TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 12.4.2012

Petition No.252 of 2011
(M.A. No. 160 of 2011)

Cellular Operators Association of India & Ors …Petitioner

Vs.

Department of Telecommunications & Anr. …Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioners :Mr.C.S.Vaidyanathan and Mr. Ramji Srinivasan, Sr. Advocates with Mr. Manjul Bajpai, Mr. Navin Chawla, Ms. Monika Singhal, Advocates

For Respondent No.1 :Ms. Maneesha Dhir, Mr. K.P.S. Kohli & Ms.Poonam Anand, Advocates

For Respondent No.2 : Mr. Saket Singh, Advocate

JUDGEMENT

S.B.SINHA

Introduction

This petition involves some questions of importance as regards the power/jurisdiction of the Respondent to issue circulars and/or guidelines purported to be in terms of the conditions of licence for the purpose of enforcing the security measures of the country.

The Back Ground Facts

2. The First and the Second Petitioners are Associations of the Cellular Operators; whereas the Petitioners 3 to 24 are licensees; licenses having been granted to them in terms of the Proviso appended to Section 4 of the Indian Telegraph Act, 1885. (The Act)

3. We, in this petition are not concerned with any disputed question of fact. Some examples however, as regards the mode and manner of levy of penalty upon the operators have been given by the Petitioners, which would be noticed.

4. It may also be placed on record that an application was filed by the Petitioners purported to be under Order II Rule 2 of the Code of Civil Procedure, 1908 (The Code), praying for leave of this Tribunal to file separate petitions questioning the demand notices issued by the Respondents on the Operators, if any, at a later stage and if any occasion arises therefor, on any ground other than those taken in these petitions. By an order dated 7.9.2011, the said prayer was allowed, subject of course to the condition that the Respondent would be entitled to raise the question of limitation/jurisdiction of this Tribunal.

5. It may further be mentioned that by reason of an order of the said date, another application marked as M.A. No. 160 of 2011 was filed by the Petitioners purported to be under Section 151 of the Code praying for leave of this Tribunal to withdraw documents being part of the Annexure P-36 and P-37 to the petition. Having been

opposed by the Respondent, the same was directed to be taken up consideration alongwith the main matter by reason of an order of the said date.

6. Indisputably the telecom industry has achieved a tremendous growth. There are about 900 million subscribers. It is also not much in dispute that for the purpose of enrolling the subscribers, the telephone operators are required to ask the subscribers to fill up prescribed forms in that behalf and supply documents containing about 5 pages.

7. It is furthermore stated that in the entire country there are about 1.2 million retail dealers, whose services are required to be availed for the purpose of achieving a higher growth of connectivity/teledensity.

8. As would be noticed hereinafter, necessary data are required to be maintained by the telephone operators for identification of the customers.

Statutes

9. The matter relating to establishment, operation and maintenance of Telegraphic works are governed by the provisions of the Indian Telegraph Act, 1885 (The Act).

10. It was enacted to amend the law relating to Telegraphs in India.

11. By reason of Section 4 thereof, the Central Government has the exclusive privilege of establishing, maintaining and work in telegraphs within the territory of India.

12. The proviso appended thereto, however, confers power upon the Central Government to part with its right of exclusive privilege by grant of licences on such terms and conditions and on such consideration as it thinks fit and proper for the aforementioned purpose.

13. The Petitioner Nos. 3 to 24 herein pursuant to a policy decision adopted by the Union of India applied for and were granted licenses in respect of various Telecom Circles.

14. Section 7 of the said Act provides for the rule making power for the conduct of all or any of the telegraphs. It is however, to be noted that Sub-section 2 of Section 7 does not provide for an authority on the part of the first Respondent to make rules with regard to the internal security of the country.

15. We may, however, notice Section 7 (2) (k) thereof, which reads as under.

> *"Rules under this Section may provide for all or any of the following among other matters, this is to say.*
>
> *"Any other matter for which provision is necessary for the proper and efficient conduct of all or any telegraphs under this Act."*

Sub-section 3 of Section 7 provides that in the event of any breach of any conditions of license, the Central Government may by rules prescribe fines for the conduct of any telegraphs established, maintained or worked by any person licensed under the Act.

16. Section 20 provides for penalties. Section 20 A provides for penalties for breach of conditions of licence in the following terms:-

"Breach of condition of license – If the holder of a license granted under section 4 contravenes any condition contained in his license, he shall be punished with fine which may extend to one thousand rupees, and with a further fine which may extend to five hundred rupees for evdry week during which the breach of the condition continues."

17. The Parliament has also enacted Telecom Regulatory Authority of India Act in the year 1997 (The 1997 Act) inter alia to protect the interest of the service providers and the consumers of the telecom sector and to promote and ensure orderly growth thereof and for matters connected therewith or incidental thereto.

18. The Authority constituted under the Act is entitled to make Regulations in terms of Section 36 thereof, sub-section 1 whereof is general in nature.

The illustrations appended to sub-section 2 of the Section 36 do not provide for any matter relating to security of the State.

19. Section 11 of the 1997 Act provides for the functions of the 'Authority'.

Clause (a) of sub-section 1 thereof empowers it to make recommendations suo-motu, or on a request from the licensor inter alia in respect of the following matters:

" (i) need and timing for introduction of new service provider;
(ii) terms and conditions of licence to a service provider"

20. Clause (b) of Sub-Section (i) of Section 11 provides that the Authority shall ensure compliance of the terms and conditions of licence.

Sub-Section (ii) of Clause (b) of Sub-Section (i) of Section 11 thereof reads as under:-

> *"(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers."*

21. The first Proviso appended thereto postulates that the recommendations of the Authority shall not be binding on the Central Government.

The second Proviso, however, mandates the Central Government to seek recommendations of the Authority in respect of the matters specified in Sub-Clauses (i) and (ii) of Clause (a) of Sub-Section 1 in respect of 'new license' to be issued to a service provider.

22. The Central Government issued CMTS licenses to some of the operators in terms of its National Telecom Policy of the year 1994.

It has been contended that Unified Access Service Licences (UASL) having been issued in the year 2003, i.e. after insertion of the aforementioned provisions, the Respondent No. 1 was mandatorily required to obtain the recommendations of the Authority. We shall deal with this contention hereinafter at an appropriate stage.

Conditions of license

23. The relevant conditions of the UAS License are under:-

> *"3. The Licensee hereby agrees and unequivocally undertakes to fully comply with all terms and conditions stipulated in this Licence Agreement and without any deviation or reservations of any kind."*

"5.1 The Licensor reserves the right to modify at any time the terms and conditions of the Licence, if in the opinion of the Licensor it is necessary or expedient to do so in public interest or in the interest of the security of the state or for the proper conduct of the telegraphs. The decision of the Licensor shall be final and binding in this regard."

Clause 5.1, thus, provides for modification in the terms and conditions of licence, inter-alia if it is expedient so to do in the interest of security of nation.

24. Clause 9.1 of the license obligates the licensee to furnish such documents, accounts, estimates, returns, reports or other information in accordance with the rules/orders as may be prescribed from time to time.

25. We may also notice the relevant portion of Clause 10.1 and Clause 10.2 (1)(a) of the license agreement:-

"10.1 The LICENSOR reserves the right to suspend the operation of this LICENCE in whole or in part, at any time, if, in the opinion of the LICENSOR, it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the TELEGRAPH."

"10.2(1) The LICENSOR may, without prejudice to any other remedy available for the breach of any conditions of LICENCE, by a written notice of 60 Calendar days from the date of issue of such notice to the LICENCEE at its registered office, terminate this LICENCE under any of the following circumstances :

If the LICENSEE:

a) fails to perform any obligation(s) under the LICENCE including timely payments of fee and other charges due to the LICENSOR;

b) fails to rectify, within the time prescribed, any defect /deficiency /correction in service

/equipment as may be pointed out by the LICENSOR.

c) goes into liquidation or ordered to be wound up.is recommended by TRAI for termination of LICENCE for noncompliance of the terms and conditions of the LICENCE."

Clause 10.2 (ii) provides for imposition of financial liability.

26. Clause 16.1 and Clause 23.2, under the heading 'Technical Conditions', read as under:

"16.1 The LICENSEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI."

.....

"23.2 Requisite monitoring facilities /equipment for each type of system used, shall be provided by the LICENSEE at its own cost for monitoring as and when required by the LICENSOR."

27. The contractual obligations of the licensee to the other service providers in terms of Clause 30.7 are governed by the terms thereof.

We may notice Clause 31.2:-

"31.2 The LICENSEE shall be responsible to ensure that the subscriber terminal is operated in accordance with the terms of the Licence and the WPC Licence. The SIM Card in the user terminal is non-transferable."

The licensees furthermore, inter alia, are required to provide all facilities to the agencies specified therein having regard to the security conditions laid down as regards detection of crime and in the interest

of national security. Clause 40.4 provides for payment of damage arising on account of licensee's failure in this regard.

28. Clause 41.5 of the conditions of license may also be noticed.

> *"41.5 LICENSOR reserves the right to modify these conditions or incorporate new conditions considered necessary in the interest of national security and public interest or for proper provision of TELEGRAPH."*

Clause 41.14 and Clause 41.15 provide:

> *"41.14 The complete list of subscribers shall be made available by the LICENSEE on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal or hand-held subscriber terminal (where SIM card is not used) shall be registered against each subscriber for his bonafide use. The LICENSEE shall make it clear to the subscriber that the SIM card used in the user terminal registered against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service."*
>
> .....
>
> *"41.15 A format would be prescribed by the LICENSOR to delineate the details of information required before enrolling a customer as a subscriber. A photo identification of subscribers shall be pre-requisite before providing the service."*

29. So far as bulk consumers are concerned, the mode and manner in which the subscriber list is to be verified is contained in Clause 41.19.

The conditions of licence also provide for the definition of 'designated authority'.

30. On or about 12.8.2002, the CMTS licences were amended by inserting Clauses 5.13 and 5.14 which are in pari materia with Clauses 41.14 and 41.15 of the UAS License.

31. Respondent inserted a clause for imposition of financial penalty in the CMTS licences on or about 25.11.2004 being in pari materia with Clause 10.1(i).

Clause 15.8 of the CMTS license agreement as amended on 25.11.2004 reads as under:-

> *"15.8 The Licensor may also impose a financial penalty not exceeding Rs.50 crores for violation of terms and conditions of license agreement. This penalty is exclusive of Liquidated Damages as prescribed in this License Agreement."*

32. On or about 31.7.2008, the UASL and CMTS licences were amended to incorporate the following clause:-

> *"The Licensor shall have the right to direct the Licensee to warn, penalize or terminate the franchisee or agent or distributor or servant, after considering any report of conduct or antecedents detrimental to the security of the nation. The decision of the 'Licensor in this regard shall be final and binding and in any case the Licensee shall bear all liabilities in the matter and keep the Licensor indemnified for all claims, cost, charges or damages in this respect."*

33. Respondent herein in its capacity as the licensor has issued circular letters/guidelines from time to time for enforcing the conditions to security of State, including the mode and manner in which `Customers' Addresses and Identifications should be verified. Several representations in relation thereto were made; some of which have been accepted by the Respondent.

Reliefs prayed for

34. On the premise that the Respondent despite representations continued to impose penalties in terms of the purported circular letters have filed this petition, claiming inter-alia for the following reliefs:-

> *(a) "Declare the penalty regime introduced by DoT through its letter dated 22.11.2006 bearing reference No. 800-04/2003- VAS (Vol.II) 1104 as illegal, arbitrary, unreasonable, irrational, disproportionate and oppressive;*
>
> *(b) Declare the "Scheme of Financial Penalty for violation of terms and conditions of the License Agreement in respect of Subscriber verification failure cases" introduced and implemented by the DoT through its letters dated 24.12.2008 (No. 800-52/2008-VAS-Ill (Part)), 23.03.2009 (No. 842- 725/2005/157), 08.02.2010 (1-3412009-SI) and 03.02.2011 (No. 800-20/2010-VAS), as being illegal, arbitrary, unreasonable, irrational, disproportionate and oppressive and to quash such impugned letters;*
>
> *(c) Declare the Office Memorandum No. 800-20/2010-VAS dated 01.06.2010 supplemented by Office Memorandum No.. 800- 20/2010- VAS dated 04.06.2010 as bad in law for being illegal, arbitrary and suffering from procedural impropriety and to quash the same;*
>
> *(d) Consequently quash all the show-cause notice and demand letters issued to the Petitioner operators and direct the Respondent No. 1 to refund all the penalties*

collected by the Respondent No. 1 under such show-cause notices and demand letters;

(e) Stay the operations of any and all outstanding demand letters issued by the DoT or the TERM Cells. for the alleged noncompliance of the subscriber verification instructions issued by the DoT from time to time, during the pendency of this petition and until final disposal thereof;
(f) pass ad-interim / interim / ex-parte order(s) in respect of the above payers; and"

Reply to the petition

35. Respondent in its reply while supporting the said circular letters/guidelines contends that the same were issued by the Central Government in exercise of its power as a licensor.

Such instructions/guidelines, the Respondent states, are of utmost importance keeping in view the security of the nation as also the growth of the industry.

36. According to the Respondent, non-verification of the identity of customers may give rise to the security concerns as in the event of any internal/external terrorist attack, it would be extremely difficult for it to trace out the actual culprit(s). Such precautionary measures were, therefore, required to be taken by way of issuance of the said Guidelines/Circulars.

37. Respondent furthermore contended that the petition is not maintainable being barred under the law of limitation.

It was furthermore stated:-

"It is pertinent to mention here that if a service provider fails to prove that document in question is not forged, the presumption would automatically fail that the service provider is guilty of non-compliance with the subscriber verification guidelines and hence put in the national security in grave danger."

Submissions

38. Mr. C.S. Vaidyanathan, Mr. Ramji Srinivasan, Dr. Abhishek Manu Singhvi, learned senior counsel and Mr. Naveen Chawla made the following submissions on behalf of the Petitioners:-

(i) Respondent No. 1 as a licensor or otherwise had no jurisdiction/power to impose penalty of this nature; the same having not been provided for under the License or any statute.

(ii) The nature of the circular letters/ instructions/guidelines being administrative instructions cannot pertake to terms and conditions of license imposing penalty on the licensees unilaterally.

(iii) The matters relating to imposition of heavy penalty, by way of deterrent measure and that too from 2004 by reason of the circular letters are not countenanced under the terms of the licenses.

(iv) The license agreement entered into by and between the parties hereto being in the nature of contract, the Respondent could not have made any provision for imposition of penalty by issuing circular letters and/or guidelines in as much as in the event of breach of any contractual terms, it was entitled only to reasonable damages.

(v) From the circular letter dated 24.12.2008, it would be evident that by reason thereof a conscious decision had been taken to introduce a penalty regime on graded scale w.e.f. 1.4.2009 and in that view of the matter the same cannot be said to be a specie of the terms of contract.

(vi) Clause 41.14 of the licence having provided only for `adequate' steps taken for the purpose of identification of the customers, the Respondent could not have by reason of the impugned guidelines, laid down different standards or norms and that too under the threat of imposition of penalty.

(vii) Respondent proceeded to issue the impugned circular letters without taking into consideration the fact that the Petitioners are in the business of telecom and, thus, they cannot be held responsible for making of an investigation into a criminal offence and/or take initiative in relation thereto.

(viii) All the instructions in effect and substance amount to amendment to the terms and conditions of the licence which having been unilaterally imposed as also having regard to the unequal bargaining power of the parties, the Respondent as a 'State' within the meaning of the Article 12 of the Constitution of India, cannot enforce the same on the premise "take it or leave it".

(ix) It is incorrect to contend that the claim of the Petitioners is barred under the law of Estoppel or Waiver;

(x) Guidelines issued by the Respondent amount to amendment of licenses, which having regard to the provisions contained in Section 21 of the General Clauses Act could have been resorted to, only upon seeking for and obtaining the requisite recommendations of the Telecom Regulatory Authority of India as envisaged under sub-clauses 11.1.(a)(i) & (ii) of the 1997 Act, in view of the fact that the second proviso appended thereto having imposed an imperative obligation on the Respondent to obtain the views of an expert body as would appear from the Statement of Objects and Reasons issued while introducing the 2000 Amendment, it must be held that the instructions issued in the year 2006 and 2008 being new conditions, the procedures laid down therein were required to be followed scrupulously.

(xi) Clause 10.1.(ii) of the conditions of the licence does not provide for imposition of penalty for violation of the circulars and, thus, by reason thereof or otherwise no penalty could have been imposed and thus, the said provision is required to be read down so as to bring the same within the purview of 'damages' within the

meaning of the provisions contained in Sections 73 and 74 of the Indian Contract Act.

(xii) The alleged subsequent conduct on the part of the Petitioners as stated in the reply would not stand as an embargo on their part to pray for the reliefs sought for in this petition in as much as the said amendments had not been carried out with their consent.

(xiii) Respondents having no statutory power in that behalf could not have issued the impugned circular letters, and moreover the Executive Power of the State under the Constitution of India must be exercised within the four corners thereof and in particular those contained in Article 73 and 300A thereof.

(xiv) The impugned circular letters must be construed keeping in view the well-known principles of Doctrine of Proportionality and having regard to the fact that there are 900 million subscribers and even if their samples are taken at 0.1% per month, 10.89 million subscribers would come within the purview thereof and in the event it is found that 80% of the subscribers have been verified and 20% thereof remained unverified, a penalty to the extent of 5000 crores would be imposed, if a sum of Rs.25,000/- per subscriber is taken as the average amount of penalty.

(xv) The circular letters providing for completion of verification within a period of 72 hours, must be held to be wholly unjustified as in a given case, it is possible for an operator to show that the concerned subscriber could not be contacted or would be available only after a few days.

(xvi) Even in a situation where the operators are in a position to show that they have acted *bonafide*, the fact that the authorities of the TERM Cell have no discretionary jurisdiction to waive penalty and/or being required to act mechanically, the same would render the circular letters invalid and void in law.

(xvii) The provisions for higher amount of penalty introduced w.e.f 1.4.2009 by reason of the circular letter dated 24.12.2008 must be held to be bad in law and without jurisdiction.

(xviii) The Respondents cannot be heard to say that the Petitioners having given an undertaking to comply with the circular letter, would be bound thereby in as much as the 'Undertakings' must be applied as on the date on which they had been given and not for all time to come.

(xix) The graded scale of penalty provided for in the circular letter dated 24.12.2008 must be read reasonably and alongwith the terms and conditions of licenses and so

read it must be held that the same should be applied in a manner as has been pointed out by the Petitioners in their communications to the Respondent and in particular those dated 22.6.2010 and 9.7.2010.

(xx) Assuming for the sake of argument that the said circular letters are valid in law, penalty could have been imposed only when a mala-fide is found in the conduct of the operators and not otherwise.

(xxi) The authorities of the TERM Cell who have been delegated with the power to impose penalty being not only the complainant and the investigator but also a prosecutor and a judge, the same must be held to be bad in law.

(xxii) The provision of appeal provided for in the circular letter dated 24.12.2008 in the facts and circumstances also becomes meaningless in as much as an appeal would lie only before an authority of the TERM Cell and not to an authority who has nothing to do with the functioning thereof.

39. Ms. Maneesha Dheer and Mr.K.P.S. Kohli, learned counsel appearing on behalf of Respondent, on the other hand, urged:-

(i) Petitioners having not questioned the legality and/or validity of the conditions of license, the present petition is not maintainable.

(ii) The mater pertaining to issuance of proper guidelines for the purpose of verification of customer identification being pending before the Supreme Court of India, the merit of the matter should not be gone into by this Tribunal.

