

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 16.1.2012

Petition No. 395/2011

M/s Reliance Communication Ltd. ... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. & Anr ... Respondents

Petition No.400/2011

M/s Tata Teleservices Ltd. ... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. & Anr. ... Respondents

Petition No.401/2011

M/s Sistema Shyam Teleservices Ltd. ... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. & Anr. ... Respondents

BEFORE:

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

For Petitioners : Mr.Navin Chawla and
Mr.Tushar Singh, Advocates.

For Petitioners : Mr.Ramji Srinivasan, Sr. Advocate
in P.Nos.400-401/2011 with Mr.Mansoor Ali Shoket,
Mr.Nitin Kala and
Ms.Vibha Dhawan, Advocates.

For Respondent in : Ms.Maneesha Dhir, and Mr.K.P.S.
P.No.395/2011 Kohli, Advocates

J U D G M E N T

Introduction

These petitions involving similar questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. Validity of a circular letter dated 21.7.2011, some bills and disconnections notices issued by the Respondent No.1 herein are in question in these petitions.

The Petitioners have also prayed for issuance of an order restraining the Respondent from recovering any amount in excess of 15 paise per minute towards inter-circle transit charge till such time as the Respondent no.2 TRAI notifies the new Interconnection Usage Charges Regulations (IUC).

Background Facts

3. On or about 29.10.2003, the Telecom Regulatory Authority of India (the TRAI) issued IUC Regulations (Regulation 4 of 2003), inter-alia levying Carriage Charges.

4. Section IV thereof stipulated that the charges levied thereunder would be as per Schedule II appended thereto .

It reads as under :-

- Carriage Charges
- (a) Carriage charges per minute for long distance calls within India

TABLE I
(Amount in rupees per minute)

	Distance Slab

Carriage charges per minute for long distance calls within India	Below 50 kms	50-200 kms	200-500 kms	Above 500 kms
	0.20	0.65	0.90	1.10

5. The TRAI in paragraph 84 of its Explanatory Memorandum stated as follows :-

“84. Based on the above review of the IUC regime, the Authority has decided to specify a revised IUC regime. **The basic principles underlying this regime address ease of collection and transfer of the IUC charges, facilitating the implementation of the IUC regime by the service providers, maintaining affordable tariffs for local calls and short distance calls likely to have major community of interest, and reducing the incentives for call by pass.** Thus, the IUC regime has the following characteristics:

- The Authority has decided to specify IUC only as termination charge and carriage charge.
- The IUC termination charge is specified as Rs. 0.30 per minute for fixed line, cellular mobile and WLL(M).
- The carriage charge for the distances have been specified as Rs. 0.20 per minute for up to 50 kms, Rs. 0.65 per minute for 50 to 200 kms, Rs. 0.90 per minute for 200 to 500 kms, and Rs. 1.10 per minute for beyond 500 kms.

- Traffic hand-over for or from Cellular Mobile Networks shall normally take place at Level II TAX POIs and a carriage charge of Rs. 0.20 per minute would be applicable. If handover is at any other TAX level, the relevant carriage charge must be paid.
- The calls from fixed line to WLL(M) would be treated as a local call or long distance call, depending upon whether the call is within or outside the SDCA. Similarly, the calls from WLL(M) to fixed line would be treated as a local call or long distance call, depending upon whether the call is within or outside the SDCA.
- In addition to these IUC amounts, the Authority has specified certain Access Deficit Charges (ADC)."

6. In levying Tax Transit Charges, the TRAI bore in mind the fact that inter-circle calls are handed over to the Respondent at Level II Tax to be terminated in the SDCC, in which event a charge of 20 paise for calls below 50 kilometers shall be leviable.

According to the Petitioners the said Clause was not given effect to by the Respondent No.1.

7. The Cellular Operators Association of India (COAI) filed a petition against the Respondent before this Tribunal which was marked as Petition No. 48 of 2004.

8. By a judgment and order dated 11.11.2005, this Tribunal opined as under :-

"49. On the issue of distance based Carriage Charges we notice that the Petitioners are obliged to pay carriage charges to the Respondents for handing over intra-circle calls at Level-II TAX in the terminating LDCAs. The IUC Regulations of October 2003 lay down applicability of these charges at Table-II in Schedule-II, Para 84 of the Explanatory Memorandum of the TUC Regulation of October lays down the carriage charge of only Re. 0.20 per minute for intra-circle calls irrespective of the distance from Level-II TAX to the Terminating Tandem / Local Exchange. We, however, find that BSNL is charging additional amount based on the distance based charges, which is not 'in accordance with the stipulation of Table-II. The arguments based on the principle of work done are not of much merit in view of the clear stipulations in IUC Regulation of October 2003, which are not under challenge by BSNL. TRAI has also clearly clarified to BSNL in this regard vide its Letter No. 409-1612003-FN .dated 20.1.2004 in the following terms:

"(c) In Schedule C of the BSNL 's letter, BSNL has specified distance based carriage charges for call terminating in their Fixed Line Network handed over at Level-II TX Further for calls handed over at Tandem in a Metro BSNL is charging Re. 0.20 additionally as TAX charges. The IUC Regulation in Table-II has prescribed Nil carriage charge in the case of Cellular Metro Circles where the call is handed over at Tandem, Similarly in the case of Intra-Circle call from Cellular Network handed over to BSNL at the TAX in which the call is to be terminated a carriage charge of only 0.20 paise per minute

would be applicable irrespective of the distance from that TAX to the terminating Tandem. In case call is handed over at any other TAX the relevant distance based carriage charge would be applicable."

