TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated: July 22, 2011

1. **Petition No.264 of 2010**

Reliance Communications Ltd. ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd. ...Respondent

2. **Petition No.276 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Kerala) ...Respondent

3. **Petition No.277 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Punjab) ...Respondent

4. **Petition No.278 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Orissa) ...Respondent

5. **Petition No.279 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi ...Respondent

6. **Petition No.280 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Rajasthan) ...Respondent

7. **Petition No.281 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Maharashtra) ...Respondent

8. **Petition No.282 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Gujarat) ...Respondent

9. **Petition No.283 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Bihar) ...Respondent

10. **Petition No.284 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (A.P.) ...Respondent

11. **Petition No.291 of 2010**

Reliance Communications Ltd., Navi Mumbai ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi (Haryana) ...Respondent

BEFORE:

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

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

HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioner : Mr.Navin Chawla & Ms. Shikha Sarin, Advocates

For Respondent : Mr.Maninder Singh, Senior Advocate with Ms. Pratibha M. Singh & Mr. Tejveer Singh Bhatia & Mr. Paras Anand, Advocates

J U D G M E N T

S.B. Sinha for himself and Mr.P.K. Rastogi, Member

Background Facts

The petitioner is a licensee; the license having been granted in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885 (The Act). The respondent herein has been constituted under a Parliamentary Act and has taken over the telecom business of the Department of Telecommunication (DOT).

The petitioner, inter alia, was granted licenses to operate as a basic service operator.

The Union of India floated a scheme in terms whereof migration packages were offered to the operators, pursuant whereto the BSO license holders could migrate to the Unified Access System Licenses subject to the conditions laid down therefor.

The petitioner accepted the said offer as a result whereof it was granted the requisite UAS licenses with effect from 14th November, 2003.

As a basic operator the petitioner was allotted a number plan by the DOT comprising of eight digits. As an operator having full mobility admittedly it was required to shift to ten digits numbering plan.

In terms of the national numbering plan, various number series are allocated to different operators for connecting their respective customers with the other service providers.

The parties hereto admittedly entered into an inter connect agreement with the petitioner as a basic service provider; some of the relevant clauses whereof read as under:

> "7) The parties acknowledge that this agreement is intended to apply to the provisions related to Basic Telephone Service only between the BSNL as a provider of various Telecommunication Services and the BSO as a provider of Basic Telephone Service and not as a provider of any other service.
>
> 9) The parties further acknowledge that the parties will mutually discuss to arrive at solutions to the issues arising out of any change in the terms and conditions of the license of either party at any point of time requiring changes in the interconnection arrangements in this agreement."`
>
> <u>Interconnection Billing System</u>
>
> "7.1.4. In the event that at any time during the continuance of this Agreement the Billing System of either party malfunctions and is unable to provide all or part of the billing Information necessary for such party to prepare a bill to the other, the other party shall at the request and expenses of the first mentioned party use its reasonable endeavors to supply the necessary Billing Information to the first mentioned Party without any legal liability to the first

mentioned party for the contents of such Billing Information.

Upon migration to UASL, petitioner requested BSNL to continue with the then existing inter connect agreements on its basic POIs so as to enable it to continue with its mobile services.

Correspondences between the parties on change of license regime

The respondent was requested by petitioner by a letter dated 17.11.2003 to make requisite arrangements in their exchanges for the purpose of accepting STD calls originated from the in-roamers of petitioner at the level of one Tax of the respective circles.

The respondent herein on receipt of the said letter asked for guidance from the Telecom Regularity Authority of India (TRAI) by its letter dated 21.11.2003, which reads thus:

1. "Department of Telecommunications (DoT) had given basic service license to various operators. Based on these basic services license and the present regulatory regime for interconnection with basic service operators BSNL had signed Interconnect Agreements with private basic service operators for basic services only.

2. It is understood that DoT has now permitted migration of the existing Basic Services Licensees to a unified licensing regime. However, no such intimation as well as copy of unified license has been given to BSNL as yet. Neither any instructions has

been issued by DoT or TRAI regarding amendments required in the present interconnection arrangements with these private Basic Service Operators who have migrated to a unified licensing regime.

3. Some of the operators have approached BSNL to provide them interconnection as applicable to cellular mobile service but with the existing basic service numbering, routing & POIs. The same cannot be implemented in the absence of guidelines on interconnection from TRAI.

4. You are requested to kindly issue the necessary guidelines in this regard urgently so that the same could be implemented. "
(Emphasis supplied)

The TRAI by its letter dated 25.11.2003 directed the parties to enter into interconnection arrangements for the interregnum, stating:

"Sub: Interconnection between Reliance Infocomm Ltd. and BSNL due to migration to Unified License regime by Reliance Infocomm.

Sir,

It has been brought to the notice of the Authority that BSNL has blocked the tariff of Reliance Infocomm at certain places like Ambasamudram, Valiiyoor in Tirunelvelli LDCA OF Tamilnadu Reliance have further informed that they have been threatened with the blocking of the traffic in other Circles including Andhra Pradesh and Uttar Pradesh. Copies of letters received from Reliance Infocomm are enclosed. BSNL vide its letter no.201-15/2003-Regln dated 21.11.2003 have pleaded ignorance about the Unified License Regime. DOT vide letter No.10-102003-BS-II/Vol.II dated 14.11.2003 (copy enclosed) have allowed the migration of Unified Access License to Reliance Infocomm covering 16(15+1) Circles. BSNL should

ensure that no blockage of the traffic at any of the existing POI takes place.

The issues relating to the Routing, POIs and numbering subsequent to Unified Access Regime are being addressed by TRAI in parallel. Meanwhile, till the details are finalized, all existing POIs shall continue based on the existing numbering and routing principles.

This issues with the approval of the Authority."

Upon receipt of the said guidelines, the respondent by its letter dated 27.11.2003 addressed to the Secretary of the TRAI stated as under:

"2.0 It is, however, submitted that M/s Reliance is not adhering to these arrangements. <u>It has been found that M/s Reliance is offering its long distance calls on the trunk groups which are only meant for local calls and thus bypassing the admissible IUC to BSNL.</u> M/s Reliance was advised by the field units to comply with the agreed arrangements for handing over/taking over of different types of calls at the various POIs. M/s Reliance, however, took no corrective measures. As a result of this, the field units of BSNL started rejecting those calls which were not as per the agreed arrangements.

3.0 It is requested that M/s Reliance may kindly be directed to maintain status quo at their end also and comply with the existing numbering and routing principles as agreed for their Basic Services in the Interconnect Agreement."
(Underlining is ours for emphasis)

The TRAI thereafter arranged a meeting between the parties hereto and prescribed the distance slab arrangement until 15.12.2003, the relevant clauses whereof read thus:

"After deliberations and discussions, following interim arrangements were agreed upto 15.12.2003

or the date from which TRAI prescribes its new guidelines as indicated vide its letter No.409-18/2003-FN dated 25th November 2003, which ever is earlier.

1. Inter-network call routing and handing over/taking over shall continue as per the existing agreements. The IUC including ADC shall also be applicable in the same way as payable.
   (as per applicable IUC rates) for different distance slabs.

2. M/s Reliance Infocomm shall route calls of the In-roamers on trunk groups based on distance slab for intra circle and Inter-circle as the case may be based upon the distance between the home location of party A to the destination of party B."

Thereafter, a meeting was held by and between the parties hereto with regard to the interim arrangement for handing over calls from the in-roamers, whereafter petitioner by a letter dated 15.12.2003 conveyed the arrangements agreed to by them.

The respondent did not immediately respond thereto. We may, however, notice that the amount of Rs.1.75 paise for the calls was the highest rate in the slab for the distance of 200 to 500 kilometers and similarly the stipulated rate of Rs.2.50 paise per minute for all calls was the highest rate for the calls on the Trunk Group AF as prescribed by the TRAI.

