**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**
**NEW DELHI**
**DATED 18TH DECEMBER, 2009**

**Petition No. 146 of 2005**

M/s Bharti Televentures Ltd
(Formerly known as M/s Bharti Telenet Ltd.),
Having its Registered Office at Qutab Ambience
(Near Qutab Minar),
H-5/12, Mehrauli Road,
New Delhi-110030 ….Petitioner

Vs.

Bharat Sanchar Nigam Limited
B-613, Statesman House,
B-148, Barakhamba Road
New Delhi-1 …Respondent

**BEFORE:**
**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON**
**HON'BLE MR. G. D. GAIHA, MEMBER**

For Petitioner : Mr. Navin Chawla, Advocate
Mr Sharath Sampath, Advocate

For Respondent : Mr. Maninder Singh, Senior Advocate
Mrs. Pratibha M. Singh,
Mr. Saurabh Mishra,
Mr. Arjun Natarajan,
Ms. Nitya Thakur, Advocates

**JUDGMENT**

**S.B. Sinha**

Petitioner is a basic telephone service provider. It was granted a license under Section 4(1) of the Indian Telegraph Act, 1885 to provide Basic Telephone Services in the Service Area of Haryana Telecom Circle. Indisputably, such services are provided by the respondent circle-wise, which for all intent and purposes, represents geographical area of a State.

2. The petitioner, on or about 9.10.2001, made separate requests for grant of connectivity at Gurgaon TAX as also at Faridabad TAX, one of which is as under:-

> "We have received License for providing Basic Service in Haryana. We propose to have interconnectivity of our BTNL network with the BSNL network at Faridabad. Kindly find enclosed Annexure-I & II showing details of E-1's and space/power requirement for the POI BSNL exchange . The requirement has been given for year 1 on the presumption that extra E1's shall be made available when applied for.
> You are requested to please issue a provisional demand note for ad-hoc lump-sum charges to be paid by us for building space power supply etc. as per the guidelines published by Sanchar Bhawan."

Similar request was also made for having interconnectivity of its network with that of BSNL at Gurgaon. An interconnection was entered into by and between the parties hereto on or about 6.12.2001. On the same day, separate agreement was also entered into.

3. The petitioner contends that pursuant to the said agreement, its demand for bandwidth was discussed and analysed on 20.12.2001 by the respondent and it was agreed that 34 MBPS (16 PCMS) would be sufficient for grant of connectivity both at Faridabad and Gurgaon.

The inaugural call was to be made on 26.12.2001 by Hon'ble the Minister of Communications of the Government of India and the Chief Minister of Haryana wherefor, by a letter dated 25.12.2001, the respondent was requested to provide connectivity both at Faridabad and Gurgaon; wherefor, the petitioner undertook to pay the charges which was to be worked out by the respondent. It is not in dispute that to the aforementioned effect, an undertaking was given by the petitioner. Relying on, or on the basis thereof, the respondent granted connectivity to the petitioner's network both at Faridabad as also at the Gurgaon TAX at the same time. Bills were raised by the respondent for the above connectivities and payments were made by the petitioner.

4. The Telecom Regulatory Authority of India (TRAI) made a Regulation known as Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 2001

(hereinafter called and referred to for the sake of brevity as 'the Regulations').

In terms of the said regulation, 0.48 paise was fixed for STD calls towards access charges with effect from 14.12.2001. The petitioner, however, contends that despite the same, it continued to pay unto the respondent @ 0.50 paise per calls in terms of the agreement. The petitioner was asked by the respondent to shift its TAX Point of Interconnect (PoI) from Faridabad to Gurgaon wherefor, a request was made by the petitioner asking the respondent to sanction 20 more E1's at Gurgaon TAX to cater to the additional traffic by a letter dated 9.5.2003.

5. According to the petitioner, it had no knowledge of the requirement of payment of any extra carriage charges or any other charge to the respondent for its connectivity at Gurgaon TAX. A notice dated 15.10.2003 was issued by the respondent to the petitioner directing disconnection of the petitioner's PoI at Gurgaon TAX on the premise that as per directions of BSNL Headquarters, only one Level-II TAX connectivity is permitted, pursuant whereto, the TAX connectivity was disconnected by the respondent on 30.3.2004. The impugned demand was made on 4.10.2005 in terms whereof, the petitioner was asked to pay additional access charges by way of carriage charges with effect from 1.5.2003. This petition has been filed by the petitioner, inter alia, questioning the legality of the said bill dated 4.10.2005. The petitioner, by this petition, also questions not only the jurisdiction of the respondent to issue the said bill but also justifiability thereof. The petitioner has furthermore taken the plea that a part of the dues is barred by limitation. According to the petitioner, the inter-departmental decision taken by the respondent herein, to raise the said demand being invalid, is not binding on it.

6. The respondent, on the other hand, pleaded that the petitioner was guilty of suppression of an undertaking given by it on or about 25.12.2001 in its Headquarters, in

terms whereof, it undertook to pay the charges which might be levied for the indulgences shown to it by way of grant of connectivity at Gurgaon TAX.

