

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 18.6.2012**

**Petition No.144 of 2012**

Reliance Communications Ltd., Mumbai ... Petitioner

**Versus**

Bharat Sanchar Nigam Ltd., New Delhi ... 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.

For Respondent : Ms.Maneesha Dhir, Advocate,

Mr.K.P.S. Kohli, Advocate,

Mr.Abhishek Kumar, Advocate,

Mr.T.S. Nanda, Advocate.

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

### **S.B. Sinha**

The parties hereto, who are licensees/ deemed licensees in terms of the provisions of Indian Telegraph Act, 1885 (The Act), entered into two interconnect agreements on or about 25.1.2002 and 1.11.2002 with regard to the basic telephone services and NLD services respectively.

2. The Petitioner migrated to Unified Access Service License regime. An ADDENDA to the said interconnect agreements was inserted on or about 21.9.2005 with retrospective effect from 14.11.2003.

3. In terms of the said interconnect agreement the parties were to pay unto each other inter alia the IUC charges.

4. The Petitioner raised its bill and on the premise that the Respondent had made short payments for the months of July,

August and September, 2005, it issued letters complaining thereabout on or about 29.12.2005, 7.2.2006 and 4.2.2007.

5. The parties met for reconciliation of their accounts, keeping in view of the disputes raised by the Petitioner herein i.e. short payment of its bills by the Respondent.

6. Indisputably, the matter relating to raising of bills on behalf of the Respondent began to be dealt with by IOBAS from July, 2005.

7. The Respondent vide its letter dated 23.1.2008 informed the Petitioner variations due to non-inclusion of 5 ESS originated calls having regard to IOBAS data. The parties met and a minutes of meeting was prepared on 5.3.2008, the relevant portions whereof read as under :-

<b>Agenda of Meeting (RCOM)As was on 10.07.2007</b>	<b>Decisions taken in meeting on 10.07.2007</b>	<b>Status as on 28.02.08</b>	<b>Decision taken on 05.03.08</b>
3. Short payment received from IOBAS cell BSNL (post IOBAS period) to the tune of Rs.13.55 Lacs. Over the period July-05 to May-07 pending	CDR details for 3 days with maximum variation in minutes of usage (MOU) has been already provided to RCOM for the month of Jan-07.	Post IOBAS reconciliation is pending for Rs. 35.70 Lacs. For the period Jul-05 to Jan-08. (IOBAS Rs. Rs.20.15 lacs.& Cellone CMTS Rs.	Joint visit will be made by DGM (IT) BSNL & RCL representative to IOBAS Chennai for expediting reconciliation & getting 03 days CDRs for POIs with

<p>reconciliation with BSNL. We have provided Daily summary report for all months. However, BSNL has to provide 03 days CDR for the period July-05 to Dec-06 &amp; April-07 &amp; May-07.</p>	<p>Feb-07 &amp; Mar-07 for reconciliation purpose. Balance CDRs will be provided as &amp; when received from data processing center. CGM office has already placed request with data processing center for all months CDRs as requested by Operator.</p>	<p>Rs.15.55 Lacs.)</p> <p>BSNL has provided reconciliation findings for the period May-06 to July-06 for 11 POIs, &amp; Oct-06 to Dec-06 for 15 POIs which contains details of matched CDRs, unmatched CDRs in BSNL and unmatched CDRs in RCL. However, findings of BSNL has been disputed by RCL by making further analysis of unmatched CDRs reported by BSNL in BSNL CDRs, as same is available in RCL CDRs. BSNL has not <u>provided any further feedback on our analysis or concluded on short payments made to RCL.</u> BSNL has provided 03 days CDRs for the month of Jan-07 to March-07 for 28 POIs. Unmatched CDRs reported by BSNL in BSNL CDRs has been disputed by RCL as same is available in RCL CDRs. BSNL has not provided any further feedback on our analysis or concluded on short payments made to RCL. BSNL is yet to provide 3 days</p>	<p>variations.</p> <p>POI level switch defects at Berhampur &amp; Bhawanipatna has been identified. <u>Old MOUs will be revised for OG traffic of BSNL.</u></p>
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		CDRs for balance period (i.e. other than May-06 to July-06, Oct-06 to Dec-06 & Jan-07 to March-07). RCL has submitted complete CDRs for all POIs for all months up to Oct-07, for Recon. At BSNL end.	
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(emphasis supplied)

8. Authorized representatives of the parties, keeping in view the decisions recorded in the said minutes of meeting for the purpose of resolution of the inter se dispute were deputed for two days at the IOBAS Data Centre at Chennai.