The respondent by its letter dated 10.4.2004 gave its own version of the minutes of the meeting.

> "3. It is further to inform you that as per prescribed IUC for locals calls, Rs.0.80 is payable for local calls by M/s RIL to BSNL. M/s RIL request for acceptance of same IUC for inter-circle in roamer calls also is neither acceptable nor was ever agreed to. M/s RIL on its own is handing over the inter circle in roamer calls to BSNL on same trunk group for locals calls due to the technical limitations of M/s RIL. M/s RIL should take POIs for its basic services from its ILT switches and for its fully mobile services on level 93 from its Gateway MSCs to BSNL TAXs so that such problems do not arise. Likewise, for near end handover, M/s RIL should take POIs from its ILT switches for its Basic Services and traffic from M/s RIL is being accepted by BSNL in same trunk group as for local calls due to technical limitation of M/s RIL."

The contents of the second paragraph of the petitioner's letter dated 15.12.2003 were, thus, disputed.

The Central Government by a letter dated 31.12.2003 with regard to normal scheme for the subscribers availing full mobility under UASL, stated as under:

> "With reference to the Licence Agreements for various service areas, as per list enclosed, the undersigned is directed to convey:-
>
> (i) All subscribers availing full mobility service under UASL shall be shifted to the following numbering scheme within a period of 30 days w.e.f 1st, January, 2004.
>
> Numbering scheme to be followed-93 XYZ ABCDE

Where 93 is Access Level allocated on non-exclusive basis

XYZ is the allocated MSC code in a designated service area, ABCDE is the five digit subscriber number.

(ii) Details of MSC codes and Mobile Network Codes, to be used in different service areas are enclosed in Annexure-I.

(iii) SDCA based linked numbering scheme will continue for Limited mobility subscribers.

2. The compliance should be reported within the stipulated period of 30 days w.e.f. 1.1.2004 to the Licensor as well as to the Telecom Regulatory Authority of India."

The respondent admittedly was allotted the number series `93' which was required to be implemented within 30 days from the effective date specified therein namely 1.1.2004.

By reason of a circular letter dated 5.2.2004, respondent stated:

5. The Interconnect Usage Charge (IUC) as prescribed as above shall be applicable from the date of migration to Universal Access Service License by M/s Reliance Infocomm Ltd. i.e. 14.11.2003 till 31.1.2004. The arrears for this intervening period shall, therefore, be collected by BSNL from M/s Reliance Infocomm Ltd.

6. BSNL field units shall maintain CDRs for all calls handed over by M/s. RIL to BSNL, at these trunk groups AB & AF, for reconciliation, if any, required to be done in future.

Yet again by reason of another circular letter dated 6.2.2004, it was directed:

> 1. "As per the revised IUC implemented w.e.f. 1st February, 2004, for POIs of Universal Access Service Licensee (UASL) at SDCC Tandem level Table A has been implemented for their fixed services & Table D for their fully mobile network. At these POIs calls originated from inter circle in roamer subscribers of M/s. RIL handed over to BSNL network in terminating SDCC Tandem is also to be accepted, to enable fully mobile services of M/s RIL. For accepting such calls a separate trunk group DC is to be formed at POI at SDCC Tandem (Table D), in SDCA where M/s.RIL is having POIs with BSNL SDCC Tandem switches from its ILTs (integrated Local cum Tandems). The applicable IUC payable by M/s RIL to BSNL shall be Rs.1.10/- per minutes for all types of calls handed over in trunk group DC.
> 2. However, in SDCAs where M/s RIL is having direct POIs with BSNL Tandem exchanges from its MSCs and is handing over the calls originated by inter circle in roamers at terminating SCA in trunk group DA itself, the applicable IUC is Rs.1.10 per minute for all type of calls handed over in trunk group DA."

By reason of a letter dated 11.2.2004, petitioner protested thereagainst inter alia contending:-

A. That no refund clause has been provided for therein;

B. The interim arrangement between the parties being valid with effect from 15.12.2003, the field unit should not have been directed to make the effective date as on 14.11.2003, stating:

> "2. With respect to excess amount refund by BSNL to Reliance, it was agreed between us as "However, as

has been agreed during the meeting, this shall be reconciled based on the CDR records and final settlement will be based on CDR reconciliation. The excess amount charged by BSNL shall be returned to Reliance for the above cases after reconciliation." (Our letter to BSNL dated 15.12.2003, submitted to you after agreed arrangement during our meeting on this issue, is attached with this letter for your reference).

However, your both circulars do not clearly mention about the refund of such excess payments (i.e. for calls of non-roaming subscribers handed over at these trunk groups) by BSNL to Reliance. This crucial lapse may cause unnecessary disputes at the field levels.

Irrespective of our protest (as detailed in point number 1 above), we would like to point out other anomalies in these circulars as below:

Regarding Circular dated 5.2.2004 for arrangement prior to implementation of revised IUC.

3. The point number 4 of your circular mentions that the interim arrangement for IUC payment shall be applicable from 14.11.2003 (i.e. Reliance Infocomm's date of migration to UASL) till 31.1.2004. In this respect we would like to draw your attention to the fact that the proposed arrangement between Reliance and BSNL regarding IUC payment of Reliance inter circle roamer calls was agreed only on 15.12.2003. (Please refer attached letter). Considering this the revised IUC charges should be applicable only from the date of mutual agreement i.e. 15.12.2003 and not from 14.11.2003."

The respondent, however, by its circular dated 27.2.2004 directed:

2. It was also prescribed that the inter/intra circle calls originated from intercircle inroamer subscribers having PSTN numbering scheme (level 3) of M/s RIL

and handed over to BSNL network in originating LDCC (of the LDCA where they are roaming) shall be accepted on a separate trunk group BF in the LDCC TAX POI (Under Table B) However, it has been brought to the notice of this office that in LDCAs where M/s RIL is having direct PoIs with BSNL LDCC TAX from its MSCs and is handing over the calls originated by inter circle inroamers in same trunk group BB itself. In such cases the trunk group BB itself should be reconfigured, as trunk group BF with applicable IUC as applicable for trunk group BF for all type of calls handed over in trunk group BF. The calls from all fully mobile subscribers of UASL M/s RIL shall be accepted in this trunk group irrespective of the fact that these subscribers are inter / intra circle roaming or are in their Home SDCA itself. Thus there shall be no trunk group BB in such cases.

3. BSNL field units shall maintain CDRs for all calls handed over by M/s RIL to BSNL, at this trunk groups BB for reconciliation, if any, required to be done in future."

By a letter dated 10.4.2004 respondent, in response to petitioner's aforementioned letter dated 11.2.2004, stated as under :

"Kindly refer to your letter No.RIL/BSNL/03-04/-763 dated 11th February 2004 regarding above-mentioned subject. The arrangements being implemented in field units during the interim period, when M/s RIL have already started full mobile services but have yet to put in place necessary arrangements for routing of its calls and change the numbering scheme to level 93, have been prescribed on request from you and as per agreed terms. Once agreed and your fully mobile traffic accepted at POIs which are, otherwise, not meant for the fully mobile traffic now raising objections to it and comparing it with IUC payable by cellular operators is not correct and is against your own request made in this regard.

2. No refund of ADC, as already paid by M/s RIL as per agreed arrangements, is admissible and the same was, therefore, not conveyed in the instructions issued to BSNL field units in this regard. Further, the license of M/s RIL was amended on 14th Nov 2003 and M/s RIL had been continuing to offer full mobility to its mobile subscribers since then. M/s RIL has since been handing over roaming subscribers calls and therefore revised IUC has been rightfully charged from 14th Nov 2003. In case it is stated by M/s RIL that this interim arrangement was agreed only on 15th Dec 2003, then, M/s RIL may kindly explain why action should not be taken under terms and conditions of the Interconnect Agreement for misuse of POIs by handover of traffic by M/s RIL that was neither agreed nor prescribed at these POIs with BSNL."

