

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 21st May, 2010

PETITION No.223 OF 2006

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Shyam Telelink Limited ... Petitioner

Vs.

Bharat Sanchar Nigam Limited ...Respondent

PETITION No. 232 of 2006

HFCL Infotel Limited ...Petitioner

Vs.

Bharat Sanchar Nigam Limited ...Respondent

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BEFORE:

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

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

For
Petitioner

: Mr.Ramji Srinivasan, Senior Advocate
Ms. Ritu Bhalla, Advocate
Ms. Jasleen K. Oberoi, Advocate
Mr. Monark Salhot, Advocate

For Respondent

: Mr.Maninder Singh, Senior Advocate
With Mrs. Prathiba M. Singh, Advocate
Mr.Yoginder Handoo, Advocate
Mr.Tejevveer Singh Bhatia, Advocate

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JUDGEMENT

S.B. Sinha

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

However, the fact of the matter would be noticed by us separately in each case. HFCL was originally a basic service license holder: having been granted licenses by the Department of Telecommunication on or about 7.11.1997. It executed an interconnect agreement with the Deptt. of Telecommunication on the same date.

HFCL thereafter migrated to Unified Access Service Licence (UASL) which came into force on or about 14.11.2003.

Shyam Telelink also originally held a basic service license dated 4.3.1998.

It also executed an interconnect agreement with the Department of Telecommunication on the same date. It although was a basic service operator, migrated to Unified Access Service License from November 2004.

Indisputably, the license agreements executed by the petitioners with DoT (the licensor) contained a clause being 1.7.2.2 (V) which promoted use of wireless technology. It reads as under

“For Subscriber loop (local loop), optical fibre and wireless are the preferred technologies. Copper Cable Technology shall not be permitted, except over the radial distance of last 500 meters of the loop. In exceptional circumstances in rural telephone systems where the penetration of DoT network is marginal, the LICENSEE may be permitted to lay copper cables.”

It is not in controversy that on or about 25.01.2001, DoT in its capacity as a licensor wrote to all basic service operators including the petitioners herein stating that the basic telephone service licensees may provide hand held

telephone sets to their subscribers with wireless access system.

This however, was subject to the condition that mobility with usage of those hand held telephone sets be restricted to local areas.

The Telecommunication Engineering Centre (TEC), a specialized department of the DoT also issued a circular setting out specifications for wireless local loop systems, the relevant portions of which read as under:

- 1.1 "This Generic Requirement (GR) relates to the Remote Station (Subscriber terminal based on IS-95A and applicable IS standards for DCMA Digital Wireless Local Loop System to support two way communication either to fixed or handheld subscriber. The specification covers the technical and general requirements of the various components of the Remote stations.
 - 1.2 The remote station includes power supply arrangement, user's interface, antenna, feeder etc. and does not include customer premises equipment such a Telephone instrument, FAX subscriber's Call Charge meter (Home meter) etc.
- 2.2 Remote station shall be of following types:

1. Fixed Terminals

- (i) Fixed Wireless Terminals supporting voice only.
- (ii) Fixed Wireless Terminals supporting voice data only. Separate port data may be provided.
- (iii) Fixed Wireless Terminals supporting voice, Grp.3 FAX and data upto 14.4 Kbps. It shall provide RJ-11 socket interface on 2W basis for Voice & Grp.3 FAX. Separate port for data may be provided.
- (iv) Fixed Wireless Terminals supporting voice, Grp.3 FAX, Subscriber's Call Charge meter (Home Meter) and data upto 14.4 Kbps. It shall provide RJ-11 socket interface on 2W basis for Voice, Grp.3 FAX & Subscriber's call charge meter. Separate port for data may be provided.

RS 232 C port for data working shall be provided. Necessary interconnecting cable to connect a Fixed terminal to Rs 232 C port of a PC shall be provided. Operation of DTMF telephone is mandatory for Fixed Remote Station.

2. Handheld Terminals

6. The handheld subscriber terminal shall be light weight, easy to handle and capable of putting in pocket. Dimension and weight of the Remote station shall be indicated by the supplier. Weight of Handheld terminal shall not be more than 150 gm excluding the battery.

7. Fixed remote station equipment shall be a fixed indoor unit suitable both for wall mounting and table top and easy to install. The antenna & feeder cable shall be indoor/outdoor type as required. All accessories for mounting shall be specified and supplied along with the equipment.
8. The remote terminal shall be provided with in-built maintenance free rechargeable battery as part of the equipment & shall be supplied along with the remote station.
9. Antenna (Short whip) shall form integral part of the Remote Station. Provision shall exist for deployment of Patch panel antenna for Fixed Wireless terminals. For Handheld terminal, Stub antenna/retractable short whip antenna shall form part of the terminal.

Technical Requirements:

A. Type A – Fixed Wireless Terminals (FWT)

(The features mentioned below are not in-built features of the FWT but the features of the devices which can be connected to it. Suitable interfaces for connecting these devices may be provided.)

- i) CDMA 2000 1xFWT supporting voice, two way SMS, voice band data upto 14.4 kbps in circuit mode and 144 kbps data in packet mode, Group 3 FAX.
- ii) CDMA 2000 1x FWT supporting voice, two way SMS, Subscriber's Call Charge Meter (Home Meter), voice band data upto 14.4 kbps and 144 kbps data in packet mode, Group 3 FAX.

iii) CDMA 2000 1x FWT supporting voice and two way SMS.

B. Type B – Integrated FWT (with in-built telephone instrument and SMS capability and subscriber's call charge meter).

(Suitable interface for connecting a Fax machine and PC/Laptop may be provided.)

i) CDMA 200 1x FWT supporting voice, voice band data upto 14.4 kbps in circuit mode and 144 kbps data in packet mode, FAX and two way SMS.

ii) CDMA 2000 1x FWT supporting voice, voice band data upto 14.4 kbps in circuit mode, FAX and two way SMS.

iii) CDMA 2000 1x FWT supporting voice, two way SMS.