7. At this juncture, we may place on record that this Tribunal, by a judgment and Order dated 5.9.2007, allowed the petition. The respondent preferred an appeal thereagainst before the Supreme Court of India which was marked as Civil Appeal No. 4961 of 2007. By an Order dated 1.5.2008, the Supreme Court of India, while setting aside the said Order dated 5.9.2007, remitted the matter back to the Tribunal, stating –

> "The only question on which we allow this appeal and remand the case to TDSAT is that the Tribunal considered only the undertaking by the respondent herein dated 25.12.2001 in the impugned judgment. However, the Tribunal failed to consider the undertaking by the respondent dated 24.12.2001. On this sole ground we are setting aside the order impugned passed by the Tribunal. The matter is remanded to the Tribunal to consider both the undertakings i.e., 24.12.2001 and 25.12. 2001 and pass an appropriate order as deem fit and proper in accordance with law.
> All contentions and arguments of both the parties are open before the Tribunal."

8. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioner would urge:-

(i) It is incorrect to contend that the petitioner is guilty of suppression of an undertaking which might have been given at the spot as the date of inauguration of connectivity between Gurgaon TAX and Faridabad TAX was fixed on 26.12.2001 and a copy thereof was not available on record.

(ii) The undertaking dated 5.10.2001 placed on record being on similar terms with the other one, the petitioner cannot be said to have derived any advantage by resorting to suppression of the said undertaking, as alleged by the respondent or at all.

(iii) A supplementary bill can be raised only in terms of clause 6.1.3 of Interconnectivity Agreement, providing for power to the respondent in respect

thereof, only in the event some honest or bonafide error had crept in the original bill and not by way of a separate independent one.

(iv) The undertaking having been given by the petitioner on 24.12.2001, the period of limitation being three years from the said date, the impugned demand is barred under the law of limitation.

(v) The petitioner, having not been communicated by the respondent, that the connectivity at Gurgaon was a special facility granted to it, therefore, separate charges would be levied, the impugned demand is illegal which would be evident from the fact that the respondent had asked the petitioner to surrender the Faridabad connectivity and move to Gurgaon.

9. Mr. Maninder Singh, the learned senior counsel appearing on behalf of the respondent, on the other hand, contended:-

(a) The petitioner, intentionally and deliberately suppressed the undertaking to pay all charges for grant of special facility to the petitioner in regard to connectivity at Gurgaon.

(b) The petitioner did not have the requisite infrastructure for making its calls from Gurgaon to Faridabad wherefor it required special facilities for the respondent.

(c) In terms of the national routing plan for optimum utilization of network and resources, the Telecom Regulatory Authority of India (The Authority), by an Order dated 15.6.2001 (which has been upheld by this Tribunal in Appeal No. 1 of 2004 (BSNL Vs. TRAI) dated 16.8.2004) laid down that handing over of the calls for the purpose of interconnection shall only be at the designated point at the near-end and at the far-end as prescribed therein. In respect of Gurgaon SDCA in

Haryana Circle, the LDCC TAX of BSNL being located at Faridabad, which the petitioner was fully conscious and aware in terms whereof, it was required to hand-over all the calls at Faridabad and only with a view to avail the facility of handing-over of its calls to BSNL at the Level-II TAX of the BSNL at Gurgaon, it had sought for a special permission.

(d) For the aforementioned purpose, the petitioner had approached the Headquarters of BSNL by giving an undertaking in terms of clause 6.1.3 on 24.12.2001 for the purpose of obtaining the said facility through a separate permission, which, having been granted, the demand dated 4.10.2005 for a sum of Rs. 1,98,75,227/- raised @ 0.60 paise for STD calls and 0.78 paise for ILD calls respectively, cannot be held to be on a higher side, particularly when one of the telecom industries, namely, Reliance Mobile Limited, had been charged and paid bills raised at the same rate. The petitioner, being a telecom operator, cannot be heard to say that it was not aware of the LDCC TAX of the BSNL. With a view to evade its liability, the petitioner deliberately withheld and suppressed the specific undertaking given by it.

(e) The term of the interconnect agreement, being not applicable, the respondent was at liberty to raise bills, at a rate higher than the permissible rate in terms thereof, which was required to be worked out keeping in view the fact that the designated place for routing and charging of such STD/ISD traffic was Faridabad LDCC TAX and not othe Gurgaon Level-II TAX.

10. Before , however, adverting to the rival contentions of the parties, as noticed hereinbefore, we may notice the relevant clauses of the interconnect agreement between the

parties herein.

Chapter I of the said agreement deals with interpretation clause. Definitions of some of the terms are as under:

"LOCAL AREA : It means the geographical area served by an exchange system and which is co-terminus with Short Distance Area (SDCA) or where the telegraph authority has declared any area served by an exchange system to be the local area for the purpose of telephone connections. All exchanges within the local area will be treated as multi exchange system.
LONG DISTANCE CHARGING AREA (LDCA) :
It means one of the several areas into which the country is divided and declared as such for the purpose of charging for trunk calls which generally is co-terminus with Secondary Switching Area (SSA).
SHORT DISTANCE CHARGING AREA (SDCA) :
It means one of the several areas into which a Long Distance Charging Area is divided and declared as such for the purpose of charging for trunk calls and within which the local call charges and local numbering scheme is applicable. SDCAs, with a few exceptions, coincide with revenue tehsil / taluk.
SHORT DISTANCE CHARGING CENTRE (SDCC) :
It means a particular Exchange in a Short Distance Charging Area declared as such for the purpose of charging trunk calls. Headquarters of SDCAs are generally SDCCs."

