

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 05TH JULY, 2012

Petition No.413 of 2011

Vodafone Essar Cellular Ltd. (VECL) ... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. ... Respondent

Petition No.414 of 2011

Vodafone Essar South Ltd. (VESL) ... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. ... Respondent

BEFORE:

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

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

For Petitioner : Mr. Navin Chawla, Advocate
Ms. Nidhi Parashar, Advocate
Mr. Anil Punj, Advocate
Mr. Narendra Yadav, Advocate

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

J U D G E M E N T

Bharat Sanchar Nigam Ltd., a statutory company but registered and incorporated under the Indian Companies Act, has issued a bill dated 18.7.2011 for a sum of Rs.24,69,025/- in respect of the basic service operation carried out by the Petitioner as also for a sum of Rs.4,98,951/- dated 19.7.2011 for the operation of the Petitioner as NLDO and a bill dated 25.7.2011 for a sum of Rs.2,83,865/- which was revised to a sum of Rs.71,135/-.

The said bills have been raised purported to be relying on or on the basis of clause 3.2.2 of the Interconnect Agreement as also a purported circular letter dated 22.3.2005.

The said bills are in question in these petitions.

2. The Petitioner contends :-

- (i) The charges on the alleged ground of delay in commissioning the interconnect services being not contemplated under the agreement as also the said circular, the same is wholly illegal and without jurisdiction;
- (ii) A part of the said claim, in any event, is barred under the law of limitation;
- (iii) The bills having been raised relying on or on the basis of audit objection only, it must be held to have been issued

without proper application of mind on the part of the Respondent;

- (iv) In any event, the principles of natural justice having not been complied with, the impugned demands cannot be sustained.
- (v) Assuming that the impugned demands have been made by way of damages, threat of disconnection in terms of the agreement must be held to be wholly illegal.

3. On the other hand, the Respondent contends :-

- (i) The impugned demands have been made by way of Port charges and not by way of damages;
- (ii) By not raising the bills, to which it was entitled to and as has been pointed out by the audit team, the Respondent has merely rectified a mistake committed by it and in that view of the matter, Petitioner cannot be said to be entitled to an opportunity of being heard;

4. Indisputably, the parties hereto have entered into an interconnect agreement on or about 25.10.2002, the relevant provisions whereof are as under :-

“3.1 CAPACITY ORDERING

3.1.1 Demands/Forecasts of CMTS PROVIDER on BSNL for the following shall be firmed up at least 12 months before the date on which the required connectivity or circuits is/are required.

- i) Number of ports (2048 ka/sec digital trunks) and type of signaling GMSC wise.*
- (ii) Addition to the traffic capacity of the MSCs in Erlangs.*
- (iii) Route wise expected traffic dispersion if possible.*

- Provided that this time frame shall be six months for demand made for the first occasion in the first year of License period. However, this does not preclude the possibility of earlier provisioning of the interconnect capacity in full or in part subject to technical feasibility and availability.*

3.1.5 After the acceptance of interconnect capacity demand, in full or part, BSNL will issue a bill based on the accepted interconnect capacity demand calculated as per Clause 6.3.2, within 30 days to the CMTS PROVIDER for the advance charges for the first year's use of connection. The CMTS PROVIDER shall pay such bill within 30 days of the date of issue of bill failing which, BSNL will not be obliged to provide the interconnect capacity.

3.1.6 The above stated interconnect capacity demand will be treated as firm demand from the date of receipt of the first year's advance payment of the port charges. The advance payment thus received by the BSNL from the CMTS PROVIDER will be adjusted against the first year's (reckoned from the date of actual provision of connection to the CMTS PROVIDER)

port charges for the connections, calculated as per Para 6.3.2. In subsequent years, the annual connection charges for the link connections will be paid each year in advance by the CMTS PROVIDER.

3.2 CAPACITY ORDER TIME SCALE

3.2.1 The time scale for the provision of capacity Ready For Testing shall be 12 months following the date of receipt of the firm demand. However, in exceptional cases, a longer or a shorter time frame can be mutually agreed. In case spare interconnect capacity is available, the POIs may be provided in much shorter time frame.