C. Type C – Handheld Terminal

These shall be of three categories

Category I :

CDMA 2000 1x handheld subscriber terminal supporting voice and two way SMS feature.

The said circular letter as noticed heretofore refers to fixed terminals, hand held terminals etc. under the head 'fixed services', it also categorically refer to fixed wireless telephones (FWT) having fixed telephone equipments. They fall in three distinct categories.

DoT as a licensor in its affidavit filed before this Tribunal in Petition No. 2 of 2001, Tata Teleservices Limited Vs. Deptt. Of Telecommunication to which we shall refer to a little later, inter alia stated that besides wireline operation, wireless phones were permissible to the basic operators and mere portability of FWP's did not require them with mobility of handsets. It is however, not in dispute that even the respondent herein and MTNL provided fixed wireless services under the name and style of 'Tarang' and 'Garuda' respectively.

It is also not in dispute that when Reliance Infocom Limited (Reliance) and Tata Teleservices Limited (Tata) started advertising their services as "Walky and Unlimited Cordless" Phone respectively, the Cellular Operators Association of India (COAI) by its letters dated 9.12.2004 and 29.12.2004 sought clarifications from the Telephone Regulatory Authority of India (TRAI) as to whether the said services fell within the purview of WLL (M) or FWT. It is also not in dispute that thereafter the respondent herein had also made a representation on or about 4.1.2005 before TRAI contending therein that WLL services under the brand name 'Walky' would fall within the purview of "Limited Mobile Services" offered by Tata and "Unlimited Cordless" offered by Reliance and, thus, they should be treated as having been providing WLL (M) Services.

'Tata' and 'Reliance' thereafter filed two original petitions before this Tribunal which were marked as Petition No. 45 of 2005 and Petition No. 146 of 2005 respectively. By a judgement and order dated 9.9.2005 this Tribunal dismissed the petition filed by the Tatas. In its decision this Tribunal extensively referred from the letter issued by

the respondent dated 14.1.2005, from a perusal whereof it would appear that it levied interconnect user charges including Access Deficit Charges (ADC) purported to be relying on or on the basis of clause 6.4.9 of the interconnect agreement for all its call of Limited Mobile Service through its 'Walky' Scheme handed over to the respondent on its trunk group purported to be meant for fixed line traffic for the period 14.11.2004 to 13.1.2005.

Similar demands were made by the respondent on the petitioners herein, which we may notice hereinafter.

So far as HFCL is concerned, the respondent herein made a demand for ADC for sum of a Rs. 27,81,67,556 for the period 14.11.2004 to 31.8.2005. The first of such demand was made by reason of a provisional supplementary bill raised on or about 10.8.2006. Various supplementary Bills were raised thereafter on various dates.

The details of the said bills are as under :-

| Sl. No. | Bill Date | Amount (Rs.) |
|---------|------------|--------------|
| 01. | 10.08.2006 | 31,92,118 |
| 02. | 10.01.2007 | 11,89,374 |
| 03. | 16.01.2007 | 1,54,63,248 |
| 04. | 16.01.2007 | 1,49,99,489 |
| 05. | 16.01.2007 | 1,57,28,479 |
| 06. | 16.01.2007 | 1,33,15,772 |
| 07. | 16.01.2007 | 1,30,75,567 |
| 08. | 16.01.2007 | 1,77,41,657 |
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| | | |
|-----|------------|------------------------|
| 09. | 19.01.2007 | 5,93,318 & 5,37,845 |
| 10. | 22.01.2007 | 34,83,443 |
| 11. | 29.01.2007 | 7,40,544 |
| 12. | 07.02.2007 | 11,57,388 |
| 13. | 20.03.2007 | 52,06,780 |

We would notice a few bills. The bill dated 10.08.2006 is a supplementary bill for the period 14.11.2004 to 31.08.2005. The said bill appears to have been drawn on the basis of a circular letter issued by the BSNL Headquarters dated 10.08.2006 for a sum of Rs. 167614241/-.

On what basis the said period was specified, is, however, not known. A bill for a sum of Rs. 573845 was raised on 19.02.2006 for the period November, 2004 to August 2005. Similarly a bill for a sum of Rs. 1189374 was raised again for the same period on 10.01.2007. Yet again Bill dated 16.01.2007 for a sum of Rs.15463248/- was raised. By another letter dated 20th March, 2007 monthly bills for the period August, 2005 to February 2006 for a sum of Rs.5206780.00 was raised.

On what basis the said bills have been raised is not clear. On what basis they were given effect to from 14.11.2004 also has not been explained. The respondent did not detect termination of a non CLI call or wrongly routed call on 14.1.2005, so as to enable it to draw a bill from a date two months prior thereto.

So far as Shyam Telelink Services (STNL) is concerned the respondent herein raised a bill for a sum of Rs. 7,91,88,939 for the period 14.11.2004 to 31.8.2005. The first such demand for ADC was raised on 28.7.2006 for a sum of Rs. 1,33,96,720. However, several supplementary bills were raised upon HTL by the respondent herein.

We may now notice the particulars of the nature of services offered by the petitioners.

We would take up the case of HFCL at the outset.

It is said to have established, maintained and operated basic telephone services in the telephone circle of Punjab and as on 2006, it had a total subscriber base of 3,30,000 subscribers. The above said number of subscribers comprised of:-

| | | |
|------|---------------------------|----------|
| i) | Fixed Wireline Subscriber | 1,75,579 |
| ii) | CorDect (Fixed) | 29,200 |
| iii) | FWT | 10,500 |
| iv) | FWP | 55,887 |
| v) | WLL (M) | 58,887 |

The petitioner stated :-

“That accordingly the Petitioner has been deploying Fixed Wireless Terminals at the customer’s premises since the very inception, especially in congested area and inaccessible areas and far flung and remote areas, where laying of cables was not feasible or possible to provide in a short time. As of July 2006, the Petitioner has a total subscriber base of about 2.12 lakhs, comprising 55,000 Wireline, 96,00 CorDect (Fixed), 34,000 FWT (Fixed) and 27,000 WLL (M) Handsets. After April 2006 the Petitioner has imported and introduced FWPs in small number, about 3,800, since the new IUC Regulations came into effect.”

