

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

NEW DELHI

DATED THE 4<sup>th</sup> MARCH, 2005**PETITION No. 3 OF 2005****(M.A.No.19 of 2005)**

Reliance Infocomm Limited

...Petitioner

Vs

Union of India (DoT)

...Respondent

-

**BEFORE:****HON'BLE MR. JUSTICE D.P. WADHWA, CHAIRPERSON****MR. VINOD VAISH, MEMBER****LT.GEN.D.P.SEHGAL(RETD.),MEMBER**

For Petitioners

:

Mr. Harish Salve,

Mr.Mukul Rohtagi,Senior Advocates with  
Mr.Milind Sathe, Mr.Atul Dayal,

Mr.K.R.Sasiprabhu,Ms.Shalini Gupta,

Mr.Ashwin Dave,

Mr.Anshul Saharan,Advocates

For Respondent

:

Mr.Goolam E. Vahanvati, Solicitor General of  
India withMr.C.A.Sundaram,Senior Advocate and  
Mr.Sanjay Hegde, Mr.Anil K. Mishra,Ms.Rameeza Hakeem, Mr.Prashanto Sen,  
Ms.Pooja Chandra,Advocates**Catchwords****HCD (Home Country Direct) Service – Features of****ITU(International Telecommunication Union) recommendations – E.153 considered and explained****ILD (International Long Distance) Service license, NLD (National Long Distance) Service License and UAS (Unified Access Service) License****Relevant clauses of - considered and explained**

**Telecommunication traffic – governed by mandatory license conditions and interconnection requirements**

**CLI (Calling Line Identification) – its tampering of – consequences**

**Penalty – leviable under clause 10.2(ii), UAS license – Prior recommendations of TRAI if required – Section 11 of TRAI Act inapplicable – Action under clause 10.2(ii) is independent of any other clause**

**Penalty and fine – difference between**

**Penalty and liquidated damages – Section 20A of Telegraph Act relates when an offence to be tried under Code of Criminal Procedure - difference between**

**Section 74 of the Contract Act – when applicable**

**Penalty if an impost**

**Section 4 of Telegraph Act – Section 3(1AA) definition of “Telegraph” – Telegraph includes telephones and telecommunication services**

**License if a contract or a privilege – effect of**

### **ORDER**

In this petition under Section 14(A) read with Section 14(A)(i) of the Telecom Regulatory Authority of India Act, 1997(the Act, for short) M/s Reliance Infocomm Ltd. has challenged the Show Cause Notices issued by the Respondent (i.e. Department of Telecommunications or DoT) dated 4<sup>th</sup> October, 2004, 24<sup>th</sup> November 2004 and 8<sup>th</sup> December 2004, and Orders dated 23<sup>rd</sup> December 2004 and 17<sup>th</sup> January 2005.

The conclusive part of the order dated 23<sup>rd</sup> December, 2004 imposing a penalty of Rs.150 crores on the petitioner reads as under:-

“Therefore, it is concluded that M/s Reliance Infocomm Ltd has violated:-

- (i) Clause 2.2 (a), 2.2(b)(i), 16.1, 26.5, 26.6, 26.7 & 41.19(iv) of Unified Access Service Licence for Chennai, Mumbai and Kolkota Service areas.
- (ii) Clause 17.1, 17.9 & 24.1 of International Long Distance Service Licence and instructions issued to International Long Distance Service providers on 24<sup>th</sup> June 2003 in respect of Calling Line Identification.

- (iii) Clause 17.4, 17.6 and 17.8 of National Long Distance service licence as well as instructions to National Long Distance service providers issued on 24<sup>th</sup> June 2003 in respect of Calling Line Identification.

For the reasons stated above, an amount of maximum penalty as stipulated in each of three Unified Access Service Licence for Kolkata, Mumbai and Chennai service, of Rs.50 crores (Rupees fifty crores) is HEREBY imposed on M/s Reliance Infocomm Ltd. This amount is to be deposited within a period of 15 days from the date of receipt of this order through a demand draft or pay order payable at New Delhi, drawn on any scheduled bank, in favour of Pay & Accounts Officer (HQ), Department of Telecommunications, New Delhi-110001, failing which the amount of the penalty shall be recovered with applicable interest as per terms and conditions of the licence agreements for non-payment of dues. Furthermore, M/s Reliance Infocomm Ltd. is also warned to avoid all sorts of violations of any conditions of National Long Distance Service, International Long Distance Service and Unified Access Service Licence Agreements and the instructions issued thereunder.

This is without prejudice to any other action, which may be taken by the Government at a later stage.”

2. M/s Reliance Infocomm Ltd submitted a response dated 07/2/2005 to the said order and requested DoT to not to insist on levying any penalty in the light of the circumstances and the detailed explanations provided by M/s Reliance Infocomm Ltd. However, the contentions of M/s Reliance Infocomm Ltd were rejected by DoT vide the order of 17-1-2005. The concluding part of the said order reads as under:-

“6.0, .....the contentions of M/s Reliance Infocomm Ltd made vide letter dated 7<sup>th</sup> January 2004 (read as understood as 7<sup>th</sup> January, 2005) are rejected.

7.0 For the reasons stated above, the Central Government is firmly of the view that there is no cause to revise the earlier decision of imposing an amount of maximum penalty as stipulated in each of the three United Access Service Licences for Mumbai, Kolkata and Chennai service areas of Rs.50 crores (Rupees fifty crores) making a total of Rs.150 crores (Rupees one hundred fifty crores) on M/s Reliance Infocomm Ltd. And furthermore warning to M/s Reliance Infocomm Ltd to avoid all sorts of violation of any conditions of National Long Distance, International Long Distance and Unified Access Service Licence Agreements and instructions thereunder as conveyed vide letter of even number dated 23.12.2004. The said amount of Rs.150 crores (Rupees One hundred fifty crores) should be deposited within three working days of the receipt of this letter through a demand draft or pay order payable at New Delhi drawn on any scheduled bank in favour of Pay & Accounts Officer (HQ), Department of Telecommunications, New Delhi-110001.

This is without prejudice to any other action including other modes of recovery, which may be taken by the Government on the expiry of three working days.”.

3. M/s Reliance Infocomm Ltd i.e. the petitioner, is a company registered under the Company's Act, 1956 and a licenced telecom operator having licenses to provide various telecom services which are described as Unified Access Service (UAS), National Long Distance Service (NLD) and International Long Distance Service (ILD). These licenses have been granted under Section 4 of the Indian Telegraph Act, 1885.

4. For the sake of completeness the extracts of the clauses of the respective licenses which M/s Reliance Infocomm is alleged to have violated, and as mentioned in the Order of 23/12/2004, are reproduced below:-

(1) **ILD Licence**

**Clause 17.1**

It shall be mandatory for all NLD service providers and all ILD Service providers to provide interconnection to each other whereby the subscribers could have a free choice to make international long distance calls through any ILD service provider. International Long Distance traffic should be routed through network of NLD service providers, to the ILD service providers gateways for onward transmission to international networks. However, the access provider shall not refuse to interconnect with the LICENSEE directly in situations where ILD Gateway Switches, and that of Access Provider's (GMSC/ Transit Switch) are located at the same station of Level - I TAX

**Clause 17.9**

The charges for access or interconnection with other networks shall be based on mutual agreements between the service providers subject to the restrictions issued from time to time by TRAI under TRAI Act, 1997.

**Clause 24.1**

The LICENSEE shall not hereunder engage, on the strength of this LICENCE, in the provision of services other than the SERVICE as defined in this LICENCE AGREEMENT.

(2) **NLD Licence**

**Clause 17.4**

The terms and conditions of interconnection including standard interfaces, points of interconnection and technical aspects will be such as mutually agreed between the service providers.

**Clause 17.6**

The LICENCEE shall comply with any order or direction or regulation on interconnection issued by the TRAI under TRAI Act, 1997.

**Clause 17.8**

The charges for access or interconnection with other networks for origination, termination and carriage of calls shall be based on mutual agreements between the service providers subject to the restrictions issued from time to time by TRAI under TRAI Act, 1997.

**(3) UAS Licence****Clause 2.2(a)**

The SERVICES cover collection, carriage, transmission and delivery of voice and/or non-voice MESSAGES over LICENCEE's network in the designated SERVICE AREA and includes provision of all types of access services. In addition to this, except those services listed in para 2.2 (b)(i) licensee cannot provide any service / services which require a separate licence. The access service includes but not limited to wireline and / or wireless service including full mobility, limited mobility as defined in clause 2.2 (c) (i) and fixed wireless access. However, the licensee shall be free to enter an agreement with other service provider(s) in India or abroad for providing roaming facility to its subscriber under full mobility service unless advised / directed by Licensor otherwise. The LICENCEE may offer " Home Zone Tariff Scheme (s)" as a subset of full mobile service in well defined geographical Areas through a tariff of its choice within the scope of orders of TRAI on the subject. Numbering and interconnection for this service shall be same as that of Full mobile subscribers.

**Clause 2.2(b)(i)**

Further, the LICENCEE can also provide Voice Mail, Audiotex services, Video Conferencing, Videotex, E-Mail, Closed User Group (CUG) as Value Added Services over its network to the subscribers falling within its SERVICE AREA on non-discriminatory basis. The Licensee cannot provide any service except as mentioned above, otherwise shall require a separate licence. However, an intimation before providing any other VALUE ADDED SERVICE has to be sent to the LICENSOR and TRAI.

**Clause 16.1**

The LICENCEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI.

**Clause 26.5**

It shall be mandatory for the LICENCEE to provide interconnection to all eligible Telecom Service Providers as well as NLD Operators whereby the subscribers could have a free choice to make inter-circle/ international long distance calls through NLD/ ILD Operator. For international long distance call, the LICENCEE shall normally access International Long Distance Operator's network through National Long Distance Operator's network subject to fulfillment of any Guidelines/ Orders/ Directions/ Regulation issued from time to time by Licensor/ TRAI. The LICENCEE shall not refuse to interconnect with the International Long Distance Licensee

directly in situations where ILD Gateway Switches/ Point of Presence (POP), and that of Access Provider's (GMSC/ Transit Switch) are located at the same station of Level -I TAX .

#### **Clause 26.6**

Direct interconnectivity among all Telecom Service Providers in the licensed SERVICE AREA is permitted. LICENSEE shall interconnect with other Service Providers, subject to compliance of prevailing regulations, directions or determinations issued by TRAI. The interconnection shall have to be withdrawn in case of termination of the respective licensed networks of another Telecom service providers within one hour or within such time as directed by the LICENSOR in writing, after receiving intimation from the LICENSOR in this regard.

#### **Clause 26.7**

Point of Inter-connection (POI) between the networks shall be governed by Guidelines/ Orders/ Directions/ Regulation issued from time to time by Licensor/ TRAI.

#### **Clause 41.19(iv)**

Calling Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security. CLI Restriction should not be normally provided to the customers. Due verification for the reason of demanding the CLIR must be done before provision of the facility. It shall be the responsibility of the service provider to work out appropriate guidelines to be followed by their staff members to prevent misuse of this facility. The subscribers having CLIR should be listed in a password protected website with their complete address and details so that authorized Government agencies can view or download for detection and investigation of misuse. However, CLIR must not be provided in case of bulk connections, call centres, telemarketing services.

5. It would be useful to briefly describe the nature of the services that are covered by each of these licenses:

#### **International Long Distance Service Licence (ILD):**

An international long distance service licensee is authorized to carry international telecommunication traffic as defined in clause 2.2 of the licence agreement reproduced below:-

“2.2(a) The ILD Service is basically a network carriage service (also called Bearer) providing International connectivity to the Network operated by foreign carriers. The ILD service provider is permitted full flexibility to offer all types of bearer services from an integrated platform. ILD service providers will provide bearer services so that end-to-end tele-services such as voice, data, fax, video and multi-media etc. can be provided by Access Providers to the customers. Except “Global Mobile Personal Communication Service (GMPCS) including through “INMARSAT” for which a separate licence is required, other listed services at Appendix are permitted to the LICENSEE. ILD service providers would be permitted to offer international bandwidth on lease to other operators. ILD service provider shall not access the subscribers directly which should be through NLD service provider or Access Provider. Resellers are not permitted”.

M/s Reliance Infocomm Ltd was granted International Long Distance Service Licence on 25.02.2002.

National Long Distance Services (NLD):

The National Long Distance Service licensee can provide services within whole of India within the scope of its licence as defined in Clause 2.2(a) of the Licence Agreement as reproduced below:

“2.2(a) The NLD Service means picking up, carriage and delivery of switched bearer telecommunication service over a long distance network i.e. a network connecting different Short Distance Charging Areas (SDCAs). However, for the present LICENCE, the LICENSEE will only pick up, carry and deliver Inter-Circle traffic which goes outside or across from one circle to another, from and to the network of Access Providers, excluding purely intra-circle traffic except when such pick up, carriage and delivery is by way of mutual agreement with Basic Service Provider in accordance with their respective agreed terms”.

M/s Reliance Infocomm Ltd was granted a National Long Distance Service License on 28.01.2002

Unified Access Service (UAS) Licence:

The Unified Access Service licensee can provide wire-line and wireless (fixed, limited mobile and full mobile) access services within its designated service area to its customers. For this purpose, the country has been divided into 23 different service areas including 4 Metro cities. The Unified Access Service licensee is not authorized to deliver the traffic to another Unified Access Service Licensee across the border of its service area. Such traffic is necessarily to be carried through a licensed National Long Distance Service Provider. Clauses 2.2(a) & 2.2(b) (i) of Unified Access Service Licence for Metro Service area are reproduced for ready reference:-

“2.2 (a) THE SERVICES cover collection, carriage, transmission and delivery of voice and/or non-voice MESSAGES over LICENSEE’s network in the designated SERVICE AREA and includes provision of all types of access service. In addition to this except those services listed in para 2.2(b)(i) licensee cannot provide any service/services which require a separate licence. The access service includes but not limited to wireline and/or wireless service including full mobility, limited mobility as defined in clause 2.2(c) (i) and fixed wireless access. However, the licensee shall be free to enter an agreement with other service provider(s) in India or abroad for providing roaming facility to its subscriber under full mobility service unless advised/directed by Licensor otherwise. The LICENSEE may offer “Home Zone Tariff Scheme(s)” as a subset of full mobile service in well defined geographical Areas through a tariff of its choice within the scope or orders of TRAI on the subject. Numbering and interconnection for this service shall be same as that of Full mobile subscribers.

