

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

Dated 16th December, 2010

Petition No.41 of 2009

HFCL Infotech 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.Ramji Srinivasan, Sr.Advocate
		Mr. Santosh Sachin, Advocate
For Respondent	:	Mr.Maninder Singh, Sr.Advocate
		Mr.Tejeev Singh Bhatia, Advocate
		Ms.Nitya Thakur. Advocate
		Mr. Arjun Natarajan, Advocate
		for
		Mrs. Pratibha M. Singh, Advocate

JUDGMENT

S.B. Sinha

What should be the duct charges in respect of passive link, provided for by the respondent herein to the petitioner, is the short question which arises for consideration in this petition.

2. The petitioner is a licensee, the license having been granted in its favour in terms of Section 4 of the Indian Telegraph Act, 1885 (the Act).

3. The respondent is a public sector undertaking. It is also a successor in interest of the Department of Telecommunication (DoT) of the Union of India.

4. It is also not in doubt or dispute that the petitioner had been availing the active link services from the respondent. It, however, intended to lay the passive network in its TAX situated at Albert Road wherefor it issued a letter dated 16.9.2003, whereby and whereunder, it undertook to pay the duct charges at the rates applicable on receipt of the demand note from the respondent.

It reads as under:-

“Subject : Laying of Passive Network in TAX at Albert Road

Dear Sir,

The Present POI from TAX at Albert Road is through STM-1 installed in your premises. We intend to shift these on Passive Network by installing STM-1 at our Node on the Albert Road.

You are requested to provide access for laying of 2 Nos. of armored PCM Cable each of 24 Pairs from our Node to your Premises as per the drawing enclosed.

The necessary duct charges as per applicable rates will be paid on receipt of demand note.” (Emphasis supplied)

5. It is not in controversy that clause 2 of the said circular would be applicable in the active links and not the passive links. The said circular letter, however, provides for charges under different links, being charges for sharing of building space, electricity & miscellaneous charges and, charges for tower sharing.

It also provides for duct sharing charges in the following terms:-

“Charges for duct sharing:

BSNL may not lease passive elements such as DUCTs, OF cable, etc. unless until governed by a regulation. Whatever number of cable ducts so far been permitted by the field units to the licensed basic service providers for sharing, the same should be got vacated. For the interim period the charges for sharing of duct by the private operators shall be as under:

Cost of duct(x) No.of cables of private operators(x) 36%
Total number of cables carrying capacity of duct”

6. The respondent thereafter issued another circular letter on or about 30.4.2002 wherein it laid down the charges in the following terms:-

"Sub: Passive links for Interconnection between BSNL and private telecom service provider.

Please refer to this office Circular No.116-14/96-PHC(Pt) dated 19th February 2001 where rental charges for providing facilities such as accommodation, power supply, tower space, cable ducts, etc. were prescribed.

2. Now as per the new Interconnect Agreements being signed with private telecom service providers i.e. BSO, CMSP, NLDO and ILDO, provision has been kept for passive links provided by the private telecom service providers. However, no infrastructure charges for such passive links have been prescribed by BSNL Corporate Office till now. The infrastructure charges in such cases including electricity charges for HDSL modems if any, are being worked out in BSNL Corporate Office and shall be intimated to you as and when these are finalized.

3. We may, therefore, permit Interconnection of network of private telecom service providers in BSNL's network on passive links with an undertaking from the private telecom service providers that they shall make payment to BSNL for such infrastructure charges for these passive links as and when finalized by BSNL, with retrospective effect, immediately on demand."

Paragraph 3 of the said letter, thus, specifically refers to undertaking of the private operators in regard to infrastructure charges for passive links as and when finalized by BSNL with retrospective effect.

7. Yet again on or about 29.4.2005, another circular letter was issued by the respondent in relation to the infrastructure sharing charges, relevant portion whereof reads as under:-

“The infrastructure charges in respect of passive links, including HDSL modems have been finalized by the competent authority and shall be @ Rs.15,000/- per E1 per passive link per annum. These include electricity charges, light, power etc. The above charges are applicable from the date of provision of such links.”