3.2.2 The CMTS PROVIDER shall ensure that the interconnect capacities are got tested within 30 days from the date these are made available by BSNL and these capacities are used fully within a period of three months from the date of commissioning. After expiry of six months extending to nine months on request, the demand shall be deemed to have withdrawn if these are not put to full use by CMTS PROVIDER's BSNLs shall have the right to use these capacities for its consumption.

Clause 3.3 provides for liquidated damages which having not been invoked.

4.1.2 BSNL and CMTS PROVIDER shall commence joint testing of interconnect circuits within one month after the relevant Ready For Test Date. The format for Ready For Test intimation shall be designed in consultation by both the parties i.e. BSNL and CMTS PROVIDER. The result of joint testing, recorded by duly authorized representatives of each side, shall be binding on both the parties.

4.1.3 If, for good reasons, either party is unable to proceed with testing of any interconnect circuit, then that party shall notify

the other in writing at least 10 working days prior to scheduled Ready For Test date where after testing will be rescheduled by mutual agreement and testing carried out on such rescheduled date.

4.1.4 If the parties are unable to agree upon a mutually acceptable date for the testing of the interconnect circuits, then either party may notify the other that it wishes to resolve the disagreement in accordance with chapter 8 and in such an event the dispute resolution procedure set out in that chapter will come into operation.

6.3.2 PORT CHARGES

<i>S. N.</i>	<i>Demand for No. of PCMs from the CMTS provider as accepted by BSNL in an exchange on each occasion</i>	<i>Annual interconnect port charges per PCM termination (excluding the cost of infrastructure viz. land, Building, air-conditioning etc.) (In Rupees)</i>
<i>1.</i>	<i>1 to 16 PCMs</i>	<i>$N*55,000$</i>
<i>2.</i>	<i>17 to 32 PCMs</i>	<i>$8,80,000 + (N-16)*30,000$</i>
<i>3.</i>	<i>33 to 64 PCMs</i>	<i>$13,60,000 + (N-32)*20,000$</i>
<i>4.</i>	<i>65 to 128 PCMs</i>	<i>$20,00,000 + (N-64)*15,000$</i>
<i>5.</i>	<i>129 to 256 PCMs</i>	<i>$29,60,000 + (N-128)*14,000$</i>

Note : 'N' above refers to the number of 'ports' demanded by the Interconnection Seeker within the capacity ranges under the column 'No. of Ports'."

5. We may also notice that the Telecom Regulatory Authority of India (TRAI) in its Explanatory Memorandum issued in 2001, stated the following as regards Port charges :-

“5. Based on the cost data supplied by the Operators for the Switching Systems in the Network, costs have been worked out for the various configurations. To these costs, overheads @ 10% representing freight, storage and installation costs, have been added. For arriving at the Annual Recurring Expenditure (ARE), a rate of 22% has been applied to the capital cost so worked out. The ‘port’ charges, which are in the nature of annual rentals, have been equated to the ARE so computed.”

6. We may also place on record the circular letter dated 22.03.2005 :-

“Sub : Changing of Rentals from Private Licensed Service Providers for EI Ports.

This has reference to your letter no. NIS/RULING/04-05 dated 20.6.2004 regarding above subject where guidelines have been sought from this office.

2. In the case where demand for ports is given by private operators to BSNL and the demand note raised by BSNL for the ports is not paid by the private operators within the due date i.e. prescribed period of 30 days, it is clarified that in such cases the ports may be released and feasibility issued to next private operator demanding such ports, if required, so that the available interconnection ports of BSNL switches are optimally utilized.

3. The Clause 3.2.2 of Interconnect Agreement states that private operator shall ensure that the interconnect capacities are got tested within 30 days from the date these are made available by BSNL.

Further, these capacities are to be fully used within a period of three months from the date of commissioning. After expiry of six months extensible to nine months on request, the demand shall be deemed to have been withdrawn if these are not put to full use by private operator and BSNL shall have the right to use these capacities for its consumption.