9. Upon such inspection, minutes of meeting was prepared, the relevant portions whereof read as under:-

<b>Agenda of Meeting (RCOM) As was on 10.07.2007</b>	<b>Decisions taken in meeting on 10.07.2007</b>	<b>Status as on 28.02.08</b>	<b>Decision taken on 05.03.08</b>
4.Recivables & Payables amount confirmation for PRE-IOBAS period required for all SSAs from <u>IOBAS CELL ORISSA</u> against letter given by HO BSNL New Delhi. Vide Letter no. <u>Lt.no..9-53 (RIL)/2005-BSNI/TR Dt..01.02.2007.</u>	4. CGM Office has Received detail of receivable & payable for SSAs (Pre-IOBAS).	Resolved , detail received.	Not Applicable

We are regularly following up with IOBAS for these details since Feb-07. Refer our reminder letter dated <u>17.02.2007,08.03.2007,28.03.2007 &amp;15.05.2007</u> However, we are yet to receive all detail.	Same will be provided to RCOM within 07 days for feedback.		
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10. It, however, appears that the authorized representatives of the Petitioner did not put any signature thereupon. Another set of minutes of meeting was sent by the Petitioner, the relevant portions whereof are as under :-

<b>Agenda of Meeting (RCOM) As was on 10.07.2007</b>	<b>Decisions taken in meeting on 10.07.2007</b>	<b>Status as on 28.02.08</b>	<b>Decision taken on 05.03.08</b>
6. Short payment received from CMTS Cellone amounting to Rs.2.32 Lacs. For the period Sep-06 to May-07 pending reconciliation at CMTS Cellone end. Daily summary report submitted by RCOM for all the months. However, CMTS has not provided 3 day CDRs for all months maximum variation in minutes of uses (MOU) in compliance with BSNL circular no. 352-5/2004 Regln. DT.23.03.2007 on (Procedure for early	6. CGM office will follow up with GM CMTS Cellone BBSR to provide 03 days CDRs as per reconciliation process. Time frame is within 16.08.2007	Short payment received from BSNL Cellone CMTS for the period from Sep-06 to Jan-08 has increased to Rs.4.09 Lacs. Cellone is yet to provide daily summary report for Outgoing traffic & 3 days CDRs for reconciliation	BSNL OG DSR will be provided to RCL from April-07 to Jan-08 for analysis of days with maximum variation.03 days CDRs will be provided for days with maximum variation for reconciliation at RCL end.  CDRs not available for the period Sep-06 to March-07

settlement of billing disputes and reconciliation of variation.			
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11. On or about 30.10.2008, the DGM of the Orissa Circle of the Respondent by a letter issued to IOBAS Data Centre asked it to generate for the period July 2008 to January 2009. There are certain internal communications with regard thereto as would appear from the letters dated 27.11.2008, 20.1.2008 and some other letters dated 28.1.2008, 2.2.2009, 19.2.2009 and e-mails dated 23.2.2009, 26.2.2009 and 4.3.2009, a letter dated 17.3.2009, e-mail dated 4.7.2009, a letter dated 2.7.2010, an e-mail dated 22.12.2010 and a letter dated 3.1.2011.

12. A supplementary invoice towards IUC charges was raised on or about 10.1.2011 for the period July, 2005 and December, 2005. Two invoices for the period January and April, 2006 were issued on 9.2.2011 (In respect of NLDO for the months of January to March, 2006 and in respect of BSO for the month of April, 2006) and

three invoices for the period May, 2006 and December, 2006 for NLDO and BSO services were raised on 28.3.2011.

13. By reason of letters dated 15.6.2011 and 2.3.2012, a request was made to the Petitioner for payment of the said invoices. In the later communication, however, it was threatened that the bank guarantees would be encashed, in the event of the Petitioner's failure to pay the said amount.

14. The Petitioner by a letter dated 16.3.2012 asked the CGM, BSNL, Orissa requested for 30 days' time to reconcile the data and match the same with its records, stating :-

"Dear sir,

We have received your captioned letter. Traffic month are of very old (July-2005 to Dec 2008). We are reconciling the data and matching the same with our inter records.

Kindly allow us 30 days time (Till 17.04.2012) to address the issue."

15. The said request of the Petitioner was allowed and the time for payment was extended till 28.3.2012.

16. The Petitioner disputed the correctness of the contents of said invoices. It furthermore denied and disputed that it had ever accepted or agreed to pay the disputed demand in the meetings dated 10.3.2008 and 11.3.2008.

