**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated :17.7.2012**

**Petition No.417/2011**

**SIESTAMA SHYAM TELESERVICES LTD** … Petitioner

Versus

**BSNL** … Respondent

**BEFORE:**

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

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

For Petitioner : Mr.Ramji Srinivasan, Sr.Advocate
Mr.Mansoor Ali Shoket, Advocate
Ms.Vibha Dhawan, Advocate.

For Respondent : Ms.Maneesha Dhir, Advocate
Mr.K.P.S. Kohli, Advocate

Mr.Abhishek Kumar, Advocate
Mr.T.S. Nanda, Advocate

**J U D G M E N T**

**S.B. Sinha**

**Introduction**

Whether the Respondent as a `State' within the meaning of Article 12 of the Constitution of India is entitled to enforce a claim which is barred under the law of limitation by taking recourse to disconnection of the POIs of the Petitioner and/or encashment of bank guarantee is the question involved in this petition.

**Factual background**

2 The Petitioner is a licensee.

3. The Respondent is a company registered and incorporated under the Indian Companies Act, 1954. It came into being in the year 2000.

It stepped into the shoes of Department of Telecommunication (DoT), which had been operating on a pan India basis to provide telephone services to its customers, as provided for under Section 4 of the Indian Telegraph Act, 1885.

4 The Petitioner and the DoT had entered into an interconnection agreement on or about 4.3.1998.

5. We may notice the relevant provisions thereof :-

- **Clause 2.5 CALLING LINE PRESENTATION**

2.5.1 Licensee's network shall be capable of transmitting and receiving calling line identification which shall include Access code, Area code and Subscriber number.

- **7.1 BILL INFORMATION**

7.1.1 Each party shall provide to the other party information relating to detailed bill trunk group bulk billing as may be reasonably required for ascertaining the charges payable by each party under this agreement on monthly basis.

7.1.2 The DoT or the Licensee shall have the right in case of dispute, having given the other not less than ten clear and working days advance written notice to such effect, to inspect the books and records of the other relating to a period not exceeding two years prior to the date of inspection, for the purpose of verifying the Billing Information provided by the other in respect of such period.

7.1.3 Each party shall keep all books and records relating to Billing Information provided by it to the other, in respect of access charges (clause 6.4) and charges for special services (clause 6.6), for a period of two years from the end of the Billing Period. In respect of which such Billing Information was delivered to the other. If a request has been made as per provisions in 7.1.2 such records will have to be preserved till final settlement of the case.

- **7.2 ISSUE OF BILLS**

7.2.1 Bills for access charges and charges for special services including trunk calls will be issued on monthly basis by the designated unit of DoT to the licensee and such bills shall be payable within 15 days from the date of issue. Similar bills may also be issued by the Licensee for the access charges, if any, due to it.

- **7.3 TERMS OF PAYMENT**

7.3.1 DOT and the Licensee agree that :

(i) The payment of bills will be made by the Licensee within the time specified in Clause 7.2 above.

(iv) If the bill issuing authority subsequently finds that some charges have been omitted from the bills issued, he will include the omitted charges in the subsequent bills at any time , but within 6 months from the date of issue of the relevant bill except in cases where additional billing becomes necessary due to the tariffs/rates changes notified subsequently with retrospective effect by the appropriate authority

- 7.5 In the event of delayed payment by the LICENSEE, interest will be charged on the due amount at the following rates:

| | Period of Delay | Interest Rate |
|---|---|---|
| **A.** | **For the first two occasions of delay:** | |
| | **(i) Delay of 15 days beyond the due date** | **18%** |
| | **(ii) Delay beyond 15 days but up** | **21%** |

| | | |
|---|---|---|
| | **to the next 15 days** | |
| **B.** | **For the third & subsequent occasions of delay payment:** | |
| | **(i) Delay of 15 days beyond the due date** | **21%*** |
| | **(ii) Delay beyond 15 days but up to the next 15 days** | **24%*** |

*Note: This stipulated interest rate or the prevailing prime lending rate of State Bank of India plus 5% (Five percent) per annum (compounded monthly), whichever is higher, shall be applicable.

**Explanation**

The interest referred above will also be applicable in case the bill is disputed but subsequently it is found to be in order by the appropriate authority.

6 An amendment to the license by way of Addenda I to interconnect agreement was signed between the parties hereto on or about 29.1.2005.

7 First schedule was appended thereto by way of Addenda II on or about 18.4.2006, clauses 7 and 10 whereof read as under :-

**Schedule –I Interconnection Usage Charge (IUC)**

7. The BSNL field units shall try to get these CDR's , for calls handed over to private operators , post process them wherever feasible for re-conciliation of the bill raised by the private operators. Already, some BSNL field units are having capabilities feasible at present, these CDRs shall be arranged to be read subsequently

and bills raised by private operators reconciled by BSNL. For this purpose , the BSNL field units shall preserve the Call Data Records (CDR) till the process of reconciliation is over or at least for a further period of one year whichever is later. The access provider will provide necessary assistance to BSNL field units for enabling reading of binary CDR files submitted by them or by providing text files of these CDR's in full or desired random sampling basis. Wherever OBAS has been implemented by BSNL the present practice of CDR based billing for calls handed over by BSNL to other operators shall continue.

10…..In case of wrongly routed calls IUC shall be charged as below :

(b) Wherever it is technically not feasible to activate CLI based barring , the calls received by BSNL without CLI or modified/tampered CLI from concerned private operator, shall be charged the IUC applicable for the highest slab (i.e. as for ISD Calls including ADC applicable for ISD calls) for all the calls recorded on this trunk group from the date of provisioning of that POI or for the preceding two months, whichever is less.

8 The Respondent herein issued a circular letter purported to be for implementation of Telecommunication Interconnection Usage Charges (Fourth Amendment) Regulations, 2005 (Regulation 1 of 2005); Clause 4 whereof reads as under :-

**4. TRAFFIC NOT ROUTED THROUGH BSNL NETWORKS**

3.0 For all inter-circle STD calls originated from cellular mobile and WLL (M) terminating in any network i.e. cellular /WLL (M) /fixed, the access deficit charge amount is to be collected by the NLDO from the originating service provider and the same shall be paid to BSNL by the NLDO concerned.

3.0 For all ILD outgoing and incoming calls from/to cellular mobile and WLL (M) as well as incoming ILD calls to fixed networks. The access deficit charge amount is to be collected by ILDO and the same shall be paid to BSNL, by the ILDO concerned. In case any ILDO picks up or hands over any outgoing or incoming ISD calls to any access provider than the ADC shall be payable by concerned NLDO to BSNL directly.

3.0 For intra circle calls from WLL(M) / cellular networks to fixed networks of any access provider including its own fixed network, ADC is payable to BSNL by concerned WLL(M) / Cellular Network Operator.

