

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**DATED 17<sup>th</sup> FEBRUARY, 2012**

**Petition No.360 of 2011**  
**(M.A. No. 284 of 2011)**

Bharti Airtel Ltd. ...Petitioner

Vs.

Mahanagar Telephone Nigam Ltd. ...Respondent

**Petition No.397 of 2011**  
**(M.A. No.297 of 2011)**

Vodafone Essar Limited & Anr. ...Petitioner

Vs.

Mahanagar Telephone Nigam Ltd. ...Respondent

**Petition No.10 of 2003**  
**(M.A. Nos.286 and 291 of 2011)**

Cellular Operators Association of India &Ors ...Petitioner

Vs.

Department of Telecommunications & Ors ...Respondent

**BEFORE:**

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

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

For Petitioner (Bharti) : Mr. Gopal Jain, Advocate  
Mr. Kaushik Mishra, Advocate

For Petitioner (Vodafone) : Mr. Ramji Srinivasan, Sr. Advocate  
Mr. Manjul Bajpai, Advocate  
Ms. Monika Singhal, Advocate  
Ms. Harshita Verma, Advocate  
Ms. Nupur Pallavi, Advocate

For Respondent (MTNL) : Mr. Samir Sagar Vashista, Advocate

For Respondent (BSNL) : Ms. Maneesha Dhir, Advocate  
Mr. K.P.S. Kohli, Advocate  
Ms. Poonam Anand, Advocate

### **JUDGEMENT**

These petitions and applications involve a question of interpretation of an order dated 13.4.2011 passed by this Tribunal and/or the enforcement thereof.

#### **Background Facts**

2. The factual matrix involved in these matters is by and large admitted.

The Telecom Regulatory Authority of India (TRAI), inter alia, made a determination in exercise of its power under the Telecom Regulatory Authority of India Act, 1997 (The Act) that the private operators while collecting the IUC charges for and on behalf of the Public Sector Undertakings, [Bharat Sanchar Nigam Ltd. (BSNL) and Mahanagar Telephone Nigam Ltd. (MTNL)] would be entitled to retain 5 percent of the collections by way of collection charges and bad debts.

The said determination was made by the TRAI in respect of six issues, referred to it.

The Public Sector Undertakings while accepting the determination in respect of five issues which were in their favour did not abide by the direction in respect of the sixth issue, i.e., so far as the same related to retention of 5 percent of the collection by the private operators is concerned.

3. Aggrieved by and dissatisfied with the said action on the part of the Respondent No.1 herein as also BSNL, COAI filed a petition before this Tribunal which was marked as Petition No. 10 of 2003.

4. By a judgment and order dated 29.3.2004, this Tribunal allowed the said petition declaring that the private operators were entitled to 5 percent retention charges, stating :-

*“For all these reasons, these petitions are allowed with cost against BSNL. BSNL and MTNL are directed to implement the TRAI recommendations dated 8.1.2001 allowing the petitioners to retain the 5% of their passed through revenue paid to them for calls made by the petitioners w.e.f. 25.01.2001 and both BSNL and MTNL shall refund/adjust all the excess amounts received by them from the petitioners towards the 5% of their passed through revenues w.e.f. 25.01.2001 upto 31.01.2002. This amount shall carry interest @ 12% per annum from 1.2.2002 as BSNL and MTNL were*

*allowed to make the payments due from 25.01.2001 by 31.01.2002. Counsel fee Rs.20,000/-.”*

5. BSNL and MTNL were directed to refund the said amount with interest @ 12% p.a. from 01.02.2002 onwards.

Appeals were preferred against the said judgment and order by BSNL before the Supreme Court of India, which were marked as Civil Appeal Nos. 5546 and 6969 of 2004.

6. By an order dated 06.12.2004, a Division Bench of the Supreme Court of India, while refusing to grant stay of the operation of the said order, directed as under :-

*“The learned senior counsel for the appellant states that whatever amount is due to be paid to the respondent under the impugned order shall be adjusted with the amounts to be paid by them from time to time within a period of two months, subject to the respondents’ furnishing a bank guarantee of a Nationalised Bank, which shall be kept alive during the pendency of this appeal. In case the appellant succeeds, the respondents shall have to pay interest on this amount so adjusted, at the rate as determined by this Court.”*

7. The said appeal came up for hearing before the Supreme Court of India and by a judgment and order dated 26.10.2010, the matter was remitted to this Tribunal upon setting aside the said judgment, directing:-