50. We feel that the distance based carriage resorted to by BSNL needs to be brought in tune immediately with what is authorized as per the Regulation of October 2003 as stated in Table-II and therefore we allow the prayers to this effect and direct BSNL not to levy the distance based carriage of Re. 0.65, Re. 0.90 and Rs. 1.10 for the distance slabs of 50 to 200 kms, 200 to 500 kms and above 500 kms, respectively in case of Intra-Circle call from Cellular Network handed over to BSNL at the Terminating LDCA TAX in which the call is to be terminated, as they are entitled to levy a carriage of only Re. 0.20 per minute for all such calls as per the said Regulation."

However, the prayer of the Operators that BSNL be directed to refund the amount was not acceded to.

The judgment was, thus, given a prospective effect.

9. On or about 23.2.2006, Regulation 1 of 2006 was made whereby the said 2003 Regulation was inter alia amended as under: -

(a) Carriage charges for Long Distance calls within India

(Amount in Rupees per minute)

Carriage charges per minute for Long Distance Calls within India	As per mutual agreement between the service providers subject to a ceiling of Rupees 0.65 per minute irrespective of the distance.
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10. By reason of the said amendment, therefore, a ceiling of 65 paise was stipulated, which, according to the Petitioners necessitated negotiations between the parties to the interconnect agreement.

Representations were made to the TRAI. An interim direction was issued on 17.5.2006; the validity whereof was questioned by the BSNL by preferring an appeal thereagainst before this Tribunal which was marked as Appeal No. 1/2006. Appeal No.8/2006 was preferred questioning the relevant provisions of 2003 Regulations.

11. By a judgment and order dated 21.5.2010, this Tribunal set aside the said directions of the TRAI opining that by reason of an Explanatory Memorandum, no charging clause can be introduced and such charges should have been levied under the principal Regulations.

Admittedly, appeals thereagainst are pending before the Supreme Court of India.

12. On or about 30.8.2010, the Supreme Court of India in Civil Appeal No.5232-5333/2010 passed an interim order, which shall be noticed at an appropriate stage.

13. A notification was issued by the TRAI on or about 9.3.2009, inter alia directing as under :-

“(e) Transit Carriage Charge from Level II Trunk Automatic Exchange (TAX) to SDCA, Transit carriage charge for carriage of intra-circle traffic handed over from Cellular Mobile. networks to Fixed network, from Level II Trunk Automatic Exchange (TAX) of LDCA in which the call is to be terminated, to SDCA, shall be Re. 0.15 (Fifteen paise only) per minute, irrespective of distance.”

14. The Respondent No.1 herein contended in its appeal preferred thereagainst that in determining the transit carriage charge at 0.15 paise, the TRAI had not taken care of the cost which is required to be incurred nor applied the ‘work done’ principle.

15. Appeals were preferred against the Interconnection Usage Charges determined by the TRAI the other operators as well before this Tribunal.

The said batch of appeals was disposed of by this Tribunal by an order dated 29.9.2010, opining as under :-

"116. INTRA-CIRCLE CELLULAR TRAFFIC

1) In the 2006 Regulations, the carriage charges fixed by TRAI for cellular calls for LDCC TAX to SDCC was 20 Paise. ETISALAT contends that it should be less than 2 Paise. It has been reduced to 15 Paise/minute. There cannot be any doubt or dispute that it should be in consonance with the ceiling prescribed for carriage charges at Rs. 0.65 /minute.

We in this behalf may notice the submissions of TRAI –

"Para 32 & 33

That, it is denied that the answering Respondent has not shared relevant data transparently. All the relevant data for calculating the mobile termination and fixed termination charge are available at Table 6.2, 6.3 and 6.4 of the Explanatory Memorandum to the regulations. For estimating transit / carriage charge from Level II TAX to SDCCC cost data supplied by the appellant and estimated minutes for year 2007-2008 were used. Since the appellant has mentioned that the data are strictly confidential! Therefore, the

answering Respondent refrained from publishing these data. However, the methodology to arrive at these charges has been clearly mentioned in the Explanatory Memorandum to the regulations.

As clearly mentioned that carriage charge was not re-estimated and the Respondent retained the same value as was specified in the IUC Regulation dated 23.02.2006. As mentioned above, the calculation sheet for carrying out the calculation of fifteen (15) paise was not provided as the data of appellant which was used were marked by it as strictly confidential."

2) As would appear from the said submissions that TRAI contends that no data in regard to minutes of usage had been supplied by BSNL for the year 2007-08. It is, therefore, difficult to conceive as to on what basis actual cost incurred or actual MoU handled by the BSNL could be arrived at.

3) Yet again the contention of Bharti Airtel, AUSPI and ETISALAT is that it should have been fixed on the basis of the most efficient operator.

4) What would be the effect thereof, has not been considered but TRAI itself accepts that the same is an untenable proposition. Keeping in view the 'work-done' principle, it was necessary for TRAI to consider as to whether a separate clause of carriage charges of cellular traffic and other traffic should be fixed.

5) The carriage charges, should also be fixed, on the basis of 'work-done' principle, which according to TRAI itself should be applied.

6) It is of some significance to notice that this Tribunal in Petition No. 95 of 2005, Tata Teleservices Vs. BSNL by its judgment dated 14.11.2006 held as under: -

"8.2 We hold in these circumstances that since BSNL has not actually done the work of carriage from the near end LDCC to the far end LDCC as a result of a conscious decision taken by it as already stated in its letters of 30-4-2003 and 13-9-04 and this kind of handover was also clearly stated to be a past practice, the notional carriage charge is not payable to BSNL.

