

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 15th April, 2010

Petition No.166 of 2006

Reliance Infocomm Ltd.

...Petitioner

Vs

Bharat Sanchar Nigam Ltd.

...Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

For Petitioner : Mr. J. J. Bhatt, Senior Advocate with Ms.
Anjali Chandurkar, Advocate, Ms.
Manali Singhal, Advcoate, Mr. Santosh
Sachin, Advocate

For Respondent : Mr.Maninder Singh,Advocate with
Mrs.Prathiba M. Singh,Advocate
Mr. Yoginder Handoo,Advocate
Mr. Tejveer Singh Bhatia,Advocate
Ms.Nitya Thakur,Advocate

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JUDGMENT

S.B. Sinha

Introduction

This petition involves interpretation of various clauses of the interconnect agreements entered into in January, 2002 and on or about 21.09.2005 by and between the parties hereto.

Facts

Petitioner is holder of Unified Access Service License (UASL) granted to it by the Government of India, Department of Telecommunication (DoT) in terms of the provisions of the Indian Telegraph Act, 1885(The 1885 Act). Originally it was a basic service operator. It was also a NLD and ILD operator. Sometime in November, 2003 however, the petitioner migrated to UASL.

The parties hereto entered into an interconnect agreement in or about January, 2002. In the said agreement an Addenda being No.VIII was added on or about 21.09.2005. It was given a retrospective effect and retroactive operation w.e.f. 14.11.2003 i.e. the date of migration to UASL by the petitioner.

Inter alia contending that different circles of the respondent had been interpreting various provisions of the UASL licenses (in some cases NLD licenses also), the petitioner has filed this petition claiming inter alia for the following reliefs:

- “1. declare and direct the respondents to not to insist on full payment of the disputed IUC bill raised by the respondents if the disputes amount is more than +/- 0.25% but upto 2%.
2. declare and direct the Respondents to not to insist on full payment of the disputed IUC bill raised by the respondents if the disputed amount is more than 2% also and make a provision for dealing with the disputed amount of the such IUC bills.
3. declare and direct the respondents to reconcile the billing records with the petitioner in terms of the Interconnect Agreement.
4. declare and direct the respondents to adhere to the dispute resolution mechanism provided under clause 7.6.1 to 7.6.5 of the Interconnect Agreement.
5. declare and direct the respondents to settle the bills raised by the petitioners as per the due dates prescribed in the IUC agreement in terms of clause 7.6.1 to 7.6.5 of the Interconnect Agreement.
6. declare and direct the respondents to refrain from raising arrears/ bills beyond six months in terms of clause 7.3.1(iv) of the Interconnect Agreement and set aside the bills raised by the respondents in violation of this clause;
7. declare and direct the respondents to following their clarifications dated 6.3.06 refund the amount deducted in violation of this clarification of the respondent headquarters amounting to Rs.6.82 crores as per the details in annexure A28;
8. declare and direct the respondent to refrain from threatening/ resorting to disconnection of the petitioners POIs without sufficient notice as provided in clause 7.3.2(i) of the Interconnect Agreement;

9. declare and direct the respondents to charge for international incoming calls at the correct rates prescribed under the IUC Regulations of TRAI in terms of clause 6.4.1 of the Interconnect agreement and 6.4.2 of the Addenda VIII of the Agreement and also refund the excess amounts already claimed and paid by the petitioner in this respect to the tune of Rs.13.82 crores as per the details in Annexure-A40;
10. declare and direct the respondent to refrain from treating inter circle roamer calls as wrong routed calls and set aside the demands raised in this regard; and reconcile and settle the higher charges paid for non roamers calls in terms of the agreement between the respondent and the petitioners and refund the amount paid on this account amounting to Rs.19.93 crores as per details in Annexure-A35 as well as Rs.86.71 lacs as per the details in Annexure-A36.
11. declare and direct the respondents to provide the details of billing record for three consecutive days as provided in clause 6.6.2 of the Interconnect Agreement; and the Respondents ought to provide the uniform CDR details of billing record to the Petitioners for all the calls terminating at the respondents network for the verification purpose;
12. declare and direct the respondents to settle the bills of the petitioners which have been originally raised within time and the respondents have not paid for the same;
13. declare and direct the respondents to abide by its clarificatory letter dated 6.3.06 and refrain from setting off/netting the IUC payments of the petitioners from the alleged dues of the respondents and make the payments to the petitioners which have been deducted on account of various reasons set out in the petition;
14. declare and direct that the respondents are not entitled to levy interest allegedly on account of delayed payment in case of disputed amounts pending reconciliation in terms of clause 7.5(ii) (iii) of the Addenda VIII of the Interconnect Agreement and refund the amount of Rs.1.48 crores paid under threats of disconnection as per detail in Annexure-A41;

15. declare and direct the respondent to refund the amount of Rs.43.31 crores as per the details in Annexure-A42 which has been paid under various headings under the threats of disconnections and in violation of the interconnect Agreement provisions.”

Proceedings

We may at the outset notice that this Tribunal by an order dated 20.07.2006 while adjourning the matter observed:

“List on 12.09.2006. In the meantime, if there is an instance of disconnection the petitioner is at liberty to move this Tribunal.”

Relying on or on the basis of the said liberty granted, the petitioner filed several Miscellaneous Applications on the premise that threats had been given to it by the respondent to disconnect its points of interconnection, being MA Nos.93/2006, 89/2007, 12/2008 and 70/2008. Those disconnection notices were in respect of various circles, for different periods and for various amounts, the details whereof are as under:

Sr. No.	MA No.	Area of Circle		Period	Bill Amount	Referred Pg. Nos.
1	MA No.93 of 2006	Bangalore	Mentioned during pendency of MA 93- stay granted	01.02.2004 – 31.03.2004	Rs.61,51,280	643
		Gudur		14.11.2003 – 31.07.2004	Rs.44,04,764	737
		Kollam		Bill dated 21.02.2007	Rs.39,0028	738
				Bill dated 27.03.2007	Rs.4,26,44,553 Rs.1,59,67,730	708
2	MA No.89 of 2007	Trichur		From 1.02.04 to July 2004 (arrears for inter circle inroamer) 14.11.2004 – 31.01.2005 (for differential rate in respect of AA services)	Rs.18,10,801	708

3	MA No.12 of 2008	Maharashtra	Arrears accrued due to implementation of IUC 2003 – Bill dated 05.01.2008	Rs.61,37,562.3	867-68
4	MA No.70 of 2008	Bangalore	May 2003 – Aug 2005 (periods vary between the said period as per the nature of violation)	Rs.42,48,75,897	1030-1036A & 1044

Besides the said miscellaneous applications, two other miscellaneous applications were also filed being MA No.166/2006, MA No.18 in MA No.166 of 2006 which have since been disposed of and, thus, we are not concerned therewith at this stage.

Various interim orders were passed in the aforementioned Miscellaneous Applications. However, the main petition was not amended. No court fee was also paid.

This Tribunal from time to time furthermore made observations in regard to the reconciliation of accounts between the parties on various issues. Pursuant to or in furtherance of the said observations the parties met. However, no settlement could be arrived at.