2.2(b)(i) Further, the LICENSEE can also provide Voice Mail, Audiotex services, Video Conferencing, Videotex, E-Mail, Closed User Group (CUG)\_as Value Added

Services over its network to the subscribers falling within its SERVICE AREA on non-discriminatory basis. The Licensee cannot provide any service except as mentioned above, which require a separate licence. However, an intimation before providing any other VALUE ADDED SERVICE has to be sent to the LICENSOR and TRAI”.

M/s Reliance Infocomm is holding UAS Licenses in 21 service areas including Mumbai, Kolkata and Chennai.

6. The licensing framework has thus delineated the types of services to be covered by separate licences and a structured licensing arrangement has been put in place whereby separate licenses have been issued for International Long Distance Service, National Long Distance Service and for providing Access Service to the subscribers. The effect of such delineation is that a service provider cannot directly access a subscriber without going through the proper routing.

7. In order to have interconnectivity between various service operators and to provide seamless connectivity between a subscriber of one network with a subscriber of another network, the licensees enter into arrangements with each other by way of interconnect agreements. For ensuring effective interconnection and regulating the related interconnection charges, the Telecom Regulatory Authority of India has been issuing Regulations from time to time prescribing the charges payable.

8. There are three different stages involved in the process of completion of a telecommunication call namely (i) Origination (ii) Carriage; and (iii) Termination. For the smooth flow of traffic interconnection arrangements/ agreements between the concerned operators take into account these stages involved in call completion.

9. The IUC Regulations (4 of 2003) of Telecom Regulatory Authority of India define Originating/Transit/Terminating service provider and Transit / Terminating network as follows:-

“(xvii)”Originating/Transit/Terminating Service Provider” means the service provider whose network is used for originating/transit/terminating a telecommunication message (voice and non-voice) respectively”.

10. The transiting and terminating network have been defined in the above mentioned Regulation as:-

“(xxvi)”Transit Network” means the network through which telecommunication messages (voice or non-voice) from originating networks or other transit networks are transmitted and delivered to terminating or other transit networks”.

“(xxv) “Terminating Network” means the network to which a receiver of a telecommunication message (voice and non-voice) is proximately connected to”.

11. As on date the Telecommunication Interconnection Usage Charges Regulations 2003 (2 of 2003) dated 29-10-2003 were in force.

Interconnection usage charges are defined in clause 2(x) as follows:

“Interconnection usage charge (IUC)” means the charge payable by one service provider to one or more service providers for usage of the network elements for origination, transit or termination of the calls.”

12. The above mentioned TRAI Regulations have prescribed payment of IUC charges as below:

#### **“4. Interconnection Usage Charges (IUC)**

The Interconnection Usage Charges are specified in Schedules hereto.

##### **Schedule-I – Termination Charges**

##### **Schedule-II – Carriage Charges**

##### **Schedule-III – Access Deficit Charge (ADC)**

#### **Schedule- I**

##### **1. Termination Charges**

Termination charge for call to Basic (Fixed , WLL (Fixed), and WLL (with limited mobility) and Cellular networks would be uniform @ Rs.0.30 per minute. The same termination charge would be applicable for all types of calls viz. Local, National Long Distance and International Long Distance.

##### **2. Origination Charges**

Forbearance.

The Originating Service Provider shall retain origination charges from the residual after payment of the charges for carriage, termination and access deficit.

##### **3. Carriage Charges**

Carriage charges have been specified in **Schedule II**.

##### **4. Access Deficit Charges**

Access Deficit Charge (ADC) has been specified in **Schedule III**.

### Schedule-III

#### Access Deficit Charge (ADC)

3.1 Access Deficit Charge shall be applicable for the specified category of calls mentioned in **Table III**. The ADC will be payable to Basic Service operators on a per minute basis by the Basic, Cellular, National Long Distance and International Long Distance service providers.

The ADC applicable for different types of calls are mentioned in **Table III**.

The rates are shown on a per minute bulk settlement basis.

(Details mentioned in the Tables are not being given except to state that for ILD calls the ADC payable is Rs.4.25 per minute and for inter-circle calls it is fixed at Rs.0.30, Rs.0.50 and Rs.0.80 for 0-50 km, 50-200 km and above 200 km respectively.)

#### 3.2 Collection and distribution of ADC.

The amount given above is to be collected/paid as follows:

- For intra-circle calls from fixed line to fixed line, the originating service provider to retain the access deficit amount (local calls and calls within “0 to 50 kms” do not have any access deficit charge). No access deficit charge is payable to the terminating fixed network.
- For all inter-circle (including ILD) calls from fixed line, the originating service provider to keep the access deficit amount. No access deficit charge is payable to the terminating fixed network.
- For all ILD calls to fixed line, the terminating service provider to be paid the access deficit amount by the ILDO (directly or through NLDO, wherever applicable) together with the termination charge.
- For all inter-circle calls from cellular mobile/WLL(M) to fixed line, the access deficit charge and termination amount is to be collected by the NLDO from the originating service provider and the access deficit charges together with the termination charge should be paid to the terminating service provider.
- For all inter-circle calls from cellular mobile and WLL(M) to cellular mobile/WLL(M), the access deficit amount is to be collected by the NLDO from the originating service provider and the access deficit charges should be paid to BSNL.
- For all ILD outgoing and incoming calls from/to cellular mobile and WLL(M), the access deficit amount is to be collected by the ILDO and the

access deficit charges be paid to BSNL..”

The delivery of telecommunication traffic therefore is governed by the mandatory licence conditions as well as interconnect regulations. It necessarily implies that for the completion of any call the prescribed route has to be adhered to and any violation or by pass of such arrangements would be in violation of the relevant licence agreement. For the proper implementation of the interconnection usage regime stipulated under the TRAI Regulations, responsibilities have been assigned to the concerned service providers in regard to collection and in turn in regard to payment of the termination charges to the terminating service provider or to the relevant service provider for carriage charges, or to the Basic Service Operators for payment of Access Deficit Charge (ADC).

13. Before we enter into the detailed examination of the matter, it would be useful to bring out at this stage the essential character of the alleged breach of the terms and conditions of the licences by M/s Reliance Infocomm Limited. The first Show Cause notice dated 4-10-2004 brings out the following position:

“And whereas it is understood that some of the international traffic is provided by M/s Reliance Infocomm Limited bear the following features:

- (i) Some of the international calls are being terminated to a switch of M/s Reliance Infocomm Ltd., as Unified Access Service Provider in some of the licensed service areas.
- (ii) The above said traffic is handed over to the other Access Provider with a Calling Line Identification bearing a National Significant Number without any mutual agreement / arrangement for such handing over of calls as Unified Access Service Provider in that service areas or as National Long Distance Service Provider.
- (iii) The International traffic is being handed over at trunk groups for National Long Distance and Local traffic.
- (iv) The Access Deficit Contribution for such calls is not getting paid to the respective authorized Access Providers.
- (v) Further, with the above arrangement, correct Calling Line Identification of International Subscriber is not displayed to the called subscriber.

AND WHEREAS the Central Government reiterates that the scope and character of any licence cannot be changed while providing service to the subscribers.

AND WHEREAS the Central Government reiterates that the telecommunication traffic has to be carried and handed over in the network in separate trunk groups earmarked for local, National Long Distance, International Long Distance traffic unless mutually agreed by two service providers otherwise.

NOW THEREFORE it appears that the above mentioned features are not as per the terms and conditions of various licences.”

14. It would be relevant to briefly explain the concept of Calling Line Identification (CLI). This is a facility whereby the called party is able to know the number of the calling party. The relevant provision in the license is as under:

Clause 41.19 (iv) of Unified Access Service Licence: “ Calling Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security. CLI Restriction should not be normally provided to the customers. Due verification for the reason of demanding the CLIR must be done before provision of the facility. It shall be the responsibility of the service provider to work out appropriate guidelines to be followed by their staff members to prevent misuse of this facility. The subscribers having CLIR should be listed in a password protected website with their complete address and details so that authorized Government agencies can view or download for detection and investigation of misuse. However, CLIR must not be provided in case of bulk connections, call centers, telemarketing services.”

15. In the Show Cause Notice of 4-10-2004 attention has been drawn of M/s Reliance Infocomm Ltd to the fact that the Department of Telecommunications (DoT) has consistently maintained that the CLI should not be changed. In this regard the following instructions of DoT dated 24-6-2003 circulated to all service providers were brought to our notice and are extracted below:

“Calling Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security. CLI Restriction should not be normally provided to the customers. Due verification for the reason of demanding the CLIR must be done before provision of the facility. It shall be the responsibility of the service provider to work out appropriate guideline to be followed by their staff members to prevent misuse of this facility. The subscribers having CLIR should be listed in a password protected website with their completed address and details so that authorized Government agencies can view or download for detection and investigation of misuse. However, CLIR must not be provided in case of bulk connections, call centers, telemarketing services.

All the ILD operators should transit the CLI as received from foreign callers . In case CLI is not received from the distant end (foreign party) then the ILD operator in the country should introduce his assigned two digit carrier identification code followed by the country code from where the call is received. In no case, the call

should be offered to BSO/CMTs without any CLI. This is to identify the origin of call and ILD operator handling the call.”

16. The stand of M/s Reliance Infocomm Limited is brought out in their letter dated 19-10-2004 addressed to DOT. In brief it states as under:

- (i) that M/s Reliance Infocomm in association with Reliance Communications International Inc of USA has launched what is called “Home Country Direct Service” (HCDS). This is an internationally recognized service offered in line with the ITU Recommendations and was not in violation of the licence conditions. There is no tampering of CLI on the part of the Reliance Infocomm Limited
- (ii) Presentation of switch CLI is an inherent feature of any operator assisted service or IVRS (like HCD). Normally CLI of the operator switch is sent to the called party as per the international practice. These calls can be monitored, intercepted or call records can be traced by the designated security agencies like any other call traffic. Therefore, the service does not pose any security threat.
- (iii) This service was offered by a USA registered company floated by M/s Reliance Infocomm Ltd. after entering into an agreement with Reliance Infocomm’s ILD licensee to tap a highly competitive market in the US to bring more traffic to India. All the traffic so brought to India has been properly reflected in the records. There is no loss of revenue to the Government as these records already filed with DoT are used for calculation of Licence Fee.

17. According to the petitioner the ADC for International Calls for such service is paid to the first terminating fixed line operator. Beyond this fixed line operator, charges payable to the last terminating operator are as applicable in the case of domestic calls.

18. In a detailed para-wise reply to the points raised in the show cause notice of DoT dated 4-10-2004, which is annexed with the main reply dated 19/1/2004, details in regard to the HCD Service, have been elaborated, including in regard to its linkage with Calling Line Identification (CLI), as under:

“Features of International Call:

In the abovementioned notice, some features of International calls related to our HCD service have been mentioned. In this regard, we submit that:-

- (i) In case of HCD service calls, since the first stage of the call needs necessarily to be terminated into the network of the HCD operator, RIC(ILDO) had terminated calls into the switches of HCD operator, which are in RIC's UASL network.
- (ii) In the second stage of the call, the RIC (UASL) handed over the corresponding calls, originated on the request of the calling party to the other interconnected operators – i.e. other access providers in the same circle in case of calls to be terminated in the same circle and NLDOs in case of inter-circle calls to be terminated into other circles. Since these calls were originating from the HCD switch, the call CLI was that with the National Significant number and such traffic was routed as any other traffic originating from the concerned circle.

NLDO was performing only the role of a national long distance carrier for carriage and termination of call from one circle to another, based on the information it had w.r.t. the call.

- (iii) In the first stage of the call, when the international caller has dialed the number of the RIC UASL operator the traffic was terminated by the RIC ILDO into the network of RIC UASL network on the international trunks. Since the corresponding second call originated from the respective RIC UASL network as a local or an NLD call, the further call handover of these calls was either on local trunks (in case of calls terminating the same circle) or on NLD trunk (in case of calls terminating in other circle)
- (iv) Since the first leg of the call was terminated by the RIC ILDO into the fixed network of RIC UASL, the ADC with respect to international call was paid by the RIC ILDO to RIC UASL.

In case of international calls ADC is payable by the ILDO, which the ILDO pays either to BSNL in case of mobile terminated calls or the terminating operator including BSNL in case of fixed network terminated calls as per the IUC regulation.

- (v) In case of second stage of the call as the call is being routed as domestic call, CLI which is displayed to the called party is that of the HCD operators switch and not that of International subscriber. This feature is in line with the practice adapted in case of operator assisted services through IVRS, where the called party receives the CLI of the switch of the operator and not that of the calling party.”

19. With reference to Calling Line Identification (CLI), the following has been mentioned:

- (i) It is denied that RIC UASL has engaged in the “tampering” of the CLI. In any event and without prejudice to the other submissions made, presentation of switch CLI cannot be termed as “tampering with CLI” because the same is a normal feature in any network including those of BSNL/MTNL where the operator assisted services are provided, whether through the operator or through IVRS. Moreover, this is not in violation of the Interconnect agreement.
- (ii) In the second stage of the call, the corresponding domestic calls originated on the request of the calling party are handed over by RIC (UASL) to the other interconnected operators. Since these calls were originating from the HCD switch, the call CLI was that with the National Significant number.
- (iii) The concern here may be the requirement of CLI for the security purposes. In this regard, it is stated that even in the HCD service, the entire call detail records from abroad to India are maintained and are available. The calls can be monitored, intercepted or call records can be traced by the designated security agencies, like any other call traffic. Therefore, the service does not pose any security threat.
- (iv) Without prejudice to our above contentions it is stated that, from the reading of the entire clause it is clear that the clause is intended to avoid provision of the CLI restriction to the subscribers without proper justification and verification. This clause of the UASL licence has not been violated in any manner.

20. In the end M/s Reliance Infocomm Ltd. had stated that it had not violated nor changed the scope and character of any of the licenses while providing the service and that telecom traffic has been carried and handed over in the separate trunk route designated for the particular traffic.

21. During the hearing the learned counsel for the petitioner Mr. Harish Salve stated that the broad grounds of challenge are:

- (i) failure to adhere to the condition precedent – viz. seeking a recommendation of the TRAI, prior to imposition of “penalty”,
- (ii) breach of the principles of natural justice

- (iii) Imposition of penalty under the license conditions, which condition is illegal and contrary to Section 20A of the Telegraph Act, 1885.
- (iv) misdirection in law in arriving at the conclusion that there was a breach of the license conditions”.

22. We would take up first the points made by Mr. Salve the learned counsel for the petitioner in regard to ‘misdirection in law in arriving at the conclusions that there was a breach of the license conditions’. He stated that the Show Cause notices primarily raise two issues, namely (i) whether HCD service is permissible, and (ii) whether there was a tampering of the CLI by the license.