8.3 In this background we have seen the terms contained in the letter dated 26-8-2005 of the Petitioner addressed to the BSNL offering terms for a full and final settlement of all pending demands. In these terms the Petitioner has indicated willingness to discharge its liability towards payment of termination charges and Access Deficit Charges to BSNL based on the distance from the originating end SDCC to the terminating end SDCC which is in accordance with what BSNL has claimed. In regard to the liability towards payment of carriage charges it is envisaged that these would be applicable only for the carriage done from the LDCC TAX where the call was actually handed over to the BSNL and the SDCC of the SDCA when the call was terminated.

We are of the view that in the light of our analysis the terms offered by the Petitioner to the BSNL provide a sound basis for a settlement and should be accepted by BSNL towards full and final settlement of the issue."

7) We, therefore, do not see sufficient ground and without assigning any cogent reasons as to why the same was reduced to 15 Paise.

8) We, therefore, are of the opinion that the matter relating to carriage charges should receive a fresh considerations at the hands of the TRAI in the light of the observations made heretobefore as also in our aforementioned order dated 21.05.2010 in the aforementioned Appeal No. 1 of 2006 and 8 of 2006."

It was concluded :-

"For the aforementioned reasons, we direct the TRAI to consider the matter afresh. We would, however, request it to consider the desirability of informing all the stakeholders in advance, if it is otherwise not inconvenient, that the charges determined by it shall remain valid for more than one year and preferably three years so that the stakeholders or the operators may arrange their business accordingly and submit their representation keeping in view that aspect of the matter. We would also request the TRAI to consider the desirability of granting sufficient time to party to respond, if any occasion arises therefor, sufficient time preferably not less than two weeks. We render our appreciation to the efforts made by TRAI and request it to consider desirability of completing the consultation process in a time bound manner and determine the charges so that the IUC charges could be made effective/implemented by 1.1.2011. We, therefore, remand the case to TRAI with the direction that TRAI will complete the consultation process in a time bound manner so that new IUC charges could be made effective/implemented by 1st January, 2011. These appeals are disposed of with aforementioned observations and directions."

16. The TRAI preferred an appeal against the said judgment and order dated 29.9.2010 before the Supreme Court of India which was marked as Civil Appeal No.271-281 of 2011.

It is stated at the bar that the TRAI merely prayed for extension of time to comply with the said order before the Supreme Court of India whereupon the following order was passed :-

“Admit

As far as interim relief is concerned, time is given to the appellant to implement the decision of TDSAT within a further period of four months from today without prejudice to the rights and contentions of the parties.”

17. The matter relating to grant of interim relief as prayed for by the Appellant therein came up for hearing and the time granted earlier to the TRAI was extended by three months by an order dated 29.7.2011, stating :-

“This Court has, admitted the Civil Appeals filed by TRAI. Before taking up the matter for final hearing, this Court would like the Regulator to compute the IUC with the inclusion of capital cost and without inclusion of the capital cost.

In this case, the TRAI, which is the original Authority, has taken the view as a

matter of law/regulation that capital cost should not be taken into account in the matter of fixation of IUC, whereas the Telecom Disputes Settlement and Appellate Tribunal (TDSAT for short) has taken a contrary view saying that the capital cost should be taken into account in the matter of fixation of IUC. Therefore, we want the Regulator to give us the computation of the IUC to be worked out on both the basis, namely, what would be the IUC if capital cost is taken into account and what would be the IUC if the capital cost is not taken into account? This exercise needs to be done by the Regulator at the earliest. We once again, therefore, direct the service providers/operators to give the data to the Regulator in order to enable it to complete the exercise above-mentioned as early as possible. It is made clear that the Regulator will give its working uninfluenced by the observations made in the impugned judgment by the TDSAT. The Regulator will give its judgment by 31st October, 2011."

18. It is not in controversy that the TRAI had issued a pre consultation paper inter alia on the issue as to whether the rate of 2009 should be made applicable.

19. According to the Petitioners, the Respondent had also been paying IUC charges under different head in terms of the 2009 Regulations.

The Respondent, however, issued a circular letter on or about 21.7.2011. It reads as under :-

" Dated: 21st July 2011

To
The Chief General Manager,
West Bengal Telecom Circle

Subject: Recovery of distance based carriage charges in respect of intra-circle cellular calls handed over by private operators at LDCC TAX(s) of BSNL- from 01.04.2009 onwards regarding.

Kindly refer to your D.O. No. WBTC/ CAO/ Misc. Corr./108, wherein, you have intimated that West Bengal Telecom Circle is preferring bills with revised carriage charges from June'2010 onwards in respect of intra-circle cellular calls to basic services of BSNL, but many private operators are making payments after making deductions. The plea given by one of the operator, namely, M/s Bharti Airtel Ltd. is that it is as per orders passed by the Hon'ble Supreme Court.

(2)In this regard, kindly refer to this office letter of even number dated 04.06.2010, wherein, ITPC Pune circle was requested to:

(a) generate the distance based carriage charges on the cellular operators in respect of handover of intra-circle cellular calls by them at the LDCC TAX(s) of BSNL for the period 12.11.05 onwards as per the judgment dated 21.05.2010 of the Hon'ble TDSAT.

(b) generate the bills at the rate of distance based carriage, charges for the period June'2010 onwards.

All the Chief General Managers were requested to recover the bills so generated by ITPC Pune from the private operators alongwith applicable interest.

