TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : July 19, 2012

Petition No. 328 of 2011

Bharti Airtel Ltd. …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 & Mr. Tushar Singh, Advocates

For Respondent : Ms.Maneesha Dhir & Mr.K.P.S. Kohli & Mr.Abhishek Kumar, Advocates

J U D G M E N T

1. Effect of a judgment inter parties is one of the principal questions which arise for consideration in this petition which has been filed by

the Petitioner herein, a licensee in terms of Proviso to Section 4 of the Indian Telegraph Act 1885.

2. Respondent is a Public Sector Undertaking dealing in rendition of Telecom Services.

3. The parties hereto entered into an interconnect agreement in respect of CMTS services on or about 28.2.2002. Inter alia, on the premise that the calls originated from the network of the Petitioner and terminated in the Respondent's network bore no CLI number as is mandated under the inter connection agreement, the latter raised demands on the former for a sum of Rs.22,01,36,277/- for the period May, 2003 and January, 2004.

4. Another bill was raised for a sum of Rs.71,76,882/- for the period February, 2004 and November, 2004.

5. So far as the first bill is concerned, most of the non-CLI calls comprised of those, which were made to the emergency number.

6. So far as the second bill is concerned, it was a case of wrong routing but according to the Petitioner, the calls originated from in roamer subscribers calling from the concerned circle and thus, they terminated in right Trunk Group. The said contention did not find favour with the Respondent.

7. It is not in dispute that so far the CMTS services provided for by the Petitioner is concerned, similar demands were raised. The said

bills were subject matter of a petition filed by the Petitioner before this Tribunal which was marked as Petition No.108 of 2008.

8. The alleged unauthorized calls whether for the basic service operation which was the subject matter of the said Petition No.108 of 2008 or the Cellular services as in the instant case, originated from the same Point of Interconnection namely Malleshwaram.

9. By reason of a judgment and order dated 11.2.2010, this Tribunal allowed the said Petition No.108 of 2008 and set aside the demands raised therein; opining inter alia, that Clause 6.4.6 of the Interconnect Agreement which was inserted on or about 21.7.2004 had a prospective effect and was, thus, not applicable.

10. The first impugned bill herein is dated 23.7.2008 for a sum of Rs.76,32,711/-; the break up whereof is as follow:

1st	Month	Type of call	Count	Duration (Sec)	MCUs	% of violation	% of tgp violation	< OR > 0.5% Violation	Violln Dur in Sec	Violln Dur in min	Violn mcu	Highest TGP Rate	Amt billed already	Amt to be billed for	Net amount to be claimed
		Feb													
47	200402	Airtel Intra Mob (Ok)	3985981	322001177	44055056										
		CLI Vio													
47	200402	impCLI	1119	127187	17247	0.0278									
47	200402	Less 10	64	7937	1088	0.0016									
47	200402	NoCLI to 100	11697	222991	49422	0.2903									
47	200402	NoCLI to Other	193	19029	2599	0.0048									
		Routing Vio													
47	200402	Inter Mob 200-500	16767	1483722	022243	0.4162									
47	200402	Inter Mob> 500	13098	1213193	165330	0.3251									
			29865	2696915	367573	0.7413	0.7413	>0.5%	325075236	5417921	44492985	1.10	4,449,298.60	5,959,712.66	1,510,414.16
			4028919	325075236	44492985	1.0657									
		Mar-04													
47	200403	Airtel Intra Mob (Ok)	4374242	362986830	50102199										
		CLI Vio													
47	200403	Less 10	75	6169	852	0.0017									
47	200403	Impcli	1032	113738	15600	0.0234									
47	200403	Nocli to Other	40	9473	1279	0.0009									
		Routing Vio													
47	200403	Inter Mob 200-500	17060	1580308	218047	0.3873									
47	200403	Inter Mob> 500	12913	1230837	169873	0.2931									
			29973	2811145	387920	0.6804	0.6804	>0.5%	365927355	6098789	50507850	1.10	5,050,785.00	6,708,668.18	1,657,883.18
			4405362	365927355	50507850	0.7064									
		Apr-04													
47	200404	Airtel Intra Mob (Ok)	2843463	232010548	31794968										
47	200404	Intra Mob Other	1	80	11	0.0000									
		CLI Vio													
47	200404	NoCLI to 100	1	33	7	0.0000									
47	200404	NoCLI to Other	8	814	99	0.0003									

47	200404	ImpCLI	777	97964	13372	0.0271									
47	200404	Less 10	40	4084	561	0.0014									
		Routing Vio													
47	200404	Inter Mob 200-500	13854	1261267	173657	0.4830									
47	200404	Inter Mob> 500	10280	951046	131027	0.3584									
			24134	2212313	304684	0.8414	0.8414	0.5%	234325836	3905434	32113702	1.10	3,211,370.20	4,295,973.66	1,084,603.46

Petitioner filed a representation to the Respondent inter alia contending that there existed various documents to show that the calls in question were in roamer calls and if a customer availing roaming services calls a local number from Karnataka to Karnataka, the CLI would show the local trunk group; whereas if he makes a call from Karnataka to Delhi, the same would be handed over to the TAX of the Respondent.

11. The said representation was rejected by the Respondent by an order dated 21.3.2011.

12. The quantum of the billed amount was however, revised to Rs.72,75,000/-. Petitioner contends that the bill in question was not for wrong routing.

13. Petitioner was called upon to furnish CDRs. By a letter dated 17.5.2006 Petitioner contended that the CDRs could not be furnished as a period of two years from the date of first bill i.e. May, 2004 expired and as such, they were not preserved.

14. It may be placed on record that on 17.5.2006 a composite bill till November, 2004 was issued. Petitioner was also asked to supply the CDRs so as to enable the Respondent to ascertain as to whether the calls were non-CLI ones.

15. The bill was modified on or about 7.7.2009 for the period

February, 2004 and November, 2004, stating:

> "Sub: Payment of violation bill raised for routing Non-CLI/Incomplete CLI/Invalid CLI calls on 'DA' TGP at Malleswaram Tandem POI during May-2004 to Nov., 2004 by M/s. BAL CMTS.
>
> A Bill for Rs.76,32,771/- with No.1622825705 dt. 30/06/2009 has been raised in r/o wrong routing & Non-CLI/Incomplete CLI/Invalid CLI calls on "DA TGP" at Malleshwaram Tandem POI during Feb-2004 to Nov 2004 by M/s BAL CMTS. The copies of the bills are enclosed herewith to expedite payment from your end.
>
> The violation bills upto Jan 2004 for Rs.22,01,36,277/- along with Interest Bill for Rs.3,17,90,091/- are still pending. Kindly arrange to make payment of these bills also along with B.No.1622825705 immediately on or before 14/07/2009. If payment is not forthcoming on or before the prescribed period i.e. 07/07/2009, BSNL is constrained to take action as per the Interconnect Agreement pl.
>
> The Lr of even No. dt. 30/06/2008 may be treated as cancelled pl."

16. It is not in dispute that from time to time the parties hereto exchanged communications. They have also met from time to time. Respondent asked the Petitioner to supply CDRs and/or unprocessed CDRs for periods specified therein. Inter alia, on the premise that the Petitioner had not supplied unprocessed CDRs and furthermore failed to supply the IMEI numbers, its representations were rejected.

17. It is also not in dispute that the Respondent issued various disconnection notices from time to time but on representations made by the Petitioner, the same were not given effect to..

18. Indisputably, Clause 6.4.6 was inserted in the interconnection agreement by way of Addenda I on or about 21.7.2004.

19. It reads as under:

6.4.1 Unauthorised 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 be free to charge the UASLs the higher IUC, as applicable for unauthorized call, for all the calls recorded on these ports from the date of provisioning of that POI or for the preceding two months whichever is less. In addition, BSNL shall also have the right for taking other legal actions including disconnection of POIs or temporary suspension of the Interconnection arrangements under misuse. In case the BSNL wishes to disconnect the POI, it shall give a one-week notice to UASL. If the unauthorized routing of calls to BSNL is not removed within one week, BSNL shall disconnect the POI.

20. Clause 6.4.6 was amended by reason of Addenda VI dated 19.7.2005, which reads as under:

"6.4.6 WRONGLY ROUTED CALLS

(a) Unauthorised 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 PoIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever 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 groups 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 & 6.4.6 (b) above for Incoming International call, 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 Interconnection arrangements under misuse."