In regard to permissibility of the service the following points were made:

- The impugned orders of DoT accept that HCDS is a recognized (and thus per se permissible service). That the petitioners service is not in conformity with ITU recommendation E.153 is a contention based on a patent misinterpretation of ITU recommendations.
- The expression ‘Service Access Provider’ has been misconstrued by DoT while treating the ITU recommendations on HCDS as the definition thereof in the ITU recommendations has been overlooked, namely,

“3.2 Service access provider: The Recognized Operating Agency (ROA) in the country of call origination providing access and telecommunication transport to the home country direct service provider on behalf of the caller”.

- Agreement is in place between the licensee and the ROAs in the country of call origin. This agreement is necessitated due to the fact that there will not be any direct payment by the caller for such calls to the access provider (ROA) from whose network such call is made. In spite of this the ROA has to allow the caller to dial the specified number in the country of call origination to reach the IVRS/the operator of HCD Service provider in the country of call termination. As far as call termination is concerned, it is submitted that there is no difference between termination of a call received under the HCD service regime and any other call originating in a network of the licensee – they are all covered by the Interconnect Agreement. It bears emphasis that there is nothing in the Interconnect Agreement that limits termination of calls to any specified category of calls. The fundamental premise underlying the Order, therefore, that the service

provided by the Licensee was not of the kind visualized by the ITU is thus misconceived.

In regard to tampering of the Calling Line Identification (CLI), the points made were

- The first show cause notice suggested that there was a change in the CLI in that the CLI that was received at the point of termination was not the CLI of the origination of the call. The second show cause notice then further suggested that the CLI had been “tampered” by the Licensee.
- In reply to the show cause notice, the Petitioner placed sufficient material before the Government to show that in IVRS operator-assisted calls, there is a change in the CLI as a part of systematic technical feature of service implementation.
- It is accepted in the second Order passed by the Government that changes do occur in the CLI in operator-assisted calls. The allegation of tampering, therefore, no longer survives.
- As far as the second allegation namely, “wrong CLI was being given” is concerned, the same is misconceived. In the normal course, it is CLI from the operator end that goes through to the

termination end – it is a common occurrence in calls made by BSNL and MTNL in their operator assisted services. Also, when the DoT directed the Petitioner to ensure that the callers’ CLI goes through, the Petitioner made changes and got this arrangement immediately. There is no “violation” of UAS license agreement – in any event, no cause for imposition of penalty is made out.

- Further, the suggestion made in the impugned order that there was some danger posed to “national security” etc, is baseless. The calls were all received, verified and then forwarded for termination on a digital system. Full particulars in detail of each and every calls including the number from which the call originating and particulars of the purchase and credit by the caller were verified by the Operator. These are all recorded and these records are readily available with the Petitioner. No complaint whatsoever on this account has been received – the Petitioner has always been ready and willing to prove to the Government with full particulars of each every call received on the HCD service. The suggestion therefore that on account of the originating CLI not going through, there was any threat to national security is, it is submitted, entirely misconceived.

- There is only one issue – i.e. the nature of the calls vis-à-vis the tariff regulation for interconnect – that needs to be resolved between the Petitioner and BSNL/MTNL. The DoT had in its letter dated 15<sup>th</sup> October, 2004 correctly justified itself on this issue that this is a matter which would directly be resolved between the Petitioner and the Company in other legal proceedings. Financial disputes between the service provider are outside the ken of the Licensor as it is not a licensing issue – other than this, there is no issue as to the service – the demands of penalty raised by the DoT on the footing that there was some illegality in providing the service, are, it is submitted misconceived.
  
- When BSNL and MTNL approached the DoT, the DoT in its first directive of 4<sup>th</sup> October, 2004 directed the Petitioner to “discontinue such features”. The features that are referred to are (a) termination of international traffic on a UAS provider switch, (b) handing over these calls to access providers with a CLI bearing national significant number “without any mutual agreement/arrangement for handing over of calls as Unified Access Service Provider in that area.....”(c) handing over international tariff groups for NLD and local traffic and not paying the access deficit contribution and (e) non-display of the correct calling line identification. These features were construed by the Government as constituting a “change in the scope and character of the license while providing service to the subscriber. In other words, simply stated, the objectionable features were two fold – (a) the portal at which the calls were to be delivered and (b) the CLI issue. The first feature is really a matter of the Interconnect Agreement and raises purely financial issues. Identification of different portal for delivery of calls is a one sided requirement, it is not based on any real technical need. This is evident from the fact that while the Petitioner is required to deliver calls at specified portals, the calls received by the Petitioner from MTNL and BSNL are all received at one single portal. In the ultimate analysis, the only dispute of any consequence is a financial dispute between the Petitioner on the one side and the two Government owned service providers – this does not call for the imposition of any penalty.
  
- If for the service provided the service provider required a separate license and was not covered by any of the existing licenses then there was no question of violation of the terms and conditions of an existing license – it would be a violation of the Indian Telegraph Act per se.

23. Mr. Goolam E. Vahanvati, learned Solicitor General, appearing on behalf of the respondents, countered these arguments as follows:-

- (i) An international call must continue to be an international call at the call destination having regard to the character of the call which cannot be changed.
- An international call having regard to the interconnection regulation and ITU recommendations can terminate only at the call destination.
  - By coming out with the theory that RIL as UASL was the Home Country Direct service provider, RIL has masked an international call and presented it as a domestic call.
  - Once an international call, always and international call. That is the basis of a interconnect regulations.
  - The whole masquerade has been done to hide and mask the international call and to wriggle out of the obligation to pay ADC on the basis that it was not an international call.
- (ii) Interconnect Regulations are expressly made part of the license conditions, Clause 16.1 of the UAS License reads as “The licensee shall be bound by the terms and conditions of this license agreement as well as such order / directions / regulations of TRAI as per provisions of TRAI Act, 1997 as amended from time to time and instructions as issued by the Licensor / TRAI.”
- (iii) The definitions of Originating Network, Originating / Transit / Terminating / Service Provider, Terminating Network in the Interconnect Regulation clearly show that there are essentially only three networks which come into play. There is no other interpolating network.
- (iv) The interconnection charges basically consist of three types of charges. Terminating charges, Carriage charges and Access Deficit Charge. The Access Deficit Charge is based on the specified character of class of call mentioned in the relevant table. And payment is made having regard to the type of call. Thus, it is clear that the nature of the call cannot be tampered with. The provision made for ILD calls as under:-

“For all ILD calls to fixed lines, the terminating service provider to be paid the access deficit amount by the ILDO (directly or through NLD, where applicable) together with the termination charge.

For all ILD outgoing and incoming calls from / to cellular mobile and WLL(M), the access deficit amount is to be collected by the ILDO and access deficit charge be paid to BSNL.”

Thus there is no manner of doubt that for all ILD calls to fixed lines, it is the responsibility of the ILD Operator or the NLD Operator as the case may be, to pay ADC along with the termination charge.

- (v) The Petitioner was asked by DoT to submit the Customer Application Form and Call Data Records for 8 numbers in June 2004. In the first response it was stated that no incoming and outgoing details were found for the specified duration for the said numbers. Repeated reminders were sent and on 7<sup>th</sup> June 2004 it was asserted that “Currently as per initial report, these MDNs do not exist.” MDNs are Mobile Domain Numbers.
- (vi) On 9<sup>th</sup> June 2004 an annexure to the agreement between Reliance Inc. and Reliance Infocomm said to have been executed on 30<sup>th</sup> April 2004, was filed with TRAI Senior Research Officer. This action, by itself, raises some very serious issues. If there was such an agreement and if, according to the Petitioners, this agreement was valid and proper, why was there such a strained silence and deliberate misinformation given to DOT.
- (vii) A letter dated 25<sup>th</sup> August 2004 was written by DoT to the Petitioners in which a list running into 21 pages of Reliance phone numbers was enclosed calling for details of the calls. For the first time in response on 14<sup>th</sup> September 2004, the Petitioners stated, “We would like to inform you that we have service called “Home Country Direct Calling Service.” They also stated. “We would like to inform you that numbers mentioned at Annexure I are the numbers used for providing this service.” Later on it was indicated that 3039 series is used for this. This is a categorical admission that domain numbers were fabricated for the purpose of masking and camouflaging the nature of the calls. Thus these numbers were generated by the system to create dummy numbers so that the call would be registered at the terminating network as a domestic call and not as an international call.
- (viii) The Licensor is directly vitally concerned with the regime relating to Interconnection Regulations. As pointed out in the Counter Affidavit, a careful licensing system has been put in place with each service being delineated and the entire structure of policies, rights and obligations under their license are set up to ensure that structured interconnection usage charges are paid. By their action the Petitioners have gone against the specific conditions of the licenses and regulation which are based on public interest. The Petitioners have shown scant respect for the laws of this country and have resorted to subterfuge, camouflage and deceit.

- (ix) Turning now to the ITU recommendations E.153, the reliance on the ITU recommendations is misconceived. What the Petitioners have actually done is not a Home Country Direct Service at all. The Petitioners have been tied in knots and contradictions when it comes to a consideration of the terms used in the ITU. They have been shifting their stand from time to time but the most important part is that Clause 3.4 which provides that Service Delivery Provider can only be the ROA providing transport at the call destination. This is significant because the note shows that the service delivery provider can also be the home country service provider or the service access provider if he was providing the service at the call destination. However, if this not so, the service delivery provider must be the ROA providing the service to the called destination. There is nothing in the ITU recommendations which provides for termination of calls before the delivery. On the contrary this goes against the very spirit of the ITU recommendations as well as the Interconnection Regulations. This is because ITU requires an agreement with the service delivery provider. Without such an agreement, it cannot be put in place at all. It is an admitted position that there was no such agreement with the other operators till today. It is submitted that what was done was calculated to subvert ITU recommendations and the Interconnection Regulations.

The statement that the international call had to be terminated in the network of the HCD provider is not correct.

The fact that the calls were regenerated so as to deliver international calls as domestic calls at the trunk groups other than those marked for international traffic is not even denied. In fact it is admitted.

The submission that a second stage call has to be set up as a domestic call is not borne out by the Home Country Direct Service provisions at all – on the contrary it is destructive of the whole process of the Interconnect Regulations. In the Counter Affidavit it was categorically also asserted that all this was done so as to access a portal of BSNL or MTNL, which would register a call, not as long distance international call but in fact as domestic call. There is no mention of this in the Rejoinder. On the contrary, as far as the Rejoinder is concerned, an amazing statement is made, “It is denied that the contentions that RIL cannot be terminating operator and avoid payment of access charges is totally incorrect.” This, therefore, is a clear admission that this theory of the UASL switch being put forward as terminating network has been fabricated so as to avoid payment of Access Deficit Charges on an international call.

- (x) The theory that the UASL was legitimately brought into the picture was nothing but an afterthought with a view to justify the unjustifiable. The statement in the Rejoinder at para 17.8 of page 24 that “RIL as UASL was the HCD service provider and the call was brought to India through Reliance ILDO which is terminated in the network of the HCD Operator

which is Reliance UASL network because the HCD service is provided by the Petitioner as UASL and this licensee has to verify the details of the calling subscriber” is completely false. The inclusion of the Reliance UASL into the picture is nothing but a desperate attempt to justify the theory that the call was required to be terminated in its network – there is no such requirement. Indeed it cannot be done.

- (xi) In regard to Calling Line Identification, attention was drawn to what the Petitioner has stated in the Rejoinder as follows:-

“16.2 The contention that the CLI was changed by using technological means and incorrect picture was presented is incorrect and is denied. It is demonstrated how the HCD service operated and from that is evident that as per the normal features of HCD the switch CLI appeared. However, since the dispute was raised by technological corrections, the CLI, which was received on the first call, was sent on the second call. The contention that the petitioner’s actions are violative of instructions and against public interest is incorrect and is denied.”

“16.3 It is contended that change of CLI by petitioners for international calls cannot be compared with CLI of operators assisted trunk services and IVRS trunk services as this is existing from inception and is well understood by the customer, security agencies and service providers, only demonstrates that the respondents are bent upon to decide against the petitioner at any cost without appreciating the correct position. The fact that in an operator assisted service or IVRS the called party receives the operator or switch CLI is therefore an admitted position and on this count alone the entire edifice of the show cause notices and the impugned order must fall.”

24. On the basis of the material produced before us and after hearing the parties our findings and conclusions in regard to breach of license conditions are as follows:

24.1 We are of the view that in regard to the routing of the incoming international calls it is clearly established that at the UASL Switches of Reliance Infocomm at Chennai, Kolkata and Mumbai, the nature of the international call was changed into a domestic call.

The licensing framework in our view stipulates that: an international call originating from a foreign country is supposed to land at the International Gateway / Switch for processing it to the concerned UASL Switch where the called subscriber is connected. By this routing, the nature of the call i.e. INLD is maintained right up to the called subscriber who receives the call from the last UASL Switch. Once the call leaves INLD Gateway

termination of the same is automatically done on the appropriate point of interconnect at the NLD / UASL Switch i.e. INLD Port and not any other port i.e. Local Port. The record of processing this call on various switches and carriage over the respective networks is truthfully maintained in order to facilitate the service providers to collect the charges due to them as per IUC Regulations.

In the instant case Reliance Infocomm used the International Gateway and established connectivity directly to their UASL Switch at Chennai / Kolkata / Mumbai. Thereafter, the call was passed on to the concerned Service Providers Switch / Network up to the called subscriber. The nature of the call was changed at the UASL Switch of Reliance Infocomm to domestic call.

24.2 In regard to the allegation of tampering of CLI it is clearly established that the petitioner deliberately changed the nature of the calls and instead of transmitting the original numbers of the Calling Party, to the Called Party, generated 10 digit numbers at their UASL Switches at Chennai, Kolkata and Mumbai.

Calling line Identification (CLI) is basically the number of the subscriber originating the call which is received by the called subscriber. This number is transmitted in a truthful manner over the switches and the network in the processing of INLD calls, as stipulated in the licensing framework, and this facilitates the lawful interception by the Enforcement / Intelligent agencies. The switches processing the call on origination to the last switch delivering the call do not change the CLI unless it is suppressed / changed by design. In the former case no CLI will be passed on to the Called Subscriber and he will receive only a blank number. In the latter case the changed number will be received by the Called Subscriber.