(iii) The terms and conditions of UAS Licence issued in the year 2003 having been laid down in consultation with the Authority whereby and whereunder a provision was made for imposition of penalty to the extent of Rs.50.00 Crores for violation of a condition of contract, a subsequent amendment inserted in the CMTS licence on or about 25.11.2004 and that too having been accepted by the operators, the same cannot be held to be invalid. In any event the parties having executed the amended licence agreement, no unilateral decision can be said to have been taken by the Respondent.

(iv) From a perusal of the impugned circular letters issued by the Respondent, it would be evident that by reason thereof only a machinery provision has been laid down so as to limit the discretionary jurisdiction of the TERM Cell officers authorized to impose penalty as imposition of maximum amount of damages as envisaged under Clause

10.1 (ii) of the conditions of license would have hampered the growth of the industry.

(v) The instructions having been challenged after a period of 5 years, this petition should be dismissed being barred under the doctrine of Delay/Latches.

(vi) The power to issue guidelines having emanated from the conditions of license, wherefor the Respondent was expressly authorized and the licensees have undertaken to abide the same, it is incorrect to contend that the issues raised by the Petitioners being (a) regarding their difficulty; (b) involuntariness on their part; (c) that the operators are doing their best; (d) impossibility to perform; (e) absence of mens rea; (f) exercise of jurisdiction are dependent on the actions of third parties; and/or (g) the penalty is imposed mechanically, are not sustainable; being in violation of the conditions of licence;

(vii) It is incorrect to contend that the guidelines issued amount to amendment to the conditions of licence and thus, it was obligatory on the part of the Respondent to seek for the recommendations of Regulator in terms of Section 11 (1) (a) (i) and (ii) of the TRAI Act.

(viii) In any event the licenses had suitably been amended on 25.11.2004 being conditions No. 10.8 and 15.8 of the CMTS licenses which are in pari-materia with clause 10.1 (ii) of the UAS Licence, no exception thereto can be taken.

(ix) The Proviso appended to Section 11 (1) of the 1997 Act in any event is applicable to grant of new licences, and thus, any amendment thereto would not be governed thereby.

(x) The recommendations of the Regulator being not binding on the Respondent and moreover, there being an embargo to the effect that the relationship between the licensor and the licensees would not be at the cost of the security of the State; non obtaining of the recommendations of the Regulator does not vitiate the proceedings.

(xi) The consistent stand of the Petitioners being that they would be complying with the circular letters and they having furnished undertakings of compliance from 1996 onwards and having merely sought for extension of time, the Petitioners are estopped and precluded from questioning the validity of the said circular letters.

(xii) Clause 41.14 of the UAS Licence having provided for an obligation on the part of the licensees to furnish a list of subscribers in the manner provided for therein as also in the format prescribed therefor and the rules/orders or the Regulations as may be prescribed and laid down from time to time, the Petitioners cannot be permitted to question the validity or legality of the said circular letters.

(xiii) Perusal of the record would demonstrate that for the purpose of fixation of quantum of the financial liability not only various committees were constituted, the

operators having also been made aware thereof and having regard to the various complaints received by the IB, the procedure evolved to the effect that higher the number of subscribers, the higher will be the quantum of penalty must be held to be reasonable.

(xiv) The Doctrine of Proportionality cannot have any application in this case as no case has been made out that the penalty imposed is wholly disproportionate.

(xv) The Doctrine of Proportionality providing for the facets of balancing 'necessity' and 'suitability' must be judged having regard to the fact that for enforcing the terms and conditions of the contract, the Respondent is empowered in the event of a breach, not only to levy financial penalty but also terminate the contract as also the suspend the same.

(xvi) Financial penalty in a graded scale being least onerous satisfies the test of proportionality in as much as the same had been introduced keeping in view the gravity of offence vis-à-vis the percentage of omissions and commissions on the part of the licensees to carry out the customer identity verification.

(xvii) It is incorrect to contend that the 'adequacy' Clause contained in Clause 41.14 of the conditions of Licence could not have led to 100% verification of the customer's identity in view of the fact that on and from 22.11.2006, a

deadline upto 31.3.2007 was given, for carrying out the same which having not been questioned, the petition is liable to be dismissed. In any event, what was directed is that if a person is unable to give adequate informations, the connection should be terminated, and thus the Petitioner's cannot be heard to make a complaint in relation thereto, more so, in view of the fact that obtaining of a sim-card is not a fundamental right of any person under the Constitution of India.

(xviii) The amount of penalty @ Rs.1,000/- per subscriber was a small sum and thus a change was introduced as the security of the nation should have received the highest level of diligence at the heads of the operators.

(xix) The difficulties pointed out by the Petitioner having been considered by the Respondent from time to time, the same must be held to be reasonable.

(xx) It is incorrect to say that the penalty imposed is very heavy having regard to the fact that the same is imposed on a sample survey of 0.1% and in the event to the extent of 95% in compliance found out, only a nominal penalty is imposed.

(xxi) By reason of the circular letters, mainly a civil liability having been created, the principles of mensrea or actus reus have no application in as much as the same is inbuilt in the conditions of licence.

(xxii) Section 7 of the Indian Telegraph Act cannot be said to have any application as the same relates to conduct of the Telegraph and not with enforcement of conditions of licence.

(xxiii) One of the Petitioners viz M/s Vodafone Essar Ltd. having committed fraud on this court, as would be evident from the Miscellaneous Application filed by it for withdrawal of the documents, the entire petition must be dismissed.

40. Mr. Saket Singh, learned counsel appearing on behalf of the TRAI would submit that keeping in view the purport and object for which the 1997 Act was enacted, the words 'new licence' contained in Proviso 2 appended to Section 11 of the Act must be liberally construed so as to hold that new conditions of licence, amendment of licence, new licence to old service providers, as also providing of new service by the old licensees would come within the purview thereof.

Some preliminary observations:

41. Security of the nation vis-à-vis operations carried out by the telecom licensees has an important role to play. Social order includes security of the State.

In RE:Ramlila Maidan Incident Dt. 4/5.06.2011 vs. Home Secretary, Union of India & Ors. 2012(2) SCALE 682, it was stated:

> *"233(194), I have already discussed that the term `social order' has a very wide ambit which includes `law and order', `public order' as well as `security of the State'.*

.....

237(198). The security of India is the primary concern of the Union of India. `Public order' or `law and order' falls in the domain of the State. Union also has the power to enact laws of preventive detention for reasons connected with the security of the State, maintenance of the public order, etc. I am not entering upon the field of legislative competence but am only indicating Entries in the respective Lists to show that these aspects are the primary concern, either of the Union or the State Governments, as the case may be and they hold jurisdiction to enact laws in that regard. The Union or the State is expected to exercise its legislative power in aid of civil power, with regard to the security of the State and/or public order, as the case may be, with reference to Entry 9 of List I, Entry 1 of List II and Entries 3 and 4 of List III of the Seventh Schedule of the Constitution of India.

238(199). These are primarily of fields of legislation, but once they are read with the constitutional duties of the State under Directive Principles with reference to Article 38 where the State is to secure a social order for promotion of welfare of the people, the clear result is that the State is not only expected but is mandatorily required to maintain social order and due protection of fundamental rights in the State."

42. By and large, it is not in controversy that identification of the customer plays an important role in checking unlawful activities including terrorism and tracking down the culprits.

Measures therefore, are required to be taken by all concerned including the Central Government to see that the security conditions are met.

43. There cannot however, be any doubt or dispute that any restriction put on carrying of business by the telecom licensees should be brought about in a legal manner and upon following the

procedure established by law. Furthermore such restrictions should neither be excessive nor disproportionate.

It is in the aforementioned context, the questions which arise for consideration herein must be answered.

Jurisdiction of the Tribunal

44. Jurisdiction of this Tribunal to issue any direction has been questioned only on the premise that a Public Interest Litigation is pending before the Supreme Court of India.

In the said public Interest Litigation the questions which have been raised in this petition are not in issue.

45. We are informed that the said Public Interest Litigation related to issuance of necessary guidelines with regard to security of the State. The said guidelines, if any, may be issued by the Supreme Court of India in exercise of its jurisdiction under Articles 141 and 142 of the Constitution of India, which would be a law laid down for the country till appropriate legislation is brought about.

46. What, however, is in question in this petition is the methodology adopted by the Respondent for imposition of penalty by the delegated authority of the DOT, i.e, TERM Cells applying at a flat highest slab rate for all unverified subscribers relying on or on the basis of various circulars issued by the Respondent from time to time.

47. This Tribunal has neither been called upon nor has any jurisdiction to fix the guidelines with regard thereto.

The jurisdiction of this Tribunal emanates from the provisions of Section 14 and 14 (A) of the 1997 Act, in terms whereof, it is

entitled to adjudicate on the disputes inter-alia between a licensor and a licensee.

48. It has not been contended that the contentions raised herein by or on behalf of the Petitioners, vis-à-vis the reliefs sought for by them would not come within the purview of the provisions of Section 14 and Section 14A of the Act.

49. Pendency of a litigation before any other competent court of law by itself cannot be a ground for not exercising jurisdiction by this Tribunal which it otherwise has, unless such a case is made out.

It is not even a case, where Doctrine of 'amity' or 'comity' is attracted.

The preliminary objection as regards the jurisdiction of this Tribunal, in our opinion, has no force. It is rejected accordingly.

Provisions of Indian Telegraph Act

50. Whether in view of the provisions contained in Section 7 (2) (k) read with Section 20 and 20A of the Indian Telegraph Act, 1885, the Respondent was precluded from levying any penalty on the alleged ground of non-compliance of the Customer Acquisition Form, is the question.

51. Subsection 2 of Section 7 of the Act provides for a rule making power. It is illustrative in nature. The general power to make rules is contained in Sub-section(1) of Section 7 of the Act.

Clause (k) of Sub-section 2 of Section 7 of the Act is a residuary power. No rule has been framed in terms thereof.

52. Only when a statute governs the field, contract between two parties shall be governed thereby. Absence of a rule would not be a bar for two parties to agree to the terms of a contract.

In Bharat Sanchar Nigam Limited & Anr. Vs. BPL Mobile Cellular Limited & ors. (2008) 13 SCC 597 at page 620, it is stated:

> *"45.....In absence of any statutory rule governing the field, the parties would be at liberty to enter into any contract containing such terms and conditions as regards the rate or the period stipulating such terms as the case may be. The matter might have been different if the parties had entered into an agreement with their eyes wide open that the circular letter shall form part of the contract. They might have also been held bound if they accepted the new rates or the periods either expressly or sub silentio."*

53. Moreover, Executive Instructions can only supplement the rule and not supplant it. [See *Joint Action Committee of Air Line Pilots' Association of India (ALPAI) v. Director General of Civil Aviation*, (2011) 5 SCC 435 and P.H. Manoj Pandian vs. P. Veludurai (2011) 5 SCC 214]

No executive order in this behalf also exists. In a situation of this nature, it is therefore, not correct to contend that the amount of fine prescribed thereunder would be relevant for the purpose of this case.

54. In any event, it was incumbent upon the Petitioner to show that rules have been framed and quantum of penalty has been specified thereby.

In absence of such a rule having been made, it is difficult for us to hold that the parties to the contract could not have arrived at an

agreement that in the event of breach of performance of contract on the part of the licensees, penalty to the extent of Rs.50.00 crores would become payable.

55. A fiscal liability, which is in the nature of a civil liability, can always be fixed by consensus *ad-idem*.

Only because Section 7 of the Act provides for the conduct etc of a 'telegraph', the same would not mean that the parties cannot enter into an agreement with regard to the quantum of fiscal liability to be imposed by one on the other in case of any breach, irrespective of the fact as to whether thereby the licensor suffers any loss or not. Such a fiscal liability is imposed to compel performance of contract.

56. We have noticed heretobefore the definition of the term 'telegraph' as contained in Clause (i) of Section 3.

Conduct of the telegraph within the meaning of the provision of Section 7 would, thus, mean conduct of appliances, instruments, material or apparatus used for the purpose specified therein.

57. The conditions of licence, on the other hand, provide for the mode and manner in which the parties are required to carry out their respective rights and obligations.

It may also provide for the consequence of any breach of the conditions of licence on the part of one party.

58. Section 20 of the Act, to which our attention has been drawn, refers to fine and, thus, can be imposed only by a Criminal Court.

If only a Criminal Court can impose fine in terms of Section 20 of the Act, the same, evidently cannot be imposed by the licensor.

59. For similar reasons, the provision of Section 20-A can be resorted to only by a Criminal Court, if any case is made out therefor.

This aspect of the matter has been considered by this Tribunal in BPL Mobile Cellular Limited & Another Vs. DoT, Petition No. 8 of 2003 decided on 11.02.2010 in the following terms :-

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

Interpretation of Section 11 (1) (a) of 1997 Act

60. The said Act was enacted to provide for the establishment of the TRAI and this Tribunal, to regulate the Telecommunication services, adjudicate disputes and to protect the interest of the service providers and consumers in the telecom sector.

61. The TRAI, in terms of Section 11(1) of the 1997 Act is required to perform its functions as specified therein. Broadly stated, it may make recommendations either suo-moto or on a request from the licensor in respect of the matters specified therein.

62. Clause (i) thereof specifies the need and timing for the introduction of service providers and Clause (ii) pertains to the terms and conditions of the license. The contention of the Petitioners is that the guidelines issued by the Respondent herein from time to time in effect and substance amount to amendment of licenses which having gone to the core of the matter and in terms of the Section 21 of the General Clauses Act, was required to undergo the same process as is provided for in Section 11 of the Act.

63. Respondent however, contends that any recommendations made by the TRAI being not binding on it; the question of any reference to the TRAI for the purpose of obtaining its recommendations for amending the terms of license in terms of Section 11 did not arise.

64. Mr. Saket Singh, learned counsel appearing on behalf of the Respondent No. 2 however, urged that the term 'new license' contained in Proviso appended to Section 11 of the Act is required to be liberally construed to hold that even if the new conditions are introduced in the license or amendment to the license is made or a new license to old service providers is provided and grant of new service to the existing licensee is made, the same would also come within the purview thereof.

65. We may place on record that in view of the decision of this Tribunal, in Internet Service Providers Association Vs. Union Of India, Petition No. 119 of 2006 disposed of on 13.8.2007, any amendment to the license need not undergo a process of compliance of the

formalities laid down under Section 11 of the Act, but in the said case the larger question raised herein has not been comprehensively considered.

66. The question raised by Mr. Saket Singh, in the opinion of this Tribunal, concerns a broader aspect of the matter and in absence of any material having been brought on record, it may not be possible for us to determine the said question finally. It may however, be placed on record that in Petition No.518 of 2011, the DoT itself has contended that the amendment carried out in the licenses of the successful 3G auction would amount to a new license.

67. Having regard to the facts and circumstances of the case, in any event, we are of the opinion, it is also not necessary to go into the said question.

We say so because parties hereto have brought on record a large number of materials in support of their respective contentions on the basis whereof, this petition can otherwise be disposed of.

68. It is, moreover, not in dispute that the licenses had in fact been amended by inserting Clauses 41.14 and 41.15 whereby and whereunder the licensees were obligated to undertake adequate steps to undertake verification of the identity of subscriber verification.

Moreover, licence could be amended as it is provided under Clause 5.1, if it is in the public interest or it is required to do in the interest of security of nation.

69. Security of nation being of paramount interest, we are of the opinion, directions from time to time could be issued by the Union

of India in exercise of its sovereign function of maintaining public order.

Source of power, even otherwise is not necessary to be mentioned, if it is found that the State has the requisite power. We are informed that directions with regard to the security of nation are ordinarily issued by the Home Ministry.

Different Interpretation by Different TERM Cells issue

70. Indisputably in terms of the said circular letters and/or guidelines, the authority relating to imposition of penalty had been delegated to the TERM cells apart from carrying audit.

Petitioners by reason of various representations made inter alia by their letters dated 20.10.2009, 5.5.2010, 7.6.2010, 11.6.2010, 22.6.2010, 9.7.2010, 13.7.2010, 15.10.2010 and 12.11.2010 brought to the notice of the Respondent, the following instances involving diverse interpretations purported to have been adopted by different TERM cells which, according to them became highly oppressive, irrational, arbitrary and unreasonable, stating:-

> *"(i) Existence of two TERM Cells within a service area with each TERM Cells demanding segregated subscriber data from the telecom service providers pertaining to their respective jurisdictions. Also, the. TERM Cells treat their respective jurisdiction as a separate Circle (even though the TERM Cells are in same service area) and consider, subscribers from the other jurisdictions as outstation subscribers leading to difficulties at the field level. (ACT Letter dated 20.10.2009).*
>
> *(ii) The TERM Cells raise many issues in respect of accepting Proof of Identity (P01) and Proof of Address (POA) being collected by the service providers even though such documents are on the*

list of acceptable documents in the DoT letter dated 07 October 2009. Term Cells also insist on the "address proof' of local referee for outstation and foreign customers even though it is neither necessary nor required in terms of DoT letter dated March 23, 2009. (ACT, Letter dated 05.05.2010)

(iii) The TERM Cells marked all the cases of re-verification which were Corrected in the year 2007-2008 as negative on the ground that these documents should have been stamped re-verified since the POA/POI are as per the re-verification date and the activation is on earlier date. (ACT Letter dated 05.05.2010).

(iv) Certain TERM Cells do not allow the operators to put their comments on the CAF Audit Report and in some circles the audit report is not discussed at all and the operators are forced to sign it without discussions. (ACT Letter dated 05.05.2010).

(v) The, TERM Cells insist on additional requirements (for e.g. list of dissolved panchayats) that are over and above the DoT guidelines without routing them through DoT headquarters. Different requirements by different TERM Cells in different service areas create confusion and disruption in the day-to-day operations of the operators. (ACT Letter dated 05.05.2010).

(vi) The TERM Cells treat more than 3 connections (having the same name and address) as bulk connections whereas the License conditions state 9 connections as bulk connections. (ACT Letter dated 07.06.2010).

(vii) In certain service areas, the TERM Cells insist on re-verification of the existing subscribers in a very short time-period. (ACT Letter dated 07.06.2010).

(viii) The TERM Cells take extra sample of multiple CAFs over and above the limit prescribed by DoT for monthly audit. This leads to an addition of cost in terms of photocopy and manpower. (ACT Letter dated 07.06.2010).

(ix) The DoT guidelines contained in the letter dated 07 October 2009 accept passbook of scheduled banks as POI/P0A. However, certain TERM Cells insist that a stamp be affixed by the banks on the passbook even if that is not the usual practice. (ACT Letter dated

07.06.2010).

(x) Driving licenses which do not contain signatures of the holder are marked as negative' by the TERM Cell on the grounds that there is no signature. (ACT Letter dated 07.06.2010).

(xi) The DoT has allowed the certificate of address by village Panchayats to be issued by any equivalent authority at the Panchayat. However, the TERM Cells reject this certificate on the ground that it is not issued by the Village Panchayat Head. . (ACT Letter dated 07 06.2010).

(xii) The TERM Cells reject forms if there is a slight difference on the form vis-à-vis the proof of identity. The TERM Cells do not consider that the signatures of customers may change slightly over a period of time and this cannot be construed as a forged signature. A disconnection of the active subscriber on the basis of slight changes in the signature results in major customer dissatisfaction. (ACT Letter dated 07.06.2010).

(xiii) The TERM Cells treat customers of same circle (different LDCA) as outstation customers and insist for documents of local referee. (ACT Letter dated 07.06.2010).