3.0 The access provider shall have to intimate to BSNL the volumes of incoming and outgoing NLD and ILD traffic handed over / accepted by them of their WLL(M) / Cellular Service and incoming ILD calls to their fixed networks. Information of the total volumes of the outgoing intra Circle STD traffic handed over to private NLDOs or outgoing and incoming ILD traffic handed over or accepted from ILDOs & NLDOs in a circle shall be compiled and bills for recovery of ADC on this traffic shall be issued by BSNL to the concerned NLDO / ILDO. Bills for ADC to NLDOs shall be raised by BSNL Telecom Circles and to ILDOs be concerned Maintenance Regions of BSNL.

3.0 The access providers shall also have to intimate to BSNL the volumes of outgoing intra circle traffic from their WLL (M) / Cellular Network to any fixed (including its own) networks and incoming intra circle traffics to their fixed networks from WLL (M) / Cellular (including its own) networks. Information of the total volume of

incoming intra circle traffic received by various fixed networks from different WLL (M) / cellular networks in a circle shall be compiled and bills for recovery of ADC of this traffic shall be issued by BSNL to the concerned WLL (M) / Cellular Network operators.

3.0 Similarly access providers have to intimate to BSNL minutes of intra circle traffic from their WLL (M) / cellular network operators who have handed over this traffic to terminating fixed networks."

9 A circular was issued on or about 13.6.2005 in regard to handing over of non-CLI, invalid/ incomplete CLI calls by private exchange providers, the relevant provisions whereof read as under :-

3. It has been decided for all access providers that in case for a billing cycle, the number of non CLI calls received at POI are less than 0.5% of the total number of calls received at that POI, then in such cases the access provider shall be charged for double the number of such non CLI calls handed over at the highest slab of IUC applicable i.e. incoming ISD calls as detailed below for each of the three IUC regimes.

| SNo | Carriage involved | IUC-I Regime (Rs.per Minute) | IUC-II Regime (Rs.per Minute) | IUC-III Regime (Rs.per Minute) |
|---|---|---|---|---|
| 1 | Terminating SDCA | 5.50 | 4.55 | 3.55 |
| 2 | 0-50 k.m. | 5.70 | 4.75 | 3.75 |
| 3 | 50-00k.m. | 5.95 | 5.70 | 4.20 |
| 4 | 200-500 k.m. | 6.23 | 5.45 | 4.45 |
| 5 | >500 k.m. | 6.60 | 5.65 | 4.65 |

10 In February, 2006 for the Churu local DIT POI and Tijara (N), Bhiwadi Local C-DoT POI, a letter was issued to the Petitioner stating that non-CLI calls of 3826 and 1055 calls have been generated in its system and, thus, the Petitioner is liable to pay a sum of Rs.17,48,600/- for Churu district and a sum of Rs.14,66,854/- for the district of Bhiwadi.

11 According to the Petitioner, which is not denied or disputed, the said purported non-CLI calls were in respect of two days i.e. 30th and 31st January, 2006, so far as Churu POI was concerned and for 24.1.2006, sofar as Bhiwadi was concerned.

12 The Petitioner on receipt of a consolidated bill for the entire Rajasthan circle informed the Respondent that the duration mentioned in the said bills were not in consonance with the CDRs maintained by the Petitioner and, thus, by reason thereof raised a dispute in relation thereto by its letter dated 24.2.2006, which reads as under :-

> " Dear sir,
> We have received your consolidated IUC bill for January 2006. On verification it is found that in case of some POIs as mentioned below there is much difference between the duration and amount mentioned in the bills and generated in our data

system. It therefore requested that CDR in these cases may kindly be supplied for reconciliation and settlement of the bill. Our CDR will follow

| | **BSNL** | **BSNL** | **STL** | **STL** | **Difference** | **Percentage** |
|---|---|---|---|---|---|---|
| **POI** | **Amount** | **Duration** | **Amount** | **Duration** | **In amt** | **Difference** |
| Bundi (T) | 95578.97 | 206317.85 | 61193.08 | 85683.04 | -34385.9 | -35.98 |
| Jhalawar (T) | 71481.57 | 129253.37 | 52773.34 | 73721.77 | -18708.2 | -26.17 |
| Bhilwara (T) | 375782.9 | 388293.82 | 296428.5 | 386399.5 | -79354.4 | -21.12 |
| Jodhpur (L) | 361093.4 | 1193742.02 | 319430 | 1056236 | -41663.3 | -11.54 |
| Jhunjhunu (L) | 102745.7 | 341410.25 | 100132.6 | 333111.3 | -2613.08 | -2.54 |
| Pali (L) | 66632.2 | 220826.28 | 60670.85 | 200962.7 | -5961.35 | -8.95 |
| Sikar (T) | 513801.3 | 625804.07 | 470687.9 | 625020.1 | -43113.4 | -8.39 |
| Udaipur (L) | 168476.4 | 556355.72 | 163682.6 | 540610.7 | -4793.75 | -2.85 |
| Bhiwadi | 1466854 | 646575.08 | 66449.46 | 219384.7 | -1400404 | -95.47 |
| Churu (L) | 1748600 | 773579.13 | 80968.29 | 269358.1 | -1667632 | -95.37 |
| Total | 4971046 | 5082157.59 | 1672417 | 3790488 | -3298629 | |

13 It was asked to submit its CDRs, pursuant whereto the Petitioner, in continuation of its letter dated 24.2.2006 submitted its CDRs to BSNL in respect of the POIs of Bhiwadi and Churu requesting in turn that the Respondent may supply its CDRs for reconciliation and settlement of the disputes.

14 The Petitioner migrated to the UASL regime w.e.f. 14.11.2003; whereafter by reason of Addenda II to the interconnect agreement Clause 6.4.6 was inserted therein on 18.4.2006. The said Addenda

was given a retrospective effect and retroactive operation w.e.f. 14.11.2003, stating :-

> "Each party, i.e. BSNL as well as the UASL, does hereby agree to the terms and conditions as described herein which shall append as Addenda to the original agreement and the combined agreement, hereinafter called "AGREEMENT", will become effective from 14th November 2003 except the applicable Interconnection Usage Charges (IUC) including ADC, Interconnection arrangements and associated billing arrangements as prescribed, by BSNL Corporate Office, during this intervening period till date of signing of this Addenda.

