TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 11th February, 2010

(a)Petition No.8 of 2003
(With M.A.No.34 of 2003, M.A. No. 190 of 2005)

BPL Mobile Cellular Limited & Another ...Petitioners

Vs.

Department of Telecommunications ...Respondent

(b)Petition No.22 of 2005

IDEA Cellular Limited ...Petitioner

Vs

Union of India & Anr. ...Respondents

(c)Petition No. 27 of 2005

BPL Mobile Communications Ltd. ... Pétitionner

Vs.

Department of Telecommunications ...Respondent

(d)Petition No.98 of 2005

Bharti Broadband Limited ...Petitioner

Vs

Department of Telecommunications ...Respondent

(e)Petition No.73 of 2007

Essel Shyam Communication Ltd. (ESCL) ... Petitioner

Vs.

Department of Telecommunications (DoT) & Ors. ...Respondents

(f) Petition No.227 of 2007
(M.A. No.136 of 2007)

Videsh Sanchar Nigam Limited ...Petitioner

Versus

Union of India & Ors. ...Respondents

(g) Petition No.228 of 2007

(M.A. No.137 of 2007)

Videsh Sanchar Nigam Limited ...Petitioner

Versus

Union of India & Ors. ...Respondents

BEFORE:

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

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

For Petitioners (a) & (c)	:	Mr. C.S. Vaidyanathan, Senior Advocate
		Mr. Rishi Agrawala, Advocate
		Mr. Akshay Ringe, Advocate
		Mr. Nakul Mohta, Advocate
		Mr. Nikhil Rohatgi, Advocate
For Respondent in (a) to (c)	:	Mr.Kuldip Singh, Advocate
For Petitioner in (b)	:	Mr. P.V. Kapur, Senior Advocate
		Mr. Manjul Bajpai, Advocate
		Mr. Ashish Yadav, Advocate
		Ms.Devika Bajpai, Advocate
		Mr. Akshay Misra, Advocate

For Respondents in (b)	:	Mr.Kuldip Singh,Advocate
For Petitioner in (d)	:	Mr. Kaushik Mishra, Advocate
For Respondent in (d)	:	Mr. Vineet Malhotra, Advocate
For Petitioner in (e)	:	Mr. Maninder Singh, Senior Advocate Mr.Saurabh Mishra,Advocate Mr.Arjun Natarajan,Advocate Ms.Nitya Thakur,Advocate
For Respondent (e)	:	Mr. S.K.Dubey, Advocate
For Petitioners in (f), (g)	:	Mr. U. Hazarika, Advocate
For Respondents in (f), (g)	:	Mr.Sanjay R. Hegde, Advocate

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JUDGMENT

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S.B. Sinha

Introduction

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The petitioners, in this batch of petitions, inter-alia, question the validity and/or legality of the provisions contained in the respective license agreements entered into by them with the Department of Telecommunications of the Union of India, in terms whereof the latter claims itself to be entitled to levy penalty at the rate of 150% of the shortfall in payment of the license fee for different years.

The petitioners furthermore question the justifiability or otherwise of such a levy in each of these petitions.

We, therefore, are required to take into consideration for factual aspects involved in each case separately.

BPL Mobile Cellular Ltd Case (Petition No. 8/03 and Petiton No. 27/05)

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The parties entered into license agreements with the respondent for establishing cellular mobile services in the State of Tamil Nadu, Kerala and Maharashtra Circles. The said agreement contained stipulations with regard to levy of interest at Primary Lending Rate (PLR) as specified by the State Bank of India plus 5% thereover and compounded monthly. Indisputably, the said agreement did not contain any stipulation for payment of any penalty.

BPL Mobile Cellular Ltd entered into a similar agreement for the Mumbai Metro on 30.11.1994.

A Migration Package was offered by the Department of Telecommunication (DOT) of Union of India to the petitioner and the same was accepted.

The Telecom Regulatory Authority of India (TRAI) recommended imposition of penalty in cases of National Long Distance Operators in the event of occurrence of any intentional under-statement of any payment required to be made in each quarter towards license fees. It is contended that the cellular operators were not consulted prior to making of the said recommendations by TRAI in terms of Section 11(1)(a) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as 'the said Act').

Recommendations were also made by TRAI with regard to insertion of penalty clauses in the NLD license on or about 15.5.2000, stating that while considering insertion thereof; the same should be made operational only in cases of deliberate under-declaration.

Fresh agreements were entered into by and between the parties hereto on or about 3.4.2002 on the basis of revenue sharing. It also did not contemplate imposition of penalty. Respondent, however, sought to introduce the penalty clause by way of Clause 1.8 in the license agreement, in terms whereof, 150% penalty was to be levied for short deposit of license fee.

It reads as under :

"1.8 In case, the total amount paid on the self assessment of the LICENSEE as quarterly LICENCE Fee for the 4 (Four) quarters of the financial year, falls short by more than 10% of the payable LICENCE Fee, it shall attract a penalty of 150% of the entire amount of short payment. This amount of short payment along with the penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged as per terms of Condition 3.5. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed."

The petitioners contend that in view of the Orders passed by this Tribunal in Petition No. 10 of 2001 on 9.4.2002 with regard to wrong interpretation of ADC Charge payable to the respondent, huge amounts of refund became payable by the respondent to it with interest. The petitioner asked for refund of a sum of Rs. 87.03 crores as on the date of the judgment in terms of a letter dated 17.5.2002. A request for adjusting all the claims of the respondents towards payment of license fees for all the licenses was also made by the petitioner by its letter dated 20.5.2002 which was not responded to.

Only on or about 3.12.2002, penalty for a sum of Rs. 1.49 crores was imposed in respect of Kerala Circle, the details whereof are as under:-

(Amount in Rupees)

PERIOD	**AGR**	**Revenue Share Due**	**Revenue Share Paid**	**Difference**	**Interest on delayed payment upto 31.10.02**	**Penalty**

(A)	(B)	(C)	(D)	(E)	(F)	(G)
1999-00 (Aug 99 to March 00)	**314060351**	**47109053**	**37260000**	**9849053**	**423549**	
2000-01	591165489	82910763	91200000	-8289237	1309704	
2001-02	**689799388**	**68979939**	**59040000**	**9939939**	**4013889**	**14909909**
Total	**1595025228**	**198999755**	**187500000**	**11499755**	**5747142**	**14909909**

The petitioner objected to imposition of the said penalty amount as also levy of interest thereupon by its letter dated 6.1.2003.

An appeal in the meanwhile had been filed by the respondent against the said judgment of this Tribunal dated 17.5.2002 before the Supreme Court of India which was dismissed by a judgment dated 4.3.2003.

By reason of a letter dated 18.3.2003, the respondent unilaterally contended that penalty clause would operate retrospectively. Validity of the said letter was also questioned by the petitioner in terms of its letter dated 18.3.2003. Insertion of clause 3.8 of the license agreement was also objected to by the petitioner by a letter dated 21.3.2003.

The respondent adjusted the amount which was lying at its hands pursuant to the judgment of this Tribunal as also that of the Supreme Court of India dated 4.3.2003 after a delay of more than 63 days. The purported penalty imposed for a sum of Rs. 1.49 crores was also adjusted from the amount lying in its hands. No Show Cause Notice, however, was issued prior thereto.

The matter relating to wireless spectrum charges were indisputably governed by a separate license. The petitioner by a letter dated 12.5.2003 requested that the amount remaining with DoT be adjusted towards the license fees in respect of the Mumbai Circle. The said instruction of the petitioner was ignored and the refundable amount against the WPC Charges was also adjusted.

The matter relating to refund was the subject matter of a petition before this Tribunal marked as Petition No. 17 of 2002 in this Tribunal. By a judgment and Order dated 13.5.2003, this Tribunal directed that refunds which were to be made to the petitioner no. 2 should be adjusted from the outstanding dues. Whereas according to the respondent, the refundable amount was Rs. 1.34 crores, according to the petitioner no. 2, the amount was much higher. The said refundable amount was however adjusted against dues as outstanding on 13.5.2003. The petitioner in terms of a letter to the respondent raised a grievance that adjustments had wrongly been made and the respondent was not entitled thereto, as amounts refundable to the petitioner as on 3.4.2002 should have been adjusted.

