TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 15th April, 2010

Petition No.109 of 2008

Reliance Communications Limited …Petitioner

Versus

Bharat Sanchar Nigam Limited …Respondent

And

Petition No.118 of 2008

Tata Teleservices Limited …Petitioner

Versus

Bharat Sanchar Nigam Limited …Respondent

BEFORE:

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

For Petitioner(In Pet.109 of 2008) : Mr.Mukul Rohtagi, Senior Advocate
Mr. Ramji Srinivasan, Senior Advocate, Ms.Manali Singhal, Advocate, Mr.Santosh Sachin, Advocate, Mr.Kshatrshal Raj,

	Advocate, Ms.Ruchi Sharma Advocate
For Respondent (In Pet.No.109 of 2008) :	Mr.Maninder Singh, Senior Advocate Mrs.Prathiba M. Singh, Mr.Tejveer Singh Bhatia, Mr. Yoginder Handoo, Advocates
For Petitioner(In Pet.No.118 of 2008) :	Mr. Ramji Srinivasan, Senior Advocate, Mr. Mansoor Ali Shoket, Advocate, Mr. Rahul Dhawan, Advocate
For Respondent (In Pet.118 of 2008) :	Mr.Maninder Singh, Senior Advocate Mrs.Prathiba M. Singh, Mr.Tejveer Singh Bhatia, Mr. Yoginder Handoo, Advocates

JUDGMENT

S.B. Sinha

These two petitions being inter-related were taken up for hearing together and are being disposed of by this common judgment.

The basic fact of the matter having regard to the previous round of litigation between the same parties is not much in dispute.

The question as to whether some phones providing for limited mobility services should be treated to be a mobile service and if so, the consequences thereof, is the subject matter in these petitions.

Mobility in the telecom service from a long time is treated to be a premium feature. It includes limited mobility commonly known as WLL(M) or Cellular Mobile Services. Fixed lines, however, are treated as basic minimum services for the common public. Several operators, the petitioners being amongst them, started rendering limited mobility service in different names.

Indisputably, the Telecom Regulatory Authority of India (TRAI) framed Regulations known as The Telecommunication Interconnection (Charges and Revenue Sharing) Regulations in relation to connectivity of telecommunication services between on operator and another. The first of such Regulation was framed in 1999. It was amended in 2001.

However, in 2003 two other regulations were framed, the later one being dated 29.10.2003 as amended on 31.12.2003; pursuant whereto and in furtherance whereof Access Deficit Charges (ADC) became payable to the fixed line operators, Government Operators like BSNL or private operators like the petitioners providing fixed services. ADC was also payable to the terminating operators when a call was terminated on a fixed network from any mobile network; including limited mobile service.

However, no ADC was payable if a call was originating and terminating in the fixed network i.e. no ADC was to be paid to the terminating operators if the call was terminated in the fixed service which meant when a call was made to the network of another operator. For the said purposes, the rates of ADC were provided in the regulations framed by TRAI. We may refer thereto being as under:

TABLE III

Access Deficit Charge in Rs.Per minute applicable for various type of Calls

Access Deficit Charges	**Local calls**	**Intra-Circle calls**		**Inter-Circle calls**	**ILD Calls**	
In Rs. Per minute		**0-50 kms**	**>50 kms**	**All Distances**	**Outgoing**	**Incoming**
Fixed - Fixed	0.00	0.00	0.30	0.30	2.50	3.25
Fixed – WLL(M)	0.30	0.30	0.30	0.30		
Fixed – Cellular	0.30	0.30	0.30	0.30		
WLL(M) – Fixed	0.30	0.30	0.30	0.30	2.50	3.25
WLL(M) – WLL(M)	0.00	0.00	0.00	0.30		
WLL(M) – Cellular	0.00	0.00	0.00	0.30		
Cellular – Fixed	0.30	0.30	0.30	0.30	2.50	3.25
Cellular – WLL(M)	0.00	0.00	0.00	0.30		
Cellular – Cellular	0.00	0.00	0.00	0.30		

Indisputably the question as to whether some services offered to their customers by the petitioners hereto commonly known as “Walky” and “Unlimited Cordless” services would come within the purview of WLL(M) or not was the subject matter of two petitions filed before this Tribunal being Petition No.45 of 2005 and Petition No.108 of 2005.

In the first petition the Tata Telecom Services Ltd. (Tata) inter alia prayed for the following reliefs:

"(a) set aside BSNL's letter/circular dated 14/01/2005 read with its further Circulars dated 19/01/2005 and 09/03/2005 and all consequential Demand Notes as being illegal, arbitrary without jurisdiction and bad in law."

In Petition No.108 of 2005, the petitioner Reliance Infocomm Ltd. (Reliance) prayed for the following reliefs:

"(a) This Hon'ble Tribunal may be pleased to call for the record & the proceedings pertaining to Notices dated 14th January, 2005, 4th March, 2005, 23rd March, 2005, 26th August, 2005, 22nd September, 2005 and 23rd September, 2005 and demand notice issued by Chennai unit of Respondent No.1 dated 22nd September, 2005 for Rs.27,52,717/- and after examining the validity, legality and propriety the same may be quashed and set aside."

It is neither in doubt nor in dispute that in the case of 'Tata' a bill was raised on or about 12.05.2005 wherefor a MA was filed therein. The petitioner filed a writ petition before the Delhi High Court and obtained an order of stay.