8. The respondent yet again came out with another circular letter on or about 16.06.2006, the relevant portions whereof read as under:-

“In continuation of this office circular No.s103-4/2004-Comml. Dated 29.04.2005 and 115-15/2002-Regln. Dated 7.9.2005 on the subject cited above, the competent authority has reviewed and decided to revise the charges prescribed in the aforementioned circulars as under:

- (1) Infrastructure sharing charges for passive links with HDSL modern will be charged at Rs.15,000 per annum as per circular no.103-4/2004-Comml dated 29.4.2005
- (2) Infrastructure sharing charges in case of passive link without HDSL modem, will be charged @ Rs.3000 per E1 per annum. However, Minimum infrastructure sharing charged up to five E1s, shall be Rs.15,000 per annum.

- (3) The charges will be applicable retrospectively from the date of provisioning of such links. Any excess payment with BSNL shall be adjusted in future bills.

All other terms and conditions will remain the same.”

9. The respondent yet again issued a circular letter dated 23.05.2007 allegedly upon making changes in the formula toward infrastructure charges, the relevant portions whereof read as under:-

“Vide this office circular of even no. dated 29.4.2005, charges of Rs.15,000/- per E1 per passive link per annum have been prescribed. In this context references have been received in this office seeking clarification as to whether this Rs.15,000/- includes duct charges, when duct is shared for laying the PCM cable provide passive connectivity to private operator.

2. In the above context, it may be noted that the charges for duct sharing have already been prescribed vide this office letter No.116-14/96-PHC(Pt) dated 19th Feb. 2001 as under:

$$\frac{\text{Cost of duct}(x) \text{ No.of cables of private operators } (x)}{\text{Total number of cables carrying capacity of duct.}} 36\%$$

3. The circular dated 29.04.2005 prescribes infrastructure charges for passive links. These charges are separate from duct charges.
4. In view of above, it is clarified that Duct usage charges are separate from charges for providing Active or Passive links to private operators.”

10. One other circular dated 7.10.2008 was issued whereby and whereunder a corrigendum was issued.

11. Indisputably, on or about 5.6.2009, the petitioner was served with a bill for a sum of Rs.47,23,204/-. The duct cost of passive link in terms of the BSNL's HQ letter dated 23.5.2007 was Rs. 3293128, apart from the passive link charges for the Punjab Circle as contained in the Annexure-I thereto for a sum of Rs.24,411/-.

12. The said demand is in question in this Petition.

13. It is the contention of the petitioner that it has laid down its own duct and had not been using the respondent's duct and therefore is not obliged to pay duct charges to BSNL.

Although, we may refer to the subject a little later, we may notice that the validity of the circular letter dated 19.02.2001 is not in question before us anymore as the interpretation thereof came up for consideration in Petition No.123 of 2005. We may notice, which however is not conclusive, that in Petition No.209 of 2006 (M/s Reliance Infocom Vs. BSNL) which has been disposed of by a judgment dated 11.05.2009 even no such contention has been raised. Our attention has been drawn to the part of the said judgement that wherein a contention had been raised that a purported admission had been made on behalf of the respondent that the rental charges for infrastructure would include building space, electricity charges, tower sharing charges and charges for duct charges.

Whereas the contention of Mr.Maninder Singh, the learned senior counsel appearing on behalf of the respondent is that the word 'respondent' has wrongly been typed in stead and in place of 'petitioner', the submission of Mr.Ramji

Srinivasan is otherwise.

14. We may, for the purpose of ascertaining as to whether any typographical error had occurred or not may notice that in the order dated 23.05.2010 itself has been clarified that the question as to whether the duct has been laid down in circular letter dated 19.02.2001 or not may be considered.