21. Our attention has also been drawn to circular letters dated 28.1.2004, 29.1.2005 and in particular paragraph 11 thereof being as

under:

> “The CLI based barring facility shall be activated at the POIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk group only. Wherever it is technically not feasible to activate CLI based bearing, periodic monitoring of the incoming trunk groups shall be done by BSNL to ensure this objective. The calls received without CLI by BSNL from various operators shall be charged at the highest slab i.e. as for ISD Calls. In case such calls are received by BSNL on a trunk group not meant for such calls then all the traffic received on such trunk group for that month/billing cycle shall be charged at the rates applicable for IUC of incoming ISD Calls.

21. Para 11 of the circular letter dated 29.1.2005 reads as under:

> “The CLI based barring facility has been activated by BSNL at the POIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk group only. Wherever 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. In case of wrongly routed calls IUC shall be charged as below:
>
> (a) Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC (including ADC) is higher than the IUC (including ADC) applicable for calls prescribed in that trunk group, then BSNL shall charge the concerned private operator the highest applicable IUC (including ADC), 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) Wherever it is technically 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.

(c) When CDR based billing is introduced in BSNL's network some of the trunk groups shall be merged. If unauthorized or Incoming International call or without CLI call or call with tampered CLI is handed over to BSNL at the merged trunk group, then BSNL shall charge the concerned private operator the highest applicable IUC (including ADC), as prescribed in clauses 6.4.4 (a) above for unauthorized calls & 6.4.4 (b) above for Incoming International call, without CLI call, call with tempered 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 Interconnection arrangements under misuse."

22. Unlike some other interconnect agreements, the said Addenda was given only a prospective effect.

23. One of the questions therefore, which would arise for consideration is as to whether the bill for the period May, 2003 and January, 2004 could not have been raised; Clause 6.4.6 having been inserted in July, 2004.

24. As far as the bill dated 30.6.2009 is concerned, from a perusal thereof it would appear that although it is accepted that the calls were made to the emergency numbers which can be done even from a

mobile without a SIM card, according to the Respondent as the number of calls exceeded 0.5% of the total calls Clause 6.4.6 would be attracted.

25. Respondent does not deny or dispute that questions raised by the Petitioner herein is covered by the aforementioned judgment of this Tribunal dated 11.2.2010 upto 20.7.2004, but urges:

1. The said judgment having been appealed against and pending before Supreme Court of India, this Tribunal should not proceed with the matter.
2. Some relevant circulars having not been brought to the notice of this Tribunal, the ratio of the said judgment should not be applied in this case.
3. In its representations the Petitioner having failed to question the validity and/or applicability of Clause 6.4.6, it is estopped and precluded from raising the said contentions herein.
4. The bill having been raised for the first time in the year 2006 and subsequent bills being either in modification or in affirmation thereof, this petition is barred by limitation.

26. Before us, the matter was argued by learned counsel for the parties at great length spreading over several days.

Our attention has been drawn to the circular letters issued by the Respondent as also the correspondences exchanged between the parties more than once.

27. We, however, intend to refer to only the relevant circulars and correspondences at an appropriate stage.

This Tribunal in its aforementioned judgment dated 11.02.2010 framed the following question:

1. Whether the respondent is legally and factually justified in invoking clause 6.4.6 of the agreement in the peculiar facts and circumstances of the case?

28. Upon taking note of the provisions of the Telecommunication Interconnection Usage Charges Regulations, 2003, which came into force with effect from 1.5.2003 as also the purported implementation circulars issued by the Respondent on 24.4.2003 and 28.1.2004, it was opined:

(i) By reason of the said purported implementation circulars, no additional fiscal liability could have been imposed being not contemplated under the Regulations.

(ii) It was not a case of handing over calls at wrong trunk group nor the Petitioner was guilty of wrong routing or tampering of CLI.

(iii) Respondent, despite being required to put infrastructure for barring non CLI calls, did not do so.

(iv) The preamble of the interconnect agreement and the Clause 1 thereof would clearly show that the Addenda I was prospective in nature.

(v) The conditions precedent for applying the said Clause 6.4.6 were:

(i) "The call must be delivered in a wrong trunk group.

(ii) Local calls if handed over to the STD/ISD port, the same would not apply but converse is true.

(iii) Calls must attract higher I.U.C. Charges."

(vi) A circular letter imposing additional fiscal liability cannot be given a retrospective effect.

(vii) The circular letters issued by the Respondent do not have the force of a statute. Respondent by reason of such circulars even could not have filled the gap.

(viii) Paragraph 11 of the circular letter dated 28.1.2004 could not have been enforced until it became a part of the contract.

(ix) Even bilateral agreement cannot be amended by issuing unilateral circulars.

29. Ms. Maneesha Dhir, learned counsel appearing on behalf of the Respondent has, however, drawn our attention to the definition of CLI as also Clauses 2.5, 2.5.1, 2.5.2 and 2.5.3.

They read as under:

> "CLI or "Calling Line Identification" means the information generated by the Network capability which identifies and forwards the calling number through the interconnected BSNL's/CMTS PROVIDER's Network."

2.5 CALLING LINE PRESENTATION

2.5.1 BSNL's and CMTS PROVIDER's network shall wherever technically possible, transmit and receive Calling Line Identification. The Calling Line Identification from CMTS network shall contain mobile subscriber number including '98'. The Calling Line Identification from BSNL shall contain area code and subscriber number depending on the technical feasibility.

2.5.2 Malicious call line identification shall be transported across the network as required by Law Enforcing Agency.

2.5.3 Disclosure of identity of calling line will be subject to provisions of law and this facility will be made use of for technical, commercial and administrative requirements as prescribed by the Government of India any other competent authority from time to time.

30. We may also notice that by reason of an internal circular letter dated 13.6.2005, while considering the representation filed by the

operators that non CLI calls may not be registered in the TAX of the Respondent for various reasons, in the event, non-CLI calls are less than 0.5% only, double of the charges in respect of the calls in question should be made in stead and in place of the highest IUC charges. It reads as under:

> "Several instances have come to the notice of this office through various BSNL filed units that due to handover of a small number of non-CLI, invalid/incomplete CLI calls by private access providers to BSNL network, the BSNL field units in such cases have charged all calls received at the PoI at the rate of incoming ISD calls. This has resulted in very high IUC bills which have been disputed by the concerned private access providers.
>
> 2. Various reasons for handover of such non-CLI or invalid/incomplete CLI calls have been reported. These reasons may be due to calls originating from mobile without SIM card, transient faults in the switch, software version/signaling problem, non-recognition of CLI by exchanges, lack of capability to analyze all digits by some exchanges, operator assisted trunk calls booking, non-CLI calls originated by BSNL network and meant for private operators' network which is in turn forwarded back to BSNL network due to activation of call forwarding feature by private operators' subscribers, roaming call forwarded cases wherein non-CLI or invalid/incomplete CLI calls meant for cellular subscribers roaming in other service areas/networks were routed via BSNL TAXs etc. In all such cases where it is sufficiently established by concerned BSNL field units that the reasons for handover of non-CLI, invalid/incomplete CLI calls to BSNL network was not of deliberate misuse or routing/ tampering of CLI of incoming ISD calls at PoI, and where the private operators give an undertaking that call forwarding to BSNL network has been barred from their network, in all such cases which have

come to notice as well as cases which come to notice henceforth shall be settled as prescribed below.

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.

S.No	**Carriage Involved**	**IUC-1 regime (Rs per minute)**	**IUC-2 regime (Rs. Per minute)**	**IUC-3 regime (Rs per minute)**
1	Terminating SDCA	5.50	4.55	3.55
2	0-50 km	5.70	4.75	3.75
3	50-200 km	5.95	5.20	4.20
4	200-500 km	6.25	5.45	4.45
5	500 km	6.60	5.65	4.65

31. The word `establish' must be given a proper meaning. According to The Concise Oxford Dictionary Establish it means:

> "Establish v.1 set up on a firm or permanent basis. 2 initiate or bring about. 3 (be established) be settled or accepted in a particular place or role. 4 (of a plant) take root and grow. 5. show to be true or certain by determining the facts. 6. Bridge ensure that one's remaining cards in (a suit) will be winners (if not trumped) by playing off the high cards in that suit. 7.[as adj. established] recognized by the state as the national Church or religion."

32. Establishing of the facts specified therein were to be on the part of the BSNL's field units. Respondent by reason of the impugned notices of disconnection/ letters/bills admitted that a large number of

calls were received where the calling party had been calling emergency numbers.

It does not deny or dispute that where emergency numbers are called as for example 100, the question of a call being received with CLI does not arise.

33. It is not the case of the Respondent that the Petitioner masked the calls. No mala fide has been attributed to the Petitioner.

It has not been stated that there had been a deliberate misuse of or tampering of CLI of incoming ISD calls at POI.

For such emergency calls the Petitioner has paid requisite charges in terms of the interconnect agreement.