In the case of 'Reliance' even the notices for disconnection and the demand notice for a sum of Rs.27,50,00,717/- were also put in question.

This Tribunal by reason of the aforementioned judgment dated 09.09.2005 rejected the contentions of the petitioners inter alia, opining:

(a) The action on the part of the respondent herein to raise a demand was not an unilateral one.

(b) ADC has nothing to do with IUC; whereas ADC is a kind of subsidy which was allowed by TRAI but tagged with IUC together therewith only for convenience although the same have specific connotations.

(c) In view of the advertisements issued by the parties offering services of the equipments marketed by them as mobile services, the same must be held to be in the nature of WLL(M) service and not the fixed one.

It was held:

"11. During the course of hearing it was pointed out to us by the learned counsels for the petitioners that BSNL had not taken any action against similarly situated fixed line operators who were making use of WLL(F) technology. In particular attention was drawn to the 'Garuda' service of MTNL which had been advertised as having mobility all over Mumbai with the caption "Jahan Aap Wahan Garuda FW" and introduced into the market as a 'Fixed Wireless Terminal'. It was stated that there were other fixed service providers who were providing almost similar services but BSNL had not taken any action. In fact it was also pointed out that BSNL itself was providing limited mobile service making use of Fixed Wireless phones."

We may, however, for completion of narration of facts also place on record that Mr.Maninder Singh contended that so far as BSNL is concerned, requisite corrective action had been initiated in regard to its own fixed line services i.e. WLL(F).

'Reliance' in its petition apart from those raised by 'Tata', also raised a contention that DoT and TRAI had acted without any authority of law by classifying fixed wireless services as WLL(M) which was impermissible in law. The Tribunal rejected the said contention also.

Both 'Tata' and 'Reliance' preferred appeals thereagainst before the Supreme Court of India in terms of Section 18 of the Act which were marked as Civil Appeal Nos. 5850 and 5871 of 2005 and Civil Appeal No.9636 of 2006 respectively. The said appeals were dismissed by judgments dated 30.04.2008. The case of 'Tata' is reported in 2008(10) SCC 556; whereas that of 'Reliance' is reported in 2008(10) SCC 535.

The Court framed the following issue:

"Whether limited mobility if or is not possible but whether fixed operators are liable to pay ADC with the service."

The findings of this Tribunal in the aforementioned petitions were affirmed. It, however, assigned additional reasons therefor. Upon taking into consideration various literatures on telephone including some authorities, the Court discussed in great details the generic requirements relating to digital WLL system which were issued as far back as in May, 1996 and found to be in consonance with the technical concepts enumerated in the reference books.

The Court opined that payability of ADC does not arise out of any legal rights but out of consideration of smoothening the processes during competition i.e. providing support during transition period when cost of access is not fully recoverable from the revenues from access lines monthly rental on the existing tariff regime due to competition in the market.

The Supreme Court of India like this Tribunal, also noticed the circular letter dated 23.03.2005 wherein it was stated:

"Wherever such restriction cannot be imposed, it shall be treated as WLL(M) feature for all purposes which inter alia includes numbering plan, interconnection usage charges, interconnection arrangements, etc."

Indisputably clause 6.4.6 of UASL interconnect agreement is akin to clause 6.4.9 of the earlier agreement.

Holding that the aforementioned circular letter dated 04.03.2005 was clarificatory in nature and not amendatory, it was observed:

> "The record indicates that right from 2003 when UAS licence stood issued the classification was contemplated by the licensor, DoT when it categorised wireless service into full mobility, limited mobility and FWA. ADC, interconnection usage charges, etc. follow that classification. The IUC Regulations, 2003 imposes the statutory charges based on the classification in the licence. What is important in this case is that besides technological data, even as a matter of policy if there is a contract between DoT and the access provider in terms of UAS licence which provides for three categories then the levy of ADC would depend upon the service which is rendered to the user by the access provider. In the circumstances, apart from technology, this case is more on tax policy which levies ADC on services which fall in the category of WLL(M)."

It was furthermore observed:

> "One more fact needs to be mentioned that the impugned directive dated 4-3-2005 came to be issued by TRAI after giving show-cause notice to the appellant as far back as on 15-1-2005. It is true that the show-cause notice was given in the context of certain advertisements given in the newspaper by Tata Teleservices Ltd. and by Reliance Infocomm Ltd. However, vide the said show-cause notice(s) the appellant was called upon to explain why the impugned service is not WLL(M). In fact, a reply was given to the show-cause notice by the appellant on 24-1-2005

which indicates that the appellant clearly understood the show-cause notice and, therefore, gave its explanation as to why the impugned service should be treated as WLL(F) and why the impugned service should not be categorised as WLL(M). We may mention that, keeping in mind the technology, the policy framework and the thrust of the entire correspondence between TRAI, DoT and the appellant herein, it is very clear that the concept of FWA was well known in the market and in the business right from 2003 and in that light we hold that the impugned Circular dated 4-3-2005 of TRAI was clarificatory in nature and, therefore, the demand made by BSNL for the period 14-11-2004 to 26-8-2005 is valid in law and justified in terms of the UAS licence."

Noticing that the licences are granted for three types of wireless services, namely, limited mobility, full mobility and FWA, it was held that ADC is payable by the appellants therein for the period 14.11.2004 to 26.08.2005.