(3) After filing, of the appeals by the COAI and AUSPI before the Hon'ble Supreme Court against the judgment dated 21.05.10 of the Ld. TDSAT, instructions were issued vide this office letter number dated 04.08.2010 to all the field units to continue to raise the supplementary demands but not to disconnect the POIs or encash the bank guarantees under any circumstances in case of non-payment of supplementary bills by the cellular operators. Further, for the future periods also, bills were continued to be raised and recovered at the rate of distance based carriages for handover of cellular traffic for each and every month. However, in case of non- payment for this period also no coercive action was to be taken.

(4) Thereafter, when the matter was listed before the Hon'ble Supreme Court on 0.08.10, BSNL as well as member operators of COAI and AUSPI were directed to submit the CDRs to TRAI for the period 12.11.05 to 31.03.09. TRAI was directed to calculate the amount of carriage charges payable by cellular operators to BSNL based on the CDRs submitted by the parties. The CDRs have already been submitted by BSNL with TRAI for the entire period for North and West zone. Further, CDRs for East and South zone have also been submitted by BSNL except for the period 12.11.05 to 31.05.07. In the meantime, BSNL was restricted from taking any coercive action.

(5) The Hon`ble TDSAT vide judgment dated 29.09.2010 in the Appeals filed by BSNL and private cellular operators challenging the regulations of TRAI implemented w.e.f. 01.04.2009 has clearly observed that there can not be any doubt or dispute that carriage charges for intra-circle cellular traffic should be in consonance with the ceiling prescribed for carriage charges at Rs. 0.65 per minute.

(6) Accordingly, you are requested to:

(a) Take all necessary actions in accordance with the provisions of Interconnect Agreement for recovery of distance based carriage charges (alongwith applicable interest starting from respective month till date) as per annexure-C to this office letter of even number dated 04.06.2010 (again being enclosed as Annexure-A to this letter) from such private operators who have yet not

paid the same for the period 01.04.09 to till date.

(b) Further, in future also the bills should be raised and recovered as per rates prescribed in Annexure-A to this letter (Annexure C) of letter dated 04.06.2010).

(c) However, for the period 12,11.05 to 31.03.09, no coercive action is to be taken by you for recovery of distance based carriage charges as per orders dated 30.08.2010 of the Hon'ble Supreme Court.

Sd/-

(Applicable from 1.4.2009)

C 1 POI of CMTS at Level II TAX					
Sri No.	Types of Calls	IUC recovered by BSNL from CMTS (Rs per minute)	IUC recovered as per judgment of Honable TDSAT (Rs per minute)	Difference to be recovered (Rs per minute)	Trunk Group
Calls from CMTS network handed over to BSNL for termination in same LDCA					
	CMTS to Basic Intra-Circle upto 50	0.35	0.40	0.05	C
	CMTS to Basic Infra-Circle STD > 50	0.35	0.85	0.50	C

E POI of CMTS at Level I TAX					
Sri No.	Types of Calls	IUC recovered by BSNL from B (Rs per minute)	IUC recovered as per judgment of Honable TDSAT (Rs per minute)	Difference to be recovered (Rs per minute)	Trunk Group
Calls, from CMTS network handed over to BSNL for termination in same LDCA					
	CMTS to Basic Infra-Circle upto 50 km	0.35	0.40	0.05	EA
	CMTS	0.35	0.85	0.50	

The Respondent despite the fact that the Petitioner had been paying at the rate stipulated under the 2009 Regulation served

disconnection notices. It is stated that in some cases some POIs had also been disconnected.

Submissions

20. Mr. Navin Chawla, learned counsel and Mr. Ramji Srinivasan, learned senior counsel appearing for the Petitioner submitted :-

(i) This Tribunal in its judgment and order dated 29.9.2010 having merely laid down the principles for levying different types of interconnection charges and having not set aside the Regulations opining that a new IUC Regulation should come into effect from 1.1.2011, the Respondent could not issue the impugned circular letters.

(ii) Had that been not the intention of this Tribunal, it would have issued necessary directions for the interregnum i.e. for a period of three months which could not have been a

period of free for all as far as payment of IUC is concerned.

(iii) It being not in controversy that all the operators including BSNL in the matter of payment of all other charges including FTC had been following 2009 Regulations, it is inconceivable that in respect of transit carriage charges, a contention would be raised by it that in stead and in place of 20 paise or 15 paise per minute per call, charges @ 65 paise would be leviable, particularly, in view of the fact that all cellular operators have also been receiving IUC charges in terms of 2009 Regulations only.

(iv) In view of the prevailing regulatory regime, the Respondent has no jurisdiction to raise an unilateral contention that the Tax Carriage Charges would be higher than 15 paise.

(v) The interconnection charges either may be a matter of contract or a statute and having

regard to the fact that the statute provides for a ceiling rate, the Respondent cannot claim any higher amount without entering into a contract in that behalf.

(vi) Assuming for the sake of argument without admitting the same, even if it be held that the 2009 IUC Regulations have been set aside and by reason thereof the 2006 Regulations revived providing for a ceiling of 65 paise, negotiation between the parties was imperative; having regard to the fact :

(a) the matter is pending before the Supreme Court of India and thus would be governed by its order dated 30.8.2010

(b) without mutual negotiations the Respondent cannot fix a price and issue a disconnection notice.

(vii) A judgment of Tribunal should not be read as a statute.

(viii) This Tribunal even otherwise has been conscious of remand 'without setting aside an order' and an order of remand up on 'setting aside' of an order; as would appear from the decisions passed in Neo Sports Broadcast Pvt. Ltd. vs. TRAI in Appeal No.1 (C)/2007 and Videsh Sanchar Nigam Ltd and Anr Vs. TRAI being Appeal No.5/2005, disposed of on 28.4.2005.