It is now well settled that whenever typographical error is apparent on the face of the records, the same may be ignored. [See State of West Bengal & Ors. Vs. Keshoram Industries Ltd. – 2004(10) SCC 201].

The question as to whether the counsel for the respondents had made a concession or not, must be considered having regard to the circumstances attending thereto.

Even in Para 7 of the written submissions filed on behalf of the respondent on 01.04.2010, this point was specifically taken. The said statement has not been specifically denied or disputed, although a written submission has been filed before us only on 26.07.2010. But it is not decisive.

The learned counsel appearing on behalf of the respondent, however would urge that the duct charges for passive link had specifically been demanded.

Our attention in this behalf has been drawn to the bill dated 05.01.2009 to show that active link charges for Punjab Circle for a sum of Rs. 535132/- has been drawn. So is the invoice dated 2.2.2009 for a sum of Rs. 195673/- as per Annexure 1 & 2 attached thereto providing for charges for duct charges by the respondent.

15. By a letter dated 23.5.2007, it was stated :-

(Setout from page 172)

16. A corrigendum was issued on 7.10.2008 by the respondent, stating :-

(Page 173)

According to the learned counsel for the petitioner no duct charges has been paid for passive link. It, however, does not appear to be correct.

Annexure-3 of the bill in question contains duct charges for the passive link for various circles. It is one thing to say that the same is under challenge but it is another thing to say that the same was not a part of the claim at all.

We, therefore, are of the opinion that the respondent cannot be said to have taken a new stand which have not earlier been taken.

The question as to whether the respondent was entitled to levy the aforementioned charges indisputably arises out of an interconnect agreement entered into by and between the parties hereto.

Para 6.3 of the said interconnect agreement provided for the connection charges.

We are in this petition concerned with clause 6.3.3 thereof, which reads as under:-

“6.3.3 OTHER CHARGES

It shall not be mandatory for BSNL to provide any infrastructure to UASL which UASL himself is supposed to arrange. In case the UASL is not able to bring his interconnecting transmission link upto the BSNL's designated exchange for the POI, BSNL may subject to availability and payment of the prescribed charges by UASL, provide inter exchange junctions on PCMs from the exchange upto which the UASL has brought its transmission link to the location of POI. These charges shall be same as prescribed by TRAI for leased lines from time to time or on R&G terms & Conditions as the case may be.

For any other infrastructure like space in BSNL's building, provision of power supply, air conditioning, mounting of antennas on towers or building tops if feasible, the charges and other terms & conditions for the same shall be as prescribed by BSNL from time to time separately.”

17. Indisputably, the question as to what would be the effect of levy of link charges came up for consideration before this Tribunal in the case of AUSPI Vs. BSNL which was disposed of by this Tribunal by a judgment and order dated 3.3.2006.

In the said judgment, what were the requirements provided for grant of active link or passive link had succinctly been recorded in para 4 thereof.

It reads as under:-

“Each service provider connects its network with the other service provider’s network by interconnecting its Trunk Automatic Exchange (TAX)/Mobile Switching Centres (MSCs) with that of the other through a transmission link. These transmission links normally consist of optical fibre cable between the two exchanges and connected through terminal equipments at both ends of this Optical Fibre. Alternatively, this could be connected through a microwave link provided at both ends. The service provider asking for interconnection with the other operator is called interconnection seeker and the service provider providing the same is called interconnection provider. As per the TRAI Regulation, the later entrant is the interconnection seeker. The said interconnection links between the two exchanges can be either active or passive. An active link involves only connection through copper wire on one end which is passive interconnection and the other end where OLTE is placed, is called active end. In the Petition under consideration, the Members of the Petitioner Association had asked for interconnection links from the Respondent where in some cases the links were provided as active links and in some other cases due to constraint for availability of space or for some other reasons like Trade Union problems, the Respondent’s end was provided with passive end. For providing passive interconnection, the petitioners had to hire premises outside the respondent’s premises where the equipment was housed and from this end to the respondent’s premises only cable was extended for interconnection to the respondent’s network.”