Chapter 2 of the agreement deals with technical issues. Clause 2.1.2 reads as under:

"….2.1.2 The BSO's network shall have interconnectivity with BSNL's network equivalent level at a local/tandem exchange and at the LDCC TAX….

2.1.3 The BSO shall be responsible for providing the required transmission links from/to his network to/from BSNL's network at interface points under Clause 2.1.2, at local/tandem and TAX levels, initially as well as for augmentation from time to time. These links include passive transmission links.
2.1.12. INTERCONNECTIVITY FOR STD/ISD CALLS :
Interconnectivity for STD/ISD calls shall be between BSNL's LDCC TAX and BSO's LDCC TAX, in case BSO does not have his own TAX in the LDCC, STD/ISD Calls from BSO's SDCC Tandem/local exchange in an SDCA in the LDCA shall be handed over to BSNL's LDCC TAX by the BSO.
2.1.13.1
(i) Calls from BSNL's subscriber or BSNL's network at BSO's network will be routed in the BSNL network up to the farthest point, i.e., up to BSNL's SDCC Tandem/local exchange in the terminating SDCA and then will be delivered to the BSO's SDCC Tandem/Terminal exchange. Similarly the BSO can carry the intra

circle STD Cass originated in their network up to the farthest point in its service area i.e., the SDCC tandem in the terminating SDCA. In case this far end handover is nt feasible for the BSO, BSNL shall accept such calls at the near end i.e. at the originating LDCC TAX.

(ii) If the BSO serves multiple SDCAs through one large exchange, BSNL shall deliver the traffic directly into BSO's large exchange from its TAX except for local and intra SDCA calls. For calls delivered from BSNL's TAX to BSO's main exchange, the latter shall be treated as terminal exchange and access charges corresponding to the termination at the SDCC shall only be payable by BSNL to the BSO.

(iii) The local and intra-SDCA calls shall be handed over by BSNL at the POP or the large switch through a direct link established by the BSO.

(iv) The above situation of one main exchange serving multiple SDCAs does not exist n BSNL at present. However, if a similar situation arises at a later date, the same facility shall be extended to the BSO as well, provided it is not technically feasible to accept the calls directly by the remote BSNL exchange in the SDCA. The numbering and charging plans shall always be adhered to by both BSNL as well as BSO.

2.1.13.2 For the purpose of Inter circle and international call, the BSO shall handover the call to BSNL at the originating LDCC TAX.

6.1.3 STD/ISD calls originated by subscribers of BSO will be delivered to BSNL's LDCC TAX of the LDCA in which the call is originated and not at any other intermediate points as provided under clause 2.1.13. …XXX…**BSNL may accept STD/ISD calls from BSO at the SDCC** tandem in originating SDCA and LDCC TAX in the terminating LDCA **on terms and conditions to be prescribed by BSNL separately. …xxxx…."**

6.2.1 For every STD/ISD Call originating from the BSO's network and accepted by BSNL, a detailed billing and/or bulk billing record will be generated in the LDCC TAX. For this purpose calling subscriber's identity shall be supplied by the BSO for detailed billing purpose.

Chapter 7 of the agreement provides for interconnect billing system. Clauses 7.2.1 and 7.3.1 (IV) thereof read as under:-

"7.2.1. Bills for access charges – actual or minimum usage charge, whichever is higher and charges for special services including trunk calls will be issued on monthly basis by the designated unit of BSNL to the BSO and such bills shall be payable within 15 days from the date of issue. Similar bills may also be issued by the BSO for the access charges, if any, due to it.

7.3.1.(iv) if the bill issuing authority subsequently finds that some charges have been omitted from the bills issued, he will include the omitted charges in the subsequent bills at any time, but within 6 months from the date of issue of the relevant bill except in cases where additional billing becomes necessary due to the tariffs/rates changes notified subsequently with retrospective effect by the appropriate authority."

The core question which arises for consideration is whether the designated TAX of BSNL for the connectivity of STD/ISD Calls originating from the network of the petitioner was at Faridabad or Gurgaon or both?

11. It is not in dispute that within the Circles, there are Short Distance Call Areas (SDCAs) and Long Distance Call Areas (LDCAs). An LDCA is constituted with a few SDCAs. Interconnection between the two areas can be done through the SDCC tandem, but for STD, calls must be routed through LDCC TAX.

12. In the State of Haryana, according to the petitioner, there were two TDCC TAXs – one at Gurgaon and another at Faridabad. The respondent, however, contends that Faridabad TAX is the LDCC TAX of Gurgaon, it being an LDCA, and the petitioner was fully aware thereof.

In terms of clause 2.1.2 of the Interconnect Agreement dated 6.12.2001, interconnection between the petitioner and the respondent was to be at equivalent level of the networks, i.e., respondent's SDCC tandem was to be connected with the petitioner's SDCC tandem and LDCC TAX for calls originating in the LDCA.