The Issues:

A large number of contentions have been raised in this petition. They relate to the following issues:

- (A) Alleged violation of clause 7.6.0 of the Addenda VIII to the Interconnect Agreement**
- (B) Alleged violation of clause 7.6.1 to 7.6.5 of the Interconnect Agreement**

- (C) Alleged violation of clause 7.3.1 (iv) of the Interconnect Agreement**
- (D) Alleged violation of clause 7.3.2 of the Addenda VIII to the Interconnect Agreement**
- (E) Alleged violation of clause 7.3.2 (III) of the Addenda to the Interconnect Agreement**
- (F) Alleged violation of clause 6.6.2 of the Interconnect Agreement**
- (G) Alleged violation of clause 7.3.1 (iii) of Interconnect Agreement**
- (H) Alleged violation of Agreement by the Respondent for treating the In-Roamer Calls**
- (I) Alleged violation of clause 6.4.1 of the Interconnect Agreement and 6.4.2 of the Addenda VIII to the Interconnect Agreement**
- (J) Alleged Violation of clause 7.5 (ii) & (iii) of the Addenda to the Interconnect Agreement**

Before proceeding further, however, we must place on record that having regard to the preliminary objections raised on behalf of the respondent that this petition is not maintainable as several causes of action have been joined together, the petitioner in its rejoinder categorically stated that it would confine itself to the interpretation of UASL agreement. However, it appears that Issue (E) relates to NLD agreement which has not been seriously pressed. Issue (I) also relates to the NLD agreement but despite a categorical stand taken in the Rejoinder, the said issue was pressed before us contending that, this Tribunal having regard to the provisions of Order II of Rule 3 of the Code of Civil Procedure, 1908 (The Code), has the requisite jurisdiction to determine the same.

The petitioner has also claimed refund of a sum of Rs.43.31 crores wherefor a tabular chart has been annexed to the petition being Annexure A/42. In the said annexure, claims pertaining to different clauses of the agreements and concerning various circles have been mentioned. It has not been explained as to on what basis such claims were advanced. We may furthermore place on record that the petitioner in support of its claim has relied upon various correspondences which pertain to NLD license which in view of the assertions of the petitioners can not be taken notice of.

In support of some of its claims, the petitioner has merely relied upon certain correspondences, the receipt whereof may not be in dispute but having regard to the claims and counter claims, the contents thereof cannot be said to have been admitted.

The nature of the claim being for declaration as also money claim, it was required to be proved by the parties so as to enable us to arrive at a definite finding.

We would, however, advert to this aspect of the matter in some details at an appropriate stage.

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Preliminary Issue

The respondent, as noticed heretofore, has raised a preliminary objection in regard to the maintainability of the petition on the ground of misjoinder of causes of action. The respondent furthermore questioned the maintainability of various miscellaneous applications without suitably amending the petition; causes of action whereof arose during pendency of this petition in respect of the circles which are not the subject matter of the present petition. Prayer for refund of the amount of

Rs.43.31 has also been objected to contending that on the basis of Annexure-A2 alone no judgment can be passed and, thus the prayer for refund cannot be granted.

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Submissions

Mr. J.J. Bhatt, learned senior counsel appearing on behalf of the petitioner made the following submissions on each of the issues:

Issue (a)

- (i) The respondent acted illegally and without jurisdiction in insisting upon payment of the entire billed amount without any reconciliation, even in the cases where the difference shown in the bill and the actual amount based on CDRs of the petitioner is more than (+)/(-) 0.25% but upto 2%.
- (ii) Letter of Nagpur Unit of the respondent dated 29.03.2006 threatening disconnection of POIs of the petitioner in case of failure to make payment without reconciliation of the accounts being wholly illegal, the demand made by the respondent to pay the said amount purported to be in terms of clause 7.1.1 of the agreement must be held to be wholly unsustainable and in fact there is no such clause either in the interconnect agreement or in the Addenda VII thereof (It, however, appears that the amount in question has been paid).
- (iii) Whereas the Jaipur Unit of the respondent by a letter dated 05.03.2006 demanded full payment of the billed amount under threats of disconnection without reconciliation, its Mumbai Unit in terms of its letter dated

22.02.2006 had correctly interpreted the same, stating:

“ - In case they do not receive the amount due to them, they can withhold the payment to the UASL operators (Petitioner).

- Insofar as payment of the variations in the billing amounts are concerned, the same is applicable to the UASL operators, such as the Petitioners, and not to the BSNL i.e., BSNL is not required to pay 50% of the disputed amount.

- In case, BSNL does not receive their money on any account including cable damage they can set off the amount from the bills of the operator.”

(iv) The circular letter dated 12.06.2006 having been held to be prospective in nature by a judgment and order of this Tribunal dated 05.05.2009 and 27.05.2009 in Petition No.224 of 2006, no effect thereto can be given with regard to a period prior to the said date.

(v) The contention raised by the respondent with regard to alleged typographical error is only an afterthought as even Maharashtra Unit of respondent had not taken any such stand.

Reliance in this behalf has been placed in BSNL & Anr. Vs. BPL Mobile Cellular & Others [2008(13) SCC 597].

Issue (b)

(vi) The demand of the petitioner for reconciliation of all accounts of both the parties, although made in various letters being dated 03.01.2006 by Mumbai Circle, Nagpur Circle and Nasik Unit, dated 06.01.2006 by Panjim Unit, dated

04.05.2006 by Chennai Circle, dated 11.01.2006 of Osmanabad Unit having not been responded, the Tribunal should issue appropriate direction.

- (vii) Respondents in their reply having not declined reconciliation of the bills, the petitioner was entitled to the level playing field on the same terms and reciprocity as has been held by this Tribunal in its judgment in COAI & Ors. BSNL & Ors. being Petition No.48 of 2004 disposed of on 11.11.2005.
- (viii) The respondent being in commanding position should be directed to be treated equally as that of the petitioner, in the matter of reconciliation of accounts.
- (ix) Having regard to the stand taken by the petitioner, this Tribunal may appoint a Chartered Accountant recognized by the Government of India or by TRAI for going into the respective accounts of the parties.

Issue (c)

- (x) Clause 7.3.1(iv) restricting the right of the respondent to raise a bill as also a supplementary bill after six months and right to disconnect on the basis thereof being only a contractual one, no bill can be raised thereafter nor relying on or on the basis thereof any disconnection of the POIs of the petitioner could be threatened. Some bills having been raised after a period of six months, one of them being dated 27.01.2006 in respect of the Vadodara Unit and the other being 17.05.2006 in respect of the Bangalore Unit; the purported of threatening of disconnection of the POIs by the respondent on the basis of such bills, the respondent must be held to have committed a grave error in deducting amount of Rs.17.50 lakhs from the dues payable to the petitioner unilaterally and thus, adjusting its bills which were raised after six months.

- (xi) The respondent even raised a bill on the Nasik Unit of the petitioner for the period from February 2004 to August 2004 alleging that it had transferred the calls in a particular trunk group other than the prescribed one which being wholly illegal, no payment could be made.
- (xii) The action on the part of the respondent not to make any payment in respect of the bills raised by the petitioner on one ground or the other and then to contend after expiry of six months that the same have become time barred, must be held to be wholly malafide.