It is at that stage, the Petition No. 8 was filed.

Respondent invoked the bank guarantee furnished by the petitioner to the extent of Rs. 25.9 crores and on 19.6.2003, recovered the entire outstanding license fees of Rs. 19.45 crores alongwith the interest payable thereupon viz a sum of Rs. 3.08 crores.

On an application filed by the petitioner, the Tribunal stayed the levy of the amount of penalty by an Order dated 20.6.2003.

On the same date, the respondent imposed penalty for a sum of Rs. 29,18,42,155/- for purported delay in payment of Rs. 19,45,61,437/- towards license fee by encashment of the bank guarantee.

Idea Cellular (Petition No. 22/05 and Petition No. 27/05)

The petitioner was granted a license by the DoT in December, 1995 for the States of Andhra Pradesh, Gujarat and Maharashtra.

Clause 19.2 of the said licenses provided for payment of license fees in advance every quarter.

The Union of India evolved a new Telecom Policy in the year 1999, pursuant whereto and in furtherance whereof, all the licensees were offered to switch-over to Migration Package, in terms whereof, in stead and place of a fixed sum the license fee became payable on a revenue sharing basis. Such an offer was made to the petitioner on 22.7.1999, by reason whereof, the license fee on revenue sharing basis was to be paid within 10 days in advance for the relevant year with effect from 1.4.2000. Payment of license fee, thereafter, was to be made on quarterly basis. In terms of the said license agreement, no audited statement was required to be filed.

It may be placed on record that in the 1995 agreement, there was no provision for levy of penalty for non-payment of the license fees within the stipulated time.

Respondent, however, amended the terms of the license on or about 6.3.2002, pursuant whereto and in furtherance whereof, license fee became payable in four quarterly advances within 15 days of commencement of the relevant quarter on self-assessment basis.

As per the new arrangement, the petitioner was to pay license fees for the quarter April-June 2002 on or before 15.4.2002.

This Tribunal in the AGR matter by a judgement dated 9.4.2002 passed in Petition No. 10 of 2001 directed the respondent to refund the excess amount recovered from the petitioner, as a result whereof the respondent is said to have become liable to pay unto it a sum of Rs. 116 crores.

For the financial year 2001-2002, only a net amount of Rs. 4.81 Crores was payable by the petitioner to the respondent, which was less than 10% of the payable License Fee.

The petitioner wrote to DoT to adjust the outstanding amount against the refundable amount on 18.4.2002 and again on 24.5.2002, but it neither adjusted any sum nor communicated its disinclination to do so. The petitioner again made a request for adjustment of the amount due from it towards license fees from the refundable amount

by reason of its letters dated 11.6.2002 and 2.7.2002.

Instead of acceding to the said request, the respondent preferred an Appeal before the Supreme Court of India against the said judgement dated 09.04.2002 of this Tribunal. The petitioner was asked to pay the balance amount of Rs. 57.03 Crores, which was complied with. License fee for the quarter April-September, 2002 was also paid on 5.8.2002.

By an order dated 22.8.2002, the respondent imposed the impugned penalty on the petitioner.

The Supreme Court of India by its Order dated 4.3.2003 confirmed the direction of this Tribunal in Petition No.10 of 2001 vide its order dated 09.04.2002 directing the respondent to make refunds.

<u>Essel Shyam Communications Ltd (Petition No. 73/07)</u>

The petitioner is a Public Limited Company. It has been granted a license to provide value added service for closed user group by INSAT. The services are also known as VSAT (hereinafter called and referred to for the sake of brevity as "the services").

On or about 28.3.1995, the Department of Telecommunications (DoT) issued a license in favour of the predecessor in interest of the petitioner, which was subsequently assigned to it.

The amount of license fees payable to the respondent is contained in Schedule 'B' of the license. Clause 9 of the said agreement clearly provides that the license fee payable to the respondent would not include the amount of royalty payable for use of radio frequency, i.e., the spectrum charges. Moreover, clause 21.1 of the license mandates that there shall be a separate license for utilisation of the radio frequency.

Clause 21.3 of the said agreement reads as under:-

"21.3 License fee and Royalty shall have to be paid for grant of license which will be subject to revision from time to time.

21.3.1. Royalty : Rs. 20,000/- for the Hub station and Rs. 5,000/- per V SAT station, per annum.

21.3.2. License fee : Rs. 10/- per station (Hub or VSAT) per annum is chargeable."

On or about 16.4.2003, the respondent issued an Order for payment of spectrum charges. Clause 1.2 of the said Order provides that a percentage of the adjusted gross revenue for levy of spectrum charges would be received as specified under the license.

Clauses 1.3 and 1.4 furthermore provided that in case of any delay in the payment of spectrum charges, penal interests shall be levied. Clauses 1.2, 1.3 and 1.4 read as under:-

"1.2 Adjusted Gross Revenue (AGR) for the purpose of levying WPC spectrum charges shall be same as specified under the main DoT License Agreement.

1.3 Payment of spectrum charges shall be on advance quarter basis and payable within 15 days of the commencement of the respective quarter, failing otherwise the same shall invoke penal interest as per the procedure in vogue in the main DoT License.

1.4 Penal interest shall be levied as per existing norms, procedure terms and conditions in vogue for delayed / non-payments for main DoT License Agreement."

The license issued by the respondent as amended came into force on or about 23.1.2004. Clause 1.2 of the amended license provided that the license fee would be payable by the licensee. Clause 1.5 thereof mandates that in case of delay in payment of license fee beyond the stipulated period, the licensee would be liable for payment of interest.

Clause 1.8 of the amended license provided that if the payment of license fee for four quarters of the financial year fell short by more than 10%, the same would attract a penalty of 150% of the entire amount payable in the following terms:-

> "1.8 In case, the total amount paid on the self assessment if the Licensee as quarterly license fee for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable license fee, it shall attract a penalty of 150% of the entire amount of short payment…."

Clause 1.9 stipulates that payment of spectrum charges would be payable at such times and in such manner as is prescribed from time to time.

It reads as under:-

> "1.9 The license fee / royalty towards WPC charges shall be payable at such time(s) and in such manner as the WPC Wing of the Department of Telecommunications, Ministry of Communications may prescribe from time to time."

By reason of a letter dated 7.2.2006, the respondent communicated to the petitioner that a sum of Rs. 98,19,525/- is due from it. In response thereto, the petitioner, by it's letter dated 21.2.2006 contended that in calculating the said amount, the respondent has erroneously imposed penalty for delay in payment of the spectrum charges. By a letter dated 22.3.2006, the respondent, however, reiterated its stand relying on or on the basis of clause 6.8 of the amended license.

The respondent, by a letter dated 3.4.2006, however, raised a contention that reference to clause 6.8 was made by way of mistake in stead and in place of clause 1.8. By a notice dated 25.10.2006, the petitioner was asked by the respondent to pay the amount of penalty for delay in payment of spectrum charges. The respondent, moreover, contended that clause 1.5 of the Order dated 16.4.2003 has nothing to do with the delay in payment of spectrum charges. It was stated—

> "5. Para 8 & 9 of the petition are wrong and denied. It is denied that the license fee for VSAT and spectrum charges for WPC have been separately provided in the license. It is submitted that the license fee for VSAT license and spectrum charges are covered in the same agreement. No separate license agreement was signed for WPC spectrum charges as per clause 21 of the original License Agreement. Therefore, the contention of the petitioner that the provisions for payment of spectrum charges and provisions of payment of license fee are "entirely distinct and independent" is wrong and denied."

On the aforementioned premise, we may notice clauses 1.3 and 1.4 of the Order dated 16.4.2003 passed by the respondent which read as under:-

> "1.3 Payment of WPC spectrum charges shall be on advance quarter basis and payable within 15 days of the commencement of the respective quarter, failing otherwise the same shall invoke penal interest as per the procedure in vogue in the main DoT license.
>
> 1.4 Penal interest shall be levied as per existing norms, procedure terms and conditions in vogue for delayed / non-payments for main DoT license agreement."