(xiv) In many POIs issued by the Government authorities like Voters ID Card, Driving License, PAN Card etc., the photograph on the POI may not be clear and the issuance of same is not in the control of service providers. Such cases are rejected by TERM Cells on the ground that there is a mismatch in the photograph on the POI and the photograph on CAFs. (ACT Letter dated 07.06.2010)".

71. Petitioners furthermore have annexed various documents to demonstrate that sample forms have arbitrarily and /or erroneously been rejected by the Officers of the TERM Cells:-

"Sample forms rejected on ground of signature mismatch

ANNEXURE P36;
Sample forms rejected on ground of photograph mismatch-

ANNEXURE P37;

Sample forms rejected on ground of being apparently forged — ANNEXURE P38;

Sample form rejected on ground Of photograph not visible- ANNEXURE P39;

Sample form rejected on ground of Student Identity Card not accepted — ANNEXURE P40;

Sample Copies of forms rejected on ground of Bank Pass Book not being complete — ANNEXURE P41."

72. In this petition, we need not go into the merit of each of the grievances raised by the Petitioners as herein we are by and large concerned with the legal aspects of the matter.

Industry Initiative

73. Petitioners contend that the 'Industry' had taken various initiatives voluntarily to make subscriber verification regime successful; wherefor *inter-alia* an Apex Advisory Council for Telecom in India (ACT) was constituted.

Various steps are said to have been taken by it on voluntary basis, such as:-

i. *"Making recommendations regarding standard operating procedures for Subscriber Verification Processes;*
ii. *Carrying out multiple Re-verification exercises;*
iii. *Mystery shopping and periodic and independent audit checks to ensure that the process for subscriber identification and verification is being complied with;*
iv. *Creating customer awareness through periodic advertisements;*

v. *Educating the retail chain;*

vi. *Installing and using de-duping software to deal with multiple connections; and*

vii. *Conducting regional work-shops at regular intervals for better understanding of security related issues amongst security agencies, TERM Cells and the industry."*

It was furthermore stated:-

> *"6. The telecom operators are providing all possible assistance to the security and law enforcement agencies through various means, like (i) providing call data records; (ii) legal interception; (iii) location updates; (iv) information about point of sales; (v) nodal officers appearing in the Courts to provide evidence; (vi) !MEI tracking and (vii) providing all the available documents. The Petitioners submit that security enforcement must be seen in 'a holistic sense and the other means described above provide, the agencies with better quality and current data in relation to a subscriber who they are interested in tracking. In many cases, the security agencies have acknowledged the contribution of the nodal officers of service providers in resolving important cases.*
>
> *7. It is submitted that despite all efforts being made by the service providers to comply with the DoT guidelines, the industry has been confronted with several challenges in its efforts. These include, inter alia*
>
> *(a) Lack of proper identity documents/unique national ID, as the service filters down to the economically disadvantaged sections of society;*
>
> *(b) Lack of a single uniform national identity for all citizens or residents;*
>
> *(c) Changes in the rules mid way (for example the requirement of a photo was dispensed with and then reintroduced with retrospective effect);*
>
> *(d) Difficulties in getting documents in time from the remote and up country areas;*

(e) Decentralization of the penalty implementation to the TERM Cells;

(f) Different interpretations by different TERM cells etc."

The Instructions/Guideline issued by the Respondent:-

74. A large number of instructions and/or guidelines have been issued by the first Respondent herein, being dated 11.7.1996, 18.12.1998, 12.7.2000, 31.7.2000, 27.2.2001, 22.11.2001, 26.4.2002, 7.5.2002, 24.7.2002, 16.9.2002, 14.5.2003, 26.3.2003, 16.4.2004, 26.4.2004.

75. The circular letters having not been issued under a Statute would not have statutory force. They do not have the force of law being not a part of delegated legislation.

76. From a perusal of the proforma appended to the instructions dated 11.7.1996, 12.7.2000 and 31.7.2000, it would be evident that the requirements stipulated therein for the purpose of verification of identity of the customers are identical.

77. The security of the nation, however, gives rise to a dynamic situation for which involvement on a regular basis is necessary and thus instructions from time to time might have been issued by the Central Government in its capacity as the licensor or in exercise of its sovereign power, such a course of action being permissible under the Constitutional Scheme of India.

78. It furthermore appears that the Central Government had annexed a proforma of the 'Undertakings' which were required to be furnished by the cellular operators with its circular letter dated

31.7.2000. Such undertakings have been furnished by the licensees without any demur whatsoever.

We may notice paragraphs 4, 5 & 6 of the said Undertaking:

> *"4. The aforesaid instructions including the clarification are followed from the date of their receipt scrupulously without any fail and the licensee company undertakes to continue to follow and abide by the said instructions.*
>
> *5. the licensee company again undertakes and confirm that the above-stated instructions including clarification shall be strictly followed without any dereliction or deviation and the supplied proformas shall be got filled up for all time to come from all the subscribers of each and every category of the Cellular Mobile Telephone Service in order to obtain subscribers clear identity before providing them the service.*
>
> *6. The licensee company also undertakes that in case of any failure in compliance of the aforesaid instructions, the company will be held responsible for the violation of the terms and conditions of the license agreement and shall suffer appropriate liability imposed on the licensee company for such violation."*

79. The licensees thus, made themselves bound to abide by the said undertakings even in future.

Our attention was also drawn to the `Instruction' dated 22.11.2001 whereby relaxation had been granted in the case of prepaid customers upon dispension of the requirements of having a photograph of the customer.

80. It may, further be placed on record that although in the compilation of documents, the Respondent has annexed a circular letter dated 26.4.2002, the same had not been annexed with the reply

but we have, in the larger interest taken note thereof having regard to the fact that the Respondent in its reply has not only annexed a copy of the letter dated 7.5.2002 containing the gist thereof but also in fact has annexed a copy of the said document.

By reason of the aforementioned documents, the requirements of carrying out verification of 100% customers have been emphasized.

81. It was furthermore directed that operators would verify the identity of all old prepaid customers and in the event such identification has not been carried out, the operator was directed to withdraw the services.

By reason of the said circular letter however, all concerned were informed that failure to carry out the identification of the customer would be viewed seriously and the same would tantamount to:- (i) breach of conditions of the license; (ii) complicity of the operators; and (iii) compromising the security of nations.

82. Yet again by a circular letter dated 24.7.2002, 100% verification in respect of the customers were directed to be carried out within the time prescribed therefor, as would appear from the following:-

> *"However, COAI on behalf of operators have represented that in respect of the pre-paid customers for the period prior to above said DOT letter, the Cellular Operators need extension of the deadline of 31st July, 2002. COAI have also informed that in respect of all new connections after the said DOT letter of 07.5.2002, identity verification has been carried out in 100% cases.*
>
> *As has been advised earlier, verification of identity prior to providing the service is an important*

> *requirement, which you are bound to comply with. Enough time has been given to carry out this in 100% cases. However, in view of the representation and as a last and final opportunity, additional period of one month upto 31.8.2002 is hereby granted for carrying out identity verification of all the old customers. In respect of new customers, there must not be any deviation and identity verification must be carried out in each and every case prior to provision of the service."*

83. At this stage, we may also notice a letter of the Petitioner No. 1 dated 26.8.2002 wherein an issue was raised that if the operators were to withdraw the services of those customers, whose identification have not been verified, the same would give rise to loss of a significant proportion of subscribers, stating

> *"As you would be aware, all cellular operators have been taken all possible steps on a war footing to meet the stipulated deadline. Even in our earlier representation TVR/COAI/199 dated 16th July 2002 we had earnestly sought extension of deadline to 30th September, 2002, in view of the fact that, despite all possible efforts, it was envisaged that it would be practically impossible to complete the request before the date without severe inconvenience and loss of connectivity to a significant proportion of subscribers. We now find that our earlier estimates for compliance are proving to be correct, since, despite tremendous efforts made by the operators, significant proportion of subscribers have still not had a fair chance to meet the requirements. We are however confident that as earlier stated, we would be able to comply with the Government's order by the suggested date of 30th September, 2002."*

84. By reason thereof, it was contended that the Petitioner accepted the factual position that the verification of the customers had not been properly made and merely an extension of time by a month was sought for thereby.

85. On or about 16.9.2002, an un-equivocal and categorical assurance had been given by the operators that 100% verification shall be carried out. In terms thereof, it may be noted, no difficulty was expressed at that point of time nor any contention was raised that it was impossible to do so.

86. A meeting took place between the officers of the DOT, the Intelligence Agencies and the Operators wherein the following decisions were taken :-

> *"(i) Timely information regarding updated list of subscribers :*
> *Decision of the Licensing Authority that a complete and up-dated list of all subscribers of service (without leaving any subscriber of any category whatsoever) shall be sent to each of the six Central Government Intelligence Agencies by 10th of every month, for the previous month, is reiterated.*
> *As decided in the meeting the said list shall henceforth be sent by the operators in CD.*
>
> *(ii) Customer Identity verification for pre-paid and post-paid subscribers Decision of the Telecom Authority was earlier communicated to all the licensees that it will be the responsibility of the licensee to verify the identity of each and every customer, without any exception, before start of providing the service to a customer, as per the proforma prescribed (for pre-paid & post-paid customers). In this respect, instructions issued under letter no. 800-4/98-VAS (Vol.VI) dated 22.11.2011 & earlier instructions may be referred.*
>
> *It is reiterated that there must not be a single customer provided with service whose identity has not been verified.*
>
> *(iii) Nodal officer of the service provider and his availability for extending the facility of Interception at all times including holidays etc. :*
>
> *Instructions were issued to all Cellular Operators vide letter number 800-4/98-VAS (Vol. VI) dated*

31.10.2001 that a Nodal Officer of the licensee in respect of each license service area will be nominated & communicated to all the designated Intelligence Agencies. Security Agencies intimated that some of the operators had not intimated the name and contact details of their Nodal Officers and also that they were finding it difficult to contact some of the officers during weekends or holidays.

It was decided that each Operator will intimate the name and contact details of nodal officer in the first week of April every year and also as soon as there is any change, an alternate Nodal Agency should also be nominated and intimated who may be contacted if the Nodal Officer was on leave etc.
Accordingly, all operators would intimate the name of the Nodal Officers/alternate Nodal Officers immediately and would also follow the said instructions. Further, till the names of the Nodal Officers/alternate Nodal Officers are intimated afresh, and also in situations where the Nodal Officer/alternate Nodal Officer is not available due to any reason, the concerned Intelligence Agency will contact the Chief Executive Officer concerned for extending the required assistance in a time bound manner. The names of CEOs have been communicated to the six Intelligence Agencies.

(iv) Inadequate capability in the service providers' network for required monitoring facilities.

At present, the Intelligence Agencies are availing the monitoring facility as available in the network of Cellular Operators; this will be continued for the time being.

As had been discussed and communicated earlier and as also reiterated during the meeting. Ministry of Home Affairs will be shortly finalizing the requirement of interface/equipment and the facilities for monitoring that will be required to be set up by the Cellular Operators. This will be communicated as soon as a decision is taken.

3. In addition to above, it was also pointed out that there is an urgent need for coordinated & corrective measures against operation of illegal telecommunication facilities/Centres, which primarily function by obtaining bulk telephone connections

from service operators. Such illegal telecom services not only cause loss of revenue but are also a threat to the national security. Operators will have to be vigilant while providing bulk connections to any organization/individual. However, separate instructions in this matter also be issued."

87. In another meeting, the question with regard to the operation of the illegal telephone exchange has also been pointed out.

In a letter dated 16.4.2004, the Respondent stated:-

"The complete list of subscribers shall be made available by the licensees on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The licensee shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal shall be registered against each subscriber for the bonafide use. The licensee shall make it clear to the subscriber that the SIM card used in the user terminal registered against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service."

88. Even in respect of the foreign nationals, directions were issued on or about 26.4.2004 to the following effect:-

"In view of grave security concerns, there is a need to evolve a mechanism to authenticate the documents provided by client and establish his proper identity before providing connections/service. In addition, it is imperative that in cases of provisioning of services to a foreign national, the following measures are taken :

(a) Besides foreign identity proof, furnishing of local referee/local address should be insisted upon and obtained;

(b) The Service Providers should immediately furnish the details of SIM/Cash Cards given to foreign nationals along with his particulars to DOT as well as Security Agencies."

89. Respondent by a circular letter dated 15.10.2004 while referring to the 15 circular letters issued by it and as has been noticed heretobefore that issuance of sim-cards without proper identification is a matter of concern having serious security implications stated that a procedure is required to be evolved with regard thereto.

We may notice a few relevant paragraphs of the said circular letter:

"Since, it has repeatedly been emphasized that sale of SIM cards without proper identity verification is a matter of concern and has serious security implications, a procedure needs to be evolved to ensure that SIM cards are not sold without proper identity verification. Also, it was emphasized to cross check the addresses of all the existing subscribers and it is felt that the service providers must have completed that exercise. In view of the above, it needs to be ensured by the service providers that there should not be any working number in their network without proper address of the subscriber.

In this regard, you are requested to submit the action taken report in the above matter latest by 15th November 2004. Further, it is to mention that in case such instances of non-verification of identity of subscriber would be noticed in future, it would be treated as breach of terms and condition of Licence Agreement and action would be taken accordingly."

90. The operators were, thus, requested to submit an Action Taken Report by 15th Nov, 2004.

By reason of a circular letter dated 23.11.2004 meant for the operators of J&K, Assam and North-East Telecom Service areas, while allowing pre-paid services, the Respondent emphasized that the informations desired in the proforma annexed thereto were mandatory in nature.

91. Alleged lapses on the part of the telecom service providers with regard to non-compliance of verification of address of customers were reiterated by a circular dated 30.11.2004, although according to the Petitioners there existed a practical problem with regard thereto. The service providers were put to notice that they would be held responsible for causing security threat to the country and loss, if any, occurs in this behalf.

92. According to the Respondent, the question as to what would constitute an adequate verification (although not specifically referred to therein) was explained in a circular letter of the Respondent dated 29.12.2004, stating:-

> *"3. It is again emphasized that sale of SIM cards/connections without proper identity verification is a matter of concern and has serious security implications, a procedure needs to be evolved to ensure that SIM cards are not sold without proper identity verification. Also, it is emphasized to cross check the address of all the existing subscribers and it is felt that the service providers are already doing this exercise. In view of the above, it needs to be ensured by the service providers that there should not be any working number in their network without proper address of the subscriber. Further, it will be the responsibility of the licensee to maintain the records of the identity of their customers and produce the same on requisition. Therefore, necessary arrangements for obtaining the necessary records from the franchisees in a foolproof*

manner so as not to leave out even a single user of the service, should be made.

4. Verification of identity of subscribers before provision of Telephone Service as per above instructions for security reasons is an important requirement. You are, therefore, required to furnish an undertaking per attached proforma to the effect that the instructions issued as above are scrupulously followed."

93. Pursuant to or in furtherance of the said direction, it is stated before us that undertakings were furnished by the operator.

Noticing the alleged laxity on the part of the licensees in this regard as also non-compliance of the directions to furnish informations as per the proforma annexed, it was directed that the same was to be treated as breach of the terms and conditions of license agreements and it was threatened that appropriate action would be taken accordingly including imposition of penalty/ invocation of bank guarantee, and/or termination of license.

94. Perusal of a circular letter dated 22.11.2006 shows that a meeting was held on 27.9.2006 wherein it was decided that the guidelines in respect of verification of subscribers enumerated in paras 3 and 4 thereto should be scrupulously followed by the service providers with immediate effect.

It may be placed on record that by reason of the said letter, a time frame till 31.3.2007 was given for compliance of the said requirements, stating:-

"6. For ensuring that the complete subscriber information is available with all the service providers and the same is duly verified, it has also been decided that each Licensee shall take up re-

verification of the existing subscribers on priority and ensure that the re-verification of the existing subscribers is completed by 31st March, 2007. By re-verification, it is meant that there shall be 100% check of CAF/SAF, documentary proof of identity and documentary proof of address and it would be ensured that the subscriber information available in service provider's database matches with that in CAF/SAF and enclosed documents. Further, the Licensee company shall cross-verify the information from the actual used by calling the respective subscriber. There shall not be any connection working after 31st March 2007 in the Licensee's network without having above subscriber information duly verified.

7. As already mentioned above, the corrective measure of re-verification of subscribers is for the purpose of ensuring that the complete subscriber information is available with all the service providers and the same is duly verified and this may not be construed as any exemption or relaxation from fulfilling the license conditions.

8. After 31st March, 2007, if any subscriber number if found working without proper verification, a minimum penalty of Rs.1000 per violation of subscriber number verification shall be levied on the licensee apart from immediate disconnection of the subscriber number by the licensee."

95. It may furthermore be placed on record that the Respondent contends that operators had certified that the process of re-verification had been carried out.

96. On or about 3.5.2007 an uniform sampling of 0.02% of the customer base subject to a minimum of 100 sample in stead and in place of 1500 samples was prescribed. According to the Respondent, the said circular letter is a pointer to the fact that exercise on the part of the Respondent in this behalf was not meant for generation of revenue alone.

97. By an Office Memorandum dated 10.4.2008, a Committee was constituted for the purpose of making recommendations as regards the quantum of penalty which may be imposed, wherein the Secretary Generals of COAI and AUSPI were to be the special invitees.

98. Pursuant thereto or in furtherance thereof, a meeting took place on or about 16.4.2008. The relevant portions of the said MOM read as under:-

> *"It was felt that it would be appropriate to categorize the cases of violation in broadly into certain categories such as:-*
>
> *(a) Cases involving National Security;*
> *(b) Cases of malafide, fraud, etc;*
> *(c) Technical violation cases where service providers has launched certain services without proper approval/security clearance or which are not in conformity of scope of license agreement."*

99. It appears that another meeting took place on 5.5.2008 but the minutes of the meetings thereof has not been placed on record.

The documents which should be relied upon for the purpose of proof of verification were specified by reason of a circular letter dated 16.4.2008.

100. By a circular letter dated 13.4.2008, the sample size for verification/ audit was raised from 0.02% to 0.1%, which was without prejudice to the discretion of the Government or its authorized officer to inspect or to check any other subscriber(s) including prescribing any other sample size.

101. A clarificatory circular was issued on 17.2.2008 with regard to the proof of identity, stating that CAF for customers acquired between Nov, 2001 and May, 2005 would also be necessary.

102. We may at this juncture, notice that a circular letter dated 24.12.2008 was issued whereby a graded scale of penalty was introduced; providing:

> *"In spite of the above provisions/instructions regarding subscriber verification, it has been observed from the report of TERM Cells that the service providers are not complying with the requirement of subscriber verification fully. Accordingly, the matter has been reviewed and it has been decided to introduce a scheme of penalty for subscriber verification failure cases at graded scales w.e.f. 1st April 2009, so that it works as a deterrent. The graded scales are based on correct subscriber verification per centage i.e., correct subscriber verification per centage of a service provider in any service area will be ascertained and based on this per centage, a financial penalty of corresponding amount for each detected case of unverified subscriber shall be levied on account of violation in respect of subscriber verification failures from the service provider in that service area. According to the said scheme, the correct subscriber verification per centage vis-à-vis financial penalty per unverified subscriber shall be as per table below:-*

Correct subscriber verification per centage in a service area	*Amount of financial penalty per unverified subscriber*
Above 95%	*Rs.1000/-*
90%-95%	*Rs.5000/-*
85%-90%	*Rs.10000/-*
80%-85%	*Rs.20000/-*
Below 80%	*Rs.50000/-*

103. The quantum of penalty and other matters were reiterated by a circular dated 23.3.2009 by reason whereof a time frame was also fixed as far as supply of informations to the security agencies/TERM Cells in case of any emergency is concerned, although it was stated, that all informations relating to customer identity verification had been placed by the operators on their respective websites.