13. The Authority, by its Order dated 15.6.2001, while considering the applicability of the National Routing Plan, in almost similar circumstances, opined as under:-

> "In the light of the foregoing, the Authority has come to the following conclusions:-
>
> (i) BSNL's refusal to accept at Ujjain an Indore, the STD inter network traffic for call originating in other LDCAs is in accordance with the stipulations in the license agreement as well as interconnect agreement signed by both the contending parties."

14. TRAI was of the opinion that it was not a case of refusal on the part of the respondent to accept handing-over of a call at a place which is not designated but it was impermissible on the part of the licensee to hand-over such calls at the places which are not designated.

In arriving at the aforementioned finding, the Authority, inter alia, noticed the following contentions:-

> "5. According to BSNL, one of the reasons for non acceptance of transit traffic in Indore/Ujjain TAX put forward by the BSNL to them is that such a handover is not in conformance with the National Routing Plan (NRP) of the DOT. To counter this argument, BSNL has contended that the NRP was a Plan drawn up only for the DOT (now BSNL) network and that it will not be far to ask BSNL to conform to this plan. They further contended that the NRP is an internal document of DOT, which has not been amended to take care of the dynamic situation of the liberalisation of the telecom market and the entry of private BSOs. BSNL stated that optimization of their Network usage required that BSNL be free to carry its traffic on its Network, as far as possible, and be permitted to hand over the Inter Network STD calls to BSNL at any point, within the service area, without any restriction about its origin and its ultimate destination."

It furthermore noticed clause 1.7. 6.5 which reads as under:-

> "Inter-connectivity for STD/ISD calls shall be ordinarily only between DOT's LDCC TAX and Licensee's LDCC TAX. In case licensee does not have his own TAX in the LDCC, STD/ISD calls from Licensee's SDCC Tandem. Local exchange in an SDCA in the LDCA shall be routed to DOT's LDCC TAX. This requires the Licensee to connect to the nearest DOT TAX even for Intra-Circle calls that may be between two LDCCs. However, the Licensee is free to have his Network for carrying the traffic entirely over his own Network within the Circle/Service Area."

15. The Authority held as under :-

> "26. There is no denying that the general framework of the routing plan provides for a Hierarchical Routing with exceptions called "high usage routes". Such routes can be justified between level II TAXs based on techno economic viability, and are required to carry traffic which originate and terminate in these two TAXs, i.e., these high usage routes do not carry any transit traffic to other TAXs, i.e., these high usage routes do not carry any

transit traffic to other TAXs. These high usage routes may be used by both the operators for far end hand overs, provided for in the license agreement as per Clause 1.7.6.6 thereof.

16. Thus, not only the general applicability of such plan was noticed but also an exception thereto was carved out.

17. A three-Member-Bench of this Tribunal in BSNL Vs Telecom Regulatory Authority of India Ltd being Appeal No. 1 of 2004 by a judgment and Order dated 16.8.2004, held :-

> "10. Therefore taken in its totality, we do not see any reason to interfere in the TRAI determination that intermediate handover of calls for transiting is not in conformity with the license agreement; and we do not see any relaxation having been given by DOT as stated on behalf of the Appellants and rightly so as that would have meant modification of the terms of the license which did not seem to have been the intent of the letter of 12-5-98."

18. It is, therefore, difficult to accept that the petitioner was not aware that the Faridabad TAX was designated TAX for STD calls.

19. From the records, it does not appear that the designated TAX for BSNL was located in Gurgaon. It appears from the records that Gurgaon has a level-II Tax and Faridabad was having the designated level-I LDCC TAX.

20. Gurgaon level-II DCA is to have 5 SDCAs in Gurgaon, Palwal, Faridabad, Nooh and Ferozepur Zirka. LDCC TAX of this Gurgaon LDCC is located at Faridabad SDCA. STD/ISD calls of the petitioner was thus required to be handed over at Faridabad TAX and not at Gurgaon TAX. There was a confusion as to which TAX ultimately, Gurgaon TAX or Faridabad TAX, was the correct TAX for delivery of STD/ISD traffic originated by the network of the petitioner at Gurgaon LDCA. It is not in dispute that the DoT had prescribed a National Routing Plan, in terms whereof, only the Interconnect Agreement dated 6.12.2001 was entered into by and between the petitioner and the respondent pursuant whereto or in furtherance whereof, only the STD/ISD calls originated by the subscribers of the petitioners were required to be handed over by it to the respondent either at the nearest