Issue (d)

- (xiii) A bare perusal of clause 7.3.2 would demonstrate that notice period for disconnection is 30 days from the date of issue of notice for payment but in some cases notice for a lesser period has been given which must be held to be illegal. The respondent only by circular dated 26.12.2007 stated that the provisions of the interconnect agreement should strictly be adhered to, wherein also it has been pointed out that notice period shall be 30 days and not 31 days.
- (xiv) There are instances where the respondent raised demands but refused to give details thereof and make reconciliation of the issues raised by the petitioner, and at the same time insisting on payment of the demanded amount and raise a contention that they had been forced to disconnect the POI on account of non-payment must be held to be wholly arbitrary.

Issue (f)

- (xv) Clause 6.5.4 although mandates that billing record should be provided but the respondent had consistently been refusing to provide CDRs and even if the same are provided they are not being in uniform format and containing no details in regard to respondent's incoming traffic and other operators, which action on its part cannot be sustained.
- (xvi) Instances of the respondents not providing CDRs to the petitioners would be evident from letters dated 26.08.2005 and 08.02.2006. In case of Punjab Circle although the CDR details had been provided, but the same were not of uniform format and did not contain complete details as a result whereof, difficulties have been faced by the petitioners in making a comparative study. The respondents however, in their reply although stated that steps have been taken to ensure that CDRs as per agreement provided, but the same is not correct as supply of CDRs thereof was by way of an exception on its part, rather than the rule.

Issue (g)

- (xvii) The provisions of clause 7.3.2(iii) does not provide for a level playing field as also the doctrine of reciprocity in so far as the respondent had been deducting and/or adjusting various charges including damages which are disputed amounts and even without reconciliation of the account as also for the amount for the bills which had been raised after six months.
- (xviii) The arrangement entered into by and between the parties in regard to payment at the maximum rate in respect of any roaming calls was required to be made which being subject to reconciliation, the respondent is wholly incorrect in contending that no such amount was payable.

Issue (h)

- (xix) Although under IUC Regulations framed by TRAI only Rs.5.50 per minute per call was payable by the petitioner to the respondent in respect of international calls, the respondent had been charging Rs.6 per minute and thus the excess amount is liable to be refunded which comes to about Rs.13.82 crores.
- (xx) Reliance placed by the respondent on the judgments of this Tribunal in Petition No.48/2005 and Petition No.88/2005 cannot be treated as precedent, as no reason therein has been assigned and only observations were made for non-grant of the refund was “in the totality of the facts and circumstance of the case”.

Issue (j)

- (xxi) No interest can be levied relying on or on the basis of clause 7.5(i) and (iii) of Addenda VIII of the interconnect agreement as it has been stated therein that the interest shall be levied at the prescribed rates only if it is found subsequently that the interest raised by the UASL operator in the IUC bills were not correct and thus, such interest can be levied only after the amounts are reconciled and crystallised and the disputes raised by the UASL operators are settled through the prescribed mechanism but despite the same the field units of the respondent without reconciling the disputes started levying interest on alleged late payment under threat of disconnection.
- (xxii) The respondent, although in its reply filed in September, 2006 contended that they were in the process of collecting informations from the respective circles and was to file a detailed reply, has failed and/or requested to do so till date.

(xxiii) The petitioner having supplied all the datas to the respondent for settlement of the issues in terms of the order of this Tribunal dated 17.07.2008 and the respondent having not acted in right spirit thereof, should be directed to reconcile the accounts of the parties.

Without prejudice to the aforementioned preliminary objections Mr.Maninder Singh made the following submission, which may be noted issue wise:

(a) Clause 7.6.0 was inadvertently inserted in the interconnect agreement dated 21.09.2005 which relate to wrong interpretation thereof by the petitioner which had in fact been correctly incorporated in the interconnect agreement signed after 10.04.2006 which reads as under:

“.... The bills issued by BSNL based on bulk record shall be final. In case of difference up to 0.25%+/- with the billing record of UASL, the amount billed by BSNL shall be treated as final. If the difference is more than +/-0.25% but upto +/-2%, payment shall be made by UASL. However, reconciliation of variance shall be carried out by both parties and will be subject to dispute resolution mechanism. Variance beyond this limit also shall be subject to dispute resolution mechanism as specified in the Interconnect Agreement. However, UASL shall pay to BSNL the undisputed amount plus 50% of the disputed amount subject to a minimum of an amount equal to previous month's billed amount immediately.”

(b) In terms of clauses 7.6.1 to 7.6.5 only the bills raised by the BSNL was required to be reconciliated and not the bills of the petitioner. However, during pendency of the petition meetings were held and wherever the petitioner

has approached the respondent's SSA for reconciliation as per the terms and conditions of the interconnect agreement, the same has been carried out.

- (c) So far as the dispute relating to interpretation of Clause 7.3.1(iv) of the interconnect agreement is concerned; some of the instances in respect thereof have been given by the petitioner for a ILD licenses/NLD agreements and not of the UASL license, which is impermissible.

In any event the respondent being a public sector undertaking is entitled to recover all its legitimate dues by raising supplementary bills even beyond the period of six months. Some of the instances given by the petitioner pertain to NLD licenses/NLD agreements and thus, the case of the petitioner cannot be determined in this petition. Disconnection of POI however has been resorted to by the respondent in extreme cases where even after several demands the petitioner did not clear its dues.

- (d) In the month April/May 2004 it was discovered that the petitioner had been tampering with its CLI by suppressing the original/authentic CLI of the international calls by inserting a domestic CLI and handing over the same to the respondent's ports as domestic calls. In view of the aforementioned violations of the interconnect agreement only the POIs of the petitioner in the Kolkata Field Unit was disconnected on 14.10.2004 which, however, was later on reconnected.

- (f) Some of the instances have been given with regard to the NLD licence/NLD interconnect agreement, BSNL. Without prejudice to the aforementioned contention, the petitioner had all along been ready and willing to provide the detailed billing records in terms of the clause in question of the agreement.

- (g) Some of the examples given by the petitioner are with regard to the NLD licence/NLD interconnect agreement. In any event in terms of the said provision the petitioner was bound to make payments without setting off or raising its counter claim by clearing IUC bills of the respondent paid by it.
- (h) The respondent had acted in terms of the directions of TRAI and in view the fact that the calls were wrongly routed, clause 6.4.9 of the interconnect agreement was attracted on the basis whereof penalty for a sum of Rs.86.17 lakhs had been levied.
- (j) The dispute pertains to a NLD licence as such the petition is not maintainable in this respect. In any event the question raised by the petitioner is no longer res-integra in view of the decision of this Tribunal in COAI Vs. BSNL (Petition No.48 of 2004) disposed of on 11.11.2005 and (Petition No.88 of 2005) disposed of on 12.05.2006.

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Scope of the petition

The core question which arises for consideration in this petition is as to whether the petitioner is entitled to any relief having prayed for so many reliefs. Out of the 16 reliefs that the petitioner has prayed for, 15 relate to declarations. Only in the 16th prayer, the petitioner has asked for a direction upon the respondent to refund a sum of Rs. 43.31 crores the details whereof are purported to have been furnished in Annexure-A-42 appended to the petition.