104. On or about 29.4.2009, ACT by a letter addressed to the Respondent expressed the difficulties of the operators in complying with the direction(s) issued by the Respondent from time to time.

105. While contending that steps have been taken by them for verification of the customers as stipulated in the circular letter issued by the Respondent, it was stated:-

> *"While conducting the re-verification initiative, operators would generally carry out the following steps:*
>
> *1. Checking for completeness of forms and documents as per DOT's list of documents vide letters issued previously (10May 2005, 16 April 2008, 22 November 2006, 23 March 2009).*
>
> *2. Tele-calling the customer and collecting correct documents i.e. Photos, Proof of identity (POI) Proof of Address (PoA). In some cases, new CAFs will also be required to be filled. This re-verification initiative will also facilitate to collect photographs from the customers acquired between the period Nov 2001- May 2005, where photo on PoI was considered sufficient for the purpose of verification."*

106. Another circular was issued with regard to re-verification process as proposed by 'ACT' wherewith two forms were prescribed. A clarification was issued on 18.2.2010 with regard to lodging of First Information Report(s) in respect of the offence of forgery.

107. New directions were issued on 20.4.2010 as regards data which were to be furnished. 'ACT' again raised certain grievances by its letter dated 5.5.2010 as far as the functions of the TERM Cells were concerned, contending:-

> *"It is pertinent to note that it becomes very difficult for the operators to comply with such additional requirements of the TERM Cells. Also, different requirements in different circles create confusion and disrupt day to day operations of the operators.*
>
> *It is thus requested that such additional requirements of the TERM Cells, which are over and above the DoT guidelines should be routed through DoT headquarters only.*
>
> *In light of the above, we seek your urgent kind support in advising TERM Cells clearly on the guidelines/parameters on which subscriber verification audits are to be carried out and ensure that these guidelines are followed consistently across all TERM Cells.*
>
> *Further, we would also be grateful if the above guidelines/parameters could be shared with the industry so that there is a common understanding across all stakeholders on how documents are going to be assessed for compliance."*

108. On or about 1st June, 2010 an internal office Memo was issued by reason whereof the criteria relating to imposition of penalty was decentralized, wherefor guidelines were provided.

109. Another letter was issued on 4th November, 2010 regarding Decentralization of work relating to imposition of penalty against subscriber verification audit, which is to the following effect"-

> *"Various representations from Service Providers and their associations have been received. In this regard, following clarifications are hereby issued:-*
>
> *"The work of imposition of penalty for subscriber verification cases shall be carried out by the TERM Cells as detailed in the instructions dated 01.06.2010.*
>
> *(i) The TERM Cells shall conduct the CAF audit as per the instructions issued from time to time.*
>
> *(ii) After the Audit of CAFs for a particular month is completed by the TERM Cell, the initial report of the CAF audit shall be forwarded by ADG/Director TERM Cell to the respective service providers indicating the findings about the compliance/non-compliance.*
>
> *(iii) The service providers may be given one week's time to discuss the cases on non-compliance for correcting in CAF Audit Report in view of status of CAF/documents available with 'original CAF'.*
>
> *(iv) The initial report may be modified by the ADG/Director TERM Cell where the service provider does not agree with the audit report and such modifications may be done in accordance with the best judgment of ADG/Director TERM after considering the 'original CAFs' and proper interpretation of instructions, if any.*
>
> *(v) The report thus finalized shall be jointly signed by the Service Provider and TERM Cell.*
>
> *(vi) The showcause notice may be issued to the service provider for payment of penalty as per findings of jointly signed report.*
>
> *(vii) The showcause notice shall have the amount of penalty to be paid based on the total number of non-complaint CAFs giving 21 days time to deposit the penalty amount. One week's time may be given*

to the service provider in the showcause notice to make representation to DDG TERM Cell, if any, against the findings of non-compliance in the jointly signed report.

(viii) In case, the service provider makes the representation to the DDG TERM concerned, the representation shall be examined by the DDG TERM and decided preferably in two weeks time. For the examination of the representation, DDG TERM may take assistance of the ADG/Director TERM not involved in the issue of showcause notice for the CAF Audit, wherever available.

(ix) The decision of DDG TERM shall be final. The amount of financial penalty shall be deposited as per decision of DDG TERM within one week from the date the decision of DDG TERM or within 21 days from issue of showcause notice, whichever is later."

110. Respondent sought for suggestions from the 'Industry' with regard to the issues which had been raised by ACT as regards functioning of the TERM Cells.

Similar grievances were again raised by ACT by its letter dated 7.6.2010 inter-alia contending that different TERM Cells had been giving different interpretations of the circular letters issued by the Respondent from time to time.

111. A request was made to the following effect:-

"It is thus requested that such additional requirements of the TERM Cells, which are over and above the DoT guidelines, should be routed through DoT headquarters only and we also request you to issue necessary advice to TERM Cells so that service providers are not penalized for differential interpretations of the TERM Cells."

112. As regards de-centralization of work relating to imposition of penalty against subscriber verification audit, ACT vide its letter

dated 11.6.2010 addressed to the Secretary of DOT, requested as under:-

> *"In the light of the above facts, we would request DoT to reconsider its decision to decentralize the work pertaining to imposition of penalty with respect to Subscriber Verification audits with TERM Cells. Adjudication of penalty on subscriber verification failure should remain a function of the licensing Arm of the DoT. DoT already has experience in this substantive area as well as established the penalty imposition procedure which is generally fair as service providers are involved at all levels of decision making with regard to the imposition of penalties."*

113. By a letter dated 22.6.2010 it was stated that high amount of penalty on subscriber verification may impede the growth of the industry in the following terms:

> *"Our Submissions:*
>
> *(i) Present penalty slab structure may kindly be re-viewed and fixed at lower rates.*
>
> *(ii) Reconsideration of imposition of penalty of Rs.50,000 in case of disconnection of non-compliant forms within 72 hours.*
>
> *(iii) Adjudication of penalty on subscriber verification failure should remain a function of the licensing arm of the DoT."*

Similar letters were issued again on 9.7.2010 and 13.7.2010.

114. By a letter dated 12.8.2010, it was directed, in view of the notification issued by the State of Maharashtra, that the ration cards issued in the State of Maharashtra and/or Mumbai Service Areas would not be accepted as POI/POA.

115. On 12.10.2010 allegedly a draft of proposed instructions was also issued.

Yet again by a letter dated 15.10.2010, 'ACT' sought for extension of time for further six months, i.e., until 13.4.2011 to complete the re-verification exercise; in response whereto the Central Government granted two months' further time i.e, upto 31.12.2010 by a letter dated 2.11.2010.

116. On or about 4.11.2010 procedures were laid down for levy of penalty which were in three stages; (i) Taking out the documents in regard whereto deficiencies existed; (ii) Report of the field unit whereupon signature of the representative of the operator was also to be obtained, and (iii) An appeal before the DDG, TERM Cell preferably within two weeks from the date of the order imposing penalty.

The said circular letter was issued in continuation of the Office Memorandum dated 8.6.2010.

117. ACT by its letter dated 12.11.2010 contended that the matter relating to imposition of penalty may be dealt with by DOT itself in stead and in place of TERM Cells, as also for downward review as regards quantum of penalty, stating:-

> *"We are now further dismayed to note even this punitive scheme is being applied in a most incorrect manner with TERM Cells applying penalty at a flat highest slab rate for all unverified subscribers. It is submitted that as per a graded system, the financial penalty is to be levied in a graded manner, and the manner in which it is being applied by the TERM Cells is against the very principle of a graded approach."*

118. Draft instructions of subscriber verification were issued again on 30.12.2010. Respondent by its letter dated 14.1.2010 conveyed its decision that 'ADHAAR' issued by Unique Identification Authority of India would also be treated for the purpose of valid documents for the purpose of verification of identification of the customers.

On or about 2.2.2011, time for completion of the process of re-verification was extended up to 31.3.2011.

Impugned Orders

119. By reason of the impugned circular letter dated 3.2.2011, purportedly the earlier circular letters were clarified, stating:

> *"It has been observed that some of the CMTS/UAS Licenses have misinterpreted the applicability of the penalty slab in the above table. It is to mention that there is no scope for misinterpretation. The issue has been clarified time and again at various meetings. However, it is being observed that some of the Licensees are still misinterpreting it. Therefore, it is being clarified again. It is reiterated that the penalty is to be calculated as per rate applicable in the slab relating to the percentage of correct subscriber verification for all the failed CAFs in the Audit. For example, if the sample size of the CAF Audit for a month is 1000 and the number of compliant cases is 870, then the CAF audit compliance shall be 87%. The penalty slab applicable as per letter dated 24.12.2008 for all the failure cases shall be @Rs.10,000/-. The total penalty shall be calculated after multiplying the total no. of failed cases i.e. 130 with the applicable penalty i.e. Rs.10,000/-. Thus the total penalty imposed for the above CAF audit shall be 130X10000 i.e. Rs.13,00,000/-.*
> *Any defaults in payments of penalties as per schedule given in demand notes will be dealt as per license condition and service providers will be responsible for all consequences."*

120. Some corrections to the following effect thereto were made by a letter dated 7.2.2011:-

> *Doubts have been raised about the penalty to be imposed in case the overall correct subscriber verification per centage in a particular CAF Audit is, say, 85% or 90%. To clarify the doubts the above table in the instruction dated 24.12.2008 may be read as below:-*

Correct subscriber verification percentage in a service area	*Amount of financial penalty per unverified subscriber (in rupees)*
Above 95%	*Rs.1000/-*
90% or more and upto 95%	*Rs.5000/-*
85% or more but less than 90%	*Rs.10000/-*
80% or more but less than 85%	*Rs.20000/-*
Below 80%	*Rs.50000/-*

121. We have noticed the said guidelines in details not only for the purpose of judging the legality thereof but also in view of the fact that the purport and object thereof is in question.

Estoppel/Waiver issue:

122. The initiative undertaken by the industry has been noticed by us heretobefore. Petitioners have categorically stated that apart from the compliance with the circular letters and/or guidelines issued by the DOT from time to time, it itself took initiatives on voluntary basis to make the subscriber verification regime successful.

For the said purpose, we have noticed heretobefore, a body, commonly known as Apex Advisory Counsel for Telecom in India ('ACT') was constituted.

123. Heretobefore, we have also noticed that not only the individual members of the Petitioner Association but also the 'ACT' had made communications with various authorities or DOT. It is also beyond any controversy that the Petitioners by and large complied with the said circular letters/instructions.

124. It is, however, true that from time to time various difficulties faced by the industry have also been pointed out; sometimes they were responded to favorably and sometimes, they were not.

125. Would these acts on the part of the Petitioners constitute 'Estoppel', is the question?

Principle of Estoppel is applied in equity. It should not be applied in a manner so as to violate the principle of right and good conscience. Moreover, it is procedural in nature. The rules of Estoppel/Acquiescence/Waiver cannot be applied where an order is otherwise unconstitutional or contrary to statute. It is trite that there is no estoppel against statute. In the event if it is held that the action on the part of the Respondent herein is violative of the Constitution of India or any other statutes, the rule of estoppel although may not have any application, but the rule of waiver may have application, as it is well-known that even a statutory right can be waived.

126. We may also notice that recently Chauhan (J) speaking for a Division Bench of Supreme Court of India in *Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.* reported in (2011) 10 SCC 420, a case where a party took advantage of the benefit of an agreement was not permitted to question the validity whereof, stated the law, thus:-

> *"34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide Nagubai Ammal v. B. Shama Rao12, CIT v. V.MR.P. Firm Muar13, Maharashtra SRTC v. Balwant Regular Motor Service14, P.R. Deshpande v. Maruti Balaram Haibatti15, Babu Ram v. Indra Pal Singh16, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors17, Ramesh Chandra Sankla v. Vikram Cement18 and Pradeep Oil Corpn. v. MCD19.)*
>
> *35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."*

127. In Joint Action Committee of Air Line Pilots' Association of India (ALPAI) v. Director General of Civil Aviation, (2011) 5 SCC 435 it was stated:

> "**12.** The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate

> and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. [Vide *Babu Ram* v. *Indra Pal Singh* [(1998) 6 SCC 358] , *P.R. Deshpande* v. *Maruti Balaram Haibatti* [(1998) 6 SCC 507] and *Mumbai International Airport (P) Ltd.* v. *Golden Chariot Airport* [(2010) 10 SCC 422 : (2010) 4 SCC (Civ) 195] .]"

128. In VIACOM 18 Media Pvt. Ltd. vs. MSM Discovery Pvt. Ltd., Petition No.220(C) of 2010 disposed of on 23.12.2011, this Tribunal stated as under:

> *"187. In United Australia Ltd. Vs. Barclays Bank Ltd. (1941) AC1 at 30, Atkin, LJ, stated the law thus :-*
>
> *"….if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose."*
>
> *Knowledge in the context of breach means at least knowledge of the circumstances which in law give rise to the right to terminate. Ordinarily, election should be communicated and communication will be essential if there would otherwise be no unequivocal act. (See China National Foreign Trade Transportation Corporation V. Evlogia Shipping Co. (1979) 2 All ER 1044 and Peyman V. Lanjani (1985) Ch 457 at 493).*
>
> *Affirmation does not, as a general rule, affect the promisee's right to claim damages for the promisor's breach. (See Compagnie de Renflorement de Recuperation et de Travaux Sous-Marins V.S.*

Baroukh et Cie v. W. Seymour Plant Sales and Hire Ltd. (1981) 2 Lloyd's Rep. 466).

Waiver and Election are two different concepts as was opined in Super Chem Products Ltd. v. American Life and General Insurance Co. Ltd. (2004) UKPC02 : (2004) 2 All ER (Comm.) 713 : (2004) Lloyd's Rep. IR 446.

Some Judges, however, used different words to mean the same thing and the same word mean to different things i.e. waiver, total waiver, waiver of remedy, waiver of rights, election, abandonment, equitable estoppels, promissory estoppels, quasi estoppels and waiver by estoppels. It is considered to be one of the most complex and difficult area in the modern law of contract. The law is still in a state of development.

Lord Denning, however, has used the words 'waiver', and 'estoppel' interchangeably. (See Woodhouse AC Israel Cocoa Ltd. Vs. Nigerian Produce Marketing Co. Ltd. (1971) 2 QB 23).

Unlike election, which concentrates mainly on the conduct of the promisee, the principal focus of estoppel is on conduct of the promissor in reliance on what the promise has said or done following the breach which provides the basis for termination. Estoppel, ordinarily, is based on a representation which need not be expressed in all situations, although requires to be unequivocal.

In this case, we are of the view that the said principle has no application."

129. We, keeping in view the conduct of the operators, are of the opinion that the principle of Estoppel would be applicable in this case.

It is well settled that a person cannot be permitted to approbate and reprobate at the same time. [See Pradeep Oil Corporation vs. MCD, (2011) 5 SCC 270].

We would consider the applicability of this principle furthermore at appropriate stages.

Delay/Laches Issue

130. In this case although the question of validity and/or legality of the circular letters/guidelines are in question, constitutionality thereof is not.

131. As would appear from the discussions made hereinafter, the principal question which would arise for our consideration is as to whether the Respondent can be said to have acted within the purview of its jurisdiction as a licensor.

132. It is also not in dispute that since the inception of the grant of CMTS license in the year 1996, such circular letters and guidelines were being issued. Petitioner ordinarily should have questioned the same within a reasonable time. This Tribunal, having been constituted in terms of a Parliamentary Act and it being a `Court' within the meaning of the provisions of the Limitation Act, 1963, validity of circular letters should have been questioned within a period of three years. Petitioner for one reason or the other not only failed and/or neglected to do so but also abided thereby to a substantive extent; the effect thereof would be considered hereinafter.

133. Delay, as is well known, defeats equity. If the operators stood by the circulars and in fact abided by the same, they should not be permitted to question the validity and/or legality thereof at the later stage.

134. The question of delay and latches came up for consideration recently in Shankara Co-operative Housing Society Limited v. M. Prabhakar, 2011(5) SCC 607, wherein it was opined:

> *"**67.** It is now well settled that the power of the High Court under Article 226 of the Constitution to issue an appropriate writ, order or direction is discretionary. One of the grounds to refuse relief by a writ court is that the petitioner is guilty of delay and laches. Inordinate and unexplained delay in approaching the Court in a writ is indeed an adequate ground for refusing to exercise discretion in favour of the petitioners therein. The unexplained delay on the part of the petitioner in approaching the High Court for redressal of their grievances under Article 226 of the Constitution was sufficient to justify rejection of the petition.*
>
> ***68.** The other factor the High Court should have taken into consideration is that during the period of delay, interest has accrued in favour of the third party and the condonation of unexplained delay would affect the rights of the third parties. We are also of the view that reliance placed by Shri Ranjit Kumar on certain observations made by this Court would not assist him in the facts and circumstances of this case. While concluding on this issue, it would be useful to refer the observations made by the Court in Municipal Council, Ahmednagar v. Shah Hyder Beig [(2000) 2 SCC 48] , wherein it is stated that: (SCC p. 54, para 14).*
>
> *Delay defeats equity and that the discretionary relief of condonation can be had, provided one has not given by his conduct a go-by to his rights."*

135. Prima-facie in this case, this petition has been filed so far as some of the circular letters are concerned after a period of five years. We do not see any justification therefor.

136. It may be true that delay/laches by itself may not be a ground to question the constitutionality of a provision of law. In this case, however, such a question does not arise. Reliance placed by the Petitioners on *Motor General Traders v. State of A.P.* reported in (1984) 1 SCC 222, keeping in view the facts and circumstances of this case,

is not applicable, as therein the provisions of Andhra Pradesh Rent Control legislation which was meant to be a temporary statute having been continued for an indefinite period was found to be unconstitutional at a later stage. However, in this case certain clarifications have been issued in February, 2011, whereafter only, this petition was filed.

137. Validity/Applicability of the said recent circular letters, in our opinion, should not be refused to be considered only on the ground of delay and latches.

In this case while exercising our original jurisdiction, it may not be proper for us not to enter into the merit of the matter at all only on the ground of delay and latches, if it is otherwise found to be within the permissible limit prescribed under the law of limitation. We have held heretobefore that in this case apart from the delay and latches, the Petitioners stood by the circulars and acted in terms thereof.

138. We may therefore, consider the effect of the recent circulars which are within the period of limitation and not those, which are barred under the law of limitation and/or otherwise barred under the doctrine of Estoppel.

Parting of Privilege

139. A statutory recognition exists under Section 4 of the Act that working of `Telegraph' is the exclusive privilege of the Central Government. The proviso appended thereto provided that by grant of a license, the Central Government may part with its exclusive privilege. There cannot be any doubt or dispute that parting with such

exclusive privilege by way of grant of license would be subject to such conditions as the Central Government may think fit and proper to impose and on such consideration as may be deemed fit and proper.

140. The Supreme Court of India recently in *Union of India v. Assn. of Unified Telecom Service Providers of India*, reported in (2011) 10 SCC 543 opined that licences granted in terms of Section 4 of the Act are in the nature of a contract entered into by and between the licensor and the licensees. It was held that the licensee having derived benefit under the condition of the license should not be permitted to question the legality and/or validity thereof at a later stage.