15 Clause 6.4.6 reads as under :-

> "**6.4.6 WRONGLY ROUTED CALLS**
>
> (a) Unauthorized calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC is higher than the IUC applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC, as applicable for such unauthorized calls, for all the calls recorded on this trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.
>
> (b) The CLI based barring facility shall be activated at the Pols wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Whenever it is technically not feasible to activate CLI based barring, periodic monitoring of the incoming trunk groups shall be done by BSNL to ensure this objective. The calls received by BSNL without CLI or modified/ tampered CLI from UASL shall be charged at the highest slab i.e. as for ISD Calls. In case such calls are received by BSNL on any trunk group, then all the calls recorded on this trunk group shall be charged at the

rates applicable for IUC of incoming ISD Calls from the date of provisioning of that POI or for the preceding two months, whichever is less.

c) When CDR based billing is introduced in BSNL's network some of the trunk group shall be merged. In such cases also , in case unauthorized or incoming international call, without CLI call, call with tampered CLI is handed over to BSNL at the merged trunk group, then BSNL shall charge the UASL the highest applicable IUC , as prescribed in clauses 6.4.6 (a) above for unauthorized calls and 6.4.6(b) above for incoming international calls, without CLI call, call with tampered CLI for all calls recorded on this merged trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.

d) In addition, BSNL shall also have the right for taking other legal actions including disconnection of POIs or temporary suspension of the inter connection arrangement under misuse."

16 The Petitioner received a communication from the Respondent on or about 30.8.2010 asking it to pay a sum of Rs.16,67,632/-, failing which action in terms of the interconnect agreement was threatened to be taken for the district of Churu.

17 A similar communication dated 6.9.2010 was issued in respect of the Bhiwadi POI.

18 The Petitioner while annexing its CDRs again contended that the penalty has wrongly been imposed on it and, thus, not payable as it had been found that it in fact had handed over calls to the Respondent with proper CLI.

19 It appears that some internal communications were made by the Respondent for the purposes of ascertaining as to why the bills dated 24.2.2006 and 27.2.2006 had not been realized from the Petitioner for Churu and Bhiwadi districts.

20 The IOBAS, the agency of the Respondent appointed for raising bills, was asked to submit report for Churu and Bhiwadi, by an e-mail which reads as under :-

"Fault No. : BSNL/09072010/DSP/609

Fault Title: Variation in IOBAS call duration and operator call duration (STL-BSO,Jan-2006,IN)

Raised On: 07/08/2010
POI-CRUCDO, Month Jan 2005, Dir.-In, Operator-STL-BSO, call duration by IOBAS is equal Fault to 26B411 minutes and call duration by operator is equal to 268411 minutes so you are

Description: requested to check this abnormal variation in call duration and provide worksheet if any.

Raised By: RAJASTHAN
Authorised By: RRKULKARNI
Fault Status: CLOSED

Remarks by Pl. check for difference and do the needful…. ADDED BY RRKULKARNI Through DCM Staff: BSNL-IOBAS Webporcol… Please

provide NCLI calls charged in Jan. 2006 bill of M/s STL BSO(IN direction) by Rajasthan: 06 Aug-10

For the Level: POI
For the Circle: RJ
For the SSA: CHURU
For the SDSA: CHURU
For the POI: CRUCDO

Attachments: 1. Crucdo-JAN_06_18072010_140237_By_mk0060094_1907 2010_104558_By_Pmo_xls

2.cruedo_jan_06_18072010_140344_By_mk0060094_090820 10_104201_By_PMO.xls

Remarks From : PLZ FIND THE NCLI CALL DETAIL……..-By mk0060094 At 08/08/2010 18:13:50

MBT:
Reference:
Response Req. Date: 08/13/2010
Remarks:"

21 The Respondent furthermore issued a letter to the Petitioner on or about 30.8.2010 stating that a technical investigation through NCL1 had been carried out and it was found that variation and call duration was due to non-CLI calls and the penalty imposed on the Petitioner has correctly been levied. Similar letter was issued in respect of Bhiwadi district on 9.10.2010.

22 The Petitioner issued a communication to the Respondent in response to the aforementioned letters contending that it had checked its data and found that all the calls pertaining to the said bill had been handed over to the BSNL network with proper CLI. The Petitioner

again sent the CDRs of 24.1.2006, 30.1.2006 and 31.1.2006 to the Respondent for verification. In response to the said communication of the Petitioner, the Respondent sought for payment of said sum of Rs.14,00,404/- immediately contending that the variation was due to the non-CLI calls.

23 Another communication was issued on 16.10.2010 demanding a sum of Rs.16,67,632/-.

24 The Petitioner, however, denied its liability inter alia contending that an unilateral decision was unacceptable and no amount was due and payable to the Respondent.

25 The Respondent, however, by several communications asked IOBAS to check the data supplied by the Petitioner for Bhiwadi and Churu, whereupon the following reports were submitted :-

"View Authorised Fault Details: BSNL/09072010/DSP/608: ::::::…….BSNL – IOBAS

Fault No : BSNL/09072010/DSP/608
Fault Title : Variation In IOBAS call duration and operator call duration(STL-BSO, Jan. 2006,IN)
Raised On : 07/08/2010
Equal Description : PCI-BHICDO, Month-Jan. 2006, Dir.-IN, Operator-STL-BSO Call duration by IOBAS is equal to 216457 minutes and call duration by Operator is equal to 219384 minutes so you are requested to check this abnormal variation in call duration and provide worksheet if any.
Raised By : RAJASTHAN

Authorized By : RRKULKARNI
Fault Status : CLOSED

Pl. check for difference & do the needful…..ADDED BY RRKULKARNI Though BSNL- IOBAS Webportal.. Please provide NCLI calls charged in Jan. 2006 bill of M/s STL-BSO (IN direction) BY RAJASTHAN:: 06-AUG-10 .. NCLI call provided by you are not NCLI calls so please check these calls and provide worksheet please. These valid calls have been charged as NCLI calls and a huge penalty has been imposed BY RAJASTHAN:: 24-AUG-10.. Operator stated that he has checked his data and found that there is not any NCLI calls so please check it again. CDRs submitted by operator are forwarded to you. BY RAJASTHAN:: 20-SEP-10

For the Level : POI
For the Circle : RJ
For the SSA : ALWAR
For the SDCA : TIJARA(N) (BHIWADI)
For the POI : BHICDO
Attachments :

1. BHICDO_Jan

2006_NCLI_10082010_163640_By_shilpap_10082010_173448_By_PMO.txt
2. NCLI Calls_ BHICDO_Jan

2006_STLBSO_IN_28082010_155840_By_shilpap_28082010_163634_By_PMO.xis
3. BHIWADI_20092010_161752_By_RAJASTHAN.xisx

Remarks From MBT : Details are rechecked and NCLI calls are found as per mentioned previously.- By shilipap At 24/09/2010 13:44:19

Reference :
Response Req Date : 09/27/2010
Remarks :

26 The said reports were supplied to the Petitioner and the demands made earlier were reiterated for Bhiwadi and Churu by the Respondent herein in terms of its letters dated 12.10.2010 and 16.10.2010.