(ix) From a perusal of the judgment of this Tribunal, it would be evident that in respect of all components of IUC a direction having been issued directing the TRAI to consider the matter afresh, it is evident that the IUC charges of 2009 had not been set aside in respect of carriage charges.

(x) The power of remand by a superior court as contained in Order 41 Rule 23, Order 41 Rule 23A and Order 41 Rule 25 of the Code has a limited application; except in very exceptional cases, its inherent power would also not be applicable.

(xi) The Respondent in issuing the impugned circular letters dated 21.7.2011 and 30.7.2011 could not have relied upon stray observations made by this Tribunal in as much as what is binding on the parties would only be the ratio of the decision.

21. Mr. Saket Singh, learned counsel appearing on behalf of the Respondent No.2 TRAI, submitted that as the question involved herein has been pending before the Supreme Court of India and the draft Regulations prepared by the TRAI having been handed over to it, no submission on merit of the matter is required to be made on its behalf.

Learned counsel, however, contended that all operators have been paying the requisite charges in terms of 2009 Regulations.

22. Mr. K.P.S. Kohli and Ms. Maneesha Dhir, learned counsel appearing on behalf of the Respondent No.1 herein, however, would urge :-

- (i) This Tribunal having held that the Regulator did not consider the correct principles of computation of IUC charges must be held to have remanded the matter only upon setting aside the 2009 Regulations as otherwise the same would give rise to an anomalous situation.
- (ii) In this case, in view of the fact that 2009 IUC Regulations was preceded by 2006 Regulations, the later would automatically come into force, the former having been set aside and in that view of the matter it would not be correct to contend that any vacuum

had been created by reason of the judgment of this Tribunal dated 21.5.2010.

- (iii) The order of remand of a matter in absence of any specific direction would ordinarily mean that the order impugned before this Tribunal has been set aside, particularly, when it asked the TRAI to consider the matter afresh.
- (iv) Keeping in view the observations made by this Tribunal, the Respondent no.1 cannot be said to have committed any illegality in issuing the impugned circulars.
- (v) As some of the operators have implemented the judgment by paying @ 65 paise per minute, it is evident that even according to them the 2009 IUC Regulations have been set aside.
- (vi) The Respondent no.1 had to implement the 2009 Regulations as in absence of any order

of stay granted by this Tribunal, it had no other option in that behalf.

Reading of a judgment

23. Before, however, we refer to and consider the rival submissions made by the learned counsel for the parties with regard to construction of the judgment dated 29.09.2010, we may notice certain basic principles so far as reading of a judgment is concerned.

A judgment is not to be read as a statute. It should be read in its entirety. A stray observation made in the judgment divorced from the context may not be read as a ratio decidendi.

24. In Ramesh Chand Daga v. Rameshwari Bai, reported in (2005) 4 SCC 772, the law was laid down in the following terms :-

“19. A judgment, as is well known, is not to be read as a statute. A judgment, it is trite, must be construed upon reading the same as a whole. For the said purpose the attendant circumstances may also be taken into consideration. (Islamic Academy of Education v. State of Karnataka, Zee Telefilms Ltd. v. Union of India and P.S. Sathappan v. Andhra Bank Ltd.)”

25. Recently, in *Uttar Pradesh State Road Transport Corporation vs . Assistant Commissioner of Police (Traffic), Delhi*, (2009) 3 SCC 634, the law was stated in the following terms :-

“32. A decision is an authority, it is trite, for which it decides and not what can logically be deduced therefrom. This wholesome principle is equally applicable in the matter of construction of a judgment. A judgment is not to be construed as a statute. It must be construed upon reading the same as a whole. For the said purpose, the attending circumstances may also be taken into consideration.”

26. Yet again, in *Goan Real Estate and Construction Limited vs. Union of India*, (2010) 5 SCC 388, Panchal, J speaking for a Division Bench of the Apex Court opined :-

31. It is well settled that an order of a court must be construed having regard to the text and context in which the same was passed. For the said purpose, the judgment of this Court is required to be read in its entirety. A judgment, it is well settled, cannot be read as a statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved therein and the context wherein the observations were made. Observation made in a judgment, it is trite, should not be read in isolation and out of context. On perusal of para 10 of the judgment, it is abundantly clear that even under the 1991 Notification which is the main notification, it was stipulated that all development and activities within CRZ will be valid and will not violate the provisions of

the 1991 Notification till the management plans are approved. Thus, the intention of legislature while issuing the Notification of 1991 was to protect the past actions/transactions which came into existence before the approval of the 1991 Notification.”

27. In *Mehboob Dawood Shaikh vs. State of Maharashtra* reported in AIR (2004) SC 2890, the Apex Court has stated the law, thus: -

“There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if they were, said Bose J. about half century back in *Willie (William) Slaney V. The State of Madhya Pradesh*, (1955 (2) SCR 1140 at page 1169). A decision is available as a precedent only if decides a question of law. A judgment should be understood in the light of facts of that case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be complete law decided by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court.”

(See also *Shankara Cooperative Housing Society Limited vs. M. Prabhakar and Ors* reported in 2011 (5) SCC 607 para 82).

Brief Backdrop of the Judgment

28. Having noticed the principles of construction of judgment as laid down by the Supreme Court of India, we may notice the judgment of this Tribunal.

29. Appeal No.1 of 2006 was preferred by the Respondent No. 1 herein questioning Regulation 4 of 2003; whereby the charges were fixed on a distance based manner. By reason of paragraph 84 of the Explanatory Memorandum 84, the charges were sought to be limited to 20 paise per minute.