18. The dispute in that petition arose when the members of the Association objected to the orders of the respondent dated 29.4.2005 and 7.9.2005 for conversion of some existing passive links to active links and allegedly laying down of exorbitant rental charges for passive links.

19. The Tribunal in its order inter alia noticed the contention of the Association that Rs.15,000/- per E-1 per annum per passive link, was an exorbitant one. A contention was also raised therein that clause 6.3.3 was not applicable so far as levy of charges so far as passive links are concerned, in as much as no equipment is required to be placed in the premises of the respondent therefor.

In the said order it was furthermore noticed that in the case of passive link, it is only the cable duct which enter the respondent's premises and since no physical premises of the respondent was to be used therefor, the interconnect agreement provides for mutual agreement for charging rental for the same which would be hardly any amount since neither air-conditioning nor electricity and space is used for the said facility.

By its order dated 03.03.2006, this Tribunal directed the respondent to work out a realistic formula for the passive links.

20. It is, furthermore, contended that after one year of the issuance of the said circular letter dated 19.2.2001, the members of the Association wanted to shift to active links wherever possible, although the respondent was in a position to offer the requisite infrastructure therefor, stating.

“That in the judgment of this Hon’ble Tribunal dated 11.05.09 in Petition No. 209/06 M/s Reliance Infocomm Vs. BSNL at Pg. 205-214 one of the grounds raised was that the BSNL while laying down an amount of Rs.3000 annually for one passive link (Rs. 250 per month and Rs.8.33 per day) is acceptable to them, however, the stipulation of minimum 5 E1s imposed by the BSNL should be removed. The petitioner Reliance in that case had also sought the relief of removal of minimum 5E1s stipulation imposed by the BSNL in its circular dt. 16.06.06.”

21. This Tribunal, upon noticing para 23, which reads as under -

“The contention raised on behalf of the Reliance in Petition No. 209/06 was that the charges for duct sharing for passive links be included as a part of the payment of charges of Rs.3,000 per E1 for passive links and the circular of the BSNL dt.25.03.07 reiterating the obligation to pay for duct charges for passive links separately, should be quashed.”;

directed:-

“The BSNL is entitled to receive all its due payments for uses of its ducts for passive links obtained by the petitioner in the area in question. There is no dispute on the entitlement of the BSNL for payment of all due charges in terms of the agreement between the parties.”

22. Thereafter, as noticed hereinbefore, the aforementioned circular letter dated 16.6.2006 was issued in terms whereof, the respondent although fixed Rs. 3000/- per E-1 per annum, but provided for a minimum payment clause, namely, payment of Rs. 15,000/- by each of the licensees.

23. The charges sought to be levied by the respondent was the subject matter of another petition before this Tribunal filed by Reliance Infocom Ltd. which was marked as Petition No.209 of 2006. This Tribunal opined that the minimum charges fixed by respondent therein were not reasonable.

However, it was found that the rate of Rs.3000/- per E-1 of passive link without HSBC fixed by the respondent was reasonable. It was directed that the said minimum stipulation clause be removed and the circular letter dated 16.6.2006 be amended accordingly. The benefit of this direction was to be extended to all the licensees. Validity of 'Duct Charges' in respect of passive link was not in question.

23. In the aforementioned backdrop of events, we may notice the respective contentions of the parties herein.

24. Mr. Ramji Srinivasan, the learned senior counsel appearing on behalf of the petitioner would contend:-

- (a) The respondent could not have levied any charge by reason of issuance of any internal circular, in respect whereof the agreement between the parties had not been amended.

- (b) Clause 6.3.3 of the interconnect agreement has no application in relation to the passive link charges. Thus, for providing the passive link facilities, no other or further charge could be levied.
- (c) The purported undertaking given by the petitioner dated 16.09.2003 is not applicable in the instant case in as much as this Tribunal had clarified the matter as to what charges would be reasonable and what should be the components of the passive link charges.