If somebody calls from a phone of any operator or from any phone without any SIM card, the signals of such operators which is strong shall carry the call.

34. We, therefore, fail to see any reason as to why in respect of such calls, Clause 6.4.6 or the IUC implementing circular could be applied.

A document as is well known must be given a contextual meaning.

Ms. Dhir, however, would contend that clause 6.4.6 is for enforcement of pre-estimate damages being a strict civil liability in terms of Section 74 of the Indian Contract Act.

35. It has been so held by the Supreme Court of India in Bharat Sanchar Nigam Ltd. vs. Reliance Communication Ltd. 2011(1) SCC 394.

Even for the purpose of invocation of Section 74 of the Indian Contract Act, there has to be a breach of the term of the contract. By reason of such breach a party to a contract must suffer a loss. Only in such an event the parties may fix a reasonable amount of compensation by way of a pre-estimated damages. Section 74 would be attracted only in such an event.

36. We fail to understand that when emergency numbers can be called even by the customers of other operators or even without sim cards; how Section 74 of the Indian Contract Act would be attracted, particularly, when even in relation to such cases payment at the rate of Rs.1.20 paisa has indisputably been made.

37. Another internal circular was issued on 25.2.2009, paragraphs 3 and 4 whereof read as under:

> Private service providers, in few cases have come up with the representation to BSNL that in relation to certain miniscule number of calls, which unintentionally get handed over by them at wrong trunk group/ port-where it also does not become possible for the parties to even find out the cause/ reasons in that regard- BSNL may consider of not treating these miniscule number of calls as wrong routed calls in a manner to not to apply to provisions of clauses 6.4.6 (a) of Interconnection Agreements to the fullest possible extent and some relief be extended to them.

2. This matter has been examined in Corporate Office and it has been decided that in case for a monthly billing cycle where such miniscule number of calls, for which applicable IUC is higher than the IUC applicable for calls prescribed in that trunk, (which unintentionally get handed over by them at wrong trunk group/ port- where it also does not become possible for the parties to even find out the cause / reasons in that regard) are less than 0.5% of the total number of calls received at that POI during the month, then in such cases BSNL may charge for double the number of such wrongly routed calls at the IUC rates applicable for such calls. In case multiple type of such wrongly routed calls (which unintentionally get handed over by them at wrong trunk group/ port – w4here it also does not become possible for the parties to even find out the cause/ reasons in that regard) have been received on the trunk group, the highest IUC rate out of the wrongly routed calls may be applied to all such wrongly routed calls but to the extent of double the number of such calls.

3. It is, however, reiterated and re-emphasized that the cases of receipt of such wrongly routed calls (as mentioned in paras 2 & 3 above) – where their number is more than 0.5% of total calls received at the POI shall, however, continue to be dealt with as per the provisions of the Interconnect Agreement, i.e. charging all the calls at the higher rat in terms of clause 6.4.6(a) and this clause will continue to be applied to its fullest extent.

4. These guidelines shall be applicable to all the cases of such miniscule number of wrongly routed calls (which unintentionally get handed over by them at wrong trunk group / port – where it also does not become possible for the parties to even find out the cause/ reasons in that regard and less than 0.5% of the total calls received at the POI – as mentioned in paras 2,3 & 4 above) from the date of implementation of IUC regime i.e. 1st May, 2003.

> However, the cases of wrong routing of calls which have already been settled shall not be re-opened.

38. Ms. Dhir contended that Clause 6.4.6 should be construed having regard to the aforementioned implementation circular as also internal circular dated 25.2.2009 and on such construction, it should be held that retrospective effect was given thereto.

39. It is difficult to accept the submission of Ms. Dhir that Clause 6.4.6 which was specifically given a prospective effect should be construed to be retrospective in the light of the purported implementation circular dated 28.1.2004 or 29.1.2005.

40. No authority in support of the said proposition has been cited. No principle of interpretation of contract has been brought to our notice so as to enable us to hold that a prospective provision would become retrospective or can be construed to be retrospective by reason of a subsequent circular. The said submission moreover, is in the teeth of the said judgment dated 10.2.2010.

The said contention, therefore, is rejected.

So far as in roamer calls are concerned the Respondent was obligated to make enquiries with regard to the correctness or otherwise of the explanation offered by the Petitioner.

41. If it is technically feasible that a customer of Delhi when visits Karnataka and makes a call at a Karnataka number the same would

show the local number and if he makes a call to Delhi the same has to pass through the TAX of the respondent. The entire mechanism involved in the process must be taken into consideration.

42. Whether the principles contained in Section 74 of the Contract Act is attracted or Section 73 thereof, the reasonableness of demand can always be a subject matter of challenge. We, however, need not go into this question in the present proceeding being not necessary.

43. We agree with Mr. Chawla that assuming that the Petitioner ought to have retained the unprocessed CDRs despite Clause 7.2 of the interconnect agreement apart from the processed CDRs, there are several other documents to establish the fact that the calls were in roamer ones; verification whereof could have been made with reference to several other documents. Respondent in none of the correspondence rejected the claim of the Petitioner. It did not say that it's case cannot be verified from other documents apart from CDRs. Discrepancies in the CDRs, moreover, even were otherwise possible as would be evident from the Respondent's own circular letter dated 13.6.2005.

44. For the purpose of appreciating the rival contentions of the parties we may notice only a few correspondences, although, as noticed heretobefore, the learned counsel had taken us through the entire bunch of correspondences.

While, however, doing so, we would not consider documents of similar nature.

45. The first bill was raised on 17.5.2006. Along with the bill, a statement showing sample of such calls was enclosed. Advisedly Clause 6.4.6 was not invoked. Some sample calls of 2003 and 2004 only were annexed. No details, however, had been enclosed.

46. Reference has been made only to the internal circular dated 13.6.2005, although termed as a Regulation by the Respondent.

Petitioner replied thereto by its letter dated 24.5.2006 contending:

> "As a service provider we are well aware of the regulation and it has been our constant endeavor to comply, adhere to all the laid down principles and regulations and have largely exhibited strong corporate and commercial governance.
>
> The network across all our circles are quipped with the latest and state of art technology and handing over some non-CLI calls are highly improbable. Before giving our detailed explanation to the demand issued from BSNL-Malleswaram POI for the period May 2003 to January 2004; February 2004 to January 2005 & from February 2005 to August 2005 wherein BSNL has penalized BTVL for handing over some non-CLI calls at Malleswaram, Bangalore, we request you to consider our below mentioned observation and request for the following:
>
> 1. The statement which you have enclosed showing sample of calls for the year 2003 & 2004 are only few in number. The sample calls made available for the year 2003 are almost mostly emergency numbers and for the year 2004, the sample calls are

mostly inroamer numbers. For the year 2005, there is only one number provided to us.

2. Based on the few sample calls, it would be difficult for us to look & investigate completely into the issue. Hence we request you to kindly provide CDRs for the entire period for which violation is alleged in order to enable us to look and investigate into the issue.

3. We request that one person be nominated from your end and further provide us with an opportunity to personally come with all relevant data and records and reconcile the same with the CDR of BSNL. From our end, we would be deputing the following personnel namely, Mr. A P Cletus (Head-Switch), Mr. Shashi Bhushana (Sr. Executive-Finance) & Mr. S Nagaraj (Sr. Manager-Regulatory).

4. In the meanwhile, we request you not to take any precipitative action against BTVL. Needless to state that BTVL is committed in providing all cooperation, evidence and record and further request you to keep the demand note issued under abeyance."

47. Petitioner, thus, invoked the principles of natural justice. Yet again by a letter dated 30.5.2006 the Respondent asked for supply of CDRs of three consecutives days once in a year at every POI location;

In response thereto the Petitioner by a letter dated 30.5.2006 stated:

"No.BGTD/IUC/BML/CMTS/VIO DATE: 30/05/2006

Sir,

Subject: Handover of Non-CLI, Invalid/incomplete CLI calls.
Reference: Your letter dated 24/05/2006

> Please refer to your letter cited above. As per interconnect agreement CDRs for 3 consecutive days once in a year at every POI location can only be given. As such you are requested to inform the dates for which CDR is required to Sheri S Thyagarajan, AGM(EP), VI Floor, Telephone House, Bangalore-1 who is the nodal officer for reconciliation. He is available on Telephone No. 22862120."