4. In the cases where private operators pay the demand note and BSNL makes available the E1 ports ready for testing but private operators do not offer the ports for Acceptance Testing (A/T) within one month of ready for testing date or as per the date fixed in A/t schedule of BSNL, whichever is earlier, rent of ports concerned shall start on expiry of said date without waiting for commissioning of ports. Further treatment of such E1 ports shall be done in a similar manner as prescribed in Clause 3.2.2 of the Interconnect Agreement as described above except that instead of date of commissioning the date of ready for testing shall be used.

5. In the case where private operators offer the ports of A/T but do not commission the ports or the A/T is not completed due to reasons of private operators, the rent for these ports shall start after one month from the date of start of acceptance testing of these ports by BSNL.

6. However, it is to be strictly ensured by BSNL field units that demand notes are raised timely to private operators and there is no delay in availability of A/T team as per schedule at site. Also, action as above is to be taken in cases where BSNL can prove fault on the side of the private operators seeking interconnection and that no delay occurs due to reasons of BSNL.”

7. However, it is not in dispute that the contents or any part thereof were not inserted in any subsequent agreement, although the last 'Addenda to the agreement' was entered into by and between the parties hereto on or about 10.03.2011.

8. For better appreciation of the dispute between the parties, we may notice the following fact :-

- (i) A provisional bill was issued on or about 14.6.2011. The same contains a summary of Port charges for the Exchanges in question.

The said bill, however, was replaced by a bill dated 18.7.2011.

We may notice the same :-

<i>SN</i>	<i>PARTICULARS</i>	<i>AMOUNT (Rs.)</i>
1	<i>Annual Port Charges for Delay in commissioning for New/Aug of Cellone POIs (Annexure-A)</i>	2238463
2	<i>Any other charges</i>	0
3	<i>Total (1+2)</i>	2238463
4	<i>10% Service Tax on item No.3**</i>	223846
5	<i>Education Cess @ 2% on item No.4</i>	4477
6	<i>Secondary & Higher Education Cess @ 1% on 4</i>	2238
	<i>Net Amount Payable</i>	2469025

- (ii) For better appreciation of the scheme, we may notice the details of the said demand :-

Summary of Port Charges raised as per Audit objection for delay in commissioning of Cellone POIs (As per Interconnect Agreement Clause No.3.2.2)

Operator	SSA	Name of SDCA	Dn No.	Date of BSNL Readiness	Type of POI	No. of E1s	Dt. of Commissioning	Delay in Days	Applicable Port charges
Vodafone	Pune	Pune (Cell One)	HCA08	07.05.2008	CMTS	10	09.07.2008	34	51233
Vodafone	Nagpur	Nagpur (Cell One)	HCA010	09.06.2008	CMTS	20	22.08.2008	45	123288
Vodafone	Pune	Pune (Cell One)	HCA011	24.06.2008	CMTS	9	23.10.2008	92	124768
Vodafone	Pune	Pune (Cell One)	HCA015	08.08.2008	CMTS	20	23.10.2008	47	128768
Vodafone	Pune	Pune (Cell One)	HCA017	25.09.2008	CMTS	20	14.11.2008	21	57535
Vodafone	Nagpur	Nagpur (Cell One)	HCA018	25.09.2008	CMTS	15	08.12.2008	45	101713
Vodafone	Pune	Pune (Cell One)	HCA019	03.12.2008	CMTS	36	26.12.2008	-6	0
Vodafone	Nagpur	Nagpur (Cell One)	HCA022	23.12.2008	CMTS	4	17.08.2009	208	125370
Vodafone	Pune	Pune (Cell One)	HCA023	23.01.2009	CMTS	63	25.08.2009	124	672658
Vodafone	Pune	Pune (Cell One)	Vfone902	17.06.2009	CMTS	10	01.08.2009	16	24110
Vodafone	Pune	Pune (Cell One)	Vfone905	11.08.2009	CMTS	25	23.12.2009	105	330822
Vodafone	Pune	Pune (Cell One)	Vfone909	22.10.2009	CMTS	15	17.03.2010	117	264453
Vodafone	Pune	Pune (Cell One)	Vfone910	14.01.2010	CMTS	63	04.06.2010	112	607562
Vodafone	Pune	Pune (Cell One)	Vfone1004	02.06.2010	CMTS	2	11.11.2010	133	40083
Vodafone	Pune	Pune (Cell One)	Vfone1003	02.06.2010	CMTS	38	11.06.2010	-20	0
Vodafone	Pune	Pune (Cell One)	Vfone1007	28.06.2010	CMTS	10	20.07.2010	-7	0
Vodafone	Pune	Pune (Cell One)	Vfone1006	08.11.2010	CMTS	63	30.12.2010	23	124768
Vodafone	Pune	Pune (Cell One)	Vfone1007	28.12.2010	CMTS	63	05.01.2011	-21	0
Vodafone	Pune	Pune (Cell One)	Vfone1009	08.02.2011	CMTS	25	21.02.2011	-16	0
Vodafone	Pune	Pune (Cell One)	Vfone1010	22.02.2011	CMTS	63	21.03.2011	-2	0
Vodafone	Pune	Pune (Cell One)	Vfone1103	22.03.2011	CMTS	63	05.04.2011	-15	0