25. Mr. Maninder Singh, the learned senior counsel appearing on behalf of the respondent, on the other hand, would contend:-

- (1) All circular letters issued by the respondents were known to the petitioner in so far as from the reliefs prayed for by it, it would appear that they had sought for quashing of the circulars which would not have been possible, had they not have any knowledge of the existence thereof.
- (2) The circular letters issued by the respondent would clearly go to show that the duct charges are leviable both for active links as also the passive links charges.
- (3) The petitioner itself having relied upon the circular letter dated 19.2.2001; there cannot be any doubt or dispute that every operator was required to pay the same. In fact, every operator has been paying the duct charges when they take the services by way of active link or passive link.

- (4) Those who intend to lay the cables from the road to the petitioner's building, while they operate from the neighbouring exchange, would not have to pay any duct charges for the networks to the respondent.
- (5) The terms and conditions for levy of the charges are governed by the interconnect agreement entered into by and between the parties.
- (6) It is not correct to contend that charges have been levied only on the basis of the circular letters issued from time to time.

26. The parties had entered into an arrangement in terms whereof certain facilities were to be granted to the respondent in its old Exchange. The respondent, for levy of charges for the purpose of grant of active link, as noticed heretofore, issued a circular letter dated 19.2.2001 :-

Although the said circular letter refers to active link, the same would not mean that by reason of the said circular annual charges were to be levied on an ad-hoc basis, no other or further circular letter has been issued in that behalf.

It refers to various charges other than building space, electricity and miscellaneous charges, tower sharing charges as also the charges for duct sharing.

27. We have noticed heretofore, that the respondent has in its circular letter dated 19.06.2001, had sought to levy different charges upon those licensees who intended to obtain the benefits of services from it. The said circular

letter dated 19.2.2001 leaves no manner of doubt that the same principally referred to the charges leviable for active link services but in our opinion, it also clearly provides for different nature of charges apart from those leviable for cable duct links and radio links and cable based links separately. It must be read as a whole. So read, it is difficult to accept that duct charges were not separately payable. The amount mentioned in para 2 of the said circular letter does not provide for an umbrella rate, building rates for charging building space, electricity and tower sharing charges alone but also duct charges, being separately leviable.

28. The circular letter was issued having active link service from the respondent. It, however, asked for obtaining only passive link services. In the aforementioned situation, the said letter dated 16.9.2003 was issued. On a bare perusal of the said letter, it would be evident that the petitioner was aware that even on shifting to the passive network, it was required to install STM-1 on its node on the Albert Road, wherefor the requisite charges were to be paid for the use of duct charges. It in fact undertook to pay the same.

29. The only question which survives for our consideration is as to whether the amount of Rs.3000/- per EA per annum, as has been held to be reasonable by this Tribunal in its judgment dated 11.3.2009 in Petition No. 209 of 2006 would include duct charges or not. Prima facie, it appears that the same would. The Tribunal noticed the respective contentions in great details.

30. The issue raised by the petitioner therein, was as to whether the charges levied by reason of the 2000 circular would include the duct charges or not.

31. Even if there existed any controversy as to whether any contention as regards wherein validity of the duct charges apart from levy of Rs. 3000/- per EA per annum was revised or not, evidently, the same was not gone into being not under challenge.

A bare perusal of para 15 of the said order would clearly show that what was found to be unreasonable was the stipulation of a minimum charges of 5 EA's and not any other.

32. Whether a contention has been raised that the rental charges for infrastructure would include building space, electricity charges, tower sharing charges and charges for duct sharing etc. or whether the issue relating to duct charges has also been raised by the learned counsel for the petitioner or the respondent, does not appear to be in controversy, having regard to the fact that therein the question which arose for consideration revolved round imposition of a reasonable amount by way of passive link charges and in that view of the matter, we have no doubt in our mind that the said contention could have been raised but had not been specifically been raised.