It is not in dispute that the petitioner has paid spectrum charges amounting to Rs. 8,78,937/-. The petitioner furthermore accepts that a sum of Rs. 8,73,937 would be leviable by way of penal interest on the aforementioned amount. It, however, disputes its liability to pay penalty @ 150% of the amount of charges purported to be due.

VSNL Case (Petition No.227/07 and Petiton No. 228/07)

The petitioner is a public sector undertaking. It was granted a National Long Distance (NLD) license on or about 8.12.2002. An agreement was also executed by and between the petitioner and the Central Government, in terms whereof, the procedure and schedule for payment of annual license fee and other dues payable by the petitioner had been specified.

It is beyond any controversy that annual license fee was payable by way of percentage of revenue earned under the license.

In this matter, we are concerned with clauses 6.2 and 6.8 of the license which read as under:-

"6.2 License fee shall be payable in four quarterly instalments during each financial year. Each quarterly instalment shall be paid in advance, within 15 days of the commencement of that quarter. This fee for each quarter shall be paid by the Licensee on the basis of own assessment of revenue (on accrual basis) for the current quarter subject to a minimum payment of the actual revenue share of the previous quarter, duly certified with an affidavit by a representative of the licensee authorised by the Board Resolution. However, the Licensee shall pay the license fee for the first quarter of the first year of payment on the basis of the expected revenue for the service in the first quarter.

6.8. In case, the total amount paid on the self-assessment of the Licensee as quarterly license fees for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable license fee, it shall attract a penalty of 150% of the entire amount short payment. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed. This amount of penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged as per terms of condition 6.5."

It may, however, be noticed that in terms of clause 6.5, interest is payable on delayed payment at a rate which will be 5% above the Prime Lending Rate (PLR) of the State Bank of India. Clause 6.6 provides that final adjustment of the license fee for the year shall be made on or before 30th June of the following years based on the gross revenue figure duly certified by the auditors of the license in accordance with the provisions of the Companies Act, 1956.

In these petitions, the validity of the said clause 6.8 only is in question.

Bharti Broadband Case (Petition No. 98/05)

The petitioner is a licensee. A license agreement was entered into by and between M/s Comsat Max Ltd and the respondent on or about 2.8.1994. It was subsequently amended on 30.1.2002 in terms whereof, the mode of payment of the licensee fee was changed whereby, the revenue for commercial VSAT services were to be paid on Adjusted Gross Revenue (AGR) basis. On or about 14.3.2005, the respondent called upon the petitioner to pay the provisional license fee for the year 2001-02 for a sum of Rs. 10,11,52,296/-. The demand was based on calculation sheets containing computation of quarterly AGR and license fee, interest and penalty. A notice was issued by the respondent on 30.3.2005 asking the petitioner to pay license fee for the year 2001-02 whereby the petitioner was called upon to make payment with interest by 30.3.2005 failing which, it was threatened that action would be taken under the terms and conditions of the license agreement.

In response to the said notice, the petitioner, by a letter dated 7.4.2005, indicated to the respondent that it had three different revenue streams. It was contended that the petitioner maintained separate books of account for the revenue earned by providing services under the aforementioned licenses and revenue earned from the trading activity which are disclosed separately in the audited financial statement of the company. The petitioner requested the respondent not to include ISP revenue, trading revenue etc in the license fee and not to impose any penalty on the premise that the license fee actually deposited by it had not fallen short of the stipulated amount of license fee due and payable by 10% and in that view of the matter, the penalty clause contained in clause 1.8 of the amended license agreement was not attracted. According to the petitioner, it was entitled to a refund of Rs. 113,81,958/-. The petitioner submitted an audited AGR statement for the year 2003-04 and the license fee for

the financial year 2003-04 by a letter dated 24/25.5.2005. According to the petitioner, there had been no change in the figures of revenue earned which were earlier disclosed in the AGR certificates, save and except that the new certificates specifically mentioned of revenues arising under the VSAT license, ISP license and trading income by giving break-ups thereof.

On the premise that the certificate was issued not by the auditor who had audited the accounts of the petitioner, it was asked to pay the amount of Rs. 10.37 crores before 30.6.2005 to avoid further accruals of interest by a letter dated 16/12.6.2005. By a letter dated 29.6.2005, the petitioner brought it to the notice of the respondent that AGR certificate for the year 2003-04 was issued by the statutory auditors of the company for the period ending 31.3.2003. It was moreover pointed out that during the financial year 2003-04, the statutory auditors of the company were replaced by Price Water House. Several other correspondences were exchanged between the parties. By a letter dated 5.8.2005, the respondent directed the petitioner to deposit a sum of Rs. 5.04 crores within 7 days of issuance of the said communication towards provisional re-assessment of license fee for the years 2001-02, 2002-03 and 2003-04.

SUBMISSIONS

The principal submissions in support of these petitions were made by Mr.C.S. Vaidyanathan, Mr.Kapoor, Mr.Srinivasan and Mr. Hazarika the learned senior counsel. Other counsels while adopting their submissions raised contentions independently in their respective cases.

Mr.Sanjay R. Hegde, appearing for the Solicitor General of India, Mr.Dubey, Mr.Malhotra and Mr.Kuldeep Singh represented the Union of India in these matters.

The principal contentions raised on behalf of the petitioners herein are as under:

(i) The penal provisions inserted by way of the second amendment in the agreement seeking to impose penalty at the rate of 150% of the amount of short fall is ultra vires Article 14 of the Constitution of India.

(ii) The said provision in any event being wholly unconscienable is hit by Section 23 of the Indian Contract Act.

(iii) The Government of India through the DoT had no authority to direct insertion of a penalty clause in the licences for telecom services.

(iv) In any view of the matter, mere delay in payment beyond the fixed period of 60 days from the close of financial year can not be considered to be reasonable for the purpose of imposing 150% penalty as not only, penal interest at the rate of Prime Lending Rate (PLR) + 5% have been charged and fully recovered before imposition of penalty, but the respondent had also the authority to enforce the bank guarantees which have been furnished by the petitioners.

(v) The penalty clause inserted in the amended licence agreement being compensatory in nature must be held to be contravening the provisions of Section 73 and Section 74 of the Indian Contract Act.

(vi) The intent and purpose of introducing the penalty clause being to safeguard willful misdeclarations or under-declaration of revenue or fraudulent concealment of more than 10% of AGR on self assessment basis, no penalty could have been imposed in absence of any finding of the aforementioned ingredients by the Government of India or by any court of law.

(vii) The Central Government could not have inserted a clause for imposition of penalty unilaterally nor act pursuant thereto or in furtherance thereof without affording an opportunity of hearing to the petitioners.

(viii) Having regard to the provision contained in Sections 20(A), 29(A) and 7 of the Indian Telegraph Act, the Central Government had no jurisdiction to impose penalty beyond the rate provided for therein.

(ix) Having regard to the judgment of the Supreme Court of India in CA No.5050 of 2005, the direction to adjust the amount of penalty should be held to have been substituted in place and stead of the direction issued by this Tribunal.

(x) As the quantum of penalty must be commensurate with the actual loss, if any, suffered by the Government of India and/or any amount which should be reasonable ; no penalty could have been levied, keeping in view the fact that the respondents had been charging interest for the entire amount, which itself was penal in nature.

(xi) Keeping in view the recommendations made by TRAI, which according to the 1st respondent were accepted by the Central Government, the element of mens rea was required to be found to be existing before passing of an order imposing penalty.

(xii) The terms and conditions of a contract contained in the license agreement could not have been modified unilaterally by the respondent herein by issuing office orders or otherwise.

(xiii) After the judgment of this Tribunal in the AGR matter, the respondents could not have levied penalty relying on or on the basis of clause 6.8 of the license agreement, having regard to the provisions of the Indian Telegraph Act.

(xiv) The Parliament, although inserted Section 9(A) at a later date, did not amend the provisions of Section 20(A) or any other provisions and thus must be held to have kept the said provisions intact.