It is of some significance to notice that in the said Annexure, merely a table has been furnished in respect of a large number of circle viz. the States of Andhra Pradesh, Bihar, Delhi, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Maharashtra, Mumbai, M.P., Orissa, Punjab, Rajasthan, Tamil Nadu, UP(East), UP(West) and West Bengal.

In the said annexures various headings have been mentioned in terms whereof different sums of money have been mentioned, the total whereof comes to a sum of Rs. 12.47 crores.

The issues – an overview

Before we advert to the preliminary issue raised by the respondent herein, we may broadly notice some of the issues raised before us by the parties.

Issue-A relates to violation of clause 7.6.0 of Addenda VIII appended to the Interconnect Agreement. Indisputably, after the petitioners had migrated to UASL regime, the parties signed the said addenda on or about 21.9.2005 which was given a retrospective operation with effect from 14.11.2003. It is not in dispute that the said clause 7.6.0 pertains to the liability of the petitioner which is said to be necessary for being worked out upon reconciliation of the variances which were required to be carried out by both the parties and the same would be subject to dispute resolution mechanism contained in clause 7.6.5 thereof.

The said clause reads as under :

“7.6.0 The bills issued by BSNL based on bulk record shall be final. In case of difference up to 0.25% +/- with the billing record of UASL, the amount bills by BSNL shall be treated as final. If the difference is more than +/- 0.25% but upto +/- 2%, payment shall be made by UASL. However, reconciliation of variance shall be carried out by both parties and will be subject to dispute resolution mechanism given below under sub clauses 7.6.1 to 7.6.5. However, UASL shall pay to BSNL the undisputed amount plus 50% of the disputed amount subject to a minimum of an amount equal to previous month's billed amount immediately.”

Issue-B relates to breach of clauses contained in the aforementioned 7.6.1 to 7.6.5 of the Interconnect Agreement, which read as under:

“7.6.1 In the event the RIL disputes the accuracy of a bill delivered by the BSNL pursuant to this Agreement, it will, as soon as practicable, but in any case before the pay-by-date notify the billing liaison contact of the BSNL of the nature and extent of the dispute along with all details reasonably necessary to substantiate its claim, which shall be reasonably capable of being verified by the BSNL.

7.6.2 In case of calculation or clerical error in the bill, the bill issuing authority after verifying the bill, if it finds the errors genuine, will correct the relevant bill accordingly within three days of the receipt of the complaint.

7.6.3 In cases other than those referred in clause 7.6.2, RIL shall immediately obtain a provisional bill from BSNL before the pay by date of the original bill on the basis of the number of call units of the previous month. The provisional bill shall be paid by the BSO before the pay by date indicated in the provisional bill. Thereafter, within 7 days of the issue of the provisional bill, the BSO shall approach the designated authority of BSNL along with all his relevant records based on which the BSO disputes the bill issued by BSNL. The BSO shall, in consultation with the designated authority of BSNL, settle the dispute within 15 days of the issue of the provisional bill referred in this clause. In this consultation, the records made by the measurement devices located at the BSNL Interface point shall have precedence over the records of the BSO. If after consultation, it is found that the bill issued by BSNL is correct, the balance amount of the bill, which was kept under dispute after the issue of the provisional bill, will also have to be paid by the BSO within 7 days of the settlement of such dispute.

7.6.4 After the settlement of the dispute, if balance of the due payment is not made within the period referred to in clause 7.6.3, the BSNL shall discontinue the use of its facilities by the BSO immediately on occurrence of this default. Restoration of the facility will be made only on clearance of the dues payable by the BSO. The BSO shall also take action to open irrevocable Bank Guarantee in favour of BSNL as per clause 7.4.1 of the Inter Connect Agreement in the event of such a default.

7.6.5 (i) Notwithstanding provided herein above, if the dispute over the accuracy of the bills fails to be resolved, in the manner already provided, the dispute shall be referred to the CMD BSNL, as an expert and not as an arbitrator, for resolution of the dispute. The decision of the CMD BSNL shall be final and binding.

(ii) Each party shall continue to fulfill its obligations under the interconnect agreement during the pendency of dispute and while dispute resolution process invoked under sub para(i) above except that BSNL shall not be obliged to continue to provide and/or restore the interconnect services when all payments are not made by the BSO.

(iii) Any party shall not use any information obtained from other party during the course of dispute resolution process under this clause for any purpose other than to resolve the dispute and such information shall not be used in any litigation.”

Issue-C relates to breach of clause 7.3.1 (iv) of the Interconnect Agreement. It reads as under:-

“(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.”

Issue-D relates to breach of clause 7.3.2 of the Addenda VIII to the said Interconnect Agreement. It states:-

“7.3.2. (i) If due payment is not received within the specified period/ due date outlined in the bill, notice for disconnection shall be issued immediately to UASL by concerned BSNL field unit. 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 UASL by encashing Bank Guarantee available with BSNL. In case the amount of 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 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 due 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.”

Violation of clause 7.3.2 (iii) of the Addenda VIII to the said Interconnect Agreement is subject matter of Issue-E which reads as under:

“(iii) On clearing of all outstanding dues by RIL as above and furnishing of fresh bank guarantee by RIL, within 30 days of disconnection of PoI, the concerned POI shall be reconnected on payment of reconnection charges by RIL @ Rs.10,000/- (Rs. Ten Thousand) only per 2 Mbps PCM port subject to a maximum of Rs.1,00,000/- (Rs. One Lakh) only per POI location per occasion of disconnection. Such reconnection fees shall also be charged in case of restoration of POIs disconnected due to any other reason permissible under this Interconnect Agreement. However, Reconnection Fee shall not be levied in case the disconnection of the POI cannot be attributed to any default by the RIL.”

Issue-F relates to alleged violation of clause 6.6.2 of the Interconnect Agreement. It reads as under:

“6.6.2 Detailed billing records for 3 consecutive days once in a year at every location of POI shall be supplied free of charge to the BSO on request. In case additional detailed billing information is required by the BSO, it will pay to BSNL @ Rs.5/- per A1 size page of such record.”

Issue-G relates to violation of clause 7.3.1(iii) of the Interconnect Agreement, which is as under:

“(iii) All payments due to BSNL will be paid without set off (netting) or counter claim and shall be free and clear of any withholding or deductions.”

Issue-H deals with breach of the Agreement by the respondent for treating the In-roamer calls, and of the petitioner's migration to UASL regime. The petitioner in this connection inter alia contended.

- Prior to migration to UASL the petitioners were providing Limited Mobile Services under Basic License.
- The Numbering Scheme being used by the petitioners as BSO was 8 digit number scheme with levels 30, 32, 39 etc.
- As a BSO the petitioners were interconnected with BSNL at SDCA level.
- The types of call given to BSNL were the following:
 - (a) Local call with the SDCA
 - (b) Intra circle call (calls within a circle from one city to another)
 - (c) Inter circle call (calls from once circle to another)
- The IUC charges for terminating local, intra circle and inter circle were different. The IUC charges for inter circle & intra circle were based on distance and hence more than the IUC charges for local calls.
- However, on migration to the UASL in November 2003, the petitioners became fully mobile operators. This means that now the mobility was not limited to SDCA but was available within the entire circle. Therefore, now the category of calls was: inter circle and intra circle.
- The BSNL Exchanges were earlier able to identify the call as being local, inter circle or intra circle depending on the level of calling number and the STD code. BSNL was able to identify this by analyzing the dialed numbers of

the calling party.