Long Distance Charging Centre (LDCC) TAX of the respondent in the originating Long Distance Charging Area (LDCA) for the purpose of onward carriage or at the Short Distance Charging Centre (SDCC) TANDEM Exchange in the terminating Short Distance Charging Area (SDCA) for the purpose of termination. So far as the local calls originating at petitioner's network within Gurgaon SDCA is concerned, the same were required to be handed over at BSNL's local Exchange/SDCC TANDEM of the Gurgaon SDCA. However, so far as the STD/ISD calls originating in the network of Gurgaon LDCA of the petitioner is concerned the same were required to be handed over either at BSNL's LDCC TAX of Gurgaon LDCA, i.e., at Faridabad or the same were to be carried over by the petitioner itself entirely on its own network upto the respective terminating SDCC tandem of the terminating SDCA within the licensed service area of Haryana. In terms of the agreement, therefore, the petitioner was bound to hand over the STD/ISD traffic to Gurgaon LDCC TAX at Faridabad and not at the PoI taken by it in Gurgaon TAX of BSNL as the same was not the designated LDCC TAX. The petitioner being in the business of providing basic telecom service, must be held to be aware thereof as LDCC TAX is installed whenever there was an interconnection. The parties, as noticed hereinbefore, entered into one agreement and not two agreements, thus, the purpose for filing separate applications so as to obtain interconnections both for Gurgaon and Faridabad lost relevance. After the aforementioned agreement was entered into, requisite 'roll-out' was the responsibility of the licensee, wherefore, no separate permission was required.

21. From the letter of the respondent dated 25.12.2001, it would appear—

> "M/s Bharti Telenet Limited has proposed to launch basic telephone services in Haryana on 26.12.2001. In this regard, M/s Bharti Telenet has requested to permit handing over of STD/ISD traffic from M/s BTNL Gurgaon MSU to BSNL Tax at Gurgaon.
>
> As per clause 6.1.3 of the Interconnect Agreement 'BSNL' may accept STD/ISD calls from BSO at the SDCC tandem in originating SDCA and LDCC TAX in the following terminating LDCA on terms and conditions to be prescribed by BSNL separately.

M/s Bharti Telenet Ltd has given an undertaking to BSNL Corporate Office to bear the charges for the said traffic in accordance with the terms as may be decided by BSNL.

We may accept the request of M/s Bharti Telenet Ltd in this regard and permit handing over of STD/ISD traffic from M/s BTNL Gurgaon MSU to BSNL Tax at Gurgaon. The charges for this traffic shall be decided by BSNL Corporate Office and communicated to you. However, complete record of MCUs and traffic in Erlang per PCM may be kept for this traffic."

22. The undertaking dated 24.12.2001 furnished by the petitioner reads as under:

"In accordance with clause 6.1.3 of the Interconnect Agreement with BSNL, it is requested to permit the handing over of STD/ISD traffic from BTNL Gurgaon MSU to BSNL TAX at Gurgaon. We, hereby undertake to bear the charges for the said traffic in accordance with the terms as may be decided by BSNL."

23. Mr. Chawla would submit that there was no deliberate suppression of the said undertaking as a similar undertaking had been given by the petitioner in respect of Faridabad TAX. It is difficult to agree with the aforementioned submission. The contention of the petitioner in this behalf was that the said undertaking was not available in its file.

24. It is in the aforementioned premise that we may refer to the decision of the Authority dated 15.6.2001 wherein the scope of National Routing Plan was taken note of in the following terms:

"According to BTNL, one of the reasons for non acceptance of transit traffic in Indore/Ujjain TAX put forward by the BSNL to them is that such a handover is not in conformance with the National Routing Plan (NRP) of the DOT. TO counter this argument, BTNL has contended that the NRP was a Plan drawn up only for the DOT (now BSNL) network and that it will not be fair to ask BTNL to conform to this plan. They further contended that the NRP is an internal document of DOT, which has not been amended to take care of the dynamic situation of the liberalization of the telecom market and the entry of private BSOs. BTNL stated that optimization of their Network usage required that BTNL be free to carry its traffic on its Network, as far as possible, and be permitted to hand over the Inter-Network STD calls to BSNL at any point, within the service area, without any restriction about its origin and its ultimate destination."

25. The findings of the Authority are as under:

> "There is no denying that the general framework of the routing plan provides for a Hierarchical Routing with exceptions called "high usage routes". Such routes can be justified between lever II TAXs based on techno economic viability, and are required to carry traffic which originate and terminate in these two TAXs i.e. these high usage routes do not carry any transit traffic to other TAXs. These high usage routes may be used by both the operators for far end hand overs, provided for in the license agreement as per Clause 1.7.6.6 thereof."

By reason thereof, thus, an exception to the general rule was carved out. The Authority, therefore, after having taken into consideration, the letter of DoT dated 12.5.1998 and other documents, concluded:-

> "BSNL's refusal to accept at Ujjain and Indore, the STD inter network traffic for calls originating in other LDCAs in accordance with the stipulations in the license agreement as well as interconnect agreement signed by both the contending parties."

26. The aforementioned order of the Authority was upheld by this Tribunal in Appeal No. 1 of 2004 (BSNL Vs TRAI), wherein it was opined:

> "20. Based on the above, it is clear that the correct interpretation of the determination of TRAI dated 15.6.2001 would be that HFCL has no case for handing over its calls originating in an SDCA located within Amritsar LDCA and meant for SDCA Barnala located in LDCA Sangrur at the LDCC TAX of BSNL at Sangrur. They have option of interconnection with BSNL network, only of "near end hand over" at the LDCC TAX at Amritsar vide clause 1.7.6.5 of the license or of a "far end hand over" at the SDCC Tandem at Barnala but not at any intermediate point, not even at LDCC TAX of BSNL at Sangrur.
>
> 21. We, therefore, (i) quash and set aside the impugned communications dated 4.12.2003, 17.12.2003 and 22.12.2003 issued by TRAI and (ii) hold that HFCL is not entitled to hand over its traffic originating from the SDCA in Amritsar LDCA at LDCC TAX at Sangrur for termination to a BSNL subscriber in Barnala SDCA."

