TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated July 22, 2011

1. **Petition No.263 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

2. **Petition No.285 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

3. **Petition No.286 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

4. **Petition No.287 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

5. **Petition No.288 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

6. **Petition No.289 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

7. **Petition No.290 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

8. **Petition No.292 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

9. **Petition No.293 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

10. **Petition No.294 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

11. **Petition No.295 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

13. **Petition No.296 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

14. **Petition No.297 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...Respondent

15. **Petition No.298 of 2010**

Reliance Communications Ltd. ...Appellant

Vs.

Bharat Sanchar Nigam Limited ...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.Meet Malhotra, Senior Advocate with Mr. Navin Chawla & Ms. Shikha Sarin, Advocates
For Respondent	:	Mr.Maninder Singh, Senior Advocate with Mr. Tejveer Singh Bhatia & Mrs. Pratibha M. Singh, Advocates

J U D G M E N T

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

Introduction

Interpretation and/or application of Clause 7.3.1(iii) of the Interconnection Agreement entered into by and between the parties hereto on or about 1.11.2002 is in question in this petition.

The Petitioner's case

Pursuant to or in furtherance of the said interconnection agreement, the parties hereto used to raise bills on each other for the purpose of providing connectivity to the customers of the other party through their respective POIs. Indisputably, the respondent herein used to set off and/or net its bills from the bills issued by the petitioner.

By reason of a letter dated 6.12.2004, petitioner stated as under:

> "Dear Sir,
>
> Please refer to your demand Note No.N-1457/16 dated 21st May 2004 amounting to Rs.5,87,410 towards Cable Damage Charges.
>
> Keeping in view our on going business relationships & to ensure that the customer gets the required services including the capability to call BSNL subscriber & vice versa, we under duress & protest agree that the said amount may be adjusted against the payables from your side. We would like to inform you that Rs.53.03 Lacs is outstanding from your side towards IUC invoices raised by us.
> Kindly let us know if you have any reservations in this respect."

Prior thereto by a letter dated 9.11.2004, the petitioner requested the General Manager of respondent not to disconnect its POIs, stating as under:

> "Subject: Non-Acceptance of IUC Payment for the month of Sep 04
>
> Dear Sir,
>
> Please refer to your Letter No. AO (COMP)/RWR/Reliance dated 29th October, 2004 regarding disconnection of Local and NLD POI at Narnual and Rewari on Account of Non Payment of IUC Bill for the month of Sep. 04.
>
> We would like to refer to our previous letters dated 28th October, 2004 and 4th November, 2004 wherein we had tried to pay the IUC amount to you. Further we wish to inform you that Rs.13.03 Lacs is still lying outstanding from your side which is payable towards IUC Bills raised by us against BSNL's Rewari for the period May 03 to Sept 04.

> You may adjust the Cable Damage Charges from our receivable.
>
> In lieu of above we request you not to disconnect our POIs at Rewari and Narnaul.
>
> We shall be thankful for you co-operation."

By a letter dated 8.12.2004 while annexing the demand drafts, the details whereof were specified therein, the petitioner stated :

> "Keeping in view our on going business relationships & to ensure that the customers get the required services including the capability to call BSNL subscriber & vice versa we under protest agree with the following arrangement:
>
> 1. Payment of Rs.1.50 lacs vide DD No.365686 dated 1st December, 2004.
>
> 2. Adjustment of balance amount of Rs.7.575 Lacs against the IUC invoices raised by us and are pending towards you for payment .
>
> Kindly let us know if you have any reservations in this respect."

Indisputably, the petitioner filed a petition before this Tribunal questioning the interpretation of various clauses of interconnection agreements entered into by and between it and the respondent, on the premise that different circles of respondent had been interpreting them differently.

The said Petition was registered as Petition No.166 of 2006. It was filed some time in May, 2006.

One of the issues raised therein reads as under:

> "(G) Alleged violation of clause 7.3.1(iii) of Interconnect Agreement

This Tribunal in its judgment while disposing of the said petition on 15.4.2010 noticed as under:

> "Issue –G relates to violation of clause 7.3.1(iii) of the Interconnect Agreement, which is as under:
>
> > "(iii) All payments due to BSNL will be paid without set off (netting) counter claim and shall be free and clear of any withholding or deductions."

The Tribunal, however, refused to answer the said issue, observing:

> "Issue G
>
> The validity of the provisions of clause 7.3.2(iii) being not in question, we are unable to decide the said issue and grant appropriate relief."

We may notice that a typographical error had crept therein in as much as in stead and in place of Clause 7.3.1., 7.3.2 has been mentioned. Liberty, however, was granted to the petitioner to file separate petition(s) in the following terms:

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

We would consider the effect thereof a little later.

The petitioner contends that the aforementioned clause permitting BSNL to set off its dues from those of the private operators must be held to be bad in law, and/or, in any event it having not been expressly conferred any power of set off (netting or counter claim), the amount realized by it under threats of disconnection must be directed to be refunded.

Indisputably a Miscellaneous Application was filed in the said Petition No.166 of 2006 for stay of the bills raised by the respondent from January, 2007 onwards.

However, by reason of an order dated 22.2.2006, the same was rejected.

According to the petitioner, it had to make payments of the bills raised by respondent thereafter on the threat of disconnection.

Reply of the respondent

The respondent in its reply, however, contends:-

1. This petition is barred under the principles of Res Judicata and/or Order II Rule 2 of the Code of Civil Procedure.
2. This petition is barred by limitation
3. The petitioner itself having volunteered to get its dues deducted from its pending bills is estopped and precluded from raising any contention in relation thereto.
4. The payments having been made in the year 2005 and the petitioner having not raised any grievances with regard to

validity of the clause is estopped and precluded from doing so.

5. The petitioner is bound to discharge its fiscal liabilities in terms of the interconnection agreement which is a composite document.
6. The impugned clause clearly empowered the respondent to set off and netting which is not available to petitioner and it itself having made requests for adjustments.

Submissions

Mr. Meet Malhotra, learned Senior Counsel appearing on behalf of the petitioner, would urge:

A) From a perusal of the impugned provision of the agreement namely clause 7.3.1. (iii) it would be evident that by reason thereof the respondent did not derive any contractual right to raise any claim by way of set off or counter claim.

B) The respondent has committed an illegality in invoking the said clause not only by netting from the bills of petitioner issued in terms of the interconnection agreement but also from those arising out of other licenses.

C) The respondent itself made an unequivocal admission in its letter dated 6.3.2006 that the respondent has no power to make any set off and/or counter claim from the bills of

the petitioner and in that view of the matter it is estopped and precluded from raising any contention contrary thereto.

D) In any view of the matter, if the respondent is found to have the authority in respect thereof having regard to the essence of any level playing field between the parties to the agreement, cannot be given effect to.

E) The respondent has committed an illegality in directing its field officers to effect `set off' by reason of its internal circulars dated 6.10.2003 and others.

F) Having regard to the liberty granted by this Tribunal in the aforementioned Petition No.166 of 2006, the question of these petitions being barred under the principles of Order II Rule 2 of the Code of Civil Procedure or Res Judicata does not and cannot arise.

G) The petitioner having issued the letters dated 6.12.2004, 9.11.2004 and 8.12.2004 under duress/coercion and/or under protest, it cannot be said that it had voluntarily agreed to get the dues of the respondent deducted from its bills.

H) This petition is not barred under the law of limitation having regard to the fact that it had earlier filed Petition No.166 of 2006 in May 2006 and judgment therein was delivered on 15.4.2010 and this petition having been filed

in August, 2010 must be held to be within the period of limitation.

I) The respondent being a `State' within the meaning of Article 12 of Constitution of India cannot act arbitrarily and the deductions having been effected capriciously, the same must be held to be violative of the `Equality Clause' contained in Article 14 of the Constitution of India.