48. Three months' CDRs were delivered on 12.6.2006. An analysis thereof was stated in the following term:

> "Subject: Handover of Non-CLI, Invalid/incomplete CLI calls by private access providers.
>
> Reference: Letters bearing No.
>
> (1) BGTD/IUC/BML/CMTS/VIO dated 17/05/2006
>
> (2) BGTD/IUC/BML/CMTS/VIO dated 30/05/2006
>
> This is in continuation to the personal discussion had with you by our colleagues and the subsequent analysis done based on the CDR's provided to us for the dates 7th to 14th for the months of June 03 & May 04. The analysis done is annexed (Annexure 1) hereto this letter. Our findings on the same are as under:
>
> .The calls are either in-roamers or emergency numbers.
>
> .The percentage (%) of violation for the months of June 03 & May 04 is 0.27% and 0.002% and are within the allowable limits of 0.5 %."

49. Respondent by a letter dated 31.7.2006 asked the petitioner to reconcile the CDRs.

50. A committee was constituted to look into this aspect of the matter, but it did not meet.

51. Respondent on or about 20.8.2008 informed the Petitioner that emergency calls shall also be taken into consideration. We may, however, notice the same:

> "Kind reference is invited to your letter cited above. This office has gone through your claims vide situations 1 & 2 and also examined the violation details furnished by BGTD. It is observed from the report sent by BGTD that Non-CLI calls to emergency numbers contributed towards major portion of violation i.e. Non-CLI calls to emergency number (Level 100) alone is greater than 0.5% during the period May, 03 to Feb 04 and Non-CLI calls to other numbers is less than 0.5% during all the months of violation. (Violation details enclosed at Annexure).
>
> In this regard, it is to intimate that BSNL HQ has given clear instructions vide letter dtd 13.6.05 to consider percentage of Non-CLI violation up to 0.5% which includes the calls made without SIM. The same has been reiterated by BSNL HQ in their reply to this office when the case was specifically referred to HQ, for guidelines.
>
> In view of the above, we are constrained to raise the violation bill. Hence, it is regretted that your request regarding Non-CLI calls to emergency numbers cannot be accepted. It is therefore requested to arrange to pay the violation bill before the due date in order to avoid any further action as per Interconnect Agreement."

52. Explanation was furnished by the Petitioner as regards the number appearing both in DATGP of CMTS POI and FDTGP of

NLDO POI stating:

1. "Such instances are common to customers who are located in border areas.

2. Classic example of this would be customers who are located in Hosur, Tamil Nade and whose home networks is TN.

3. While such a customer makes a call form Hosur to any number in Karnataka, the call is routed through the NLDO.

4. The same customer when he moves to Karnataka (inroamer) makes a call to any number in Karnataka, the same is routed through Malleswaram Tax (during the violation period)

5. Hence, the scrutiny of the details billing of such customers would reveal that he has been both in his home network as well as an inroamer in Karnataka on the same day (within few hours)."

Petitioner was asked to pay the demanded amount on 20.8.2008.

53. We may notice the so called violation report annexed with the said letter.

Violation report of M/s BAL CMTS from May 03 to Nov 04					
Month	Total count in the TGP	Non-CLI calls to 100	Percenatage of violation for Non-CLl calls to 100	Non-CLl calls to other levels	Percentage of violation for Non-CLl to other levels
May'03	4014364	37851	0.942889	112	0.002790
Jun'03	4371834	36451	0.833769	72	0.001647

July'03	4409037	30574	0.693439	89	0.002019
Aug'03	4553720	25177	0.552889	158	0.003470
Sep'03	4134152	24523	0.593181	129	0.003120
Oct'03	3696058	22915	0.619985	79	0.002137
Nov'03	3327307	23089	0.693925	140	0.004208
Dec'03	2966070	23733	0.800150	80	0.002697
Jan'04	3507871	18543	0.528611	708	0.011631

We may consider some correspondences with regard to the in roamer calls.

54. Sample call details of `in roamer' calls was furnished by a letter dated 26.9.2008 in the following terms:

Sample of DA calls not available in Roaming statement						
Calldata	calltime	Calling no		Called no	duration	
20040302	223138	9894402105	4741000041	26990179	30	4
20040000	170332	9894402105	4741000041	26990179	3	1
20040320	200357	9894401002	4741000041	20081959	243	33
20040301	105045	9894401003	4741000041	20012114	166	23
20040307	020134	9894401003	4741000041	20012114	44	6
20040307	100000	9894134463	4741000041	23500536	5	1
20040307	110726	9894134463	4741000041	23500536	12	2
20040415	188328	9894401002	4741000041	20081850	55	8
20040423	185840	9894401002	4741000041	23249888	681	91
20040408	185038	9894401002	4741000041	22389900	6	1
20040407	103424	9894401006	4741000041	25534788	615	109
20040410	065114	9894401009	4741000041	20530004	153	21
20040411	066114	9894401008	4741000041	20538115	10	3
20040411	126958	9894401008	4741000041	20538004	35	5
20040411	106528	9894401008	4741000041	20501080	47	7
20040411	180054	9894401008	4741000041	23312277	10	2
20040411	180150	9894401008	4741000041	20001000	18	3
20040411	182843	9894401008	4741000041	20712840	18	2
20040411	200849	9894401008	4741000041	26530054	271	37
20000411	210052	9894401008	4741000041	26638115	20	3
20040412	075408	9894401008	4741000041	26653868	137	10
20040412	10020	9894401008	4741000041	26381327	186	22

55. Relying on or on the basis of the purported data furnished by the Petitioner for the period March, 2004 and April, 2004, it by a letter

dated 3.10.2008 contended that data for the months of March, 2004 and April, 2004 having not been furnished, the question of making any comparison with the said data does not arise. Petitioner by a letter of the same date raised the following questions:

> "In this regard, to enable us to effectively have the issue resolved at the BSNL HQ, may we numbly request your good self's valuable, objective and fair comments to the following points please:
>
> 1) Whether BSNL being a large GSM service provider, agrees that as per GSM standard the calls to emergency number 100 (SOS Calls-112) are technically feasible from the mobile phone without SIM Cards?
> 2) Whether BSNL agrees that the termination of the calls to emergency numbers was allowed to AirTel by BSNL?
>
> 3) Whether BSNL agrees that the calls made to emergency number can be identified with the help of dialed digits present in CDRs?
>
> 4) Whether BSNL agres that the calls made to emergency number have been included while calculating 0.5% of No. of CLI calls?
>
> 5) Whether BSNL agrees that AirTel has already paid the due IUC i.e. Rs.1.20 per minute for these calls as per the IUC billing for the calls made to emergency number?"

56. Respondent in reply to the Petitioner's letter dated 3.10.2008 did not say as to how the purported data for March, 2004 and April, 2004 which had not been furnished by the Petitioner came to be compared with the other data.

It, however, asked for certain data for the months of June, 2003 to November, 2004 and that too to be supplied within a period of one week, stating:

> "Kindly refer to the above-cited letter. The billing statement provided by you was, for the period of 08.03.04 to 07.04.04, copy of which is enclosed herewith for reference. It is requested to furnish roaming statement for the full months of Mar.04 to April 04[01.03.04 to 30.04.04] to verify with the CDRs of BSNL, in respect of the calling number in the list enclosed.
>
> Also it is to intimate that CDR of in-roamers furnished for the months June 03, July 03, Aug 03, Sep.03, May 04, June 04, Sep. 04, Oct.04 & Nov.04, have been compared with BSNL. CDRS and the comparison statement along with sample CDRs is enclosed herewith for reference.
>
> Your comments are requested in this regard, for the call count difference between BSNL CDRs and Airtel CDRs. The reply may be given within a week's time to settle the issue of inroamer calls on DA TGP from, May 03 to Nov 04."

Data for the months of June, 2003 to November, 2004 were supplied. We may notice the same:

Comparison report of Airtel Inroamer CDRs with BSNL CDR

Month	Type of Call	BSNL CDR	Airtel CDR		
		Total Count (A)	No.of CDRs matched with BSNL (B)	No. of CDRs unmatched with BSNL (C)	Total Count (B +C)
June-03	National Inroamer	35135	23919	433	24352
	International Inroamer (ImpCLl)	16814	954	44	998
	Total	51967	24873	477	25350
Jul-03	National Inroamer	32088	18713	88	18801

	International Inroamer (ImpCLI)	20482	1040	45	1085
	Total	52580	19753	133	19886
Aug-03	National Inroamer	30629	19875	116	19991
	International Inroamer (ImpCLI)	21307	1119	14	1163
		51938	20994	160	21154
Sep-03	National Inroamer	26446	22591	164	22755
	International Inroamer (ImpCLI)	8089	671	80	751
		34535	23262	244	23506
May-04	National Inroamer	11460	11268	58	11326
	International Inroamer (ImpCLI)	217	167	46	213
		11677	11435	104	11539
Jun-04	National Inroamer	17584	16382	130	16512
	International Inroamer (ImpCLI)	603	640	4	644
		18277	17022	134	17156
Nov-04	National Inroamer	808	489	0	489
	International Inroamer (ImpCLI)	19	19	0	19
		827	508	0	508

On further representation made by the Petitioner in terms of a letter dated 9.2.2009 the Respondent asked it to provide comments on the purported discrepancies in the in roamer calls count by comparing CDRs of both the parties.