Out of the said 3,30,000 subscribers according to HFCL 58,887 subscribers were subscribers to WLL(M) Services. According to it on the said services it had duly been paying ADC to the respondent all along. The bills for the said services are not the subject matter of the present petition.

The Petitioner, however, contends that the remaining 3,71,113 subscribers were subscribers to the fixed services. According to them they should be sub-divided into 3 heads namely fixed wireless, fixed services and fixed wireless services.

It is not in dispute, as noticed heretobefore, that mobile services were categorised as WLL (M) which were earlier known as fixed wireless services.

So far, however, fixed services are concerned, they fall in the following categories :

- (1) Fixed Wireline Subscriber – 1,75,579
- (2) Cor Dect fixed -29,200 and
- (3) FWT – 10,500

Fixed Wireless Services may also be categorized as WLL (M) i.e. FWP of which the petitioner had 55,553 subscribers.

According to the Petitioner Wireline Cor Dect and FWT Services are all fixed services which was never exigible to ADC in terms of the provisions of the regulations framed by TRAI or otherwise. It is now not in dispute that wireline services are fixed services. It is also not in dispute having regard to the nature of services rendered by the Petitioners that the Cor Dect Services would also fall within the purview of the fixed services.

There, however, appears to be some controversy as to whether FWP service which had been offered by the Petitioner were also in the nature of fixed services or not. Whereas according to the Petitioner, it has a fixed roof top antenna along with wall mounted box with which the telephone instrument is connected, according to the respondent, FWT Services would also fall within the purview of WLL (M) Services. It has been contended that it is not factually correct to say that the instruments offered by the petitioner to its subscriber are FWT Services.

According to the respondent if the petitioner is in a position to show that in any of its SDCA neither the calls had been generating from nor calls were getting terminated in that SDCA from other SDCAs and any technology other than Cor Dect technology fixed roof top antenna had been used, it would not raise any bills for the said SDCAs of the Petitioner. It had furthermore been submitted that if on any trunk groups on a PoI, only Cor Dect technology fixed roof top antenna originated calls and wireline originated have been received, the respondent would not be entitled to raise any supplementary bills for that trunk group.

The respondents, however, contend that as the petitioner had not been willing to make any such statement, the same being not factually correct, no fault or infirmity much less illegality can be found with the bills raised by the petitioner.

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

We may however, notice that if the petitioners' contention is correct then as on August, 2006, 17% of its entire Services and less than 26% of its fixed services at the relevant point of time would fall within the purview of FWP Services which eventually came to be categorized as WLL (M) Services.

STNL had about 2.12 lakhs subscribers in the telecom Circle of Haryana for which it has been granted licenses to establish maintain and operate basic telephone services. Out of these subscribers, 27,000 subscribers were

subscribers to WLL (M) services on which services STNL has been paying ADC all along and which are not the subject matter of the present dispute. The remaining 1,25,000 subscribers, according to the petitioners were subscribers to fixed services which should be sub-divided into following sub-heads namely – fixed services and fixed wireless services.

Fixed services can further be subdivided into three categories :-

1. Wireline – 51,000
2. Cor Dect (Fixed) 96,000 and
3. FWT – 34,000

According to the petitioners, at the instance of Government of Haryana it had fitted its fixed wireless services in cycle rickshaws for the handicapped persons so as to help them to earn their livelihood. The said handicapped persons had been rendering services in the nature of the public call offices known as 'Chalta-Firta' PCOs. The numbers of Chalta-Firta PCOs according to the petitioners were only 161.

The Petitioner contends that all such services would also fall within the purview of fixed services. It had the features of Cor Dect services.

It had furthermore been contended that its Chata-Firta Services as on July 2006 constituted merely less than 0.1 % of its entire services. According to it before launching the said services it sought permission from the DoT by its letter dated 9.3.2005 for its place of operation and not the place of dealing which however had not been granted by DoT.

We have noticed heretofore that 'Tata' and 'Reliance' filed two applications before this Tribunal being Petition No. 45 of 2005 and Petition No. 146 of 2005. They were dismissed by this Tribunal.

The question which arose for consideration before this Tribunal inter alia was as to whether the services offered by 'Tata' known as 'Walkie' and the Services offered by 'Reliance' known as 'Unlimited Cordless' will come within the purview of WLL(M) services or not.

This Tribunal in its judgement opined that the said services would fall within the purview of WLL(M) services. It is also not in the dispute that both 'Tata' and 'Reliance' preferred appeals thereagainst before the Supreme Court of India in terms of Section 18 of the TRAI Act. The said appeals were also dismissed.

The decision rendered by the Supreme Court of India in 'Tata' being dated 30th April 2008 has since been reported in 2008(10) SCC page 556, whereas, the decision rendered in Reliance is reported in 2008 (10) SCC page 535.

In the case of 'Tata' the Supreme Court in regard to the question as to whether the technology in question would fall within the purview of WLL(M) or fixed services or not noticed the submissions of the parties in great details.

For the purpose of appreciating the rival contentions of the parties herein as to whether FWP Services should fall within the purview of WLL(M) services or not, we may notice the following observations made by the Supreme Court :-

“High mobility of the users is one of the important properties of cellular telephone. The location of a user can change significantly during a call which can originate from the user or from the network. In cellular telephony a mobile user communicates with a base station. The base stations are connected to MSC, which is connected to the public telephone system. The most important aspect of cellular telephony is the unlimited mobility. The user can be anywhere within the *coverage area of the network (i.e. it is not limited to a specific cell)*. The user can move from one cell to another even during one call.

Cellular telephony is different from cordless telephone. In cordless telephone, there is a wireless link between a handset and a base station which in turn is directly connected to the public telephone system.