It is not in dispute that the date 14.11.2004 was the starting date for invoking clause 6.4.6 having regard to the fact that demand on 'Tata' was made on 14.01.2005 in terms whereof bill was raised in respect of the calls originated two months prior thereto.

We may, however, notice that the Court while considering the submissions made on behalf of the appellants therein that the respondent also had put in a similar service during the relevant period in the name of 'Tarang' and, thus, also bound to pay ADC to the private operators made the following observations:

"Before concluding, one aspect needs to be mentioned. It is alleged by the appellants and also by Reliance Infocomm Ltd. in the conjoint appeal which we will separately deal with in the subsequent judgment that BSNL have also not disclosed their numbering levels for their fixed wireless service and for their WLL(M) services which they have been providing during the relevant period in the name of "Tarang", which according to the appellants, would now constitute WLL(M) service. According to the appellants, BSNL has also been providing fixed wireless phone services which has limited mobility. This is a matter of quantification. That stage has not yet arrived. However, Mr Gopal Subramanium, learned Senior Counsel appearing on behalf of BSNL, has fairly stated that BSNL would abide by the parameters laid down in our judgment and whatever adjustments required to be made in that regard in the context of claims and counterclaims, the same shall be worked out in near future. Be that as it may, we express no opinion on the point of quantification which question did not arise even before TDSAT in this case. Suffice it to state that the services of the appellants vide the instrument Walky falls in the category of WLL(M) service and, accordingly, the appellants would be liable to pay ADC in that regard during the relevant period 14-11-2004 to 26-8-2005."

In the case of Reliance Infocomm Ltd. it was observed:

"59. As stated in our judgment pronounced earlier in Civil Appeal No. 5850 of 2005, etc. in *Tata Teleservices Ltd.* v. *BSNL*, we are not required to decide in this case quantification of the amount in question as the claim and counterclaim made by the appellant herein against BSNL and vice versa is not the subject-matter of this appeal. Those questions are left open to be decided in accordance with law at the appropriate stage by the competent

authority under the 1997 Act. Suffice it to state that the impugned Circular dated 4-3-2005 issued by TRAI falls under Section 13 of the 1997 Act as clarification. The reasons given hereinabove are in addition to the reasons given by TDSAT in its impugned order dated 17-1-2006. We find no infirmity in the reasons given by TDSAT in its impugned order."

After the aforementioned judgments were delivered, the respondent asked the petitioner to pay the amount demanded earlier, failing which it was threatened that all their POIs all over the country would be disconnected, to which a protest was made by the petitioner in terms of its letter dated 03.05.2008, inter alia, stating:

"7. We have received a telephonic instruction today at about 1'o' clock instructing us to make the payment of the demanded amount failing which the POIs will be disconnected in the entire country. You are aware that today being Saturday, the banking hours are also over and there is no time left for us to arrange the payment of any amount through Demand Draft or Pay Order which is the only mode of payment acceptable to BSNL. In order to avoid disruption of services to our millions of subscribers we are willing to make an interim payment by cheque even today if it is acceptable to you. Otherwise you may extend the time for payment of the amount by Pay Order or Demand Draft by the closing business hours of Monday. You may also please note that this payment is being offered/made without prejudice to our rights and contentions in terms of what has been stated above and subject to the adjustments to be made based on the details as referred above."

Without prejudice to the aforementioned contentions, the petitioner, however, agreed to make a payment of Rs.2.28 crores through cheque which was not accepted. On or about 04.05.2008, the respondent disconnected not only the UASL but also of

ILD services of the petitioner. The petitioner was, thus, compelled to make payment of Rs.2.87 crores i.e. 75% of the demanded amount including the payment earlier made in terms of the orders passed by this Tribunal and the Supreme Court of India.

By a letter dated 07.05.2008 the petitioner requested the respondent to revise its bills in accordance with the directions of the Supreme Court of India and also to supply the details of their purported 16.18 lakhs FWTs to enable it to raise bills of counter claims. The respondent was also informed that the bills not only include ADC but also penalty charges for wrong routing of calls at the highest rates of ILD incoming calls and for all the calls for POI.

These petitions were filed before us on 26.05.2008 and 29.05.2008 respectively.

Mr.Ramji Srinivasan, the learned senior counsel appearing on behalf of the appellants would submit:

(i) The respondent is entitled to receive payment towards ADC in respect of FWP services of the petitioner only for the period 14.11.2004 to 26.08.2005 and not from 14.11.2004 to February 2006.

(ii) The respondent is entitled to receive ADC for the "Walky" or "Unlimited Cordless" calls and not the penalty charges for alleged wrong routing or otherwise.

(iii) The respondent is not entitled to levy interest on the petitioners even when the claims and counter claims are yet to be settled.

(iv) The respondent was not legally entitled to disconnect the petitioners' POI without completing the process of quantification as has been directed by the Supreme Court of India in its judgment dated 30.04.2008.

(v) In any event the respondent has no right to disconnect the petitioners' POI in violation of clause 7.3.2 of the interconnect agreement.

(vi) The respondent in any view of the matter had no jurisdiction to disconnect the NLD and ILD POI which were never the subject matter of the present dispute.

(vii) The respondent could not have absolved itself of its liability for making payment of ADC to the petitioner in relation to its FWT services contending that it had not details thereof. The respondent was obligated to disclose the numbering levels used by it for FWT services beforehand so as to enable the petitioners to raise bills payable to them by way of ADC. The purpose of quantification of the claims and counter claims of the parties necessarily require exchange of details and CDRs with each other.