Mr. Maninder Singh, learned Senior Counsel appearing on behalf of the respondent, on the other hand, urged:-

(1) The petitioner having not raised any argument in the alternative so far as prayers A and C are concerned, this petition must be held to be not maintainable.

(2) The interconnection agreement having been entered into with effect from November, 2003 and Petition No.166 of 2006 having been filed in May, 2006, the prayer of the petitioner so far as validity of the aforementioned clause is concerned even the earlier petition was barred by limitation and, thus, by reason of grant of leave to file a separate petition, the period of limitation has not been and could not be extended.

(3) The petitioner having not questioned the validity and/or constitutionality of the said clause in Petition No.166 of 2006, prayer C must be held to be barred under the

principles of Order II Rule 2 Code of Civil Procedure as also the principles of Constructive Res Judicata.

Strong reliance on this behalf has been placed on *Dadu Dayalu Mahasabha, Jaipur (Trust) vs. Mahant Ram Niwas & Another* (2008) 11 SCC 753, and *Friends Cooperative Housing Society Limited duly registered under the Maharashtra Cooperative Societies Act, 1960 & Ors. etc. vs. The Nagpur Improvement Trust through its Chairman, The State of Maharashtra through its Secretary, Department of Urban Land Development, Matru Seva Sangh a society registered under the Bombay Public Trusts Act through its Secretary and Sati Mata Shikshan Sanstha through its Secretary & Ors. etc. etc.* 2008 (5) All Maharashtra High Court Reports 815 = (2008)11 Bombay Law Reports 3204.

(4) In any view of the matter, having regard to the commercial nature of the contract, it must be held that the impugned clause being one of the various terms and conditions as inserted/amended by `Addendum' issued from time to time and the same having been accepted by both the parties, the validity thereof cannot be allowed to be questioned when the contract has been worked out.

(5) The petitioner, in law, could have questioned the validity of contract only immediately after entering into the contract under protest as has been opined by this Tribunal in *Star India Pvt. Ltd vs. Indus Media & Communications Ltd.,* Petition No.44(C) of 2004 disposed of on 17.1.2006.

(6) In a case of this nature, the principles of `level playing field' have no application as the respondent as a Public Sector Undertaking and having been dealing with the public money must have adequate protection in relation thereto and moreover as the manner of functioning of a private sector essentially differs from that of a public sector; on that ground alone the validity of clause 7.3.1(iii) must be upheld.

(7) The respondent having not only issued various circular letters but also a letter to the petitioner herein on 22.2.2006, the letter dated 6.3.2006 must be held to have been issued by mistake.

The impugned clause

We have noticed heretobefore Clause 7.3.1(iii).

We may, however, notice Clause 7.2.2 also at this stage:

> "Bills for telecom resources and other support facilities, such as connection charges, charges for leased facilities and charges for enhancement of

features, if availed by the BSO will be issued by BSNL and paid by the BSO at the intervals specified in this agreement."

Interpretation of a contract – Legal Principles

It is now a well settled principle of law that a contract has to be read in its entirety. It is also well settled that unless there exists an anomaly or absurdity, a literal meaning to the words used in a contact should be given. However, it should also be just and proper.

The submission of Mr. Malhotra that on a literal meaning assigned to clause 7.3.1(iii) it would appear that respondent had no power of set off cannot be accepted.

The parties hereto for one reason or the other agreed for a negative covenant so far as the petitioner is concerned.

If both the parties could not do it and/or in other words by reason of such prohibition, the petitioner was not prohibited from doing the same, it was not necessary for them to use the language in negative terms. By necessary implication the respondent must be held to have the power of `set off'/netting.

The intention of the makers of the document must be found out from the reading of the contract and/or conduct of the parties.

However, such a power, in our opinion, cannot extend to `netting' or `set off' from other agreements as no such power has been conferred on the respondent.

In that view of the matter no set off/netting may be held to be permissible in relation to a bill which has not been raised out of the contract.

The Agreement

The fact that the interconnection agreement is a commercial document is not in controversy. Such interconnection agreement was required to be entered into having regard to the mandate given in that behalf by reason of the terms of license itself.

The Telecom Regulatory Authority of India, the independent regulator constituted under the provisions of Telecom Regulatory Authority of India Act, 1997 (The 1997 Act), has also been empowered to make Regulations prescribing the terms of interconnection agreements in terms of Section 11(1)(b) thereof.

The respondent in the year 2002 was a basic service operator. It had been granted license in that capacity.

Clause 7.2 of the interconnect agreement dated 25.1.2002 provides for the manner in which the bills for excess charges and charges towards telecom resources and other support facilities were to be issued.

Clause 7.3.1 provides for terms of payment in relation whereto both the parties had agreed that all payments due to respondent would be paid without netting or counter claim.

Conduct of the Parties

How the parties have understood the meaning of the terms of the contract may, inter alia, have to be considered from their conduct.

Before, however, we refer to the various letters and circulars relevant for our purpose, we may notice two charts showing the manner in which payments were made to respondent by petitioner in respect whereof the prayer for refund has been made.

"Part `A'

Amount of Cable damages adjusted by BSNL various circles against IUC amount payable to RCOM as on 13th May 2006

Name of the circle	Amount of cable damages adjusted by BSNL
Andhra Pradesh Chennai	Rs.1371665 Rs.925218
Delhi	Rs.1798440
Gujarat	Rs.6949415
Haryana	Rs.4710954
Kerala	Rs.14754030

Madhya Pradesh	Rs.1723900
Maharashtra	Rs.15821334
Orissa	Rs.849725
Punjab	Rs.4393183
Rajasthan	Rs.429509
Tamil Nadu	Rs.1156125
Tamil Nadu	Rs.1149000
Total	**Rs.56034036**

Part `B'

Amount of cable damages adjusted by BSNL's various circles against IUC amount payable to RCOM after May 2006

Name of the circle	Cable damages adjusted by BSNL approval not yet received	Recovered by BSNL out of our IUC revenue in traffic month
Andhra Pradesh	Rs.150000	Jun 09
Bihar	Rs.750000	Jul 09
Gujarat	Rs.450000	Jun 09
Kerala	Rs.94500	Feb 09
Kerala	Rs.582500	Jul 09
Orissa	Rs.450000	Jun 07
Rajasthan	Rs.750000	Sep 09

Rajasthan	Rs.150000	Oct 09
Tamil Nadu	Rs.658000	Oct 07
Tamil Nadu	Rs.586500	Dec 07
Tamil Nadu	Rs.320871	Mar 08
Tamil Nadu	Rs.53000	Feb 09
UP(E)	Rs.300000	May 08
UP(E)	Rs.2400000	Jan 08
UP(E)	Rs.450000	Jul 08
UP(E)	Rs.1200000	Jan 09
UP(E)	Rs.300000	Apr 09
UP(E)	Rs.1672986	Aug 09
UP(E)	Rs.150000	Dec 09
UP(W)	Rs.600000	Mar 09
UP(W)	Rs.2250000	Sep 09
TOTAL	Rs.14318357	

The Circulars/Correspondences

The respondent herein admittedly had issued various circular letters. We may notice some of them:

"No. 110-7/2002-RegIN.Dated 13th April 2004

To

The Chief General Manager, Telecom,
ALL BSNL Telecom Circles,
Metro Districts/Maintenance Regions

CIRCULAR

Sub: Recovery of Cable Damage Charges.

It has been brought to the notice of this office by some of the field units that huge outstanding amount is to be recovered from by various Private Telcom Service Providers due to damage of underground cables of BSNL by them during their U.G. cable/OFC cable laying works. Due to cable cuts done on various occasions recoveries of these charges have been put into dispute by the operators due to one or other reasons. Field units have not been able to link this claim with commissioning of various POIs due to non-linking of cable cuts claims with new POI, had to link these charges with the charges of augmentation of POIs only. Since the operators had commissioned POIs at same locations with sufficient capacity at first stage. They do not need augmentation of POIs in the coming 2 to 3 years. This way BSNL is losing money for years together when the BSNL has already spent money on repairing of u g cables.