For example, the per minute price in the case of cellular telephony system is higher than the landline telephone. It is competition which may bring down the price per unit. Since 1990 many consumers and even companies have opted for cellular telephony alone cancelling in some cases wired services. On the other hand, services where wireless access is only intended as a cheap cable replacement, without additional features e.g.

fixed wireless access, the systems have to be cost effective, as the infrastructure is comparatively cheaper as compared to the infrastructure needed for wired connections.

(ii) Examples of wireless equipments

Wireless is a term used to describe telecommunications in which electromagnetic waves carry the signal over the communication path. The first wireless transmitter went on air in the early 20th century using Morse Code. Later, as technology improved it became possible to transmit voices and music via wireless and the medium came to be called "radio". With the advent of television, fax, data communication and the effective use of the spectrum, the term "wireless" has been revived. The common examples of wireless equipments in use today include cellular phones, pagers, global positioning system (GPS), cordless telephone sets, satellite television, wireless LANs (local area networks), global system for mobile communication (GSM), *fixed wireless application*, *mobile wireless* and *portable wireless*. Correspondingly, services are broadcasting, paging, fixed wireless access (FWA), limited mobility and full mobility, etc.

In the case of fixed wireless, the operation of wireless systems is confined to homes and offices, in particular, fixed wireless refers to equipment connected to the internet via specialised modems. In FWA, the location of the end-user terminal and network access point to be connected to end-user are fixed.

(xii) Fixed wireless access WLL(F)

Fixed wireless access (FWA) also known as WLL(F) has coverage between wireless local area networks (WLANs) and cellular communication systems. *The main purpose of FWA is to provide network access to*

buildings through exterior antennas communicating with central radio base stations. In this way, users in a building are allowed to connect to the network with conventional in-building networks.

FWA is a service in which wireless access is intended as a cheap cable replacement without additional features.

FWA replaces copper lines to the homes of the users by wireless links, but without the specific benefit of mobility. The original intent was to give access to customers for basic phone services by passing the copper lines.

Fixed wireless access system is one type of service. FWA system can also be considered as a *derivative of cordless phones* or wireless local area networks. FWA system essentially replaces a dedicated cable connection between the user and the public landline system. The important difference to be noted is that FWA system is not the same as cordless phones. *The main difference from cordless system is that in FWA system there is no mobility of the user devices.*

There is a difference between mobility and portability. A mobile device can be portable but every portable device is not mobile. The purpose of FWA lies in providing users with telephone and data connections without having to lay cables from a central switching office to the premises of the user. It is, therefore, cost effective as compared to wireline basic phone.

(xiii) Identification of a mobile subscriber

In analogue wireless network every mobile station (MS) is identified by a single number that is permanently associated with it. All connections that are established from this MS are billed to its registered owner. However, in the case of GSM, the subscriber is identified by a SIM, which is a plug-in chip card. In the case of GSM, MS can only make and receive calls when such a SIM is plugged in and activated. All calls that are made from the MS are billed to the subscriber whose SIM is plugged in. Furthermore, the MS only receives calls going to the number of the SIM owner. Therefore, SIM is a fundamental importance for billing procedure. It may be noted that even in "Walky" there is a plug-in chip card which is inbuilt in the instrument.

Mobility is an inherent feature of most wireless systems. If there is an incoming call from MS (user), the network has to know in which cell the user is located. The first requirement is that an MS emits a signal at regular intervals, *informing nearby base stations* in the neighbourhood. Two databanks then employ this information: the home location register (HLR) and the visitor location register (VLR).

(xiv) Difference between wireless systems and services

In systems, mobility per se is of value e.g. in cellular telephony. Such services can charge a premium to the customer i.e. it is more expensive than equivalent wired systems. In cellular telephony the per minute price is higher than landline telephony and yet on account of competition, the price has come down.

Services where wireless access is intended as a cheap cable replacement without additional features have to be cost effective, as the infrastructure thereof has to be cheaper than wired connections. The classic example of such services is FWA.

New technologies and systems such as IMT-2000, wireless broadband ISDN, wireless ATM, HAPS, etc., also form part of wireless access if they satisfy the basic criteria of end-user radio connection(s) to core networks.

Wireless access may be considered from many perspectives, for example:

- *Mobility capabilities of the terminal: fixed, nomadic* (may be used in different places but the terminal must be stationary while in use), *mobile, restricted mobility* (e.g. within a single cell), etc.
- *Service support capabilities: narrow band, broadband, multimedia, etc.*
- *Type of telecommunication service: conversational, distribution, information retrieval.*
- *Connectivity: (which would depend on the switched network that the terminal accesses, e.g. Internet, PSTN, etc.).*

— *Radio transmission technology*: access technique (TDMA, CDMA, etc.), modulation technique (analogue, digital, etc.), duplex technique (FDD, TDD, etc.), etc.

— *Delivery mechanism*: terrestrial, satellite, etc.

Of particular interest are the mobility characteristics of wireless access systems; thus this recommendation provides definitions of the terms 'fixed', 'mobile' and 'nomadic' wireless access.

In addition, the said recommendation also defines relevant terms. The definitions of the relevant terms are contained in Clause 4, which read as follows:

4.1.1. *Wireless access*

End-user radio connection(s) to core networks.

Note 1.—Core networks include, for example, PSTN, ISDN, PLMN, PSDN, Internet, WAN/LAN, CATV, etc.

(See § 4.4 for list of acronyms and abbreviations.)

Note 2.—The end-user may be a single user or a user accessing the services on behalf of multiple users.

4.1.2. *Fixed wireless access (FWA)*

Wireless access application in which the location of the end-user termination and the network access point to be connected to the end-user are fixed.

4.1.3. *Mobile wireless access (MWA)*

Wireless access application in which the location of the end-user termination is mobile.

4.1.4. *Nomadic wireless access (NWA)*

Wireless access application in which the location of the *end-user termination* may be in different places but it must be stationary while in use.