30. By reason of a subsequent circular letter dated 17.5.2006 determining the carriage charges to 20 paise gave rise to filing of Appeal No.8 of 2006. By reason of the judgment and order of this Tribunal dated 21.5.2010, the orders impugned therein were set aside.

31. This Tribunal noticed its earlier decision dated 21.4.2004 in Appeal No.2 of 2004 (BSNL vs. TRAI) and the order dated 27.4.2005 passed in Appeal No.11/2002 BSNL vs. TRAI to hold that the orders of the TRAI impugned therein could not be sustained and they were set aside, accordingly.

Interpretation of the judgement

32. The Respondent herein, preferred two sets of appeals.

By reason of a judgment and order dated 21.5.2010, the 2006 Amendment so far as the same related to carriage charges is concerned was set aside on the premise that by reason of an Explanatory Memorandum, no rate can be fixed.

The 2009 Regulations were notified by the TRAI on 9.3.2009. BSNL preferred an appeal thereagainst which was marked as Appeal No.2 of 2009.

33. Before this Tribunal, the Respondent prayed for the following reliefs in Appeal No.2 of 2009: -

“(i) Fixation of termination charge for fixed wireline services on actual cost basis taking into account latest data furnished by BSNL.

(ii) Permit mutual negotiation for fixing of termination charges on incoming ILD traffic and in case mutual negotiation fails then fix the same between rupees 3 to 4 per minute.

(iii) Permit BSNL to recover carriage charges on cost basis i.e. Rs. 1.43 per minute for carriage of traffic in rural, remote, hilly and inaccessible areas.

(iv) No reduction in carriage charge of cellular calls from LDCC to SDCC from Rs. 0.20 to Rs. 0.15 per minute.

(v) No reduction in carriage charge from Rs. 0.20 to Rs. 0.15 per minute.

(vi) Permit BSNL to pay no termination charge for calls originating from its fixed line.

(vii) Set aside and quash the regulations to that extent."

No reduction in carriage charge was sought for the calls originated from LDCC to SDCC, i.e., from Rs.0.20 to Rs.0.15 paise per minute.

34. It furthermore appears that in the case of Bharti Airtel being (Appeal No.5/2009), Idea Cellular Ltd. (Appeal No.6/2009) as also Etisalat Telecom Pvt. Ltd. (Appeal No.8/2009), the Appellants, while asking for determination of transit charge, carriage charge from Level II Tax from SDCC and intra SDCA and tax transit charge on the basis of cost, the TRAI was asked to fix transit charge at not more than 0.02 paise per minute, although, in Appeal Nos.5-6/2009, a submission was made to the effect that actual cost would be about 4 paise per minute.

In regard to the carriage charges, the prayer made by it was that the charges for Cellular calls from SDCC to LDCC should not have been directed to be reduced to 0.15 paise from 0.20 paise.

35. The said prayer was made inter alia on the premise that the cost basis or work done principle should have been applied by the TRAI, while fixing the said charges.

36. Bharti Airtel, Idea Cellular had also prayed for determination of the IUC charges, carriage charges on `cost basis principle`.

37. This Tribunal considered different components of IUC being Fixed Termination Charges (FTC), Mobile Termination Charges (MTC) etc. inter alia holding that the TRAI could not have given a complete go by to the `work done` principle.

It was stated that a case based on sound reasoning and rationality was required to be made out for arriving at a correct methodology as the principles applicable in respect thereof plays an important role and, thus, the TRAI should have spelt out the same.

38. It was opined that the TRAI had accepted the principle that the carriage charges payable by one operator to the other shall be actual rather than forbearance, the same should have been followed in 2009 Regulations also.

As far as charges involving intra circle cellular traffic, was concerned, I have noticed the observations made therein. BSNL also in its letter dated 21.7.2011 described the same as observations. To me, it appears that the same merely formed part of the submissions on the part of BSNL. Having regard to the statement made subsequent to Para 1, it cannot be termed as a finding. I have also noticed heretobefore the concluding portion of the said judgment, which does not support the said purported observations.

39. It was, therefore, observed that "Keeping in view the 'work done' principle, 'it was necessary for the TRAI to consider as to whether a separate clause of carriage charges of Cellular Traffic and other traffic should be fixed.

Paragraph 5 of the said judgment is as under :-

"5 The carriage charges, should also be fixed, on the basis of 'work-done' principle, which according to TRAI itself should be applied."

In paragraph 6, this Tribunal referred from its earlier judgment passed in Petition No.95 of 2005 (Tata Teleservices vs. BSNL) dated 14.11.2006 to notice that even applying 'work done' principle the rate may be nil if no work or services is done/ rendered.

It is on the aforementioned context, we may notice paragraphs 7 and 8 of the said judgment :-

7) We, therefore, do not see sufficient ground and without assigning any cogent reasons as to why the same was reduced to 15 Paise.

8) We, therefore, are of the opinion that the matter relating to carriage charges should receive a fresh considerations at the hands of the TRAI in the light of the observations made heretobefore as also in our aforementioned order dated 21.05.2010 in the aforementioned Appeal No. 1 of 2006 and 8 of 2006."

40. Construction of the judgment of this Tribunal must be considered having regard to the backdrop of various events, namely, the order of this Tribunal in Appeal No.1/2006 and 8/2006 vis-à-vis the order of the Supreme Court of India dated 30.8.2010 passed in the Appeal preferred thereagainst by COAI marked as CA No.5232/2010 wherein it was directed :-

"Permission to file-additional documents is granted. Issue notice.

Learned counsel, who appear on caveat, accept notice on behalf of their clients.