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

(i) These petitions are not maintainable being barred by the principles of constructive res judicata and issue estoppel.

(ii) The petitioners, cannot question the legality or otherwise of clause 6.4.9 of the interconnect agreement purporting to seek interpretation in regard to the provisions made therein of raising a bill "of all calls" having regard to the fact that the agreements had been worked out being in force since 2002.

(iii) In view of the judgments of this Tribunal and those of the Supreme Court of India, letter of the TRAI dated 04.03.2005 and the letters of the DoT dated 23.03.2005 and 05.04.2005 being clarificatory and not amendatory, there cannot be any doubt or dispute that for all intent and purport, the existing licensing and regulatory regime were to prevail for all purposes including IUC, ADC and interconnect arrangement.

(iv) In view of the findings of the Supreme Court of India, the demand of the respondent prior to 26.08.2005 i.e. from November, 2005 being retrospective in nature must be held to have been rejected both by this Tribunal as also the Supreme Court of India.

(v) The Supreme Court of India having also rejected the plea of unilaterism not only against the respondent but also against TRAI and DoT and furthermore the parties having not challenged the demand pertaining to the period 26.08.2005 to 28.02.2006, no relief can be granted to the petitioners in these petitions.

(vi) The petitioner having been allocated some numbers for its WLL services could not have handed over all the calls of unlimited cordless telephone to the respondent with another number allocated to it by DoT even after 28.02.2006 which establishes the deliberate wrong handling of the WLL(M) to the respondents at the port not meant therefor.

(vii) As the respondent is entitled to raise supplementary bills on all calls' basis on the petitioners who having not questioned the computation of the period of bill, in terms in interconnect agreement, are not entitled to demand any CDR from the respondent. In any event the petitioners having not questioned the calculation for the number of calls in respect of the bills raised by the respondents, the question of supplying any CDR to them does not arise.

(viii) On the contrary the petitioners are under an obligation to provide the traffic details of the calls inter se amongst the cellular operators and also the calls on the network of the petitioners as per the stipulations contained in the tables appended to the IUC regulations for the period in question.

(ix) The contention of the petitioners that they were not aware of the numbering plan of WLL(M) calls of the respondent's services is wholly incorrect as they had raised bills upon the respondent on the basis whereof the entire amount of ADC had been paid for the relevant period.

(x) In any event the observations made in the judgments of the Supreme Court of India are not relatable to and have no application whatsoever to the demands of the respondent of Rs.372 crores on Tata and Rs.431 crores on Reliance on the aspect of WLL(M) calls originating on the networks of the petitioners and also for the traffic originating from the respondent's network and terminating at the WLL(M) network of the petitioners.

(xi) The respondent had paid the amount of ADC to private operators as per IUC Regulations 2003 for which the numbering plan is 20, 21, 29 for the WLL(M) service and 22,23,24,25, 26, 27 & 28 for the fixed services.

(xii) BSNL had 4.5 lakhs 'hand held' phones known as 'Tarang' which were sold to its consumers. It had a capacity of 1.8 lakhs of table top phones but the details of supply thereof to the consumers are not available. BSNL had also given wireless phones which were having fixed antennas, although the exact number thereof are also not known but from informations received from all circles, it appears that the respondent had paid ADC for 8.2 lakhs phones considering them as WLL(M) phones which was against the total numbers of 16 lakhs phones, both 'handheld' and fixed and, thus, even assuming that all the 1.8 lakhs table top capacity had been allotted and sold to the consumers, although the exact number thereof is not known, BSNL had actually paid higher ADC i.e. for 8.2 lakhs phones, although in some cases no ADC was payable, and, thus, in fact excess payments have been made.

(xiii) As the respondent had merely been making attempts to recover its dues which were pending since 2005-06 wherefor sufficient time had been granted, it was not necessary to give 30 days' notice to the respondent.

Before we advert to the rival contentions of the parties, as noticed hereinbefore, we may notice certain basic facts.

Interconnect licenses were entered into by and between the parties.

The effect of clause 6.4.9 of the BSO Agreement dated 25.01.02 has been noticed by us heretobefore.

It reads as under :

> "6.4.9. If BSNL detects that WLL mobile subscribers originated calls are being handed over or have been made over at any port not meant for carrying such calls, BSNL shall be free to charge the BSOs @ Rs.1.14 per metered unit for all the calls recorded on these ports from the date of provisioning of that POI or for the preceding two months whichever is less apart from taking other legal actions including disconnection of POIs or temporary suspension of the Interconnect Agreements."

Addenda VIII providing for clause 6.4.6(a) was inserted on 21.09.2005 with retrospective effect from 14.11.2003, which reads as under:

> "6.4.6(a) Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC (including ADC) is higher than the IUC (including ADC) applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC (including ADC), as applicable for such unauthorized calls, for all the calls recorded on this trunk group from the date of provisioning of that POI or for the preceding two months whichever is less."

The respondent issued a circular on 14.01.2005.

It also issued demand notes for the period 14.11.2005 to 26.08.2005.

The petitioner itself has produced various demand notes issued by various circles of the respondent for the said period.

Additional bills were raised evidently on the basis of clause 6.4.6 of the interconnect agreement.

The petitioners in the petitions before this Tribunal had not questioned the validity of the said clause.