The petitioner went back to respondent in terms of its letter dated 26.5.2004, stating:

"Referring above, we would like to bring to your notice that as per BSNL circular referred above, we have been paying the excess IUC amount to BSNL in all the circles for inroamers calls.

Regarding this, we had mentioned in the letter dated 15.12.2003 that we will pay excess IUC on all the calls (i.e. roamers calls as well as non roamers call) of the trunk groups on which roamers calls are handed over to BSNL subject to CDR reconciliation. Thus the Excess IUC only on roamers calls will be retained by BSNL and the remaining excess IUC charged for the other non-roamers calls will be refunded to us by BSNL.

Although your above referred circulars mention that CDRs for all the calls on the trunk group (DC/BF) in IUC II and AB/AF in IUC I) are to be maintained for reconciliation, these circulars are silent on the refund issue. This had already been highlighted to you vide our letter dated 11.2.2004.

> While paying excess IUC in AP for Hyderabad POI, when we mentioned to Nodal Officer. AP Circle that we will seek refund for excess IUC paid for the non roamers calls, the nodal office, expressed total unawareness about the refund issue and said that there are no instructions for refund from BSNL HQ.
>
> Therefore we request you to issue refund guidelines/circular to all the BSNL circles. Since the Excess IUC amount being paid run into crores, and this is severally constraining our resources, we will appreciate that the guidelines for refund due to us are issued by BSNL as soon as possible."

The said request of petitioner for refund of the excess IUC amount was rejected by respondent by a letter dated 2.6.2004, stating:

> "2. In this connection, please refer to this office letter of even number dated 10th April 2004 addressed to you vide which the matter regarding refund of excess IUC has already been discussed. A copy of the letter is enclosed. For the reasons mentioned therein you would kindly agree that BSNL should not refund excess IUC."

The Earlier Proceeding

The petitioner filed a petition before this Tribunal marked as Petition No.166 of 2006 on or about 9.5.2006 for interpretation of various clauses of inter connect agreements entered into by and between the parties hereto.

In the said petition it had inter alia been prayed :

> "10. declare and direct the respondent to refrain from treating inter circle roamer calls as wrong routed calls and set aside the demands raised in this

> regard; and reconcile and settle the higher charges paid for non roamers calls in terms of the agreement between the respondent and the petitioners and refund the amount paid on this account amounting to Rs.19.93 crores as per details in Annexure-A35 as well as Rs.86.71 lacs as per the details in Annexure A36."

This Tribunal keeping in view the fact that on the materials brought on record, justifiability of the said prayer could not be determined, in respect whereof `Issue (H)' was framed, declined to do so, observing:

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

The present proceeding

On the said premise, the petitioner has filed the present petition praying inter alia for the following reliefs:

a. "Direct the respondent BSNL to refund the extra amount of Rs.21,13,36,300 paid for non-roamers as per the details at annexure P-24 along with the interest in terms of the Interconnect agreement or the rate as deemed fit by this Hon'ble Tribunal.

b. Set aside the supplementary bills raised by the Haryana and Maharashtra unit of the respondent as per the chart annexed as Annexure P-31 as invalid, illegal, void abinitio and accordingly refund the amount paid under these demands amounting to Rs.9,63,66,153/- along with the interest in terms of the interconnect agreement or the rate as deemed fit by this Hon'ble Tribunal. In the alternative;

c. Direct the respondent BSNL to refund the extra amount of Rs.9,63,66,153 paid for non-roamers as per the details at annexure P-31 along with the interest in terms of the interconnect agreement or the rate as deemed fit by this Hon'ble Tribunal."

The petitioner in this petition inter alia contends that respondent did not raise its bill on CDR based system although it was having the said system in place, stating:

> "25. It is submitted that the petitioner was having CDR based billing system. The petitioner could have given the details of inroamer calls for calculation of normal IUC for roamer and non-roamers calls. <u>However, the respondent BSNL did not wish to believe the CDRs of the petitioner and insisted that either the petitioner use the new numbering, routing scheme for its fully mobile subscribers or pay higher charges for non-roamer also in order to provide the fully mobile to its subscribers.</u> This action of the respondent was clear proof the highhanded conduct of the respondent because the respondent was aware that at the time of migration to UASL neither DOT had given the new mobile numbering level to the petitioner, nor TRAI/DOT had put in place new national numbering and routing plan and nor BSNL had immediately amended the Interconnect Agreement. Therefore, the only option available to the petitioner was to accept the terms given by the respondent but it was also under the clear arrangement that after reconciliation of records based on CDRs the extra amount paid will be refunded to the petitioner."
> (Emphasis supplied)

The respondent, however, in its reply, highlighted the background of necessity to enter into a special arrangement on the said issue and stated that the reconciliation was to be carried out only so far as the

actual number of such calls was concerned with a view to ensure that no mistake or error in this regard was committed.

The petitioner also states:

> "17. It is submitted that thereafter, the petitioner vide letter dated 15.12.2003, a copy whereof is already annexed as ANNEXURE P-15 (pg. 291-292), requested the respondent BSNL for making interim arrangement for handover of calls from their inter circle roaming subscribers at its existing basic service POIs, as mutually agreed between BSNL and the petitioner.
>
> .....
>
> "20. It is submitted that the aforesaid arrangement existed only till the time the petitioner changed its numbering scheme from prefix 2 to prefix 93 for its fully mobile subscribers. The petitioner thereafter vide letter dated 11.2.2004, a copy whereof is already annexed hereto and marked as ANNEXURE P-19 (pg.332-339), requested for reconciliation based on CDRs for the period till the migration of its fully mobile subscribers with SDCA based numbering scheme to prefix 93. The petitioner also asked for refund of alleged excess IUC charged by BSNL."

Submissions

Mr. Naveen Chawla, learned counsel appearing on behalf of the petitioner, urged :-

(i) The petitioner having given its version with regard to the decisions arrived at by the parties in the meeting dated 15.12.2003 which was having not immediately

been replied to, the same must be held to have been accepted sub silentio by respondent.

Strong reliance in this behalf has been placed on *Hyderabad Municipal Corporation v. M. Krishnaswami Mudaliar & Anr.* AIR 1985 SC page 607 and *Ramji Dayawala & Sons (P) Ltd. vs. Invest Import* 1981 (1) SCC page 80.

(ii) From a perusal of the circular letters issued by the respondent being dated 5.2.2004 and 6.2.2004, it would be evident that CDRs were directed to be maintained by all field units, having regard to the fact that the payments were made by petitioner at the highest slab which would imply that it upon reconciliation was entitled to refund of the excess amount of IUC charges including ADC paid to the respondent.

(iii) The contention of the respondent that the CDRs were to be maintained only for the purpose of checking errors, even otherwise cannot be held to be bona fide and in any event the purported explanation offered as to why the provisions for the reconciliation has been made must be held to be an afterthought.

(iv) The rejection of the demand of the petitioner for refund of the excess amount by respondent by its letter dated 2.6.2004 is wholly illegal.

(v) The statements made in paragraph (1) of the reply clearly go to show that the necessity for reconciliation of the accounts was accepted, and the purported explanation that the same was only for the number of calls must be held to be incorrect as the bills were being raised on the basis of the records maintained by the BSNL, and thus, there was absolutely no need for issuing specific instructions.