141. We may notice that in Petition No. 12 of 2002 Tata Teleservices v. Union of India disposed of on 11.7.2011, this Tribunal opined as under:-

> *"PARTING OF AN EXCLUSIVE PRIVILEGE – EFFECT OF*
>
> *87. An exclusive privilege granted to the 'State' by reason of a statutory provision creates a monopoly. Such a monopoly can be created by reason of legislation in favour of a State or a Public Sector Undertaking. Creation of such a monopoly would amount to a reasonable restriction within the meaning of the provisions of Article 19 (6) of Constitution of India.*
>
> *88. Would that mean that the Government at its sweet will can impose wholly unreasonable terms and act in a manner which would not be in strict compliance of the other Parliamentary Acts?*
> *Answer to the said question must be rendered in the negative.*
>
> *89. Mr. Singh has placed strong reliance on a decision of the Supreme Court of India in Delhi*

Science Forum & Ors. Vs. Union of India & Another reported in (1996) 2 SCC 405, whereby offer was made to non-Government Companies including foreign collaborated companies for establishing, maintaining and working of telecommunication system of the country pursuant to the government policy for privatization of telecommunications.

90. It was held that the proviso appended to Section 4 could be resorted to for the said purpose, although telecommunication is recognized as a public utility for (sic) strategic importance.

91. It was, however, opined :-

***"10.** There is no dispute that the expression 'telegraph' as defined in the Act shall include telephones and telecommunications services. Sub-section (1) of Section 4 on plain reading vests the right of exclusive privilege of establishing, maintaining and working telegraphs in the Central Government, but the proviso thereof enables the Central Government to grant licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain and work telegraph within any part of India. It is true that the Act was enacted as early as in the year 1885 and Central Government exercised the exclusive privilege of establishing, maintaining and working telegraphs for more than a century. But the framers of the Act since the very beginning conceived and contemplated that a situation may arise when the Central Government may have to grant a licence to any person to establish, maintain or work such telegraph including telephone within any part of India. With that object in view, it was provided and prescribed that licence may be granted to any person on such conditions and in consideration of such payments as the Central Government may think fit. If proviso to sub-section (1) of Section 4 itself provides for grant of licence on conditions to be prescribed and considerations to be paid, to any person, then whenever such licence is granted, such grantee can establish, maintain or work the telephone system in that part of India. In view of the clear and unambiguous proviso to sub-section (1) of Section 4, enabling the Central Government to grant licences for establishment, maintenance or working of telegraphs including telecommunications, how can it be held that*

the privilege which has been vested by sub-section (1) of Section 4 of the Act in the Central Government cannot be granted to others on conditions and for considerations regarding payments? According to us the power and authority of the Central Government to grant licences to private bodies including companies subject to conditions and considerations for payments cannot be questioned. That right flows from the same sub-section (1) of Section 4 which vests that privilege and right in the Central Government. Of course, there can be controversy in respect of the manner in which such right and privilege which has been vested in the Central Government has been parted with in favour of private bodies. It cannot be disputed that in respect of grant of any right or licence by the Central Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution not only the source of the power has to be traced, but it has also to be found that the procedure adopted for such grant was reasonable, rational and in conformity with the conditions which had been announced. Statutory authorities have sometimes used their discretionary power to confer social or economic benefits on a particular section or group of community. The plea raised is that the Act vests power in them to be exercised as they "think fit". This is a misconception. Such provisions while vesting powers in authorities including the Central Government also enjoin a fiduciary duty to act with due restraint, to avoid "misplaced philanthropy or ideology". Reference in this connection can be made to the cases: Roberts v. Hopwood3; Prescott v. Birmingham Corpn.4; Taylor v. Munrow5; Bromley London Borough Council v. Greater London Council6.

92. The said decision, therefore, itself is an authority for the proposition that no unreasonable term can be imposed for grant of a licence.

142. When a license is granted, the licensor as a statutory authority is also bound to maintain equality and level playing field.

[See *State of M.P. v. Nandlal Jaiswal* , (1986) 4 SCC 566]

143. Yet again in *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, reported in (2007) 8 SCC 1, the Apex court opined:-

> ***"36.*** *We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N.3, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field".*

> *According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."*

144. When, thus, a license is granted the licensor in its acts of implementation of the conditions thereof is required to act reasonably. Arbitrariness on the part of the licensor even in the matter of imposition of penalty must be eschewed. Even after parting of privilege it must act within the Constitutional Limits. It must exercise its sovereign functions bona fide. It's actions are subject to judicial scrutiny.

Validity of the circulars

145. This Tribunal is concerned with the question of legality and validity of the recent circulars. Ordinarily power to impose penalty must emanate from a statute. The question as to whether a penalty can be imposed in a given situation will depend upon the nature of the contact. The purpose and object for which such provisions have been laid down in the license agreement is also required to be seen. There is no arbitrariness in the matter of issuance of the guidelines on the part of the officers of the Respondent. We fail to see as to why the circular should be declared to be illegal, particularly when the legality and/or validity of the licensor to even amend the license conditions in the interest of security of the nation or in public interest, is not in question.

146. It is stated before us that the circular letters and/or quantum of penalty had been considered by various committees who submitted their reports and furthermore the inputs of the Intelligence Branch has also been taken into consideration.

147. It may not be very relevant for our purpose. But what is relevant is that the Petitioner all along knew about the same, accepted most of the directions without any demur and even complied therewith. Petitioner's representatives had also been consulted from time to time. If they were a part of the decision making process, it does not lie in their mouth to turn around and question the correctness and/or validity thereof.

In P.S. Gopinathan v. State of Kerala, (2008) 7 SCC 70 it was observed:

> *"44. ..... Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant."*

[See also G. Sarana (Dr.) v. University of Lucknow (1976) 3 SCC 385]

148. In a situation of this nature, it cannot also be said that no graded penalty could have been imposed.

Moreover, as stated heretobefore, the individual cases involving imposition of penalty may have to be dealt with having regard to the fact situation obtaining in each case, as and when the petitions are filed. Each case involving separate factual matrix should be dealt on case by case basis.

149. It has been contended before us that any condition arbitrarily imposed must be held to be invalid in law and the same must satisfy the test of reasonableness and as in the instant case in view of the object of the telecom licenses, extensive customer verification cannot be said to be a part of the telecom business.

150. Section 4 of the Indian Telegraph Act confers power on the Respondent to part with its exclusive privilege. If the conditions of license granted in favour of the licensee are to be challenged, the same must be done specifically. The Petitioners have not made any prayer that some conditions of the license be declared ultra-wires the Constitution of India and/or the provisions of the Act.

151. The prayers made in the petition are confined to the certain circulars issued by the Respondent.

Moreover, recently the Supreme Court of India in *Union of India v. Assn. of Unified Telecom Service Providers of India*, (2011) 10 SCC 543 speaking through Patnaik, J, opined that a licensee having taken benefit under the license should not be permitted to question the validity thereof.

152. Strong reliance has been placed by the learned counsel for the Petitioner in *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala* reported in (2006) 4 SCC 327, wherein it was held:-

> ***"42.*** *If a policy decision is taken, the consequences therefor must ensue. Rehabilitation of the workers, being not a part of the legislative policy for which the Act was enacted, we are of the opinion that by reason thereof, the power has not been exercised in*

a reasonable manner. Rehabilitation of the workers is not one of the objectives of the Act."

153. Security of the nation has wide implication. For enforcing the security aspect, several steps are required to be taken. It is not denied or disputed that identification of the persons concerned taking mobile connection can be obtained through working out the provisions of the license. With a view to ensure the security of the nation, even reasonable restrictions on the exercise of the rights of the citizen can be imposed. If that be so, we fail to understand as to why the proper regulation cannot be brought in force therefor. If by reason of a sovereign power, control can be exercised there cannot be any doubt or dispute that restrictions can also be imposed.

154. Petitioners would contend that legality of the circulars can be challenged on the premise that some are beyond the terms of the license. There cannot be any doubt or dispute with regard to the said proposition. However, in this case as noticed heretobefore, the conditions of the license were amended. The circulars letters/guidelines must be held to have been issued only in terms of the amended license. Clauses 41.14 and 41.15 clearly stipulate that the licensees are required to furnish the CAFs. If that be so, the mode and manner in which such CAFs are to be furnished, the extent thereof as also subject to the reasonableness, the quantum of penalty could also be subject matter of the guidelines/circulars. It however, cannot be disproportionate.

155. Even in absence of the legislative Act or statutory rules, the State can issue Executive Instructions. Such Executive Instructions can be issued where the area is grey.

156. However, such Executive Instructions cannot operate, if there exists any statutory rule to the contrary.

It can only be in consonance of the rules and not contrary thereto.

[See Smt. Rohini Srivastava W/o Late Shyam Mohan Srivastava vs. Director, Pensions Directorate and Director Mudran Evan Lekhan Samagri 2004 5 AWCS 5143.

157. The effect of the circular letters issued by the licensor in exercise of the power conferred on it under the terms of the license would be similar or akin to the aforementioned legal position.

We would consider this aspect of the matter at an appropriate stage.

158. Mr. Srinivasan would submit that in Clause 41.14 of the conditions of license, the word 'adequate' having been used, the same does not mean that verification of all CAFs should be to the extent of 100%.

159. So far as this contention of the Petitioners is concerned, we have indicated heretobefore that they themselves have given up their right to question the circular letters on the aforementioned ground having stood thereby and acted thereupon. We need not further go into the merit of the said contentions as rule of estoppel clearly applies.

160. As far as the contention of reading down of the license agreement is concerned, suffice it to say that while interpreting the terms and conditions of a contract, the said doctrine *stricto sensu* may not have any application.

161. Interpretation of a document would necessitate the application of the relevant contractual provisions dealing with rights and obligations of the parties.

162. The principle of interpretation of a contract can be resorted to provided there is ambiguity. It is stated in the Interpretation of Contracts by Justice Kim Lewison that even if a contract may potentially have more than one possible meaning, it must be given only one meaning. It is, therefore, difficult to conceive that despite the fact that a clear meaning can be assigned to a provision of a contract, the same has to be read down.

163. In Reliance Communications Ltd. vs. Bharat Sanchar Nigam Ltd., Petition No.254 of 2010, disposed of on 22.7.2011, it was stated that a court of law is entitled to take into account the conduct of the parties as may appear from the materials brought on record. It is in that view of the matter, the conduct of the Petitioners assumes significance.

Reasonable Damages

164. Learned senior counsel appearing on behalf of the Petitioner urged that quantum of penalty should be commensurate with the damages as contemplated under Sections 73 and 74 of the Indian Contract Act.

165. We do not agree. Imposition of penal damages for breach of security conditions, in our opinion has nothing to do with the actual contractual damages whether pre-estimated or otherwise. The said clause as indicated heretobefore has been inserted for the purpose of enforcement of conditions of license.

166. We are of the opinion that it is not correct to contend that no condition by way of license can be laid down in terms of Section 4 of the Telegraph Act, 1885 for taking such measures as are necessary in Public Interest or in the interest of security of the nation.

167. Moreover, the maximum amount of penalty has been laid down. Subject to the application of the doctrine of proportionality, the levy as such may not be held to be illegal.

168. Rule of law is the basic feature of the Constitution of India. Maintenance of Public Order and law and order would come within the purview of the sovereign function of the State. When such a situation arises, reasonable restrictions can always be imposed even on the fundamental right of a citizen to carry on trade and business.

Decentralisation Process

169. It is difficult to accept that by decentralization of the work of checking of forms and imposition of penalty, the entire process must be held to be arbitrary.

170. It is one thing to say that the conditions of license are *d' hors* the purpose for which the same had been laid down and/or otherwise unconstitutional and/or ultra vires the statute under which

the same had been issued; but it is another thing to say that by reason thereof, the petitioners/operators have been put to serious disadvantage.

171. The issue with regard to the difficulties faced by the operators in implementing the circular letters and/or the guidelines issued by the Respondent by itself cannot be a ground for declaring the same illegal or arbitrary being violative of Article 14 of the Constitution of India.

172. Even otherwise, it has been noticed that the Respondent for all intent and purport had been taking the Petitioner Associations in confidence and/or accepting their suggestions from time to time. Many of the concerns put forth by the Petitioners have been taken into consideration and the grievances raised in regard thereto were redressed.

173. We therefore, are of the opinion that on the said grounds alone, the impugned circular letters should not be held to be illegal. For the purpose of discharge of its functions in a proper or methodical manner, the same can be delegated to the officers, who are otherwise competent.

174. However, the interpretation of the circulars and at least the recent ones vis-à-vis the applicability thereof requires our consideration.

Implementation of Circulars

175. Learned senior counsel appearing on behalf of the Petitioner brought to our notice several instances to show that for the

purpose of implementation of the circular letters/ guidelines, penalties have wrongfully been levied by acting arbitrarily and on a subjective basis.

176. We are, however, of the opinion that as the actual imposition of penalty by the authorities of the term cells are required to be considered if and when the same are questioned before this Tribunal, being difficult for us to lay down any law on an abstract basis as to how and in what manner the term cells should conduct themselves in the matter of imposition of penalty, it is not necessary to deal with the same at this stage.

177. It has been contended that the authorities of the term cells focus only on technicalities and penalties are levied although no finding is arrived at as regards identity or address of the subscribers in question. According to the Petitioners the telecom operators provide all assistance to the Term Cells to verify the details of the subscribers including :

A. Providing call data record.

B. Providing names, addresses and date of activation.

C. Search on handsets i.e. linking identified mobile numbers based on handset number given by the manufacturer.

D. Legal interception

E. Location of updates of the user.

F. Information about point of cells and nodal officers appearing in the Court to provide evidence and providing all other relevant documents.

178. In these petitions, it will bear repetition to state that this Tribunal is not concerned with individual cases. We have no doubt in our mind that in future the officers of the DoT would consider the question of enforcement of the security aspect in a holistic manner. We have also no manner of doubt that the authorities of the respondent herein shall consider the practical difficulties of the operators, if any, and ameliorate their grievances.

179. Whereas, there cannot be any doubt or dispute that the security of the nation must be considered at the highest level, the action on the part of the officers of the respondent should be to see that the operators are not unjustly harassed. It also goes without saying that on mere technicalities, penalty should not be imposed.

180. The operators may have been facing difficulties in getting documents in time from the remote and upcountry areas. But it must be borne in mind that such difficulties unless found to be impossible to be complied with would not render the license agreement to be void.

181. The country may take a few years more to have a similar uniform national identity but given the choice of verifying the identities of the customers not only in the urban areas but also in the rural and upcountry areas, but it is not possible to agree with the submissions of the learned counsel for the petitioner that their task become impossible.

182. Respondent itself has contended that imposition of penalty may be deterrent in nature, the same by itself cannot be said to be a revenue generating process. If that be so, in absence of a

statute providing for mandatory imposition of penalty, the quantum thereof cannot be fixed.

183. Imposition of penalty cannot be a mechanical act. The action on the part of the officers of the Respondent must be reasonable. They must act independently and impartially.

184. However, de-centralization of the process to the Term Cell by itself cannot be a ground to strike down the impugned circular letters. If the contention of the petitioner in this behalf is accepted, the headquarters of the DoT will have to deal with a large number of cases, although the relevant documents of the customers are with the concerned branches of the operators or with their distributor/franchisee.

185. DOT at its level would moreover be not in a position to deal with so many cases. The same would also cause unnecessary delay.

186. The power delegated in favour of the TERM Cells, according to the Respondent is a limited one. We in these cases, in absence of any material having been brought on record cannot go into the merit of the matter as to whether the penalty imposed is on a higher side and/or whether provisions have been made specifying the amount of penalty which can be imposed irrespective of the nature of violation. There are statutes which provide for mandatory penalty as has been noticed by the Supreme Court of India in *Chairman, SEBI v. Shriram Mutual Fund* reported in (2006) 5 SCC 361.

187. But there cannot be any doubt that the statute must provide for the same. Circular letters, as indicated heretobefroe, have no force of law.

188. We express no final opinion on this issue as ordinarily a discretionary power subject to imposition of the maximum penalty can be delegated in favour of an authority. Ordinarily, it would go without saying that some power should be conferred on the concerned authority as also the Appellate forum so as to enable them to use some discretion in this behalf depending upon the nature of the violation.

189. We, therefore, do not see any reason as to how decentralization of the penalty implementation in favour of the Term Cell by itself suffers from any act of arbitrariness or irrationality on the part of the respondent as has been submitted by the learned counsel for the parties.

Re: Criminal Liability for failing to lodge FIR

190. One of the questions which has been raised is as to whether the burden to prove innocence should be on the operators in case a document is found to be forged?

191. Commission of forgery is a distinct offence under the Indian Penal Code.

There cannot be any doubt or dispute that the person who commits forgery would be punished therefor. It is, however, preposterous to suggest that any operator who is recipient of a forged

document and/or whose employees despite best efforts could not detect forgery, unless a plea of collusion or conspiracy is raised and proved, would be held to be guilty of commission of that offence by raising a legal fiction or otherwise. The burden to prove on the operator and/or his employees, to say the least would be against all canons of law/jurisprudence governing our country.

192. Constructive liability of an offence must be a creature of a statute. The licensor by way of laying down condition of license or issuance of circular letters and guidelines cannot make a person constructively liable although he is not directly concerned with the criminal act of another. A large number of cases providing for constructive liability relate to the Companies, registered and incorporated under the Companies Act, Partnership firms and Association of persons.

193. If an act of forgery is committed by a third party or a forged document is produced for the purpose of obtaining a telephone connection, in the case where the operators are bound to notify commission of the offences to the designated authorities in terms of the law prevailing in the country, the failure on their part to detect a forgery by itself cannot be a ground for a conclusion that they are also a privy thereto.

194. A reverse burden cannot be created by a reason of a circular letter. Placing of such an onus upon a person must be an act of the legislature. In absence of any statute, neither a legal fiction can

be created nor the burden of proof can be shifted to the concerned employee.

195. Presumption of innocence, it is well settled, is a human right.

(See *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra*, (2010) 13 SCC 657) and *Prithpal Singh vs. State of Punjab 2012(1) SCC 10.*

(See also *Union of India (UOI) vs. Col. L.S.N. Murthy and Anr.* (2012) 1 SCC 718)

196. We therefore, are of the opinion that any circular letter or guidelines whereby and whereunder the burden of proof whether civil or criminal is placed on the operator in violation of provisions of the Indian Evidence Act and/or Indian Penal code must be held to be bad in law.

197. Ours is a country governed by Rule of law. The element of certainty is also one of the facets of rule of law.

In Vodafone Holdings B.V. vs. Union of India & Anr. 2012(1) SCALE 530 it is stated:

> "*Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system.*"

198. When a person is sought to be treated to be an accomplice of an accused, except in the cases of constructive liability or a statutory liability, he is entitled to know as to whether he, by reason of commission of certain acts may be made an accused along with

some others. It is a trite law that unless provided for by the legislature, a person cannot be held to be liable for the acts of a third party.

Principles of Natural Justice

199. The principle of Natural Justice is sought to be invoked on two grounds in the instant case.

200. Firstly the TERM Cells while investigating into the allegations, also act as a prosecutor and judge for the purpose of enforcement of a civil liability; and secondly that the provision for appeal is illusory in nature.

Respondent has provided for a forum for hearing.

The procedures laid down therefor are quite elaborate.

201. Participation of the licencees and/or their representatives at every stage of the enquiry has been ensured. In the event of any dispute or difference, an appellate forum has been provided for.

202. Even in a given case imposition of such penalty may give rise to invocation of Section 14 and Section 14 A (i) of the TRAI Act.

The penalty clause, may or may not be invoked on a mere default on the part of the licensee but we are herein not concerned with individual cases.

203. Learned counsel for the petitioner would contend that the officers of the TERM Cells could not have been both adjudicator and investigator.

204. There cannot be any dispute with regard to the said proposition of law. However, it is difficult to accept that although the real likelihood of bias test may be held to be applicable, it is not stated, that any officer of the Respondent had either any personal or pecuniary bias. Such a question, in any event, need not be gone into by us keeping in view the limited nature of the petition.