In the case under consideration Reliance Infocomm terminated the call from the Calling Subscriber on their UASL Switch at Mumbai / Kolkata / Chennai. At these switches the International Call was received and recorded as such. These respective switches generated another ten digit number of Reliance Mobile directory. This can be easily done through software. One of these numbers at random was transmitted to the Called Subscriber. These generated numbers ( referred to as Dummy Numbers ) do not belong to any subscriber

and were generated by the switch through software. By doing the above, the petitioner deliberately changed the nature of the calls from INLD to Domestic.

Learned Counsel for the Petitioner, Mr. Salve, stated that in the Operator assisted call also the CLI is changed and therefore, their case was not different from the operator assisted calls permitted by the Department. It will be pertinent to mention here that no parallel can be drawn between the changing of CLI by Reliance Infocomm and operated assisted calls. While Reliance Infocomm was changing the CLI (tampering with the original), in operator assisted calls the particulars of calling subscriber are maintained by the operator connecting the call. It may also be pertinent to mention that the operator informs the called subscriber about the identity of the calling subscriber which is not happening in petitioner's case.

It is important to note in this connection that when pointed out by the authorities, Reliance Infocomm corrected the violation within a period of few hours and started passing the original numbers to the Called Subscribers. We have not doubt whatsoever that there was a clear and deliberate breach of the license conditions by the petitioner.

24.3 For calls meant for subscribers other than those belonging to Reliance Infocomm UASL, the Reliance UASL Network could not be regarded as the 'Terminating Network' under the Interconnect Usage Charges Regulations. The definition of Terminating Network namely, "(xv) *Terminating Network means the network to which a receiver of a telecommunication message (voice and non voice) is proximately connected to*" makes it amply clear that for international calls meant for Access Providers other than Reliance UASL, the network of Reliance UASL could at best be a transit network and not a terminating network. In this context the definition of 'Transit Network' in the same regulations is relevant and is extracted below:-

"(xxvi) 'Transit Network' means the network through which telecommunication messages (voice or non voice) from originating networks or other transit networks are transmitted and delivered to terminating or other transit networks."

For all ILD calls to fixed lines, it is the responsibility of the ILD operator or the NLD operator, as the case may be, to pay ADC along with the terminating charge to the fixed line operators. The Interconnect Regulations of October 2003 clearly enjoin:

“For all ILD calls to fixed lines, the terminating service provider to be paid the access deficit amount by the ILDO (directly or through NLD, wherever applicable) together with the termination charge.

For all ILD outgoing and incoming calls from / to cellular mobile and WLL (M), the access deficit amount is to be collected by the ILDO and access deficit charge be paid to BSNL.”

This is a clear breach of the Interconnect Regulations and the motive seems to be quite clear as the petitioner stood to gain by resorting to this practice. The Access Deficit Charge payable to the terminating access provider on an ILD call is Rs.4.25 per minute whereas it is only Rs.0.80, Rs,0.50 or Rs.0.30 per minute depending on distance above 200 kms, 50-100 kms or less than 50 kms for a similarly terminating long distance domestic call.

We do not agree with the arguments advanced on behalf of the petitioner that ADC payments constitute a bilateral issue between the concerned operators. The Interconnect Regulations of TRAI which have fixed the ADC charges constitute part of the license and the licensor must ensure that the discipline enjoined in the licensing framework is adhered to by the licensees. Much has been made in this regard of the communication dated 15-10-2004 of DoT addressed to the petitioner whereby the petitioner has sought to conclude that the DoT had agreed to regard the dispute between the petitioners and BSNL & MTNL as between the operators concerned and therefore had decided not to intervene on this matter. We agree with the contention of the respondent that this correspondence was in a particular limited context and such a conclusion as was being drawn by the petitioner was totally unwarranted. M/s Reliance Infocomm had requested DoT to give directions to BSNL / MTNL to not to disconnect the Points of Interconnection (POIs) pending the dispute that had arisen with BSNL/ MTNL in regard to payment of ADC. DoT intimated the petitioner that this is a matter between the service providers and there is no case for licensor to intervene. It had however been made clear that:

“Further, this is without prejudice to the decision to be taken by the Licensor in respect of notice issued vide letter of even number dated 4<sup>th</sup> October 2004 for which an explanation has to be submitted within the stipulated time frame.”

24.4. The petitioner on 14-9-2004 for the first time disclosed to DoT, when called upon by a DoT letter dated 25-8-2004 to disclose call details of specified Reliance numbers, contained in a list running into about 21 pages, that it has a service called Home Country Direct Calling Service. It also enclosed a paper of the International Telecommunication Union (ITU) on Home Country Direct Service along with a brief write up on implementation of this service. It was admitted by them that many of the numbers communicated to them in the said list were being used for providing the said service.

We are given to understand that in the ITU recommendations Home Country Direct is an optional feature for international long distance calls which enables a caller in one country to access directly the Home Country Direct Service Provider in a second country for the purpose of placing a call terminating within the second country. It involves a two stage International Call. This feature is required to be provided on the basis of a bilateral agreement between the cooperating recognized operating agencies. It will require the HCD Service Provider to have a bilateral agreement with the "Service Access Provider."

The call on origination is processed by the "Service Access Provider" which transports the call to Home Country Direct Service Provider. The Home Country Service Provider performs the verification process, records the details of the call, informs the remainder amount / duration of the call which can be established and thereafter initiates the call establishment. The call is, thereafter, delivered through the Service Delivery Provider at the called destination.

"Service Access Provider" and "Service Delivery Provider" are defined as follows:

Service Access Provider

"The Recognized Operating Agency (ROA) in the country of call origination providing access & telecommunication transport to the HCD service provider on behalf of the caller"...

Service Delivery Provider

"The ROA providing telecommunication transport at the call destination"

HCD is a service offered in conjunction with credit card and reverse charge services. The service is charged on the basis of the service used by the calling user (credit card, reverse charging). HCD service provider should separately identify the HCD traffic and record accurate and complete call data

The manner in which the petitioner has operated the HCD feature and the contentions of the respondent in this regard are as under:

- According to the petitioner, Reliance Infocomm as UASL in association with its subsidiary Reliance Communication International Inc. (RCII), USA., is providing the HCD feature and HCD feature can be provided by Unified Access Service Licensee (UASL).

However, according to respondent, HCD can be provided only by International Long Distance (ILD) service provider in agreement with Service Access Provider in country of call origin and also in agreement with Terminating Operators (Service Delivery Providers) in HCD destination country. HCD is an international call, whose nature and character should not be changed. International call must terminate as per the laws, regulations, routing instructions governing international call. UASL, being an access service provider, cannot provide HCD.

- According to the petitioner, Reliance Infocomm as UASL is the HCD Service Provider. HCD international call has to terminate in the network of HCD service provider i.e. Reliance Infocomm-UASL. Further transport to destination is of the call regenerated at UASL switch of petitioner.

However, according to the respondent, only ILD service provider, who owns an international exchange, can provide HCD service in agreement with terminating operator (Service Delivery Provider). The terminating operator / service delivery provider. is defined in TRAI Regulations. as service provider whose network is used for terminating a telecommunication message (voice or non voice) & terminating network is the network to which receiver of such message is proximately connected to.

- According to the petitioner, first stage of the international call is completed on terminating incoming international call into the Reliance Infocomm – UASL net-work via Reliance Infocomm – ILDO Switch & 2nd stage is further carriage of call by Reliance-NLDO from Reliance Infocomm - UASL to destination as domestic call.

However, according to the respondent, it is an international call and it should be terminated as an international call irrespective of number of stages involved. First leg has to be from service access provider (in USA) to HCD provider (which can be Reliance Infocomm - ILD in India) and second leg is to be from HCD provider (Reliance Infocomm - ILD India) to terminating operator (Service Delivery Provider in India).

- According to petitioner, Reliance Infocomm as ILD Operator in India has agreement with Reliance Communication Inc. (RCI) USA, which in turn has agreement with RCII, USA which again in turn has agreement with MCI, USA.

However, according to the respondent, there is no direct bilateral agreement between cooperating ROAs. Further, there is no agreement with the terminating operator (service delivery provider) in whose network call is finally terminated.

- According to the petitioner, it could be pre-paid service and petitioner has operated the service making the use of its calling card.

However, according to the respondent, the service being provided by Petitioner does not have a feature of reverse charging or credit card. It is a prepaid international service and not HCD service as defined in ITU recommendations.

- As per petitioner, RIC – UASL as HCD service provider itself can be the service delivery provider. Information is verified by UASL with Intelligent

Network Platform at UASL switch.

However, according to the respondent, there is no agreement with service delivery provider for termination of HCD calls. Calls were wrongly terminated into the UASL network of petitioner to mask the nature of the call and to present them as domestic calls to networks of other operators.

- As per petitioner, HCD traffic is separately identified and records are maintained.

However, according to the respondent, the traffic was delivered to the terminating operator as domestic traffic and not as international traffic.

According to the learned counsel for the Respondent the petitioners did not have HCDS at all. He said that is was an afterthought to cover the fraud of Reliance Infocomm. What the petitioner was operating was a prepaid international service making use of a calling card. On enquiry from the learned counsel for the petitioner we were given to understand that the function of Home Country Service Provider was done by the UASL Switch. Thereafter the CLI was also changed by this Switch. It appears to us that many doubts have been raised by the respondent in regard to the manner in which HCD was operated by the petitioner. On going through the various contentions there appears to be considerable merit in the stand taken by the respondent.

We do not consider it necessary to go further into the question whether the service provided by the petitioner was indeed the "Home Country Direct Service" in terms of the ITU Recommendation E.153, We are inclined to agree with the conclusion drawn by DoT that the way the service was provided was not in accordance with the License Agreements in as much as it resulted in changes in the character of the international call to a domestic call and it was operated by changing the CLI which was not a technological necessity.

We are of the view that the HCD service as stipulated in the ITU Recommendation could not have been provided by in any way violating the licensing conditions of the ILD, NLD and UASL licenses of Reliance Infocomm (including the stipulation of the Interconnect Regulations of TRAI which form part of the licensing conditions). In our view the nature and character of the international call reaching the fixed line subscriber in India need not have changed in the name of providing the said HCD service. We also find it difficult to understand how the petitioner has proceeded to operate the HCD service meant to terminate in the access networks of other fixed line operators without any mutual agreement / understanding with them. This becomes even more relevant, particularly when it was intended to change the nature of the call from 'International' to 'Domestic' with a changed CLI, with implications on ADC payment obligations (Rs.4.50 per minute in the case of an international call as against Rs.0.80,

Rs.0.50 or Rs.0.30 per minute depending on the distance slab for a domestic long distance call.)

We hold that the so called HCD Service was in clear breach of the licenses and was operated by evading payment of requisite ADC charges to the terminating fixed line operators by changing the nature of incoming international call.

During arguments, it was pointed out that HCD service is also being provided by MTNL and BSNL and that there was nothing new or unusual in what the petitioner had done in this regard. A document was filed by the Respondents intimating introduction of '800 Service' by Videsh Sanchar Nigam Limited. As per the document, the service deals with calls to India from USA. It is based on reverse charging and the AT&T (access provider in USA) database translates the registered access number of subscriber (in USA) into the routing number/destination number in USA itself. Thereafter, the call is sent to the Gateway Switching Center of Videsh Sanchar Nigam Limited (ILD Operator) in India and the call is further routed from Gateway Switching Center to called subscriber as per normal routing plan of incoming international call in India. As per the referred document, in this case metering is suppressed in the USA side and the called subscriber in India is charged as per timing registered in database of USA. Therefore, it is not a case of regeneration of calls in India and the service is based on reverse charging principle. The call is routed as an international call and is charged to the called subscriber as an outgoing call originated from India.

Even for the operator-assisted call, it is noticed that the call lands on a special position in the international trunk exchange, Bombay. The telephone operator gets the number of the called party and verifies the willingness of the party to accept the charges before putting through the call. Therefore, this is also based on reverse charging and the tariff is as applicable to a call to USA, which is paid by the called subscriber in India.

BSNL Directory also mentions about this service, which as per the document submitted by the petitioner is a '800' USA Direct Service approved in 1990 and also based on reverse charging with tariffs payable by the called parties in USA. To access this service, the access numbers have to be publicized which may appear in the directories of BSNL and MTNL. Further, this service is being offered by Videsh Sanchar Nigam Limited, the ILD operator in collaboration with the access provider because in any case subscriber has to access ILD operator through its access provider.

We do not see any substance in this argument and it hardly advances the case of the petitioner.

25. In regard to 'Breach of Natural Justice' the following points were made by Mr. Salve, learned counsel for the petitioner.

The impugned orders are in breach of the principles of natural justice in as much as:-

- There is variance between the allegations in the show cause notices and the actual findings and conclusions in the impugned orders;
- The order refers to certain complaints and other material which has never been furnished to the petitioners;
- In the show cause notices there is reference to certain orders/conclusions reached by the DoT on the basis of which further action was proposed. These documents/orders/conclusions have not been furnished to the petitioners at any time despite demands being made for that purpose;
- It is settled law that the principles of natural justice – in so far as the rule audi altrem partem is concerned – requires that a fair opportunity be given to the affected person for meeting the allegations against him, and thereafter the

determination to indicate the reasons (and not merely the conclusions) for rejecting the explanations furnished by an affected person.

- Elaborate reasons and explanations were given by the Petitioner, in particular, by their letters dated 19<sup>th</sup> October, 2004, 1st December 2004, 14<sup>th</sup> December, 2004 and 7<sup>th</sup> January, 2005. A bare reading of these would show that the explanation given has not even been dealt with by the Government”.

These contentions have been contested by the respondent in the counter affidavit.

26. We do not find much substance in these arguments, in the totality of the circumstances surrounding the case.

The chronological sequence of events leading to imposition of penalty clearly indicates that it took some time for the petitioner to disclose to DoT and explain the circumstances in which certain incoming international calls were being terminated in the networks of other Fixed Line operators as domestic calls. We would not like to go into too many details as we have dealt with these earlier. It would be sufficient for our present purpose to only take note of certain aspects.

It was after considerable prodding by the DoT that on 14.9.2004 the petitioner disclosed that they were operating what has been called “Home Country Direct Calling Service”. The first show cause notice of 4.10.2004 clearly draws the attention of the petitioner to the violation of the license conditions in the following terms:

“AND WHEREAS it is understood that some of the international calls provided by M/s Reliance Infocomm Ltd bearing the following features.