(xv) The action on the part of the respondent in any event is otherwise vitiated in law.

Mr.Sanjay R. Hegde, on the other hand, urged:

(i) Having regard to the decision of this Tribunal in MA No.22 of 2004 arising out of Petition No.10 of 2001 dated 18.03.2005, the petitioners could not have prayed for adjustment of the principal amount from the amount payable by way of refund as directed by this Tribunal while disposing of Petition No.10 of 2001.

(ii) The Penalty Clause in the licence agreement having been inserted by way of an agreement as a reasonable amount of compensation as provided for under Section 74 of the Indian Contract Act, the question of the same being ultra vires Article 14 of the Constitution of India or being unreasonable or unconscionable, arbitrary or violative of Section 23 of the Indian Contract Act does not and cannot arise.

(iii) The licence agreement having been modelled on a revenue sharing arrangement in terms whereof the licensee cannot seek to obtain advantage thereof that is payment of licence fee divisible in four quarters as against payment of licence fee in advance without being compelled to pay the amount admissible and due to the Government at the end of financial year.

(iv) The provisions of Section 20(A) as also Section 29(A) of the Act being punitive in character do not have a bearing on levy of penalty for failure to pay under a contract in as much as such clauses are in addition to the statutory provisions and insertion of such clauses by mutual agreement is not barred.

(v) The amount payable under the penalty clause is directly relatable to an incorrect assessment followed by failure to pay on the expiry of 60 days from the end of the financial year, thus, and being limited to 150% on the shortfall of the licence fee, cannot be held to be violative of Section 74 of the Indian Contract Act.

(vi) It is not a case where Section 16 of the Indian Contract Act would be applicable as the said provision merely enables the court to raise a presumption against a contractual provision.

(vii) In any event the principal conditions to attract the said provision being domination of will and unconscienability i.e. absence of meaningful choice, are absent in the instant case.

(viii) The licence agreement governs the contractual relationship of the parties and mere existence of a penalty clause cannot give rise to the presumption of substantive or procedural unfairness and in any event the Indian Contract Act does not contemplate invalidation of the contract on such grounds.

(ix) Section 20(A) and Section 29(A) of the Act being penal in nature, penalty can be imposed only if a criminal proceeding is initiated therefor and not otherwise. Both the provisions, namely Sections 20A and 29A stand on different footings and comprehend different categories of offences.

(x) Proviso appended to Section 4 of the Act enables the Government of India to grant a license on such conditions and in consideration of such payment as it thinks fit to any person to establish, maintain or work a telegraph within any part of India.

(xi) Section 7(A) of the Act recognized the power of the Central Government to enter into an agreement.

In Bharti Broadband, it has been contended :

(a) Indisputably, the petitioner had paid a sum of Rs. 5,05,63,357/- on 22.8.2005.

(b) It is furthermore not in dispute that in terms of judgments dated 7.7.2006 and 30.8.2007, it has clearly been held that only the revenue earned from the license activities would form part of the AGR.

(c) The payment having been made 'without prejudice', the implications whereof would be:-

(i) that the the matter has not been tested on merits; and

(ii) that fresh proceedings, according to law, were not barred.

The respondent, however, contends that the demand raised was as per terms and conditions of license, the details whereof read as under:-

Rs. in Cr.

Year	Penalty	Interest	Total
2001-02	0	.30	.30
2002-03	4.21	.43	4.64
2003-04	0	.12	.12

According to the respondent, therefore, penalty has been imposed only for financial year 2002-03 as the shortfall had exceeded 10%. The petitioner, it was urged, being bound to follow the terms of the agreement of license and demand having been raised in accordance therewith, question of any refund does not arise.

Statutory Provisions

Before adverting to the rival contentions of the parties as noticed heretobefore, we may notice some provisions of the statutes which are relevant for determination of the issues involved in these matters.

The Indian Telegraph Act, 1885.

The said Act was enacted to amend the law relating to telegraphs in India.

Part II of the said Act confers privileges and powers on the Government. Section 4(1) provides that the Central Government would have the exclusive privilege for establishing, maintaining and working telegraphs.

The proviso appended thereto, however, enables the Central Government to grant a licence, on such terms and conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India.

The second proviso appended thereto enables the Central Government to permit establishment, maintenance and working of wireless telegraphs on ships and telegraphs other than wireless telegraphs to any person on such terms and conditions as made by rules prescribed.

Section 7 of the Act provides for the rule making power. Sub-section (1) thereof enables the Central Government to make rules consistent with the Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licenced under the said Act. Sub-section (2) of Section 7, however, provides for all or any of the matters for which rules could be framed, clauses (h) and (i) whereof read as under:

"(h) the time at which, the manner in which, the conditions under which the persons by whom the rates, charges and fees mentioned in this sub-section shall be paid and the furnishing of security for the payment of such rates, charges and fees;

(i) the payment of compensation to the Central Government for any loss incurred in connection with the provision of any telegraph line, appliance or apparatus for the benefit of any person -

(a) where the line, appliance or apparatus is, after it has been connected for use, given up by that person before the expiration of the period fixed by these rules, or

(b) where the work done for the purpose of providing the line, appliance, or apparatus is, before it is connected for use, rendered abortive by some act or omission on the part of that person."

Sub-section 3 of Section 7 reads as follows:

(3) When making rules for the conduct of any telegraph established, maintained or worked by any person licensed under this Act, the Central Government may by the rules prescribe fines for any breach of the same:

Provided that the fines so prescribed shall not exceed the following limits, namely:-

i. When the person licensed under this Act is punishable for the breach, one thousand rupees, and in the case of a continuing breach a further fine of two hundred rupees for every day after the first during the whole or any part of which the breach continues.

ii. When a servant of the person so licensed, or any other person, is punishable for the breach, one-fourth of the amounts specified in clause (i).

Any rule framed under the Act has to be laid before the Parliament as provided for under sub-section (5) of Section 7 thereof.

Section 7A provides for the saving of the provisions of the existing agreements; whereas Section 7B provides for resolution of disputes.

Section 20A of the Act is a penal provision in terms whereof in the event of contravention of any of the conditions contained in the licence by the holder thereof, punishment with fine which may extend to one thousand rupees, and with a further fine which may extend to five hundred rupees for every week during which the breach of the condition continues, may be imposed.

Section 29A also contains a penal provision in the following terms:

[29A. Penalty – If any person, without due authority, -

(a) makes or issues any document of a nature reasonably calculated to cause it to be believed that the document has been issued by, or under the authority of, the Director-General of [Posts and Telegraphs], or

(b) makes on any document any mark in imitation of, or similar to, or purporting to be, any stamp or mark of any Telegraph Office under the Director General of [Posts and Telegraph], or a mark of a nature reasonably calculated to cause it to be believed that the documents so marked has been issued by, or under

authority of, the Director-General of [Posts and Telegraphs],

he shall be punished with fine which may extend to fifty rupees.]

The Indian Contract Act, 1872

Sections 73 and Section 74 of the Indian Contract Act read as under:

Section 73. Compensation for loss or damage caused by breach of contract – When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract – When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Illustration:

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest upon the day of payment.

Section 74. Compensation for breach of contract where penalty stipulated for – When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

Illustration:

(d) A gives B a bond for the repayment of Rs.1,000 with interest at 12 percent, at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 percent from the date of default. This is stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

The Telecom Regulatory Authority of India Act, 1997

The Parliament of India in the year 1997 enacted the Telecom Regulatory Authority of India Act.

License has been defined in Section 2(e) to mean any person licensed under sub-section (1) of section 4 of the Indian Telegraph Act, 1885 for providing specified public telecommunication services.

Section 2(ea) defines licensor to mean the Central Government or the telegraph authority who grants a licence under section 4 of the Indian Telegraph Act.

Chapter III of the Act provides for constitution of the Telecom Regulatory Authority of India (TRAI) as also its powers and functions.

Chapter IV of the Act inter alia provides for establishment of the Tribunal as also its jurisdiction.

Actions taken by the respondent prior to amendment of the license.