17. This petition has been filed on 27.3.2012.

18. The short question which arises for consideration herein is as to whether the impugned bills dated 10.1.2011 for the period July, 2005 and December, 2005, and the bills dated 9.2.2011 and 28.3.2011 for the period May, 2006 and December, 2006 are barred under the law of limitation.

19. The Respondent in its reply inter alia stated that the CDRs were to be recorded at least at two stages but the same had not been done.

20. It furthermore contended that the reconciliation exercises were being carried out on the basis of the Petitioner's CDRs. According to it, the Petitioner has admitted and acknowledged its liability to pay the invoiced amounts in the aforementioned meetings dated 10.3.2003 and 11.3.2003.

21. It was furthermore contended that as the mistake in not raising bills on the part of the Respondent was detected in January, 2008, the claim was not barred under the law of limitation.

22. Mr.Naveen Chawla, learned counsel appearing on behalf of the Petitioner would contend :-

- (i) In view of the provisions contained in Sections 17 and 18 of the Limitation Act, 1963, the ingredients thereof were required to be satisfied for the purpose of sustaining its claim by the Respondent.
- (ii) In view of the fact that the acknowledgment purported to have been made on behalf of the Petitioner is neither in writing nor bears the signature of any of its authorized representatives, no admission or acknowledgement of liability can thereby or otherwise be inferred.
- (iii) In any event the meeting having been attended by two officers, there was no reason as to why the

purported acknowledgment was not made by the senior officer, a fact which would clearly go to show that the purported minutes of meeting were not correctly recorded.

- (iv) Keeping in view the provisions of Clauses 7.1 (i) and 7.1 (v) of the agreement, it would appear that the period of limitation was only 6 months.
- (v) In any event the period of 3 years having also expired, the claim of the Respondent must be held to be barred by limitation.
- (vi) The Respondent having not brought on record any material to show that the purported mistake on its part occurred despite exercise of its due diligence, it must be held that its claim was barred under the law of limitation.

23. Mr.K.P.S. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, would contend :

- (a) As the reconciliation proceedings were going on, the Respondent was entitled to enter into the question as to

why the bills for the Berhampur POI had not been raised by the Petitioner.

- (b) Keeping in view the fact that the mistake on the part of the Respondent in raising a bill for the Berhampur POI having regard to the technological aspects of the matter and the same having been decided only sometimes in January, 2008, the impugned invoices must be held to have been issued within the stipulated period of limitation.
- (c) Keeping in view the fact that consolidated bills are raised in respect of the entire circle, omission to raise the bill for one POI cannot be said to be a fresh bill but only a revised one.

24. The basic fact of the matter is not in dispute.

25. We may by way of example notice the bill dated 10.1.2011.

It is described as IOBS (IUC Supplementary Invoice for the month of July, 2005 to December, 2005).

The invoice date is also 10.1.2011. The calls mentioned were under the column `Details`, left over CDR files bore invoice number RNOR100007.

It was for a sum of Rs.86,379/-.

26. It is borne out from the record that the Respondent did not earlier raise any bill for the POI Berhampur within the Orissa circle.

27. The Respondent in its letter dated 15.6.2011 annexed its version of the minutes of meeting.

The said meeting was attended by Mr.Arjun Verma, Vice President, Communication RCL and Mr.Naveen Sharma, Deputy Manager, RCL. The agenda therefor was said to be for reconciliation of IC and OG disputes of RCL in Orissa circle.

28. Paragraph 4 of the said purported minutes of meeting reads as under :-

Sl.No.	Point of discussion	Action to be taken	Follow up action
4.	Case of Berhampur	50% of the CDRs have been	DGM (IT) has assured that

	5ESS- One stream has been left unbilled since PoL inception	replaced by POI incharge and pulled by ASP. Rest of the data also needs to be provided to ASP. Supplementary from July 05 to Dec 07 is to be generated.	OLO will pay the bills even though more than 6 months
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29. The Petitioner does not accept the contents of the said minutes of meeting. It had admittedly sent another minutes of meeting on 11.3.2008, the relevant portions whereof read as under.