* * *

23. On the technology, it is urged on behalf of BSNL, that WLL(M) is a service which is put in the “Walky”. It is urged that WLL(M) is a service given by the instrument “Walky”. What is relevant is the service and not the instrument. It is urged that the appellants herein had invoked the original jurisdiction of TDSAT on the question of characterisation of service which has been answered in favour of BSNL. It is urged, that nature and classification of instrument was not relevant; that what was relevant was the feature of the service in the instrument “Walky” and whether that feature made it WLL(M) service, to which ADC stood attracted. All these questions have been answered by TDSAT by its impugned judgment in favour of BSNL. By the impugned judgment, it has been held by TDSAT that Walky calls attract ADC under the regulatory regime.

The said UASL, 2003 brought in the numbering plan which categorised the series in the said plan to identify and measure the call for billing purposes. That, in terms of Clause 2 of UASL, “mobility” refers to service(s) within SDCA.

27. The above arguments of learned counsel for BSNL were adopted by Dr. A.M. Singhvi, learned Senior Counsel for cable operators association.

28. Mr Rakesh Dwivedi, learned Senior Counsel appearing for intervenor TRAI would submit that in November 2000, TRAI recommended Limited Mobility Service i.e. WLL(M) on 25-1-2001, DoT permitted it, whereas Walky came into the market only in October 2004.

In traditional wireline network, the cost of the last mile amounts to substantial portion of the total cost of putting up the network. CDMA and FDMA are technologies used for WLL.

33. In this civil appeal we are not concerned with WLL per se but with the concept of “limited mobility”.

34. WLL is also called broadband wireless access (BWA) or fixed radio access or fixed wireless access or fixed wireless terminal (FWT). FWT units differ from mobile terminal units operating within cellular networks—such as GSM—in that a *fixed* wireless terminal or deskphone will be limited to an almost permanent location with no roaming facility.

40. In our view, there is no merit in the above contention advanced on behalf of the appellants that the above directive dated 4-3-2005 is amendatory and not clarificatory. The reasons are as follows.

41. Firstly, the UAS licence classifies wireless service into three categories, namely, full mobility, limited mobility and fixed wireless access. As stated above, in FWA there is no mobility of the user device. FWA replaces copper lines to the homes of the users by wireless links *but without the benefit of mobility for the user devices*. FWA is one type of service. Mobility is a service feature.

44. To sum up, in WLL(F) the telephone is the access point if the antenna is in-built in the telephone. If the impugned service is operable throughout SDCA it is WLL(M). In WLL(F), location of end-user termination and the network access point to be connected to the end-user are fixed. If the impugned service cannot comply with PSR it is classifiable as WLL(M) for IUC, ADC, numbering plan, etc. Lastly, the only difference between fixed wireline and WLL(F) is that WLL(F) is a cheap cable replacement *without additional features*. WLL(F) is limited to specific premises of the subscriber or permanent location.”

In the case of ‘Reliance’ the Supreme Court held:

“36.*In FWA there is no mobility of the user device. The purpose of FWA lies in providing users with telephone and data connections without having to lay cables from its central switching office to the office or premises of the subscriber. (See p. 14 of the book entitled Wireless Communications by Andreas F. Molisch.) FWA has its market for covering rural areas which do not have wired infrastructure.*

37. Mobility is an important requirement for wireless service. The ability to move around while communicating is one of the main attractions of wireless communication for the user. However, within that requirement of mobility, different grades exist:

Fixed devices

Fixed devices are placed only once and thereafter they communicate with their BS or each other from the same location. The main reason for using wireless transmission is to avoid laying of cables. In the case of fixed devices, the devices are not mobile. *FWA falls in the same category as wired communications (for example, PSTN).”*

In view of the aforementioned findings rendered by the Supreme Court of India, there is neither any doubt nor any dispute whatsoever that an instrument which had a roof top antenna and a separate battery would come within the purview of 'fixed phones' as contradistinguished from the 'mobile phones'.

We have noticed heretobefore that the respondent, however, had all along been making demands of ADCs. Such demands were made purported to be in terms of clause 6.4.6 of the interconnect agreement. In terms of the aforementioned provisions, bills have been raised for the respective periods in the cases of the petitioners which we have noticed heretobefore. We have also referred heretobefore the periods for which such supplementary bills were raised.

In terms of clause 6.4.6 of the agreement, indisputably again bills have been raised on all calls irrespective of the fact as to whether the said calls originated or terminated from fixed telephone or not.

On the aforementioned back drop we may notice the respective submissions made by the learned counsel for the parties.

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

1. Categorization of the FWP Services as WLL (M) Services by the respondent which is the genesis of the impugned demands must be held to be wholly illegal and without jurisdiction in as much as even according to the Supreme Court of India, FWP calls can not be treated as WLL (M) calls.
2. The respondent could not have treated all the 100% of traffic routed on the fixed line trunk groups, as wrong routing of calls and visit the petitioners with penal consequences on account thereof.
3. Clause 6.4.6 having not been introduced in the interconnect agreement between the parties at the time when the first batch of impugned demands had been raised on the petitioner i.e. on 10.08.2006, the same must be held to be illegal.
4. Assuming that clause 6.4.6 of the interconnect agreement would be attracted as there had been no wrong routing of calls by the petitioners, having regard to the fact that it transferred calls to the POIs of the respondent keeping with the universal understanding being calls from fixed services, the same can not be treated to be wrong routing of calls as contemplated under clause 6.4.6 of the interconnect agreement, particularly in view of the fact that only as on 26.08.2006 even the DoT took a view that FWP calls were to be treated as WLL (M) calls.
5. Respondent had never intimated that the petitioner had been found to be wrongly routing its calls in other PoIs.