Before we take notice of different clauses of the agreement, we may notice that indisputably the petitioners have been granted licences in the year 1995. Upon coming into force of the migration package, they were to pay the licence fee in advance for the first year. However, from the second year they were to pay licence fee on each quarter. Payment of such quarterly licence fee was also to be made in advance.

Pursuant to or in furtherance of the National Telecom Policy adopted by the Central Government in the year 1999, the licensees were required to pay the licence fee on a revenue sharing basis in stead and place of fixed amount. The petitioners did not object to amendment in the licence, in terms whereof license fee was to be paid on a revenue sharing basis. The amended licence came into force on different dates but in some cases on or about 06.03.2002. Before such migration package has been resorted to, the Central Government by a letter dated 22.07.1999 marked without prejudice, stated the details of the amendments proposed to be made.

TRAI also made recommendations on introduction of payment of compensation in National Long Distance communications, paragraph 35 whereof reads as under:

> "35. While progressive quarterly payments are likely to be at variance with reference to the final liability based on audited accounts, these payments should be as accurate as possible. Any under statement of interim quarterly payments beyond twenty percent of the final calculation may attract a penalty (not exceeding the amount of short payment) in case the licensee fails to show that the under statement was not deliberate and that the projections were reasonable as per the then obtaining circumstances."

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<u>Agreement</u>

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From a letter dated 03.04.2002 issued by the Government of India, Ministry of Communications, it appears that the quantum of revenue sharing was also to be arrived at upon taking into consideration the recommendations of TRAI.

The agreement was amended, as noticed hereinbefore in some cases, on or about 03.04.2002 which reads as under:

> "In consideration of the acceptance by the Licensee, of the terms and conditions contained in the offered Migration Package vide No.842-153/99-VAS (Vol.V) (Pt.) dated 22.7.1999 for migration to the revenue sharing regime under New Telecom Policy-1999, the license agreement shall stand substituted and modified as follows with effect from 1.8.1999, notwithstanding anything contained in the License Agreement."

Annual licence fee in terms thereof was 15% of the Gross Revenue (GR) w.e.f. August, 1999.

GR has been defined in clause 2.1 which reads as under:

> "2.1 Gross Revenue:
>
> The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense etc."

Clause 3 provides for schedule of payment of annual licence fee. Clauses 3.1, 3.2, 3.4, 3.5, 3.7 and 3.8 which are material for our purpose read as under:

> "3.1 For the purposes of Licence Fee, the 1st year shall end on 31st March following the date of commencement of the Licence Agreement and the licence fee for the First year shall be determined on a pro-rata basis for the actual duration of the "year". From the second year onwards, the year shall be of Twelve English calendar months from 1st of April to the 31st March for payment of Licence Fee.
>
> EXPLANATION: The Licence fee for the last quarter of the first year and last quarter of the last year of the Licence will be computed with reference to the actual number of days after excluding the other quarters, each being of three months.
>
> 3.2 Licence Fee shall be payable in four quarterly installments during each financial year. Each quarterly installment shall be paid in advance within 15 days of the commencement of that quarter. This Fee for each quarter shall be paid by the LICENSEE on the basis of own assessment of revenue (on accrual basis) for the current

quarter subject to a minimum payment equal to the actual revenue share of the previous quarter, duly certified with an affidavit (as per Proforma annexed) by a representative of the LICENSEE, authorized by the Board Resolution coupled with General Power of Attorney. However, for the first quarter of the first year, the licensee shall pay the Licence fee on the basis of the expected revenue from the SERVICE in the first quarter.

3.4. The LICENSEE shall adjust and pay the difference between the advance payment made and actual amount duly payable (on accrual basis) of the previous quarter, along with the advance payment for the current quarter.

3.5. Any delay in payment of Licence Fee, or any other dues payable under the LICENCE beyond the stipulated period will attract interest at a rate which will be 5% above the Prime Lending Rate (PLR) of State Bank of India prevalent on the day the payment became due. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest.

3.7 A reconciliation between the figures appearing in the quarterly statements with those appearing in annual accounts shall be submitted along with a copy of the published annual accounts and audit report, within 7 (seven) Calendar days of the date of signing of the audit report. The annual financial account and the statement as prescribed above shall be prepared following the norms as prescribed in Annexure-C.

3.8 In case, the total amount paid on the self assessment of the LICENSEE as quarterly Licence Fee for the 4(four) quarters of the financial year, falls short by more than 10% of the payable Licence Fee, it shall attract a penalty of 150% of the entire amount of short payment. This amount of short payment along with the penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged as per terms of Condition 3.5. However, if such short payment is made good within 60 days from the last day of the financial year no penalty shall be imposed."

Clauses 4 provided for furnishing of financial bank guarantee. Clauses 4.1 and 4.4 read as under:

"4.1 The licensee shall maintain on year to year basis a Financial Bank Guarantee (FBG), valid for one year from any Scheduled Bank or Public Financial Institution duly authorized to issue such Bank Guarantee, in the prescribed proforma (Annexure-D). The amount of FBG shall be equivalent to the estimated sum payable for two quarters towards the license fee and other dues, not otherwise securitized. The amount of FBG shall be subject to periodic review by the licensor. The Licensee shall also maintain on year to year basis a Performance Bank Guarantee (PBG) in the prescribed proforma (Annexure-E) of an amount as prescribed in existing License Agreement. The licensee shall be permitted to reduce the value of the PBG by 50% after the coverage criteria prescribed in the license is fulfilled.

4.4 Without prejudice to any other remedy, Licensor may encash BG in case of any breach in terms & conditions of the LICENCE by the LICENSEE."

We, in these applications, are not concerned with any other provision of the said agreement.

Bank Guarantee

Indisputably, the petitioners herein furnished bank guarantees in respect of amount specified in their respective contracts. Clause 3 of the bank guarantee furnished reads as under:

"3. We, the bank, hereby further undertake to pay as primary obligor and not merely as surety to pay such sum not exceeding Rs.________________ (Rupees _________________ Only) to the Authority immediately on demand and without demur stating that the amount claimed is due by way of failure of the LICENSEE to pay any fees or charges or any part thereon in terms of the said Licence."

Some general observations

As the power to impose penalty is contained in different agreements and numbered differently, we call the respective clauses as the penal clause. Before proceeding further, we would also like to place on record that the effect and purport of the penal clauses is identical.

The difference between a clause empowering a party to the contract to impose penalty as an 'In Terrorem' clause for enforcing reasonable deterrent on the one hand and a provision for levy of 'liquidated damages' is well known.

If the penal clause is to act 'in terrorem', it, save in exceptional cases, would be rendered invalid. It is also a well settled principle of law that some claim in the contract by way of pre-estimated damages, may not be enforced by a court of law and only a reasonable amount out of the pre-estimated damage would be payable, unless the amount named is held to be a reasonable pre-estimate.

The penal clause, indisputably, however, was inserted at a later stage, being not a part of the original agreement. It is beyond any controversy that for non-payment or short-payment of license fee, attracts interest @ 5% over and above the premium interest rate of State Bank of India compounded monthly or a fraction of month.

If interest beyond the normal rate becomes payable, the same would amount to penalty. It is doubtful whether a clause for levy of double penalty and furthermore interest on penalty would satisfy the requirements of law. In our opinion, the Indian Contract Act does not envisage the same.

The respondent being the licensor has, in terms of Section 4 of the Indian Telegraph Act, 1885, a special privilege in the matter of grant of license. The statute contemplates imposition of any term and condition therefor which, it may be assumed, would include a deterrent provision. It is, however, well settled that the State in all its actions, including contractual ones, must act fairly and reasonably. It is also bound to comply with the principles of natural justice.

The action on the part of the State, in imposing penalty of a huge amount, thus, would deserve strict constriction. The respondent as a State, cannot indulge in unjust enrichment in terms of a contract qua contract. Its conduct cannot be arbitrary or capricious. Its conduct even in the matters involving contract qua contract should be just and proper. It should not take undue advantage of its superior position as a licensor.

All the petitioners were to receive a huge amount from the respondent. For all intent and purport, therefore, they were not defaulters. While imposing penalty on the petitioners, the respondent was required to keep this aspect of the matter in mind.