27 On or about 29.10.2010, the Petitioner questioned the said unilateral decision on the Respondent, stating that the same was unacceptable. The said letter read thus:-

> "Dear sir,
>
> We refer to your above letter in the subject matter, your unilateral decision is not acceptable to us and vehemently object and deny any liability to pay any charges/penalty on the alleged NCLI calls from the Churu POI. In this regard we wish to submit as under:
>
> 1. That we have disputed the IUC bill for the month of January 2006 vide our letter No. 06-141 dated 24.02.2006 and again vide our letter no. 06-146 dated 27.02.2006 and submitted our complete CDR for the said period clearly indicating that there were no calls without CLI in the CDR. In the said letter we had also requested to provide us complete CDR for reconciliation at the end.
>
> 2. That after almost 4 yrs and 7 months, in September 2010 we received a letter dated 6.9.2010 along with the hardcopy of the CDR only for two days i.e. for 30.01.2006 & 31.01.2006. based on only two days CDR it was stated that bills were correct as per your investigation by NC Cell. It is worthwhile to mention that alleged NCLI pertains to entire month of January 2006 and not for any two days.
>
> 3. That we again submitted the complete CDR for January 2006 along with our disagreement to your investigation vide our letter dated 14.9.2009.

4. That too, much to our surprise, vide your letter dated 12.10.2010 we have been intimated that the bills are correct in view of the re-investigation by the NC Cell and we are asked to deposit the disputed amount under the threat of action under the interconnect agreement.

5. That we have reconciled the BSNL Two day CDR as provide to us with our CDR for the said days. Upon reconciliation we have found that your CDR statement is not correct since our corresponding call details clearly indicate the CLI against your number and the time of the alleged NCLi calls as per your CDR.

In the view of above we would request you to kindly provide us the following details/clarifications:

1. The basis of your investigation on which the BSNL has concluded that the alleged calls are NCLIs.

2. When our CDR is indicating all CLI how it has not reached to your switch?

3. Kindly provide us the raw CDR for our perusal and the investigation/reconciliation for entire month of January 2006 of Churu POI of your switch where we have made over the calls.

4. Alternatively, please allow our technical personnel to visit your switch premises for inspection of CDRs so that the matter can be resolved as soon as possible.

Till the above desired details are being clarified/provided to us, we would request you kindly cooperate not to take

any unilateral decision and any precipitate action against us as we wish to resolve the matter amicably.

28 A few more communications passed between the parties.

29 The Respondent, however, invoked the bank guarantees. To avoid disconnection, the Petitioner paid the amount of Rs.3068036/- under protest.

30 Another invoice was issued for a sum of Rs.74,55,077/- towards IUC/Interest etc. The Respondent threatened to disconnect the POI and encash the bank guarantee.

**The Present Proceedings :**

31 This petition was filed by the Petitioner on or about 26.9.2011, praying inter alia for the following reliefs:-

(a) "Hold and declare that the impugned invoices claiming amount towards penalty on account of alleged non-CLI calls and interest claims as also the disconnection notices (Annexures 1 to 5) are bad in law, untenable and accordingly be set aside/ quash the impugned invoices.

(b) Hold and declare that BSNL is not entitled to any interest whatsoever and set aside/quash the

invoices raised towards the interest claimed ie. Invoice dated 5.8.2011 and the disconnection notice dated 26.9.2011.

(c) Restrain BSNL from taking any coercive steps including disconnection of POIs or encashment or enhancement of bank guarantees against the Petitioner."

32 In its reply, the Respondent reiterated its contentions with regard to correctness of the impugned bills.

**The Issue**

33 The questions which arise for our consideration, are :-

(i) Whether the Respondent could enforce its purported claim after a period of three years?

(ii) Whether the Respondent was bound to supply its CDRs?

(iii) Whether in a situation of this nature, Clause 6.4.6 was attracted?

34 Before however, adverting to the said questions, we may notice that Clause 6.4.6 in view of a judgment of the Supreme Court of India in Bharat Sanchar Nigam Ltd. vs. Reliance Communications Ltd. reported in (2011) 1 SCC 394, has been held to be providing for

liquidated damages recoverable under Section 74 of the Indian Contract Act and not a penalty, as was opined by this Tribunal.

**Re. Question No. 1**

35 It is not in dispute that the period of limitation for enforcing a claim before a court of law is three years from the date when the cause of action arises.

36. Indisputably again, in this case, the cause of action arose in January 2006. Indisputably, a dispute was raised, albeit with regard to the duration of calls by the Petitioner immediately after obtaining the bills. It is true that in the consolidated bill, so far as the districts of Churu and Bhiwadi are concerned, one of the components thereof was non-CLI/CLI calls.

37 The Petitioner, inter-alia, raised a dispute with regard to the duration of calls in respect of a large number of POIs in the following terms:-

| | BSNL | BSNL | STL | STL | Difference | Percentage |
|---|---|---|---|---|---|---|

| POI | Amount | Duration | Amount | Duration | in Amt. | difference |
|---|---|---|---|---|---|---|
| Bundi(T) | 95578.97 | 206317.85 | 61193.08 | 85683.04 | -34385.9 | -35.98 |
| Jhalawar(T) | 71481.57 | 129253.37 | 52773.34 | 73721.77 | -18708.2 | -26.17 |
| Bhilwara(T) | 375782.9 | 388293.82 | 296428.5 | 386399.5 | -79354.4 | -21.12 |
| Jodhpur (L) | 361093.4 | 1193742.02 | 319430 | 1056236 | -41663.3 | -11.54 |
| Jhunjhunu(L) | 102745.7 | 341410.25 | 100132.6 | 333111.3 | -2613.8 | -2.54 |
| Pali (L) | 66632.2 | 220826.28 | 60670.85 | 200962.7 | -5961.35 | -8.95 |
| Sikar (T) | 513801.3 | 625804.07 | 470687.9 | 625020.1 | -43113.4 | -8.39 |
| Udaipur (L) | 168476.4 | 556355.72 | 163682.6 | 540610.7 | -4793.75 | -2.85 |
| Bhiwadi | 1466854 | 646675.08 | 66449.46 | 219384.7 | -1400404 | -95.47 |
| Churu (L) | 1748600 | 773579.13 | 80968.29 | 269358.1 | -1667632 | -95.37 |
| Total | 4971046 | 5082157.59 | 1672417 | 3790488 | -3298629 | |

38 So far as Bhiwadi and Churu districts were concerned, thus, the difference was said to be 95.47% and 95.35% respectively.

39 The Petitioner had also submitted its CDRs, which undoubtedly showed that the calls were having CLI numbers. The said dispute was to be resolved within a reasonable period.

40 The Respondent was to enforce its claim within a period of three years.

41 It, in view of a recent decision of this Tribunal in Petition No. 324 of 2010 (Reliance vs. BSNL) and other connected matters disposed of on April 19, 2012, could not have taken recourse to its power of disconnection of the POIs when its claims were barred by limitation.