The case has been examined in the BSNL Corporate Office and it has been decided that we may club cable damage charges with Interconnect Usage Charge (IUC) which is to be recovered from concerned operator. This cable damage charge is to be linked with IUC bill after 60 days in case of non-payment of these charges by private operator. However provisioning of new POI shall continue to be delinked with cable damage charges.

SD/- 13.04.04
(Shiv Prasad)
Asstt. Director General (RegIn.E)"

In a letter addressed to the petitioner, the respondent, inter alia, stated:

Mr. Manoj Joshi, Date: 22/2/06

IUC Coordinator, MH,
Reliance Inforcomm Ltd.,
Pune.

Sub.: Settlement of IUC dues- Reply thereof.

Dear Sir,

Please refer to the Letter No.RIC/BSNL/156 dated 28/1/06. The para-wise reply is given hereunder:-

.....

Para 4:

For payment in respect of cable damage or infrastructure charges billed by SSA's, since it is an amount due from operators, the same may be adjusted from any outstanding dues payable by the operators, no matter what is the identity of the charge billed, hence SSA's shall continue adjusting amounts due from non-IUC payment from IUC PAYMENTS.

.....

Hope this letter will sufficiently answer most of your queries put up to BSNL. Kindly arrange to make payments for amounts mentioned in Annexure "A".

Warm regards,
Deputy General Manager (Finance)"

Immediately thereafter, however, on or about 6.3.2006 the respondents issued a letter to the petitioner, the relevant part whereof would be noticed a little later.

A circular letter was issued on 6.10.2003. It reads as under:

"CIRCULAR

Subject: Damage of Copper Cable of BSNL by

external agencies including the private telecom service operators.

Kindly refer to instructions issued by BSNL Corporate office vide Circular No.110-7/2002-RegIn dated 6.1.2003 prescribing the damage charges to be claimed from external agencies including private telecom service operators as compensation in case of damage of Optical Fibre Cable of BSNL.

2. Now, the copper cable damage charges to be recovered from various external agencies including private telecom service providers in case of damage of BSNL copper cables have also been worked out for uniform implementation.

3. It has been decided that for copper cables for size up to 20 pairs we may charge copper cable damage charges @ Rs.7,500/- for 50 pair and 100 pair cables we may charge @ Rs.10,000/-, for 200 and 400 pair cable @ Rs.20,000/-, for 800 pair cable @ Rs.40,000/- and for cables of size more than 800 pairs @ Rs.75,000/- per copper cable damage per occasion irrespective of the location of the copper cable.

4. It is reiterated that we may club these cable damage charge dues with recovery of access charges and augmentation of POIs from private telecom service providers rather than initial provisioning of POIs.

(Mahipal Singh)
Jt. DDG (RegIN-I)
6th October 2003"

Yet again in the circular letter dated 31.10.2003, it was stated:

"CIRCULAR

Sub: Recovery of OFC and Copper Cable Damage Charge.

Queries are being received from various Telecom circles regarding recovery of Cable Damage Charges (OFC and Copper) from Private Telcom Operator.

2. In this regard it is clarified that instructions issued vide this office letter No.110-7/2002-RegIn dt. 16.01.2003, 06.10.2003 and 22.10.200 are applicable for recovery of charges from all Pvt. Operators i.e. NLDOs/ILDOs/BSOs/CMTSs etc. All pending Cable Damages Charge Cases may be settled at the rates prescribed vide above referred letters. Cases that have already been settled by payment as per Demand Notes raised by BSNL need not be reopened.

3. It is reiterated that cable damage charge dues may be clubbed with recovery of access charges and augmentation of POIs from private telecom service providers (i.e. NLDOs/ILDOs/BSIs/CMTSs) rather than initial provisioning of POIs.

(P.C. Tewari)
Asstt. Director General (Regulations-E)"

We may also notice the Circular Letter dated 13.4.2004.

"CIRCULAR

Sub: Recovery of Cable Damage Charges.

It has been brought to the notice of this office by some of the field units that huge outstanding amount is to be recovered from by various Private Telecom Service Providers due to damage of underground cables of BSNL by them during their U.G. cable/OFC cable laying works. Due to cable cuts done on various occasions recoveries of these charges have been put into dispute by the operators due to one or other reasons. Field units have not been able to link

this claim with commissioning of various POIs due to non-linking of cable cuts claims with new POI, had to link these charges with the charges of augmentation of POIs only. Since the operators had commissioned POIs at same locations with sufficient capacity at first stage. They do not need augmentation of POIs in the coming 2 to 3 years. This way BSNL is loosing money for years together when the BSNL has already spent money on repairing of u g cables.

The case has been examined in the BSNL Corporate Office and it has been decided that we may club cable damage charges with Interconnect Usage Charge (IUC) which is to be recovered from concerned operator. This cable damage charge is to be linked with IUC bill after 60 days in case of non-payment of thee charges by private operator. However provisioning of new POI shall continue to be delinked with cable damage charges.

SD/- 13.04.04
(Shiv Prasad)
Asstt. Director General (RegIn.E)"

In another circular letter being dated 29.11.2005, it was stated:

"Subject: Recovery of Cable Damage Charges.

Please refer to this office letter of even number dated 13th April, 2004 wherein it was prescribed to club cable damage charges with the Interconnection Usage Charge (IUC) bills, which are to be recovered from the concerned private operator. It was further intimated that this cable damage charge is to be linked with IUC bill after 60 days in case of non-payment of these charges by the private operator. However, provisioning of new POIs shall continue to be de-linked with cable damage charges.

2. Some private operators like M/s Reliance Infocomm Ltd. (RIL) have represented that cable damage issues should not be clubbed with the IUC

demand notes since sometimes delay has been observed in field units of BSNL in resolution of disputes of such cases of cable damage.

3. The matter has been examined and it is intimated that the above mentioned instructions issued vide this office letter of even number dated 13th April, 2004 shall continue. However, field units are requested to expedite the settlement of cable damage disputes by formation of Committees in field units by CGMT.

(Mahipal Singh)
Joint DDG (Regulation-I)
29th Novemnber 2005"

The Earlier Proceeding

We may at this stage consider the effect of the proceedings initiated by the petitioner in the year 2006 being Petition No.166 of 2006.

The relevant pleadings in the said petition so far as the aforementioned Clause is concerned read as under:

"24. Clause 7.3.1(iii) of the Interconnect Agreement provides that the payments of the IUC Charges due to the BSNL shall be paid by the Petitioners without set off (netting) or counter claim and shall be free and clear of any withholding or deduction. The Clause 7.3.1(iii) is set out as below:

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

While the above Clause refers to payments to BSNL without setting off, however, the same principle is applicable to the IUC payments payable to the petitioners also. This was clarified

by the Respondents by their letter no.420-10/2005-RegIn. Dated 6.3.06. The said circular of BSNL dt. 6.3.06 is annexed herewith and marked as Annexure A-27.

The relevant para of the letter is set out as under:

> 4. There are no instructions of BSNL Corporate Office to adjust any of the pending dues of private operators in the payment to be made by BSNL to the concerned private operator. In fact, Interconnection Agreement also refers to the principle of making payments without netting the other dues. Instructions have also been issued by BSNL Corporate Office not to net the IUC payment of BSNL and private operators. Similarly, the dues regarding cable damages, passive link charges or various interest payments are also not be netted with the payment to be made by BSNL to private operators."

It is clear from the above that the BSNL Head Quarter has rightly referred to the principle of making payments to the private operators like the petitioners without netting the other dues and the BSNL Head Quarters had not issued any instructions to their field offices for adjusting any of the pending dues to the private operators for the payments to be made by the respondents to the private operators including the petitioner."

No averment was made in the said petition questioning the validity or otherwise of Clause 7.3.1.(iii) being unconstitutional or otherwise.