- (iii) A sum of Rs.2,30,852/- in respect of seven CMTSs, is apparently barred by limitation.

From the said chart, it would furthermore appear that no bill has been raised in respect of nine CMTSs.

Another bill appears to have been raised on 26.7.2011. Several disconnection notices have been issued.

However, on a protest made by the Petitioner as to how a consolidated bill could be raised, the bill for NLDO was bifurcated by a bill dated 19.7.2011. Respondent, in its reply, annexed a bill for a sum of Rs.2,83,865/- containing the following details :-

<i>VODAFONE CMTS Details</i>								
<i>S N</i>	<i>SSA</i>	<i>No. of E1s</i>	<i>Service</i>	<i>A/N issued</i>	<i>Demand Date of Comm.</i>	<i>Date for Bill/Comiss ioning</i>	<i>No. of days</i>	<i>Amount</i>
1	<i>Ahmednagar /Tax</i>	2	<i>CMTS</i>	<i>22.03.2010</i>	<i>21.04.2010</i>	<i>05.02.2011</i>	200	87397
2	<i>Budhana/ Tax</i>	2	<i>CMTS</i>	<i>11.03.2010</i>	<i>10.04.2010</i>	<i>28.09.2010</i>	171	51534
3	<i>Khamgaon/ Tax</i>	2	<i>CMTS</i>	<i>11.03.2010</i>	<i>10.04.2010</i>	<i>28.09.2010</i>	171	51534
4	<i>Ratnagiri/ Tax</i>	2	<i>CMTS</i>	<i>22.03.2010</i>	<i>21.04.2010</i>	<i>14.12.2010</i>	237	71425
						<i>Total</i>		261890.00
<i>This D/N is issued as per clause 3.2.2 of Interconnect Agreement.</i>								

- (iv) However, amount of the said bill was replaced by another bill dated 17.12.2011 being for a sum of Rs.71,135/- only, stating :-

VODAFONE CMTS Details									
S N	SSA	No. of E1s	Service	A/1 letter date	A/T Schedule Date	Date of Recpt. of A/T Doc.	Date of Bill/ Commissioning	No. of days	Amount
1	Ahmednagar /Tax	2	CMTS	17.04.2010	28.04.2010	11.06.2010	05.02.2011	47	14164
2	Budhana/ Tax	2	CMTS	13.05.2010	28.05.2010	13.07.2010	28.09.2010	49	14767
4	Ratnagiri/ Tax	2	CMTS	22.06.2010	29.06.2010	22.10.2010	14.12.2010	118	35562
							Total	214	64493.00
<i>This D/N is issued as per clause 3.2.2 of Interconnect Agreement.</i>									

- (v) Petitioner made a representation on or about 29.7.2011 that no delay could be attributed on its part and in fact delay, if any, in commissioning the POIs was attributable to the Respondent only.

In support of the said representation, additional data has also been furnished. It was furthermore contended that the testing was also required to be done and taken into account towards the time taken for carrying out checking and transmission. According to the Petitioner, it was not in possession of any document in respect of the eight demands made by the Respondent. All other documents, which were in its power and possession, had been supplied to the Respondent.