205. We may notice that a recently in *P.D. Dinakaran (1) v. Judges Inquiry Committee*, reported in (2011) 8 SCC 380, a Division Bench of the Supreme Court of India upon noticing *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* reported in (2000) 1 AC 119 (1999) 1 All ER 577 (HL), wherein it was observed that a judge by being a Director of one of the companies which is wholly controlled by another company is not automatically disqualified, stated the law, thus:-

> ***"57.*** *It is, thus, evident that the English courts have applied different tests for deciding whether non-pecuniary bias would vitiate judicial or quasi-judicial decision. Many Judges have laid down and applied the "real likelihood" formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias. Other Judges have employed a "reasonable suspicion" test, emphasising that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest."*

206. In this case, the Respondent has been acting through its officers. Petitioner although has questioned the legality of the delegation of power in favour of the TERM Cells, it does not state that

the supervisory jurisdiction can only exercised by the officers of the DoT at the highest level.

207. The day to day job of supervision is required to be carried out by the officers who are at the actual spot and not from Delhi.

It is necessary to consider the efficacy of the system. Ground realities cannot be ignored.

208. Submission is that provisions for appeal does not stand the scrutiny of bias test being from Ceaser to Ceasar.

209. We are not in a position to agree therewith. Constitution of the authorities entitled to make inspection, preparation of a joint report upon detection of violations on the part of the Petitioners and/or their franchisees/distributors and the officers who constitute the Appellate Authority are different.

210. It is not a case where the same person who involves himself alongwith the representatives of the licensees to find out as to whether the circular letters and/or guidelines issued by the Respondent have been followed or not, would sit in appeal over the orders imposing penalty.

211. The Appellant authority consists of different group of officers. If, the Respondent is correct in its submission that the said guidelines had been issued so as to avoid any arbitrariness on the part of the concerned officers who would investigate and/or quantify the amount of penalty upon application of the principles laid down therein, it is, to our mind, not a case where the principle of *nemo judex in sua causa* is attracted. Moreover, the operators in the terms

of the circular letter are provided opportunities to participate in the enquiry at different levels.

Mens Rea

212. Imposition of penalty is a matter which emanates from various situations. Indisputably, the question as to whether existence of *mens rea* on the part of the licensee must be ascertained before penalty is imposed depends upon the fact situation obtaining in each individual case.

213. Imposition of penalty may be quasi-criminal in nature but in this case, it provides for civil liability for the purpose of enforcing a contractual obligation on the part of the licensee.

214. In a case of this nature, ordinarily the existence of *mens-rea* would not be required to be proved.

It may be noticed that in *CST v. Sanjiv Fabrics*, reported in (2010) 9 SCC 630, D.K. Jain, J speaking for a Division Bench of the Supreme Court of India stated the law, thus:-

> ***"24.*** *Whether an offence can be said to have been committed without the necessary mens rea is a vexed question. However, the broad principle applied by the courts to answer the said question is that there is a presumption that mens rea is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered. (See Sherras v. De Rutzen9 and State of Maharashtra v. Mayer Hans George10.)*
>
> ***25.*** *Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the*

language employed in the provision of the statute creating the offence. <u>There is no gainsaying that a penal provision has to be strictly construed on its own language</u>."
[Emphasis supplied]

215. We may notice that in *Chairman, SEBI v. Shriram Mutual Fund*, reported in (2006) 5 SCC 361 upon which Ms. Maneesha Dhir has placed strong reliance, it was stated that `mens rea' is not an essential element for imposing penalty for breach of civil obligations.

216. Reliance has also been placed *on Bharjatiya Steel Industries v. CST*, reported in (2008) 11 SCC 617, wherein the Supreme Court of India while considering a case involving imposition of penalty in terms of the provisions of UP Trade Tax Act, held:-

> ***"19.*** *A distinction must also be borne in mind between a statute where no discretion is conferred upon the adjudicatory authority and where such a discretion is conferred. Whereas in the former case the principle of mens rea will be held to be imperative, in the latter, having regard to the purport and object thereof, it may not be held to be so."*

217. In this case, subject to the observations made heretobefore, prima facie the penalty has been levied by way of enforcement of a civil liability.

<u>Doctrine of Proportionality</u>

218. Doctrine of proportionality has many facets. Not only judicial review of administrative action but also of legislation is done by applying the said doctrine. It is applied in the case of

departmental enquiries as well as in the criminal trials. The application of the said doctrine would vary from case to case.

219. The impact of an order produced, if outweigh the benefits actually achieved by the measure would attract the doctrine of proportionality. Sometimes the area sought to be covered may be comparatively new. Imposition of penalty as a deterrent measure i.e. in terrorem has always been looked down upon. A distinction in the context of a commercial contract is always made of penalty as a measure in terrorem and as a pre-estimate of damages.

220. A huge penalty for enforcing performance of a contract will have to be taken into consideration. Keeping in view the whole object stated by the licensor itself vis-à-vis the framework within which it wanted its officers to act upon. In the instant case the licensor as a State not only intended to exercise its sovereign power but also its power as a licensor.

221. An action on the part of a State in imposing penalty must be judged in the context of the purpose it seeks to achieve.

Not only administrative actions, but also the legislations will come within the purview of the said doctrine.

222. The licensees have fundamental rights at least of level playing field as envisaged under Article 14 and Article 21 of the Constitution of India. The policy decisions of the State can also be questioned before a competent Court of law.

223. In Dudgeon v United Kingdom (1981) 4 EHRR 149 the European Court of Human Rights interfered with a law in Northern Ireland that outlawed homosexual sex between the consenting adults.

224. The principle of proportionality proceeds on the basis that the objective sought to be achieved is relevant to justify restrictions on fundamental right to the means chosen to limit that right are rational, fair and unarbitrary and whether the means used to impair the right as minimally and reasonably as possible.

[See Belfast City Council (Appellants) vs. Miss Behavin' Limited (Respondents) (Northern Ireland) [2007] 3 All ER 1007 para 24.]

225. The said doctrine although is an old one and prevalent in the European Countries, extensive application thereof in the field of Administrative Law however, appears to be of some recent origin so far as the Courts of India and U.K. are concerned.

226. The Supreme Court of India having regard to diverse decisions taken by a statutory authority vis-a vis the High Courts in the matter of cancellation of allotment of plots, invoked the said doctrine in Teri OaK Estates (P) Ltd. Vs. State of Punjab reported in (2004) 7 SCC 166.

227. As in the said decision, history of the said doctrine has been noticed; we may consider the same at some length.

It was stated:-

> ***"44.*** *The situation, thus, in our opinion, warrants application of the doctrine of proportionality.*

> ***45.*** *The said doctrine originated as far back as in the 19th century in Russia and was later adopted by Germany, France and other European countries as has been noticed by this Court in Om Kumar v. Union of India23.*
>
> ***46.*** *By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority*
> *"maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve".*
>
> ***47.*** *This Court as far back as in 1952 in State of Madras v. V.G. Row24 observed: (AIR p. 200, para 15)*
> *"[T]he test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."*

228. The ratio laid down therein was applied by the Apex court in several other cases, namely State of *State of U.P. v. Sheo Shanker Lal Srivastava* reported in (2006) 3 SCC 276, *Indian Airlines Ltd. v. Prabha D. Kanan* reported in (2006) 11 SCC 67, and *State of Madhya Pradesh & Ors. v. Hazarilal* reported in (2008) 3 SCC 273.

229. Noticing the development of law particularly in the field of enforcement of human rights, it was opined that the Wednesbury

Unreasonableness test was being substituted by the doctrine of Proportionality.

230. Mukundakam Sharma (J) (as his lordship then was) in *Maharashtra Land Development Corporation and Ors. v. State of Maharashtra and Anr.* 2010 (11) SCALE 675 stated the law thus:-

> *"43. However, the Wednesbury principle of reasonableness has given way to the doctrine of proportionality."*

231. Referring to a large number of decisions including *Charanjit Lamba v. Army Southern Command* reported in *(2010) 11 SCC 314*, it was observed:-

> *"The test of proportionality is therefore concerned with the way in which the decision maker has ordered his priorities, i.e., the attribution of relative importance to the factors in the case."*

232. In HSIDC v. Hari Om Enterprises, reported in (2009) 16 SCC 208, it was noticed that the court had applied the doctrine of Proportionality in a large number of decisions.

233. Radha Krishnan (J) speaking for a division bench of two judges, however, upon noticing few judgments as also some authorities in Chairman, All India Railways Recruitment Board vs. K. Shyam Kumar (2010) 6 SCC 614 differed with the view that doctrine of Wednesbury Unreasonableness has given way to the Doctrine of Proportionality.

234. The bench applied both the doctrine of Wednesbury's Unreasonableness and also the Doctrine of Proportionality to opine that the order impugned therein was unsustainable.

235. The same learned Judge however, in K.T. Plantation Private Limited & Anr. vs. State of Karnataka 2011(9) SCC 1 stated the law thus:

> *"190. Article 300-A would be equally violated if the provisions of law authorizing deprivation of property has only borrowed Article 31(1) (the "Rule of Law" doctrine) and not Article 31(2) (which had embodied the doctrine of eminent domain). Article 300-A enables the State to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive."*

236. It appears that whereas in some countries the Doctrine of Wednesbury's Unreasonableness is no longer applied to; in some jurisdictions with regard to some respects, English courts still apply the said principle.

237. So far as enforcement of human rights aspect is concerned, it is beyond any controversy that Doctrine of Proportionality only is applied and not the Doctrine of Wednesbury's Unreasonableness.

238. We may also notice that celebrated author Mark Elliot in "The Human Rights Act 1998 and the Standard of Substantive Review", published in 60 Cambridge L. Rev. 301 (2001); Sueur, AP Le

in "The Rise and Ruin of Unreasonableness" published in Judicial Review, 10 at pp. 32-51 and Paul Daly in a recent article titled "Wednesbury's Reason and Structure" published in [2011] PL 238, dealt with various indicia of Wednesbury Unreasonableness.

Mark Elliot in the aforementioned article opined as under:-

> *"…Consequently the traditional attachment of English courts to the reasonableness (or rationality) principle as the criterion of substantive review reflects a specific vision of how agency autonomy and judicial control should be balanced against one another. In this sense, the Wednesbury principle is seen to buttress a particular conception of the separation of powers within which the respective provinces of executive and judicial power are clearly demarcated.*
>
> *In contrast, the doctrine of proportionality, which a number of legal systems adopt as the standard of substantive review, expresses a rather different mode of relation between judges and decision-makers. The difference between the rationality- and proportionality-based approaches to judicial review is usefully illustrated by the Smith litigation. Until recently it was the policy of the British government that persons of homosexual orientation ought not to be permitted to serve in the military. Pursuant to that policy, the claimants in R. v. Ministry of Defence, ex parte Smith were all discharged from the armed forces on the sole ground that they were of homosexual orientation, notwithstanding their exemplary service records. They sought to challenge the legality of the decisions to discharge them by way of judicial review. The domestic courts approached the issue on what was, by then, the well-established basis that executive action which impacted upon fundamental rights was to be assessed by reference to the Wednesbury test adapted to the human rights context."*

239. The learned author noticed that the European Courts refused to adopt a differential approach. It asked a question to the UK Government as to whether the impugned policy was necessary in a democratic society?

240. It was stated that the distinction in both the principles (i.e Wednesbury vis-à-vis Proportionality) may be held to be one of degree.

Philip Sales and Ben Hooper in an article titled 'Proportionality and the form of Law' published in 2003 Law Quarterly Review page 426, however, upon noticing that various courts applied the Doctrine of Proportionality in a large number of cases, stated that legal certainty has a value in a convention jurisprudence.

241. With regard to the applicability of the said principle in domestic litigation, it was concluded:-

> *"In practice the doctrine of proportionality requires many laws to be expressed in a flexible form, sensitive to the facts of particular cases at their point of application. When a flexible law is enacted, Parliament transfers some of the decision-making power to regulate whatever area of activity is at issue from itself to those who are responsible for that law's application. Accordingly, in policy areas that engage Convention rights, the doctrine of proportionality has a tendency to promote a transfer of control over outcomes from Parliament to other agents. It is because of this effect that care must be taken when the doctrine of proportionality is used to test the appropriateness of the particular form in which any given law is cast.*
>
> *Parliament's legislative aspirations have varied over the centuries. As Maitland noted, the statute books of the eighteenth century were filled with Acts that were directed at the particular and the specific. In 1786, for instance, we find Acts passed with titles such as an Act to establish a *454 workhouse in Havering and an Act for enabling Cornelius Salvidge to take the surname of Tutton. As the nineteenth century progressed Parliament passed Acts that dealt increasingly with general rather than specific issues: it chose more to legislate rather than to govern. Parliament no longer enacted a law that said a particular common should be enclosed, but instead laid down general rules for the enclosure of commons and entrusted their application in individual cases to officials and judges.*

There is, unfortunately, a lack of detailed guidance from Strasbourg regarding how a court should approach a proportionality challenge based on the relative fact insensitivity of a particular law. As a result, the extent to which the doctrine of proportionality restricts the legislative freedom of Parliament as to the form in which a law may be framed remains in doubt. What can be said with confidence is that the increasing prominence of proportionality in our domestic law is ushering in a new period of uncertainty as regards Parliament's legislative role. In resolving this uncertainty the courts may profoundly affect the degree to which the power to secure specific outcomes lies in Parliament's hands rather than in the hands of the executive or the courts themselves."

242. Yet again in an article 'The Long Treck Away from Wednesbury Irrationality' by Nicolas Dobson published in 2003 Journal of Local Government Law page 129, it was stated:-

"So as things currently stand it seems that:

1. Wednesbury essentially concerns proper adherence to statutory discretion and to that extent its core principles would seem still to be relevant.

2. Whilst the courts had developed the "anxious scrutiny" test in cases concerning fundamental rights, as Lord Steyn pointed out in Daly that was not sufficient to enable the application of Convention rights in Ex p. Smith.

3. Whilst most cases would be decided in the same way under traditional review as using proportionality, " … the intensity of review is somewhat greater under the proportionality approach".

4. However, there has been no shift to a merits review since the "respective roles of judges and administrators are fundamentally distinct and will remain so". The task of the court is not to substitute its own view for that of the relevant authority but to review the decision with an intensity appropriate to all the circumstances of the case.

5. The intensity of review in a public law case will depend on the subject matter in hand and "proportionality is a 'flexi-principle"'.

6. Convention principles and approach are increasingly likely to inform the exercise of executive discretion even in cases not involving Convention rights.

The world in 2003 is radically different from that in 1947. However, as Sam memorably sang in the 1942 film Casablanca "The fundamental things apply/As time goes by". So whilst the nature and scope of reasonableness might have changed, the essential principle of the proper residence of and the need for adherence to lawful administrative discretion under the supervision of the courts has not. And whilst there may well have been a long trek away from Wednesbury in many ways following the HRA the journey may have ended back where it began."

Paul Daly in his article stated:-

"Under the standard of Wednesbury unreasonableness a reviewing court may strike a decision down only where the decision is "so unreasonable that no reasonable authority could ever have come to it". Wednesbury has been under sustained attack for several decades. Lord Lester and Jeffrey Jowell argued in a seminal article that Wednesbury unreasonableness has three serious flaws. First, to lable a decision "unreasonable" is conclusory and does not give an intellectually encourages suspicion that prejudice or policy may be hiding beneath Wednesbury's ample cloak". Secondly, Wednesbury is unrealistic, because reviewing courts actually sometimes quash decisions that are "coldly rational". Building on Lester and Jowell's second criticism, Paul Craig has added that continued invocation of Wednesbury borders on dishonesty:

"If the courts really were to restrict rationality review to such manifest absurdity then we would all be out of business, in this area at least. There would be almost no successful challenges of this kind."

Thirdly, Wednesbury is:

"Confusing and tautologous…It allows the courts to interefere with decisions that are unreasonable, and

then defines an unreasonable decision as one which no reasonable authority would take.

Ultimately, Lester and Jowell concluded:-

"the Wednesbury test, because of its vagueness, allows judges to obscure their social and economic preferences more easily than would be possible were they to be guided by established legal principle".

Instead, the "substantive principles" hiding behind Wednesbury should be brought into the foreground, and a test of proportionality introduced."

243. The question is as to whether the proportionality test would supplant or supplement the Wednesbury Unreasonableness principle is yet to be answered finally by the English Courts but it is difficult to conceive as to how keeping in view the over-expanding development in the realm of Human Rights law, which hardly spares any aspect of the administrative law, the Doctrine of Proportionality can continuously be ignored as an independent facet of Judicial Review. It is also difficult to comprehend as to how in a given fact situation, both the tests, which have different parameters, can be simultaneously applied.

244. It is a matter of great regret that although times without number, even the English Courts opined that they have difficulty in seeing any justification for retaining the Wednesbury test, the last rites thereof, however according to the Supreme Court remains to be performed.

245. Development of law is the prerogative of the Constitutional Courts. Law is as is interpreted. Judge made law as is well settled is also a part of law.

246. Creativity in interpretative process is necessary to march with the passage of time, development in technology and changes in the democratic polity. An interpretative tool which was valid in the late forties may not be found to be even useful in the twenty first century. Even eleven long years have passed in this century.

247. In *R (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions* reported in (2003) 2 AC 295, it was stated:

> *"50. It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps—failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness and natural justice requires, the court may interfere. The legality of the decision and the procedural steps must be subject to sufficient judicial control. But none of the judgments before the European Court of Human Rights requires that the court should have "full jurisdiction" to review policy or the overall merits of a planning decision. This approach is reflected in the powers of the European Court of Justice to review executive acts under article 230 of the European Community Treaty.*
>
> *"It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."*
>
> *51. The European Court of Justice does of course apply the principle of proportionality when examining*

such acts and national judges must apply the same principle when dealing with Community law issues. There is a difference between that principle and the approach of the English courts in Associated Provincial Picture Houses Ltd v Wedensbury Corporation [1948] 1 KB 223. But the difference in practice is not as great as is sometimes supposed. The cautious approach of the European Court of Justice in applying the principle is shown inter alia by the margin of appreciation it accords to the institutions of the Community in making economic assessments. I consider that even without reference to the Human Rights Act the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the Human Rights Act however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied: see R v Secretary of State for the Home Department, Ex p Turgut [2000] Imm LR 306; R v Secretary of State for the Home Department, Ex p Mahmood. The Times, 9 January 2001."

248. We are not oblivious of the fact that even recently the Wednesbury test was applied in the matter of policy decision, presumably to show deference to the policy makers.

249. The Supreme Court of India, however, in Centre For Public Interest Litigation v. Union of India , 2012(3) SCC 1 with regard to judicial review of policy decisions stated the law thus:

"99. In majority of the judgments relied upon by the learned Attorney General and the learned counsel for the respondents, it has been held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the

> *Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in large public interest and reject the stock plea of the State that the scope of the judicial review should not be exceeded beyond the recognized parameters."*

[See *R (Ahmad) Vs. Newham London Borough Council* (2009) UKHL 14 : (2009) HLR 31].

250. Yet again in *Gibb v Maidstone & Tunbridge Wells NHS Trust* reported in [2010] EWCA Civ 678, a Financial and Management decision was not interfered for having been found not to be unlawful.

251. There cannot, furthermore, be any doubt or dispute, keeping in view the decision *in Regina (Daly) v. Secretary Of State For The Home Department,* reported in [2001] 2 WLR 1622 that with regard to the cases involving common law constitutional rights as also Human Rights Act, the doctrine of Proportionality must be applied.