- After migration to the fully mobile service the digit of numbers were required to be changed from 8 to 10 and the level allocated to the petitioners was 93.
- The interconnection of fully mobile operators was also required to be at Long Distance Charging Area (LDCA) Level.
- It was not possible to migrate overnight in the entire country from 8 digit numbers to 10 digit numbers which required some time for making changes and informing the national and international bodies (DOT, BSNL, MTNL, ITU etc.)
- However, during this transition period the calls from the petitioners subscribers to BSNL subscribers could not be stopped in the interest of providing uninterrupted service to the subscribers.
- The DOT, TRAI and BSNL being technical bodies were aware of the same and discussed the issue with the petitioners and respondents in TRAI and TEC.
- The BSNL's only interest was to create distinction between the inter circle and intra circle calls and charge accordingly. Therefore, the only option available with the petitioners was to agree to pay higher IUC charges based on distance to BSNL irrespective of the call being inter circle or intra circle.
- This was done with the understanding that all the records (CDR) will be available and will be used to reconcile the accounts later on.
- The petitioners agree to pay for all the calls as if they are inter circle calls because that was the highest amount payable for any call.

- The petitioners sent a letter dated 15.12.2003 to the respondent (page 347 – A34) saying that as an interim arrangement the petitioners will be paying at the highest rate subject to reconciliation based on CDRs and refund of the extra amount paid. This was as per the discussion held in the meeting on 15.12.2003.
- However, the respondents have now refused to reconcile these records and refund the extra payment.

So far as Issue-I is concerned, originally, breach of clause 6.4.1 of the Interconnect Agreement and 6.4.2 of Addenda VIII thereof, was said to be subject matter of the petition before us. It was contended that such issue in fact, relates to breach of clauses 6.4.2 and 6.4.7 of the Interconnect Agreement signed by the petitioner as the NLD operator.

Issue J relates to breach of clause 7.5(ii) and (iii) of Addenda VIII of the Interconnect Agreement. This read as under:-

“(ii) The interest charges referred above will also be applicable in case the bill is disputed by UASL but subsequently the billing is found to be in order by the appropriate authority i.e. the dispute raised was not correct. Delay in this case shall be calculated from due date to date of actual payment to BSNL by UASL of the outstanding amount. Interest rate to be charged to UASL for this delay period shall be calculated on the outstanding amount received beyond due date and shall be @ 6.5% above the PLR upto 30 day and @ 24% beyond 30 day from due date.

(iii) In case of disputed and delayed bills, where it is found that billing dispute raised is correct then interest shall be charged to UASL at the specified interest rate for the entire period of delay from the due date of bill on the

undisputed portion only of the outstanding amount. This specified interest rate being @ 3.5% above the PLr upto 15 days, @ 6.5% above the PLR beyond 15 days but upto 30 days and @ 24% beyond 30 days from the due date. However, no interest shall be applicable on the disputed portion of the outstanding amount till the dispute is settled.

In case UASL fails to pay the amended/balance disputed portion of the bill as settled within the new due date prescribed after settlement of billing dispute, interest will be applicable on such amended/ balance disputed portion of the bill amount from the specified new due date of payment to the actual date of payment at rates as applicable in case of delay in payment of a fresh bill as detailed above.”

We may also place on record that despite the petitioner’s keeping the disputes confined to various clauses contained in the UASL agreement and in some of the issues, instances/examples of the alleged breaches have been given either in respect of ILD or NLD License.

Jurisdiction of the Tribunal

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The jurisdiction of the Tribunal is not governed by the provisions of the Code of Civil Procedure (CPC). Section 16 of the Act provides that this Tribunal would be entitled to lay down its own procedure, subject, however, to compliance of the principles of natural justice.

The Act, however, does not put an embargo on the power of the Tribunal to follow the principles analogous to CPC. On the other hand, ordinarily this should be followed (see Tata Teleservices Ltd. Vs. Union of India).

Furthermore, keeping in view of the submissions made by the learned counsel for the parties, as noticed hereinbefore, it is evident that the parties rely upon the said provisions.

Order I of the CPC relates to claim of plaintiffs. Rule 1 thereof provides that in one suit several persons may be joined as plaintiff if the conditions laid down therein are satisfied. Rule 3 allows joinder of several defendants in one suit subject to the fulfillment of the conditions laid down therein.

The court, however, in terms of Rule 2 of Order I and Rule 3(A) thereof, may order separate trials or make such other order as may be found to be expedient in the interest of justice, if it is found that joinder of more than one defendants or plaintiffs may delay the trial of the suit.

Order II of the CPC likewise deals with the joinder of causes of action. Rule 1 of Order II of the Code provides that a suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

The principles laid down under Order II Rule 3 of the CPC, no doubt, have been enacted to minimize filing of suits with different causes of action separately, which having regard to the nature thereof and/or the convenience of the court may be tried together in one suit.

The petitioner earlier was a basic service provider. It, as noticed hereinbefore, entered into a UASL License agreement in the year 2005 with effect from 14.11.2003.

Apart from UASL Licenses for various Circles, the petitioner had also been granted NLD and ILD licenses.

Respondent, indisputably, is a juristic person. Licenses which are operative in different Circles, however, are looked after by its officers employed at the Circle level. The Headquarters of the respondent, although, undoubtedly have a supervisory role to play in respect of the affairs in different Circles, it is not practicable, for it to look after the day to day affairs of each and every Circle.

Each Circle of the respondent may not be separate legal entities, but keeping in view the fact the officers who are in the know of the affairs relating thereto, would be able for answer the contentions raised by the licensees in relation to the matters arising out of the said Circle. it may not be possible for it to effectively deal with all the conditions of the petitioner.

When, however, a large number of causes of action are sought to be joined, only in the event the questions of fact which arise for consideration in the petition, is the same or were the questions of law arising therein is the same or similar, one petition would be maintainable. Different causes of action furthermore may be joined together but there should be some link or connection with one cause of action with the other as has been held by the Calcutta High Court in Nagendra Bala Vs. Prabhas Chandran [reported in AIR 1953 Cal-185]. In this case, as noticed heretobefore, the petitioner had not only raised a large

number of contentions relating to interpretation of various clauses contained in the UASL License, even some of the provisions in different Circles are said to be different.

Even contentions have even been raised in regard to the interpretation of other types of licenses, namely, NLD and ILD Licenses.

The petitioner did not stop there. Its prayer for determination of construction of various clauses of the agreement, according to it, have been communicated differently by different Circles vis-à-vis the Headquarter.

In Sachariu Corporation vs. Wile, 1903(1) Chancery page 410, the practice of combining a large number of causes of action which have no link or connection with each other, has been deprecated.