- i) Some of the international traffic is being terminated to a switch of M/s Reliance Infocomm Ltd. as Unified Access Service Provider in some of the licensed service areas.
- ii) The above said traffic is handed over to the other Access Providers with a Calling Line Identification bearing a National Significant Number without any mutual agreement/arrangement for such handing over of calls as Unified Access Service Provider in that service area or as National Long Distance Service Provider.
- iii) The international traffic is being handed over at trunk groups for National Long Distance and Local traffic.
- iv) The Access Deficit Contribution for such calls is not getting paid to the respective authorized Access Providers.
- v) Further, with the above arrangement, correct Calling Line Identification of international subscriber is not displayed to the called subscriber.

AND WHEREAS the Central Government reiterates that the scope and character of any license cannot be changed while providing service to the subscribers.

AND WHEREAS the Central Government reiterates that the telecommunication traffic has to be carried and handed over in the network in separate trunk groups earmarked for local, National, Long Distance, International Long Distance traffic unless mutually agreed by two service providers otherwise.

NOW THEREFORE it appears that the above mentioned features are not as per the terms and conditions of various licenses.

Hence M/s Reliance Infocomm Ltd is directed to discontinue such features within one hour of the receipt of this letter and should explain within fifteen days of the receipt of this letter as to why appropriate action including imposition of penalty may not be taken against M/s Reliance Infocomm Ltd. for violation of terms & conditions of the licenses as indicated above”

27. A very detailed reply dated 19.10.2004 was given by the petitioner to the above show cause notice the sum and substance of which is complete denial by the petitioner that he had bypassed payment of Access Deficit Charges, denial of the allegation of tampering of Calling Line Identification and highlights that the service provided was an internationally recognized service in accordance with the ITU recommendations.

28. It is quite clear from the detailed reply that the petitioner was very clear in regard to the allegations that he was required to answer. In the opening paragraph of the reply the petitioner has stated that with effect from 16.9.2004 all the HCD service calls were being routed on ILD trunk routes and CLI of the caller was being displayed. In the last paragraph of the reply the petitioner has categorically stated “ in view of what we have explained above, we have neither violated nor changed the character and scope of any license while providing the service and telecom traffic has been carried and handed over in the separate trunk routes designated for the particular traffic.”.

29. In the Show Cause Notice of 24.11.2004 it was again clearly brought to the attention of the petitioner that following breaches were committed:

- i) that the facility and feature provided by the petitioner for the international traffic was not HCD service in terms of the ITU, E.153 recommendation and also not in accordance with the provisions of the license agreements for Unified Access Service, National Long Distance Service and International Long Distance Service.
- ii) The aforesaid international traffic was not terminated on the specified trunk route of the access providers.
- iii) The methodology adopted for termination of such traffic resulted in tampering of Calling Line Identification (CLI) leading to violation of the

relevant Clauses of UAS, ILD and NLD licenses which have been clearly enumerated.

The petitioner was given 7 days time to respond and also also given notice that the licensor was inclined to impose a penalty of Rs.50 crores for each licence, totaling Rs.150 crores, for breach of conditions of the UAS Licences for Chennai, Kolkata and Mumbai service areas as well as the ILD and NLD licenses.

30. The reply of M/s Reliance Infocomm dated 01.12.2004 is again a very detailed document basically again trying to explain view points of the petitioner but vehemently denying any breach of the license conditions. The petitioner again asks for more details from the DoT regarding indicating the exact clauses of the licenses that had been violated and also asks for a detailed speaking order giving the justifications for the conclusion that the petitioner had breached the terms of the licenses.

31. It is during this intervening period that a correction letter was issued by DoT dated 8.12.2004 in which in certain paragraphs of the show cause notice of 24.11.2004 the words “international long distance service” was substituted by the word “unified access service licenses” and in the paragraph in which it was stated that the DoT was inclined to impose penalty of Rs.50 crores, a sentence was added to state that “serious violation of licence conditions have gravely endangered public interest and therefore the penalty was contemplated”.

In its reply dated 14.12.2004, the petitioner sought details of how the public interest was being endangered by the alleged breach of licence conditions. The petitioner again asked for detailed grounds, reasons and basis of the allegations made against it.

32. It is in this background that the order dated 23.12.2004 imposing penalty of Rs.150 crores was issued. On going through this order, we find that the main grounds for taking action leading to imposition of penalty are clearly enunciated. It is clearly mentioned that these relate to unauthorized routing of international calls as domestic calls resulting in violation of terms and conditions of the licensed agreements (ILD, NLD and UAS Licences for Mumbai, Chennai and Kolkata), wrongful carriage of international traffic to a switch of UASL of Reliance Infocomm and masquerading the same as domestic traffic. The contentions, and explanation given by M/s Reliance Infocomm Ltd seem to be duly considered and clear findings given in a point-wise manner. By any stretch of imagination, it cannot be considered as a non-speaking order. On the aspect of endangerment of public interest, it has been clearly mentioned, “The presentation of Incorrect Calling Line Identification has created confusion in the minds of the public and the statutory payment of Access Deficit Charge was avoided, which ultimately meant only for telecom services in rural and remote areas at affordable tariffs. Hence the public interest has been severely endangered”.

33. The petitioner made yet another representation dated 7.1.2004 stating that the information and material sought by the petitioner from DoT including the specificity of the terms and conditions of the license had been violated had not been given and the imposition of penalty appeared to be with a pre-determined mind and that all the contentions raised in the earlier letters addressed to the DoT by the petitioner had not been given due consideration.

The DoT in response to the petitioner in its letter dated 17.1.2005 has drawn attention of the petitioner to the fact that all the issues that have been included in their representations are repetitions of the issues that had been raised earlier. The contents of the order dated 23.12.2004 were reiterated and further clarity was provided in regard to the faulty interpretation taken by the petitioner in regard to the definition of “terminating network” and in regard to the stand taken by the petitioner that no illegality was committed by it in changing the CLI of the international long distance call and allowing the junction

CLI to appear at the terminating end. The order regarding imposition of penalty was also reiterated.

34. From the above circumstances of the case, we do not see any reason to hold that the principles of natural justice had been violated. We feel that adequate opportunity has been given by the DoT to the petitioner to explain his side of the case. We find it somewhat strange that a licensee under the Indian Telegraph Act should be calling upon the licensor to do the explaining and give justification to the petitioner again and again, rather the ball should be in the other court and the licensee by its actions and conduct should infuse trust and confidence in all concerned that the license granted to it would be worked in its true spirit and if any mistake has been committed in the past, it would not be repeated in the future.

35. We now take up the arguments of Mr. Salve, learned counsel for the petitioner in regard to failure to adhere to the condition precedent – viz. seeking a recommendation of the TRAI, prior to imposition of penalty. Mr. Salve does not appear to be correct that in the absence of any recommendation from the TRAI, the impugned penalty could not have been levied. First, however, it has to be seen if recommendation of TRAI is at all necessary.

Clause 10\*<sup>1</sup> of the license agreement of Unified Access Service (UASL) after migration provides for imposition of penalty, while Clause 35\*<sup>2</sup> provides for imposition

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**1\* 10. Suspension, revocation or Termination of Licence.**

10.1 The LICENSOR reserves the right to suspend the operation of this LICENCE in whole or in part, at any time, if, in the opinion of the LICENSOR, it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the TELEGRAPH. Licence Fee payable to the LICENSOR will not be required to be paid for the period for which the operation of this LICENCE remains suspended in whole. If situation so warrant, it shall not be necessary for Licensor to issue a notice for seeking comments of the LICENSEE for this purpose and the decision of the Licensor shall be final and binding. Provided that the LICENSOR shall not be responsible for any damage or loss caused or arisen out of aforesaid action. Provided further that the suspension of the LICENCE will not be a cause or ground for extension of the period of the LICENCE and suspension period will be taken as period spent. 10.2(i) The LICENSOR may, without prejudice to any other remedy available for the breach of any conditions of LICENCE, by a written notice of 60 Calendar days from the date of issue of such notice to the LICENCEE at its registered office, terminate this LICENCE under any of the following circumstances :

If the LICENSEE:

- a) fails to perform any obligation(s) under the LICENCE including timely payments of fee and other charges due to the LICENSOR;
- b) fails to rectify, within the time prescribed, any defect/deficiency/correction in service/equipment as may be pointed out by the LICENSOR.
- c) goes into liquidation or ordered to be wound up.
- d) is recommended by TRAI for termination of LICENCE for noncompliance of the terms and conditions of the LICENCE.

of liquidated damages. In the present case we are not concerned with any claim of liquidated damages in terms of Clause 35. Issue raised is with reference to the interpretation of Clause 10. Contention of the petitioner is that while taking action under Clause 10.2(ii) conditions precedent have not been complied with. That condition precedent is stated to be the absence of any recommendation from TRAI which could entitle the licensor i.e. DoT to impose penalty. The arguments proceed thus:

(1) “The scheme of Clause 10 of the license is as under:-

(a) Clause 10.1 confers a power on licensor to suspend the operation of the license where “public interest” or “in the interest of security of the state” or “for the proper conduct of the ‘Telegraph’ so requires”. This, obviously, is unrelated to any acts of the licensee – if License is suspended the license fee is not payable for that period.

(b) Clause 10.2 (i) deals with situation where action is taken pursuant to breach of “any conditions” of a license. It confers upon the Licensor the right to terminate a license in four situations.

(c) In the first three situations – i.e. failure to comply with the obligations under the license, failure to rectify any technical defects pointed out by the licensor or licensee going in liquidation or ordered to be wound up, situation in which unilateral action of termination can taken by the Licensor. Where there is an allegation of “non-compliance of the terms and conditions” unilateral action of termination by the licensor is ruled out.

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10.2(ii) The Licensor may also impose a financial penalty not exceeding Rs. 50 crores for violation of terms and conditions of licence agreement This penalty is exclusive of Liquidated Damages as prescribed under clause 35 of this Licence Agreement.

10.3 LICENSEE may surrender the LICENSE, by giving notice of at least 60 Calendar days in advance. In that case it shall also notify all its customer of consequential withdrawal of SERVICE by sending a 30 Calendar days notice to each of them. The LICENSEE shall pay all fees payable by it till the date on which the surrender of the LICENSE becomes effective. The effective date of surrender of Licence will be 60 Calendar days counted from the date of receipt of such notice by the licensor.

10.4 It shall be the responsibility of the LICENSEE to maintain the Quality of Service even during the period when notice for surrender of LICENCE is pending and if the Quality of Service is not maintained during the said notice period, it shall be treated as material breach liable for termination at risk and consequent of the LICENSEE.

10.5 The LICENSOR reserves the right to revoke the LICENCE at any time in the interest of public by giving a notice of 60 Calendar days from the date of issue of such notice.

(d) Clause 10.2(ii) in this context uses the word “also” for violation of terms and conditions – which is the same as non-compliance of the terms and conditions.

(2) It is submitted that the issue of non-compliance with the terms of the license or the violation thereof has to be established before an independent body, viz. the TRAI. The Licensor cannot unilaterally determine as to whether there has been a non-compliance of the license terms and conditions. This Clause bring it in harmony with the non-obstante provision of Section 11(1)(iii) of the TRAI Act, 1997.

(3) Section 11(1) of the Act makes its provisions applicable “notwithstanding anything contained in the Indian Telegraph Act, 1885”. Thus, even where the Telegraph Act, authorizes the Licensor to terminate a license for non-compliance of terms and conditions, after insertion of Section 11(1) of TRAI Act it can only be on the recommendation of the TRAI.

(4) This, it is submitted, was one of the vital features of reform in the Telecom sector that would insulate the private service providers from unilateral actions by the Government – one of the major concerns in the pre-reform era. This is also because Government also owns two service providers in direct competition i.e. MTNL and BSNL. Government, therefore, can act only on recommendations of the TRAI – i.e. where the TRAI in the first instance specifies that there are non-compliance of the terms of the licence conditions.

(5) It is submitted that Clause 10.2(ii) – which prescribes penalty also for the same cause of action, on its plain terms can only apply if in the first instance TRAI has determined the basic issue of non-compliance – violation of the terms and conditions.

10.6 The LICENSOR reserves the right to take over the entire services, equipments and networks of the LICENSEE or revoke/terminate/suspend the LICENCE in the interest of public or national security or in the event of national emergency/war or low intensity conflict or similar type of situations. Further the LICENSOR reserves the right to keep any area out of the operation zone of the SERVICE if implications of security so require.

10.7 Breach of non-fulfillment of Licence conditions may come to the notice of the LICENSOR through complaints or as a result of the regular monitoring. Wherever considered appropriate LICENSOR may conduct an inquiry either suo-moto or on complaint to determine whether there has been any breach in compliance of the terms and conditions of the LICENCE by the LICENSEE and upon such inquiry the LICENSEE shall extend all reasonable facilities and shall endeavor to remove the hindrance of every type.

10.8 It shall be the responsibility of the LICENSEE to maintain the Quality of Service, even during the period when the notice for surrender/ termination of LICENCE is pending and if the Quality of Service is not maintained, during the said notice period, it shall be liable to pay damages. The quantum of damages and to whom payable shall be determined by the TRAI. The LICENSEE shall also be liable to pay the Licence Fee till the end of the notice period and more specifically till the date on which the surrender/termination becomes effective.

(6) It is submitted that having established the factum of non-compliance, the TRAI can only recommend the termination of a license. The “quantum” of penalty therefore i.e. whether to terminate the license and/ or to impose a penalty thereafter, would be in the discretion of the Licensor. That is the Scheme of 10.2(i) and 10.2(ii). It is submitted that this determination by the TRAI has to be in a proceeding in which the alleged violator/licensee is heard. It is obvious that the request of the Government to the TRAI to determine this issue, the further enquiry by TRAI in the matter, must be after hearing the Licensee and the Government and the recommendation thereafter by the TRAI will have to be communicated to the Licensee.”

We do not think interpretation put by Mr. Salve is correct. Clause 10.2(i) provides that the licensor, without prejudice to any other remedy available for the breach of any conditions of the license, can terminate license after giving 60 days notice to the licensee in all the four circumstances mentioned therein. These circumstances are:

If the LICENSEE:

a) fails to perform any obligation(s) under the LICENCE including timely payments of fee and other charges due to the LICENSOR;

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**2\* 35. Liquidated damages:**

**35.1** The time period for provision of the Service stipulated in this Licence shall be deemed as the essence of the contract and the service must be brought into commission not later than such specified time period. No extension in prescribed due date will be granted. If the Service is brought into commission after the expiry of the due date of commissioning, without prior written concurrence of the licensor and is accepted, such commissioning will entail recovery of Liquidated Damages (LD) under this Condition. Provided further that if the

commissioning of service is effected within 15 calendar days of the expiry of the due commissioning date then the Licensor shall accept the services without levy of LD charges.