57. The reasons for the discrepancies were furnished by the Petitioner on 20.2.2009.

Payment was again demanded on 4.4.2009. A representation thereagainst was made on 30.6.2009. An additional bill was furthermore issued on 30.6.2009.

A further representation was made by the Petitioner. Thereafter only a demand was raised on 25.8.2009 in the following terms:

> "Subject: Payment of violation bill raised for Routing Non CLI/incomplete CLI/Invalid CLI calls on 'DA' TGP at Malleswaram OCB Tandem POI during the period May 2003 to January 2004-reg.
>
> Reference: BSNL HQ, ND Ltr at 18.8.09
>
> The claim of BGTD towards violation bill for Rs. 22.01 crores for the period May 03 to Jan 04 is towards Non CLI, as Non CLI calls to 100 are >0.5 % during this period (other violation calls are not taken into account). Bill is claimed accordingly as per the guidelines of KTK Circle Office.
>
> This matter is now under scrutiny at BSNL HQ. As BSNL HQ is requesting for CDRs of sample period for 15 days covering violation along with IMEI Nos, you are requested to furnish the CDRs for the period 16.7.03 to 30.7.03 with immediate effect (i.e. by 1500 hrs of 28.8.2009) to this office to furnish the same to BSNL HQs."

58. By another letter dated 25.8.2009 the Petitioner was informed that out of the bill of Rs.76,32,711/- raised by the BGTD for the period February, 2004 and November, 2004, Rs.5,870.96 was for non-CLI/incomplete CLI/invalid CLI and the demand for Rs.76,26,899.58 was towards wrong routing violation.

Petitioner furnished CDRs for the period 16.7.2003 to 30.7.2003 on 28.8.2009. A representation was also made on 7.10.2009. On 7.10.2009 the demand of Rs.76,32,711/- was reduced to Rs.71,76,882/-.

59. It may be noticed that as late as on 3.9.2009, 15.9.2009, CDRs were demanded. Notice was issued to the Petitioner, however, to deposit the outstanding amount by a letter dated 3.10.2009.

The judgment in Petition No.108 of 2008 was rendered on 11.2.2010.

It is in the aforementioned backdrop we may notice the impugned notice dated 21.3.2011:

> "Sub: Payment of violation bill raised for Routing Non CLI/incomplete CLI/Invalid CLI/wrong routing calls on 'DA' TGP at Malleswaram Tandem POI during May 2003 to November 2004 by M/s BAL CMTS.
>
> Ref: 1. BGTD/IUC/BML/CMTS/VIO dated 17/05/2006
> 2. BGTD/IUC/BML/CMTS/VIO/32 dated 3/7/2008
> 3. BGTD/IUC/BML/CMTS/VIO/61 dated 7/7/2009
>
> Bangalore Telecom District raised the Demand Note of Rs. 30,56,85,482/- on M/s. Bharti CMTS towards hand over of Non CLI/improper CLI/invalid CLI/incomplete CLI calls on "DA" TGP at Malleswaram Tandem POI for the period from May 2003 to November 2004.
>
> Subsequently based on CDR analysis, the Demand Note has been revised and the Bill has been raised for Rs. 22,01,26,277/- towards Non CLI/improper CLI/invalid CLI/incomplete CLI calls for the period May 2003 to January 2004 where Non CLI violation is more than 0.5 % excluding inroamer

calls. Wrong routing violations have not been claimed for the period May 2003 to January 2004 as the CLI violation is greater than 0.5 %.

Based on Inroamer calls established by Bharti CMTS, the violation bill for the period February 2004 to November 2004 has been raised for Rs. 71,76,882 (Revised as Rs. 72,75,030/- due to difference in matched count of CDRs) towards Non CLI less than 0.5 % and wrong routing violations.

As the matter was under scrutiny with bSNL Headquarters, the bills were kept pending. Based on guidelines of BSNL Headquarters, the bills as below raised by Bangalore Telecom District is in order under the Clause 6.4.6 of Interconnect agreement.

Sl No	Bill No.	Bill Date	Bill Amount Rs.	Pay By Date
1	1035657830	23/7/2008	4,01,36,277	31/03/2011
2	1035657848	23/7/2008	9,00,00,000	31/03/2011
3	1035657856	23/7/2008	9,00,00,000	31/03/2011
		TOTAL	22,01,36,277	
4	1622825705	30/06/2009	72,75,030	31/03/2011

Hence it is requested to pay the Bills with interest applicable. The Bills, Calculation details and sample calls are enclosed for making payment."

60. A further representation was made by the Petitioner asking the Respondent to withdraw the demand and refund the amount of Rs.39.70 crores along with interest. A disconnection notice was issued on 5.7.2011.

61. We may at this stage consider the question as to whether the principle of Estoppel would apply in this case on the premise that the

Petitioner in its representations failed and/or neglected to question the applicability and/or validity of the said Clauses.

Section 115 of the Indian Evidence Act reads as under:

> "115.Estoppel.- When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

62. The essential ingredients of the said provision, on its plain reading, are:

1. There has to be a declaration, act or omission on the part of one person.
2. By reason of such declaration, act or omission a person intentionally caused or permitted another to believe that the same was true.
3. That another person acted upon such belief.
4. In such an event the said person would not be permitted to deny the truth of that thing.

Interpretation of a contract and in particular the question as to whether a clause imposing fiscal liability would be prospective or retrospective is a question of law.

Evidently, the Petitioner from time to time made representations

contending that :

1. it has not deliberately committed any act in breach of the interconnect agreement.
2. call to an emergency number would lead to registration of non-CLI as the same is capable of made from even mobiles without SIM cards.
3. petitioner has paid the IUC charges at the rate of Rs.1.20 to BSNL in terms of the interconnect agreement for calls to emergency numbers.
4. If such emergency calls are excluded, the number of calls having been terminated in the TAX of the Respondent would be less than 0.5%.

63. It is, moreover, not correct to contend that the Petitioner never raised such a question inasmuch as amongst others, perusal of its representation dated 4.8.2008 would show that such a question has been raised in the following terms:

> "We refer to the letter referred to above on the subject of Handover of Non-CLI, invalid/incomplete CLI calls by private access providers. At the outset, we would like to submit that for the period in question the demand is not sustainable as the clause enabling the levy of penalty was for the first time introduced only on February 1 2004 and was intended by BSNL itself to be effective from the said date. The said provision therefore should not be invoked retrospectively. Without prejudice to the said contention we beg to aver the following facts for your kind consideration and deliberation:-

Sir, for your kind information, several meetings were held between us and the BSNL Officers consisting of the Chief General Manager, General Manager (BD), Deputy General Manager (VAS) and the Senior Divisional Engineer etc., wherein we had made our detailed presentations and had cogently explained the cause which gave rise to the issue.

During the said presentation we had requested the CGM & his officers to exclude the Calls made by Inroamers and the Calls made to emergency numbers namely 100 originating a. with SIM or b. without SIM for the following reasons:-

a. that of calls made to 100 (emergency No.) the origin and destination of calls to emergency numbers are clearly established and that we have also paid the necessary charges to BSNL, although there was no possibility of our charging such users since they accessed our network without even any SIM in their mobile & were never our registered subscribers, which un-fortunately is a standard GSM feature in any GSM network & handset for emergency calling. Hence, calls made to emergency numbers without SIM need definitely to be executed or isolated while arriving at the percentage of violation. Additionally, the calls made to 100 with sim should also be excluded since it merely met emergencies of the subscribers without any other malafide intention.

b. That we have also provided the inroamer details and bills of postpaid customers of other Airtel circles who were roaming in Karnataka Circle and bills are not raised for the prepaid customers and we had also provided the subscriber enrollment form of prepaid customers to establish that the Airtel Prepaid customer had roaming / STD facility. Hence, calls made by inroamers too need to be excluded or isolated while arriving at the percentage of violation; and

c. That Airtel is not guilty of any mala fide intentions.

The series of meetings culminated in BSNL instructing us for a host of data in support of our submission & the same was also provided by us from time to time.

After the scrutiny of the data provided by us, the said officials had appreciated the submissions put forth by us regarding the calls made by inroamer and have subsequently isolated them for the purpose of arriving at the percentage of total violation.