Mr. Malhotra would contend that in Petition No.166 of 2006 the petitioner did not challenge the validity of the clause in question in view of the circular letter of the respondent dated 6.3.2006

issued by its Headquarters of the respondent wherein it was clearly admitted that the respondent had no power to set off the amount.

It is difficult to agree with learned counsel. The respondent before issuance of the said letter had issued various circulars taking a different stand. It insisted on its right of set off. The said circular letter in fact for reasons best known to the issuing authority failed to notice the earlier circulars which, as noticed heretobefore, directed the field officers to club the IUC bills with the cable damage charges. The petitioner despite the same did not question the validity of the said clause.

It is, moreover, not correct to say as has been urged by Mr. Malhotra that probably for the said reason this Tribunal had not decided the said issue.

With a view to appreciate the said contention we may notice the prayers made in the said petition

Prayers 7 and 13 of the said petition read as under:

> "7. declare and direct the respondents to following their clarifications dated 6.3.06 refund the amount deducted in violation of this clarification of the respondent headquarters amounting to Rs.6.82 crores as per the details in annexure A28;"
>
> 13….declare and direct the respondents to abide by its clarificatory letter dt. 6.3.06 and refrain from setting off/netting the IUC payments of the Petitioners from the alleged dues of the Respondents and make the payments to the petitioners which have been deducted on account of various reasons set out in the petition……"

According to Mr. Malhotra the amount of Rs.6.82 crores swelled to Rs.8,36,36,939/-, as some deductions were made by the respondent in the year 2009.

Issue (g) framed in the earlier proceeding related to the said prayer.

It was contended:

> "(xvii) The provisions of clause 7.3.2(iii) does not provide for a level playing field as also the doctrine of reciprocity in so far as the respondent had been deducting and/outstanding various charges including damages which are disputed amounts and even without reconciliation of the account as also for the amount for the bills which had been raised after six months."

In Petition No.166 of 2006, the only contention raised related to interpretation of Clause 7.3.1(iii) in the light of the said circular letter dated 6.3.2006.

We have noticed heretobefore the pleadings of the petitioner in Petition No.166 of 2006. While granting liberty, this Tribunal did not grant any liberty to challenge the constitutionality of the said provision. Even otherwise as will be noticed hereinafter the same was not permissible in law.

Only the question of interpretation of the said Clause was debated but not decided in absence of requisite pleadings/materials.

At page 43 of the judgment dated 15.4.2010, clause 7.3.1(iii) has been noticed.

The issue with regard to the level playing field was dealt with therein noticing that no relief could be claimed to the effect that the contract between the parties were a one sided one and for that matter some of the contractual provisions were ultra vires Article 14 of the Constitution of India.

Submissions of Mr. Bhat, the learned senior counsel appearing for the petitioner in that case, inter alia, was that the terms of contract were clearly unjust and the respondent should be directed to follow reciprocity.

However, it was held:

> "It was, thus, expected that if a party to a contract thought that a provision of a contract is unjust or unconscionable, it should have approached a court of law having competent jurisdiction to ventilate its grievances as expeditiously as possible. It could even do so after the contract was entered into.
>
> If a plea of constitutionality is raised, requisite grounds therefor were also required to be raised.
>
> If it is contended that the contact is hit by Section 23 of the Indian Contract Act, the requisite plea as envisaged thereunder were required to be raised.
>
> A court of law does not declare a contractual provision ultra vires on mere asking of the parties and that too without any pleadings and without there any relief having specifically been sought therefore.

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

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

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

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

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

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

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

In our opinion the petitioner should have initiated a proceeding in this behalf with utmost

expedition. It is not the case of the respondent that no cause of action arose therefor immediately after 2002 when the interconnect agreements were entered into.

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

It was in the aforementioned situation this Tribunal, upon considering the decision of the Supreme Court of India in Celluar Operators Association of India & Ors. vs. Union of India & Ors. 2003(3) SCC 186 and Reliance energy vs. Maharashtra State Road Development Corporation Ltd 2007 (8) SCC 1, held :

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

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

It is on the aforementioned context it was opined:

"Issue 'G'

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

Liberty to initiate the proceeding was granted not in respect of issue (g) but only in respect of issues (e) and (i).

Judgment – Reading of

A judgment as it is well known must be read in its entirety.

A bare perusal of the aforementioned judgment would clearly go to establish that for all intent and purpose, the contention of the petitioner had been rejected.

If they had not been granted any relief so far as the validity of the clause in question is concerned, by reason of a subsequent petition the lacunae cannot be allowed to be filled up.

The petitioner in fact as has been noticed in the said judgment dated 15.4.2010 could have and in fact should have questioned the validity of the agreement immediately after entering into the said agreement. If it failed and/or neglected to do so, it must thank itself therefore.

This has been so held by this Tribunal in Star India P. Ltd. vs. Indusind Media and Communications Ltd. Petition No.44(C) of 2004 disposed of on 17.1.2006 in the following terms:

> "We do not find much difficulty in deciding this issue. The broadcaster is the owner of the signals. If any of the other service providers seeks his signals, normally it should be on agreed terms. The right to propose the terms is with the seller but this right is regulated by the Interconnect Regulations which mandates the owner of the signals to supply signals on a "must provide" basis and on reasonable terms. At the

same time, the Regulations governing the subscription agreement require a written agreement being signed before the supply of signals. On a perusal of these regulations we are of the opinion that seeker of the signal must negotiate with the supplier of signals and if such negotiations fail he should approach this Tribunal for redressal of his grievances. In such cases if the seeker of signals wants immediate signals or his current signals not to be disrupted, it can always pray for an interim arrangement being made by this Tribunal and the Tribunal may in a given case protect the interest of both the parties by making suitable interim orders.

In the above view, we hold in the instant case, IMCL being the seeker of the signals, if the terms proposed are not acceptable on grounds of unreasonableness it may challenge the same and in a petition so challenging it, may seek such interim order as it may think necessary.

If this procedure is not followed it is likely that many a service provider who is receiving signals, would by virtue of an interim order made by this Tribunal or other forums, in one or other earlier case, may refuse the terms of fresh agreements as and when due and can continue to receive signals under those interim orders.

We will now advert to the last argument of the learned counsel for the respondent whereby it is contended that now that the matter is before this Tribunal and the draft agreements proposed by Star is on file as also the grounds of attack by IMCL to some of the terms of the said agreement, this Tribunal should embark upon an enquiry as to the validity of the terms of the agreement in this petition itself.

We cannot accede to the above request. If a party is aggrieved by any one of the actions of the other party, the aggrieved party should approach this Tribunal based on that cause of action. May be in some exceptional case and on certain set of facts, to avoid multiplicity of

> proceedings this Tribunal if it thinks fit and convenient and in the interest of justice, may embark upon such an exercise. But in the present case, we are not satisfied that such an extraordinary procedure should be adopted by this Tribunal by holding an enquiry in a petition where the petitioner has not challenged the terms of the agreement, thereby converting this petition as that of IMCL's petition to grant it relief in a petition filed by Star. We think on the facts of this case adopting a procedure suggested by IMCL would only send wrong signals to the litigants."
>
> (Emphasis supplied)

Legal Questions

Two questions, thus, arise for our consideration, viz.

(i) Whether it is impermissible for the petitioner to re-agitate the issue raised by it in the earlier proceedings and;

(ii) Whether challenge to the validity/applicability of Clause 7.3.1(iii) is barred by limitation.

Deductions

We may notice that according to respondent, withholding of a part of the bill by way of `netting' really was started by petitioner herein.

Our attention in this regard has been drawn to paragraphs 16 and 18 of the reply by the respondent, from a perusal whereof it would appear that amongst others a specific contention had been

raised that from different bills petitioner had withheld the payment of Rs.2.81 crores.

The petitioner, however, in its rejoinder denied and disputed the same stating that it was the other way round.