42 Ms. Dhir, however, relying on or on the basis of the decision of the Bombay High Court in Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd. Vs. The Municipal Corporation of Greater Bombay and Anr. reported in AIR 1978 Bombay page 369 would contend that the word 'due' would include time-barred debts within the meaning of the provision of Section 24(1) of the Indian Electricity Act, 1910.

The said decision, to our mind, is not applicable to the fact of the present case.

43 This Tribunal in M/s. Tata Communications Ltd. Vs. Bharat Sanchar Nigam Ltd. & Anr. (Petition No. 186 of 2010 disposed of on 27.01.2011) opined:-

> "44. Submissions of Mr. Bhatia, however, was as noticed heretobefore, is that period of limitation is 30

years in terms of Article 112 of the Schedule appended to the Limitation Act.

45. The said submission of Mr.Bhatia is based on an observation made by a learned Single Judge of Andhra Pradesh High Court in the case of Paras Das (supra) wherein it was opined :

> "I am unable to agree with this submission of the Petitioner. The Respondent – plaintiff being a Central Government company is entitled to the benefit of Article 112 of the Limitation Act, 1963…."

46. With utmost respect to the learned Judge, the distinction between a `State' within the meaning of Article 12 of Constitution of India and Article 112 of the Limitation Act has not been brought to his notice.

47. In fact, the State of West Bengal for the same reason had to amend Article 112 of the Limitation Act to include a suit by Government Company.

48. If Article 112 was to be attracted in all the cases filed by the State, it would not have been necessary for the State of West Bengal to take recourse to the exercise of its legislative power to amend the said provision.

49. We may, in this connection, refer to a decision of the Calcutta High Court in the case of **West Bengal Agro Industries Corporation Ltd vs. UOI** (2001) Vol 3 Calcutta Law Times 315 wherein the effect of the aforementioned amendment of the Calcutta High Court has been considered.

50. Mr.Bhatia would urge that the provisions of the Limitation Act, being a shield and not a sword, only the remedy is barred thereby but the right is not extinguished except in the case of immovable

property, having regard to the provisions of Section 27 of the Limitation Act, 1963.

51. Mr.Bhatia may be correct that Limitation Act being a statute of repose, bars a remedy and not the right what in a situation of this nature should be held is that any remedy to realize a bill keeping in view the contractual provisions contained in the agreement would be barred. The bill should have been raised within a period of three years."

44 In DDA Vs. Ram Prakash reported in (2011) 4 SCC 180 the Supreme Court of India stated that the Appellant therein could not have raised a claim after 25 years.

45 The word 'due' within the meaning of the provisions of the Interconnection Agreement or otherwise means payable which in turn would mean 'legally recoverable', as would appear from the discussions made hereinafter.

46 In Black's Law Dictionary Ninth Edition, the word 'due' has been defined as 'owing or payable'; 'constituting a debt'.

47 What is due and payable has been considered by this Tribunal in Hughes Communication India Ltd. vs. DoT Petition No.327/2007

disposed of on 3.5.2010 :-

> "An amount "due" normally refers to an amount which the creditor has a right to recover. Wharton in *Law Lexicon* defines "due" as anything owing; that which one contracts to pay to another.
>
> In *Black's Law Dictionary*, 6th Edn., at p. 499 the following comment appears against the word "due":
>
> The word 'due' always imports a fixed and settled obligation or liability; but with reference to the time for its payment there is considerable ambiguity in the use of the term, the precise signification being determined in each case from the context. It may mean that the debt or claim in question is now (presently or immediately) matured and enforceable, or that it matured at sometime in the past and yet remains unsatisfied, or that it is fixed and certain but the day appointed for its payment has not yet arrived. But commonly and in the absence of any qualifying expressions, the word 'due' is restricted to the first of these meanings, the second being expressed by the term 'overdue' and the third by the word 'payable'.
>
> There is no reference in these definitions to a time-barred debt. In every case the exact meaning of the word "due" will depend upon the context in which that word appears."

48 Moreover, the definition of the said word has been considered by the Supreme Court of India in Modern Industries versus Steel Authority of India Ltd. reported in (2010) 5 SCC 44 as under :-

> "27. What exactly is the meaning of words `amount due from a buyer' which are followed by the

expression `together with the amount of interest' under sub-section (1) of Section 6 of 1993 Act? Do these words mean an admitted sum due? Or do they mean the amount claimed to be due?

28. The meaning of the word `due' has been explained in Webster Comprehensive Dictionary, (International Edition) as follows :

> "1. Owing and demandable; owed; especially, payable because of the arrival of the time set or agreed upon.
>
> 2. That should be rendered or given; justly claimable; appropriate"

42. The word `due' has variety of meanings, in different context it may have different meanings. In its narrowest meaning, the word `due' may import a fixed and settled obligation or liability. In a wider context the amount can be said to be `due', which may be recovered by action. The amount that can be claimed as `due' and recoverable by an action may sometimes be also covered by the expression `due'. The expression `amount due from a buyer' followed by the expression `together with the amount of interest' under sub-section (1) of Section 6 of 1993 Act must be interpreted keeping the purpose and object of 1993 Act and its provisions, particularly Sections 3, 4 and 5 in mind. This expression does not deserve to be given a restricted meaning as that would defeat the whole purpose and object of 1993 Act. Sub-section (1) of Section 6 provides that the amount due from buyer together with amount of interest calculated in accordance with the provisions of Sections 4 and 5 shall be recoverable by the supplier

from the buyer by way of suit or other proceeding under any law for the time being in force."

49 The said principle would also appear from the decision of the Apex Court in State of Kerala versus V.R. Kalliyanikutty (1999) 3 SCC 657 at page 661 it has held :-

> "8. Looking to the object of Section 71 we have to examine whether time-barred claims of the State Financial Corporation and the banks can be recovered under it. Is the object only speed of recovery or is it also enlargement of the right to recover? The Respondent-institutions rely on the words "amount due" in Section 71 as encompassing time-barred claims also. Now, what is meant by the words "amounts due" used in Section 71 of the Kerala Revenue Recovery Act as also in the notifications issued under Section 71? Do these words refer to the amounts repayable under the terms of the loan agreements executed between the debtor and the creditor irrespective of whether the claim of the creditor has become time-barred or not? Or do these words refer only to those claims of the creditor which are legally recoverable? An amount "due" normally refers to an amount which the creditor has a right to recover."

50 This aspect of the matter has also been considered in Petition No.8/2003 entitled BPL Mobile Cellular Ltd. & Anr. vs. DoT disposed of on 11.2.2010.

51 From the aformentioned dictionary meaning of the word `due', it would appear that the same would mean not only claimable but also payable.