With respect to our submissions that the Calls to emergency numbers with SIM or without SIM should also be excluded while arriving at the percentage of violation, the CGM & his team of officers fully appreciated our submissions that the facility of calling emergency numbers have been facilitated by us not only a fulfillment of the licensing conditions, but also as it is an Globally accepted standards being followed by all GSM operators. The CGM & his officers had also appreciated the fact that on this front, we have not made monetary gains as we have not charged the customers for making such calls, though we had paid the necessary ADC &termination charges to BSNL and continue to do so even to date. The fact that BSNL has not suffered any losses on this account was also fully appreciated by the CGM & his officers. During the said meetings CGM & his officers had also often remarked that they were fully convinced that absolutely no mala fide intentions could be attributed on the part of Airtel. However, the CGM & his officers had informed us that their hands are tied owing to the BSNL HQ's circular dated 13/06/05 in this regard and that only the BSNL Head Quarters can issue any directions regarding the exclusion of all calls to emergency numbers while arriving at the percentage of violations calls.

Accordingly, vide a letter dt. 10/07/08, our corporate office at Delhi have made a detailed representation to the Chairman & Managing Director and a copy of the same is attached for your kind perusal.

Hence, as our representation to CMD is pending, may we humbly request you to kindly keep the said Demand Note in abeyance until such time that the same is disposed off by the CMD.

May we also bring it to your good self's kind notice & favorable consideration that the said Demand Note was received by us only on Friday (i.e., 01/08/08) as the said demand Note has been erroneously sent by your good self's office to a different address. Hence, as we had received it only in the afternoon of 01/08/08, we are left only with two working days time to comply with the same which is absolutely insufficient & unreasonable taking into consideration the enormity of the Demand.

We also place the following for your good self's kind information & favorable consideration that as per the provisions of the Interconnect Agreement, 30 days prior notice needs to be given prior to any disconnection and that too only after the expiry of the reasonable time granted under the Notice of Demand calling for payment. Hence, may we humbly request you to kindly desist from disconnecting our POIs as indicated in the said Demand Note for the reasons stated herein above, without issuing a proper Notice of Disconnection as contemplated under the provisions of the Interconnect Agreement as the disconnection will not only caused unnecessary loss and hardship to our customers but also to your customers as well resulting in very high customer dissatisfaction.

In these circumstance, may we once again request you to kindly keep the Demand in abeyance & not to initiate any coercive or precipitative action against us until our said representation pending before the CMD of BSNL is disposed off.

We also take this opportunity to humbly request you to kindly address all your communications to us at the address mentioned herein as it will avoid any delay in receiving you communications to us."

64. On a principle of law, it would also not be correct to apply the principle of `Estoppel' so far as validity and/or applicability of a Clause is concerned, giving rise to imposition of additional fiscal liability.

The circular letter dated 13.6.2005 by itself does not constitute an agreement. The Headquarter of BSNL thereby had merely issued instructions to the concerned authorities to charge the double of the rate of calls and not at the highest rate.

Application of the provisions of Clause 6.4.6 relates to imposition of a higher amount of penalty. So was the effect of paragraph 11 of the circular letter of 29.1.2005.

65. Petitioner had been raising a contention of `least resistance'. It cannot be said to have made a representation to the Respondent that it would not question the applicability of Clause 6.4.6 of the inter connect agreement.

Moreover, the Respondent did not alter its position pursuant to such a representation. It did not grant any benefit to the Petitioner even on the basis of said circular letter dated 13.6.2005.

The effect of a circular letter had been considered by the Supreme Court of India in Bharat Sanchar Nigam Limited & Anr. vs. vs. BPL Mobile Cellular Limited (2008) 13 SCC page 597.

66. By reason of a circular letter alone a liability cannot be created In a case of this nature where additional fiscal liability is sought to be imposed having regard to the calls made to the emergency numbers by a third party with whom the Petitioner has no concern, it cannot be made liable. For invoking Clause 6.4.6 of the interconnect agreement, some violation thereof is imperative.

There may also be some force in the contention of Mr. Navin Chawla that the calls to emergency numbers cannot be said to be unauthorized, the requisite charges therefor, having been paid.

67. In a case like the present one the underlying purpose for inserting Clause 6.4.6 must be kept in view. In terms of the IUC Regulations the Respondent would be entitled to certain charges.

Clause 6.4.6 was inserted by way of pre-estimated damages. It was considered to be reasonable in the event of one party obtaining a benefit by committing a breach of contract.

68. If certain type of calls so far as emergency numbers in respect whereof, neither the connection with the operator is necessary and if the subscribers of the others can avail the said benefit, it is difficult to conceive as to how by reason of such calls the Petitioner could derive any monetory benefit, particularly when both parties agreed that the Respondent would be getting a fixed sum therefor from the operators.

69. We, therefore, do not see any reason as to why the Petitioner should be held to be estopped and precluded from raising the contentions herein on applying the principle of estoppel.

Ms. Dhir, however, had relied upon the decision of the Supreme Court of India in Bharti Cellular Ltd. vs. UOI & Anr. (2010) 10 SCC 174 and Cauvery Coffee Traders, Mangaoore vs. Hornor Resources (International) Company Ltd. (2011) 10 SCC 420.

70. In Bharti Celluar (Supra), the Petitioner therein without any demur accepted the terms of the license and paid the amounts payable thereunder, but later, questioned the method of computing the number of subscribers for determining the license fee payable from the fourth year onwards to contend that the term `subscriber' should be understood to be such as having activated cellular mobile telephone connection from the licensee.

In the aforementioned fact situation, it was held:

> "8. There is, in our opinion, no legal infirmity in the view taken by the Tribunal. Once the appellant-petitioner had specifically and unconditionally agreed to accept the migration package and given up all disputes relating to licence agreement for the period up to 31-7-1999, it was not open to it to turn around and agitate any such dispute after availing of the migration package. A party which has unconditionally accepted the package cannot after such acceptance reject the conditions subject to which the benefits were extended to it under the package. It cannot reject what is inconvenient and onerous while accepting what is beneficial to its interests. The package having been offered subject to the

conditions that all disputes relating to the licence agreement for the period ending 31-7-1999 shall stand abandoned by the operators, there was no room for going back on that representation.

9. Relying upon the decision of this Court in *City Montessori School* v. *State of U.P.*[1], *New Bihar Biri Leaves Co.* v. *State of Bihar*[2] and *R.N. Gosain* v. *Yashpal Dhir*[3], this Court has in *Shyam Telelink Ltd.* v. *Union of India*[4] held that no one can approbate and reprobate and anyone who has accepted with full knowledge or notice of facts, benefits under a transaction which he might have rejected or contested, cannot question the transaction or take up an inconsistent position qua the same. We have said: (*Shyam Telelink case*[4], SCC p. 172, para 23)

"*23*. The maxim *qui approbat non reprobat* (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument."

In the light of the above, the view taken by the Tribunal is legally unexceptionable."

71. In Cauvery Coffee Traders (Supra) the doctrine of `Aprobate and Reprobate' was applied as the Appellant therein accepted a huge amount in full and final settlement for the consignment in issue and only three months thereafter, it served a legal notice for making a reference to the Arbitrator.

The Arbitration agreement in the aforementioned fact situation was held to be not attracted, stating:

> "34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide *Nagubai Ammal* v. *B. Shama Rao*[12], *CIT* v. *V.MR.P. Firm Muar*[13], *Maharashtra SRTC* v. *Balwant Regular Motor Service*[14], *P.R. Deshpande* v. *Maruti Balaram Haibatti*[15], *Babu Ram* v. *Indra Pal Singh*[16], *NTPC Ltd.* v. *Reshmi Constructions, Builders & Contractors*[17], *Ramesh Chandra Sankla* v. *Vikram Cement*[18] and *Pradeep Oil Corpn.* v. *MCD*[19].)
>
> 35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

72. For the aforementioned reasons the principles laid down in the said decision will also have no application in the instant case.

Our attention has been drawn by Ms. Dhir to a recent decision of ours in Viacom 18 Media Pvt. Ltd. vs. MSM Discovery Pvt. Ltd. Petition No.220(C) of 2010 disposed of 23.12.2011, wherein noticing the provisions of Section 39 of the Indian Contract Act it was held as under:

"186. ………………………………. For the purpose of attracting Section 39 of the Indian Contract Act, the 'promisee' may put an end to the contract but he, in a case of this nature, would be entitled to do so after he puts his house in order. He cannot, by repudiating a contract, afford to stop his entire business and, thus, in fact its entire business in future. In order to attract Section 39 of the Contract Act, a party must refuse altogether to perform his part of the contract. Termination of a contract undoubtedly should be in clear terms. It is not a case involving sale and purchase of goods. It is not a case where an agency has been terminated by a principal. It is also not a case where a person has disabled himself from performing the contract.