27. It is therefore evident that it is now settled that handing over of STD/ISD calls for the purpose of interconnection could take place only at the 'designated TAX' at the near-end and the far-end as prescribed and the same cannot be handed over at any other point whatsoever, thus not accepting of any traffic by BSNL at hand-over points would not amount to refusal on its part.

28. The conduct of the petitioner in this behalf must be taken note of. Admittedly, it had approached the BSNL Headquarters on 24.12.1991 for additional facility at Gurgaon. A special permission was sought for in the following terms:

> "In accordance with clause 6.1.3 of the Interconnect Agreement with BSNL, it is requested to permit the handing over of STD/ISD traffic from BTNL Gurgaon MSU to BSNL TAX at Gurgaon. We, hereby undertake to bear the charges for the said traffic in accordance with the terms as may be decided by BSNL."

29. The Regulation, thus, ensures that the petitioner was an appropriate authority therefor. We may notice that the respondent in its counter-affidavit has stated as under:

> "In case petitioner had any problem in handing over such STD/ISD traffic at Faridabad LDCC TAX the same could have been brought to the notice of BSNL Corporate Office dealing with signing of interconnect agreement and related policy issues. It is submitted that in any case, the petitioner cannot wriggle out of its obligation as per its undertaking. The petitioner has been charged only on such rates which have been charged by the BSNL from other service operators who had been extended similar separate arrangement and further in accordance with the IUC Regulations dated 24.1.2003."

30. The aforementioned conduct of the petitioner, in our considered opinion, goes to show that it was, at all material times, aware of the fact that Faridabad was the designated TAX for the Gurgaon LDCA. It would be of some significance to place on record the letter of the respondent dated 15.10.2003, which reads as under:

> "As per clarification received from Corporate Office New Delhi vide letter No. 115-3/2003-Regln dated 17.09.2003, notice of one month from the date of issue of this letter is being served to you that your POI at Gurgaon TAX will be disconnected as it is only permitted at Faridabad in Gurgaon LDCA."

31. The petitioner, in its letter dated 5.11.2003 stated as under:

> "1. Whether connectivity of Touchtel Main Switches of Faridabad & Gurgaon should be separate or the same as existing between Touchtel Faridabad & BSNL TAX Faridabad.
> 2. As per interconnect agreement, TAX calls of the whole LDCC are to be given at LDCC TAX which is at Faridabad, the existing Trunk Group for STD outgoing calls will carry the calls of Gurgaon also. As per IUC guidelines, Level-II TAX POI

> should have only one Trunk Group for outgoing traffic. Pls clarify if any other change w.r.t. Trunk Groups is required or not."

32. In this view of the matter, there is sufficient evidence on record to show that the designated TAX of BSNL at Faridabad was for the Gurgaon LDCA immediately in terms of the interconnection agreement dated 6.12.2001. The petitioner must be held to have filed the application in the corporate office of the respondent headquarters for permission for additional facility at Gurgaon consciously. The said fact will also appear from a letter of the respondent dated 8.11.2005 which is on the following terms:

> "However, it is intimated that letter No. 8-3/2001-Regln dated 10.8.2005 issued by Jt DDG (Regln) for access charges & additional carriage charges for having POI at Gurgaon TAX is in accordance with your undertaking given at BSNL Corporate Office as per Interconnect Agreement clause 6.1.3.'

33. The aforementioned contention, it must be noticed, as apart from the undertaking of the petitioner dated 25.12.2001. A bare perusal of the said undertaking of the petitioner reveals two facts, namely, a request had been made to the respondent to provide them STD connectivity at Gurgaon on the charges being worked out by the respondent and second, the respondent was requested to provide the connectivity at Gurgaon also to route their STD calls from the Gurgaon TAX wherefor charges were to be worked out by BSNL, the payment whereof was to be made by the petitioner on 26.12.2001 by 10.30 a.m.

34. It is in the aforementioned context that the explanation was offered by the petitioner with regard to non-filing of the said undertaking, in the context of the letter dated 10.8.2005. If a mistake had been committed earlier, the same could be rectified. It is on the aforementioned premise that the demand dated 10.8.2005 and letter dated 25.12.2001 were issued. In the said letters, the petitioner, in terms of its undertaking, agreed to bear the charges for the trunk on the terms as may be decided by the BSNL. The suppression of a material fact has its own consequences. While saying so, we are not oblivious of the

decision in **Arunima Baruah Vs. Union of India, (2007) 6 SCC 120**, wherein, the Supreme Court of India stated the law in the following terms:

"12**.** It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppression is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