- (vi) BSNL, in its reply dated 30.7.2011, however, stated that Petitioner's representation was not acceptable.
- (vii) Another representation was filed by the Petitioner on or about 01.8.2011, which was responded to by the Respondent on or about 09.8.2011, stating :-

1. *The point raised is not correct as the delay is not from BSNL side. After completion of A/T on 30.07.2008, M/s. VECL took 11 days to submit the document to this office for commissioning i.e. on 11.08.2008. The commissioning was further delayed due to outstanding of interest of Rs.46 lacs & issued on 22.08.2008.*
2. *The point raised is not correct. The covering letter of the A/T report itself of date 19.10.2008 and document submitted to this office on 20.10.2008. The approval is issued on 23.10.2008 pl.*
3. *The point raised is not correct. The document received to this office on 20.11.2009 & was put for approval. The commissioning was delayed due to outstanding of Akola SSA. On payment of this outstanding by M/s. VECL on 22.12.2009, the approval was issued on 23.12.2009 pl.*
4. *The point raised is not correct. As the BSNL GMSC has no switch related problems and POIs of other operators were already commissioned in January-2010. Further nomination of Pune SSA representative was also done immediately on 01.02.2010. The A/T might be delayed due to Media/capacity constraint with M/s. VECL.*
5. *The point raised is not correct. Though the covering letter to A/T Document is of date 14.10.2010, the A/T document is submitted to this office on 22.10.2010 & approval is issued on 11.11.2010 & the switch A/T might be delayed to 27.09.2010 due to media/capacity constraint or due to delay in Basic services launch from M/s. VECL as this is the first POI for BASIC services.*
6. *The point raised is not correct. As per this office record the switch A/T date assigned by T&D wing is of 14.12.2010 &*

the switch A/T date might be delayed to 21.12.2010 due to media/capacity constraint from M/s. VECL.”

(viii) Further representation was made on 10.6.2011 and 18.8.2011, which were rejected by the Respondent vide its letter dated 19.8.2011, stating :-

- “1. Interconnect agreement clause No.7.3.2(iv) is not applicable for lease cases.*
- 2. The charges have been raised as per BSNL HQ Regulation Cell Letter No.342-1/2004-Regln dated 22.03.2005 instructions, copy of which was marked to you.*
- 3. Acceptance testing letters are issued in time and testing is carried out in co-ordination with M/s. VEGL after the readiness by M/s. VECL.*
- 4. Point is clarified in above points pl.*
- 5. All the relevant records are supplied to M/s. VECL time to time pl.*
- 6. 1. The dates mentioned are contradictory pl. A/t letter date is indicated as 24.06.2008 and A/T date mentioned is 25.05.2008 pl. As per BSNL, HQ instructions approvals are issued with the concurrence of IFA/Finance pl.*
 - 2. A/T covering letter is the document of M/s. VEGL only and must be available with M/s. VEGL pl.*
 - 3. As per BSNL, HQ instructions approvals are issued with the concurrence of IFA/Finance pl. M/s.*

VEGL had kept pending Akola undisputed o/s for long time & paid at the time of approval of this case pl.

4. The point raised for BSNL. T&D and Local SDE was not available is incorrect & documentary support is not submitted by you.

5. The switch A/T date is assigned by BSNL. T&D on 25.07.2010 clearly indicates that BSNL is ready for testing & A/T might be delayed due to Basic services launch by M/s. VEGL. Further, non-opening of Level 71 as indicated by you has never been brought to the notice of this office.

6. The switch A/T date is designed by BSNL T&L on 14.12.2010 is well within time & M/s. VEGL should live expedited for the necessary reports for A/T document.

Point No.5 is not applicable for any of the cases of M/s. VEGL, further letter of this office which is annexed to your above referred letter for payment of outstanding bills is not pertaining for Cellone POI cases.”

9. Disconnection notice was issued on 24.8.2011.

Petitioner protested thereagainst by its letter dated 01.9.2011. However, it without prejudice to its rights and contentions made payments for a sum of Rs.9,01,785/- on 10.08.2011, Rs.4,60,861/- on 23.09.2011 and Rs.2,81,129/- on 23.09.2011.