In a business involving broadcasting & cable services, a broadcaster appoints a distributor to see that his production reaches the viewers.

By terminating the agreement in question, immediately, the viewers would not have been able to view its production, Loss to that extent, if any, could have been entirely that of the producers as for the purpose of viewership, a lot of efforts were required to be made.

For the purpose of invoking a provision of law in a new type of contract like the present one, the Tribunal cannot lose sight of the ground realities. The action and/or inaction on the part of the promissor or promisee to a contract cannot be judged bereft of their respective positions vis-à-vis the ground realities as regards the nature of the trade.

Unlike contract of employment, the rights and obligations of the parties were noticed. We, therefore, do not find any reason to hold that in a case of this nature, the provision of Section 39 of the Indian Contract Act will have any application.

The concept of affirmation of a contract refers to affirmation of the promisee to go on with the

contract notwithstanding his right to terminate the same. It may be either a matter of positive choice or election to perform its own obligations. It can, however, be inferred only from the unequivocal conduct.

187. In United Australia Ltd. Vs. Barclays Bank Ltd. (1941) AC1 at 30, Atkin, L J, stated the law thus :-

"….if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose."

Knowledge in the context of breach means at least knowledge of the circumstances which in law give rise to the right to terminate. Ordinarily, election should be communicated and communication will be essential if there would otherwise be no unequivocal act. (See China National Foreign Trade Transportation Corporation V. Evlogia Shipping Co. (1979) 2 All ER 1044 and Peyman V. Lanjani (1985) Ch 457 at 493).

Affirmation does not, as a general rule, affect the promisee's right to claim damages for the promisor's breach. (See Compagnie de Renflorement de Recuperation et de Travaux Sous-Marins V.S. Baroukh et Cie v. W. Seymour Plant Sales and Hire Ltd. (1981) 2 Lloyd's Rep. 466).

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

Some Judges, however, used different words to mean the same thing and the same word mean to different things i.e. waiver, total waiver, waiver of remedy, waiver of rights, election, abandonment,

> equitable estoppels, promissory estoppels, quasi estoppels and waiver by estoppels. It is considered to be one of the most complex and difficult area in the modern law of contract. The law is still in a state of development.
>
> Lord Denning, however, has used the words 'waiver', and 'estoppel' interchangeably. (See Woodhouse AC Israel Cocoa Ltd. Vs. Nigerian Produce Marketing Co. Ltd. (1971) 2 QB 23).
>
> Unlike election, which concentrates mainly on the conduct of the
> promisee, the principal focus of estoppel is on conduct of the promissor in reliance on what the promise has said or done following the breach which provides the basis for termination. Estoppel, ordinarily, is based on a representation which need not be expressed in all situations, although requires to be unequivocal."

73. The said decision, therefore, inter alia lays down that for applying the doctrine of `Estoppel', out of two inconsistent rights, a person must commit an unequivocal act with full knowledge that he had chosen one of them and would not pursue the other.

Petitioner herein had not pursued one of the two rights which are inconsistent to each other.

So far as the question of Limitation is concerned, Ms. Dhir would contend that Article 58 of the Limitation Act, 1963 shall apply.

It reads as under:

Description of suit	Period of Limitation	Time from which period begins to run
58. To obtain any other	Three years	When the right to sue first

Declaration	accrues.

Petitioner herein has prayed for the following reliefs:

> "(a) Declare the impugned bills dated 23.07.2008 and 30.06.2009 issued by the Respondent as also the communication bearing No.BGTD/IUC/BML/CMTS/VIO/86 Dt. at BG-1 dated 21.03.2011 and notice bearing No.BGTD/IUC/BML/CMTS/VIO/92 Dt. at BG-1 dated 05.07.2011 as illegal, arbitrary and unenforceable and set aside the same;
>
> (b) Permanently restrain the respondent from taking any coercive action against the Petitioner based on the above impugned demands or its notice of disconnection;
>
> (c) pass an ad-interim ex-parte order in terms of prayers made above;
>
> (d) pass such and further orders as may be deemed fit and proper in the facts and circumstances of the case."

The said argument is premised on the fact that the Respondent had issued a bill on or about 17.5.2006 for a sum of Rs.30,56,85,482/-.

It reads as under:

> "No. BGTD/IUC/BML/CMTS/VIO/ Date:17/05/2006
>
> Sir,
>
> Subject: Handover of Non-CLI, invalid/incomplete CLI calls by private access providers
>
> Reference: BSNL HQ Letter No. 121-9/2003-Regin dated 13/06/05

> It has been decided as per the above regulation 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 only, the access provider shall be charged double the number of such Non CLI calls handed over at the highest slab of IUC applicable. Otherwise clause 6.4.9 of the Interconnect agreement will apply.
>
> Accordingly you are requested to pay an amount of Rs. 30,56,85,482/- (Rupees Thirty Crores Fifty Six Lakhs Eighty Five Thousand Four Hundred and eighty two only) the details of which are enclosed. A statement showing sample of such calls is also enclosed.
>
> You are requested to pay the amount within 7 days i.e. on or before 24/05/2006 (24/ May/2006)."

74. By reason of the said bills CDRs have been sought for to make an enquiry as to whether the calls are non CLI ones. The parties entered into communications with regard to the correctness or otherwise of the said bill. The said bill, however, was modified on 23.7.2008. It was clearly stated that the same related to the period May, 2003 and January, 2004.

Only when the period for which the said bill has been raised crystallized, the Petitioner raised a contention by its letter dated 4.8.2004 that no such amount for the said period was payable.

75. By another bill issued on 7.7.2009 for the period February, 2004

and November, 2004, stating:

> "Sir,
>
> Sub: Payment of violation bill raised for routing Non-CLI/Incomplete CLI/Invalid CLI calls on 'DA' TGP at Malleswaram Tandem POI during May-2004 by M/s. BAL CMTS.
>
> A Bill for Rs.76,32,771/- with No.1622825705 dt. 30/06/2009 has been raised in r/o wrong routing & Non-CLI/Incomplete CLI/Invalid CLI calls on "DA TGP" at Malleshwaram Tandem POI during Feb-2004 to Nov 2004 by M/s BAL CMTS. The copies of the bills are enclosed herewith to expedite payment from your end.
>
> The violation bills upto Jan 2004 for Rs.22,01,36,277/- along with Interest Bill for Rs.3,17,90,091/- are still pending. Kindly arrange to make payment of these bills also along with B.No.1622825705 immediately on or before 14/07/2009. If payment is not forthcoming on or before the prescribed period i.e. 07/07/2009, BSNL is constrained to take action as per the Interconnect Agreement pl.
>
> The Lr of even No. dt. 30/06/2008 may be treated as cancelled pl."

76. A contention was raised by the Petitioner by its letter dated 14.7.2009 that there was no such agreement, stating:

> "6. Without Prejudice to our earlier submissions, contentions & representations made, we would like to state that for the relevant period in question i.e. May 2003 to November 2004 neither the provisions of Interconnect Agreement nor the provisions of IUC Circulars or any internal circular issued subsequently could be made applicable in our case as the same would tantamount to retrospective application of penal provisions.

7. It is submitted that since, the demand pertains to a period commencing from May 2003 you would like to note that in our understanding the definition of unauthorized calls was introduced for the first time under the terms of the Interconnect Agreement only on 21st July 2004. Clearly these provisions cannot be made applicable from retrospective effect to penalize us. Neither the provisions of your internal circular dated 13.6.05 can be retrospectively applied modifying and rewriting the terms of Interconnect Agreement."

Strangely enough, the Respondent by its letter dated 25.8.2009 stated as under:

"Subject: Payment of violation bill raised for Routing Non CLI/incomplete CLI/Invalid CLI calls on 'DA' TGP at Malleswaram OCB Tandem POI during the period May 2003 to January 2004-reg.

Reference: BSNL HQ, ND Ltr at 18.8.09

The claim of BGTD towards violation bill for Rs. 22.01 crores for the period May 03 to Jan 04 is towards Non CLI, as Non CLI calls to 100 are >0.5 % during this period (other violation calls are not taken into account). Bill is claimed accordingly as per the guidelines of KTK Circle Office.

This matter is now under scrutiny at BSNL HQ. As BSNL HQ is requesting for CDRs of sample period for 15 days covering violation along with IMEI Nos, you are requested to furnish the CDRs for the period 16.7.03 to 30.7.03 with immediate effect (i.e. by 1500 hrs of 28.8.2009) to this office to furnish the same to BSNL HQs."