*“On the facts of the case, it appears that the Regulation of 1999 was not brought to the notice of the TDSAT and we are of the opinion that it should have been brought to the notice of the TDSAT and should have been considered by TDSAT. Hence, we remand the matter to the TDSAT for Civil Appeal No. 5546 of 2004 & 6969 of 2004 a fresh consideration of the case in accordance with law, preferably within a period of four months from the date of production of a copy of this order.*

*We make it clear that we are not expressing any opinion on the merits of the case. The interim arrangement dated 06.12.2004 ordered by this Court shall continue to operate till the disposal of the case by the TDSAT.*

*The impugned order of the TDSAT is set aside without going into the merits of the case. The Appeal is allowed accordingly. No costs.*

Civil Appeal No.6969 of 2004

*This case is also remanded to the TDSAT with the same observations and directions as made by us in Civil Appeal No(s) 5546 of 2004 above.*

*The appeal is allowed accordingly. No costs.”*

8. Pursuant to and in furtherance of the said directions, the matter was heard out again by this Tribunal and the said petition was allowed by an order dated 13.4.2011, opining:-

*“78. If the said concession was granted keeping in view the hardship faced by the cellular operators and which was not only accepted by BSNL, but also by DoT in clear and express terms, there is absolutely no reason as to why the principle of Estoppel and/or Waiver shall not be held to be applicable in this case.*

*82. Moreover, if BSNL is bound by the conditions of licence issued by the DoT in exercise of its statutory power conferred upon it under Section 4 of the 1865 Act, or otherwise bound by necessary implication it must be held to have accepted the determination of TRAI.*

*The principle of ‘Waiver’ and/or ‘acquiescence’ shall apply in the present case. Moreover, the respondent No.2 could not have objected to implementation of the determination of the TRAI in view of the stand taken by it and that too after withdrawal of the appeal by the petitioner.*

*84. We thought that the first respondent as a ‘State’ and the 2<sup>nd</sup> respondent as an instrumentality of the ‘State’, would*

*bring the same to the notice of this Tribunal. Even otherwise a party to a lis cannot suppress a document, which has a vital bearing on the subject matter thereof.*

*85. We, therefore, are of the opinion that keeping in view the conduct of the respondents, they are estopped and precluded from raising a contention that they have not implemented the order of the TRAI, although the same was implementable in law.”*

9. Admittedly the Respondent herein has not preferred any appeal from the said judgment and order.

We may notice that in the original petition being Petition No. 10 of 2003, the petitioner had prayed for the following reliefs:-

*“(a) Direct the respondents to implement the TRAI Determination dated 08.01.2001 allowing CMSPs to retain 5% of their pass through revenue paid to the fixed operators for calls made by the Cellular Subscribers w.e.f 08.01.2001;*  
*(b) direct the Fixed Service operators to refund/adjust all the excess amounts received by them from the Cellular Operators towards the said 5% of CMSPs pass through revenues w.e.f 08.01.2001 upto 31.1.2002 together with interest thereon computed at prime lending rate of State Bank of India from the date of over payment in each bill by*

*the CMSPs to the FSPs until the actual date of refund/adjustment;*

*(c) pass such further or other orders as deem fit and proper.”*

10. Respondent, however, in view of the fact that this Tribunal in its aforementioned order dated 13.4.2011 did not issue any direction with regard to grant of interest, raised demand by its letters dated 29.06.2011, 21.07.2011, 26.07.2011 and 23.08.2011 in respect of Mumbai Service Area and a letter dated 06.08.2011 for Delhi Service Area, which is the subject matter of Petition No. 397 of 2011 and by letters dated 27.06.2011 and 11.08.2011, which is the subject matter of Petition No. 360 of 2011.

11. We may notice one of the said letters/demands.

*“Dated: 27.6.2011  
M/s Bharti Airtel Limited (CMTS)  
Airtel Centre, Plot No.16  
Udyog Vihar, Phase-IV, Gurgaon.*

*Sub: Compliance of order dated 13.4.2011 passed by  
TDSAT in the matter of COAI & others Vs. DOT & others.*

*This is with reference to MTNL C.O. Vide letter No.  
MTNL/CO/Legal/TDSAT/23 dated 9.6.2011, the decision  
of Hon’ble TDSAT dated 13.4.2011 in the matter of COAI  
and others Vs. DOT and Ors. In the judgement, Hon’ble*

*TDSAT has allowed the petitioners/COAI i.e.. adjustment/refund of 5% pass through charges only for the period i.e. from 25.1.2001 to 31.1.2002. The payment of interest has not been allowed by Hon'ble TDSAT to you.*

*Hence you are requested to deposit the interest amount @ 12% from 01.2.2002 to 28.2.2005 i.e, Rs.2,24,71,770/- immediately within three days from the issue of this letter.”*