52 The meaning of the term `payable' has been considered by the Supreme Court of India in Central Excise and Custom vs. ITC Ltd. reported in (2007) 1 SCC 62 at page 68 :-

> "21. The question as to non-levy or short-levy of an excise duty would arise only when the levy had been laid in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable.
>
> 22. In New Delhi Municipal Committee v. Kalu Ram [(1976) 3 SCC 407], the word "payable" has been defined in the following terms: (SCC p. 410, para 2) "The word "payable" is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. "payable" generally means that which should be paid.
>
> 20. Ranganathan, J. in Ujjagar Prints (II) v. Union of India [(1989) 3 SCC 488] defined the word "levied" in the following terms:
>
> "The word "levied" is a wide and generic expression. One can say with as much appropriateness that the Income Tax Act levies a tax on income as that the Income Tax Officer levies the tax in accordance with the provisions of the Act. It is an expression of wide import and takes in all the stages of charge, quantification

and
recovery of duty, though in certain contexts it may
have a restricted meaning"

23. Concededly, in terms of the provisions of the Act and the Rules framed there under, the amount becomes payable only in the event, the assessee does not deposit the amount levied within a period of ten days from the date of completion of the order of assessment. A provisional assessment is made in terms of Rule 9B inter alia at the instance of the assessee. Such recourse is resorted to only when the conditions laid down therein are satisfied, viz., where the assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable good."

53 A learned Judge of the Calcutta High Court has recently followed the said decision in M/s A.S. Syndicate (Warehousing) P. Ltd. & Anr. vs. Commissioner of Customs (Ports) reported in (2010) 4 CLT 375 holding as under:-

" Was there any shortfall is a question, which must now be posed and answered. A huge amount was owing and due from the Respondent. A decree was passed by this Tribunal in favour of the Petitioner. They were in possession of huge amount. The said amount was held in trust. In some matters they preferred appeals before the Supreme Court of India. In some matters they did so only after a demand for refund of the said amount was made.

In some of the cases, as noticed hereinbefore, adjustments of the amount lying in their hands was sought for. The Supreme Court of India had not stayed the operation on the judgment of this Tribunal. The interim order passed by it was confined to adjustment of the amount. If the Respondent was not ready and willing to adjust, the amount, lying in its hands, in view of the interim order passed by Supreme Court of India, should have been refunded in terms of the judgment of this Tribunal. It failed and / or neglected to do so.

Adjustment was made at a much later date i.e. after the penalty was levied. The Respondent was therefore did not take a fair action, which should have been taken by it, being a 'State' within the meaning of Article 12 of the Constitution of India. It cannot deny level playing field with the private operators.

It is of some significance to notice that interest on penalty has also been charged which clearly demonstrate that the first part of clause 4.8 has been given effect to by the Respondent. It is well settled that no damage is payable on damages by way of interest or otherwise in as much as quantum of damages was required to be determined.

54 Referring to DTC (supra), it was opined :-

"No amount in the strict sense of the term was payable by the Petitioner, and, thus, in our considered opinion, the said decision will apply in all fours in the instant case. Furthermore, the Respondent could not take advantage of its own wrong."

"See B.M.Madani V. ITO : 2008 (13) SCALE 329; :Chairman, Indore Vikas Pradhikaran v. Pure Industrial Cock and Chem. Ltd. and Ors. - AIR 2007SC 2458, M.R. Satwaji Rao (D) by L.Rs. Vs. B. Shama Rao (Dead) by L.Rs. and Ors. - AIR 2008 SC

2328, Chinthamani Ammal Vs. Nandagopal Gounder and Anr.- 2007(4) SCC 163 and Raja Ram Pal Vs. The Hon'ble Speaker, Lok Sabha and Ors. - (2007) 3 SCC 184."

55 In HFCL Infotel Ltd., Punjab vs. BSNL Petition No.119/2008 disposed of on 15.1.2010, it was stated :-

"…. Furthermore even if the Respondent was to point out the defect in the mode of raising a bill, it should have done so within the period of limitation as provided under Article 137 of the Limitation Act. The term "payable" as is well known means legally recoverable. [See Commnr. Central Excise and Customs, Mumbai and Ors. Vs. I.T.C. Ltd. and Ors. - 2007(1) SCC 62].

56 It is one thing to say that an authority exercises a statutory power with regard to a public utility service like Indian Electricity Act, 1910, Section 24 whereof gives a right in favour of the licensor but it is another thing to say that an amount has become due by way of levying of liquidated damages in terms of a bilateral agreement.

57 Even, however, in terms of the proviso appended to Section 24 of the Indian Electricity Act, no disconnection of electrical energy could be caused, if a bonafide dispute was raised.

58 In this case, it has not been in controversy that the dispute raised by the Petitioner was a bonafide one.

59 From the correspondences passed between the parties as also the reports sought for by the Respondent from IOBAS as also Mahendra British Telecom (MBT), it appears that the records maintained by both the parties were to be reconciled.

60 The provisions of the Interconnect Agreement also provide therefor. It is one thing to say that there was no bonafide dispute in respect whereof the dispute resolution process as provided for in the Interconnect Agreement or otherwise could not be resorted to, but it is another thing to say that a 'State' within the meaning of Article 12 of the Constitution of India can keep mum for a period of four and a half years and seek to initiate the process of recovery once again.

61 If any audit has been conducted in the year 2010 when a non-realization of the invoices issued in February 2006 was purported to have been detected, the Respondent must thank itself therefor.

62 Without proceeding against those officers who were responsible therefor, only upon obtaining a report from IOBAS and relying on or on the basis thereof, it could not enforce its claim after a period of three years.

63 We, therefore, are of the opinion that the Respondent could not have enforced its purported claim which became barred by limitation.

64 An Interconnection Agreement between two operators plays an important role. It must be borne in mind that Interconnect Agreement is mandatorily required to be entered into in terms of the conditions of licence as also the Regulations framed by the Telecom Regulatory Authority of India (TRAI) under The Telecom Regulatory Authority of India Act, 1997 (the 1997 Act).

65 It is, therefore, evident that having regard to the fact that the said Interconnect Agreement was entered into by and between the parties hereto for the ultimate benefit of the consumers, must receive a proper construction keeping in view that the fact that the parties thereto required was to raise bills on monthly basis.

66 The manner, in which the payments were to be made, has also been provided for i.e. each party must pay to the other within a period of fifteen days from the date of receipt thereof. If a dispute with regard to correctness/ legality of the Bill is raised, the endeavour of the parties should be to resolve the same.

67 If that be so, the Respondent was required to, in the event a dispute was raised, to preserve its records for a period beyond two years.