We may, therefore, consider the factual aspect of the matter.

For the aforementioned purpose it must be noticed that petitioner itself in the petition has brought out a chart which is at pages 389 and 390 of the paper book.

By reason of a letter dated 23.11.2005 the respondent stated as under:

> "Sub: Payment for August & September, 2005
> Invoice
>
> Please acknowledge the receipt of cheque no.382774 (SBI, Main Branch, Mumbai) for Rs.2,65,86,448/- (Rupees Two Crore Sixty Five Lakhs Eighty Six Thousand Four Hundred Forty Eight only) dated 22.11.05 against payment of IUC for August to September, 2005. The details are as below:
>
> | | |
> |---|---|
> | Gross Amount Payable | 2,81,66,594/- |
> | Less TDS | 15,80,146/- |
> | Net Paid | 2,65,86,448/- |
>
> You are requested to send us the acknowledgement as early as possible. The dispute details are attached herewith."

The said chart together with the said letter reads as under:

Particular	July -2005			August- 205			September-205		
	BSO	UALS	NLD	BSO	UALS	NLD	BSO	UALS	NLD
Amount raised by BSNL	30536312	6861242	30933597	32551858	7004916	28248628	38103884	8889478	34312916
Amount paid by Replace	30356118	676845	26888191	31521552	6957809	25483778	32794800	6884847	27548389
Outstanding	180194	-17003	4065486	1140308	47109	2752850	5308764	14031	6783527
Month-wise total	4228657			3940256			12087122		
Total outstanding	20256044								

	BSO-LEX-TAX		UASL	BSO-LEX-TAX		UASL	BSO-LEX-TAX		UASL
Amount raised by Reliance as per 1/0-1.2.4	1883527	1858152	13705743	2043112	2032274	14013279	1996356	1874273	13689910
Total	3839679 (as per 2/C)		13705743 (as per 2/C-3)	4075386 (as per 6/C-1)		14013273 (as per 6/C-2)	3970528 (as per 6/C-3)		13689910 (AS per 6/c-4)
Vasiation ***ariatior clause given (as per 2/C and 2/c-3)	349109.76		414961.48	258765.65		14452.06	195846.34		20878.52

Amount payable (as per clause 5.1.2.& 5.1.3 of Procedure order Ver 1 attached herewith)	3493575.2 (A)	13290781.52 (B)	3816620.3 (C)	13889220.32 (D)	3774783.37 (E)	13668231.18 (F)
Amount already paid	3490578.2					
Amount payable rounded off	13280781.3		1768781.3		17444014.65	
	13280782.0		17687841.0		17444015.00	
Total payable	48422838					
ADC Dues Respondent receivable (as per & / c-3	165004					

Net payable after withholding the dispute amount of BSNL invoice at A from B (B-A)

From a bare perusal of the said chart, it would clearly appear that the petitioner withheld sums of Rs.1,80,194/-, Rs.1,14,308/- and Rs.53,08,764 totaling a sum of Rs.2,02,56,044/- from the payment of the IUC bills.

The total amount payable to respondent was Rs.4,84,22,838/-. The petitioner, therefore, deducted the said payment from the IUC bills of respondent and paid the balance sum of Rs.2,81,65,594/-.

Mr. Malhotra, however, would submit that the aforementioned sum of Rs.2,02,56,044/- was a disputed one, which could be withheld in terms of clause 7.6 of the interconnection agreement.

We may notice the said provision:

> "7.6 SETTLEMENT OF DISPUTES REGARDING WRONG/EXCESS BILLING:
>
> 7.6.0 The Bills issued by BSNL based on bulk record shall be final. In case of difference of 0.25% plus minus with the billing record of UASL, the amount billed by BSNL shall be treated as final would. If the difference is more than plus-0.25 but up to plus -2% payment shall be made by UASL. However reconciliation of variance shall be carried out by both parties and will be subject to dispute resolution mechanism given below under sub clauses 7.6.1 to 7.6.5. However, UASL shall pay to BSNL the undisputed amount +50% of the disputed amount subject to a minimum of an amount equal to previous months billed amount immediately.
>
> 7.6.1 In the event the BSO disputes the accuracy of

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

Clause 7.6 of the agreement provides for settlement of disputes regarding wrong/excess billing. It must be read in its entirety. It is required to be read for the purpose of giving the effect for which it was inserted in the interconnection agreement.

It did not empower a BSO to withhold any amount except in the manner laid down therein. In fact in terms of Clause 7.6.3 of the agreement the clerical errors were to be rectified by BSNL itself and for the said purpose a provisional bill was required to be raised by it.

A process of consultation was required to be gone into. Such provisional bills were to be paid.

The petitioner has not brought on record any material to show that it has raised any dispute with regard to the amount in question.

Clause 7.6.3, thus, was not resorted to. There is also nothing to show that recourse otherwise was taken to the dispute resolution clause upon following the procedures laid down therefor.

It is, therefore, not correct to contend that the petitioner in fact did not withhold the disputed amount and from its IUC bills the

respondent had deducted the amount which was disputed and consequently withheld by the petitioner.

It is true that in terms of the said clause, respondent could disconnect the line but the same has nothing to do with the petitioner's having an authority to withhold payment.

Clause 7.6 provides for the mechanism of resolution of a dispute.

If that has to be resorted to, the dispute must be raised.

We may furthermore notice a similar example in respect of the Kerala circle which is the subject matter of Petition No.292 of 2010.

Mr. Maninder Singh has placed before us a chart to show pleadings in respect of different circles which clearly go to show that in fact the petitioner had started withholding of the bills.

It reads as under:

Petition No.	Circle	Pg. of the petition	Amount
263	Maharashtra	372, 377, 382, and 390	The petitioner-Reliance has not disputed the payability of the amounts that have been adjusted by BSNL in terms of Clause 7.3.1 (iii) as set out in para 6 of the reply affidavit of the BSNL [Pg. 542] In para 16 of the petition the respondent had raised certain disputes about the amount adjusted by the BSNL. At Pg. 540, BSNL gave full explanation to the amounts that were adjusted for Maharashtra Circle to which admittedly there is no reply at Pg. 618-619 of the rejoinder stating

			that the said cable damages charges are not payable or have been adjusted by Reliance. BSNL had raised the demand [Pg. 588] Reliance had disputed the same by saying that it was only liable to pay Rs. 40,000/- and not Rs. 5,03,745 [Pg. 591]. BSNL immediately replied the same at Pg. 592 to which Reliance had sought no further clarification and sent the agreed amount and not paid BSNL was forced to recover the said amount. Similarly, in reply to para 18 of the petition [pg. 12] BSNL in its reply at Pg. 542 had fully explained that in fact it was Reliance which had withheld the amounts of IUC payable to BSNL and only the said amounts were recovered/adjusted by BSNL [Pg. 389] chart at Pg. 390. Reliance has also further withheld the amounts that are placed from [pg. 377-382] and the total amounts withheld by Reliance was about Rs. 2.89 crores. At Pg. 620 of the rejoinder the petitioner has wrongly stated that BSNL has withheld an amount of Rs. 2,81,66,94/- which was admittedly the amount paid by BSNL to Reliance as clearly shown at Pg. 389A vide cheque no. 382774 (Drawn on State Bank of India). Each of the document filed by Reliance in the connected petitions had been specifically replied to by BSNL clearly establishing the payability of the amounts by Reliance. Besides the above, since Reliance could not dispute the payability of the amounts adjusted by BSNL, in the other connected petitions wherein in each of counter