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Validity of the Penal Provision

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Insertion of penal clause for performance of the contract per-se may not be ultra-vires to Article 14 of the Constitution of India.

The question, however, whether the same is unconscienable and, thus, hit by Section 23 of the Indian Contract Act will depend on various factors including the bargaining power of the parties. As at present advised, although respondent is a stronger party, we do not propose to enter into the discussion in detail as to whether by reason of the said fact alone the contract should be struck down as being hit by Section 23 of the Indian Contract Act.

There cannot, however, be any doubt or dispute that the penal clause in question is required to be considered in the light of Section 74 of the Indian Contract Act. Even the respondent has relied on the said provision.

We will deal with the said aspect of the matter a little later.

It is, however, difficult to hold that the penalty clauses contained in Section 20A and Section 29 A of the Telegraph Act, would be attracted in this case, in as much as they deal with the criminal liability and not a civil one. They stand on different footings. They provide for punishment with fine. The terminology used in the aforementioned provision, in our considered opinion, are relevant and they have to be given their ordinary meaning. Fine, ordinarily can be imposed by a criminal court and not by a party to the contract. Furthermore, the penalty is to be imposed only in the event shortfall in the payment of licence fee takes place and not otherwise.

Section 7 (h) and (i) in our opinion have also no application to the facts and circumstances of the present case. Furthermore, even the Proviso appended to Section 7(3) of the Act speaks of 'fine', which would have nothing to do with a penalty which may be levied by reason of short payment of license fee.

Recommendations of the TRAI

The TRAI Act contains special provisions. The functions of TRAI are contained in Section 11 of the Act. Clause (a) of the Subsection (1) of Section 11 provides for the matters in respect whereof the authority is to make recommendations which includes the terms and conditions of licence granted to a service provider as also revocation of licence for non-compliance thereof. The functions of the authority in that behalf , however, being recommendatory in nature, it is difficult to hold that the Government of India would be bound thereby, ordinarily, though due and proper weight thereto should be attached.

No material, however, has been placed before us to show as to how and in what manner the recommendations of TRAI were considered by the Department of Telecommunication. Whether the said recommendations were accepted or rejected by it is not known. We in absence of any such material are not in a position to hold that the penal provision would be attracted only when there has been a deliberate under declaration or mis-declaration.

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Interpretation of the Penal Clause

The penal clause is attracted when :-

(i) The license fee payable in four quarters of the Financial Year falls short of more than 10%.

(ii) The amount would be payable together with the amount within 15 days of the date of signing the audit report on the annual accounts, failing which, interest shall be further charged as per condition 3.5. If such short payment, however, is made good within 60 days of the last date of the Financial Year, no penalty shall be imposed.

(iii) The license remains effective from 1st of April of a year to 31st of March of the next year.

There cannot be any doubt or dispute that the question as to whether a stipulation in a contract is by way of penalty or not must be answered in the background of various factors namely, the rights and obligations, acquaintance from a transaction, the intention of the parties, the real purpose of the stipulation, the character of the transaction and its special nature, if any. The courts are required to take into consideration the fact as to whether it may operate 'in terrorem' so far as a promisor is concerned forcing him to perform the contract, in which event the provision would be held to be penal in nature.

We may notice that the Supreme Court of India in K.B.Subbarama Sastri V. K.S. Raghavan, AIR 1987 SC 1257; (1987) 2 SCC 424 opined that if on such comprehensive construction, it is found that the real purpose for which the stipulation was incorporated in the contract was by reason of its burdensome character, it may operate 'in terrorem' over the promisor so as to drive him to fulfill the contract, in which event, the provision would be held to be penal in nature.

We would deal with the aspect of 'in terrorem' at some details a little later.

The question as to whether in a case where a very large sum becomes immediately payable in consequence of non-payment of a very small sum, should be considered to be a penalty or not, came up for consideration in **Kemble v. Farren**, [1824-34], All England Reporter Rep. Page 641 (at 642), wherein it was held:-

"But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved and against which courts of law have, in modern times, endeavoured to relieve by directing juries to assess the real damages sustained by the breach of the agreement."

Yet again, in **Astley v. Weldon**, [1775-1802] All E.R. Rep., Page 606, it was held as under:-

"There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. In this case, it is impossible to grable the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty : the concluding clause applies equally to all the covenants. If anything is to be collected from the form of this declaration, it should seem that the plaintiff meant to sue only for the damages actually sustained. If he had declared in debt and assigned breaches he would have been considered as having made his election to proceed under the statute and by varying the form of the action he shall not elude the statute."

The said principle was reiterated by the House of Lords in **Bridge v. Campbell Discount Co., Ltd.**, reported in [1962] 1 All E.R. Page 385 in the following terms:

"My Lords, if I am right so far, the appellant has clearly committed a breach of the hire-purchase agreement by failing to pay the subsequent instalments, and it becomes necessary to consider whether the payment stipulated in cl. 9(b) of the agreement was a penalty or liquidated damages.

The essence of a penalty is a payment of money stipulated in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

See per LORT DUNEDIN in Dunlop Pneumatic Tyre Co., Ltd. V. New Garage & Motor Co., Ltd. (4). I find it impossible to regard the sum stipulated in cl. 9 as a genuine pre-estimate of the loss which would be suffered by the respondents in the events specified in the same clause. One reason will suffice, though others might be given. This was a second-hand car when the appellant took it over on hire-purchase. The depreciation in its value would naturally become greater the longer it remained in the appellant's hands. Yet the sum to be paid under cl. 9 (b) is largest when, as in the present case, the car is returned after it has been in the hirer's possession for a very short time, and gets progressively smaller as time goes on. This could not possibly be the result of a genuine pre-estimate of the loss. Further, in my view, the provisions of cl. 9 were "stipulated as in terrorem" of a the appellant. As counsel for the appellant put it" "They are intended to secure that the hirer will not determine the agreement until at least two-thirds of the price has been paid." The result is that the appellant is entitled to relief in accordance with principles laid down by LORD THURLOW, L.C., in Sloman v. Walter(5)."

Bridge(supra), has been followed in a large number of cases. We may mention a few.

(1) Lambark Ltd v. Excel [1964]1 Queen's Bench, 415.
(2) United Dominions Trust (Commercial) V Ennis (1967) 2 All E.R.345
(3) Anglo Auto Finance Co V James (1963) 3 All E.R.566

Bridge (supra) has also been followed interalia by Australian High Court in AMIV-UDC Finance Vs. Austin (1987) 68 ALR 185 and IAC (Leasing) Vs. Hamphry (1971) 46 A.L.J.R. 106.

It is of some significance to notice that in Stockloser v. Johnson [1954]1 Queen's Bench, Page 476, a clause providing for special penalty over interest came up for consideration before the Court of Appeal. It was stated that the conduct of the defendant will have bearing when the effect of a penal clause is in question.

Somervell, J., referring to Tindal, C.J's., Summary of Law in Campbell (supra) stated the law, thus—

"But that a very large sum should become immediately payable, in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms. Therein a question arose as to whether a vendor to whom payments of some instalments had been made by the vendee as a part payment of the consideration should be entitled to retain the same because of shortfall of a very small percentage of the consideration amount".

It was furthermore opined:-

"As it seems to me, James, L.J. is assimilating the retention of instalments, if the result would be penal in its nature, to a provision for the payment of a penalty sum on a breach or breaches. It is a question of the effect of the clause and not of the defendant's conduct."

It was observed :-

"I am not, of course, suggesting that the plaintiff's readiness in case was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation it would have done so.

I think rightly, that Farwell J. inclined to the narrower view and certainly treated case as based on the readiness and willingness of the purchaser. On the other hand, I think that he took pains to make it clear that on any view of the facts of that case he did not think that unconscienability was established. In the following passage he was clearly dealing with cases where the penalty principle was invoked by the plaintiff seeking to recover back money. He said : "In order to entitle a plaintiff to relief from a penalty, it is necessary in my judgment for him to show that there is some ground upon which it would be unconscionable in the defendants to retain the money or the whole of the money. I find it difficult to see why, in a case of this kind, it should be unconscionable on the part of the vendor, who has contracted to part with his land on agreed

terms, to enforce the contract if he so desires. There may be special circumstances in some cases, in which the court would take the view that it was unconscionable, and that the plaintiff was accordingly entitled to relief, but unless I can be satisfied that in this case there is something unconscionable in what the defendants seek to do, in my judgment I have no jurisdiction to grant any relief whatsoever. It should be observed that this is not strictly a case of a penalty at all since the payment in question was an integral part of the principal contract."