6. The respondent failed to disclose as to when it had detected wrong routing calls on the part of the petitioner and in that view of the matter the impugned demand must be held to be illegal.
7. The demands raised from 14.11.2004 must be held to be wholly illegal in so far as neither there was any basis nor justification therefor.
8. In any view of the matter no opportunity of hearing having been granted and no notice having been issued to the petitioners by the respondent prior to its alleged finding of wrong routing of calls on the basis whereof civil consequence, which is penal in nature, is sought to be imposed upon the petitioners, the impugned demand is wholly unsustainable.
9. Even in terms of clause 6.4.6 of the interconnect agreement the respondent could levy only ADC on all calls on any trunk groups and not just wrongly routed calls and in that view of the matter the impugned demand must be held to be wholly arbitrary unreasonable, inequitable and without jurisdiction being contrary to or inconsistent with the TRAI Regulations. Such interpretation would also violate the provisions of Section 23 of the Indian Contract Act, being unconscionable and inequitable and in any event would fall foul of Section 74 thereof.

10. By reason of such demand, the respondent can not unjustly enrich itself. It being a 'State' within the meaning of Article 12 of the Constitution of India and a competitor of the petitioners, it was obligated to act in a fair and equitable manner even in contractual affairs.

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

1. The case of the Petitioners is squarely covered by the decision of the Supreme Court of India in 'Tata' (Supra) and 'Reliance' (Supra).
2. What is said to be FWT instrument as having small roof top antenna without there being a NIU, battery, and/or fixed roof top antenna and thus the same should be treated to be WLL (F) phones and not WLL (M) phones and as the impugned instruments answer the description of mobile phones, the contentions of the respondent must be held to be incorrect.
3. The controversy in regard to 10,500 phone falling in item sub-clause III and 55,550 phones being item No. 4 of the para 4 of the petition come to about 50% of the total figures of items No. 2,3,4 and 5 thereof and in that view of the matter the demand raised by the respondent on all calls must be held to be correct.

4. It being not the case of the petitioner that in any of the SHDA served by it, it had a trunk group which was exclusively used for Cod Dot technology having fixed roof top antenna instrument, the calls delivered to the exchanges of the respondent must be held to have wrongly been routed.
5. Clause 6.4.6 of the interconnect agreement having provided for strict civil liability, the respondent can not be absolved of its liability to pay all requisite ADCs which would mean the ADCs payable for 'all calls' irrespective of its area of operation and/or the instrument used.
6. All the operators including the petitioners having received the communication dated 14.01.2005 sent to 'Tata' and 'Reliance', would evidently show that the petitioners were fully aware of the issues pertaining to the WLL(M) services and, thus, had an obligation to pay to the respondent the requisite ADC in terms of clause 6.4.6 of the interconnect agreement.
7. The clause in question namely 6.4.6 having been inserted by reason of the Addenda to the interconnect agreement for UASL w.e.f. 14.11.2003 (although executed on 19.6.2006), the impugned demand must be held to be legal.
8. The retrospective effect granted to the said interconnect agreement from 14.11.2003 would bring within its purview of factual and legal impact as a result whereof, for all practical purposes it must be treated to be in existence on and from the said date, although, it was inserted on 19.9.2006.

9. The contention of the petitioner that it was not obliged to pay ADC only as per IUC regulations and not as per clause 6.4.6 only from June 2006 that is from preceding two months of the date of the demand of BSNL which was ultimately made in August 2006 are entirely misconceived, incorrect and unsustainable.
10. The demand of the respondent is to be restricted from the period June, 2006, the same would be contrary to or inconsistent with the submissions made by the Petitions that clause 6.4.6 would not be attracted at all.
11. The contention before the Tribunal with reference to the BSNL's Website printout of 2004 showing 29 of BSNL was a fixed numbering plan, although in fact the petitioners were fully conscious that 20, 21 and 29 are the number plan which were allocated to BSNL for WLL (M) Services.

The principal questions, which arise for consideration in these petitions, are : -

1. Whether the respondent is entitled to claim any amount towards Access Deficit Charges (ADC) purported to be under clause 6.4.6 of the interconnect agreement without first determining the applicability thereof and satisfying the ingredients therefor namely :-

A) Determination of factum of unauthorized calls

- B) Determination of the date of detection
 - C) Determination of the period of two months preceding the date of such detection and
 - D) Determination of the exact quantum thereof?
2. Whether the FWT services offered by the petitioners are in effect and substance WLL(M) Service?
 3. Whether the respondent had any basis for raising any claim for the period 14.11.2004 to 31.8.2005 and thereafter?
 4. Whether the respondent had any jurisdiction to claim ADC on all calls in a trunk group, which are otherwise exempt from the levy of ADC, having regard to the fact that the same had statutorily been determined by TRAI ?
 5. Whether in the facts and circumstances of this case, the respondent could have invoked the provisions of clause 6.4.6 of the agreement and that too without compliance with the principles of natural justice?

There are certain admitted facts which should be noticed by us before adverting to the rival contentions raised by the learned counsel for the periods. Some operators marketed some wireless installations titled "Desktop Walkie" or "Unlimited Wireless". According to the petitioners they had not promoted/advertised these phones

and/or services as wireless phones/services with features of mobility. We have noticed heretobefore a large number of different services offered by the Petitioners to their respective costumers. It is now beyond any doubt or dispute that wireline services as also Cod Dot services would not come within the purview of the mobile services. It is also not in dispute that the Desktop Walkie Services must be held to be mobile services having regard to the decisions of this Tribunal in Petition No. 45 of 2005 (Tata Teleservices Ltd. and another Vs. Bharat Sanchaar Nigam Limited) and Petition No. 108 of 2005 (Reliance Infocom Ltd. Vs. Bharat Sanchaar Nigam Ltd.) The said decisions admittedly have been affirmed by the Supreme Court of India in the case of Tata Teleservices Limited Vs. Bharat Sanchaar Nigam Limited reported in 2008 Vol. X SCC page 556 and Reliance Infocom Limited Vs. Bharat Sanchaar Nigam Limited and others reported in 2008 Vol. X SCC page 535.

One of the questions which however, arise for consideration is as to whether FWT services would come within the purview of WLL(M) Services or not.