			affidavit filed on behalf of the BSNL complete details of payability of amount have been demonstrated, there is no rejoinder affidavit by Reliance in any of the connected petitions disputing any of the details of the payable amounts pointed out by the BSNL in each of its counter affidavit.
292/2010	Kerala	283-304 & 338-342	Rs. 1,54,31,030/- Rs. 25,47,500/- undisputed amount [pg. 39] Ernakulam
			Kunur-pg. 79-110 details given to Reliance-never disputed.
			Kollam- dt. 21.3.05 pg. 112 minutes of meeting – cable damages charges discussed and Reliance agreed to pay the same.
			Kottayam- Demand raised on 13.10.04 – various reminders – pg. 120 – 141 disputes raised therefore amounts deducted after a long period.
			Malappuram- amounts were adjusted after reminders and joint inspection conducted between BSNL and Reliance. [pg. 146, 149, 158-160, 166, 173 & 177].
			Palakkar-Demands raised on 3.10.2002- reminders sent on 13.1.03 [pg. 18-191]- not disputed.
			Pathananthitta-Demands raised on 20.9.04-reminders sent [pg. 192-195] and thereafter amounts adjusted.
			Thrissur-Demands raised at pg. 213. Adjustment made [pg. 196-200]. Payments received by Reliance without any disputes. The bill raised as per the request of Reliance.
			Trivendrum-As per Reliance an amount of Rs. 29,94,750/- is payable in January 2004 [pg. 220-221] – reminder sent in March 05 [pg. 224]-not paid therefore adjusted.
285	Haryana	318	Para 5 at Pg. 17-18 BSNL has

			provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 30. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
286	U.P. West	361 & 364	Para 5 at Pg. 16-18 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
287	Bihar	328-333	Para 5 at Pg. 17-18 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 31-37. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
288	Andhra Pradesh	245-254	Para 5 at Pg. 17-20 – BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges. From the documents placed at Pg. 34-38 it becomes evidently clear that Reliance has not disputed any of the demand raised by BSNL and even after that it was not paying demands raised by BSNL upon Reliance against cable damage charges. Reliance has not filed any rejoinder to these submissions of the BSNL. Minutes of meeting between the parties held on 27.02.06 [Pg. 38] wherein Reliance agreed to settle the issues of deduction of cable damage charges. Further, joint inspection had taken place between the parties [Pg. 41-42].

			Joint inspection held between the parties on 15.05.06 [Pg. 43A] for Maddlapalli area. Amount not paid. After various communications, all the amounts were reduced as per request of Reliance [Pg. 48]. However, the said amount was not paid. No dispute regarding payability.
289	Gujarat	270-282 334-336 373-374	Para 5 at Pg. 17-21 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 35-45B. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
290	Delhi	266-269 365-372	Para 5 at Pg. 16-18 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 30-37. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
293	Madhya Pradesh	314-316, 375-376	Para 5 at Pg. 17-20 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 41-48. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
294	Orissa	317-321 343-344	Para 5 at Pg. 17-19 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 31-49. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
295	Punjab	322-325	Para 5 at Pg. 17-18 BSNL has

			provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 31-50. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
296	U.P. East	353-360 385-386	Para 5 at Pg. 17-20 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 37-65. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
297	Rajasthan	326 345-346	Para 5 at Pg. 17-19 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Prg. 32-56. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.
298	Tamilnadu	349-352	Para 5 at Pg. 17-18 BSNL has provided all the details of the demands raised by BSNL upon Reliance in respect of cable damage charges from the documents placed at Pg. 31-33. Reliance did not raise any dispute regarding payability of these amounts, however, the said amounts were not paid.

The said chart in fact summaries the submissions of respondent with reference to the averments made by the petitioner in various petitions.

Order II Rule 2 issue

Order II of Rule 2 of Code of Civil Procedure reads as under:

> **"**Order II
>
> 1. Frame of suit.- Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.
> 2. Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim.- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs._ A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

The petitioner admittedly has entered into the contract with its eyes wide open. The contract is commercial in nature.

It is not in dispute that various payments were made from time to time in terms of the aforementioned agreement.

The petitioner in the petition itself has averred:

> "16. It is submitted that in the absence of any provision in the Interconnect Agreement empowering BSNL to set off any dues and also in clear violation of clarification dated 6.3.06 issued by the BSNL HQ, the field units of the

Respondent have been deducted the charges on various accounts from the amounts payable to the petitioner. The total amount deducting by the various field units of the Respondents on account of different grounds and not paid to the Petitioner so far is Rs.8,36,36,939 which is totally arbitrary, illegal, unjustified and in violation of the Agreement as well as clear instructions of the HQ of the Respondents. A chart showing the details of the amount deducted in various circles as on the date is annexed herewith and marked as Annexure P-7. This chart has three parts.

The details in Part A amounting to Rs.5,60,34,036 pertain to claims of cable damages amount adjusted by BSNL against IUC amounts payable to the Petitioner as in May 2006. The details of the same are attached herewith and marked as Annexure P-8(colly).

The details of Part B amounting to Rs.1,443,18,357 pertain to claims of cable damages amount adjusted by BSNL against IUC amounts payable to the petitioner for the period 2007 to 2009. The details of the same are attached herewith and marked as Annexure P-9 (Colly)

The details of Part C amounting to Rs.1,32,84,546 pertain to the amount deducted by the filed units of BSNL for port charges and other recoveries or short payment made by BSNL field units to the IUC payable to the petitioner. The details of the same are attached herewith and marked as Annexure P-10(Colly)"

In support of its claim of refund, petitioner has relied upon payments made by it from time to time shown in three different parts.

`Part A' shows payment of a sum of Rs.5,60,34,036/-.

`Part B' shows payments of a sum of Rs.1,43,18,357/- which is said to have been recovered by BSNL out of the petitioner's IUC revenue in traffic for various months in different circles; and Part C shows the amount deducted by respondent or short payment made by it from the IUC payable to petitioner on port charges and other recovery.

Whereas according to respondent, the said amounts were due as in May 2006, according to petitioner, all payments were made prior to issuance of the aforementioned letter dated 22.2.2006 and/or on 6.3.2006.

We have noticed heretobefore that out of the three letters to which our attention has been drawn by Mr. Malhotra, namely 6.11.2004, 9.11.2004 and 8.12.2004, only in the first one, payments were made under protest and in the third one a contention of coercion has been raised, but no such statement has been made in the second letter namely 9.11.2004. No such contention has also been raised in the earlier proceedings.

The Supreme Court of India in *Dadu Dayalu Mahasabha* **(**supra) opined that although liberty might have been granted by a court to file a suit for possession, if the latter suit is barred under the principles of Res Judicata or Order II Rule 2 of Code of Civil Procedure (Code), a fresh suit would not be maintainable.

Upon considering a large number of decisions both on the principles of res judicata/constructive res judicata as also Order II Rule 2 of the Code, it was opined :

> "24. Section 11 of the Code not only recognizes the general principle of res judicata, it bars the jurisdiction of the court in terms of Section 12 thereof.
>
> 25. Explanation IV of Section 11 of the Code extends the principle of res judicata stating that the reliefs which could have been or ought to have prayed for even if it was not prayed for would operate as res judicata. Section 12 thereof bars filing of such suit at the instance of a person who is found to be otherwise bound by the decision in the earlier round of litigation and in a case where the principle of res judicata shall apply.
>
> 27. However, once it is held that the issues which arise in the subsequent suit were directly and substantially in issue in the earlier suit, indisputably Section 11 of the Code would apply.
>
> 28. Similarly the provisions of Order II Rule 2 bars the jurisdiction of the Court in entertaining a second suit where the plaintiff could have but failed to claim the entire relief in the first one. We need not go into the legal philosophy underlying the said principle as we are concerned with the applicability thereof.
>
> 35. The issue indisputably was the claim of entitlement to Gaddi by the first respondent and a plea contra thereto raised by the appellants. Once the issue of entitlement stood determined, the same would operate as res judicata. We may notice some precedents for appreciating the underlying principles thereof. Section 11 of the Code, thus, in view of the issues involved in the earlier suit, the provisions thereof shall apply."