13**.** In *Moody* v. *Cox*[6] it was held: (All ER pp. 555 I-556 D)It is contended that the fact that Moody has given those bribes prevents him from getting any relief in a court of equity. The first consequence of his having offered the bribes is that the vendors could have rescinded the contract. But they were not bound to do so. They had the right to say "no, we are well satisfied with the contract; it is a very good one for us; we affirm it". The proposition put forward by counsel for the defendants is: "It does not matter that the contract has been affirmed; you still can claim no relief of any equitable character in regard to that contract because you gave a bribe in respect of it. If there is a mistake in the contract, you cannot rectify it, if you desire to rescind the contract, you cannot rescind it, for that is equitable relief." With some doubt they said: "We do not think you can get an injunction to have the contract performed, though the other side have affirmed it, because an injunction may be an equitable remedy." When one asks on what principle this is supposed to be based, one receives in answer the maxim that anyone coming to equity must come with clean hands. I think the expression "clean hands" is used more often in the textbooks than it is in the judgments, though it is occasionally used in the judgments, but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the courts of equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in *Dering* v. *Earl of Winchelsea*[7] which has been referred to, shows that equity will not apply the principle about clean 126hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bribe has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bribe. Therefore that point, which was argued with great strenuousness by counsel for

the defendant, Hatt, appears to me to fail, and we have to consider the merits of the case."

35. We must, however, notice that the Supreme Court of India in SJS Business Enterprises Vs State of Bihar & Ors – (2004) 7 SCC 116 held as under:

> "…..13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. It must be a matter which was material for the consideration of the court, whatever view the court may have taken…."

36. In this case, the petitioner has raised a contention that its communication dated 25.12.2001 addressed to the officers of the respondent at Haryana did not contain any mention of clause 6.13. It reads:

> "….and secondly, misreading a letter dated 25.12.2001 written by the Petitioner, as an undertaking given by the petitioner in terms of Clause 6.1.3 of the Interconnect Agreement."

But it would appear from its own letter dated 25.12.2004, as indicated hereinbefore, that they had used the word 'also' and that it is evident that they were aware of the undertaking given by it. It is on the aforementioned premise that clause 6.1.3 of the agreement was applicable. The petitioner had even not raised the said plea in its correspondences with the respondent, having availed an additional facility, thus, in our opinion, estopped and precluded from contending that it was not bound to pay any additional charge as per the demand of the respondent dated 4.10.2005 for period 26.12.2001 to 30.3.2004.

37. Mr. Chawla vehemently urged that in absence of any declaration with regard to an LDCC TAX as is required in terms of its definition, the impugned demand cannot be

sustained. Reliance in this behalf has been pressed on the meaning of the said term in the agreement.

38. The importance of a declaration would be for a person who is not aware thereof. If, however, a party to the contract is fully aware of the existence of LDCC TAX at a particular place, it is in our opinion, idle to contend that a contractual obligation and / or an undertaking need not be complied with as an LDCC TAX had not been declared. In terms of Section 58 of the Indian Evidence Act, a fact admitted need not be proved. Admission, as is well known, is the best evidence. A person is obligated to fulfill its contractual terms and / or its undertaking. In our considered opinion, the petitioner cannot be allowed to raise any technical plea to defeat the legitimate claim of the respondent.

39. It may be true that in April / May, 2003, the respondent had directed the petitioner to surrender its TAX connectivity at Faridabad, pursuant whereto, request was made by it for additional E1 ports at Gurgaon Exchange. It is also true that one Rajinder Kumar of the respondent by a letter dated 29.7.2003, sought for a clarification from the Joint DDG(Regulation-I) as to whether PoI to be kept / continued for both TAX's or it was to be provided only from one TAX, and in that event, to name the TAX. The respondent, however, in para 29 of the counter-affidavit, has stated that a clarification was given that the petitioner was only entitled to inter-connectivity of SDCC Trunk traffic at Faridabad Exchange by its letter dated 17.9.2003. It is only on the basis of the aforementioned clarification that Gurgaon Exchange was sought to be disconnected.

40. We are of the firm view that the petitioner is bound by this undertaking. It is also of some significance to notice that had the petitioner been given connection both at Gurgaon and Faridabad, pursuant to the applications made by it, there was absolutely no reason why

it had succumbed to the demand of the respondent to close its Gurgaon establishment without any demur whatsoever. In other words, had the contention of the petitioner been that it had acquired a right to carry on its activities both from Gurgaon and Faridabad, there was absolutely no reason why it would not have asserted the same. Why and under what circumstances, the petitioner had not carried its STD/ISD calls through its Faridabad Exchange is not for this Tribunal to determine.

41. We are also not concerned as to whether the petitioner was capable of carrying calls both from Gurgaon and Faridabad. In any event, there does not exist sufficient proof in respect thereof.

42. The petitioner has raised the plea of limitation. In support of the said plea, reliance has been pressed on Article 29 of the Schedule appended to the Limitation Act. It reads as under:

> **"29.** Where a deed authorizes the oblige to realize the money whenever he wishes, the money becomes due immediately on the execution of the bond. If a house is mortgaged, while under attachment, the mortgage is void altogether, under s. 64, C.P.C., and a suit to enforce the personal security is governed by Art. 29. Article 47 does not apply to the case as the consideration failed ab initio."