We have also noticed heretobefore that out of 3,33,000 Subscribers, so far as HFCL is concerned, it serves only 10,500 FWT Services whereas in the case of STNL, the number of Chalta-Firta PCOs which have been provided to the handicapped persons to facilitate them to earn their livelihood amount to only 161. FWT Services were 34,000 in number.

We have also taken into consideration the fact that in the case of HFCL only 17% of its entire services constituted WLL (M) Service as in August 2000 and less than 26% of its fixed services at the relevant time; whereas in the case of HTL only 0.1% of its entire services would be WLL(M) Services in August 2006.

In view of decision of this Tribunal as also that of the Supreme Court of India in the cases of Tata (Supra) and Reliance (Supra) there cannot be any doubt or dispute whatsoever in regard to the distinctive features of a fixed services and mobile services.

For determining the said question, we may at the outset notice the pleadings of the parties, so far as FWT services offered by the petitioners are concerned :

“These Fixed Wireless Terminals (FWTs) consist of :

- a) a Network Interface Unit (NIU), that is nailed to the wall.
- b) a patch Antenna that is fixed to the terrace or exterior or building
- c) a Wire that connects the Patch Antenna to NIU.
- d) a Battery to provide electrical support to NIU.
- e) a wired connectivity to an ordinary push button Telephone Instrument from the NIU.
- f) in case of Public Call Offices (PCOs), additionally, there is Billing Equipment with built in clock and printer.”

II. FWT

Similarly, the FWT Services provided by the Petitioner are also in the genre of FWA/WLL(F) and not WLL(M). The essential features of FWT are summarized hereinbelow :

- i) They are fixed devices which communicate with their BTS or each other from the same location.
- ii) They are connected to an external phone using RJ-11 cable. It is a fixed terminal (without Dialer) & another external phone is required to be connected to FWT in order to originate & terminate any call.
- iii) The Remote station is wall mounted and fixed.
- iv) It has a wall set NIU, battery powered Adapter, Charger etc. besides wired connection to an exterior antenna as well as a wired connection to an instrument.
- v) The Location of the end-user, termination and the network access point to be connected to end user is fixed.
- vi) The antenna is not in built in the phone and is usually installed on the roof of the Subscriber's premises.
- vii) They are not cordless devices or derivatives of cordless device.
- viii) They are utilized only with heavy equipment with three sets of interconnecting parts and require 230 Volts A.C. supply for their operations.
- ix) The NIU is nailed to the wall as well as various other appliances.
- x) A wire connects the Patch Antenna to NIU.

- xi) There is wire connectivity to an ordinary push button Telephone Instrument from NIU.
- xii) They are fixed to only one access point/sector of BTS where the premises of the subscribers are located.
- xiii) If the subscriber has to move out of the existing premises/zone then it has to be reprogrammed manually by the operator from the exchange with the new parameters.
- xiv) In case if a FWT is to be moved out of the installed place it has to be physically dismantled and reinstalled at the new premises and all the configurations are done as per the zone in which it is reinstalled. It is similar to any fixed wireline telephone which when removed from one premises is to be reinstalled and reconfigured at the new place.”

It was furthermore averred :

“Before the Petitioner proceeds to spell out and detail the various features of its aforementioned Services, which would conclusively demonstrate that the said Services are not of the genre or category of WLL (M) Services, it is pertinent to mention that the Petitioner had ventured into Fixed Wireless Services as the terms of its original License mandated adoption of Wireless Services as preferred technology over Wireline Cooper Cables. Detailed submissions in this respect have been made in the Petition and may be reverted to. The Petitioner submits that compliance with the mandate of its License and adoption of Wireless Services with the aim of bypassing Copper Lines cannot now make the Petitioner liable for ADC charges, which apply to Mobile Wireless Services even though that is not the nature of Service provided by the Petitioner.”

Some photographs have also been annexed with the additional affidavit to demonstrate the nature of instruments used by the petitioner. The said photographs are at page 871 to 875 and 884 of the said Additional Affidavit. We may furthermore place on record, the deployment of Fixed Wireless Terminal has also been placed before us, which is at page 875 of the said additional affidavit.

Respondents in its reply stated :

“The contents of paras 30 to 32 to the extent they do not form part of the record are denied. Submissions made hereinabove are reiterated. It is submitted that the BSNL is also governed by the principles of law laid down by the Hon. TDSAT. It is respectfully submitted that BSNL has taken the necessary steps for its services which are in the nature of WLL(M) to be treated in the same manner as per the IUC Regulations all over the country. Wherever there is any ambiguity or error in this regard, whenever pointed out, has been corrected. In any case it is most respectfully submitted that the ADC amount is payable as per the IUC Regulations to the BSNL. All its earlier perceptions stand corrected and modified in accordance with the rules and regulations and the principles of law laid down by this Hon. Tribunal.”

We may also notice, although not very relevant, that the petitioners herein in respect of their FWT Services had not issued any advertisement that services offered by them are mobile services.

So far as STNL is concerned, the relevant pleadings are as under :-

6. "These FWTs have been in operation since the time the first Basic Licenses were granted in 1997. These FWTs also conform to the numbering plans that are specified by DoT for Fixed/Basic Phones. A diagram showing the details of an FWT is annexed hereto as Annexure P-2.
7. That besides these provisions, the License also mandated the use of indigenous technologies. Accordingly, the Petitioner teamed up with an Indian Research and Entrepreneurial Institute promoted by an IIT Professor and also recognized by the DOT and deployed FWTs on CorDect Platform. CorDect stands for Digital Enhanced Cordless telecommunications. A copy of the Technical White Paper on CorDect issued by Midas Communication Technology Private Limited is annexed hereto as Annexure P-3.
8. Both these FWTs on CDMA and CorDect on TDMA operate on Wireless Frequencies allocated by DOT/WPC and are also recognized by Telecom Engineering Center (TEC) as part of Fixed/Basic Services and are not treated as Mobile Services as licensed to Cellular Operators (CMSPs).
9. That the DoT, as Licensor and Number Plan Administrator, also assigned Numbering Levels to the Wireless Phones deployed by the Petitioner, treating them to be Fixed Phones only. BSNL, the Respondent herein, was incorporated and took over the Telecom Services of the DoT w.e.f. October,

2002 only. Even as late as in 2002, BSNL itself issued Certificates of Testing of Points of Interconnection, recognizing valid termination of both Wireline and Wireless (FWT) Traffic into the same Trunk Group/POI. A copy of STL letter dated 18.10.2002 intimating BSNL change of Numbering Levels, as per DoT Directives is annexed hereto as Annexure P-4. A copy of BSNL's Certificate of Testing dated 15.11.2002 is annexed hereto as Annexure P-5."