We may, however, place on record that 'Reliance' filed MA 10/2010 seeking to amend the petition challenging the validity of clause 6.4.6 and 6.4.9 and addenda signed 25.01.2002 and 21.09.2005. We did not allow the said MA, on the grounds stated therein.

We have noticed heretobefore that the petitioner in the said petition not only raised the question with regard to the applicability of the demand of ADC in respect of the instrument in question; but also challenged the correctness thereof.

It is true as was submitted by Mr. Srinivasan that this Tribunal as also the Supreme Court of India did not explicitly consider the effect of the demand with reference to clause 6.4.9 of the agreement but the fact, however, remains that the said petitions of the petitioners were dismissed.

The effect of dismissal of the said petition by this Tribunal and eventually by the Supreme Court of India will be that the demands of the respondent were upheld.

Demands were raised evidently by the respondent relying on or on the basis of clause 6.4.9 and/or 6.4.6 of the agreement.

Indisputably in raising the bills from 14.11.2004, the respondent calculated the period of two months backwards which was possible only when clause 6.4.9 was invoked and not otherwise.

The petitioners were fully aware that the basis for raising the demands was the aforementioned provision in the interconnect agreement.

The demands raised even according to the petitioners were penal in nature and not the deficit ADC.

If that be so, the petitioners might and ought to have raised all their contentions in regard not only to the validity of the demands but also the quantum thereof.

If they had not done so, they should thank themselves therefor.

Section 11 of the Code of Civil Procedure read with Section 12 thereof were enacted as matter of public policy and with a view to give finality to a judgment rendered by a competent court of law.

Even otherwise all judicial forums recognize the general principles of 'Res Judicata'.

Explanation IV appended to Section 11 provides for the principles of Constructive Res Judicata.

It reads as under:

> "Explanation IV – Any matter which might and ought to have been made ground or defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Like the general principles of res judicata, there exists common law principle of constructive res judicata.

It is now trite that a party with a view to give finality to a judgment is bound to raise all pleas which might and ought to have been raised.

A petitioner only at its peril may omit to raise all its contention against a defendant or would refrain from raising all contentions which were available to it.

We may notice that the principle of 'estoppel by records' also is synonymous to 'Res Judicata'

The Parliament with that end in view also enacted Order II Rule 2 in the Code of Civil Procedure.

With the aforementioned backdrop of events in mind, we may notice some decisions of the Supreme Court of India on the aforementioned principle.

In Hope Plantations Ltd. v. Taluk Land Board - (1999) 5 SCC 590, the Supreme Court of India applied the principles of constrictive res judicata vis-à-vis 'Issue Estoppel' and 'Cause of Action Estoppel' holding as under :-

> "26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in

subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

Distinguishing the decision of the House of Court in Arnold Vs. National Westminster Bank Plc. (1991) 3 All ER 41, it was observed :

"31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permissible on the ground

"that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for

the review of such judgment".”

The Apex Court similarly in Iswar Dutt Vs. Land Acquisition Collector - 2005(7) SCC 190 opined:

> “18. In the Reference Court or for that matter the High Court exercising its appellate jurisdiction under Section 54 of the Act could not have dealt with the said question. The principle of res judicata is a specie of the principle of estoppel. When a proceeding based on a particular cause of action has attained finality, the principle of res judicata shall fully apply.”

Yet again in Ramadhar Shrivas v. Bhagwandas, (2005) 13 SCC 1, it was opined :

> “23. ……..The doctrine of constructive res judicata engrafted in Explanation IV to Section 11 of the Code thus applies to the facts of the case and the defendant in the present suit cannot take a contention which ought to have been taken by him in the previous suit and was not taken by him. Explanation IV to Section 11 of the Code is clearly attracted and the defendant Bhagwandas can be prevented from taking such contention in the present proceedings.”

The Supreme Court of India had an occasion to consider the said principles again in Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas - 2008 (11) SCC 753 clearly holding that mere observations in a judgment cannot prevail over the principle of res judicata, stating :

"22. The judgment of a court, it is trite, should not be interpreted as a statute. The meaning of the words used in a judgment must be found out from the backdrop of the fact of each case. The court while passing a judgment cannot take away the right of the successful party indirectly which it cannot do directly. An observation made by a superior court is not binding. What would be binding is the ratio of the decision. Such a decision must be arrived at upon entering into the merit of the issues involved in the case."

It was furthermore observed :

"25 Explanation IV of Section 11 of the Code extends the principle of res judicata stating that the reliefs which could have been or ought to have been prayed for even if it was not prayed for would operate as res judicata. Section 12 thereof bars filing of such suit at the instance of a person who is found to be otherwise bound by the decision in the earlier round of litigation and in a case where the principle of res judicata shall apply.

35 The issue indisputably was the claim of entitlement to gaddi by the first respondent and a plea contra thereto raised by the appellants. Once the issue of entitlement stood determined, the same would operate as res judicata. We may notice some precedents for appreciating the underlying principles thereof. Section 11 of the Code, thus, in view of the issues involved in the earlier suit, the provisions thereof shall apply."

We have noticed heretobefore the reliefs prayed for by the petitioners herein.

It is neither in doubt nor in dispute that in the case of TATA, a bill was raised on or about 12.05.2005 wherefor a miscellaneous application was filed therein. The petitioner filed a petition before the Delhi High Court and obtained an order of stay.

In the case of Reliance, even the notices for disconnection and the demand notice for a sum of Rs. 27,52,00,717/- was also put in question.