It is of some interest to note that Soh Kee Bun in an Article titled **'Deposits and Reasonable Penalties'** published in 1997 Singapore Journal of Legal Studies, page 50, made a critical analysis of cases of a large number of decisions involving forfeiture of a deposit which is analogus to an action for penalty and opined that the principles stated in **Stockloser v. Johnson** should be accepted not only on the basis of General Common Law Penalty Rule and General Equitable Consideration but also on the basis of the principle of Restitution of Unjust Enrichment and Transaction and Jurisdictional Differences, stating –

"It is hoped that there will be greater acceptance of the broader approach in Stockloser, so that it can be developed. Because of the current position in England, some of the statements of principle in Stockloser have, for want of better authority, been interpreted almost as statutory provisions. Ultimately, a general jurisdiction to deal with the forfeiture of money, under whatever label, is logically unavoidable.

*85. However, there is a possibility that a 10% deposit may, because of the lack of clear local judicial pronouncements, be used as the starting point in many smaller common law jurisdictions like Singapore. It is wrong in principle to do so. Various factors have to be considered in assessing reasonableness, and an obvious one would be the state of the relevant market, which will vary from jurisdiction to jurisdiction. The property market can be used to illustrate this. In a jurisdiction with stable property prices, a 10% deposit would have a very different complexion from a similar deposit in a jurisdiction with fast rising or fluctuating property prices."

Reference may also be made to Hugh Beale on 'Unreasonable Deposits' published in 1993 Law Quarterly Review page 524-530 and A.J. Oakley on 'Deposits : Still a Guarantee of Performance?' in 1994 Conveyancer and Property Lawyer, page 100-109, and Lusina Ho on 'Deposit:The Importance of Being (An) Earnest' published in 2003 Law Quarterly Review page 34.

The question of unenforceability of a penal clause in the context of hire-purchase agreement arose also in Anglo Auto Finance Company V. James [1963] Vol.III All E.R., page 566, wherein a right to recover contained in Clause 5 of the agreement provided that on determination, the hirer should pay "a sum equal to the amount…by which the hire-purchase price (less the deposit, plus monthly instalments already paid) exceeds the net amount realized by the sale of the….vehicle by the owner after such determination. It was held to be a penal clause.

Once the clause in question is held to be a penal in nature, indisputedly the same would not be enforceable; particularly in a case of this nature where some sort of double penalty is sought to be levied. The interest levied for non-payment and / or shortfall in payment carries interest which itself is penal in nature being more than the normal rate of interest. It is therefore, not a case where a reasonable amount of compensation is sought to be recovered for non-payment of a portion of the licence fee. Moreover, the amount of license fee at the hands of the respondent is secure, as the licensees had furnished adequate financial bank guarantees in this behalf.

Interest in these cases was payable by way of restitution, i.e., what pecuniary benefit could be obtained by the promise in the event timely payment was made. In the even of default, the respondent, thus, was entitled to payment of reasonable interest which is the interest prescribed by Reserve Bank of India.

The agreement to pay interest is to pay on default at a higher rate of interest, i.e., @ 5% over the Prime Lending Rate fixed by State Bank of India from time to time; compounded monthly even for a fraction of a month.

A penalty as is well known is an elastic term. It has different shades of meaning.

It is not a case where in case of default the party is deprived of a special advantage as was the case in Sova Ray and Anr. Vs. Gostha Gopal Dey and Ors. (1988) 3 SCR 287, which has been followed by the Supreme Court of India in Deepa Bhargava and Anr Vs. Mahesh Bhargava and Ors. (2009 2 SCC 294).

It is also not a case where an authority named in the contract is entitled to take into consideration various factors in determining the amount of compensation and in a given case would be entitled to reduce or waive the amount of compensation.

(See Vishwanath Sood Vs. Union of India and Anr AIR 1989 SC 952)

The clause in question, therefore, contains a penal provision.

Section 74 of the Indian Contract Act

We have noticed heretobefore the provisions of both Sections 73 and Section 74 of the Indian Contract Act and illustrations (n) and (d) appended thereto respectively. The said provisions are to be construed conjointly. Section 73 of the Indian Contract Act does not envisage payment of any indirect or remote damages. It postulates payment of compensation for the actual loss or damage suffered in case of breach of contract.

Section 74 of the Indian Contract Act, on the other hand, postulates reasonable amount of compensation not exceeding the amount named in the contract for the breach of stipulation.

Interpretation of Section 74 of Indian Contract Act came up for consideration before the Supreme Court of India in Maula Bux Vs. Union of India (UOI) AIR1970SC1955, wherein it was categorically held:

> "7. Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation". It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is

competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty."

The Court referred to in extenso from its earlier decision in **Fateh Chand Vs.Balkishan Das** AIR1963 SC1405, to notice as under :

"this Court in dealing with a case in which a claim for damages for breach of contract to sell a lien of immovable property arose, pronounced that the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money, or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by 74 of the Indian Contract Act. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of a contract which expressly provides for forfeiture the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. The same principles, in our judgment, would apply in the case in which there is a stipulation in the contract by way of a penalty, and the damages awarded to the party complaining of the breach will not in any case exceed the loss suffered by the complainant party."

It was observed :

"The section (Section 74) is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."

The Court also observed :

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.

In **P. D'Souza Vs. Shondrilo Naidu** (2004)6SCC649, it was held as under :

"31. In M.L. Devender Singh and Ors. v. Syed Khaja MANU/SC/0019/1973 : [1974]1SCR312 , the following statement of law appears:

"The question always is: What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or, is it that one of the two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes:

(i) Where the sum mentioned is strictly a penalty -a sum named by way of securing the performance of the contract, as the penalty is a bond:

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract:

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first - mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically

enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract."

IN TERROREM

In Dr. A.R. Biswas's Encyclopedic Law Dictionary the term 'in terrorem' has been defined as under:

"A condition in a will or gift which is intended to frighten or intimidate the donee is said to be *In terrorem.* When a contract has been broken and the sum named in the contract becomes payable for the breach or some penalty, the plaintiff is entitled to reasonable compensation or the penalty stipulated for. The reason is that the sum or the penalty has been inserted *in terrorem. Section 74* of the Indian Contract Act 1872."

What would be the effect of a clause said to be in terrorem has been considered by the Apex Court in a number of decisions. We would refer to a few of them.

In **Steel Authority of India Ltd.Vs. Gupta Brother Steel Tubes Ltd.,** it has been held :-

"The Section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."

In **P.K. Palanisamy Vs. N. Arumugham and Anr. -2009 (10) SCALE 79,** the law was laid down in the following terms:-

"Section 148 of the Code, in terms, allows extension of time, even if the original period fixed has expired, and Section 149 is equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. That the application was filed in the vacation when a Division Bench was not sitting should have been considered in dealing with it even on 13-7-1954, when it was actually heard. The order, though passed after the expiry of the time fixed by the original judgment, would have operated from 8-7-1954. How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed."

Yet again in **Niyaz Ahmad Khan Vs. Mahmood Rahmat Ullah Khan and Anr.** 2008(8)SCALE635, the Apex Court held:-

"Where the High Court chooses to impose any conditions in regard to stay, such conditions should not be unreasonable or oppressive or in terrorem. Adopting some arbitrary figure as prevailing market rent without any basis and directing the tenant to pay absurdly high rent would be considered oppressive and unreasonable even when such direction is issued as a condition for stay of eviction. High Court should desist from doing so."