<b>Agenda of Meeting (RCOM) As was on 11.03.08 12.03.08</b>	<b>Decision taken in meeting on 11.03.2008</b>
4. One PC will be identified by DGM (IT) to dump 03 days CDRs as provided by IOBAS Chennai.	4. Agreed by DGM (IT)
6.Regular high variation between BSNL records & RCOM records for BSNL OG calls in Berhampuer Lex 5ESS, Koraput TAX . II AXE, Rourkela Lex WLN 5ESS Bhawanipatna WLL TAX II OCB & Rourkela L-II TAX POIs	6. Problems in Bherhampuer lex 5ESS & Bhawanipatna WLL TAX II OCB has been identified. Bill for these POIs will be revised for all previous months also & Refund will be make applicable. For rest POIs we have analyzed DSR & will further analyze CDRs for highlighted POIs once received from IOBAS Chennai.

30. The contents of the two minutes of meeting are, therefore, different.

31. The period of limitation for bringing an action is contained in Section 3 of the Limitation Act, 1963 whereby it is mandated that a suit has to be filed within the prescribed period of limitation as specified in the Schedule appended thereto subject of course to the other relevant provisions contained therein.

32. In the event, however, computation of period of limitation is sought to be excluded within the meaning of the provisions of Section 12 to 24 thereof, the same is required to be specifically pleaded and proved.

Indisputably, the impugned bills ex-facie are barred under the Law of Limitation.

The Petitioner approached this Tribunal as the Respondent threatened to encash the bank guarantees furnished by it. It has sought to take the benefit of Section 17 or 18 of the Limitation Act, 1963.

It was, thus, for it to plead and prove that it was so entitled in the facts and circumstances of the case.

33. The said provisions read as under :-

**17. Effect of fraud or mistake.**

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-

(a) the suit or application is based upon the fraud of the defendant or Respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him; the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production: Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which--

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment- debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment- creditor made after the expiry of the said period extend the period for execution of the decree or order: Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

## **18. Effect of acknowledgment in writing.**

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872 ), oral evidence of its contents shall not be received.  
Explanation - For the purposes of this section,-

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right,

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

34. We may at the outset consider the applicability of the ingredients of the said provision. The ingredients thereof can be held to have been fulfilled, provided an acknowledgement in writing is signed by the party.

The word 'signed' has been explained in Explanation B appended thereto to mean sign personally or by the person duly authorized in this behalf.

35. The grounds for exemption from limitation must exist at the date of the filing of the suit.

Reliance on the minutes of meeting dated 10.3.2008 and 11.3.2008 saying that the Petitioner has acknowledged its liability by the Respondent within the meaning of Section 18 of the Limitation Act, is misplaced.

For the purpose of consideration of applicability of the said provision, the backdrop of events may also have to be noticed.

36. It is not the case of the Respondent that it had at any point of time raised any contention prior to the parties' authorized representatives' visit of the Data Centre at Chennai with regard to the bills for incoming calls.

37. Petitioner having brought to the notice of the Respondent that its CDR had not recorded some data in respect of one of the POIs was within its knowledge.

38. The Respondent in fact in paragraph 3 of its reply admitted the billing procedure. According to it from July, 2005 the billing through SSC was replaced by the Centralized Data Centre situated at Chennai.

39. In paragraphs 4 to 7 of the reply, it was stated :-

4. That for each service of the operator and for different type of calls, different Trunk Groups (TGP) were configured in BSNL switch and the CDR's passing through the same were pulled for rating and billing purpose by the Data Centre based on the TGP configuration entered into the Data Centre portal by each BSNL POI incharge in the circle. The CDRs recorded at each POI of Odisha Circle are pulled up by the Data Centre at Chennai from the POI after having being loaded by the concerned POI incharge through File Transfer Protocol (FTP) Location Data Pull System. That the full data of a month is required to be ready for pulling by the Data Centre, Chennai by the 2<sup>nd</sup> day of the following month.

5. That after the CDRs of a month are captured and pulled by the Data Centre, the same are rated and invoices/bill for the both way traffic are generated on monthly basis by the Application Service Provider (ASP) i.e M/s Satyam at Data Centre, Chennai by 5<sup>th</sup> of the following month. The draft invoices/bills are uploaded in the IOBAS portal and after the go ahead conformation about the accuracy of the draft invoices/bills is given by the DGM (IT) Odisha circle who is the nodal officer for IODAS technical cell, the final bill/invoices are generated. While giving the go ahead, the DGM(IT) coordinated and confirms from all POI incharges about 100% provision of CDRs to Data Centre for bill/invoice generation to insure that there are no missing/left over CDRs. In case, there are any missing CDRs for any technical reason whatsoever, action shall be taken to retrieve the same and arrange for issue of supplementary bills at a later stage. It is submitted that once the confirmation from the technical cell of circles is received, the final bills/invoices are generated, which contains the following details:

- a) Invoice (i.e. consolidated bills)
- b) POI-wise monthly summary

- c) Invoice details
- d) Day-wise summary

6. That in the present case, the supplementary bills were generated by the Respondents only after an investigation which was carried out in response to the Petitioners complaint of short payment of BSNL. On investigation carried out by the Respondent, it was found that one stream of POI at Berhampur was not configured due to which the CDRs were not captured at the time of issue of the main invoices. It is pertinent to mention that under the Berhampur POI 2 exchanges (a) EIOB local and (b) 5ESS local Exchanges were working during the period from July 2005 to December 2006. In 5ESS exchange, the details of subscriber billing and junction/TGP billing are registered into system i.e stream 0 and stream 1. The copy of letter issued by the Petitioner to the Respondent regarding complaining of short payments are annexed herewith marked as **ANNEXURE R-2(COLLY)**

7. It is evident from the correspondence of the Petitioner that the Petitioner had the knowledge of the problem in the POI and in its letter dated 2<sup>nd</sup> February 2007 had also observed inter alia *'that the major intec difference every month is because of software problem.....'*. Further, in its letter dated 7<sup>th</sup> February 2006, the Petitioner observed that *"we have found that in many cases, BSNL switch did not capture the CLI. Hence you are requested to kindly give us the exclusive CDRs of such calls, so as to validate your claim. Till that time, you are requested to exclude this amount from our outstanding until the matter is resolved"*. Copy of letter dated 7<sup>th</sup> February 2006 is annexed herewith and marked as **ANNEXURE R-3**

40. The system introduced by the Respondent for raising bills were having checks and balances at different stages. The first stage was loading by the concerned POI through file transfer protocol location

and data pull system. The second one was the data centre Chennai's scrutinizing the bill by second day of the following month and the third stage was that the draft/ invoice bills were uploaded in the IOBAS portal and after obtaining go ahead or confirmation thereabout by the concerned Nodal Officer, Technical Cell; whereafter the final bills were to be generated.

41. Further check was provided at the centre for bills/invoice generation to ensure that no CDR was missing.

42. In the event of any finding that there were any misuse of CDRs, action was required to be taken.

43. The final bill was to be generated which contained the certificate in respect of four items mentioned in paragraph 5 of the Reply. Admittedly investigations were carried out with regard to the Petitioner's complaint.

44. The Respondent does not state as to when the mistake to the effect that one single POI - Berhampur did not configure due to which CDRs were captured at the time of issue of the main invoices was detected. It also does not state as to how the letter of the

Petitioner dated 8.2.2007 gives rise to the presumption that it had full knowledge of the problem of POIs and thus bound by it.

45. There is another aspect of the matter. The Petitioner by reason of various letters including the one dated 29.12.2005 and 2.2.2006 had asked the Respondent to make good of its short payments.

46. All actions were taken pursuant thereto or in furtherance thereof. The parties had met ultimately and resolved to find out the reason for short payment of the Petitioner's bill. Even at that point of time the Petitioner was not informed that the Respondent had committed any mistake in omitting to raise its bill.

47. Mr.Kohli has taken us through various internal letters and e-mails to contend that the matter was being examined by different offices.

48. In our opinion they are of not much relevance for the purpose of considering the question as to whether the provisions of Section 18 of the Limitation Act, 1963 would become applicable thereby.

49. In any event the Petitioner itself stated that it came to know of the defect in its system on 10<sup>th</sup>/11<sup>th</sup> March, 2008. There is therefore, no reason as to why the impugned bills were issued after such a long time.

50. Indisputably, the original invoices show that no bill was raised in respect of the Berhampur circle. There is nothing on record to show that the mistake was a bonafide one or the same could not be detected despite due diligence on the part of the officers of the Respondent.

51. Respondent was not only required to bring on record sufficient materials in that behalf but also ought to have examined the concerned officers as to how due diligence on its part was exercised.

52. Mr.Chawla has relied upon a decision of the Supreme Court of India in Chandradhar Goswami & Ors. vs. The Gauhati Bank Ltd. reported in (1967) 1 SCR 898 wherein despite the provisions of Section 4 of the Bankers' Books Evidence Act, the Apex Court observed :-

"Then we come to the question of limitation. The suit is clearly within time insofar as the liability for sale under the mortgage deed is concerned as it was

filed within 12 years of the execution of the mortgage (see Art. 138 of the Limitation Act of 1908). As to the personal liability under this deed, that is beyond time as the suit was filed more than six years after the execution of the mortgage (see Aret 116 *ibid*). Nor does the entry of payment of Rs.100/- in the accounts help the bank in this behalf. That entry is of no value under s. 19 or s. 20 of the Limitation Act for neither a writing signed by the appellants nor an acknowledgement of payment in the handwriting of the appellants or in a writing signed by them has been proved. Nor does Art. 85 of the Limitation Act of 1908 help the bank.”