A Division Bench of the Bombay High Court in *Friends Cooperative Housing Society Ltd.* (supra) held that when a benefit was taken from the trust and an agreement had been entered into, the society could not have questioned Clause 9 of the agreement in isolation.

The High Court rejected the contention that such a commercial contract having been entered into with full knowledge of the offending clauses/conditions and factually acted upon, the same till date can never be said to be an unconscionable bargain.

It also went into the question of the status of the parties namely, one was the society and another was a `State' to opine that the terms and conditions are binding on the parties and the agreement having already been acted upon it needed to be respected in totality and, thus, there was no question of reading and/or severing any unequal clause in isolation or in parts.

It was held:- " that is to say, no party can accept or reject the same instrument or transaction."

It was furthermore held relying on a decision of Supreme Court of India in Prem Singh & Ors. vs Birbal & Ors. reported in (2006) 5 SCC 353 that the provisions of the Limitation Act shall apply both in relation to a transaction which is void as also voidable. It was also opined:

> "42. When the parties entered into agreement, they were fully aware of the nature of

> transaction, conditions and respective obligations. There was no objection raised at any point of time while entering into such agreement and even thereafter when petitioners and such other persons who based upon the said agreement got the benefit out of the same. We cannot read the clauses in isolation. We have to read the whole agreement in question. It is very clear even from the provisions of the Contract Act that the consideration of any such agreement was permissible and not unlawful and/or not prohibited by law and was not to defeat the provisions of any law or is fraudulent and/or is immoral or opposed to public policy."

So far as the issue of `Estoppel' is concerned the Division Bench of the High Court invoked the same, stating:

> "65. There is force in the submission raised by the respondents that they are estopped from challenging the agreement. The doctrine of estoppel or acquiescence in challenging the only Clause 9/8 of the agreement is squarely applicable. The Apex Court in P.S. Gopinath v. State of Kerala and Ors. : 2008(4) SCC 85, has rejected such petitions/action of person like the petitioner based upon this doctrine itself.
>
> 66. There is no dispute that as per the scheme after sanctioning the layout though entire expenses for the development were borne out by the petitioner society or such other person and NIT in return after due advertisement allowed the said public utility plot in the public interest to registered Trust and educational institutions, cannot be said to be beyond the scope and power of NIT Act."

It may also be noticed that in *Union of India vs. Surjit Singh Atwal* (1979) 1 SCC 520**,** the Supreme Court rejected an application for amendment of plaint whereby a plea of illegality of

an agreement was sought to be questioned after 13 years and which was not made an issue before the trial court.

Res Judicata Issue

Let us now consider as to whether the claim of the petitioner would otherwise come within the purview of Explanation IV appended to Section 11 of the Code and/or the general principles of Constructive Res Judicata.

The underlying principle in this behalf is that no party should be vexed twice.

If a plea, in the facts and circumstances of the case, might and ought to have been raised, and if not raised, the principles of Constructive Res Judicata can be invoked.

The judgment of this Tribunal passed in Petition No. 166 of 2006 has attained finality. If no relief had been granted to the petitioner in that petition either on the question of level playing field, interpretation of the agreement and/or any illegality and/or unconstitutionality thereof, we are afraid, no relief as has been prayed for by the petitioner can be granted in this petition.

In M. Nagabhushana vs. State of Karnataka & Ors. reported in (2011) 3 SCC page 408, the Supreme Court of India observed:

> "13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing

> his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring the finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties."

In this case, as has been noticed hereto before, no plea with regard to validity of the clause in question was raised. Although such a plea was available, the same was not raised.

Even otherwise, the effect of absence of such a plea has been considered by this Tribunal. Those findings have attained finality. The lacunae in the earlier proceeding cannot be permitted to be filled up. The petitioner, in our opinion, cannot be permitted to raise the said question once over again.

Jurisdictional Issues

Section 11 of the Code of Civil Procedure provides for the principles of res judicata. Explanation IV appended thereto provides for constructive res judicata. It reads as under:

> "11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under

> the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Section 12 of the Code of Civil Procedures bars a suit which has attained finality.

The principles contained in Section 11 and 12 of Code of Civil Procedure thus can be invoked and in fact have been invoked in cases where even stricto sensu the provisions of Section 11 of CPC would not be attracted by invoking the general principles of res judicata and/or constructive res judicata.

The aforementioned provisions are wholesome one. They have been brought to the statute book having regard to high public policy. They cannot, therefore, be refused to be invoked only on the ground that this tribunal had granted leave to the petitioner herein.

Before, however, we may take recourse to the interpretation of the said clause or interpretation of the said provisions, it would be apt to observe that even assuming for the sake of argument that this Tribunal in its aforementioned judgment dated 15.4.2010 passed in Petition No.166 of 2006 did not decide the question as

regards effect of the circular letters issued prior to and after 6.3.2006, the same by itself cannot be a ground to re-agitate the said issue.

This Tribunal categorically held that the petitioner should have questioned the validity of the clauses in question by raising appropriate pleadings therefor. In other words, in absence of such a pleading, the validity of some provisions in the contract could not have been permitted to be challenged.

Taking a cue from the said observations and/or leave granted, can a petitioner be permitted to raise contentions which would tantamount to getting over the statutory bar of constructive res judicata, limitation, the bar under Order II Rule 2 of CPC, is the question.

In our opinion it cannot be permitted to be done. We have noticed heretobefore that the only contention raised in the earlier proceeding was the validity of clause 7.3.1(iii) vis-à-vis the large number of circular letters issued by the respondent has referred to heretobefore being dated 13.4.2004, 26.2.2006, 6.3.2006, 6.10.2003 and 31.10.2003. What is being highlighted is that the bar created by reason of Explanation IV appended to Section 11 of Code of Civil Procedure and/or Order II Rule 2 thereof, and/or Section 3 of the Limitation Act are absolute ones.

They, thus, relate to the jurisdictional question. Once on fact it is found that the aforementioned statutory provisions would be

attracted, the Court/Tribunal would have no jurisdiction to entertain the petition. Any judgment or order passed would be a nullity and, thus, non est in the eye of law.

Apart from the provisions of Article 142 of the Constitution of India, no court or tribunal can ignore a statutory provision creating a bar in exercise of its jurisdiction. The same cannot in any event be done indirectly by making an observation. So far as the question of limitation is concerned a suit for recovery of the amount was required to be filed within a period of three years from the date of wrongful netting of the bills. It has been found as of fact that the petitioner itself by various letters allowed the respondent to deduct the amount in question. If the petitioner was aggrieved by issuance of any circular letter it was required to be questioned within a period of three years from the date of issuance thereof. Some of the circular letters had been issued much prior to May, 2006 when the said Petition No.166 of 2006 was filed.

Moreover, as regards the payments by way of netting which were made by petitioner by offering the same voluntarily would attract the principles of estoppel. It is on the aforementioned premise the bar with regard to the maintainability of the second petition is required to be taken into consideration. The petitioner in Petition No.166 of 2006 did not question the validity of the said Clause 7.3.1(iii) of the interconnection agreement. If the same had not been done, the petitioner cannot be permitted to do so

once over again. An issue can be said to have been raised provided their exists rival contentions between the parties. Moreover, if the issue was substantial in nature the same was required to be specifically raised. If the issues have not been raised in the earlier proceedings, the same cannot be permitted to be raised after a period of three years. In the law there is no concept of notional period of limitation. At the cost of repetition it would be reiterated that interpretation of Clause 7.3.1 was not put in issue in argument what was argued was the validity thereof which could not have been decided in absence of any pleading. It is also difficult to accept the contention that the liberty granted is not a qualified one. It would certainly be subject to statute. The question is as to whether the clause in question required independent interpretation either with the aid of the said circular letter dated 6.3.2006 or with the other circular letters as well. If all the circular letters are to be given effect to, indisputably, all have to be treated equally. In view of the fact that admittedly the circular letters are contradictory to each other, this Tribunal was required to interpret the same independently. No amount of strong words would help us in getting rid of the statutory bar. We are not unmindful of the fact that bar to a suit must be strictly construed. In this case, however, the parties have proceeded on the admitted facts. Liberal reference has been made to the pleadings of the parties in the earlier proceedings. The fact that

validity of this interconnection clause was not in issue in the earlier proceedings and/or subject matter of the pleadings is not in question. Apart from Dadu's case (supra) we may also notice some of other decisions of the Supreme Court of India relied on by Mr. Malhotra.