In **Prithvichand Ramchand Sablok Vs. S.Y. Shinde** AIR1993SC1929, the Apex Court observed:-

"The defendant shall pay to the plaintiff a sum of Rs. 15,000/- and costs on or before 31st December, 1993. If however, he fails to pay the said amount of Rs. 15,000/- with costs within the time stipulated, the plaintiff will be at liberty to recover the entire sum of Rs. 20,000/- with interest and costs from the defendant by executing the decree.The latter clause of such a decree will clearly be in terrorem and, therefore, penal in character. No court will execute the same."

PAYABLE

Was there any shortfall is a question, which must now be posed and answered. A huge amount was owing and due from the respondent. A decree was passed by this Tribunal in favour of the petitioner. They were in possession of huge amount. The said amount was held in trust. In some matters they preferred appeals before the Supreme Court of India. In some matters they did so only after a demand for refund of the said amount was made.

In some of the cases, as noticed hereinbefore, adjustments of the amount lying in their hands was sought for. The Supreme Court of India had not stayed the operation on the judgment of this Tribunal. The interim order passed by it was confined to adjustment of the amount. If the respondent was not ready and willing to adjust, the amount, lying in its hands, in view of the interim order passed by Supreme Court of India, should have been refunded in terms of the judgment of this Tribunal. It failed and / or neglected to do so.

Adjustment was made at a much later date i.e. after the penalty was levied. The respondent was therefore did not take a fair action, which should have been taken by it, being a 'State' within the meaning of Article 12 of the Constitution of India. It cannot deny level playing field with the private operators.

It is of some significance to notice that interest on penalty has also been charged which clearly demonstrate that the first part of clause 4.8 has been given effect to by the respondent. It is well settled that no damage is payable on damages by way of interest or otherwise in as much as quantum of damages was required to be determined.

In Commissioner, Central Excise & Customs V. ITC Ltd. reported in (2007) 1 SCC 62 the Apex Court has held as under :

"19. Section 11-A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power under Section 11-A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of Sub-section (3)(ii)(b) of Section 11-A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11-A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

20. Ranganathan, J. in Ujjagar Prints (II) v. Union of India [(1989) 3 SCC 488] defined the word "levied" in the following terms:

"The word "levied" is a wide and generic expression. One can say with as much appropriateness that the Income Tax Act levies a tax on income as that the Income Tax Officer levies the tax in accordance with the provisions of the Act. It is an expression of wide import and takes in all the stages of charge, quantification and recovery of duty, though in certain contexts it may have a restricted meaning"

21. The question as to non-levy or short-levy of an excise duty would arise only when the levy had been laid in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable.

22. In New Delhi Municipal Committee v. Kalu Ram [(1976) 3 SCC 407], the word "payable" has been defined in the following terms:

"The word "payable" is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. "payable" generally means that which should be paid."”

See also State of Kerala & Ors Vs. V.R. Kalliyanikutty & Anr : AIR 1999 SC 1305 and New Delhi Municipal Committee V. Kalu Ram & Anr : AIR 1976 SC 1637.

No amount in the strict sense of the term was payable by the petitioner, and, thus, in our considered opinion, the said decision will apply in all fours in the instant case. Furthermore, the respondent could not take advantage of its own wrong.

See B.M.Madani V. ITO : 2008 (13) SCALE 329; :Chairman, Indore Vikas Pradhikaran v. Pure Industrial Cock and Chem. Ltd. and Ors. - AIR 2007SC 2458, M.R. Satwaji Rao (D) by L.Rs. Vs. B. Shama Rao (Dead) by L.Rs. and Ors. - AIR 2008 SC 2328, Chinthamani Ammal Vs. Nandagopal Gounder and Anr.- 2007(4) SCC 163 and Raja Ram Pal Vs. The Hon'ble Speaker, Lok Sabha and Ors. - (2007) 3 SCC 184.

Natural Justice

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In a case where the penal clause is sought to be invoked, ordinarily the principles of natural justice should be followed.

There is nothing in the agreement to indicate that application of the said salutory principle has been excluded either expressly or by necessary implication.

The respondent did not give any opportunity of hearing to the petitioners. No show cause notice was issued.

Even the representations of the petitioner, contending that no penalty could be levied on the amount lying in the hands of the respondent should be adjusted, were not responded to.

There cannot be any doubt or dispute that the petitioners were to suffer grave civil consequences. They were, thus, entitled to an opportunity of hearing. Had such an opportunity been given, the petitioners could demonstrate that they have not committed any default in payment of the license fee as the shortfall was below the permissible 10% limit.

In **Rajesh Kumar & Ors v. Dy. CIT & ors.** [JT 2006(10) SC 76 : 2007 (2) SCC 181], it was held:

"15. Effect of civil consequences arising out of determination of lis under a statute is stated in **State of Orissa v. Dr. (Miss) Binapani Dei and Ors.** [1967 (2) SCR 625]. It is an authority for the proposition when by reason of an action on the part of a statutory authority, civil or evil consequences ensure, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf compliance of principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution."

(See also **V.K. Ashokan v. Asstt. Excise Commnr. & Ors.** [JT 2009(5) SC 104].

RETROSPECTIVITY

In some of these petitions, the levy of penalty is in relation to a period much prior to the amendment made in the agreement. By reason of such penal clause inserted in the terms of the said agreement, a huge financial obligation has been laid on them. It, thus, could not have been given any retrospective effect.

Any levy of penalty prior to the period in question must, therefore, be held to be illegal and without jurisdiction.

An agreement should be construed to have only a prospective effect and not a retrospective one. Even ordinarily a statute cannot be so construed.

Instead of burdening this judgment with a large number of case laws on the subject, it will be profitable to refer from Principles of Statutory Interpretation by Justice G.P.Singh 11th Edition page 497, which is to the following effect:

"Thus to apply an amending Act, which creates a new obligation to pay additional compensation, or which reduces the rate of compensation, to pending proceedings for determination of compensation for acquisitions already made, will be to construe it retrospective which cannot be done unless such construction follows from express words or necessary implication. Similarly, a new law enhancing compensation payable in respect of an accident arising out of use of motor vehicle will not be applicable to accidents taking place before its enforcement and pending proceedings for assessment of compensation will not be affected by such a law unless by express words or necessary implication the new law is retrospective. It makes no difference in application of these principles that the amendment is by substitution or otherwise."

In **Shakti Tubes Ltd. Vs. State of Bihar and Ors.,[2009(7)SCC673 it was held as under :**

"24. Generally, an Act should always be regarded as prospective in nature unless the legislature has clearly intended the provisions of the said Act to be made applicable with retrospective effect.

In support of the said proposition, the Apex Court referred to the following passage from its earlier decision in **Assam Small Svale Industries Development Corpn. Ltd. v. J.D. Pharmaceuticals, (2005)13SCC 19:**

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. The aforesaid rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only -- *"nova constitutio futuris formam imponere debet non praeteritis"* -- a new law ought to regulate what is to follow, not the past. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004 at p. 438.). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440).

25. In the case of **Zile Singh v. State of Haryana** : AIR2004SC5100 , the Court observed as follows:

"15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of *Attorney General* v. *Pougett* (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134)

'The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;' (Price at p. 392)"

VSAT Contracts

The learned counsel in this matter rightly contended that the provisions of the contract would clearly demonstrate that no penalty can be levied for delayed payment of the spectrum charges as the manner in which such payment was to be made is as prescribed by the DoT from time to time.

There cannot be any doubt that in view of the Order dated 16.4.2003 passed by the respondent, in case of any delay in payment of spectrum charges only penal interest was to be charged and not any penalty. Clauses 1.8 and 1.9 of the amended license are, therefore, required to be read conjointly. The Order dated 16.4.2003 passed by DoT, together with clauses 1.8 and 1.9 would reveal that only in the event of delay in payment of license fee, the penal clause would be attracted and not otherwise. Spectrum charges, thus, being not license fee within the meaning of the agreement, no penalty @ 150% of the shortfall could be levied.

For the reasons aforementioned, the impugned demand cannot be sustained, which are set aside accordingly. The petitions are allowed with costs.

Counsel's fees is to be assessed at Rs. 1,00,000/- in each case.

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

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(G. D. Gaiha)
Member

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