Pending- final hearing of these Civil Appeals, following directions are being issued at the interim stage:

(a) Within two weeks from today, each of the Members of the Cellular Operators Association of India will submit Call Data Records ('CDR', for short) to the TRAI. The same direction is also being given to the Members of AUSPI; and

(b) The CDR will also be submitted to TRAI by BSNL within two weeks from today.

On receipt of the CDR, the TRAI will calculate the amount of liability of each of the Operators, including BSNL (if any), during the period 12th November, 2005 to 31st March, 2009, towards the carriage charges. This calculation will be done on the basis of the impugned order.

On the next occasion, this Court will fix the amount, which each of the Operators is required to deposit in this Court, pending the hearing and final disposal of the Civil Appeals. It is made clear that, on the next date, each of the Operators will be ready with an affidavit giving an Undertaking to this Court that, in the event of the appeals filed by the Associations being disallowed by this Court at the final hearing of the matter, each of their Members undertakes to pay the amount due with interest that may be fixed by this Court at the final hearing of these Civil Appeals.

To the same effect, the affidavit will be filed by the BSNL. Further the affidavit shall contain an averment that the Bank Guarantee submitted by each of the Operators will cover the carriage charges and it would not

be open to any of the Operators at the later stage to contend that the Bank Guarantee given by them do not cover the carriage charges.”

41. What was, thus, pending before this Tribunal thereafter was carriage charges from 1.4.2009.

Various circumstances attending thereto are also required to be considered.

42. From a perusal of the judgment dated 29.9.2010 it would be evident that the intention of the court was clear that the impugned Regulation had not been set aside in terms whereof it must be inferred that this Tribunal directed that the charges should be not only `cost based' but also on the basis of `work done' principle and in that view of the matter the TRAI was to consider as to whether the charges would be 20 paise or 15 paise; BSNL having contended that the carriage charges at 65 paise per minute should be fixed by way of ceiling. What was being considered was as to whether the principle of carriage charges should be determined on a work done principle.

43. The judgment of this Tribunal read as a whole leaves no manner of doubt that the different components of IUC Regulations

framed by the TRAI were to be considered afresh. A stray observation, even if the same is considered to be one (although the same appears to be part of submission) cannot be held to be decisive particularly when the said observations runs counter to the main finding.

44. The Telecom Regulatory Authority of India has in exercise its power to issue direction in terms of Section 11 (1) (b) of the TRAI Act determined the rates applicable to the Interconnect charges.

This Tribunal vide its Judgment /Order dated 22.09.2010 merely asked the Regulator to consider the matter afresh in the light of the findings and/or observations made therein. It was expected that the Regulator as a subordinate authority would comply with the said directions.

Had a new regulation been framed in the light of the directions issued and observations made by this Tribunal w.e.f January, 2011, the same could have been made applicable for the years in questions.

45. The Regulator however in stead and in place of complying with this Tribunal's order considered it fit to question the correctness thereof by preferring an appeal before the Supreme Court of India. It was entitled to do so.

The order of this Tribunal, unless interfered with the Supreme Court of India, will have to be construed of its own.

46. In terms of an order of the Tribunal even keeping in view the directions issued and observations made, the tariff in question may be given a retrospective effect and retroactive operation. What was needed was to have a fresh look to the entire matter. Moreover, for the time being the Regulator till fixation of the tariff could have directed, in its discretion that the 2009 Regulation would continue in the interregnum.

47. There is another aspect of the matter which cannot also be lost sight of.

In law, only because the 2009 Regulations have been set aside (assuming it to be so) the same would not mean that automatically 2006 Regulations would automatically revive.

In *B. N. Tewari v. Union of India*, (1965) 2 SCR 421, the question was as to whether the carry forward rule of 1952 still exists. It is true that in *Devadasan* case, the final order of this Court was in these terms:

“In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid.”

That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive.

Similarly, in the case of *State of U.P. v. Hirendra Pal Singh*, (2011) 5 SCC 305, it has held as under :-

27. Thus, the High Court erred in issuing directions to the State authorities to proceed, as an interim measure, under a non-existing law. Such an order seems to have been passed only to fill up the vacuum. Generally quashing of a subsequent notification would not affect in revival of an earlier notification in whose place the subsequent notification had been issued, however, the legal effect of an earlier law when the

later law enacted in its place is declared invalid, does not depend merely upon the use of the words like substitution or suppression. It depends upon the totality of circumstances and the context in which they are used. [Vide B.N. Tewari v. Union of India; Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India; West U.P. Sugar Mills Assn. v. State of U.P.; Zile Singh v. State of Haryana and State of Kerala v. Peoples Union for Civil Liberties.] (See also Ameer-un-Nissa Begum v. Mahboob Begum and India Tobacco Co. Ltd. v. CTO.)

In view of the well settled legal position, it would not be correct to contend that the Respondent became entitled to levy charges relying on or on the basis of 2006 Regulations.

In any event, as noticed heretobefore even, therefore, certain conditions were to be complied with in as much as the amount of 65 paise per minute per call was subject to a ceiling and not a fixed sum, it required negotiations between the parties.

Order of Remand

48. At the outset, it should be placed on record that Ms.Manisha Dhir contended that this Tribunal in its judgment dated 29.9.2010 must be held to have set aside the IUC regulations relating to carriage charges, although, might not have set aside the other parts of the Regulations.

49. I am, however, of the opinion that the said contention vis-à-vis those raised by learned counsel for the Petitioners must be judged keeping in view not only the factual scenario prevailing at the relevant point of time but also the contentions raised by the parties therein.