**35.2** In case the LICENSEE fails to bring the Service or any part thereof into commission (i.e., fails to deliver the service or to meet the required coverage criteria/ network roll out obligations) within the period prescribed for the commissioning the Licensor shall be entitled to recover LD charges @Rs.5 Lakh (Rupees Five Lakhs) per week for first 13 weeks; @ Rs.10 lakhs for the next 13 weeks and thereafter @ Rs.20 lakhs for 26 weeks subject to a maximum of Rs.7.00 crores. Part of the week is to be considered as a full week for the purpose of calculating the LD charges. For delay of more than 52 weeks the Licence may be terminated under the terms and conditions of the Licence agreement. The week shall mean 7 Calendar days from (from midnight) Monday to Sunday; both days inclusive and any extra day shall be counted as full week for the purposes of recovery of liquidated damages.

- b) fails to rectify, within the time prescribed, any defects/ deficiency/ correction in service/equipment as may be pointed out by the LICENSOR
- c) goes into liquidation or ordered to be wound up,
- d) is recommended by TRAI for termination of LICENCE for non-compliance of the terms and conditions of the LICENCE.

These circumstances are independent of each other. Termination of the license if resorted to does not deprive the licensor to any other remedy available to it for the breach of any of the conditions of the license.

**35.1** We may examine the power of TRAI to make recommendations and for that we have to refer to Section 11 of the Act. Under Section 11(1)(a)(iii) one of the functions of the TRAI is to “make recommendations, either suo motu or on a request from the licensor” for revocation of licence for non-compliance of terms and conditions of licence. Section 11(1) (b)(i) provides that one of the functions which TRAI is required to discharge is to “ensure compliance of terms and conditions of licence”. TRAI in the present case has not made any recommendations for revocation of the licence. The

question whether TRAI has discharged its functions to ensure compliance of terms and conditions of the licence does not fall for consideration before us as that question has not been raised. Then though under sub-clauses (i) and (ii) of Clause (a) of sub-section (1) of Section 11, it may be mandatory for the Central Government to seek recommendations of TRAI in respect of matters specified therein, there is no such mandate requiring recommendations of TRAI prior to taking action for termination of the licence. Neither any recommendation is required to be sought under sub-clause (iii) nor any recommendation of its own was rendered by TRAI. As to the question of value to be attached to the recommendations of TRAI for taking any action against the licensee is not quite relevant for our purposes. Even the recommendations of the TRAI are not binding on the Central Government. Except for the first proviso or may be second or third to Section 11 other proviso also do not fall for consideration in the present case. That being the position we fail to understand where there is mandate in Clause 10.2(i) to get the recommendations of the TRAI. Unless of course recommendation is called for or TRAI suo motu makes any recommendation, that would itself be a separate ground for taking action by the licensor to terminate the license after giving 60 days notice. This Clause 10.2(i) says no more. Then the argument raised was that for taking action under Clause 10.2.(ii) for imposition of penalty, there should have been first taken action under Clause 10.2.(i) to terminate the license and only then action for imposition of penalty could be initiated. The argument is based on the use of the word “also” in the Clause 10.2(ii). Again we do not agree to such interpretation. The word ‘also’ only indicates licensor has also power to impose penalty independent of its right to terminate license though licensor may simultaneously take action under both the clauses i.e. 10.1(i) and 10.2(ii). A counter argument was thrown in on the use

of the word 'also' that prior recommendations of TRAI for termination of the license for non-compliance of the terms and conditions of the license, was a must pre-condition and then steps could be taken to impose penalty. The language of both the clauses 10.1.(i) and 10.2.(ii) is quite explicit and there is no ambiguity as was sought to be projected by Mr. Salve. There is a decision of the Supreme Court on the interpretation of the term 'and may also' in Samee Khan vs. Bindu Khan (1998) 7 SCC 59. In this case Supreme Court was considering the words "also", "and" if it was conjunctive or disjunctive - "and" when means "or". The Court was interpreting Rule-2-A in Order 39 of Civil Procedure Code which reads as under:

*"2-A. Consequence of disobedience or breach of injunction. – (1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, the court granting the injunction or making the order, or any court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the court directs his release.*

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto".

High Court, from whose order appeal came to Supreme Court was of the view that, "In the language of Order 39 Rule 2-A(1) the use of the words 'and may also' indicates the intention of the legislature that the order of detention of the contemner in civil imprisonment may be passed in 'addition to' the order of attachment of his property and not 'in lieu thereof'. Supreme Court did not agree with this interpretation and examined the question as under:

**"13.** The words "and may also" appearing in R. 2A were sought to be given a meaning that the course suggested thereafter in the Rule has to be resorted to as an optional additional step, a resort to which would be impermissible without complying with the first course suggested in the Rule. The word "also" has different attributes and its meaning is not to be confined to "further more". In legalistic use, the word "also" can be employed to denote other meanings as well. In Black's Law Dictionary the word "also" has the following variety of meanings.

*"Also. Besides; as well; in addition; likewise; in like manner; similarly; too; withal. Some other thing; including; further; furthermore; on the same manner; moreover; nearly the same as the word 'and' or 'likewise'."*

**14.** Since the word "also" can have meanings as such "as well" or "likewise", cannot those meanings be used for understanding the scope of the trio words "and may also"? Those words cannot altogether be detached from the other words in the sub-rule. Here again the word "and" need not necessarily be understood as denoting a conjunctive sense. In Stroud's Judicial Dictionary it is stated that the word "and" has generally a cumulative sense, but sometimes it is by force of a content read as "or". Maxwell on "Interpretation of Statutes" has recognised the above use to carry out the interpretation of the legislature. This has been approved by this Court in *Ishwar singh v. State of UP, (AIR 1968 SC 1450)*. The principle of *Noscitur A*

*Sociis* can profitably be used to construe the words "and may also" is the sub-rule.

**15.** Hence the words "and may also" in Rule 2-A cannot be interpreted in the context as denoting to a step which is permissible only as additional to attachment of property of the opposite party. If those words are interpreted like that it may lead to an anomalous situation. If the person who defies the injunction order has no property at all the court becomes totally powerless to deal with such a disobedient party. He would be immuned from all consequences even for any open defiance of a court order. No interpretation shall be allowed to bring about such a sterile or anomalous situation (vide Constitution Bench in *Vidya Charan Shukla v. Khubchand Baghel*, AIR 1964 SC 1099). The pragmatic interpretation, therefore, must be this: it is open to the Court to attach the property of the disobeying party and at the same time the court can order him to be detained in civil prison also if the court deems it necessary. Similarly the court which orders the person to be detained in civil prison can also attach the property of that person. Both steps can be resorted to or one of them alone need be chosen. It is left to the court to decide on consideration of the fact situation in each case."

We, therefore, do not accept the contention of Mr. Salve that there has been failure to adhere to the condition precedent viz seeking recommendation of the TRAI, prior to imposition of penalty.

36. Mr. Salve, then submitted that it appeared from the list of dates filed by the DoT that there were some private communications between them MTNL, BSNL and the TRAI and these have been for the first time disclosed in the list of dates and events. This now shows the lack of transparency in the procedure followed by the DoT – it further supports the apprehension that the DoT had acted only to support the ill-conceived and hasty demands raised by BSNL and MTNL. It is submitted that a failure to adhere to the procedure prescribed in Clause 10.2(i) of the License, without more, vitiates the entire process. It is not correct to allege that there was any private communication between MTNL, BSNL and TRAI which was prejudicial to the interest of the petitioner. When BSNL and MTNL found unauthorized routing of the international calls by the petitioner, in breach of the license conditions, they, it appeared, complained to the TRAI for appropriate action under Section 11\*<sup>3</sup> of the Act. Then on 4<sup>th</sup> October, 2004, petitioner wrote a letter to the Chairman, Telecom Commission explaining its stand on HCDS. Last two paragraphs of the letter are as under:-

“Sir, we look forward to your clarification/interpretation on the implementation of HCD service and reiterate our commitment to abide by the

decision taken by the DoT in this regard. We have already indicated our willingness to pay the relevant ADC amount, which might become payable to BSNL/MTNL based on the call records available with us which can be verified with records available with BSNL/MTNL and can be reconciled as explained above.

Keeping in view our submissions above and our firm commitment to transparently settle the issue as explained above by making necessary ADC payments, we request that BSNL and MTNL field units may please be asked not to take any coercive action in the form of issuing disconnection notices etc.”

This reply was sent by DoT on 15<sup>th</sup> October, 2004. It was stated that the dispute regarding disconnection of POIs by BSNL/MTNL was a matter between the service providers governed by the interconnection agreement with petitioner and BSNL/MTNL

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**3\* Section 11.** 1)Notwithstanding anything contained in the Indian Telegraph Act,1885,the functions of the Authority shall be to-

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:-

- (i) need and timing for introduction of new service provider;
- (ii) terms and conditions of license to a service provider;
- (iii) revocation of license for non-compliance of terms and conditions of license;
- (iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services.
- (v) technological improvements in the services provided by the service providers.
- (vi) type of equipment to be used by the service providers after inspection of equipment used in the network.
- (vii) measures for the development of telecommunication technology and any other matter relating to telecommunication industry in general;
- (viii) efficient management of available spectrum;

and as such there was no case for licensor to intervene. The request by petitioner to the Telecom Commission to issue directions to BSNL and MTNL and the reply of Telecom

Commission do not have any relevance for imposition of financial penalty for violation of terms and conditions license agreement. This penalty is exclusive of liquidated damages as prescribed under Clause 35 of the license agreement. In its letter dated 15<sup>th</sup> October, 2004 petitioner was also informed that proceeding for imposition of penalty was quite separate. That being the position, the fact that MTNL/BSNL had complained to DoT about the impugned activities of the petitioner and for the DoT to initiate action for imposition of penalty under Clause 10.2(ii) would show that objection of Mr.Salve, learned counsel for the petitioner, is of no consequence.

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(b) discharge the following functions, namely:-

- (i) ensure compliance of terms and conditions of license;
- (ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority (Amendment) Ordinance,2000, fix the terms and conditions of inter-connectivity between the service providers;
- (iii) ensure technical compatibility and effective inter-connection between different service providers.
- (iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
- (v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication services;
- (vi) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
- (vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;
- (viii) keep register maintained under clause (viii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;
- (ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations.

37. Imposition of penalty by the impugned order is also challenged on the grounds of (i) misdirection in law, in view of Section 20A of the Indian Telegraph Act, 1885 (ii) and imposition of penalty is bad in view of Section 74\*<sup>4</sup> of the Indian Contract Act, 1872.

Section 20A\*<sup>5</sup> of the Telegraph Act provides for punishment with fine where licensee under Section 4\*<sup>6</sup> contravenes any condition of the license granted to him. We may here also note Section 29\*<sup>7</sup> of the TRAI Act which also prescribes for punishment with fine if a person violates the direction of the TRAI. For punishment under both the Sections it is the criminal Court which can convict an offender after following the procedure of a criminal trial as prescribed in the Code of Criminal Procedure. There is no bar to the imposition of penalty under Clause 10.2(ii) as well as filing a criminal complaint under Section 20A of the Telegraph Act. Penalty and fine have different

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(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in the clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period of specified in the second provision or within such period as may be mutually agreed upon between the Central Government and the Authority.

Provided also that if the Central Government having considered that recommendation of the Authority comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendations back to the Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by the Government. After receipt of further recommendation, if any, the Central Government shall take a final decision.

concepts. Under Section 63\*<sup>8</sup> of the Indian Penal Code “where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited but shall not be excessive. Section 64\*<sup>9</sup> of the Code prescribes sentence of imprisonment for non-payment of fine.

In *M/s. Gujarat Travancore Agency, Cochin vs. Commissioner of Income Tax, Kerala, Ernakulam* – (1989) 3 SCC 52, the Court was considering Sections 271(1)(a) and Section 276-C of the Income-Tax Act, 1961. Section 271(1)(a) provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income. Section 276 provides that if a person willfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. The Court said that it was clear that under Section 271(1)(a) what is intended is civil obligation while in the case of Section 276-C what is imposed is a criminal sentence. Court also said that there was nothing in

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(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India;

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under [sub-section (1) or sub-section (2)], the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. The Court then referred to the following statement in *Corpus Juris Secundum*, volume 85, page 580 paragraph 1023:

“A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws”.

Mr. Salve said that when there is breach of contract by the promisor and there is any stipulation in the contract by way of penalty then the Central Government as promisee under Section 74 of the Contract Act is entitled to receive from the promisor on the alleged breach of the contract a reasonable compensation not exceeding the amount of

penalty stipulated. He said penalty imposed in the present case was in breach of the provision of law as contained in Section 74 of the Contract Act. He said penalty has three different concepts (i) in service jurisprudence where employment is terminated by way of penalty for breach of contract, (ii) in an excise contract where penalty of Rs.1000/- per day could be imposed which would be statutorily liquidated damages and (iii) a case like the present one where penalty is imposed as a consequence of certain

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#### **4\* 74. Compensation of breach of contract where penalty stipulated for**

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation : A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Explanation : When any person enters into any bail bond, recognisance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

actions of the party breaching the contract terms. He said there is a vital difference between the third category and those in first and second categories. To support his submissions he cited certain decisions of the Supreme Court and the English House of Lords::

A five Judges Bench of the Supreme Court in the case of Fateh Chand vs. Balkishan Das – 1964 (1) SCR 515 was considering the question of compensation for breach of contract where penalty was stipulated. The matter before the Supreme Court arose out of a suit filed by the plaintiff vendor for alleged breach of contract of sale of immovable property. The vendee had paid a sum of Rs.1000/- as earnest money and also paid subsequently Rs.24,000/- towards part payment of the sale consideration. Alleging breach of contract vendor sought to forfeit Rs.24,000/-, claimed possession of the property and also damages for use and occupation for the period the property remained in possession of the vendee. A clause of the contract provided that if for any reason vendee failed to get the sale deed registered by stipulated date the amount of Rs.25,000/- (Rs.1,000/- + Rs.24,000/-) shall stand forfeited and the agreement deemed cancelled. The covenant for forfeiture of Rs.24,000/- was manifestly a stipulation by way of penalty. The Supreme Court considered the provisions of Section 74 of the Contract Act which dealt with the measures of damages into two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where contract contains any

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**5\*** **20A. Breach of condition of license** – If the holder of a license granted under section 4 contravenes any condition contained in his license, he shall be punished with fine which may extend to one thousand rupees, and with a further fine which may extend to five hundred rupees for every week during which the breach of the condition continues

other stipulation by way of penalty. The Court in the case before it was not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract fell within the first class. The Court said.