77. If the headquarters of the Respondent had still been scrutinizing the bills in question and the CDRs were demanded for the period

16.7.2003 to 30.7.2003, we fail to understand that how the demand of the Respondent was final and became due and payable.

It may also be noticed that with reference to bill dated 17.5.2006 along with the bills modifying the same being dated 23.7.2008 and 7.7.2009, Respondent in its letter dated 21.3.2011 stated as under:

> "Sub: Payment of violation bill raised for Routing Non CLI/incomplete CLI/Invalid CLI/wrong routing calls on 'DA' TGP at Malleswaram Tandem POI during May 2003 to November 2004 by M/s BAL CMTS.
>
> Ref: 1. BGTD/IUC/BML/CMTS/VIO dated 17/05/2006
> 2. BGTD/IUC/BML/CMTS/VIO/32 dated 3/7/2008
> 3. BGTD/IUC/BML/CMTS/VIO/61 dated 7/7/2009
>
> Bangalore Telecom District raised the Demand Note of Rs. 30,56,85,482/- on M/s. Bharti CMTS towards hand over of Non CLI/improper CLI/invalid CLI/incomplete CLI calls on "DA" TGP at Malleswaram Tandem POI for the period from May 2003 to November 2004.
>
> Subsequently based on CDR analysis, the Demand Note has been revised and the Bill has been raised for Rs. 22,01,26,277/- towards Non CLI/improper CLI/invalid CLI/incomplete CLI calls for the period May 2003 to January 2004 where Non CLI violation is more than 0.5 % excluding inroamer calls. Wrong routing violations have not been claimed for the period May 2003 to January 2004 as the CLI violation is greater than 0.5 %.
>
> Based on Inroamer calls established by Bharti CMTS, the violation bill for the period February 2004 to November 2004 has been raised for Rs. 71,76,882 (Revised as Rs. 72,75,030/- due to difference in matched count of CDRs) towards Non CLI less than 0.5 % and wrong routing violations.

As the matter was under scrutiny with bSNL Headquarters, the bills were kept pending. Based on guidelines of BSNL Headquarters, the bills as below raised by Bangalore Telecom District is in order under the Clause 6.4.6 of Interconnect agreement.

Sl No	Bill No.	Bill Date	Bill Amount Rs.	Pay By Date
1	1035657830	23/7/2008	4,01,36,277	31/03/2011
2	1035657848	23/7/2008	9,00,00,000	31/03/2011
3	1035657856	23/7/2008	9,00,00,000	31/03/2011
		TOTAL	22,01,36,277	
4	1622825705	30/06/2009	72,75,030	31/03/2011

Hence it is requested to pay the Bills with interest applicable. The Bills, Calculation details and sample calls are enclosed for making payment."

78. If scrutiny on the demand upon analysis of the CDRs was pending with the headquarters of the Respondent and the bill had been kept pending, we fail to understand as to how the period the limitation had begun to run from 7.5.2006.

What is sought to be enforced was the four bills referred to in the prayer portion of the petition. The said bills, therefore, gave rise to a cause of action to the Petitioner to file this petition which was done on 1.8.2011.

79. Ms. Dhir, however, relied upon a decision of this Tribunal in Reliance Communication Ltd. vs. Bharat Sanchar Nigam Ltd. Petition No. 211 of 2010, wherein it was observed as under:

"The petitioner for all intent and purport is seeking to take benefit of the judgement pronounced by this

Tribunal in the aforementioned Petition No. 166 of 2005. It had asked for supply of CDRs for the respondent only subsequent to the disposal of the said petition. It seeks now to rely upon the decisions rendered in the other petitions including Petition No. 56 of 2009, M/s. Vodafone Essar Gujarat Ltd., Gujarat v. Bharat Sanchar Nigam Ltd., New Delhi disposed of on 11TH February, 2010.

It cannot, therefore be said that the petitioner was pursuing its remedy bonafide. The cause of action for bringing an action on the part of the petitioner was the disconnection of P.O.I. and not the bill impugned in the Miscellaneous application.

The petitioner in the said Miscellaneous Application had inter alia prayed for the following reliefs:-

"a. restrain the Respondents herein from raising and/or enforcing any demand on the issues raised in the above mentioned Petition No. 166 of 2006 during its pendency before this Hon'ble Tribunal;

b. grant ex-parte ad-interim stay of the notice of disconnection dated 17.8.06 issued by the Respondent's Bangalore Telecom District.

c. Pass such further order /orders as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case."

No declaration was prayed for. No principal relief was sought. What was sought for was only an interim relief.

The petitioner did not even annexe the copy of the said application with the petition. Section 14 of the Limitation Act, 1963 will have no application in a case where merely an interim order was prayed for.

It was not an original application. It was only an application filed in a connected matter."

Therein a question was being dealt with as to whether only by reason of an interim order alone and only because liberty had been granted to the Petitioner therein to file a fresh petition, the same amounted to extension of the period of limitation, stating:

> "25. No averment has been made by the petitioner therein as to on what premise, it sought to claim an exemption from the purview of the provisions of the Limitation Act.
>
> 26. It is also not in controversy that the period of limitation prescribed in the schedule appended to the said act shall be 'three years' from the date when the cause of action in regard thereto arose.
>
> 27. The petitioner, as noticed heretobefore, has sought for several declarations.
>
> 28. Article 58 of the Limitation Act provides for the period of limitation of 3 years computed from the date when they the right to sue first accrues. The right to sue accrued in the favour of the petitioner to file a petition before this Tribunal on the dates on which the bills were served upon it. The petition therefore, should have been filed on or before 21.03.2008 or 20th July 2008.

It was furthermore opined:

> "37. This Tribunal interalia exercises original jurisdiction. It cannot even otherwise, having regard to the provisions contained in Section 3 of the Limitation Act, extend the period of limitation.
>
> 38. Section 3, as is well known is imperative in character. The Limitation Act is statute of repose. A right accrues in favour of another person if an action is not brought within the period prescribed under the law of limitation. Proper explanation therefore, is required to be given if a valuable right of another is sought to be defeated (See Ashish Kumar Hazra Vs.

> Ruby Park Cooperative Housing Society, AIR 1997 SC 2724)."

It was also held that Section 14 of the Limitation Act was not attracted.

80. Reliance has also been placed by Ms. Dhir on State of Punjab & Anr. vs. Balkaran Singh reported in (2006) 12 SCC 709, wherein it was held:

> "17. Once the prayer for declaration sought for in the suits is found to be barred by limitation, it has to be noticed that the prayer that follows is only consequential on the relief of declaration. That prayer is to the effect that the plaintiff is entitled to the pay scale of Rs.1200-1850/- as against the scale of pay of Rs.940-1850/- with effect from 1.1.1978 and entitled for payment of all other service benefits including yearly increments, arrears and interest thereon at the rate of 18 per cent per annum up to the date of payment with effect from 1.1.1978. It must be noticed that there is no independent prayer for recovery of arrears of pay and the prayer is couched in such a manner that it can be understood only as consequential on the grant of the first relief. In other words, it is not an independent relief that could be granted even if the main prayer is declined. In that view, it has to be held that a consequential relief could not be granted in view of the fact that the main relief of declaration sought for has been held to be barred by limitation."

In that case the Respondent claimed that he was entitled to a declaration with regard to the revision of scale of pay, wherefor the lis was brought in a court after 12 years. The same was held to be

barred by limitation rejecting the contention that another judgment has been rendered in the meanwhile.

Reliance has also been placed by Ms. Dhir on Khatri Hotels Private Limited & Anr. Union of India & Anr. (2011) 9 SCC 126 wherein it was held:

> "30. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word `first' has been used between the words `sue' and `accrued'. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued."

In that case immovable property was involved. The Apex Court held that in case of multiple causes of action, a suit for declaration will have to be filed within a period of three years from the date of the first cause of action.

In the facts and circumstances of this case the said decision in our opinion is not applicable.

81. One of the questions which arises for consideration is as to whether the Petitioner could have sought for any benefit under circular dated 13.6.2005 having not objected to the implementation of circular dated 28.1.2004 and 29.1.2005.

For the purpose of invoking the said circular the Petitioner was not required to question the validity thereof.

Conclusion

82. We, therefore, hold:

(1) The impugned demand for the period May, 2003 to 21.7.2004 would be governed by the judgment of this Tribunal dated 11.2.2010 in Petition No.108 of 2008.

(2) So far as the rest of the period is concerned the Respondent is entitled to only double the charges of the actual calls which did not have any CLI number or incorrect CLI number.

This petition is allowed to the aforementioned extent with costs. Counsel's fee assessed at Rs.25,000/-.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

July 19, 2012
`anu'