12. The aforementioned demands by the Respondent herein are in question in these petitions.

13. Mr. Ramji Srinivasan, learned senior counsel and Mr. Gopal Jain, learned counsel appearing for the petitioners would submit:-

- (i) Petitioners having furnished bank guarantees in terms of the order of Supreme Court of India and the said bank guarantees having expired (in the case of Bharati Airtel during pendency of this proceeding) the impugned demands cannot be sustained and, thus, the question of invocation thereof does not arise at this stage.
- (ii) So far as the action on the part of the Respondent to adjust the amount from the IUC payable to the Petitioner is concerned, the same is not permissible in law in view of the Interconnection Agreements entered into by and between the parties hereto.

14. Mr. Vashishta, learned counsel appearing on behalf of the Respondent however, urged:-

(a) The Supreme Court of India having set aside the order of this Tribunal, the matter was to be considered afresh and if by reason of its judgment dated 13.04.2011, this Tribunal has not granted any interest, the Petitioners must be held to be not entitled thereto.

(b) Respondent could adjust the interconnection charges payable to the Petitioners from the said dues although no netting or setting off was permissible in terms of the Interconnection Agreement.

15. Before advertng to the rival contentions of the parties, we may notice that in Petition No. 10 of 2003, Cellular Operators of Association of India, the original petitioner, has filed two Miscellaneous Applications seeking for clarification of the said judgment and order dated 13.04.2001.

16. The prayers made in the said Applications, are as under:-

*“(a) Clarify that this Hon’ble TDSAT has not disturbed or altered the grant/adjustment of interest and that no order directing any refund, etc by the Applicants has been passed*

*by this Hon'ble Tribunal in its order and judgment dated 13.4.2001.*

*(b) Strike down the MTNL's impugned letters dated 29.6.2011, 21.7.2011, 26.7.2011 and 23.8.2011 for Mumbai Service Area and 06.08.2011 for Delhi Service Area;*

*(c) Direct MTNL to forthwith refund the said amount of Rs.1,46,52,224/- in respect of VEMSL (Delhi) and Rs. 2,27,91,860/- in respect of VEL (Mumbai) wrongly adjusted by MTNL together with applicable interest as per interconnect agreement thereon computed from the date of wrongful adjustment till the date of actual fund;*

*(d) Restrain MTNL from making such further adjustments;*

*(e) Direct MTNL to forthwith return the Bank Guarantees which have expired;*

*(f) Pass ad-interim/interim/ex-parte orders in terms of the above prayers”*

17. It appears that the BSNL had preferred an appeal before the Supreme Court of India questioning the order of this Tribunal dated 13.04.2011 passed in Petition No. 10 of 2003.

18. Notices of the said Application have been served on the Respondent as also BSNL.

We have heard learned counsel for the parties on the said Applications also.

19. The matter relating to refund of the amount of 5 percent of the collections made by the operators relate back to January, 2001. The matter has been considered in great details by this Tribunal twice; once without taking into consideration the effect of the 1999 Regulations and for the second time upon remand of the matter by the Supreme Court of India.

20. We have noticed heretobefore that MTNL which operates in the Mumbai circle and the Delhi circle used to get collected the IUC charges through the operators.

21. The judgments of this Tribunal will clearly go to show that the licensees were incurring bad debts apart from incurring collection charges.

22. If an order/direction had been issued by the TRAI which had been accepted by the DOT albeit w.e.f. 25.01.2001 in stead and in place of 08.01.2001, the Petitioners became entitled to some interest. In our considered opinion, there was no ground on the basis whereof the legitimate claim of interest could have been denied to the operators.

23. The Supreme Court of India in Thajathay..Vs. Union of India reported in (2009) 7 SCC page 372 stated the law, thus:-

*“25. It is, therefore, clear that the court, while making a decree for payment of money is entitled to grant interest at the current rate of interest or contractual rate as it deems reasonable to be paid on the principal sum adjudged to be payable and/or awarded, from the date of claim or from the date of the order or decree for recovery of the outstanding dues. There is also hardly any room for doubt that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants.*

*26. The courts are consistent in their view that normally when a money decree is passed, it is most essential that interest be granted for the period during which the money was due, but could not be utilized by the person in whose favour an order of recovery of money was passed.*

*27. As has been frequently explained by this Court and various High Courts, interest is essentially a compensation payable on account of denial of the right to utilize the money due, which has been, in fact, utilized by the person withholding the same. Accordingly, payment of interest follows as a matter of course when a money decree is passed.*