We are, in these applications, not concerned with the provisions of Order I Rule 3 of the Code of Civil Procedure. A plaintiff, save as otherwise provided, may unite several defendants in the same suit. Several causes of action against the same defendant(s) may also be joined. Plaintiffs having causes of action in which they are jointly interested against the same defendant(s) may unite such causes of action in the same suit.

Rule 3 of Order II states that where several plaintiff file one suit, the jurisdiction of the court as regards the same would depend upon the amount or the value of the aggregate subject matter at the rate of institution of the suit.

The principle is that Order I Rule 3 read with Order II Rule 3 of the Code no doubt, have been inserted for minimizing filing of suits with different causes of actions separately, which having regard to the nature thereof and/or subject to the convenience of the court, may be tried in one suit but indisputably there are certain limitations to the rule. The provisions of Order II Rule 3 of the Code do not contemplate that a large number of causes of action, irrespective of their nature, must be tried jointly.

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Estoppel Issue

When the petitioner chooses a course of action, it is trite, it must invariably be asked to confine itself only thereto. It cannot, thus, be permitted to turn round and contend that the Court or Tribunal may exercise its jurisdiction to broadening the scope and effect of the litigation.

In Spencer and Turner on Principles of Estoppel, it is stated:

“Where A in his dealing with B, being at liberty to adopt either of two mutually exclusive steps, proceedings, courses of action, or attitudes, in relation to B, elects to take or adopt one of them, and to reject the other, or to ‘waive’ his right in respect thereof and A’s declaration of such election or ‘waiver’ by words, conduct or inaction, influences B to alter his position to his detriment, A is estopped, as against B, from thereafter resorting to the course of action which he has thus intimated his intention of relinquishing, dispensing with, or ‘waiving’.

As to the principle of election applied in the conduct of litigations, the learned author states at p. 333 :

“The last of the four fields in which the doctrine under discussion may be observed in operation, and perhaps, the most important and interesting of them all, because yielding the greatest variety of illustrative examples, is the conduct of litigation, in the course of which it very frequently happens that a party litigant is confronted with the

necessity of immediately making a definite choice between two possible courses of action which are mutually exclusive. Whenever this occurs, the general rule of estoppels by election comes into play that is to say, if by words, or (as is almost invariably the case) by conduct or inaction, he represents to the other party litigant his intention to adopt one of the two alternatives and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to adopt or preserve in a line of conduct which he otherwise would have abandoned or modified, or (as the case may be) to change tactics from which he otherwise would never have deviated, the first party is estopped, as against his antagonist, from resorting afterwards to the course or attitude which, of his free choice, he has waived or discarded.”

The petitioner in no uncertain terms in para 6 of the rejoinder affidavit stated as under :-

“The Respondent has raised a preliminary issue in its reply that the Petitioner has purportedly sought to join a number of issues pertaining to different licenses and different interconnection agreements, which, in the respectful submission of the Petitioner herein, is completely incorrect. By the present Petition, the Petitioner has challenged actions of the Respondents which are in violation of some of the clauses of the same Interconnect Agreement signed by the Petitioners with the Respondents as a UAS Licensee. A reference to the three licenses namely, UAS, NLD and ILD and Interconnect Agreements is only by way of providing complete factual input to this Hon’ble Tribunal. The cause of action is arising from one and the same Interconnect Agreement executed between the Petitioners and the Respondents for Unified Access Services.....”

(Emphasis supplied)

Once it had taken a positive stand in its pleadings, in our considered opinion, the petitioner is estopped and precluded from raising any other contention.

We will assume that the petitioner was entitled to join different causes of action in one petition. But in view of the categorical statement made by it in para 6 of the rejoinder, it must be held that it had abandoned its other part of the claim. If the causes of action raised in the petition are to be confined to UASL licenses, it is inconceivable that the interpretation involving clauses of other licenses should also be adjudicated upon.

It is not a case where the parties to a suit are litigating on different transactions, as was the case before the Delhi High Court in *Bank of India Vs Vinod Kumar Bhalla* [AIR 1998 Delhi page 79]. Breach of every contract gives rise to separate causes of action. (See *Narasimha Vs. Kadir* ILR 7 Madras page 108].

In SC Sarkar's Code of Civil Procedure at page 805, the learned author referred to the decisions of the Allahabad and Calcutta High Courts reported in *Behari v. Kodu*, 15 A 380; *Ram v. Sachin*, 6 CWN page 585 and *Ganesh v. Khairati*, 16-A , page 279] to state that in such an event, ordinarily, the plaint is put for restoration for amendment to so as to enable the petitioner to make the election as to the cause of action which can conveniently be dealt with, by a Court.

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Misjoinder of causes of action.

The petitioner herein has principally asked us to interpret various clauses of the interconnect agreements entered into by and between the parties.

The petitioner, however, has referred to the interconnect agreements entered into by and between the parties hereto, not only in respect of its UASL Licenses but also the NLD and ILD Licenses.

In *Ishwar Bhai C Patel Vs. Harihar Behra* – 1999(3) SCC 457 the Supreme Court of India opined :- “the simple principle is that the person is being a party in a suit because there is a cause of action against him and when causes of action are joined, the parties are also joined”.

Mr. Bhatt would contend that this Tribunal has ample jurisdiction to adjudicate on several causes of action in one petition if the parties are same.

Strong reliance in this behalf has been placed on a decision of the Supreme Court of India in *Prem Lala Nahata Vs. Chandi Prasad Sikaria* reported in 2007(2) SCC 551.

Mr. Maninder Singh, on the other hand, would contend that although in terms of the provisions of Order II rule 3 of the said CPC, there is no legal bar of adjudication of several causes of action, this Tribunal may not undertake the said exercise if it is found to be wholly inconvenient to do so.

In *Prem Lala Nahata* (Supra) the Supreme Court of India was concerned with the situation where the defendant filed an application under Order 7 Rule 11 of the Code of Civil Procedure. The said application was allowed. The Supreme Court of India on an appeal having been preferred therefrom opined that the High Court committed an error in rejecting the plaint as misjoinders of the causes of action per se would not lead to rejection of the plaint stating :-

“9. But it is a different question whether a suit which may be bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by law in terms of Order 7 Rule 11(d) of the Code. The Code of Civil Procedure as its preamble indicates, is an Act to consolidate and amend the laws relating to the procedure of the courts of civil judicature. No doubt it also deals with certain substantive rights. But as the preamble vouchsafes, the object

essentially is to consolidate the law relating to civil procedure. The very object of consolidation is to collect the law bearing upon the particular subject and in bringing it up to date. A consolidating Act is to be construed by examining the language of such a statute and by giving it its natural meaning uninfluenced by considerations derived from the previous state of the law.”

There is no quarrel with aforementioned proposition of law and in fact no exception thereto can be taken. But the application of the said rule is in question.

Preliminary Issue

A preliminary issue as is well known should ordinarily be determined at the threshold stage.

Ordinarily in the event it is found that a petition is not maintainable, the merit of the matter need not to be gone into.

We would for the said purpose refer to certain decisions whereupon reliance has been placed by Mr. Maninder Singh.