68 Both the parties, in the event of a dispute, have the right to inspect the books and the records of the other party.

69 Indisputably, the Petitioner raised disputes with regard to correctness of the bills in February 2006. The Respondent did not show any inclination to resolve the same. It sought to enforce its claim only in 2010. The Petitioner once again raised a dispute. In terms of Clause 7 appended to Schedule 'I' of the IUC Charges for implementation dated 18.4.2006 binary or residuary or the text filed were to be exchanged between the parties, if demanded.

70 The Respondent contends that it was not technically possible for it to bar non-CLI calls; such a stand has not been taken in its reply.

71 It is true that in terms of the Clause 7.3.2, the Respondent was entitled to disconnect or encash the bank guarantee but such an exercise could be resorted to immediately, in the event the payment is not received within the period specified therefor/ due date, meaning thereby the date mentioned in the notice or within fifteen days from the date of receipt of the bill.

72 When the word 'immediately, is used, the same may not mean 'forthwith' or 'without any loss of time', but there cannot be any doubt or dispute that such a course must be resorted to within a reasonable time, if not a minimum possible time.

73 If that be the correct, interpretation of the extraordinary power granted in favour of a 'State' within the meaning of the Article 12 of the Constitution of India, in our considered opinion, defies any logic as to how such a power can be exercised after a period of three years.

74 It is only in that sense, the decision of the Bombay High Court vis-à-vis the decision of Supreme Court of India should be considered.

75 It is not the case of the Respondent that it has not been maintaining CDRs.

76 Even otherwise, it could not afford to do so in view of the clear direction issued by the TRAI in this behalf as also the provisions contained in the Interconnect Agreements. What had also been contended by the Respondent was that it was not having a platform to raise bills on CDR basis. This may be so. But, the very fact that at all material times the Respondent had itself referred to the CDRs and in fact asked IOBAS to analyze the data supplied by the Petitioner, clearly suggests that the CDRs have been checked and analyzed.

77 In any event, no CDR had been supplied. The Respondent should have made its stand clear in that regard.

It had even supplied CDRs on selective basis. It could detect the unauthorized calls only when CDRs were maintained. As indicated heretobefore that the 18.4.2006 circular letters speaks of CDRs and in

that view of the matter, we are of the opinion that the Respondent ought to have supplied its CDRs to the Petitioner for their analysis, as there existed a clear divergence of views so far as records are concerned; viz. that the Petitioner's CDRs showing that the calls originated from its network and terminated at the network of the Respondent had the requisite CLI; whereas the CDRs of the Respondent showing otherwise.

**Re. Question No.3**

78 We have noticed heretobefore that the Supreme Court of India in BSNL Vs. Reliance (2011) 1 SCC 394, opined that Clause 6.4.6 provides for pre-estimated damages.

79 A party to a contract alleging breach of the provisions thereof, therefore, was required to establish the same before it could take recourse to claim damages in terms of Section 74 of the Indian Contract Act.

80 In the event, a party to a contract contends that it has not committed any breach as alleged by the other, such breach must be proved.

81 Section 74 of the Contract Act in other words, would be attracted only when a party to a contract would become entitled to compensation by reason of breach of contract.

82 In a given case even where a sum is specified by way of pre-estimated damage, reasonable compensation may be awarded although we are not concerned with the said question, we have referred to therein only to show that in a given case where no actual damage is suffered, even a nominal damages can be directed to be paid. Damages which can be imposed by a Court of law in terms of Section 74 of the Act, must be reasonable.

83 On a plain reading of Clause 6.4.6 of the Inter Connect Agreement, it would be evident that the necessary ingredients therefor must be established.

84 Our attention has been drawn to a circular letter dated 13.6.2005, wherein it has clearly been stated that the bills raised by the Respondent could be disputed by the private service operators owing to various reasons mentioned therein.

85 Ms.Dhir would contend that the said circular letter will have a prospective effect. It is not necessary to consider the correctness of the said submissions in view of the fact that the said circular letter clearly goes to show that the same contains an admission on the part of the Respondent that there could be various reasons for recording of non-CLI calls.

86 If that be so, the contention of the Respondent on technical ground that in the event of a conflict between two records, that its record would prevail, cannot be accepted firstly because in a situation of this nature such a contention cannot be permitted to be raised (See Tata Teleservices versus BSNL P.No.111/2007 disposed of on 11.2.2010).

Secondly because, the inconsistency between the two records can be detected only when they are reconciled. If the Respondent refuses to produce the records it must be held to have not complied with its contractual obligations. An adverse inference should be drawn against it.

Thirdly because, the interconnect agreement itself provide for a dispute resolution clause being 7.5.1 providing for a consultative process which would mean not an unilateral decision.

87 The report of IOBAS does not indicate that the data supplied by the Petitioner was in any way flawed, forged, incomplete or otherwise were hit by virus.

There was no verification of the CDRs of the Petitioner far less any joint verification. The Petitioner had asked for raw CDRs and/or to grant to it an inspection of the Respondent's exchange, so that it can verify the data. In view of Clause 7.5 of the Agreement, a dispute having been raised, it was obligatory on the part of the Respondent to maintain the data.

If that be so, the Respondent should have complied with the same.

88 This Tribunal in Bharti Airtel versus BSNL (Petition No.108/2008 disposed of 11.2.2010) opined as under :-

> "46. Clause 6.4.6 appended to the Addenda provides for a drastic civil consequence. It is in a

nature of the penal provision. There are some pre-conditions of its applicability. They are as under:

(i) Delivery of call at wrong trunk group and / or the local call if handed over to the ISD port.

(ii) In that event higher tariff provided for in the IUC regulation would be attracted.

(iii) How and in what manner the Petitioner can be said to have incurred such penal consequence or civil consequence, was for the Respondent to show.

(iv) The applicable IUC in respect of unauthorized calls must be higher than IUC applicable for calls prescribed in that trunk group which would mean that finding of fact has to be arrived at that the IUC applicable pertains to one trunk group of the calls received in another for which the IUC is lesser than the IUC prescribed therein.

47. Clause 11 has thus, an enormous impact. It is also prospective in nature. The BSNL's circular dated 29.01.2005 must also be held to be prospective and not retrospective in operation.

48. The conditions precedent therefor were required to be satisfied. By its very nature the provision should be held to be a penal one as it speaks of a modified or tampered call which would mean a conscious act on the part of the private party, provided the same is applicable."

89 As regards application of penal clause upon considering a large number of dictionaries, it was stated :

> "91. In our opinion clause 6.4.6. provides at least for civil consequence, if not evil consequences. In either case the principles of natural justice are required to be complied with. The Petitioner categorically stated that it would be in a position to explain its case, if a personal hearing is granted. There was, in our opinion absolutely no reason to deny it from that opportunity. The contract did not exclude application on the principles of natural justice."

90 We have not, however, based our opinion on the said decision for the proposition that the clause in question is penal in nature, keeping in view the decision of the Supreme Court of India in BSNL's case (supra).