*28. The only question to be decided is since when is such interest payable on such a decree. Though, there are two divergent views, one indicating that interest is payable from the date when claim for the principal sum is made, namely,*

*the date of institution of the proceedings in the recovery of the amount, the other view is that such interest is payable only when a determination is made and order is passed for recovery of the dues. However, the more consistent view has been the former and in rare cases interest has been awarded for periods even prior to the institution of proceedings for recovery of the dues, where the same is provided for by the terms of the agreement entered into between the parties or where the same is permissible by statute.”*

Recently in *Indian Council for Envior-legal Action v. Union of India*, (2011) 8 SCC 161, the law is stated in the following terms:-

*“187. The Court in the aforesaid judgment also observed that once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or of 1978.*

In Goff & Jones’s ‘*The Law of Unjust Enrichment*’ Eighth Edition Page 800, it is stated:-

*“In Sempra the House of Lords held that it is possible for a claimant to frame a claim for interest on a capital sum paid to a defendant not as an interest award that is parasitic on a claim in unjust enrichment to recover the face value of the money, but as a separate stand-alone claim in unjust enrichment to recover the use value of the money. The quantum of the award made to a successful claimant in such a case should be calculated as compound interest on*

*the money paid to the defendant when that is the use value of the money that the defendant received. This will usually be the case, since defendants usually have to pay compound interest in order to borrow money. “*

24. No reason has been assigned by this Tribunal in its judgment dated 13.04.2011 as to why the payment of interest by way of compensation to the Petitioner would be disallowed. More significantly, as noticed heretofore, the Petitioners furnished bank guarantees in terms of its order dated 06.12.2004 whereby they became entitled to adjust all the amounts in terms of this Tribunal's order dated 29.03.2004 which included not only the amount of pass through revenue but also interest accrued thereupon.

The said interim arrangement was directed to continue to operate till the disposal of this case by this Tribunal, by the Apex Court.

If Supreme Court of India did not disturb or alter the direction of this Tribunal as regards adjustment of interest and no order directing refund of any amount was passed, the same must be held to have continued.

25. So far as bank guarantees furnished by Petitioners are concerned, Respondents adjusted the IUC charges payable to Petitioners.

Petitioners protested against the said action on the part of the MTNL.

We may notice that the Vodafone Essar by its letter dated 08.08.2011 stated that the Respondent is liable to pay both the amount of principal and interest and furthermore, the Interconnect Agreement did not provide for any set off facility, stating:-

*“1. MTNL is liable for payment of BOTH the 5% pass through charges of disputed period (i.e. from 25.01.2001 to 31.01.2002) as well as the 12% interest, which was paid by MTNL to us as per Hon’ble TDSAT judgment dated 29.4.2004 and Hon’ble Supreme Court order dated 06.12.2004. This is because the Hon’ble TDSAT judgment dated 13.4.2011 has not altered its own earlier judgment or Hon’ble Supreme Court’s order and issued any directions to us ordering a refund of the 12% interest amount to MTNL....*

- (i) The Hon’ble TDSAT had granted us interest on the relevant pass through revenue vide judgment dated 29.4.2004.*
- (ii) The Hon’ble TDSAT in its order dated 06.12.2004 allowed us to adjust all the amounts under the Hon’ble TDSAT’s order of 29.4.2004 which included the principle pass through revenue as also interest thereon subject to our furnishing the Bank Guarantee.*

(iii) *The Hon'ble Supreme Court in its remand order dated 26.10.2010 continued the said interim arrangement to operate till the disposal of the case by Hon'ble TDSAT.*

(iv) *The Hon'ble TDSAT vide judgment dated 13.4.2011 allowed the petition of COAI & Ors. in part and to the extent that the determination of TRAI shall take effect from 25.1.2001 (instead of from 31.1.2002 as contended by MTNL).*

*Therefore, we say that the said adjustment of interest allowed by the Hon'ble Supreme Court has not been disturbed or altered by the hon'ble TDSAT and no order directing any refund etc by the Petitioners private service providers has been passed by the hon'ble TDSAT. On the other hand the plea of the Petitioners has been sustained again.*

*If MTNL has any doubt/claim, you could have moved appropriate application before Hon'ble TDSAT.*

*Hence we say that no such interest earlier received by us. i.e, adjusted in our favour, is refundable to you under the Ld. TDSAT's judgement and any claim by MTNL to seek a refund of the interest amount is wrongful.*

*Please also note that as the Hon'ble Tribunal has disposed of the case in our favour, the interim arrangement dated 6.12.2004 ordered by the Hon'ble Supreme Court of maintaining the bank guarantee provided by us is no longer required.*