This Tribunal in the case of 'Tata' noticed the principal submissions made in its behalf in paragraph 4 of the Judgement dated 9th September, 2005 which inter-alia are :-

1. The Wireless Terminals (FWTs) which are large, bulky and heavy and had several accessories i.e. separate antenna, separate battery, separate network, interface unit and a separate telephonic instrument pitch over a period of time with technological development combining to an integrated Fixed Wireless Phone (FWP) also called Desktop Phones. WLM however, refer to mobile handsets and not portable FWPs. This distinction was also noticed by the Telecom Engineering Centre of the Department of Telecommunication. A High Powered Committee also was constituted which had not objected the continued use and deployment of FWPs by the BSOs even though they were equally portable. The licensor and TRAI had been aware thereabout throughout and ADC had been allowed to them notwithstanding such portability holding them to be fixed services.

2. TRAI was fully aware of the need to provide ADC to private BSOs including the petitioners who were providing FWPs which were classified as fixed phones. IUC Regulations made on 29.10.2003 made that aspect quite clear.

ADC had nothing to do with IUC, whereas ADC is a kind of subsidy which was allowed by TRAI and bracketed with IUC together only for convenience. But ADC and IUC have specific contents. The advertisement issued by the parties offering services of the equipment produced by them as a mobile services. The same must be held to be in the nature of WLL(M) and not fixed services.

The Tribunal quoted in its judgment the letter of the respondent dated 14th January, 2005 addressed to 'Tata', paragraph 3 whereof reads as under :

"3. The BSNL calls upon M/s TTL to immediately pay the entire amount of Interconnect Usage Charges including ADC as per Clause 6.4.9 of the Interconnect Agreement for all its calls of Limited Mobile Service through its WALKY Scheme handed-over to BSNL on the BSNL Trunk Groups meant for fixed line traffic, for the period of last two months i.e. from 14.11.2004 to 13.01.2005. Thus, the difference of the IUC charges including the ADC in this regard should be paid by M/s TTL immediately on receipt of this communication. Also, the ADC paid by BSNL to M/s TTL for the calls originated by limited mobile and cellular/fully mobile subscribers of BSNL and terminated on the numbering levels of WALKY should be refunded to BSNL. Further the tariff information of the inter circle STD calls originated from/received in the numbering levels of WALKY and terminated in/originated from the network of other mobile and fully mobile service providers and the incoming and outgoing ILD calls to/from the numbering levels of WALKY are to be given to the respective BSNL Circle Offices for billing of ADC

payable to BSNL for such calls. You are also called upon to immediately stop the operation of above-mentioned WALKY service using numbering levels of fixed services, without paying the IUC charges including ADC which is applicable for Limited Mobile Services, as the same is contrary to the license conditions, IUC Regulations and also to the agreed terms and conditions of the Interconnection Agreement."

This Tribunal furthermore noticed the circular letter dated 19th January, 2005 issued to all Private Access Providers and NNDOs, the relevant portion whereof reads as under:-

"Subject: Providing of 'WALKY/' limited mobile service by M/s Tata Teleservice Ltd. and 'Unlimited Cordless' limited mobile service by M/s Reliance Infocomm Ltd. On fixed line numbering levels.

This has reference to the above mentioned limited mobile services 'WALKY' and 'Unlimited Cordless'services being offered by M/s Tata Teleservices Ltd. And M/s Reliance Infocomm Ltd respectively on fixed line numbering levels, thereby evading the ADC payable to BSNL.

2. In this regard, notices have been given by BSNL to M/s Tata Teleservices and M/s Reliance Infocomm to stop such services on fixed numbering levels and for paying the ADC paybvle to BSNL in this case. A copy of the notices given by BSNL to M/s Tata Teleservices and M/s Reliance Infocomm is enclosed for your information.

3. You are requested to submit the traffic data information for inter circle STD calls made from your network of limited mobile and fully mobile service to and received from the fixed numbering levels of 'WALKY' and

'Unlimited Cordless' services as per existing procedure as prescribed in Annexure III and IV of IUC Circular No.208-20/2003 Regn. Dated 28.1.2004 issued by this office."

It was also considered that in the agreement entered into by and between the parties there existed a clause being Clause 6.4.6 in terms whereof the respondent was free to charge the BSOs at the rate of Rs.1.14p per minute; recorded on those ports from the date of provisioning of that POI or from preceding two months whichever is less, apart from other legal actions which might be taken including disconnection of POI or temporary suspension of the interconnection agreement, in the event it is detected that WLL(M) subscribers' originating calls were being handed over at any port not meant for carrying such calls.

This Tribunal furthermore noticed the definition of 'WLL service' as contained in Regulation 2 (xxviii) which reads as under:

"WLL(M) means limited mobility telephony service using wireless in local loop technology within a Short Distance Charging Area".

It was concluded:-

"The regulatory regime does not make any reference to use of any particular subscriber end equipment and the Interconnection Usage Charges make reference to "service" only. Since the Walky service of the petitioners is capable of operating outside the subscribers premises and within the SDCA, it is squarely covered by the definition of WLL(M)."