“The measure of damages in the case of breach of a stipulation by way of penalty is by s 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of

**6\* 4. Exclusive privilege in respect of telegraphs, and power to grant licenses.**

(1) Within [India], the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs: Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]:

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working-

- (a) of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territorial waters], and
- (b) of telegraphs other than wireless telegraphs within any part of [India].

[Explanation – The payments made for the grant of a licence under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997).]

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.]

compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

The Supreme Court examined some of the decisions of the High Court and observed:

“High Courts appear to have concentrated upon the words "to be paid in case of such breach" in the first condition in s. 74 and did not consider the import of the expression "the contract contains any other stipulation by way of penalty", which is the second condition mentioned in the section. The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract which by the terms of the contract expressly or by clear implication are liable to be forfeited. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties predetermined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special

**7\* 29. Penalty for contravention of directions of Authority** - If a person violates directions of the Authority, such person shall be punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues

**8\* 63. Amount of fine**

Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court, is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach".

After examining the facts of the case the Court held that the vendor was entitled to retain out of Rs.25,000/- only Rs.1,000/- and was also entitled to compensation for the period during which the vendee remained in possession of the property.

In *Maula Bux vs. Union of India* - (1970) 1 SCR 928 Supreme Court followed its earlier decision in the case of *Fateh Chand*. It said that the expression "whether or not actual damage or loss is proved to have been caused thereby" in s.74 is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases, compensation can be calculated in accordance with established rules. Where the court is unable to assess the compensation, the sum named

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**9\* 64. Sentence of imprisonment for non-payment of fine**

[In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable [with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,]

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

by the parties, if it be regarded as a genuine pre-estimate, may be taken into consideration as the measure of reasonable compensation, but not of the sum; named is in the nature of a penalty”.

In Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. - (2003) 5 SCC 705 Supreme Court again relied on two aforesaid cases in Fateh Chand and Maula Bux . In this case the Court was concerned with the situation where it was impossible to assess or prove the damages and where the specified terms of the contract itself had made a provision in consonance with Sections 73 and 74 of the Contract Act. Paras 67 and 68 of the judgments are relevant for the purpose which we quote:

“67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provision of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damage are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, respondent was informed that it would be required to pay stipulated damages.

68. From the aforesaid discussion, it can be held that :-

- (1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;
- (2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that since estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act”.

In Dunlop Pneumatic Tyre Company Ltd. vs. New Garage and Motor Company Ltd. – 1915 AC 79 (HL) House of Lords laid down the principles in the case of breach of several stipulations of varying importance in a contract. We quote this principle from the head note and is as under:

“Where a single sum is agreed to be paid as liquidated damages on the breach of a number of stipulations of varying importance, and the damage is the same in kind for every possible breach and is incapable of being precisely ascertained, the stipulated sum, provided it be a fair pre-estimate of the probable damage and not unconscionable, will be regarded as liquidated damages and not as a penalty”.

Clydebank Engineering and Shipbuilding Company Limited and Ors. AND Don Jose Ramos Yzquierdo Y Castaneda and Ors. – 1905 AC 79 (HL) is another decision of the House of Lords. In this the House of Lords considered the question of penalty in a contract for late delivery of a vessel. We quote from the head note:

“The Spanish Government contracted with the appellants for the building of four torpedo boats, delivery to be within periods varying from six and a half months to seven and three-quarter months from the date of the contracts. The contracts provided that ‘The penalty for later delivery shall be at the rate of 500*l.* per week for each vessel.’ The vessels having been delivered many months after the stipulated period and the price paid, the Spanish Government claimed from the appellants payment of 500*l.* for each week of late delivery:-

*Held*, affirming the decision of the Second Division of the Court of Session, (1) that the sum of 500*l.* a week was to be regarded as liquidated damages and not as a penalty, and that the Spanish Government were entitled to recover; (2) that payment in full of the price of the vessels without reservation was no waiver of the claim for damages for delay in delivery.

Bridge vs. Campbell Discount Co. Ltd. – 1962 AC 600 (HL) is yet another decision of House of Lords where the dispute was between hirer of a car under the hire purchase agreement and a finance company. The agreement provided for an agreed amount of compensation to the owner for breach of the agreement. House of Lords said that this amount in the Clause was not a genuine pre-estimate of damages but a penalty

and had to be determined the amount of damages if any which the company had suffered.

In the case of Smt. Sova Ray and Anr. Vs. Gostha Gopal Dey and Ors-. 1988 (2) SCC 134, a compromise was entered between the parties. A Clause in the terms of compromise provided “that half of the share of the plaintiff i.e. one-sixth share, would go to defendant No.9 provided he paid a sum of Rs.40,000 to the plaintiffs by a particular date, failing payment within time, the decree passed by the trial court would stand confirmed as per terms of the compromise”. It was contended by the defendant that this Clause of compromise agreement was of penal nature and was illegal. In support of the argument reliance was placed on Section 74 of the Contract Act. The Supreme Court did not find any merit in the argument that the Clause was illegal being of penal nature. After referring to the terms of the compromise the Court held:

“In this background the defendant was subjected to the condition that if he had to take the advantage of the bargain he was under a duty to pay the stipulated amount by the time mentioned in the agreement. On failure to do so within time, he was to be deprived of this special benefit. Such a Clause cannot be considered to be a penalty Clause. The expression ‘penalty’ is an elastic term with many different shades of meaning but it always involves an idea of punishment. The impugned

Clause in the present case does not involve infliction of any punishment; it merely deprives defendant 9 of a special advantage in case of default”.

38. It was the submission of Mr. Sundaram, learned Senior Advocate for the DoT that Section 74 of the Indian Contract Act is not exhaustive of all the contractual obligations and as a matter of fact Preamble to the Indian Contract Act, 1872 would show that it was enacted “to define and amend certain parts of the law relating to contract”. He said license in the present case is a privilege which the Central Government has granted to the petitioner under Section 4 of the Telegraph Act. The license under Section 4 gave exclusive privilege of “establishing, maintaining and working telegraphs” to the Central Government. It gave discretion to the Central Government to grant license for the same on such condition and in consideration of such payments as it thinks fit to any person to establish, maintain or work telegraphs within any part of India. In *Delhi Science Forum Vs. Union of India and Anr. – 1996(2) SCC 405*, Supreme Court was considering power to grant of the licences under proviso to Section 4(1) of the Telegraph Act 1885 by the Central Government to non-government companies, including foreign collaborated companies for establishing, maintaining and working telecommunication system of the country pursuant to the policy of privatization of the telecommunication. Supreme Court held that Section 4(1) confers exclusive privilege on the Central Government and this is how the court said:

“Sub-section (1) of Section 4 of the Telegraph Act on plain reading vests the right of exclusive privilege of establishing, maintaining and working telegraphs in the Central Government, but the proviso thereof enables the Central Government to grant licence, on such conditions and in consideration of such payments as it may think fit, to any person to establish, maintain and work telegraph within any part of India”, and then “In view of the clear and unambiguous proviso to sub-section (1) of Section 4 enabling the Central Government to grant licence for establishment, maintenance and working telegraphs including telecommunications, it can be said that privilege, which has been vested in the Central Government, can be granted to others on such conditions and considerations as the Central Government may deem fit. The Central Government while exercising its statutory power under first proviso to Section 4 of the Act, of granting licenses for establishment, maintenance and working of telecommunications, have a judicial duty as well.”

Mr. Sundaram also referred to a Division Bench decision of the Madras High Court in *B.N. Mathur & Anr. Vs. The Union of India – AIR 1974 Madras 233*. In this case the licensee was granted license to bring foreign car into India on the condition that the car imported against the said permit should be re-exported when licensee leave the country. The licensee executed bond wherein he undertook that he would not sell or dispose of the car when the same is in India and that it would be re-exported out of India in terms of the license. There was a breach of the condition and the car was not re-exported. In proceedings for enforcement for the bond it was pleaded that the condition for payment was outside the scope of the Import (Control) Order it being in the nature of penalty. Reliance was placed on Section 74 of the Contract Act. The High Court rejected the plea and held as under:

“In our opinion, this argument of the learned Counsel for the appellants overlooks the exception to Section 74 of the Indian Contract Act, which also we have extracted. That exception takes two categories of instruments out of the scope of the restriction

contained in Section 74. One category of instruments is bail bond, recognizance or other instrument of the same nature. The other category is any bond entered into by any person under the provisions of any law or under the orders of the Central Government or of any State Government for the performance of any public duty or act in which the public are interested. In both these cases, the person who entered into the bond, recognizance or other instrument, upon breach of the condition of any such instrument, shall be liable to pay the whole of the sum mentioned therein. If the case of the appellant falls within the scope of the exception, certainly the appellants are liable to pay the entire amount mentioned in Ex.A-2, without the court assessing the reasonable compensation for the breach of the contract committed by the appellants herein. We are clearly of the opinion that the bond executed by the appellants is covered by the Exception to the section and comes within the second category referred to above. That it is a bond is not disputed. That it was executed under orders of the Central Government is not disputed either. The bond itself states that it was executed under the orders of the Central Government and was in respect of an act in which the public are interested. For one thing, the appellants having executed the bond with the express stipulation that the bond was entered into under the orders of the Central Government, for the performance of an act in which the public are interested, are not entitled to go back on the said stipulation and contend that it was not executed under the orders of the Central Government, and it was not for the performance of an act in which the public are interested. Even assuming that the appellants are entitled to go back on the express stipulation and canvass the position as to whether the present bond was executed in respect of an act in which the public are interested, we are clearly of the opinion that the present case falls within the scope of the exception referred to independent of the above stipulation in Ex.A-2. It is not disputed that the import of foreign cars is prohibited. Such prohibition is imposed by the Government, among others, for giving protection to indigenous production of the cars. Therefore, the fulfillment of the condition of re-export subject to which the foreign car is imported is an act in which the public as a whole are interested, and indisputably the stipulation itself was inserted in the bond under the orders of the Central Government. Consequently, the case falls directly within the scope of the exception and the appellants herein having failed to perform the obligation of re-exporting the car are bound to pay to the respondent the sum mentioned in the bond, and the question of the court itself determining a reasonable compensation not exceeding the sum mentioned in the bond does not arise”.

Mr. Sundaram also relied on exception to Section 74 of the Contract Act and said Central Government was well within its right to impose penalty of the full amount. He said in fact, facts and circumstances of the case so demanded.

39. To counter this argument Mr. Salve referred to explanation appearing after exception Clause which provides that a person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

To support his argument that grant of license under Section 4 of the Telegraph Act is not a privilege as contended by the respondent Mr. Salve referred to a few decisions of the Supreme Court in which the Government granted license for retail vend of country liquor:

First case to which reference was made is of the Constitution Bench decision of the Supreme Court in the case of Har Shankar and Ors. vs. The Dy. Excise and Taxation Commissioner & Ors - (1975) 1 SCC 737. This case arose out of the proceedings under

the Punjab Excise Act, 1914. The matter came to the Supreme Court on appeal from the order of the Punjab and Haryana High Court. The appellants were mostly retail vendor of country liquor holding license for sale of liquor in specified vends. The licenses were granted to them on acceptance of their bids in auction held by the Excise Department of the Government of Punjab. The appellants, it appears, were unable to meet their obligations under the conditions of auction and fell in arrears. The State Government demanded the payment, threatened to cancel the licenses granted to the appellants and declared its intention to re-sell the vends at the risk of the appellants. This led the appellants to file writ petition in the High Court. They asked for quashing of the auction held in pursuance of which they were granted licenses and also asked that the respondents be restrained from enforcing the obligations arising under the terms and conditions of auction. A preliminary objection was raised by the Government as to the maintainability of the writ petition on the ground that the appellants who offered their bids in the actions did so with full knowledge of the terms and conditions attaching to the auctions and they cannot, by the writ petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. The Court held that the objection was well-founded and must be accepted. (Para 15).

In para 16 the Court held as under:

16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale; of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between, the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to, sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of the trading transactions. Those who contract With open eyes must accept the burdens of the contract along With its benefits. The powers of the Financial-Commissioner to grant liquor licensees by auction and to collect licence fees through the medium of auctions cannot by writ petitions be, questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.

After referring to various judgments Supreme Court held that there was no fundamental right to do trade or business in intoxicants.

The other judgment to which reference was made is that of State of Orissa and Ors. vs. Harinarayan Jaiswal & Ors. – (1972) 2 SCC 36 where the Supreme Court was

considering provisions of the Bihar and Orissa Excise Act, 1915. The Preamble of this Act reads as under:

“Whereas it is expedient to amend and re-enact the law in the Province of Bihar and Orissa relating to the import, export, transport, manufacture, possession, and sale of certain kinds of liquor and intoxicating drugs;

And whereas the previous sanction of the Governor-General has been obtained, under Section 5 of the Indian Councils Act, 1892, to the passing of this Act;

It is hereby enacted as follows:”

Under Section 22 of the Bihar and Orissa Excise Act, 1915 the State Government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege of manufacturing and supplying wholesale and selling retail, any country liquor or intoxicating drug within any specified local area. For this public notice is to be given of the intention to grant any such exclusive privilege. Under Section 29 State Government may accept payment of a sum in consideration of the grant of any exclusive privilege which could be in addition or instead of duty. This Section also provides as to how the sum so payable shall be determined. It could be by calling tenders or by auction or otherwise as the State Government may, by general or special order direct.

In this case before the Supreme Court which had come in appeal from the Orissa High Court, the Supreme Court noticed the following facts:

“In pursuance of the order made by the State of Orissa, the Excise Commissioner notified on January 8, 1971, that the exclusive privilege of selling by retail the country liquor in the eight specified shops in the Cuttack District for the period from April 1, 1971 to March 31, 1972, will be sold by public auction on February 15, 1971, and on the following days. The auction was accordingly held on the notified day. The 1<sup>st</sup> respondent was the highest bidder for those eight shops. His bids were provisionally accepted by the Collector subject to confirmation by the Government. The Government rejected those bids being of the view that inadequate price had been offered as a result of collusion between the bidders. It ordered the Excise Commissioner to call for tenders in respect of those shops. After the tenders were duly received, the Government accepted the tender in respect of one shop and rejected the other tenders as it was again of the opinion that the price offered was inadequate. Thereafter it sold the seven shops by negotiating with some of the tenderers. The price ultimately fetched was substantially more than that offered either at the auction or as per tenders.