Apart from the nature of instruments,, which was used for providing FWT & FWP Services, the Petitioner had also annexed like claims and our attention has been drawn to pages 114, 116, 119 and 122-24 of the Paper Book.

We may at this juncture also notice the relevant provisions of the license agreement :-

"For Subscriber loop (local loop), optical fibre and wireless are the preferred technologies. Copper Cable Technology shall not be permitted, except over the radial distance of last 500 meters of the loop. In exceptional circumstances in rural telephone systems where the penetration of DoT network is marginal, the LICENSEE may be permitted to lay copper cables."

"6.4.6 WRONGLY ROUTED CALLS

- (a) Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC is higher than the IUC applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC, as applicable for such

unauthorized calls, for all the calls recorded on this trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.”

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Analysis :

For attracting the provisions of clause 6.4.6 (a) it is not disputed that the calls must be wrongly routed.

For fixed services and mobile services, it is again not disputed that some definite numbers are allotted.

BSNL for its mobile services, allotted numbers 20, 21 & 29.

Indisputably, the petitioner have not been using the number allotted to them for providing fixed services but the numbers allotted to them for mobile services.

Technically, therefore, the calls can be said to be wrong routed ones but the question remains whether for that view of the matter alone, clause 6.4.6 of the interconnect agreement would automatically be attracted.

In our opinion, the technology involved the third category of phones as described in paragraph 4 (iii) of the petition is not material. What is mentioned therein is that the said category of instruments has a roof top antenna. If they had, in view of the decision of the Supreme Court of India, it would be a fixed phone and not a mobile one.

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Applicability of Clause 6.4.6

Clause 6.4.6 of the interconnect agreement could be applicable in the case only in respect of those categories of instruments which answer the description of mobile phones.

It would not be, in our opinion, in the facts and circumstances of the case, correct to contend that the respondent would be entitled to invoke the said provision in respect of all calls originated from all types of instruments and terminated to all types of instruments.

It is inconceivable that the respondent would be entitled to change ADC indirectly even in respect of such calls.

What cannot be done directly, cannot be done indirectly is a well settled principle of law.

In Chandrakant Hargovindas Shah Vs. Deputy Commissioner of Police, 2009 (7) SCC 186 it has been held :-

“..... there cannot be any doubt whatsoever that a licensee cannot be permitted to do something indirectly which he cannot do directly – Therefore, licensing authority was entitled to infer that appellant had in effect and substance not been purchasing the same for his own use which was the sine qua non for grant of licence”

Penal Clause :

Clause 6.4.6 of the interconnect agreement ordinarily on a plain reading should be construed to be a penal clause.

We would, however, assume that it provides only for a civil liability.

A person even under the law of contract would be liable for damages for breach thereof on his part. A party to a contract would not be liable to pay any amount either stipulated or contracted, by way of damages or penalty although there is no default on its part.

A person is not liable to pay any damages beyond his contractual liability. Such liability in a case of this nature must be proved.

A civil liability clause also deserves a fair interpretation. No law states that a court of law would construe a contractual provision in such a manner which would confer benefit to one party to the contract unduly.

Damages in terms of Sections 73 and 74 of the India Contract Act may be either actual or pre-determined. In both the cases, the amount of damages claimed must be found to be reasonable.

When a provision in the contract provides for a reasonable pre-determined amount of damage or the mode and manner in which the amount of damage may be possible to be ascertained, the same must be construed in a manner, which would lead to ascertainment the true intention of the parties and the purpose for which the same was stipulated not for any other.

Scope of the nature of clause 6.4.6 of the interconnect agreement in our opinion cannot be enlarged.

Purpose for which it was inserted in the contract was to check evasion of payment of ADC. It cannot be equated with a case where a statutory provision has been laid down to check evasion of a tax liability. What binds the parties is the terms of the contract. If no ADC is payable in respect of phones used for fixed services, 6.4.6 also would not be applicable in regard thereto.

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Natural Justice

It is, inter alia, for meeting a situation of this nature, the principles of natural justice were required to be complied with.

Had an opportunity of hearing been given to the petitioner, it could have shown that some of the instruments issued by it do not answer the descriptions of mobile phone.

The respondent even for the purpose of ascertaining the categories of the instruments could have visited the offices of the petitioner with or without prior notice.

It could have even gone through the records of the petitioner even to ascertain the call details.

It could have compared the CDRs of the petitioners with those of its own.

It did not do anything of this sort.

There cannot, therefore be any doubt whatsoever. We have, therefore, no doubt in our mind that the respondent must give an opportunity of hearing to the petitioner in respect of the disputed nature of services.

It is, therefore, directed :-

- (i) The respondent is not entitled to invoke clause 6.4.6 of the interconnect agreement in the peculiar facts and circumstances of the case, in respect of all the calls originated from all the instruments.

- (ii) It must give an opportunity of hearing to the petitioners in respect the disputed nature of instruments through which FWP service are provided for by the petitioners.
- (iii) The respondent would be entitled to ADC from the petitioner in respect of the calls originated from the phones providing WLL (M) services.
- (iv) For the said purpose, it may also invoke clause 6.4.6 of the interconnect agreement i.e. the calls originated from the phones providing WLL (M) service. Subject to compliance of the principles of Natural Justice.
- (v) In view of the divided success the parties shall pay and bear their own costs in this petition.

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

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