The contention that relying on or on the basis of the representation made by the Cellular Operators Association of India Ltd., TRAI should not have come up with a purported clarification that the equipments having such mobility would come within

the purview of WLL(M) as the consultative process was still being carried out, was also not accepted. Upon taking extensive note of various documents as also the circular letter dated 04.03.2005 issued by TRAI and the circular letter dated 23.03.2005 issued by the Department of Telecommunication, this Tribunal held as under:

> "In our view the circular letter of TRAI dated 4-3-2005 and the clarificatory letter of DoT dated 23-3-2005 are clear determinations on the existing regulatory / licensing position in regard to portability / mobility of WLL(F) phone. The Consultation Paper of TRAI has taken note of the circular mentioned above issued by TRAI restricting the portability/mobility of a WLL(F) subscriber and equipment within the premises of the subscriber. It is also clear that this has not been kept in abeyance by TRAI pending the deliberations on the consultation paper. We are therefore of the view that the consultation process initiated by TRAI is part of a larger exercise relating to review of ADC and whatever regime is put in place in pursuance thereof would have prospective effect.
>
> On going through the language of the above two communications of TRAI and DOT we have no hesitation in concluding that these are intended to bring out clearly the existing licensing/regulatory position in regard to the WLL(F) service and cannot be regarded as laying down any new regulations/licensing conditions."

It also noticed another circular of 9th March 2003, issued by respondent itself.

This Tribunal by reason of the aforementioned judgment dated 9th September, 2005 rejected the contention of the petitioners that the action on the part of the respondent herein to raise a demand was a unilateral one.

It is in the aforementioned background of events the principal reliefs prayed for by the petitioner in the case of Reliance may be noticed.

> "(a) Direct Respondent BSNL to give full details of calls originating from their more than 16 lakh FWTs phones and terminating in the Petitioner's Fixed/mobile network for the relevant period, circlewise;
>
> (b) Direct Respondent BSNL to give details of calls and the methodology of quantification in respect of the alleged claim made by BSNL against the petitioner;
>
> (c) Declare that the calls of WLL(F) service for the purpose of payment of ADC by the Petitioner in respect of their "Unlimited Cordless" service cannot be treated as wrongly routed calls under clause 6.4.6 of the Interconnect Agreement;
>
> (d) Declare that the disconnection of POIs by Respondent BSNL on 3.5.2008 is illegal and in violation of provisions of UASL and NLD Interconnect Agreement.
>
> (e) Direct Respondent BSNL to refund such amount claimed by it and paid by the Petitioner as aforesaid along with the applicable interest from the date of payment by the Petitioner to BSNL till repayment and/or realization."

From a bare comparison of the reliefs claimed by the parties, it will be evident that they are more or less the same.

The disconnection notice was issued by the respondent relying on or on the basis of its earlier demand. It may be a right or wrong demand; may be justified or unjustified, the action on the part of the respondent was raised on the basis of the terms of the contract, the validity whereof is not in question. Even if legality and/or validity of clause 6.4.6 was open to challenge, the same could have been done in the original petition. It is in the aforementioned premise the principle of constructive res judicata is applicable. It, in our opinion, thus, does not lie in the mouth of petitioners to contend that the respondent could not have invoked the penalty clause contained in the clause 6.4.9 of the BSO Agreement or clause 6.4.6 of the UASL Agreement on the ground that they were not wrongly routed. The said contentions were raised in the earlier round of litigation and rejected and/or are treated to be rejected.

It is also not correct to contend that interest is a part of demand. Having regard to the decision of this Tribunal as also the Supreme Court of India wherein the respective contentions of the parties have finally been determined, in our opinion, the questions raised herein need no further determination. The contention with regard to the validity or otherwise of the bills are also necessary to be considered by us afresh.

It may be true that the notice for disconnection without giving 30 days time was illegal. It may also be true that the respondent took recourse to a hasty action. It, in all fairness, should not have made such a huge demand on a Saturday evening. The petitioners were entitled to notice in terms of clause 7.3.2 of the Interconnect Agreement which reads as under:-

> "7.3.2(i) If due payment is not received within the specified period outlined in the bill, notice for disconnection shall be issued immediately to UASL by concerned BSNL field units. The notice period shall be of 30 days from the date of issue of notice. BSNL shall have the right to obtain payment through encashment of bank guarantee which shall be provided by the UASL in favour of BSNL.

(ii) If due payment is not received within 30 days of the specified period/due date outlined in the bill then concerned POI of UASL shall be disconnected and complete outstanding amount including interest on delayed payment shall be recovered from UASL by encashing Bank Guarantee falls short of amount to be recovered then for balance amount interest @ 24% shall be applicable for period beyond 30 days from the due date till the time of actual recovery of this balance outstanding amount. During this period of disconnection the rentals (already available with BSNL) of E1/2 Mbps ports (port charges) shall continue to be applicable. The encashment of the bank guarantee shall not detract in any manner, the BSNL from discontinuing the use of its facilities by the UASL after failure in making the payment within the notice period. Provided, before disconnecting the said facilities, 30 day's notice shall be given to the UASL but such notice will not be construed to have any link or connection with the encashment of Bank Guarantee."

The contention of the respondent that the said clause is not applicable or they did so upon obtaining the advice of the learned Additional Solicitor General can not be appreciated as no exception in regard thereto was available and, thus, what prompted it to ignore the procedure laid down in the Interconnect Agreement is not known. Its action should have been fair and reasonable. It appears to have taken advantage of its position of a stronger party.

However, it may not be possible for us to grant any relief to the petitioner as no relied by way of damages have been claimed for by it.