252. In the cases involving substantive legitimate expectation also the doctrine of Proportionality should be applied, i.e, in the cases involving substantive legitimate expectation, proportionality would also be the governing standard of the Courts where relevant principles of EU law has to be considered.

253. It would also not be out of place to notice that rigidity with which the Wednesbury Principles used to be applied has been relaxed. There cannot, therefore, be any doubt or dispute that proportionality should be preferred over Wednesbury test, except in some cases, e.g. where deference may have to be shown to the Parliamentary wisdom.

[See Beatson, Matthews, and Elliott's Administrative Law Fourth Edition at page 289]

254. Michael Taggart, in an Article titled "Proportionality, Deference, Wednesbury" published in [2008] New Zealand Law Review 423, raised an argument that Proportionality test applies in cases concerning rights as opposed to the applicability of the Wednesbury Doctrine concerning public wrongs.

255. The doctrine of Proportionality, thus, is almost conceded in the academic world, should be applied in the cases involving enforcement of rights of the citizens of the country.

256. The `deference' doctrine, how far, is applicable in the Indian context for the purpose of applying the doctrine of proportionality is debatable. The courts may not undertake a job in respect whereof it has no expertise but policy issues are required to be considered in the light of the Constitution, the relevant statute, the larger policy decisions and public interest.

257. The UK test of deference, in the present day context stricto sensu may not be applicable in India.

The Governmental Education Policy in U.S found a sea change after the Brown series of judgements by `Warren Court'

258. Housing policy of the Government of South Africa gave way to the doctrine of prioritisation evolved by the Constitutional Court in the Grootboom case and the cases following the same. (See 4th Dr. Durgadas Basu Memorial Lecture by Mark Tushnet at N.U.J.S. Calcutta, March, 2011).

259. The Supreme Court of India recently in Centre for Public Interest Litigation (supra) thought that 2G spectrum should be auctioned in stead and in place of the governmental policy of `first come first serve'.

260. In "Proportionality and Deference: The Importance of a Structural Approach" Dr. Mark Elliot stated:

1. The benefits of the proportionality test is its greater potential for analytical clarity than the Wednesbury test.

2. Because the criteria of two tests is distinct, consequences of their enforcement are different.

3. The perceptions may differ as to the legitimacy of judicial enforcement of the necessity criterion on the one hand and the narrow proportionality criterion on the other.

4. As regards deference the learned author stated:

> *"Deference therefore makes the tests which comprise the proportionality doctrine less hard-edged, blunting them such that the defendant's decision may pass muster without precisely mirroring the court's view. However, while this much is apparent from existing*

case law, there are three other important issues about which, it will be argued in subsequent parts of this chapter, greater clarity is needed."

5. As regards expertise-based deference it was opined:

"Such deference on the grounds of the executive's superior expertise in relation to certain matters is broadly, but not universally, recognized as legitimate."

6. It was furthermore observed:

"If, on such an analysis, the objective is genuinely very general, then although, as noted above, this will render necessity review largely meaningless, it is important to recognize that this is not determinative of the legality of the measure in question. First, the objective-however general-must be a legitimate one. And, secondly, even if a very general objective is deemed lawful and the measure necessary, the decision-maker will still have to satisfy the court that it is proportionate in the narrow sense: at this stage, the generality of the objective is irrelevant, since the question is simply whether the specific gains which the measure entails are sufficient to justify whatever losses (in terms of prejudice to human rights or other highly-regarded interests) it occasions."

7. So far as legitimacy test based deference is concerned, the learned author states:

"Two questions arise. First, is legitimacy-based deference ever appropriate? And, secondly, if it is, at what stage or stages within the proportionality test does it have a role to play and by what doctrinal means should it take effect? The focus of the remainder of this chapter, in line with its central objective of clarifying the doctrinal structure within which proportionality review should be undertaken and deference exhibited, is on the second of those questions-although, in the course of addressing it, the first question, which has been explored

extensively elsewhere, must at least be touched upon."

8. It was concluded:

> "Indeed, the bifurcated nature of the proportionality doctrine-in the sense that it is concerned both with judicial scrutiny of factual issues and value-judgments-implies that to speak of a single doctrine of deference is meaningless and ultimately unhelpful."

(Christopher Forsyth, Mark Elliot Et Al, Effective Judicial Review: A Cornerstone of Good Governance. page 264.)

261. Judicial Restraint and judicial deference to the Regulator has also come under attack in the UK as being incompatible with the core contention of the individual justice concept enshrined in English Law.

262. In "The Intensity of Judicial Review in the Commercial Context: Deference and Proportionality" by Dr. Jaime Arancibia, published in `Effective Judicial Review, A Cornerstone of Good Governance at page 287' shortcomings of the traditional approach has succinctly been pointed out in the following terms:

> *"Moreover, it can be argued that the administrative convenience rationale, which leads the courts to be very cautious in commercial cases for the sake of regulatory efficiency, entails a serious abdication of the judge's primary responsibility to protect individual rights in particular and the legal order as a whole through effective review of the lawfulness of impugned decisions. Indeed, it is very difficult to maintain that an applicant has a proper access to a court for redress of grievances when his claim is not given any consideration or priority over those of public interest.*
>
> *Secondly, the present doctrine is unconvincing, in that it is rooted in mistaken assumptions about*

the ability of private parties and the judges to deal with complex issues. Indeed, by founding judicial restraint on the 'unique' expertise of the decision-maker, the court overlooks the fact that individuals operating in the business field are normally advised by economic and legal experts and, consequently, equally capable of providing 'highly technical' views on the matter in dispute.

The apparent lack of expertise in the judiciary to deal with market cases is not a good reason to be deferential to executive power either. Such an argument is not only somewhat exaggerated and preclusive of any definitive judgement, but also unduly simplistic, in the sense that it fails to capture the precise role of the courts in the legal system. Crucially, this is grounded in the need to ensure a neutral and just adjudication of disputes rather than in the provision of expert opinion about regulatory functions. It therefore follows that, even in the lack of specialised knowledge, judicial bodies should conduct a thorough and independent review of decisions which secures administrative respect for the rule of law. This task may be facilitated, for example, by the use of expert witnesses or consultants.

Besides, once the court accepts the regulatory decision on the ground of its own lack of knowledge, a significant problem of logic arises. Actually, it is very difficult for the court to support both the proposition that it is ignorant on the issue and the conclusion that the adopted decision is lawful. If the court doesn't feel qualified to properly understand the conflict, it cannot legitimately make a judgement which is detrimental to the interests of one of the parties.

Such an attitude would clearly involve an illogic argument, which Wald expresses in the following terms: `if it is too complicated for me to understand, then the agency must be right. The court is either able to deal with the issue, in which case it is entitled to resolve the dispute at hand, or it is not, in which case it should refrain from determining that there is no legal flaw in the exercise of a particular power. In other words, the judiciary cannot simultaneously be unable to consider a technical

decision at stake and able to reach a definitive judgement on its validity.

263. Judiciary in our constitutional scheme is bound to determine the lis independently and impartially. It cannot adopt a too simplistic idea of deference and thereby deny the disputant an effective remedy.

264. It cannot refuse to perform its own duties by not addressing the grievances of the litigant. It must render an effective judgment. Reluctance on the part of the Courts to do so may give rise to violation of the right of Access to justice as envisaged under Article 39A read with Article 14 of the Constitution.

265. A heightened scrutiny test should be applied more and more in preference to the deference test.

What is necessary is to strike a balance between a private right and public policy objectives.

266. Proportionality in the judicial review context is largely concerned with controlling invasion of rights of the individuals. The principle also arises in deciding the propriety of penalties or the permissibility of disappointing a legitimate expectation. [See Editor:Helen Fenwick, Judicial Review (4th edn, 2011) p 243].

267. In its simplest sense, proportionality is the principle that requires the harms of a state measure, in terms of its invasion of a right or its impact on the right holder, must not outweigh the importance of the measure in terms of the aim it pursues and its efficacy in pursuing it. [See A and Ors v. Home Secretary [2004] UKHL

56, [50]. That is to say, a measure must not be disproportionate to its impacts (detriment), requiring that there be a balance between the state's need for the measure and its effects. [See Helen Fenwick, Judicial Review (4th edn, 2011) p 242]

268. Proportionality due to its wide usage nowadays has been used for some specific purpose such as an element of reasonableness, as a standard of review, for measuring the appositeness of penalty (punishment) imposed [See Ibid P244] but the onus rests on an applicant to establish, the principle of proportionality to be relevant and the decision to be disproportionate.[2010] IESC 3.

269. Nettle J in the case of Mastwyk v DPP [2010]VSCA 1111 held that the purpose of Wednesbury Unreasonableness is to determine whether the administrative decision for which the review is being considered was within the power. But it does not cure administrative injustice or error in reasoning. The merit of the administrative decision is for the repository of the relevant power alone.

270. In Tweed, Re Judicial Review [2009] NICA 13 Girvan L.J. made a reference to the case of R (Razgar) v Secretary of State for the Home Department in which Lord Bingham [2004] 2 AC 368 stated that the judgment on proportionality "must always involve the striking of a fair balance between the right of the individual and the interests of the community inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment.

271. U.K. Courts applying the ECJ test have recently taken to expressing it in this way, to satisfy proportionality: the measure (1) must be effect to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued. [See BAA Limited v Competition Commission [2009] CAT 35; as quoted in Helen Fenwick, Judicial Review (4th edn, 2011) p 243].

272. As far as the principles of Administrative Law is concerned, any decision taken by an Administrative Authority which entails civil or evil consequences affect the right of the people. The right may be a Constitutional right, a legal right or a contractual right. If a person is inflicted with a heavy amount of penalty by reason of a circular letter issued by a 'State', the reasonableness thereof must be judged keeping in view the fact situation involved in every case, although the same may not be held to unconstitutional.

273. In applying the doctrine of Proportionality, what is required to be considered is as to whether two different consequences may be arrived at on the basis of the same factual matrix.

274. If that be so, the lesser of the punishments should be inflicted.

C.K. Thakkar, J speaking for a Division Bench of the Supreme Court of India in *Coimbatore District Cooperative Bank Vs. C.D.C.*

Employees Association reported in (2007) 4 SCC 669 observed that where a pair of scissors suffice, the battle axes are excluded.

275. The said decision has recently been followed by a learned Judge of the Andhra Pradesh High Court in *A.B.C. India Vs. A.P. Industrial Infa Corporation Ltd.* reported in (2010) 6 ALT 142, stating:-

> *"33. In Coimbatore District Central Coop. Bank v. Employees Assn. (2007) 4 SCC 669 Supreme Court after referring to the standard textbooks on Administrative Law, English decisions and the decisions of apex Court, held as follows:*
>
> *So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".... "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise--the elaboration of a rule of permissible priorities.*
>
> *34. In these cases, after the allotment was made, all the petitioners paid entire sale consideration. APIIC entered into agreements and long thereafter executed registered sale deeds. A decade thereafter when the allottees applied for building permission, as a statutory authority accorded such sanction. In this background the question is whether the harsh action of cancelling allotment is proportionate to the situation. The answer should be in the negative. Applying the doctrine of proportionality as was applied in Teri Oat Estates, in these cases, the petitioners should be granted some more time for completion of construction especially when they alleged*

that till 2006, APIIC did not provide any infrastructural facilities. Except denying the allegation in the counter affidavits, APIIC has not placed any material before this Court to disprove the allegation."

276. The strict scrutiny test in a case of this nature thus, would be required to be applied.

Petitioners contend that the impugned orders affect their constitutional right of property as envisaged under Article 300A of the Constitution of India.

277. Right of Property, in the context of extinction thereof, e.g., Section 27 of the Limitation Act, 1963 has been held by the Supreme Court of India to be involving human rights in *State of Haryana v. Mukesh Kumar and Ors* (2011) 10 SCC 404.

278. Recently Beatson, Mathews and Elliot in a book titled 'Administrative Law, Text and Materials' at page 287 opined:-

"Several years have elapsed since that judgment was given, and still the 'burial rites' of the Wednesbury doctrine remain to be performed. Indeed, it remains alive and well, and examples of judicial reliance on Wednesbury are not hard to find. For example, in R (Ahmad) v. Newham London Borough Council [20091 UKHL 14 [2009] HLR 31, the legality of a council's policy for allocating social housing was challenged. The claimant argued that the policy was inappropriately crude: it accorded too much weight to the length of time for which applicants had been waiting for housing, and insufficient weight to other, potentially more accurate, indicators of need. Holding that the challenge failed, Lord Neuberger (at [49]) said that 'it seems to me to be impossible to argue that an authority's allocation scheme is unlawful unless the basis on which it accords priority as between those applicants who satisfy [the relevant statutory criteria] is irrational'. The House of Lords could in this case have chosen to put Wednesbury out of its misery, as the Court of Appeal in the Internees case anticipated it might, and yet it did not. Meanwhile, the

Court of Appeal recently relied on the Wednesbury test in Gibb v. Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678 in determining whether a severance package offered to a former employee was unduly generous. The Court of Appeal held that it was not, and Sedley U (at [57]) was critical of the first instance judge for adopting an inappropriately interventionist approach. It was unjustifiable, he said, for a court to retake a financial and management decision which lay within the powers and purposes of the Trust, whatever reservations the court itself might have had about the computation and cost of the deal. To start by dissecting the figures is both to assume the very thing that has yet to be established — that the Trust has exceeded its own powers — and to substitute the court's judgment for that of the Trust, It is only if the figures are inexplicable on their face, or palpably inflated in the light of evidence, that the court will in general be justified in examining their elements, and then not in order to remake the calculation but to see if it has indeed gone beyond the bounds set by law.

Clearly, then, the Wednesbury test remains part of English law — so how do we know when it, and when, in contrast, proportionality, is the governing principle? The easiest way to answer this question is to begin with the categories of case in which we know proportionality to be the applicable standard. First, and most obviously, the proportionality test is to be used in cases under the HRA. Second, it is at least arguable, on the basis of dicta in R (Daly) v. Secretary of State for the Home Department [2001] UKHL 26 [2001] 2 AC 532 (on which see above at 9.3.5) that proportionality is applicable in cases concerning common law constitutional rights. (The practical significance of this point is, however, limited, unless either the HRA is repealed or amended or courts articulate common law rights which cover ground not already covered by the HRA.) Third, we saw above at 7.1.5 that a test which either resembles or is the same as the proportionality test applies in certain cases which are concerned with substantive legitimate expectations. Fourth, when domestic courts have to evaluate the conduct of national authorities by reference to relevant principles of EU law, proportionality is the governing standard (see, eg R v. Chief Constable of Sussex, exparte International Traders' Ferry [1999] 2 AC 418)."
[Underlining is ours]

279. We have noticed heretobefore that Mike Taggart had argued in favour of retention of 'rationality review' alongside proportionality.

Paul P. Craig, however, in his article 'Proportionality Rationality & Review' published in the University of Oxford 2010 NZ Law Review page 265 stated that Proportionality should be treated to be a separate head of review, stating :-

> *"We can now begin to appreciate the paradox adverted to above. Courts operating within the Wednesbury framework had the following choice in a particular case where they felt that legal intervention was warranted. They could broaden the ambit of rationality review by applying it to the case even though the challenged action could not realistically be regarded as irrational in the sense articulated by Lord Greene and Lord Diplock, in acknowledgement that such a high standard of irrationality would only rarely if ever be met. They could alternatively characterise the dispute as one going to purpose/relevancy, thereby obviating the need to broaden rationality review, and substitute judgment on the issue of purpose or relevancy presented to them.The courts used both strategies. The salient point for present purposes is that the latter strategy, insofar as it entailed substitution of judgment, was even more intrusive than the former.*
>
> *We live now in a world where rights-based judicial review has assumed more prominence. This is reflected in the greater intensity of substantive review used in such cases. There is good reason for differential intensity of review in cases that do not have a rights component. The thesis propounded by Mike Taggart may well be depicted as part of the "rainbow of review", but the difference for claimants who fall within the respective parts of the rainbow is stark indeed. The limit of rationality review for those who fall within the "public wrongs" part of this spectrum means that such claimants will rarely if ever satisfy the test for such review advanced by Mike Taggart.We should not live in a world where "public wrongs" are subject to no meaningful judicial scrutiny. This does not fit the reality*

of the positive law, nor is it desirable in normative terms."

280. It was pointed out that there are other grounds of Substantive Judicial Review, such as, review for error of law, error of fact, propriety of purpose, relevancy, legitimate expectations and equality.

281. As regards legal certainty, it was stated:-

> *"It is over 60 years since Wednesbury, and over 250 hundred years since the advent of some form of rationality review in the UK. The bottom line remains that we cannot produce a modern definition of rationality review which is legally authoritative and where the mode of application coheres with the legal test. This is reflected in the contributions to this volume by those opposed to proportionality, where the definitions of rationality, insofar as they are proffered, vary significantly both within and as between the various articles.*
>
> *What we have is a legal test, Wednesbury, which cannot, for reasons given above, explain the current case law. This is coupled with various ad hoc modifications of the legal test by dicta of judges in individual cases. I looked at a sample of 200 recent rationality cases that did not involve rights for the purposes of this article. It revealed the following. Some courts continue to cite Lord Greene and/or Lord Diplock, while at the same time adjudicating on cases which would have been stopped in limine if the criteria of rationality review from their respective Lordships had been taken seriously, since the alleged error came nowhere close to the kind of irrationality demanded by them. Some cases simply conclude that the Wednesbury test has not been met on the facts, without any further indication as to how demanding the court perceives the test to be. In other cases the precise language of rationality review is modified so as to countenance more searching scrutiny, although there is no consistency in the actual wording used. In yet other cases, the courts have deployed the term "anxious scrutiny", the precise import of which has itself varied within this sub-part of the jurisprudence."*

282. The learned author advocated that whether it is a right issue or non-right issue, 'Proportionality' as a general head of review should be adopted.

It was argued:

> *"Thus, the European Court of Human Rights has held that where there is an obligation to take positive action, the public authority must take "reasonable" steps to protect an individual from harm. There is no reason why this should alter if proportionality were to become a general head of judicial review. To suggest that this is so is to confuse the definition of a right with the test for judicial review as to whether that right has been breached in a particular case. Tom Hickman is, therefore, clearly right to stress the distinction between what he terms standards of legality and tests for judicial review. He is equally correct to note that the definition of a right will vary.*
>
> *The test for judicial review under the HRA for breach of Convention rights is, however, already proportionality. The way in which this test is used takes account of the nature and importance of the right. It has not led to the excision of rationality from the definition of a right where its inclusion has been felt warranted. The interplay between standards of legality and standards of judicial review is therefore firmly part of the present law. It is not something that is in any way created by proportionality becoming a general head of review. Thus, what we are asked to believe is that the advent of proportionality as a general test for review, which would be of novelty in non-rights cases where such a test has not hitherto applied, would somehow cause the differential standards of legality as they pertain to different Convention rights to be obscured, even though proportionality already applies within the HRA and has not had this consequence. There is no reason to think that this should occur at all."*

283. As regards `low intensity rationality issue', the learned author stated:-

> *"I do not believe that adherence to very low intensity rationality review cast in terms of the Lord Greene/Diplock test is desirable, nor do I believe that it is demanded by the separation of powers. In practical*

terms, litigants would never get beyond the court door if the strictures of this version of the rationality test were taken seriously. In normative terms, it has never been apparent precisely why the separation of powers is thought to demand this exiguous form of judicial oversight. Nor is it self-evident why the divide between rights cases and non-rights-based cases is felt to warrant this chasm in the test for judicial review. This is more especially so given that the far more demanding test used in relation to rights is premised on the assertion that a right might have been infringed, not that it necessarily has been. There are many interests falling short of rights that are of real importance for individuals, which warrant meaningful judicial oversight even if this is not as intensive as that which pertains in rights-based cases."