Validity of the circular letter of 2007 in any event had not been considered. There is nothing on record to show as to whether the said contention was specifically raised or not.

33. To our mind, keeping in view the respondent's stand that each and every licensee need not share the duct of the respondent, by incurring capital expenditure, we are of the opinion that the duct charges were levied by the

respondent really on quid pro quo basis. If it is quid pro quo which formed the basis for levy of duct charges, the same must be held to be payable.

34. We do not agree with the submissions of Mr. Srinivasan that the circular letter dated 19.2.2001 was issued only in respect of the active link services and not passive link services. A bare perusal thereof would show that by reason thereof, separate charges were sought to be levied including the duct charges.

What would be levied, would, however, depend upon the actual usage. If the petitioners actually use the facilities provided for by the respondent for connecting its cables from one exchange to the other, we are of the considered view that the said charges are payable. It is, in other words, not a levy, which is payable in terms of the agreement.

35. The duct charges would, therefore, come within the purview of the generic term used in this interconnect agreement under the heading "other charges".

36. Mr.Srinivasan would contend that impugned bill is barred by limitation in as much as charges have been levied from 2001.

37. In **Bharati Vs. BSNL**, this Tribunal has held that having regard to the provisions contained in Section 28 of the Indian Contract Act, it cannot be said that the respondent is precluded and debarred from raising any bill beyond a period of six months.

(See also Reliance Infocomm Versus BSNL Petition No. 2 of 2008 disposed of on 15.04.2010 and Tata Teleservices Limited Vs. BSNL, Petition No. 111 of 2007 disposed of on 11.02.2010)

38. Furthermore the bill issued by the respondent being legal; what would be the legal consequences of non-payment thereof is not a matter which falls for our consideration in this application.

39. In view of our findings aforementioned, we are of the opinion that the charges levied by the respondent are legal and no case has been made out for setting aside the bill dated 5.8.2009.

40. The petitioner had relied upon several decisions of this Tribunal as also the Supreme Court of India in BSNL and Anr. Vs. BPL Mobile Cellular Ltd and Ors [(2008)13SCC597]. Reliance has also been placed on the decision of this Tribunal in P. No.12 of 2001 (BPL Mobile Cellular Ltd Vs BSNL & Ors) dated 17.2.2003; P. No. 13 of 2001(BPL Mobile Cellular Ltd Vs BSNL & Other) dated 1.4.2003; and P. No. 93 of 2005 (IDEA Cellular Ltd Vs. BSNL & Ors) dated 3.3.2006.

41. There cannot be any doubt or dispute with regard to the proposition of law laid down therein. However, in this case, we are of the opinion that the said decisions have no application for more than one reason; firstly, because validity of the said circular letters are not under challenge on the premise that they were not aware thereabout. It is not a case where the petitioners were not aware of the existence thereof. As a matter of fact, as is noticed heretobefore, beginning from 2001 to 2008, the petitioners themselves have annexed copies of the said circular letters in various petitions including the present one. It is possible that some of them might have been supplied by the respondent as and when the basis for raising a bill was questioned and which had a direct bearing on the circular letters issued by the Headquarters of the respondent, but the same is decisive, secondly because it was clearly undertaken by the petitioners that they would be ready and willing to pay the requisite charges towards passive link services which may be levied. They knew that such duct charges were leviable. The undertaking given by them in terms of its letter dated 16.9.2003 is clear and explicit. They had been paying duct charges for active link services. They knew that even duct charges were to be paid for taking the benefit of passive link services. In view of the said undertaking, we are of the view that the petitioner undeniably had knowledge of the circular letters dated 19.2.2001 and 30.4.2002 at the relevant point of time the same was given as also other circular letters issued by the respondent from time to time, the validity whereof being not in question in this petition.

42. This petition is, therefore, dismissed.

In the peculiar facts and circumstances of the case, however, the parties are directed to pay and bear their own costs.

.....J
(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member

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