 3.30 and 4.30 PM that day itself, and giving them less than an hour to collect the Letter of Intent (LoIs). In the subsequent investigation, it was found that some of those who had paid the money had got their bank drafts prepared weeks in advance. Obviously they knew about the change in the date, and were ready with all paperwork. In gross violation of the FCFS policy, the applications submitted between March 2006 and 25th September 2007 were issued LoIs on a single day, 10th January 2008. Not only this, while the DoT press release had talked of "inter se seniority" based on the date of application, Raja also changed this. Thus Swan Telecom, which had applied on March 2, 2007, got spectrum for Delhi while Spice Communications which had applied in August 2006 didn't. Altogether 122 new licensees and 35 Dual Technology licences were issued in a process that entirely lacked transparency and objectivity.

The CAG report found a plethora of irregularities and gaps in policy implementation. The Telecom Commission was not consulted, views and concerns of Ministry of Finance were overruled, advice of Ministry of Law and Justice was ignored, and even the suggestions of the Prime Minister were not followed by the telecom Minister Mr. Raja. In November 2007, the former PM had written to Raja, expressing concern that in the backdrop of the inadequate spectrum and the unprecedented number of applications received for fresh licenses, spectrum pricing through a fair and transparent method of auction for revision of entry fee, which was benchmarked on an old figure, needed to be reconsidered. Raja replied twice on the same day that sufficient 2G spectrum was available, that more operators will increase tele-density and bring down the tariff while justifying the decision to amend the cut-off date and rejecting the suggestions of Ministry of Law and Justice as 'out of context'. He further informed that it would be unfair, discriminatory, arbitrary and capricious to auction spectrum to new applicants as it would deny them a level playing field. Thus he justified the allotment of spectrum in 2008 without reconsidering the 2001 prices, ignoring the advice of the Prime Minister.

The process followed by the DoT for verification of applications to determine their eligibility also lacked due diligence, fairness and transparency leading to grant of licences to ineligible applicants - 85 of the 122 licenses were issued to ineligible companies – they had suppressed facts, disclosed incomplete information and submitted fictitious documents. Among these were Unitech and Swan Telecom, both of which had authorized capital on the date of application far less than the requirement of Rs 10 crore (Rs 5 lakh for Unitech and Rs 4 crore for Swan), both had submitted false certificates in respect of paid up capital and misrepresented other facts. These companies were new entrants to the Indian market without any foothold and did not have the requisite capacity to toll out the allocated spectrum. But subsequent to the allocation of UASL, their stakes rose astronomically and they could attract significant foreign investments. Unitech paid Rs 1658 crore for the licenses and sold 67% of their equity at Rs 6120 crore soon afterwards, making its full equity, Rs 5 lakh a few months ago, worth at Rs 9100 crore; Swan Telecom paid Rs 1537 crore and sold 45% of its equity at Rs 3217 crore later, making its total equity worth Rs 7192 crore. These figures were the basis of CAG's calculations for estimating the presumptive loss.

Taking the value of a new company without any previous experience in the sector reflective of the worth of the license and access to spectrum, CAG estimated that the cost of a pan India licence would lie between Rs 7758 crore to Rs 9100 crore, against Rs 1658 crore charged by the DoT. As a result 122 licenses

and 35 dual technology approvals issued in 2008 could have fetched revenues ranging from Rs 58,000 crore to Rs 68,000 crore to the Government, against Rs 12,386 crore actually collected. The scam actually lay here, irrespective of the loss worked out by the CAG, for which CAG gave four figures based on different assumptions which were clearly explained in the report, ranging from Rs 58000 crore to Rs 176,000 crore. It was the media that picked up the highest figure which it sensationalised.

CAG concluded that "The entire process of allocation of UAS licences lacked transparency and was undertaken in an arbitrary, unfair and inequitable manner", by flouting every cannon of financial propriety, rules and procedures, and even its own guidelines on eligibility conditions. DoT "arbitrarily changed the cut-off date for receipt of applications post facto and altered the conditions of the FCFS procedure at crucial junctures without valid and cogent reasons, which gave unfair advantage to certain companies over others." This was crony capitalism at its worst, and even the Supreme Court concurred with this when it had to cancel all 122 licenses, while observing that that telecom minister had "virtually gifted away natural resources", that he "wanted to favour some companies at the cost of the public exchequer…" and that his FCFS procedure was grossly distorted to favour a few.

The bench of Justices G S Singhvi and A K Ganguly said, "The exercise undertaken by the officers of the DoT between September 2007 and March 2008, under the leadership of then Minister of C&IT, was wholly arbitrary, capricious and contrary to public interest, apart from being violative of the doctrine of equality." The court found that "the manner in which the exercise for grant of LoIs to the applicants was conducted on January 10, 2008 leaves no room for doubt that everything was stage-managed to favour those who were able to know in advance change in the implementation of the first-come-first served principle". It imposed fines of Rs 5 crore each on Tata Teleservices, Unitech Wireless Group and Etisalat DB Telecom and Rs 50 lakh each on 4 other companies as they "benefited by a wholly arbitrary and unconstitutional action taken by the DoT for the grant of UAS licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crore in the name of fresh infusion of equity or transfer of equity."

The CBI judge did not find anything irregular in any of these, neither did he refer to the SC judgment. Nor did he ask for more evidence to be procured and submitted to arrive at the truth. On the allegation of entry fee charged in 2008 at 2001 rates, he even justifies the lower fee using a queer logic, "There is no material on record to indicate any insistent assertion or objective analysis by anyone for the need of revision of entry fee. It is all general talk. There is no evidence on record that telecom companies were rolling in or wallowing into wealth warranting revision of entry fee." So the bidders' wealth, and not the intrinsic worth of the licenses, should have determined the value of the bids!

One must not forget that but for the scam exposed by the CAG, India probably would not have moved away from the opaque system of spectrum allocation so decisively towards a transparent system of auctioning of the spectrum, which has earned us more than Rs 3.56 lakh crore in the six telecom auctions conducted since 2010. Raja's utterances about unfolding of the 2G Saga wouldn't therefore cut any ice with a perceptive public. As regards his criminal intent, one will have to depend on the outcome of the appeal process likely to follow.