*Accordingly we had written to you on 13.5.2011 pointing out that the Bank Guarantee, given by us which was expiring on 16.5.2011 was no longer required and may be kindly returned to us for cancellation. MTNL did not return our Bank Guarantee and instead attempted to wrongly invoke the Bank Guarantee to the extent of purported refund of interest.*

*Despite our letter dated 28.6.2011 in this regard, you have still not returned our original Bank Guarantees, even after expiry and our request for returning the same. We once again request you to kindly return our original Bank Guarantees furnished to MTNL since 17.5.2008 on this matter, as these Bank Guarantees are no longer relevant pursuant to the judgment of the Hon'ble TDSAT dated 13.4.2011."*

26. Having heard the learned counsel for the parties, we are of the opinion that this Tribunal has committed an inadvertent error by not directing grant of interest.

27. It is not a case where the provisions of Sub-section 2 of Section 34 of the Code of Civil Procedure would be attracted.

28. It was required to be borne in mind by this Tribunal that by reason of its order dated 26.10.2010, the Supreme Court of India continued the Interim Order passed by it on 06.12.2004.

29. This Tribunal, therefore, was required to pass an express order keeping in view the fact that the Petitioners had furnished bank guarantees which not only included the principal amount but also the amount of interest.

It is also not in controversy that such interest is ordinarily payable.

30. Mr. Vashist appearing on behalf of MTNL and Mr. Kohli appearing on behalf of BSNL would submit that these applications for clarification in substance in effect and substance are applications for review which should not be allowed at this stage as no error apparent on the face of the record as when pointed out.

Even assuming that in effect and substance these applications are for review of the order of this Tribunal dated 13.4.2011 the situation will not change.

31. This Tribunal in appropriate cases may direct review of its own order even suo-motu, if it arrives at a conclusion that it would be just and proper to do so.

The jurisdiction of a Court of law to review its own order in terms of Or XLVII Rule 1 of the Code of Civil Procedure, 1908 or otherwise is

not confined to a case only where there is 'an error apparent on the face of the record'.

Review of an order is permissible if sufficient reason exists therefor.

*[See BCCI Vs. Netaji Cricket Club (2005) 4 SCC 741 and R N. Jaji & Brothers vs. Subhash Chandra (2007) 6 SCC 420.]*

32. It is a well known principle of law that no litigant should suffer for the mistakes committed on the part of a Court of law.

The maxim '*Actus curiae neminem gravabit*' is a well known one.

Applying the said principle, we are of the opinion that a case same has been made out for review of the said order and/or clarify the same.

In *Kalabharati Advertising V. Hemant Vimalnath Narichania* (2010) 9 SCC 437, at page 447, the law is stated in the following term:-

*"15. No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ*

*petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court.”*

In Enviro-legal Action (Supra) the said principle has been reiterated.

33. Mr. Vashista would contend that by reason of its order dated 26.10.2010 the Supreme Court of India must be held to have remitted the entire matter including interest before this Tribunal.

It is so. But, there cannot be any doubt or dispute having regard to the fact situation involved herein, this Tribunal was required to pass an order with regard to grant of interest one way or the other expressly.

Even no submission to the contrary had been made by learned counsel appearing on behalf of BSNL and MTNL.

34. We, therefore, are of the opinion that a case has been made out for clarification of this Tribunal's order dated 13.4.2011 that interest on the aforementioned sum, @ 12 % per annum was payable to the Cellular operators by the Respondents of Petition No. 10 of 2003.

35. So far as the action on the part of the Respondent herein to adjust the amount from the IUC charges payable to the Petitioner is concerned, suffice it to say that same was not permissible in view of the following stipulation in the Interconnect Agreement.

*“7.3.1 MTNL and the UASP agree that:-*

*(iii) All payments due to MTNL/UASP will be paid without set off (netting) or counter claim and shall be free and clear of any withholding or deductions.”*

36. Mr. Vashist would very fairly concede that having regard to the provisions of the Interconnection Agreement, the Respondent could not have set off any amount payable to the Petitioners. Exercise of such a purported power by the Respondent herein, thus, was wholly without jurisdiction.

37. We have noticed heretobefore that during pendency of these petitions the bank guarantees furnished by the Petitioners have expired. The question of invocation of the bank guarantees, therefore, does not arise.

### **Conclusion**

38. For the reasons aforementioned, the original Petitions and also the Miscellaneous Applications are allowed.

The impugned orders of the Respondent are set aside.

The applications for Clarification/Review are also allowed.

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

.....  
**(S.B. Sinha)**  
**Chairperson**

.....  
**(P.K. Rastogi)**  
**Member**

*HKC/*