It is also difficult for us to agree with the submission of the petitioner that no counter claim could have been raised by it without ascertaining details of six WLL numbers in each SDCA by the respondent.

The petitioner could have raised their bills on the basis of their own CDRs. The respondents have disclosed its numbering plan. If correctness thereof is to be challenged, the same has to be done separately.

So far as the contention of the petitioners that the basis and the rates prescribed in clause 6.4.6 of the UASL Agreement or 6.4.9 of this agreement being different, the demands are illegal is concerned; we reiterate, cannot be gone into as specific prayers were made for setting aside the bills in the earlier round of litigation but were upheld. The basis and rates prescribed in two sub-clauses of clause 6.4.9 of BSO and clause 6.4.6 of UASL agreement could also form the subject matter of challenge.

It is true that sub clauses (a) & (b) of clause 6.4.6 prescribes two different rates and they apply in different situations, but they came into force with effect from 14.11.2003. Validity of the bill for the period from 14.11.2004 to 26.08.2005, cannot be challenged in these proceedings and in that view of the matter it is not necessary for us to consider which of the sub clauses is applicable in the instant case keeping in view the principle of res judicata/constructive res judicata.

The methodology used by the respondent, however, in our opinion can be found out from the number of calls and the rate which has been applied i.e. STD and ILD prevailing at the relevant time in terms of the IUC.

The respondent claims that the petitioners were guilty of wrong handing over of calls i.e. handing over of limited mobile service calls at the ports meant for fixed service calls. According to it, the requisite amount of IUC including ADC had been demanded for all calls at the rates prescribed in the IUC Regulations. There are materials on record to show that even in the earlier round of litigation that the bills were raised by the respondent relying on the basis of the Interconnect Agreement. The submission of the petitioner that all calls of limited mobile service through its 'Walky' or 'Unlimited Cordless' phones only should have been the subject matter of the demand and not all calls on the POIs may or may not be correct but specific amounts

claimed were the subject matter of the earlier round of litigation and the same having been upheld, the validity thereof cannot be allowed to be questioned once over again before us in these proceedings.

The computations of the amount demanded by the BSNL were disclosed by way of additional affidavit filed by it before the Supreme Court of India. The same according to the petitioner had not been the subject matter of challenge before the Supreme Court of India but if that be so, the petitioners ought to have raised arguments before it. Nothing has been pointed out by them to show that the said arguments were advanced or in fact considered by the Court.

The petitioners furthermore filed a Review Petition which has also been rejected. We are, therefore, of the opinion that it is not open to the petitioner to question the validity of the bills and quantum thereof in these proceedings, so far as the same relate to the same period.

It however appears that the period for which the bills have been raised herein is 14.11.2004 to 28.4.2006, but the bills which were the subject matter of the earlier round of litigation were for the period 14.11.2004 to 4.6.2005.

The subject matter of consideration of the bill before us and before the Supreme Court of India or being different, in our opinion, the respondent may not be correct to contend that no challenge whatsoever can be raised in respect of the demand pertaining to the period from 26.08.2005 to 28.2.2006. The judgment of the Supreme Court of India dated 30.04.2008 related to the period 14.11.2004 and 4.6.2005. The demand of the respondent has been found to be valid in law in respect of that period only being in terms of the provisions of the UAS Licenses. The claim of the respondent that it had filed its affidavit in respect of

its demand up to 28.2.2006 would not mean that the Supreme Court had also found the validity of its demand in respect of the said period also. The respondent therefore, in our opinion, should raise a revised demand of ADC for the period other than the one upheld by the Supreme Court of India, if not already raised.

There cannot however be any doubt or dispute that if any occasion arises therefor, the petitioner would be at liberty to question the validity of clause 6.4.6 of the interconnect agreement.

There is another aspect of the matter which must also be taken note of .The demand of BSNL was for calls terminating in the network of the petitioners herein and originating from its net work. The said demand has been made in terms of the circular letter dated 14.1.2005 addressed to 'Tata', which has been noticed by us heretobefore.

This aspect however has been upheld by the Supreme Court in its aforementioned judgments.

Another aspect, however, is that there were calls which terminated at the network of 'Tata' or BSNL from the other private operators, where also the respondent would be entitled to ADC on the basis of the datas maintained in that behalf including incoming or outgoing ISD on their network, in terms of Table 3 of the IUC Regulation.

In relation to this aspect of the matter, the petitioner must also furnish all details to the respondents. Similarly, if necessary, it may also call for the details from other private operators.

The 3rd aspect is that the respondent had launched the service known as 'Tarang' which was in effect and substance WLL(M) Service for which it is bound to pay charges to the petitioners and other private operators as per IUC Regulations i.e. in respect of the WLL(M) calls originating from its network.

We have issued certain directions in this behalf in the Petition No.140/2005 – COAI Vs. Reliance Infocom & Others. We have noticed therein the BSNL has undertaken to pay all ADCs to the Cellular Operators' bill in that behalf. The petitioner may thus also raise a bill on the respondent for the period in question. The direction issued therein mutatis mutandis would also bind the parties hereto.

The said directions should also be complied with by all parties including the timeframe provided for therein.

These petitions, for the foregoing reasons, are allowed in part and to the extent mentioned hereinbefore but in view of the facts and circumstances of the case and there shall be no order as to costs.

…….J
(S.B. Sinha)
Chairperson

……..…
(G.D. Gaiha)
Member