Re : Agreement

10. There cannot be any doubt or dispute, as has been contended by Ms. Dhir that the agreement has to be read as a whole. A bare perusal of the different provisions of the agreement would show that the stipulated Port charges payable on an annual basis were to be recovered from the date of commissioning. The interconnect agreement provides for mutual obligations of the parties thereto. For each stage of commissioning of the ports, a time limit has been prescribed. As far as violation of some of the provisions is concerned, no such consequence has been provided.

11. Whereas, clause 3.1.1 provides for a demand on BSNL by a CMTS provider twelve months before the date on which the required connectivity or circuits are required; clause 3.1.5 entitles BSNL to raise a bill in terms of the clause 6.3.2 within thirty days in respect of the advance charges for the first year's use of connection.

The CMTS provider is required to pay such amount within thirty days, failing which BSNL would not be obliged to provide the interconnect capacity. The said demand in terms of clause 3.1.6 is to be a firm one. The advance payment made by the seeker of interconnection was to be adjusted against first year's Port charges.

12. Clause 3.2.1 provides for a time scale prescribing a time for twelve months following the date of receipt of the firm demand, subject however, to a mutual agreement.

Clause 3.2.2 provides for only two time periods; i.e. (i) Within thirty days CMTS provider has to ensure that the interconnect capacities are got tested from the date those are made available; and (ii) these activities are used fully within a period of three months from the date of commissioning.

The said clause does not envisage any charges in between the said period.

13. Some other provisions also provide for mutual obligations of the parties as would appear from clauses 4.1.2, 4.1.3 and 4.1.4. The quantum of Port charges is specified in clause 6.3.2.

Clause 7.3.1 inter-alia provides for the terms of payment enabling the bill issuing authority to include the charges omitted, if any, within an outer limit of a period of six months from the date of issue of relevant bill except for the reasons mentioned therein specifically.

14. The said agreement, by reason of the aforementioned circular letter dated 22.3.2005, according to the Respondent, was sought to be explained. A bare perusal of the said circular letter would go to show that thereby certain queries

purported to have been raised by Gujarat Telecom Circle have been answered in the matter of charging of rentals from Private Licence Service Provider for E-1 Port.

15. Paragraph 3 of the said circular is a production of Clause 3.2.2. Paragraph 4, however, may be divided in two parts. The first part provides for a feeder point namely, that within one month of the Vodafone's paying the amount specified in the demand note shall provide for that the testing as per the date fixed in AT schedule of BSNL or when it was ready for testing date, whichever is earlier.

It, however, provides that the rent of the Port concerned starting from the expiry of the said date without waiting for the commissioning of Ports. The second part in effect and substance is an amendment to Clause 3.2.2 of the agreement to the effect that Port charges is said to be payable from the date when BSNL was ready for testing and not from the date of commissioning.

16. Ms. Dhir would contend that the said provision must be read with Clause 3.1.6, the effect whereof has been noticed by us heretofore. It merely provides as to how Port charges would become payable in the event BSNL was ready to provide a connection. The operators are not concerned with the said

date. The actual provision of connection would depend upon the relevant date i.e. the date after testing of the equipments.

Clause 4.1.5 provides for a joint report to be signed by the parties and only thereafter the Ports become fit for use.

17. It is not in dispute that all the earlier bills were raised on the basis of actual commissioning of Port charges.

The charges for causing delay attributable to CMTS provider, thus, arose in terms of the aforementioned circular and not by reason of Clause 3.1.6 or 3.2.2. Licence agreement provides that the Port charges would be payable from the date of commissioning and by reason of any circular letter, the same cannot be converted into the date of BSNL's being ready therefor.

The circular letter also provides for obligations on the part of the BSNL. Paragraph 5 providing for the commissioning of Port, states that the rent for the Ports in the event of the eventualities specified therein comes into effect, it shall start one month from the date of start of acceptance, distinct from the Ports by BSNL. It is, thus, evident that the levy of Port charges in terms of the said circular letter, would start earlier from the date of commissioning.

When a demand by way of advance is made, it would mean that BSNL was ready to provide the Ports upon taking recourse to the procedure mentioned therein and not otherwise.

18. This aspect of the matter is squarely covered by a decision of the Supreme Court of India in BSNL Vs. BPL reported in (2008) 13 SCC page 579 and by this Tribunal in Appeal No. 8 of 2006 – BSNL Vs. TRAI.