43. A plain reading of the said Article would show that the same has no application in the instant case whatsoever. It applies only in a case of bond/Undertaking given by a party to pay the dues of another contracting party does not constitute a bond.

44. Reliance has also been placed by the petitioner on clause 7.3.1.4 of the Interconnect Agreement and clause 3(v) of the Supplementary Interconnect Agreement, to contend that

the demand made by the respondent is vitiated in law as it was not permitted to charge any additional amount from the petitioner after expiry of six months. They read as under :

> "7.3.1(iv) If the bill issuing authority subsequently finds that some charges have been omitted from the bills issued, he will include the omitted charges in the subsequent bills at any time, but within 6 months from the date of issue of the relevant bill except in cases where additional billing becomes necessary due to the tariffs/rates changes notified subsequently with retrospective effect by the appropriate authority.
> 3(v) Access charges for net local calls, ISD and STD Calls shall be reviewed within six months (of signing of this Interim Interconnect Agreement) through mutual discussions. These access charges as finalized above shall be made effective retrospectively from the date of signing of this interim interconnect agreement. TRAIs order/regulations in this regard will become applicable from the date of effect of such orders/regulations."

45. The said clauses on a bare perusal would clearly show that the same in this case have no application. By reason of the provision contained in a contract, the statutory period of limitation cannot be curtailed as would be evident from Section 28 of the Indian Contract Act.

46. The Supreme Court of India in the case of National Insurance Company Vs. Sujir Ganesh Nayak, 1997 (4) SCC 366 held that curtailment of the period of limitation provided by law is not permissible and is hit by Section 28 of the Indian Contract Act.

47. The said decision therefore is an authority for the proposition that period of limitation cannot be curtailed by mutual agreement. In any event, in this case, the respondent had detected a mistake. If a mistake was detected, it could rectify the same under the common law. It could, therefore, in exercise of its said jurisdiction, issue a demand also. The petitioner contended that a special permission had been granted to route calls from Faridabad. The respondent, however, in its reply stated –

> "It is respectfully submitted that the special permission for the traffic originating in Gurgaon to be handed over at Faridabad TAX given to the petitioner by

BSNL for a limited period of 10 days was due to the congestion being faced by petitioner from its MSU at Gurgaon to BSNL TAX at Gurgaon. It is submitted that the petitioner itself had requested BSNL to temporarily accept the traffic meant for MTNL, Delhi at Faridabad TAX till the time petitioner's PoI at BSNL TAX at Gurgaon is augmented. Copy of request of petitioner dated 3.6.2003 to BSNL in this regard is placed at Annexure R-6. The petitioner has chosen not to place its own communication dated 3.6.2003 before this Hon'ble Tribunal."

48. It is, therefore, evident that such permission was granted with a view to facilitate the petitioner to get over from the congestion in the traffic faced by it at its MSU at Gurgaon. The petitioner had requested the respondent to temporarily accept traffic meant for MTNL, Delhi at Faridabad TAX till its PoI at Gurgaon are augmented.

49. Mr. Chawla has relied upon a decision of the Supreme Court of India in **BSNL Vs BPL Mobile Cellular Ltd. – (2008) 13 SCC 697.** The said decision in our opinion has no application as therein the question which arose for consideration was as to whether internal circulars raising charges which were at variance with the contractual amount could be enforced. It was held that such internal circulars would not prevail over the contractual provision. Reliance has also been pressed by Mr. Chawla on **Delhi Development Authority Vs. Joint Action Committee – (2008) 2 SCC 672**. In that case, levy by way of surcharge being not forming a part of the contract, was directed to be quashed.

In this case, as noticed hereinbefore, the contract came into being by and between the petitioner and the respondent. Having regard to the petitioner's own application for grant of additional facilities at Gurgaon to which the responded acceded to.

It was a separate contract. Liability of the petitioner arose in terms of its undertaking. The formal agreement entered into by and between the parties in relation to the interconnect agreement for Faridabad TAX has nothing to do with the same. Terms and conditions of the said agreement are irrelevant so far as the present claim is concerned; being based on the undertaking of the petitioner. Furthermore, the petitioner must be held

to be bound by its own undertaking. We may place on record that this Tribunal in its judgment dated 05.09.2007, accepted the respondent's contention:-

(i) That the petitioner was aware that Faridabad TAX was the designated TAX;

(ii) That connectivity at Gurgaon was not governed by the interconnect agreement for which separate permission had been sought for and undertakings given by the petitioner only on the ground that the respondent did not raise bill within six months in terms of clause 7.3.1(iv).

50. For the reasons aforementioned, in our opinion, there is no merit in this application. It is dismissed accordingly.

51. The petitioner, pursuant to an interim order dated 13.12.2005 has deposited 75% of the dues. It is directed to deposit the rest of the amount within 90 days from date, failing which, the same shall carry interest at the rate of 12% p.a. The petitioner shall pay and bear the costs of the respondent. Counsel's fee assessed at Rs. 50,000/-.

**……....., J** **(S.B.Sinha)**
**Chairperson**

**…….....**
**(G. D. Gaiha)**
**Member**