The first respondent then filed a writ petition under Article 226 of the Constitution in the High Court for a direction to the Government to confirm his bids and cause the necessary licences to be issued to him. The High Court allowed the writ petition on the ground which is not necessary for us to record. The State Government filed appeal before the Supreme Court against the order of the High Court. The Supreme Court allowed the appeal and dismissed the writ petition.

40. Telegraph Act, however, grants exclusive privilege in respect of working of telegraphs on the Central Government and by granting license Central Government has parted with that exclusive privilege in favour of licensee to an extent. Nature of duty in telecommunication is such that any licensee under Section 4 could be said to have undertaken to perform public duty. The cases cited by Mr. Salve are those which relate to trade of liquor. There is no law that right to trade in liquor or intoxicants exclusively belongs to the State and it is the State which is parting that right (or privilege) in favour of the traders. There is, therefore, marked difference as under Section 4 of Telegraph Act where exclusive privilege is conferred on the State i.e. the Central Government.

Decision in the case of Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. and that of House of Lords in Dunlop Pneumatic Tyre Company Ltd. vs. New Garage and Motor Company Ltd. would rather show that in the circumstances of the case the amount of penalty stipulated in the contract could be treated as liquidated damages in case of breach of that contract.

License in the present case is not the usual type of contract like supply of goods, construction of bridge or building, laying of pipeline etc. where the Courts have to arrive at the amount of damages or loss caused to promisee. The Courts also in certain circumstances grant injunction or even specific performance of the contract. Various judgments have settled this law of damages for breach of contract under Section

74 of the Contract Act. It is in fact a trite law as so many judgments quoted above would themselves show.

41. The other set of cases cited at the Bar by Mr. Salve relates to power of the executive to recover impost not authorized by law. In State of Kerala vs P.J. Joseph - AIR 1958 SC 296, the Court after examining the facts of the case said “ The fact of the matter is that the impost was nothing but an executive order, if an order it was, which had no authority of law to support it and was, therefore, an illegal imposition. As explained by this Court in Mohammad Yasin v. Town Area Committee Jalalabad 1952 SCR 572: (AIR 1952 SC 115) (A) and again in Bengal Immunity Co. Ltd. v. State of Bihar 1955-2 SCR 603 at p.681 : ((S) AIR 1955 SC 661 AT P. 693) (B), an impost not authorized by law cannot possibly be regarded as a reasonable restriction and must therefore, always infringe the right of the respondent to carry on his business which is guaranteed to him by Artc.19(1)(g) of the Constitution”.

In Bharat Kala Bhandar Ltd. vs. Municipal Committee - (1965) 3 SCR 499, the Court by majority ( 3-1) held:

“Since the respondent had no authority to levy a tax beyond what s.142A of the Government of India Act, 1935, or what Art.276 permitted, the assessment proceedings were void in so far as they purported to levy a tax in excess of the permissible limit and authorize its collection, and the assessment order would be no answer to the suit for the recovery of the excess amount, and therefore, the suit was maintainable”

In the case of Hindustan Times vs. State of UP – 2003(1) SCC 591, the petitioner challenged a direction issued by the respondents – State of UP which was to the effect that at the time of payment of bills for publication of government advertisements in all newspapers having a circulation of more than 25,000 copies, 5% of the amount thereof, forming part of a fund for the purpose of granting pension to the working journalists, would be deducted. It was contended that the impost leviable either as tax or as a fee on various grounds. The

Court agreed and said the State cannot make any compulsory exaction from any citizen unless there exists a specific provision of law operating in the field. In relation to a compulsory payment, it is well settled, there is no room for any intendment.

In the case of *Digvijay Cement Co. Ltd. vs. Union of India* - 2003(2) SCC 614, the appellant has challenged Clause 9-A in the Cement Control Order, 1967 which require every producer of cement to pay to the Cement Regulation Account an amount at the rate of Rs.9 per metric tonne of production of non-levy cement. It was contended that levy under this Clause was in the nature of a tax and in the absence of any authorization for the same under the relevant provisions of law of Industries (Development and Regulation) Act, 1951, was ultra vires the Act. The Court after examining various clauses in the Cement Control Order, 1967, which was issued under the Industries (Development and Regulation) Act, 1951 observed that except Clause 9-A, no other Clause of the Control Order applies to the non-levy cement. The non-levy cement is free from price and distribution control in contract to levy cement, whereas in respect of levy cement the Court held that the impugned levy under Clause 9-A was a compulsory exaction and that such levy amounted to levy of tax and was therefore, invalid for want of sanction to levy such a tax

In the case of *Collector of Central Excise, Ahmedabad vs. Orient Fabrics (P) Ltd.* – (2004) 1 SCC 597, the issue was “whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 by taking recourse to the provisions of the Central Excise Act and the Rules framed thereunder” While answering the question in negative and after referring to various tests the Court said “it must be held that the confiscation proceedings taken against the respondents and the penalty imposed upon them were totally without the authority of law and were rightly set aside by the Tribunal.

We do not think any of these decisions which related to the power of the executive to recover impost not authorized by law is of any relevance in the present case. Here the penalty has been imposed under the terms of the licence granted under Section 4(1) of the Telegraph Act. It is not an impost as is sought to be projected.

42. Mr.Salve submitted that in the counter affidavit a new case is sought to be built up not reflected in the impugned order. He said the department cannot justify its order on grounds different from what were stated in the orders proposing and levying penalty. In support of his submission, Mr.Salve relied upon a decision of the Supreme Court in *Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.* – (1978) 1 SCC 405= AIR 1978 SC 851. Supreme Court said that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in a shape of affidavit or otherwise. This how the Court said:

“The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Gordhanadas Bhanji* (AIR 1952 SC 16) (at p. 18):

‘Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders

made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.’

Orders are not like old wine becoming better as they grow older”.

We do not find much substance in the submission of Mr. Salve that a new case has sought to be built up by the respondent in its counter affidavit. In any case, we have for the purpose of our decision considered the show cause notice, the orders of the DoT and the supporting material from the record before us. As a matter of fact, it has not been brought to our notice which new case or part of any case not reflected in the impugned orders, has been brought on record in the counter affidavit.

43. At the end of his arguments in rejoinder Mr. Salve also raised an issue that Telegraph Act deals with only ‘telegraph’ and not ‘telecommunication services’. He referred to Section 4 and also to the definition of ‘telegraph’ in the Telegraph Act. While “telecommunications services” are defined only in TRAI Act. He said that since the license was issued under Section 4 of the Telegraph Act and there is no violation of ‘telegraph’ as defined in Section 3(1AA)\*<sup>10</sup> of that Act, there could not be any levy of penalty.

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**10**\* **3. Definitions.** – in this Act, unless there is something repugnant in the subject or context, -

(1) .....

(1A).....

(1AA) "telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means.

Explanation. – "Radio waves" or "Hertzian waves" means electro-magnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide.]

(2) .....

This argument appears to have been raised in despair. We examined the pleadings and this argument does not appear to have been raised either in the petition or in the rejoinder. Section 4 of the Telegraph Act grants exclusive privilege to the Central Government of “maintaining and working telegraphs”. “Message” is also defined in Section 3(3)\*<sup>11</sup> of the Telegraph Act which means any communication sent by telegraph, or given to telegraph officer to be sent by telegraph or to be delivered. Licence under Section 4 of Telegraph Act is granted for the provision of telecommunication services. Though the definition of “telecommunication service” in the TRAI Act is more comprehensive touching various services.

Licenses have been granted under Section 4 of the Telegraph Act for telecommunication services. Petitioner cannot turn back and say that grant of license under Section 4 for telecommunication services is illegal. In fact, decision of the Supreme Court in the case of Delhi Science Forum and Ors. Vs. Union of India & Anr. with National Telecom Federation of Telecom Employees and Ors. Vs. Union of India & Ors. - (1996) 2 SCC 405, is a complete answer to the argument of Mr. Salve. In this case there was a challenge to the power of the Central Government to grant license under Section 4 of the Telegraph Act to the different non-government companies and to

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- 11** \* (3) "message" means any communication sent by telegraph, or given to telegraph officer to be sent by telegraph or to be delivered;  
 (4) "telegraph line" means a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same, and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same;  
 (5) "post" means a post, pole, standard, stay, strut or other above ground contrivance for carrying, suspending or supporting a telegraph line;  
 (6) .....  
 (7) .....

establish and maintain telecommunication system in the country and also to the validity of the procedure adopted by the Central Government for the said grant. The Court noticed the National Telecom Policy, 1994, the aim of which was to supplement the effort of Department of Telecommunications in providing telecommunications services. Some of the petitioners questioned the validity and propriety of the new Telecom Policy itself on the ground that it shall endanger the national security of the country and shall not serve the economic interest of the nation. According to them, telecommunication being sensitive service should always be within the exclusive domain and control of the Central Government and under no situation should it be parted with by way of grant of licences to non-government companies and private bodies. The Court also noticed that the primary ground of the challenge in respect of the legality of the implementation of the policy is that Central Government which has the exclusive privilege under Section 4 of the Indian Telegraph Act, 1885 of establishing, maintaining and working telegraphs which shall include telephones, had no authority to part with the said privilege to non-government companies for the consideration to be paid by such companies on the basis of tenders as that amounted to an outright sale of the said privilege. The Court referred to the definition of telegraph and noticed that there was no dispute that the expression 'telegraph' as defined in the Act shall include telephones and telecommunications services. The Court observed that Central Government is expected to put such conditions while granting licenses, which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act. The Court also noticed promulgation of Telecom Regulatory Authority of India Ordinance, 1996 and the definition of the "telecommunication services" and other provisions in the ordinance. Referring to the tender conditions Supreme Court noticed that in Section III contained different conditions including in respect of security in Clause 16. The Court said that there was no dispute with the expression 'telegraph' as defined in the Telegraph Act shall include telephones and telecommunication services. The Court noticed:

"In view of the clear and unambiguous proviso to sub-section (1) of Section 4, enabling the Central Government to grant licences for establishment, maintenance or working of telegraphs including telecommunications, how can it be held that the privilege which has

been vested by sub-section (1) of Section 4 of the Act in the Central Government cannot be granted to others on conditions and for considerations regarding payments? According to us the power and authority of the Central Government to grant licences to private bodies including companies subject to conditions and considerations for payments cannot be questioned. That right flows from the same sub-section (1) of Section 4 which vests that privilege and right in the Central Government”.

It must also be noticed that licenses have been granted under Section 4 of the Telegraph Act before the TRAI Act came into force. We, therefore, do not find any merit in this contention of Mr.Salve and reject the same.

44. In the present case the nature of license is such that any breach of its obligations on the security aspect can be of serious consequence for the nation. Mr.Vahanvati, learned Solicitor General said that conduct of the respondent borders on fraud. It is certainly a case of exceptional nature and without going to the niceties of the license being a statutory contract or otherwise actual amount of damages suffered cannot be estimated. Central Government while parting with a privilege had a right to put conditions. Respondent agreed to the terms and conditions of the license. Licensor is indeed entitled to regulate the manner in which any activity is carried on by attaching appropriate conditions in the license. Condition of imposition of penalty fairly and reasonably relate to the performance of obligations by the licensee for the licensing purpose. This Clause is not for any non-genuine or ulterior purpose.

Validity of the penalty clause cannot be questioned. Public interest requires such a clause to be put in place in the license. Such a penalty clause is required in the license to see that licensee performs its obligations as per terms and conditions of the license entered into with the licensor, the Central Government, which the Central Government does in exercise of its statutory powers for public good. The words in proviso of Section 4(1) of the Telegraph Act “Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit” have to be given proper meaning. “Conditions” and “consideration of such payment” and “as it thinks fit” have been appropriately used. Of course, no one can say that “conditions” could be arbitrary or unreasonable. License is not a contract in its ordinary sense but rather a privilege granted to the licensee on certain conditions for establishing, maintaining and working

telecommunications in the country. There are conditions in the license which the licensee is obliged to observe in the interest of security of the country. We do not find clause 10.2(ii) in the license to be any arbitrary or unreasonable. Having examined the whole aspect of the matter we do not find that the impugned order of the Central Government imposing full amount of penalty in any way excessive. It could not be faulted with.

45. Mr. Salve learned counsel for the petitioner said that there is interconnection agreement between the petitioner and BSNL/MTNL and that the dispute thereunder would fall within the jurisdiction of TDSAT, and DoT cannot take it upon itself to decide that dispute. He stated on that account again the impugned order is without jurisdiction. DoT is not concerned with the losses, if any, occasioned to BSNL/MTNL on the ground that BSNL/MTNL have been deprived of the legitimate ADC or otherwise. It is quite correct to say that the award of damages assessed by reference to financial loss, if any, either to BSNL or MTNL is not within the purview of DoT and in fact, DoT rightly made its stand clear in its communication dated 15.10.2004 to the petitioner. It could be that damages, if any, suffered by BSNL/MTNL might be measured by the benefits gained by the petitioner from the breach of the terms of the license or agreement between them.

According to DoT, breaches committed by the petitioner were of extreme vital nature. Mr. Vahanvati said that action of the petitioner put the security of the nation in grave danger. He was referring to Caller Line Identification (CLI) numbers. He said the modus operandi adopted by the petitioner was a criminal act. It was a ruse to conceal true nature of the calls. Petitioner generated fake numbers which did not belong to any subscriber, misguided the recipients of the calls and misled the security agencies. Petitioner gave no explanation whatsoever why it all resorted to generating dummy or bogus subscriber numbers though it started giving correct CLI numbers from 16<sup>th</sup> September, 2004 but only when DoT asked for its explanation. It is not one or two dummy numbers. Rather these run into hundreds and thousands. The method Reliance Infocomm Ltd., the petitioner, employed to camouflage an international call was certainly unprincipled and if we may say so unscrupulous. This was in total breach of the license conditions. Petitioner stated that all records were being maintained and there was no stoppage for the licensor or any of the security agencies to call for the records and to see from that where the call originally

emanated. That may be so, but when the security agencies want to monitor a call immediately/simultaneously that will be the crucial time to take action and not to wait for the records to be called by which time, it may be too late. With the specter of terrorism and other dangers looming all over even a second's delay could be disastrous.

46. Having regard to all the circumstances including the subject matter of the license, the performance of licence provisions which have been breached, the circumstances in which breach was committed, the consequence of the breach putting the security of the nation in jeopardy, we do not find it to be a fit case for this Tribunal to interfere.

We, therefore, dismiss the petition with cost. Counsel fee Rs.25,000/-.

.....J

**(D.P. Wadhwa)**

**Chairperson**

.....

**(Vinod Vaish)**

**Member**

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**(D.P. Sehgal)**

**Member**