(vi) Having regard to clause 7.3.1(iv) providing for a limitation of six months in the matter of raising bills having been inserted to bring about a finality of all dispute, it must be held, that the bills raised by the respondent from January, 2007 onwards for the years 2003-2004 were barred under the law of limitation.

(vii) In any event the matter relating to the arrangement between the parties having been made not by way of inter connection agreement and petitioner having been forced to pay the entire demand having regard to the fact that no order of stay was granted by this Tribunal

when a Miscellaneous Application therefor was filed by the petitioner, it must be held to be entitled to recover the amount paid therefor.

Mr. Maninder Singh, learned Senior Advocate appearing for the respondent, on the other hand, urged:

(i) The petitioner in law cannot claim refund of any amount as has been prayed for in the petition or otherwise.

(ii) It is incorrect to contend that in terms the minutes of meeting dated 15.12.2003 as alleged by petitioner, respondent agreed to pay the amounts of IUC and ADC specified by the TRAI in its Regulation of 1999, as from a perusal thereof it would appear that the amount of ADC including IUC were different, as payment of the IUC charges was to be increased from Rs.1.75 to Rs.2.50 depending upon the distance for both intra circle and inter circle calls but from the minutes of meeting it would appear that what was payable to respondent was Rs.1.75 and Rs.2.50 per call.

(iii) Having regard to the technologies involved in the matter it must be held that the Trunk Group AB having been designated for intra circle calls and as immediately prior to the coming into force of UASL regime i.e. on

14.11.2003, the basic service operators could not have gone beyond the SDCA, petitioner was required to hand over all the calls to NLD operators as it was not ready therefor, the parties entered into the aforementioned binding special arrangement.

(iv) From the circular letters of the respondent dated 5.2.2004 and 6.2.2004 it will be evident that reconciliation, if any, was necessary to be done in future only for the purpose of finding out any error or mistake which might have crept in.

(v) In view of the new IUC which came into force effective from 1.2.2004, at the request of petitioner the rates were brought down to Rs.1.10 for all types of calls from Rs.1.75 and Rs.2.50. In view of the said arrangement, it would not be correct to contend that the local calls would be beyond the purview of the rate fixed in the said minutes of meeting as modified by the aforementioned letter dated 6.2.2004.

(vi) A properly facilitated carried call as per the national routing plan and conditions of license applicable to a basic service operator being not in force, customers of such an operator could not have gone to the other circle

and any inter SDCA calls were required to pass through NLDs and only for that reason the said special arrangement had to be entered into.

(vii) Having regard to the National Routing Plan, calls were required to be handed over at the designated ports and in that view of the matter all the UASL licensees upon migration from basic licenses were required to arrange the roaming facilities both for intra circle and the inter circles to be delivered at the allocated port, wherefor the norms laid down in the letter of the DOT for arranging the roaming facilities were to be provided, for each type of calls as also depending upon the distance difference in trunk groups, the special arrangement was entered into providing for rates on a different basis.

(viii) All the calls being required to be delivered by the licensee at the designated ports, any call in violation thereof was to be considered as rejection of call.

(ix) The arrangement entered into by and between the parties hereto was a separate and distinct one and not an interconnection agreement, in terms whereof petitioner was required to pay at the highest rate.

(x) The respondent having taken the benefits of the arrangements having no requisite infrastructure therefor at the relevant time, it cannot be permitted to resile therefrom.

(xi) The respondent having rejected the demand of the petitioner for refund of the amount paid by it vide its letters dated 10.4.2004 and 2.6.2004, the validity whereof having not been questioned and in fact payments having been made upto October-November, 2004, the petitioner is estopped and precluded from making a prayer for the refund.

(xii) From the details of payment as appearing at page 340 of the paper book, it would appear that no dates for payments have been mentioned therein, although in fact petitioner had made all payments in terms of the arrangement till it could adhere to the National Routing Plan.

(xiii) From the reliefs prayed for by the petitioner, it would appear that no claim of refund in respect of Rs.21.00 crores which was paid in 2004, has been made.

(xiv) It is incorrect to contend that the petitioner was to pay the amounts claimed by respondent in terms of its bills

which were the subject matter of Petition No.166/2006 inasmuch as therein it had not claimed any refund in respect of Rs.21.00 crores which stood paid in 2004.

(xv) It is incorrect to contend that the petitioner was forced to pay the amounts claimed by respondent which was the subject matter of Petition No.166 of 2006 in terms of the interim order of this Tribunal dated 20.2.2004 inasmuch as admittedly, it had made some payments even prior thereto.

(xvi) In the Miscellaneous Application filed by the petitioner in the said Petition No.166 of 2006, the only ground taken by it being the applicability of the period of limitation in terms of Clause 7.3.1 (iv) of the agreement and no contention having been raised with regard to the number of the calls, other and further contentions before this Tribunal must be held to be not maintainable.

(xvii) Even it has approached this Tribunal within the prescribed period of limitation, all payments must be held to have been made in terms of the arrangement dated 15.12.2003 wherein no clause existed for making

payment on the basis of the distance between two exchanges.

Questions / Issues

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

a) Whether the arrangement dated 15.12.2003 between the parties hereto is binding on them and all payments were to be made in terms thereof.?

b) Whether petitioner is entitled to refund of any sum purported to have been made in excess of the amount payable in terms of IUC framed by the TRAI?

c) Whether demands raised by respondent are barred by limitation having regard to the provisions contained in Clause 7.3.1(iv) of the agreement in terms whereof bills were to be raised within a period of six months.

d) Whether in any event petitioner having made payments is estopped and precluded from claiming any refund ?

Construction of the Agreement

Both the parties hereto accept that a special arrangement was entered into by and between them on 15.12.2003, which would not come within the purview of the inter-connection agreement and, thus, the same must be construed of its own. We, therefore, have to

proceed on the basis that the agreement in question stricto sensu was not an interconnection agreement but a special one.

For the said purpose the relevant background facts must be borne in mind.

Indisputably, on migration to UASL regime from the basic operator regime, petitioner was required to meet the requirements of National Routing Plan.

For the said purpose it was required to make arrangements for changing over from eight digit numbering plan to ten digit numbering plan. It was for that purpose required to have its own infrastructure.

It is also not in dispute that having regard to the National Routing Plan the numbers were to be allotted by the DOT.

The parties sought for assistance of both the TRAI and the DOT.

Indisputably, in the UASL regime, full mobility was offered to petitioner. Being not in possession of the requisite infrastructure for acceptance and delivery of calls to the customers, petitioner intended to continue to utilise the infrastructure of respondent. The respondent contends that in fact petitioner had not been adhering to the arrangement which was valid upto 15.12.2003. At that point of time a meeting was held on or about 28.11.2003.

The TRAI, however, did not come out with any special arrangement. Thus, the parties hereto were required to enter into a

separate arrangement. It is not in dispute that a meeting had taken place on 15.12.2003.

The petitioner by its letter dated 15.12.2003 gave its own version as to what had transpired in the said meeting contending that the terms therein had been offered by BSNL and accepted by it.

The respondent on 10.4.2004, by a letter contended that the contents of the second para of letter dated 15.12.2003 were not correct.

The contents of the said letter dated 15.12.2003 as also 10.4.2004 have been noticed by us heretobefore.

Before, however, adverting to the rival contentions of the parties with regard to the terms of the said arrangement, we may notice the legal position.

General Rules of the Construction of a document

If a contract is reduced in writing, the terms and conditions thereof must be given effect to and for that purpose literal meaning should be assigned. In the event, however, the terms are found to be wholly unjust or one sided, a Court of law may not refuse to interfere.

The conduct of the parties in a case of this nature would also be relevant.