91 The fact, however, remains that the agreement itself provides for giving an opportunity of hearing to the other side by way of exchange of CDRs and reconciliation thereof pursuant whereto both the parties were entitled to verify the CDRs of the other side.

92 It may not be out of place to mention that before the Supreme Court of India in Reliance vs. BSNL, the Solicitor General of India

unequivocally stated that BSNL would supply its CDRs (See (2008) 10 SCC 556).

93 In Tata Communication vs. BSNL being Petition No.186/2010 disposed of on 27.1.2011, the law was stated by the Apex Court in the following terms:-

> "54. Sofar as the merit of the matter is concerned, we must observe that it was a statutory obligation on the part of the Respondent to provide CDRs whenever called upon to do so. Only when the CDRs were provided, the Petitioner could point out grave mistakes and errors contained in the bill as a result of which the Respondent itself had reduced the amount of bill from Rs.5.16 crores to Rs.1.16 crores."

94 The Petitioner has made payments `under protest' and without prejudice to its rights.

It had, of course, not prayed for refund of amount but if a declaration as prayed for and is granted, the Respondent must refund the amount automatically.

95 Parties would be bound by a decree of declaration of a right.

It would not be a case where the Proviso appended to Section 34 of the Specific Relief Act, 1963 would be attracted. Even otherwise a

`State' is expected to comply with a declaratory decree made by a competent court of law.

96 A declaratory decree must also be implemented. When a declaratory decree as prayed for by the Petitioner is passed, the same would put an obligation on the Respondent to pay back the amount. It would, thus, not be correct to contend as has been done by Ms.Dhir that in absence of a prayer for a decree of recovery of amount this petition would not be maintainable.

97 We may notice that the Punjab and Haryana High Court in the case of UOI vs. Burma Nand reported in (1976) ILR 1 P&H 268 stated the law thus:-

> "Another case which is directly in point is Lt. Col. G.S.Dutta v. Union of India AIR1996 J&K 124. In that case the plaintiff who had been retired from the services sought a declaration that the date of his retirement was 16th of July, 1954, instead of 7th of June, 1953, and that he was entitled to increase in his pension accordingly. He prayed for an injunction against the Union of India. A contention was raised that the provision to sec 42 of the 1877 Act was a bar to the suit because the plaintiff had not asked for the arrears of his pension due up to the date of the suit. Considering the provision, Jankinath Bhat,J., observed:…

> The emphasis is on the words further relief. In my opinion further relief would mean a relief which is inherent in the original declaration claimed, a relief without which the declaratory relief claimed would be ineffective infructuous and unworkable. A typical case of the application of this proviso is where a person claims a title to some property but is out of its possession, a mere declaration of title would make the decree meaningless infructuous and incapable of yielding any fruitful results because the effective decree that can be passed is with respect to possession of the property. If the possession is allowed to remain with the adverse party, and a mere declaration is issued in favour of the Plaintiff the decree would be meaninginglessly. That is the purport of this proviso and the principles underlying it.

Applying this interpretation of the proviso to the case before him, the learned Judge held :

> The present case can very well be understood arid interpreted in the following manner. If the Plaintiff gets a declaration that he is entitled to an enhanced rate of pension this decree will enure for the life time of the Plaintiff, because lie will be, entitled to the enhanced pension, not only upto the date of the institution of the suit, but fight upto the end of his life. If he omits to claim a certain sum which he could have claimed upto the institution of the suit, that would not make the declaratory decree meaningless and infructuous, because the decree; will envisage a recurring cause of action to him for an enhanced fate of pension for future also after the date of the decree I think the Plaintiff's ease is not hit by the proviso to Section 42 of the Specific

> Relief Act, but a subsequent suit by him after retirement for arrears of the enhanced rate for the period upto the intuition of the suit would be barred under Order 2, Rule 2 of the Code of Civil Procedure.
>
> With the utmost respect I am in full agreement with the interpretation placed on Section 42 of 1877 Act (corresponding to Section 34 of the 1963 Act) by Janakinath Bhat, J., in Lt. Col. Dutta's case AIR 1966 J & K 124 and would say on the basis thereof that the relief for recovery of arrears of salary is not a further relief within the terms of the proviso to Section 34 of the 1963 Act inasmuch as the declaration sought by the Plaintiff is, all by itself, a fully effective relief which is not rendered meaningless by the absence of a prayer for recovery of arrears of salary."

98 It has not acknowledged its liability. A dispute was already pending.

99 The Petitioner has not waived its right with regard thereto.

100 A payment made `under protest' cannot be said to be a payment without demur.

101 Here it will also be relevant to consider as to the scope of the term "protest" which is defined as under in the various dictionaries:

**CHAMBERS ENGLISH DICTIONARY**

to express or record dissent or objection

an affirmation or avowal; a declaration of objection or dissent;

**THE OXFORD ILLUSTRATED DICTIONARY**

Formal statement of dissent or disapproval, remonstrance;

**THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES--VOLUME II.**

To give formal expression to objection, dissent, or disapproval; to make a formal (often written) declaration against some proposal, decision, or section;

The position, therefore, to be examined is whether in the facts and circumstances of this case, circumstances in law existed whereby the appellants were in a situation where they were required to make a payment and, therefore, had to register their protest and, if that be so, whether the scheme of the Act and Rules provided for the payment to be made under protest in the circumstances under which the appellants made the payment.

102 A communication made without prejudice, it is trite may have to be interpreted differently in different situations.

103 It may be capable of variation, the same would mean "without prejudice to the position of writer of the letter".

104 It is not a case where an offer had been made and an order was passed by a statutory authority.

105 Payments made under protest may not be held to be final and irrevocable.

In Black's Law dictionary it is stated :-

> "….Where an offer or admission is made 'without prejudice', or a motion is defined or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also Dismissal Without Prejudice.
>
> Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows:
>
> > The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.

> The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs. The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'."

106 In the case of Ansal Properties and Industries Ltd. vs. State of Haryana and Anr. reported in 2009 (3) SCC 553, it was held as under:-

> "52 It is thus established that the appellant on receipt of the demand issued by Respondent No. 2 raised this objection regarding the charge and the demand made and the payment which was made by the appellant was due to the threat issued by Respondent No. 2 that on failure of the appellant to pay the same its licence would stand cancelled. Such demand was made by the appellant under protest as aforesaid. Therefore, the principle of waiver and acquiescence will have no application in the present case and therefore we reject the said contention of the learned counsel appearing for Respondent No. 2."

107 For the reasons stated aforementioned, the question no.3 is also answered in favour of the Petitioner and against the Respondent.

108 This petition is, therefore, allowed with costs.

109 Advocate's fee assessed as Rs.50,000/-.

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

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

**July 17, 2012**
**`ns'**