50. It must, moreover be noticed that setting aside of the orders impugned in Appeal No.1 of 2006 and Appeal No.8 of 2006 are not relevant keeping in view the fact that by reason thereof the main provisions of 2003 Regulations could be put into effect.

51. Questions raised in this petition is said to be covered by the order of this Tribunal dated 13.5.2011 passed in MA No.153/2011 entitled M/s Vodafone ESSAR Gujarat Ltd vs. TRAI, wherein this Tribunal analysed the provisions of Order 41 Rule 23, Order 41 Rule 23A and Order 41 Rule 25 of the Code, wherefrom it would appear that the order of remand could be passed in terms of Order 41 Rule 23, and Order 41 Rule 23A of the Code only upon setting aside the judgment and order of the inferior Tribunal.

52. The effect of the said order setting aside the orders impugned in the said appeals vis-à-vis the findings of the Tribunal in the appeals preferred by different entities including BSNL questioning the 2009 Regulations must be considered.

53. Reliance in this behalf has been placed on P. Purushottam Reddy and Anr. vs. Pratap Steels Ltd. reported in (2002) 2 SCC 686, upon considering the relevant provisions of the code, it was held as under :-

“It is only in exceptional cases where the court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.”

In the case of Municipal Corporation, Hyderabad vs. Sunder Singh, (2008) 8 SCC 485, it was held :-

“**32.** A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary

evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41 Rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code."

54. In view of the fact that the TRAI was asked by an Appellate Court to consider the IUC charges afresh may not always mean that the same has been set aside in its entirety. Concedingly it has not been. In any view of the matter, it is possible, that this Tribunal committed an error in not making its order clear and explicit as to the effect of the order of remand.

55. I am, however, of the opinion that the principles contained in Order 41 Rule 23 A and Order 41 Rule 25 of the Code of Civil Procedure, 1908 would have no application in a case of this nature.

Conclusions

56. So far as 2009 Regulations, are concerned, the subject matter thereof including carriage charges had been given effect to in as much as, admittedly no order of stay was passed by this Tribunal.

57. It is one thing to say that the entire IUC Regulation had been given effect to and remained operative throughout the litigation relying on or on the basis whereof, the operators had carried out their business plan without in any way be able to recover the excess amount, if directed to be paid from its customers, but it is another thing to say that an order passed by this Tribunal irrespective of its consequences should be given effect to, at this stage, as the matter is pending before the Supreme Court of India

58. This Tribunal has heretofore noticed the broad parameters of the said judgment and the respective contentions of the parties.

59. A typographical error has been crept in the body of the judgment in so far as carriage charges have interchangeably been used as transit charges, they being different in character.

60. The parties by and large (except in the matter of FTC and MTC) had proceeded on the basis that cost based principle should be adopted. If that be so, what was the quantum of cost was required to be determined. The conflicting claims of the parties

have also been noticed that such costs would be varying from 2 paise or 4 paise to 65 paise.

61. The TRAI, however, in its communication dated 20.1.2009, stated as under :-

"(a) BSNL propose to implement a uniform Carriage Charge of 20 paise for Transit of calls originating and terminating within SDCA. As per IUC Regulation Clause (b) of Schedule 2 carriage charge within SDCA should be lower than 20 paise per minute and this may be decided through mutual negotiations. TRAI had calculated 20 paise/minute as the carriage cost from SDCA Tandem to LDCA TAX in which distance component of 40-50 KM was also involved. In local intra-SDCA calls, the transmission link of 40-50. KM is not involved and it involves only the cost of Tandem switch, BSNL may work out a reasonable transit charge through mutual arrangements with other Access Providers at rate lower than 20 paise per minute referred in the TRAI Regulation covering exceptional situations of no direct connectivity.

(c) In Schedule C of the BSNL's letter, BSNL has specified distance based carriage charges for call terminating in their Fixed Line Network handed over at Level II TAX. Further for calls handed over at Tandem in a Metro BSNL is charging Rs.0.20 additionally as TAX charges. The IUC Regulation in Table II has prescribed Nil carriage charge in the case of Cellular Metro Circles where the call is handed over at Tandem. Similarly in the case of Intra-Circle call from Cellular Network handed over to BSNL at the TAX in which the calls it to be terminated a carriage charge of only 0.20 paise per minute would be applicable irrespective of the distance from that TAX to the terminating Tandem. In case call is handed over at any

other TAX the relevant distance based carriage charge would be applicable,"

BSNL, however, refuted the same contending that its contention before the TRAI was that 20 paise carriage charges should be for 50 kms. only.

This Tribunal may notice that response of the TRAI to the BSNL's aforementioned letter, if any, had not been brought on record.

It is also stated that in respect of carriage charges, BSNL had also been asking for mutually negotiated transit facility.

62. This Tribunal had also taken note of the fact that the charges determined by the TRAI or this Tribunal will have far reaching consequences. The TRAI had also suggested, although, the same had not been found favour with us that the BSNL had not furnished data for the year 2007-2008.

63. Counsel for the parties have drawn attention of this Tribunal to the operative portion of the order in respect of the FTC, MTC etc. as also the quantum issue.

64. Prima facie it is difficult for us to accept that although conclusions in respect of all the components of IUC are the same, but in respect of one of the components, a different order has been passed.

65. For the reasons abovementioned, the impugned demand of the Respondents cannot be sustained. They are set aside accordingly. These petitions are allowed. This order shall, however, it goes without saying, be subject to any other or further order which may be passed by the Supreme Court of India and/or subject to any Regulation that may be made by the Regulator.

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

(S.B. Sinha)
Chairperson

January 16, 2012
ns'/HKC