In John Lee (Grantham) Ltd v Railway Executive [1949] 2 All ER 581 which has been followed by the Madhya Pradesh High Court in

Smita Conductors Pvt. Ltd., Bombay and Anr. vs. Madhya Pradesh State Electricity Board reported in AIR 1984 MP 44, Lord Denning, J. observed that while allowing freedom of contract, there is vigilance of common law, which watches to see that it is not abused and that defendants therein were not free to exempt themselves in the wide term which were contended for.

The question as to how the parties have understood the terms of the contract would be a relevant fact for the purpose of construction thereof.

The conduct of the parties in construction of contract.

The objective of an interpreter of a document should be as to how a third party consider the contract.

In Petition No.57 of 2010 and other connected matters, (Aircel Ltd. Vs. Bharat Sanchar Ltd.) disposed of 1.9.2010 this Tribunal noticed :

> 56. Objective of every interpreter of a document should be as to how a third party would consider the contract. Kim Lewison states as under:
>
> *"In other words "intention" is equiuvalent to "meaning". However, Lord Hoffmann has pointed out an important qualification to this principle. In Mannai Investment Co. Ltd. v Eagle Star Life Assurance Society Ltd. he said:*
>
> *It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning*

of his words' conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammer, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."

It is also well settled that a commercial document should be construed in "business commonsense", although the application of the said rule has some limitation. Kim Lewison states the law thus :

"The interpretation of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words."(2.01)

"2.02 Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

The modern starting point is Lord Hoffmann's statement that:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties

in the situation in which they were at the time of the contract."

As he explained in Kirin-Amgen Inc v Hoechst Marion Roussel Ltd:

"Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, ' the meaning of the words the author used', but rather what the notional addressee would have understood the author to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules, It is highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience."

The learned author furthermore states :

"Lord Hoffmann's reformulation by reference to the reasonable outsider, rather than by reference to the parties themselves, emphasizes the objective nature of the task. Indeed, the phrase "the intention of the parties" does not appear at all in the five principles he laid down. This is a reflection of the philosophical basis of interpretation in English law; namely that it is an objective exercise.

This is not a new approach. Even in the more traditional formulations of the purpose of

interpretation judges have been careful to stress that when they speak of the intention of the parties, they are ascertaining their presumed intention objectively.

Thus in Reardon Smith Line Ltd v Hansen-Tangen, Lord Wilberforce said:

"When one speaks of the intention of the parties to the contract one speaks objectively-the parties cannot themselves give direct evidence of what their intention was-and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."

57. It is now a well-settled principle of law that each word used should be given effect to. No word should be considered to be a surplusage or otiose. The construction put by the maker of the document assumes importance, having regard to the doctrine of 'Estoppel by Convention'. The principle of estoppel by convention shall apply, if it is found that the makers of the document understood the meaning of a clause in a particular manner."

In Clear Media (India) Pvt. Ltd. vs. UOI P. No.248(C) of 2009 disposed of 9.7.2010, this Tribunal has relied upon a decision of Donaldson MR in Amalgamated Investment & Property Company Ltd. vs. Texas Commerce International Bank Ltd. 1981 Vo.3 All ER 577 holding:

> In Amalgamated Investment and Property Company Limited Vs. Texas Commerce International Bank Ltd., reported in 1981 Vol. 3 All ER page 577 – Lord Donaldson M. R., held as under :-

"Subsequent conduct

For many years I thought that when the meaning of a contract was uncertain, you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by Watchem v. Attorney General of East African Protectorate (1919) AC 533,[1918-19] All ER Rep 455, a Privy Council case which was applied repeatedly in my early days in the common law courts. But it was always repudiated by the more logical minds in Chancery. Eventually, the logicians prevailed. In James Miller (James) and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796 at 798, [1970] AC 583 at 603 Lord Reid said :

'....it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'

I can understand the logic of it when the construction is clear, but not when it is unclear. Still, we must accept it. Nevertheless a way of escape was left open by a Viscount Dilhorne in that very case when he said [1970] 1 All ER 796 at 805 [1970] AC 583 at 611) : "....subsequent conduct by one party may give rise to an estopel."

So, here we have available to us in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted on it. Under the guise of estoppels we can prevent either party from going back on the interpretation they themselves gave to it."

It was furthermore observed :-

"If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

To us, the phrase of Latham CJ and Dixon J in the Australian Hough Court in Grundt v Great Boulder Pfy Gold Mines Ltd (1937)99CLR 641 the parties by their course of dealing adopted a conventional basis for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppels. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the inequitable to do so, having regard to dealings which have taken place between the parties. That is the principle on which we acted in Crabb v Arun District Council [1975] 3 All ER 865, [1976] Ch 179. It is particularly appropriate here where the judges differ as to what is the correct interpretation of the terms of the guarantee. The trial judge interpreted it one way. We interpret it in another way. It is only fair and just that the difference should be solved by the course of dealing, but the interpretation which the parties themselves put on it and on which they have conducted their affairs for years."

In Anson's Law of Contract 28th Edition, the learned author has, upon referring to the case of

Amalgamated Investment (Supra), stated as under :-

> "When the parties have acted in a transaction upon a common assumption (either of fact or law, whether due to mistake or misrepresentation) that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of the facts so assumed where it would be unjust and unconscionable to resile from the common assumption. There must be some mutually manifest conduct by the parties, which is based on a common but mistaken assumption which the parties have agreed on, and such agreement may be inferred from conduct or even from silence."
>
> To the same effect is the decision in Republic of India Vs. India Steamship Company Ltd., 1997 Vol. II, Weekly Law Reporter page 828.
>
> We, therefore, are of the opinion that the petitioner is entitled to the aforementioned relief."

In this case, however, there is no common assumption.

One party has asserted its right of refund not being an express condition but an implied one, whereas the other side has denied and disputed the same.

Yet again recently, in Hathway Cable & Datacom Ltd. vs. Neo Sports Broadcast Ltd. Petition No. 209(C) of 2008 disposed of on 14.12.2010 it was observed :

> "It may be true that even for the purpose of the arriving at a conclusion as to whether a contract has been entered into by and between the parties or not, the exchange of letters between them, their subsequent conduct would play some role.

The decisions of the Supreme Court of India as also other decisions which had been relied upon by Mr.Nasir Hussain also point out to the said fact. We may notice the same.

In ***Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.*** reported in (1966) 1 SCR 656, it has been held as follows:

"Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror: see Baroda Oil Cakes Traders' case1 and cases cited therein. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram."

It may be true that even for the purpose of arriving at a conclusion as to whether a contract had been entered into by and between the parties or not, the exchange of letters between them, their subsequent conduct would play a great role.

The English Common Law position more or less remains settled that evidence with respect to the conduct of the parties is generally inadmissible after a contract is made for interpreting the same. A few exceptions have been carved to this attitude of inadmissibility as for the purpose of determining the full terms of the contract, in the event of an allegation of estoppel by convention, when the contract is partly oral etc.
(See Carmichael v National Power Plc [1999] 1 WLR 2042

Ali v Lane, 2007 EWCA Civ 1532, CA.Kellogg Brown & Root Inc. v. Concordia Maritime AG [2006] EWHC 3358
Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84)

Kim Lewison, Q.C in his celebrated work "Interpretation of Contracts" has stated, with respect to interpretation of contracts by referring to the subsequent conduct of the parties, acknowledging the reluctance of the English Courts to generally refrain from looking at the subsequent conduct of the parties to interpret a written agreement as thus:

"The current English approach is not shared internationally. The Unidroit Principles for International Commercial Contracts state that in interpreting a contract, regard shall be had to all the circumstances including "any conduct of the parties subsequent to the conclusion of the contract". Likewise Principles of European Contract Law state that in interpreting a contract, regard must be had to "the conduct of the parties, even subsequent to the conclusion of the contract".
[……]
Even in some other common law jurisdictions, evidence of subsequent conduct is admissible"

In M/s Ushodaya Enterprise Ltd. vs. V. Gauthami Cable in Petition No.59(C) of 2010 also it has been observed that a Court of law is entitled to take into account the conduct of the parties.