284. We may consider the question from another angle i.e. the principles of Good Governance: The Characteristic of Good Governance are:-

a) Consensus oriented

b) Participatory

c) Follows the rule of law

d) Effective and efficient

e) Accountable

f) Transparent

g) Responsive

h) Equitable and inclusive

Reasonable Taxation is also part of good governance.

Only through Good Governance, a strong democratic set up in the country is possible to be brought about.

285. In a democratic polity governed by Constitutionalism, the doctrine of Good Governance mandates Judicial Review.

Mark Daly, in an article Judicial Review, in Hong Kong Administrative Region: Necessary Because of Bad Governance published in the Effective Judicial Review, A Corner Stone of Good Governance at page 413 states:

> *"Often, it is only by initiating a Judicial Review that the hidden and non transparent policy and policy making will be exposed to scrutiny, bad governance, in the area of asylum and CAT (Convention Against Torture), legitimates Judicial Review as a mean of achieving same form of remedy for the Flaws in the system."*

It was stated:

> *"At the root of the problem in Hong Kong is the democratic deficit, where neither the Hong Kong executive nor legislation is fully elected. As Richard Cullen described it, freedom in Hong Kong is something of a two-legged stool; the judiciary and a free press provide two legs but the third, democracy is at best only half a leg."*
>
> *Therefore, rationale advanced for deference by the judiciary to the executive and the legislature in Hong Kong SA loses much of its force."*

286. The deficits in good governance vis-à-vis enforcement of a constitutional right is possible by applying the doctrine of Proportionality and not by the Wednesbury Unreasonableness.

287. Reasonableness test, if applied strictly, give rise to unreasonableness.

Who is a reasonable man itself may be a big question.

288. An administrative action may be held to be good by a learned single judge as well as the Division Bench of the High Court but may be set aside by the Supreme Court on the ground of unreasonableness.

289. There may not be fixed norms but judicial review also requires fixing of normative standards. It cannot be based on uncertainty, when certainty is said to be a facet of rule of law.

[See Vodafone Holdings B.V. vs. Union of India & Anr. 2012(1) SCALE 530.]

290. Moreover if indirectly and in phases, a doctrine is diluted by judicial decisions; the erosion doctrine must be held to have been applied.

After sixty five years of its coming into being, the relevance of continuing the doctrine of Wednesbury Unreasonableness is doubted in many circles. That doubt in other jurisdiction should not deter the Indian Courts to adopt what is best suited for the disputants of this country on the touchstone of their constitutional right.

291. In the early part of the twenty first century, it was opined that days for Wednesbury are numbered.

Value Judgment in the individual right cases as also the cases involving restrictions imposed on freedom of a citizen cannot be determined by applying `Wednesbury' test. Proportionality test must be applied therefor.

292. In a given case, a Court may have options to grant reliefs to a litigant.

If the proportionality doctrine is applied, the best can be granted; but it may not be possible if reasonableness test is applied.

Similarly in a case involving quantum of punishment, application of the proportionality doctrine may provide some relief to

the delinquent, reasonableness test; if applied, may lead to the denial thereof.

293. In his article 'Wednesbury's Reason and Structure' published in 2011 Public Law page 238, Paul Daly opined:-

> *"Thus, differential treatment had been established, but the indicium of unreasonableness was justified, perhaps surprisingly.*
>
> *A case in which the justification for differential treatment was more convincingly established is R. (on the application of L (A Child)) v J School Governors."*
>
> *The pupil who was the effective applicant had been permanently excluded from school by his head teacher, but the decision to permanently exclude him was overturned on appeal to an independent appeal panel Under s.67 of the School Standards and Framework Act 1998, the pupil had to be "reinstated" by the head teacher. Due to strike threats by teachers, the pupil did not return to normal classroom activity and was educated under a special regime, initially on his own but later accompanied by another student. The regime was designed to keep the pupil out of mainstream classes and thereby avert any strike action. Whether or not the pupil had been reinstated was a question of degree:*
>
> *"As to the formal reacceptance by the school of responsibility, that acceptance would certainly be necessary but would not be sufficient. The formal reacceptance would have to be accompanied by treatment of the pupil that was consistent with his or her status as a pupil of the school Otherwise the reacceptance would be meaningless ... The 'reinstatement' of an expelled pupil as a member of an organic body such a school may require the relationship of the pupil with each of [the school's] constituent parts and the expected or likely interaction between them to be taken into account."*
>
> *A number of factors, then, were relevant in determining whether a reinstatement had occurred, or, whether the decision of the head teacher was "unreasonable and disproportionate" or not: "the need to 'reinstate' L required the head teacher to balance a number of*

different factors, pulling in different directions"."4 On the one hand, the school resumed responsibility for the pupil, who was permitted to study, was supervised, received tuition and for whom travel arrangements to and from school were made. On the other hand, there was no social contact with other students. However, given the disruption that might have been caused to the other students had the special regime not been put in place; the threat of strike action, with examinations imminent; and the need to keep the pupil from the victim of the alleged assault which led to the permanent exclusion in the first place, the head teacher's decision was not unreasonable or disproportionate."5 Although the discussion was not couched in these terms, it is clear that the allegedly unequal treatment was at the root of the applicant's complaint. However, any inequity in treatment was amply justified by the desire to avoid industrial strife and its deleterious effects on the education of the other students."

294. The discussions on the subject, although, would undoubtedly continue in future, it should be borne in mind that unlike England, India has a written Constitution. The grounds of judicial review of Administrative Action is not only be followed on the basis of Administrative Law point of view but also from the Constitutional Law points of view.

295. Proportionality test comprises of suitability, necessity and not imposing a huge burden on the citizen, whereas an imbalance between public and private interest should pass the reasonability test.

Where imbalance is significant the doctrine of Proportionality may have to be considered with reference to the doctrine of Legitimate Expectations.

296. Mr. Paul Craig appears to be of the view that doctrine of Proportionality provides for much more structure and reasons in the balancing process.

Application of the doctrine in this case

297. The security of a nation must be above other considerations.

Even a legislation concerning the security of a nation and/or public purpose may be held to be imposing reasonable restrictions in a case involving fundamental Right of a citizen.

298. We are herein however, concerned with the applicability of the test of doctrine of Proportionality vis-à-vis the quantum of penalty levied.

299. The policy decision of the Respondent may provide for better or more detailed disclosure of the same procedure, in which event it cannot be said that contradictory and/or inconsistent stands have been taken. The matter, however, would be different when an action on the part of an authority of the State is questioned on the ground of arbitrariness in which event the action based on individual discretion must be held to be in violation and/or ignorance of the prescribed rules, procedure or law or founded on irrelevant consideration. In a situation of this nature even the doctrine of Proportionality must be held to be applicable.

300. By reason of the impugned orders, the Central government does not say that in the interest of the security of nation

or public interest, certain activities should be stopped. It does not say that the Telecom Licenses be suspended.

301. Respondent had been considering the question having regard to the pan India situation and not in regard to the areas which can justifiably be said to be sensitive ones.

We, therefore, of the opinion that the Doctrine of proportionality may be applied in a case of this nature.

302. Once it is held that doctrine of proportionality shall apply in the facts of this case, to what relief the Petitioner would be entitled to is the question.

Broadly speaking, two different interpretations of the circular letters issued by the Respondent and in particular to the one dated 24.12.2008 proposing imposition of penalty in graded scale involve two different interpretations.

303. One of the interpretations would lead to imposition of a lessor amount of penalty.

When a penalty is imposed for the purpose of performance of a part of the contract, the quantum of which would represent the lessor sum should be imposed.

304. The question which would arise is as to whether the purported clarificatory letters dated 3.2.2011 and 7.2.2011 are really clarificatory or a new burden has been imposed on the Petitioners.

305. We have noticed heretobefore that for the purpose of imposition of penalty a graded scale was introduced. This admittedly led to two different interpretations not only made by the operators but

also by different Term Cells. The graded scales were required to be ascertained being based on the percentage and the financial penalty of corresponding amount for each detected case from "verified subscriber. It was necessary to be construed keeping in view para 2 of the circular letter dated 24.12.2008.

306. According to this circular, the financial penalty for unverified subscriber shall be as per table below :

"Correct subscriber verification percentage in a service area	*Amount of financial penalty per unverified subscriber*
Above 95%	*Rs. 1000/-*
90%-95%	*Rs. 5000/-*
85% - 90%	*Rs. 10000/-*
80%-85%	*Rs. 20000/-*
Below 80%	*Rs. 50000/-"*

307. While the contention of the petitioner is that the penalty should be imposed separately for each slab, the respondent's contention is that the amount of penalty for each subscriber should be on highest slab for each subscriber from the beginning. We know that the Income Tax is calculated for each slab separately. For example,

(Amount in Rupees)

Income slab	Interpretation	Tax rate
Income < 50,000	First 50,000	10%
50,000>Income<120,000	Next 70,000	20%
50,000>Income<200,000	Next 80,000	30%
Income<120,000		40%

308. Given these tax rates, if someone's annual income is Rs.60,000, then the tax would be computed as indicated below:

(Amount in Rupees)

Income slab	Tax rate	Tax Amount
Income 50,000	10%	5,000
Next 10,000	20%	2,000
Total		7,000

309. Like income tax, there are very many examples where the telescopic system of calculation is not followed. If the intention of the licensor was to follow the system where the amount of penalty will be increased from the beginning on highest slab, it should have been made clear in the circular itself. This cannot be done on the basis of a clarificatory circular. It is trite that when the provision is likely to give rise to two interpretation, the benefit thereof should go to the Petitioners.

310. It is in this context, it will bear repetition to state, that the Doctrine of Proportionality as enunciated heretobefore would be applicable in this case. For example, in a sample of 100, if unverified subscribers are 20, then the penalty will be 20000 x 20 = 4,00,000. In case the number of unverified subscribers are 21, the penalty will be 21x 50000=10,50,000. This means just having one additional unverified subscriber, the penalty for that additional subscriber will be 6,50,000, in the event the purported clarification dated 3.2.2011 is

given effect to. On the other hand, if we follow the system based on slab, the penalty for additional unverified subscriber will be 50,000 only.

311. Therefore, we are of the opinion, that financial penalty should be calculated on the principles as it is followed in the Income Tax system, i.e. rate of financial penalty to be calculated separately for each slab and the total amount of penalty arrived at.

Fraud Issue (Withdrawal of Documents)

312. Petitioner has filed an application for withdrawal of some documents and replacement thereof by some others which was opposed to by the counsel for the Respondent. Inter-alia on the premise that the Petitioners are guilty of commission of fraud in as much as they deliberately and intentionally relied upon certain documents for the purpose of obtaining an interim order from this Tribunal, it was urged that this petition should be dismissed *in limine*.

313. Strong reliance in this behalf has been placed by learned counsel appearing on behalf of the Respondent on the following decisions:-

- *S.P. Chengalvaraya Naidu (Dead) by LRs vs. Jagannatha (Dead) by LRs & Ors.,* (1994) 1 SCC 1
- *Gowrishankar v. Joshi Amba Shankar Family Trust* , (1996) 3 SCC 310
- *Goa Urban Coop. Bank Ltd. v. Noor Mohd.*, (2004) 6 SCC 166
- *Bhaurao Dagdu Paralkar v. State of Mahara*shtra , (2005) 7 SCC 605

It is difficult to accept the said submissions of the learned counsel.

314. The two forms which are sought to be withdrawn are at pages 391 and 392 of the Paper Book. They are sought to be substituted by two other forms.

315. This petition was filed on or about 17.5.2011. The preliminary hearing of this petition came up for consideration before this Tribunal on 18.5.2011 on which date an interim order, staying the effect of the impugned circulars, was passed. 31.5.2011 was the date fixed for hearing on the interim prayer made by the Petitioner. Before, however, the said date, namely, on 23.5.2011, the said Miscellaneous Application was filed.

316. It is only thereafter, namely on 25.5.2011, the Respondent had filed a short affidavit. This Tribunal, thus, had occasion to consider the prayer of the Petitioner whereby it had sought to withdraw two forms and substitute them by two other, when the matter relating to interim prayer of the Petitioner was heard and considered.

317. The interim order was passed on 3rd June, 2011.

From a perusal of the said order, it would appear that this Tribunal had an occasion to go through the documents including the forms which are sought to be substituted. Those forms were brought on record by the Petitioner with a view to show that the officers of the TERM Cells had acted arbitrarily. 13 such forms had been filed and

according to the Petitioner an inadvertent mistake had been committed only in respect of the two of them.

318. Our attention has been drawn to the fact that there had been inadvertent error in the name of the customer, namely, Babulal and Baburam whose parents' names were unfortunately the same. Petitioners contend and in our opinion rightly that if the documents which as indicated heretobefore are at pages 391 and 392 of the paper book are compared with those which have been annexed with the Miscellaneous Application, it would appear, that the nature of the documents are the same.

319. In its rejoinder, the Petitioner stated as under:-

> *"The CAF was correctly upoloaded and was and is available on the system. However, while restapling the same after uploading, the ID proof document of another similarly named person inadvertently got interchanged and attached to this CAF. So, while the correct CAF is on the system (access to which is available to the TERM Cell), the physical copy of the CAF stored had discrepancy. It was the copy of this physically stored CAF document, which was handed over to the TERM Cell. And since there was discrepancy in this set of CAF, the TERM Cell levied penalty. The CAF was provided to TERM Cell of DoT on 27.12.2010."*

320. We are satisfied that there was some problem in screening of the said documents. The reason for rejection of the said documents assigned by the Respondent was that of signature mismatch and on the said premise, the same was opined to be forged. From page 396 of the paperbook, it would appear that the relevant form if compared with the page 21 of the Reply, it would appear that according to the Respondent, the photograph had been changed.

321. Whereas at page 22 of the M.A, a copy of the ration card has been filed, from page 396 of the paper book, it would appear that the election identity card was relied on by the Respondent. The reason for rejection appears to be that the photographs were not legible.

322. Mr. Navin Chawla, would urge that the person concerned became the customer of the operator on or about 3.11.2010 and the relevant form was produced before TERM Cell's officer on 27.12.2010. Noticing that there was some problem, the customer was located and he was asked to file a fresh application in Jan, 2011.

323. The penalty was imposed by the TERM Cell on 10.3.2011. The operator, however, reported back to TERM Cell that fresh documents had been obtained from the customer concerned on 07.4.2011. It is, therefore, evident that the Respondent had been informed about the identity of the concerned customer much prior to the filing of the petition.

324. Petitioners relied on the said forms by way of example to contend that had an opportunity been granted, the alleged discrepancies could have been explained.

325. Our attention in this behalf has been drawn to page 25 of the Rejoinder, which reads thus:-

> *"The original CAF pertaining to Telephone No. 9772194116 was signed by the customer at the retail level on 03.11.2010. The said CAF was forwarded by the retailer to the distributor and ultimately was received by the Company. The Company*

forwarded the same to the TERM Cell on 27.12.2010. (See Annexure R-2 to DoT's Reply).

However, the Company itself noticed the discrepancy in the said CAF and, therefore, informed the subscriber accordingly for verification. Subsequently another CAF was filled up in the month of January, 2011 (with the same date i.e. 03.11.201 0) by the real subscriber in respect of the said Telephone Number. This OAF had correct ID proof and it is this latter CAF/ID proof which was thereafter on record of the Company.

However, since the original form submitted to the TERM Cell on 27.12.2010 had the discrepancy, the TERM Cell had levied penalty on the said OAF with the said Telephone No. 9772194116 in March, 2011.

At the time of filing of the Petition, the Rajasthan Circle of Vodafone however sent photocopy of the CAF procured from their system, where the correct CAF with correct ID proof was earlier uploaded (See Annexure P-37 to the Petition)

Since the penalty had been levied qua this CAF, it was taken as an example in the Petition. Thus, the basis of provision of this information as an example, by the Circle was:

(a) the fact of levy of penalty and

(b) the fact of the correct CAF being on record of the Circle as existing in and checked from the scanned / uploaded records of the Company, which was used as point of reference; though as stated earlier, the CAF sent to Term Cell was defective.

And, therefore, this CAF got identified as an example, as a case where DoT could not have levied penalty."

326. From a perusal of the said explanation on the part of the Petitioners, it would appear that the reason for rejection of the CAF was stated to be that the photograph was not legible.

It is, however, evident from pages 40 and 41 of the MA folder that new documents had been obtained.

327. Mr. Kohli, however, would contend that there is nothing on record to show that the aforementioned discrepancies had been pointed out to this Tribunal at the time of hearing of the interim order.

328. However, having regard to the fact that a case of inter mixing of CAF forms has been made out, we are of the opinion that it is not a case where the application itself should be rejected on the ground of alleged commission of fraud or that the petition itself should be dismissed.

329. There is another aspect of the matter which cannot also be lost sight of. We, in this petition, which has not only been filed by two Associations but also by several operators have been called upon to consider the legality and/or validity of various circular letters issued by the Respondent herein in the matter of verification and/or re-verification of the CAFs.

330. Even assuming that one of the operators for the purpose of showing arbitrariness on the part of the Respondent had committed fraud, the same by itself would not be a ground to dismiss the entire petition.

331. We therefore, are of the opinion that the Miscellaneous Application filed by the Petitioner should be allowed.

Conclusion

332. We, therefore hold :

(i) This Tribunal despite pendency of a Public Interest Litigation (PIL) before the Supreme Court of India cannot

be said to have no jurisdiction to go into the merit of the matter.

(ii) The matter related to the security of the nation so far as conduct of telegraph is concerned, can be implemented through conditions of license.

(iii) The provisions of Indian Telegraph Act, 1885 so far as the matter concerning imposition of penalties is concerned, namely, Section 7 (2) (K) thereof, Section 20 A and Section 29 A would have no application.

(iv) The question as to whether by issuance of the circulars/guidelines in effect and substance the conditions of license stood amended requiring concurrence of the `Authority' in terms of Section 11 (1) (a) (ii) and (iv), need not be finally decided.

(v) Petitioners cannot be permitted to question those circular letters which have been acted upon and in respect whereof undertakings were granted. However, as serious questions of law are involved, the Petitioner cannot be said to have waived their right and they cannot be estopped from questioning the latest circulars in respect whereof the doctrine of estoppel will have no application.

(vi) Petitioners cannot be permitted to question the validity of those circular letters which have been issued three years prior to the date of filing of the petition being barred

under the law of Limitation as well in view of the doctrine of delay/latches on their part.

(vii) Subject to the observations made heretobefore the circular letters issued by the Respondent for the aforementioned reason are not illegal or invalid.

(viii) Respondent cannot be said to have acted illegally and without jurisdiction in delegating its power relating to making inspection, imposition of penalties, making provisions for appeal and the determination thereof by the authorities of the Term Cells and the Appellate Authority.

(ix) The principle of Natural Justice are provided for in the circular letter and enough safeguards have been provided to the licensees in this behalf.

(x) The question as to whether the principles of *mens rea* or *actus reus* is applicable, will depend upon the facts and circumstances of each case and it is not necessary to decide the same finally in absence of materials having brought on record.

(xi) The financial penalty should be calculated on the principles as it is followed in the Income Tax system, i.e. rate of financial penalty to be calculated separately for each slab and the total amount of penalty arrived at.

(xii) Each individual cases of imposition of penalty is required to be considered on the factual matrix involved therein.

333. This petition is allowed in part and to the extent mentioned hereinbefore.

In the facts and circumstances of this case, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

April 12, 2012
Anu