19. Ms. Maneesha Dhir, however, would rely upon a decision of this Tribunal in Cellular Operators Association of India Vs. Department of Telecommunication – Petition No.252 of 2011 disposed of on 12.4.2012.

In that case, the question which arose for consideration was as to whether the circular letters issued by the DoT having been accepted and acted upon, the same were binding on the operators. It was held to be binding keeping in view the conduct of the parties.

The said decision cannot be said to have any application in the instant case.

20. Ms. Dhir, however, would rely upon another judgment of this Tribunal in Aircel Ltd., Chennai Vs. Union of India – Petition No.115 of 2010 decided on 26.5.2011, wherein it was stated that additional bills can also be raised on the basis of the audit reports. The said decision also has no application.

21. The Petitioner, apart from the fact that some demands have been raised beyond the specified period of limitation, must be held to be prejudiced as it

was not in possession of documents relating to eight cases. It asked for the copies thereof, which have not been supplied.

22. Learned counsel for each of the parties has made endeavours to show that the delay in commissioning the port was attributable to the other side. However, keeping in view the fact that some disputed questions of facts were required to be gone into, in our opinion, the principles of natural justice were also required to be followed.

Merely, on the basis of audit objection, the demands could not have been raised and that too after a long time.

23. We, as at present advised, also do not intend to enter into the controversy as to whether the supplementary bills could be raised after a period of six months keeping in view the provisions of Section 28 of the Indian Contract Act.

It may, however, be of some interest to note that whereas in most of its responses, the BSNL did not assign any reason for the purpose of rejecting the representation(s) of the Petitioner despite a large number of documents having been annexed thereto, it also failed to assign any reason even in its reply dated 19.8.2011. If an opportunity of hearing was granted to the Petitioner, it could have shown that the dates mentioned in paragraph 6 of the Respondent's letter

dated 18.8.2011, is misplaced as by reason thereof delay of eleven days has been caused on the part of BSNL.

Sub-paragraph 4 of Paragraph 6 states that some of the documents were not available at its office. If that be so, the documents supplied by the Petitioner could have been seen.

24. Sub-paragraph 5 of paragraph 6 appears to be based on surmises and conjectures as the words “might be delayed’ have been used which clearly goes to show that the Respondent was not sure as to whether any charges could be levied for that delay attributed to the Petitioner.

It is in this regard, we may notice the details furnished by the Respondent in its provisional bill dated 17.12.2011.

It is not clear as to how the period of delay has been calculated.

It has not been taken into consideration the additional documents filed by the Petitioner. Such a case has not been made by the Respondent in its earlier correspondences.

25. In stead of the said position, the delay was sought to be explained by the Respondent only by its replies dated 09.8.2011 and 19.08.2011, the errors contained therein have been pointed out by the Petitioner.

26. We may notice that so far as the response of the Respondent dated 09.8.2011 is concerned, BSNL has accepted that they had been adjusting the outstandings of the demands in respect of non-payment of any other bill by way of interest which would be a subject matter of a demand in terms of clause 3.2.2.

Whereas delay has been attributed on the part of the Petitioner, if it has not responded to any of the letter within one day, the Respondent should have followed the same rule in its own case, as the parties were entitled to the level playing field.

Paragraph 3 of the letter dated 09.08.2011 again points out non-payment of a demand in respect of Akola SSA, although there was no delay in testing or commissioning. Immediate action in that behalf on the part of the Petitioner was accepted and acknowledged.

27. Whereas again surmises were raised in paragraph 4 of the said letter, we have noticed heretofore that the circular letter dated 22.03.2005 categorically states that proof of default must be furnished, which cannot be done by way of assumptions and presumptions. As is evident, paragraph 5 and paragraph 6 of the said letter are based on assumptions.

28. For the reasons aforementioned, the impugned demands cannot be sustained. They are set aside accordingly.

Respondent is hereby directed to refund the amount deposited by the Petitioner on the threat of disconnection with interest at the rate of twelve percent per annum from the date on which they are deposited till the date of actual refund.

29. In the facts and circumstances of this case, the Petitioner shall be entitled to costs. Advocate's fee is quantified at Rs.50,000/-.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

rkc