In Mohinder Singh Gill Vs. Chief Election Commissioner (1978(1) SCC 405 the law is stated as under :

“9.Indeed, we should have expected the High Court to have considered the basic jurisdictional issue first, and not last as it did, and avoided sallying forth into a discussion and decision on the merits, self-contradicting its own holding that it had no jurisdiction even to entertain the petition. The learned Judges observed:

“It is true that the submission at Serial No. 3 above in fact relates to the preliminary objection urged on behalf of Respondents 1 and 3 and should normally have been dealt with first but since the contentions of the parties on submission 1 are intermixed with the interpretation of Article 329(b) of the Constitution, we thought it proper to deal with them in the order in which they have been made.”

This is hardly convincing alibi for the extensive *per incuriam* examination of facts and law gratuitously made by the Division Bench of the High Court, thereby generating apprehensions in the appellant's mind that not only is his petition not maintainable but he has been damned by damaging findings on the merits. We make it unmistakably plain that the election court hearing the dispute on the same subject under Section 98 of the RP Act, 1951 (for short, the Act) shall not be moved by expressions of opinion on the merits made by the Delhi High Court while dismissing the writ petition. An obiter binds none, not even the author, and obliteration of findings rendered in supererogation must allay the appellant's apprehensions. This Court is in a better position than the High Court, being competent, under certain circumstances, to declare the law by virtue of its position under Article 141. But, absent such authority or duty, the High Court should have abstained from its generosity. Lest there should be any confusion about possible slants inferred from our synoptic statements, we clarify that nothing projected in this judgment is intended to be an expression of our opinion, even indirectly. The facts have been set out only to serve as a peg to hang three primary constitutional issues which we will formulate a little later.”

Yet again in *Arun Agrawal Vs. Nagreeka Exports (P) Ltd.* 2002(10) SCC 101, it was observed that the question regarding jurisdiction of the court should be decided as a preliminary issue.

In *T.K. Lathika v. Seth Karsandas Jamnadas* (1999) 6 SCC 632, the Supreme Court of India observed:

“9. If the ban contained in the third proviso to Section 11(3) of the Act applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the court should not enter into the merits because whatever is said or found on the merits would then be without jurisdiction. The High Court should have first decided the question of maintainability of the petition and only if that point was found in the affirmative the merits need have been gone into.”

We are, however, of the opinion that this is wholly inconvenient to allow the petitioner to proceed with all the causes of action jointly in this petition itself. We would, therefore, confine this petition only in respect of the purported violations of the terms and conditions of licence resorted to by the respondent hearing either on misconstruction thereof. We furthermore make it clear that while interpreting different provisions of the UASL licences, this tribunal shall also not take into consideration the instances referred to by the petitioner from the purported violations by the respondent in relation to ILD License or NLD licence.

We may furthermore at this juncture also notice that the petitioner from time to time has filed miscellaneous applications inter alia questioning the validity of the notices for disconnection issued by respondent in different circles. Some of the said miscellaneous applications, as has been noticed by us, are yet to be disposed of. Out of the 6 applications, MA 165 of 2007 and MA 18 of 2008 have been disposed of by this tribunal by reason of orders dated 19.12.2007 and 16.12.2008 respectively. We may furthermore place on record that after disposal of MA 165 of 2007, the petitioner has filed Petition No. 2 of 2008 Reliance Vs. BSNL in relation to Kerala Circle regarding tampering of CLI and wrong routing. Mr. Bhatt will contend that the aforementioned miscellaneous applications were maintainable before this tribunal as the purported disconnection notices have been issued by the respondent in connection with the 'In-Roamer Clause' on the premise that the same had been issued relying on or the basis of the bills raised by the respondent after a period of six months. The learned counsel would contend that in view of the provisions contained in clause 7.4.2, the respondent is estopped from raising any bill after a period of six months and in that view of the matter too, no disconnection notice could also be raised for non-payment of the said bills.

We have noticed heretofore that in Prem Lala Nahata (Supra) the Supreme Court has clearly stated the law that on the ground of misjoinder of causes of action, the plaint cannot be rejected.

The Merit of the Issues

We would, therefore, consider the merit of the matter in respect of such issues which may be possible to be decided without any inconvenience to this Tribunal and wherefor adduction of oral evidence may not be necessary.

Furthermore, the issues which can be determined on the basis of interpretation of the interconnect UASL agreement, the parties need not be relegated to another round of litigation. It will cause some injustice to the petitioner, if it is asked to file several petitions once over again although some of the issues without any inconvenience caused to the parties are possible to be determined.

It is only with that end in view we had permitted the parties to address us also on merit of the issues.

There cannot however, be any doubt or dispute that this Tribunal must not entertain the issues which relate to NLD License i.e. Issues E and I aforementioned.

It may furthermore be noted that while discussing the other issues on merit, this Tribunal would have to bear in mind that those issues which cannot be determined without oral evidence or which are sought to be proved on the basis of instances pertaining to NLD or ILD licenses can not also be determined on their merits.

Circulars

The relationship between the parties is governed by contract qua contract.

It is true that so far as the matters relating to claim of the respondent as regard ADC and IUC charges are concerned, the Regulations framed by TRAI shall govern the field. ADC and IUC charges are, however, separate and distinct; the former being not part of the later.

The respondent, however, in law only for the purpose of raising any monetary claim on the petitioner is not entitled to rely on its own circulars.

The said question is, in our opinion, no longer res integra.

In BSNL v. BPL Mobile Cellular Ltd. 2008 (13) SCC 597, the Supreme Court of India stated the law, thus:-

“44. If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion that no interference with the impugned judgment is called for.”

To the same effect are the decisions of this Tribunal in –

- (a) BPL Mobile Cellular Ltd v. BSNL & Ors [P.No.12 of 2001] delivered on 1.2.2003,
- (b) BPL Mobile Cellular Ltd v. BSNL & Ors [P.No.13 of 2001] delivered on 1.4.2003, and
- (c) IDEA Cellular Ltd v. BSNL & Ors [P. No. 93 of 2005] delivered on 3.3.2006.

Level Playing Field

We have noticed heretofore the reliefs prayed for by the petitioners in this petition.

No relief has been claimed to the effect that the contracts between the parties are one sided ones or for that matter some of the contractual provisions are ultra vires Article 14 of the Constitution of India.

No plea has also been raised in this behalf in the petition.

Although we do not intend to say that a party to a commercial contract would never be entitled to question the validity of a contract or some of the clauses contained therein, as an absolute proposition of law (some decisions of the Supreme Court of India said in the negative in the service contract, e.g. Moti Ram Deka Vs. GM, North East Frontier Rly – AIR 1964 SC 600); we have no doubt in our mind that for the said purpose at least pleas to that effect must be raised.

Submissions, in this behalf, of Mr.Bhatt are, that:

- (i) BSNL has not complied with the terms of the contract.
- (ii) The terms of the contract are clearly unjust and the respondent should be directed to follow reciprocity; and
- (iii) The respondent has unfairly exercised its superior bargaining power.

The respondent indisputably is a 'State' within the meaning of the provision of Article 12 of the Constitution of India.

Even in relation to its action which is contractual in nature, it must be fair and reasonable. We must, however, hasten to add that the requirement of Article 14 of the Constitution of India need not always be complied with in a case involving contract qua contract.