However, the conduct of the parties must be clear and discernible from the material brought on record. It cannot be a matter of surmise.

We cannot assume as to how a contending party must have through about it.

[See an illustrative judgment of V.V.S. Rao, J. of Andhra Pradesh High Court in Dr. K. Subbaiah vs. C.N. Krishnamacharlu in Appeal Suit No.150 of 1991 disposed of 29.12.2010. See also Clear Media vs. Prasar Bharati Petition No.174(C) of 2010 disposed of on 21st April, 2011.]

Application of the legal principles

The aforementioned principles of law are required to be applied on fact of the present matter.

The core issue is the terms of an oral arrangement entered into by and between the parties hereto on or about 15.12.2003. No minute of meeting was drawn.

The parties are not ad idem so far as the terms of the said arrangement are concerned.

The background in which the said arrangement was required to be entered into is relevant. The need for the said arrangement arose because of the migration of petitioner to UASL whereby full mobility services could be provided. The BSNL admittedly had not implemented CDR based billing system although the same has been asserted by the petitioner in its petition. All calls were to be billed at higher rates.

The question is as to whether an extra amount was to be calculated on the basis of the inter circle calls or intra circles calls.

Contentions of the petitioner were:

> "As discussed with you today in the meeting on the above subject as an interim arrangement, till TRAI determination/Regulation on the above subject, following arrangement as proposed by BSNL is agreed by Reliance:
>
> 1. In SDCAs, where Reliance is handing over the calls originated by intercircle in Roamer at Local/Tandem POI (Trunk Group AB, Reliance will pay an IUC (ADC + Termination) of Rs.1.75 per minute to BSNL for all the calls handed over on this trunk group. (list of 18 such locations where Reliance MSC's have direct POIs with BSNL Tandem Exchange is attached)
>
> 2 In other SDCAs where Reliance is handing over the calls originated by intercircle in Roamer in the trunk group corresponding to > 200Km (Trunk Group AF) an IUC (ADC + Termination) of Rs.2.5 per minute will be paid by Reliance for all calls handed over on this trunk group.
>
> However, as has been agreed during the meeting, this shall be reconciled based on the CDR records and final settlement will be based on CDR reconciliation. The excess amount charged by BSNL shall be returned to Reliance for the above cases after reconciliation."

TRAI had issued instructions with regard to interconnection routing and numbering plan on 13.12.2003.

On that date the numbering scheme for full mobile subscribers with prefix 93 was also provided for in the following terms:

> "With reference to the License Agreement for various service areas, as per list enclosed, the undersigned is directed to convey:-
>
> (i) All subscribers availing full mobility service under UASL shall be shifted to the following numbering scheme within a period of 30 days w.e.f 1st January, 2004.
>
> Numbering scheme to be followed -93 XYZ ABCDE
>
> Where 93 is Access Level allocated on non-exclusive basis
>
> XYZ is the allocated MSC code in a designated service area,
>
> ABCDE is the five digit subscriber number.
>
> (ii) Details of MSC codes and Mobile Network Codes, to be used in different service areas are enclosed in Annexure-I.
>
> (iii) SDCA based linked numbering scheme will continue for Limited mobility subscriber.
>
> 2. The compliance should be reported within the stipulated period of 30 days w.e.f. 1.1.2004 to the Licensor as well as to the Telecom Regulatory Authority of India."

A grievance had been made regarding decentralization of the trunk group and in that view of the matter the agreement was entered into on 15.12.2003 contents whereof have been noticed by us.

The petitioner by a letter dated 11.12.2004, requested for reconciliation of accounts based on CDRS till the migration of its fully mobile subscribers with SDSA based numbering scheme to prefix 3 was achieved and furthermore asked for refund of the alleged excess IUC charges paid.

By a letter dated 10.4.2004, the respondent stated:

> "Kindly refer to your letter No.RIL/BSNL/03-04/-763 dated 11th February 2004 regarding above-mentioned subject. The arrangements being implemented in field units during the interim period, when M/s RIL have already started full mobile services but have yet to put in place necessary arrangements for routing of its calls and change the numbering scheme to level 93, have been prescribed on request from you and as per agreed terms. Once agreed and your fully mobile traffic accepted at POIs which are, otherwise, not meant for the fully mobile traffic now raising objections to it and comparing it with IUC payable by cellular operators is not correct and is against your own request made in this regard.
>
> 2. No refund of ADC, as already paid by M/s RIL as per agreed arrangements, is admissible and the same was, therefore, not conveyed in the instructions issued to BSNL field units in this regard. Further, the license of M/s RIL was amended on 14th Nov 2003 and M/s RIL had been continuing to offer full mobility to its mobile subscribers since then. M/s RIL has since been handing over roaming subscribers calls and therefore revised IUC has been rightfully charged from 14th Nov 2003. In calls and therefore revised IUC has been rightfully charged from 14th Nov 2003. In case it is stated by M/s RIL that this interim arrangement was agreed only on 15th Dec 2003, then, M/s RIL may kindly explain why action should not be taken under terms and conditions of the Interconnect Agreement for misuse of POIs by

handover of traffic by M/s RIL that was neither agreed nor prescribed at these POIs with BSNL.

3. It is further to inform you that as per prescribed IUC for locals calls, Rs.0.80 is payable for local calls by M/s RIL to BSNL. M/s RIL request for acceptance of same IUC for inter-circle in roamer calls also is neither acceptable nor was ever agreed to. M/s RIL on its own is handing over the inter circle in roamer calls to BSNL on same trunk group for locals calls due to the technical limitations of M/s RIL. M/s RIL should take POIs for its basic services from its ILT switches and for its fully mobile services on level 93 from its Gateway MSCs to BSNL TAXs so that such problems do not arise. Likewise, for near end handover, M/s RIL should take POIs from its ILT switches for its Basic Services and traffic from M/s RIL is being accepted by BSNL in same trunk group as for local calls due to technical limitation of M/s RIL."

4. Regarding handing over of terminating calls from intra circle in roamer calls at trunk group `DA' in place of trunk group `AE' necessary instructions have already been issued on 27th February, 2004.

A reconciliation was to take place but whether the same was for segregation of the inroamer calls or calls of roamers is the question.

It is not in dispute that the BSNL issued various circulars asking its field officers to act in terms thereof.

BSNL in its circular letter dated 5.2.2004 directed its field officers to the following effect:

"5. The Interconnect Usage Charge (IUC) as prescribed as above shall be applicable from the date of migration to Universal Access Service License by M/s Reliance Infocomm Ltd. i.e. 14th November 2003 till 31st January 2004. The arrears for this

intervening period shall, therefore, be collected by BSNL from M/s Reliance Infocomm Ltd."

The arrangement was, therefore, for the period 14.11.2003 till 31.1.2004. The petitioner raised no grievances thereabout initially. Although a contention has been raised that a higher amount was to be paid to respondent with effect from 15.12.2003 but admittedly higher IUC was payable with effect from 14.11.2003. Reconciliation was also to be required to be done in future but for the CDRs were to be maintained in respect of trunk group AB and AF. The circular letter dated 6.2.2004 also provided for reconciliation wherefor CDRs were to be maintained in respect of the calls to be handed over by petitioner to respondent at the trunk groups BC and BF.

In the said circular letter reference has been made to the new IUC. A sum of Rs.1.10 per minute for all types of calls were to be charged which were to be handed over in trunk group DC which is said to be a new trunk group. The same charges were also to be applied in respect of inter circle inroamer calls terminating the trunk group DA itself in the SDCAs.