In Gurbux Singh vs. Bhooralal reported in AIR 1964 SC 1810, the Supreme Court has held as under :-

> "6. In order that a plea of a bar under O. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be estblished satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O. 2. r. 2 Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the

two suits. It is common ground that the pleadings in C.S. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under O. 2. r. 2, Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under O. 2. r. 2, Civil Procedure Code was not maintainable. Learned counsel for the appellant, however, drew our attention to a passage in the judgment of the learned Judge in the High Court which read :

"The plaint, written statement or the judgment of the earlier court has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsels for the parties have likewise done so. That file is also before this Court."

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge "the two courts have, however, freely cited from the record of the earlier suit" is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under O. 2. r. 2, Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under O. 41. r. 27, Civil Procedure Code by consent of parties. There is

> nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under O. 41. r. 27, Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit."

In Inacio Martins (Deceased Through LRS) vs. Narayan Hari Naik & Ors. reported in (1993) 3 SCC 123 the Apex Court held as under:-

> "6. The next contention which found favour with the High Court was based on the language of Order 2 Rule 2(3) of the Code of Civil Procedure. The submission regarding constructive res judicata was also based on this very provision. Now Order 2 concerns the framing of a suit. Rule 2 thereof requires that the plaintiff shall include the whole of his claim in the framing of the suit. Sub-rule (1) of Rule 2, inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any court he will not be entitled to claim that relief in any subsequent suit. However, sub-rule (3) of Rule 2 provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted. It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court. But the rule does not

preclude a second suit based on a distinct cause of action. It may not be out of place to clarify that the doctrine of res judicata differs from the rule embodied in Order 2 Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of [130]action. The High Court is, therefore, clearly wrong in its view that the relief claimed is neither relevant nor material. Now, in the fact-situation of the present case, as we have pointed out earlier, the first suit was for an injunction and not for possession of the demised property. The first suit was dismissed on the technical ground that since the plaintiff was not in de facto possession no injunction could be granted and a suit for a mere declaration of status without seeking the consequential relief for possession could not lie. Once it was found that the plaintiff was not in actual physical possession of the demised property, the suit had become infructuous. The cause of action for the former suit was not based on the allegation that the possession of the plaintiff was forcibly taken sometime in the second week of June 1968. The allegation in the former suit was that the plaintiff was a lessee and his possession was threatened and, therefore, he sought the court's assistance to protect his possession by a prohibitory injunction. When in the course of that suit it was found that the plaintiff had in fact been dispossessed, there was no question of granting an injunction and the only relief which the court could have granted was in regard to the declaration sought which the court held could not be granted in view of the provisions of Specific Relief Act. Therefore, the cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit and hence we do not think that the High

> Court was right in concluding that the suit was barred by Order 2 Rule 2(3) of the Code of Civil Procedure. It may be that the subject-matter of the suit was the very same property but the cause of action was distinct and so also the relief claimed in the subsequent suit was not identical to the relief claimed in the previous suit. The High Court was, therefore, wrong in thinking that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit the relief for possession was not claimed whereas in the second suit the relief was for restoration of possession. That makes all the difference. We are, therefore, of the opinion that the High Court was completely wrong in the view that it took based on the language of Order 2 Rule 2(3) of the Civil Procedure Code."

Yet again in Bengal Waterproof Limited vs. Bombay Waterproof Manufacturing Company And Another (1997) 1 SCC 99 it has been held :-

> "7. A mere look at the said provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) of Rule 2 of Order 2 CPC is concerned, bar of which appealed to both the courts below, before the second suit of the plaintiff can be held to be barred by the same it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press in service in that suit cannot be subsequently prayed for except with the leave of

the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order 2, Rule 2, sub-rule (3) that the second suit of the plaintiff filed in 1982 is based on the same cause of action on which its earlier suit of 1980 was based and that because it had not prayed for any relief on the ground of passing off action and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit. So far as this plea of the defendants is concerned there is a threshold bar against them for their failure to bring on record the pleadings of the earlier suit which 106unfortunately has not been properly appreciated by the courts below. A Constitution Bench of this Court in the case of *Gurbux Singh* v. *Bhooralal*[1] speaking through Ayyangar, J. in this connection has laid down as under:

"In order that a plea of a bar under Order 2, Rule 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2, Rule 2, Civil Procedure Code can be established only if the

> defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in C.S. No. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2, Rule 2, Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under Order 2, Rule 2, Civil Procedure Code was not maintainable."

In those decisions of the Supreme Court as also an order of this Tribunal in Viacom 18 Media vs. MSM Discovery Petition No.220 (C) of 2010 it has been held that the second suit would be maintainable when a separate cause of action has arisen. Questioning the validity/ interpretation of a claim for refund of the amount constituted a composite cause of action. It was furthermore held that the fact that causes of action were the same in both the suits is to be established. The petitioner, thus, deliberately omitted to sue in connection with a part of the cause of action which it seeks to resurrect subsequently although the cause of action remains the same. If the cause of action for filing the earlier proceeding was the said circular letter dated 4.3.2006, the action on the part of the respondent in clubbing the amounts set to be recoverable by it for causing damages to the

underground cable with the IUC charges, a decree for refund could have also been prayed for on the cause of action which arose in May, 2006. It is not the case of the petitioner that any cause of action arose subsequently. It is also not its case that the two causes of action for claiming refund of the amount are different and distinct and it was not necessary to club them together. We have noticed heretobefore that apart from the fact that the correctness or otherwise of the judgment dated 15.4.2010 (which otherwise could not be questioned in a subsequent proceedings) the parties have referred to the pleadings in Petition No.166 of 2006 before us. Both parties have relied thereupon. Both the learned counsel have referred to from the pleadings of the present proceedings with reference to pleadings in the earlier proceedings. It is from that point of view we have invoked the provisions of constructive res judicata, the provisions analogous to Order II Rule 2 of the Code of Civil Procedure as also the limitation.

Recently in Petition No.211 of 2010 (Reliance Communications vs. BSNL), by a judgment and order dated 21.1.2011, this Tribunal held:

> "This Tribunal inter alia exercises original jurisdiction. It cannot even otherwise, having regard to the provisions contained in Section 3 of the Limitation Act, extend the period of limitation.
>
> Section 3, as is well known is imperative in character. The Limitation Act is statute of repose. A right accrues in favour of another

person if an action is not brought within the period prescribed under the law of limitation. Proper explanation therefore, is required to be given if a valuable right of another is sought to be defeated (See Ashish Kumar Hazra Vs. Ruby Park Cooperative Housing Society, AIR 1997 SC 2724).

A right accrued to a party cannot be taken away by mere observations.

Maintainability

There is other aspect of the matter, which also must be noticed.

A petition for recovery of money would be maintainable if a sum is payable by the respondent to the petitioner.

The legality and/or validity of the amount of damage payable by the petitioner to the respondent is not in question. The right of respondent to recover the amount by way of damage caused to its underground cables is also not in question.

This petition on equitable principles cannot be allowed only on the ground that the respondent has illegally (assuming it to be so) resorted to netting.

For the purpose of recovery of the amount in question, it should have been shown that the petitioner has made excess payments to respondent.

Such a plea had not been raised even in Petition No.166 of 2006.

It was necessary to be raised within a period of three years from the respective date of over payment.

Conclusion

We, therefore, are the opinion that this petition is not maintainable.

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

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

July 22, 2011
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