But would that mean that this Tribunal would exercise its jurisdiction under Section 14 of the 1997 Act to declare some of the provisions of the contract illegal without any material having been brought on record?

Answer thereto must be rendered in the negative, in the facts and circumstances of this case and as at present advised.

Like administrative actions on the part of a 'State', all its contractual obligations cannot be termed as unfair or unconscionable without sufficient materials being brought on record.

Specific plea must be raised as to why the petitioner was not in a bargaining position to seek mutually acceptable terms of the contracts.

It may be true that the respondent has a wide network of providing basic service. It may further be true that entering into interconnect agreements inter se amongst the service providers is almost imperative.

The respondent like any other service provider is required to obtain licenses from the Government of India. One of the common conditions of license is that a licensee must enter into an interconnection agreement on being asked to do so by the other licensees.

It is with that end in view, the Act in no unmistakable terms makes TRAI as the Arbiter in the matter of fixation of terms and conditions of interconnect agreements.

Petitioner would be bound by the terms of the regulation/directions framed/issued by TRAI in exercise of its power conferred upon it under Section 11(1)(b) read with 36(1) of the 1997 Act.

Provisions of a contract provide for performance of mutual obligations on the part of the contracting parties.

It was, thus, expected that if a party to a contract thought that a provision of a contract is unjust or unconscionable, it should have approached a court of law having competent jurisdiction to ventilate its grievances as expeditiously as possible. It could even do so after the contract was entered into.

If a plea of constitutionality is raised, requisite grounds therefor were also required to be raised.

If it is contended that the contract is hit by Section 23 of the Indian Contract Act, the requisite plea as envisaged thereunder were required to be raised.

A court of law does not declare a contractual provision ultra vires on mere asking of the parties and that too without any pleadings and without there any relief having specifically been sought therefor.

Even if there exists a finality clause, the same would not be beyond the pale of judicial review. It will per se be not final.

Any damage claimed by the respondent for breach of contract again must satisfy the requirements of law.

Any demand by the respondent despite a finality clause may be subject matter of a decision, which is not beyond the realm of the jurisdiction of this Tribunal as envisaged under Sections 14 and 14A of the 1997 Act, but a relief for that purpose must be sought for.

It is, thus, one thing to say that an action on the part of the respondent may for sufficient reason would be liable to be struck down; it would be another thing to say that any wrong interpretation of a contractual provision by an officer of the respondent would result in rendering the said provision ultra virus or illegal.

Moreover, the petitioner could have even brought the same to the notice of TRAI where as it had been taking the under consultation process prior to framing of regulations.

The Petitioner, thus, in our opinion is clearly wrong to urge these questions without sufficient pleas having been raised in that behalf.

It is true that reciprocity or level playing field amongst the service provides should be encouraged. But there cannot be any doubt that the same by itself may not be sufficient to strike down some contractual provision only on that ground.

In our opinion the petitioner should have initiated a proceeding in this behalf with utmost expedition. It is not the case of the respondent that no cause of action arose therefor immediately after 2002 when the interconnect agreements were entered into.

We may, however, notice some of the decisions rendered by the Supreme Court of India highlighting the doctrine of level playing field being a facet of Article 14 of the Constitution of India.

In COAI Vs. Union of India [2003(3) SCC 186 a decision of this Tribunal was set aside as the matter was not considered having regard to the level playing field.

In LIC of India v. Consumer Education & Research Centre, 1995(5) SCC 482, it was held:

“27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take

any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

47. It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.”

Yet again in the case of *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.* - (2007) 8 SCC 1, the Apex Court held:-

“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of “non-discrimination”. However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to “right to life”. It includes “opportunity”. In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho v. State of T.N.*, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. “Level playing field” is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of

“level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of “level playing field” is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. “Globalisation”, in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of “globalisation”. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of “equality” should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.

These decisions, however, are not authorities for the proposition that applying the said principles, this Tribunal would be legally entitled, not only to strike down the contractual provision but also to hold that the petitioner would also be entitled to the same or similar position.

We, therefore, are of the opinion that in absence of pleading and/or relief claimed for by the petitioner, it is not possible for us to strike down certain provisions of the contract as has been submitted by Mr.Bhatt.

Miscellaneous Applications

The Miscellaneous Applications which have been filed by the petitioner during the pendency of this petition being not maintainable, they are dismissed.

Liberty, however, is given to the petitioner to file fresh petitions before this tribunal afresh.

Issues 'A' & 'B'

These issues pertain to the right of the parties to get the bills conciliated where the actual amount payable by the petitioner would be more than +/- 0.25%. The clause 7.6.0 pertaining to the said issues, in our opinion, are clear and unambiguous. Subject to the petitioner's paying the admitted amount plus 50% of the disputed amount, and/or a minimum of an amount equal to previous month's billed amount, dispute resolution mechanism contained in sub clauses 7.6.1 to 7.6.5 can be resorted to. There cannot, however, be any doubt or dispute that can deny the petitioner recourse thereto at its sweet will. The respondent is, therefore, directed to reconcile the accounts of the parties as and when such a demand made.

Issue 'C'

As instances given pertain to ILD license / NLD agreement, this issue cannot be decided by this Tribunal in this petition. The petitioner, however, would be entitled to file an appropriate application in this behalf. Supplementary bills, furthermore, can be raised even within the period of six months, which do not come within the purview thereof and would otherwise be hit by Section 28 of the Indian Contract Act, 1872.

Issue ‘D’

Admittedly, the notice period to which the petitioner would be entitled to in terms of clause 7.3.2 would be 30 days from the date of issue of notice. The circular letter issued by the respondent is also clear and explicit in this behalf. Any disconnection of the PoIs of the petitioner, by the respondent without issuing 30 days’ notice must be held to be illegal. We, however, need not decide as to the effect thereof as no damages in this behalf has been pleaded or established.

Issue ‘F’

Some of the instances given by the petitioner relate to NLD/ILD license. In view of the fact that, according to the respondent, it had all along been ready and willing to provide the detailed billing records in terms of clause 6.5.4, there cannot be any doubt whatsoever that the respondent would be bound to provide the same to the petitioner as and when the said clause is invoked.

Issue ‘G’

The validity of the provisions of clause 7.3.2 being not in question, we are unable to decide the said issue and grant appropriate relief.

Issue ‘H’

This issue cannot be decided in this petition.

Issue ‘J’

This issue pertains to an NLD License and thus, cannot be a subject matter of decision by us.

We, however, make it clear that the grievances of the petitioner which could not be addressed by us, it would be open to the petitioner to file appropriate petitions before this Tribunal.

However, having regard to the fact that the petitioner has not proved as to what damages, if any, had been suffered by it, no order for damages can be granted in this petition. We, therefore, can only pass a declaratory order. We cannot also, having regard to the prayers made in the petition, pass a preliminary decree and appoint a commissioner for the said purpose. Such a prayer made by Mr. Bhatt, in our opinion, is beyond the reliefs prayed for by the petitioner in this petition and thus cannot be allowed.

This petition is allowed, in part and to the aforementioned extent. In the facts and circumstances of the case, there shall be no order as to costs.

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(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member