We may notice that the petitioner in the meanwhile had been making simultaneous payments of all the bills while asking for refund only in respect of a few of them. It was expected of the petitioner to reiterate its stand taken in its letter dated 15.12.2003 in all its

subsequent letters. By its letter dated 10.4.2004 the BSNL refused to make any refund. The claim of refund was, thus, rejected.

The petitioner was reminded that the numbering scheme was to be changed to level 93. Technical limitations on the part of petitioner in the matter of maturing of the calls were also highlighted. The petitioner, however, insisted for issuance of refund guideline/ circulars, inter alia, on the premise that CDRs were to be maintained for all the calls on the trunk group DC/DF in IUC II and AB/AF in IUC I. The said request of petitioner was not acceded to by respondent in terms of its letter dated 2.6.2004.

The petitioner, however, yet again asked for refund of the excess amount relying upon its earlier letters as also the circulars of the respondent 5.2.2004 and 6.2.2004.

The petitioner reiterated its demand of refund by a letter dated 27.4.2006. On or about 25.4.2006 a demand was made for refund of a sum of Rs.8,11,00,937.

It also asked for a refund of a sum of Rs.2,28,10,804/- by its letter dated 27.6.2005. By a letter dated 7.3.2008 respondent stated as under:

> "4. The rates of IUC at which such type of calls are to be charged are also given in the above referred Circulars have been decided in consultation with M/s RCL and were agreed by them.

There are, thus, counter allegations that petitioner was a privy to the circulars.

What would be the nature of reconciliation is disputed. A party to a contract may enter into an agreement to pay an amount higher than the one prescribed by the TRAI. In any event undoubtedly, as envisaged under Section 11(1)(b) of the TRAI Act, 1997 the agreement in question was not an interconnection agreement.

The Supreme Court of India recently in Bharat Sanchar Nigam Ltd. vs. Reliance Communications Ltd. 2011 (1) SCC 394 noticed the numbering plan. [See also in Tata Teleservices Limited vs. Bharat Sanchar Nigam Limited & Ors. (2008) 10 SCC 556]. In BSNL (supra) also the Court noticed the obligations of the UASL licensees under the agreement holding:

> "37. BSNL receives ADC payments for international calls made to fixed numbers. These payments are made by either national long distance licensee(s) or international long distance licensee(s) that collects them. BSNL receives ADC payments for all international calls from cellular and limited mobility numbers. These payments are collected by ILDOs and given to BSNL. Similarly, ADC payments on calls from international roaming subscribers are collected by host service providers and paid to BSNL. ADC payments for international calls are higher than similar payments for national long distance or local calls. This has tempted some licensees to engage in ingenious schemes to avoid making ADC payments. One such scheme is masking.

> 38. Call masking takes place when a licensee deliberately alters the identity of an incoming international call before handing it over to another service provider at an interconnection point, i.e., POI. The international calling party's identity is obliterated (i.e. international CLI is wiped out) and the said international call is made to appear as it were from a domestic/ national number. This technique enables evasion of ADC payments at enhanced rates for international calls. Today, all private automated branch exchanges (PBX) are computerized.
>
> 39. It is important to note that a Caller ID (CID) is a signal. Most subscribers have a caller ID display unit at their residence to receiver caller ID signals which also indicates the nature of the call - whether it is local/ national or international. As stated, whenever a call for a mobile subscriber comes from outside the mobile network or vice-versa, the call is routed through a special kind of gateway switch which is called as GMSC. It serves as an interconnection between mobile switching centre and PSTN, which is a network. However, it is at the POI (point of interconnection) that the GMSC of the mobile network of UASL gets interconnected to the GMSC of BSNL by a facility of the interconnection seeker (which in this case happens to be Reliance)."

The national number plan has a great significance. It cannot be avoided. The petitioner could not avoid or evade the same. The arrangement was entered into at its instance.

It, therefore, was bound thereby.

Nothing has also been brought on record to show that the respondent was able to identify the details of calling party.

Sub Silentio Issue

Submissions of Mr. Chawla that the respondent must be held to have accepted the contention of the petitioner that refund of the excess amount paid was required to be made on reconciliation of CDR on the basis of the decision of Supreme Court of India in Ramji Dayawala (supra) and Hyderabad Municipal Corporation (supra) cannot be accepted.

Those two decisions were rendered in the fact situation obtaining therein. The question which fell for consideration before the Supreme Court of India related to the acceptance of a contract and not the interpretation thereof.

In Ramji Dayawala (supra), the Apex Court was considering the existence of a concluded contract vis-a-vis an arbitration agreement. It was a case of offer and acceptance and not involving an interpretation of contract.

In Hyderabad Municipal Corporation (supra) the question which arose for consideration was whether the respondent therein was entitled to any extra payment for the work done beyond the stipulated period of contract or was required to complete the work on the basis of the original rates as also the liability of the appellant therein.

None of these cases have any direct application to the fact of the present case.

Recently in Bharat Petroleum Corporation ltd. vs. The Great Eastern Shipping Co. Ltd. reported in (2008) 1 SCC 403, D.K. Jain, J., stated the law thus:

> "It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offerree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offerree's silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance – an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct."

The said doctrine would, therefore, apply not only by words but also by conduct which takes the form of a positive act. In this case, the conduct of the parties does not indicate any unanimity in the matter of the construction of the contract.

Estoppel/Order II Rule 2 Issue

Inroamer service is a special service. A person is required to avail the inroamer service when, in a situation as was obtaining at the relevant point of time when he goes out of the respective SDCAs of the licensee and enter into another SDCA area where the concerned licensee cannot provide for the said service. In one case a person going out of the SDCA may also make a local call.

Whether even for that call the highest maximum rate would be charged is the question.

The question as to whether the payment was to be made in the highest slab or not, in our opinion, may not be very relevant. The petitioner agreed to pay Rs.1.75 per minute for all the calls handed over on AB trunk group. The petitioner similarly agreed to pay for all calls handed over on the trunk group AF being for a distance of less than 200 kilometers. Highest slab under the IUC, however, is for more than 500 kilometers. The petitioner did not raise any grievance with regard thereto upto October, 2004.

It made all the payments. The respondent rejected the petitioner's claim of refund.

Could the petitioner in a case of this nature claim parity with other operators? The answer thereto must be rendered in the negative. Admittedly the arrangement in question was not an interconnection agreement so far as the mobile services are concerned. The contract between the parties provided for a special arrangement. It is a commercial contract. A party for obtaining special services may agree to pay special charges. If a party to a contract becomes entitled to the consideration specified therein, the doctrine of unjust enrichment will have no application.

Validity or otherwise of the respondent's letter dated 10.4.2004 and 2.6.2004 are not in question. The legality/validity of the bills were not challenged even in Petition No.166 of 2006. Payments

continued to be made under the said agreement till October-November, 2004.

The principle of `Estoppel' in the aforementioned situation will apply. The only ground on which the Petition No.166 of 2006 was filed related to the issue of limitation. The petitioner filed Miscellaneous Application No.18 of 2008 for an order of injunction on the ground that certain supplementary bills had been raised beyond the expiry of six months.

Rightly or wrongly the said contention of the petitioner has been rejected. No order of injunction was passed by this Tribunal in the said Miscellaneous Application.

The petitioner, however, had made some payments even before passing of the said order and made the entire payments on the basis thereof. It, therefore, was aware of its liabilities. The respondent rejected the claim of petitioner on 10.4.2004. The extra payments, if any, have been made from December, 2003.

In Petition No.166 of 2006 principally a declaration had been prayed for. No prayer of refund was made on the basis of the contentions raised before us. It is in that limited sense only that the principles akin to Order II Rule 2 of the Code of Civil Procedure and/or constructive res-judicata shall apply. The present petition is not based

on any subsequent cause of action. The petitioner itself has relied upon the earlier proceedings.

Interpretation of the terms agreed to by the parties in the aforementioned meeting dated 15.12.2003 was also not raised. The issue was not decided in that petition. The petitioner, therefore, in terms of the liberty granted could have confined its case only to the stand taken in the said proceeding.

Interpretation of Clause 7.3.1(iv)

In Petition No.166 of 2006, this Tribunal has held that having regard to the provisions of Section 28 of the Indian Contract Act, period of limitation for raising a bill cannot be six months.

Similar views have taken in Petition No.111 of 2007 Tata Teleservices Ltd. vs. Bharat Sanchar Nigam Ltd. disposed of on 11.2.2010.

Yet recently in Petition No.186 of 2010 M/s Tata Communications Ltd. vs. BSNL and another, disposed of on 27.1.2011, a similar view was taken.

Clause 7.3.1 of the interconnection agreement in this can have no application.

Limitation Issue

Petition No.166 of 2006 was filed in 25.5.2006. It was decided on 15.4.2010.

The present petition has been filed on 12.8.2010. The period of limitation for claiming the refund in terms of the Limitation Act would be three years.

Is the petitioner entitled to obtain the benefit of Section 14 of the Limitation Act, 1963? In our opinion it would be.

Section 14 speaks of not only of a suit but also other cause of like nature. The words must be read ejusdem generis. It must be construed liberally.

Explanation 3 appended to Section 14(2) of the Limitation Act gives us a clue with regard to the intention of legislature. [See India Electric Works Ltd. vs. James Mantosh & Anr. 1971 (1) SCC 24].

However, the said words must be relatable to the subject matter in issue.

In Shakti Tubes Limited through Director vs. State of Bihar & Ors. 2009(1) SCC 786 the Supreme Court of India, inter alia, held :

> "22. Section 14 of the Limitation Act speaks of prosecution of the proceedings in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. What would be the true purport of the words "other cause of a like nature"? The same must relate to the subject matter of the issue. A Three-Judge Bench of this Court had an

occasion to consider the same in Rameshwarlal v. Municipal Council, Tonk and Ors. (1996) 6 SCC 100 wherein it was held:

> "3. Normally for application of Section 14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and this Court, obviously pursued diligently and bona fide, needs to be excluded."

The said decision has been followed by the Supreme Court of India in J. Kumaradasan Nair & Anr. Vs. Iric Sohan & Ors. (2009) 12 SCC 175. [See also Ghasi Ram & Ors. Vs. Chait Ram Saini & Ors. 1998(6) SCC 200 and Deena (Dead) through LRS. vs. Bharat Singh (Dead)Through LRS & Ors. 2002 (6) SCC 336.]

It is not, however, correct to contend that plea of limitation could not have been raised by respondent.

In an original petition, this Tribunal having regard to Section 3 of the Limitation Act, 1963 was bound to apply the same, if it is otherwise applicable being a jurisdictional issue.

[See Petition No.211 of 2010 decided on 21.1.2010 (Reliance Communication vs. Bharat Sanchar Nigam Ltd.]

Repudiation Issue

Mr. Chawla has placed strong reliance on Pollucok and Mulla's Indian Contract and Specific Relief Acts, the relevant paragraph whereof reads as under:

> "The innocent party has an option to either accept the wrongful repudiation or to affirm its continuance. There is no third choice, as a sort of via media to affirm the contract and yet to be absolved from tendering further performance, unless and until the party who refused to perform obligations gives reasonable notice that he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of both parties and would deny the party who successfully sought to rescind the right to take advantage of any supervening circumstance which would justify him in declining to complete."

In this case, however, the contract has been worked out; payments have been made.

Whether any excess payment has been made is the only question. It is not a case where the respondent has rescinded the contract. The matter might have been different if the petitioner had refused to perform its part of the contract. It did not do so. It allowed the contract to be worked out. Having allowed the contract to be worked out and having made payments, petitioner cannot now be permitted to contend that it stood discharged from performing its

obligation to pay in terms of the arrangement by the reason of the breach of contract by the other party, it being an innocent party.

It had an option in relation thereto but it did not exercise the same. It did not repudiate the contract. It did not allege any fundamental breach of contract.

Reliefs prayed for in this petition

We have noticed the prayers made in the present petition heretobefore.

So far as the prayer A is concerned, no declaratory relief has been sought for. The petitioner does not question the validity of any supplementary bill in the said prayer.

Prayers B and C, however, are inter related. The respondent raised the supplementary bills beyond a period of three years.

According to petitioner it could not have done so and that too under the threats of disconnection which provision was existing only in the inter connection agreement, as it is accepted that the inter connection agreement will not apply in relation to the present arrangement.

The petitioner, however, has sought for refund of the excess amount only on the premise that it had made excess payments. Such excess payments, in the opinion of the Tribunal having not been made

as payments were made in terms of a special arrangement. The prayer of refund can be allowed provided in fact excess payment had been made and not because only a letter of disconnection has been issued.

We, therefore, are of the opinion that although respondent could not have threatened disconnection in terms of the agreement, no decree for refund can be passed only on that basis.

The contract in question is a commercial document. An undertaking to make payment had been made on a particular basis. It is expected that the parties have entered into a contract knowing fully well the implications thereof.

If the contention of the petitioner is accepted, the same would result in virtual nullification of a part of the contract as in terms thereof the petitioner must be held to be not liable to pay for the highest rate for all calls. If the petitioner was an innocent party, it could repudiate the entire contract. In such an event either the whole contract remains or stands repudiated. A party to a contract alleging fundamental breach cannot insist on performance of a part of the contract. It is bound to exercise its right of election.

If the subsequent conduct of the parties as has been urged by Mr. Chawla himself has any relevance, the same should be understood in the light of the circulars issued by respondent and not only on the ground that it did not reply to the petitioner's letter for about four

months. In fact the petitioner itself had raised protests in relation to the said circulars. In the aforementioned situation it was expected that it would have brought an action against the respondent immediately after the execution of the contract was over and/or the petitioner was able to put in place its own infrastructure. The petitioner had taken a conscious decision being commercial in nature that it would continue with the arrangement. It was aware that it was to make payments as was demanded by respondent.

It made payments some times with protest and some times even without protest.

It is, thus, difficult to accept the contention of petitioner that it could raise a definite claim for refund in 2010 and not in 2006. The petitioner had made payments from 15.12.2003 to November, 2004. The respondent refused to refund the so called excess amount in June, 2004.

Conclusion

We, therefore, are of the opinion:

(i) In view of the conduct of the parties, the petitioner is bound to pay for all the calls at the rate specified.

(ii) The CDRs were required to be maintained only for the purpose of any calculation error and not for the purpose of revision of rates after the calls were completed.

(iii) The bills of the respondent were not CDR based but on the basis of the data supplied by the petitioner itself which was maintaining the CDR based billing system.

This petition however, stricto sensu is not barred under the law of limitation.

(iv) The supplementary bills could have been raised but by reason thereof no disconnection could have been effected.

The respondent could have only filed a suit for recovery of the amount. The payments, however, having been made in terms of the order of this Tribunal in Petition No.166 of 2006 as also even prior to passing of the said order the impugned bills cannot be faulted. In the facts and circumstances of the case, petitioner is not entitled to a decree for refund of the amount.

(v) The claim of the petitioner is otherwise barred under the principle of `estoppel' and/or principles analogous to Order II Rule 2 of Code of Civil Procedure and/or Constructive Res Judicata.

For the reasons aforementioned, this petition is dismissed but in the facts and circumstances of this case there shall be no order of costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

July 22, 2011
`anu'/`ns'