Internal documents of the Respondent, in view of the aforementioned authoritative pronouncement of the Supreme Court, are of no avail.

53. The Apex Court in *J.C. Bhudraja vs. Chairman, Orissa Mining Corporation Ltd.*, (2008) 2 SCC 444 reiterated the proposition of law that although the admission in question need not be express but be made in circumstances and in words from which the Court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement.

It was opined that the Courts lean in favour of a liberal construction of such statement though it does not mean that where no admission is made, one should be inferred, or where a statement

was made clearly without intending to admit the existence of jural relationship, such intentions could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. In construing the words used in the statements made in writing on which a plea of acknowledgement rests, oral evidence has been expressly excluded but surrounding circumstances could always be considered. The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor thereof.

54. It was opined that the acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties as also emphasis conscious expression of an intention of continuing such relationship in regard to an existing liability. It was stated as under:-

“20. Section 18 of the Limitation Act, 1963 deals with effect of acknowledgement in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. The explanation to the section provides that an acknowledgement may be sufficient though it omits

to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right.”

55. Sofar as the question of purported doctrine of mistake is concerned, exercise of due diligence is a sine qua non for application thereof.

56. In Ramesh B. Desai v. Bipin Vadilal Mehta, (2006) 5 SCC 638, it is stated :

**27.** In our opinion, in view of the facts pleaded in the company petition, the case is covered by Section 17(1)(a) of the Limitation Act and not by Section 17(1)(b) as the Petitioners are not claiming any right or title over the shares of the Company, which according to them were purchased out of the funds of the Company. Section 17(1)(b) will apply when the plaintiff or the applicant is claiming any kind of right or title to any movable or immovable property, etc. Their simple case is that in view of the fact that the funds of the Company were utilised for purchase of shares by Bipinbhai, which were then recorded in his name, the whole transaction was in violation of Section 77 of the Companies Act, and consequently the register of the Company required to be rectified in accordance with Section 155 of the Companies Act. It was also pleaded that the Petitioners had got no knowledge of the fraud played by the Respondents of the company petition whereby the funds of the Company were utilised for purchase of shares and they came to know about it in May 1987 through the criminal complaint. In view of the pleadings as aforesaid, it is Section 17(1)(a) of the Limitation Act which would govern the situation and not Section 17(1)(b) of the Limitation Act.

**30.** Clause (a) of sub-section (1) of Section 17 of the Limitation Act, 1963 is the same as clause (a) of Section 26 of the English Act. There was no corresponding provision like clause (a) of sub-section (1) of Section 17 in Section 18 of the old Limitation Act and this provision has been introduced for the first time as a result of the amendment. All the decisions cited by Mr Chagla have been rendered on Section 18 of the Limitation Act, 1908. In view of the amendment incorporated in the Limitation Act, 1963 and specially the language in which Section 17 is cast now, they can have no application to the facts of the present case

(See also Prabhakaran versus Azhagiri Pillai reported in AIR 2006 SC 1567)

57. Mr.Chawla has placed reliance on a decision of the Madras High Court in Ramanathapuram Market Committee, Virudhunagar and Ors. vs. East India Corporation Ltd. reported AIR 1976 Madras 323, wherein it has been held :-

"9. The law as to limitation affords a guarantee to the litigant public that after' the lapse of a particular period of time prescribed under the Act, the cause of action rests. The object of the statute of limitation is preventive and not curative. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right. Such extinguishment of claims by statutory interference resulting in making certain demands should be construed strictly. No doubt the provisions of the Limitation Act should be interpreted strictly in accordance with the language used, but it is always necessary that a litigant, who relies upon it, should bring his cause within the four corners of the terms of the statute. An attempt to deprive the party entitled to a right arising out of the existing benefit should not lightly be made by Courts.

But such, a pleading as to the bar of the cause of action should flow from a permissible construction of the statutory provision.”

58. The said decision has been noticed by a Division Bench of the Delhi High Court in Life Insurance Co. vs. Raghunath Prasad reported in 44 (1991) DLT 521 in the following terms :-

“24. The provisions of the above Section came up for interpretation before their lordships of the High Court of Madras reported in Ramanathapuram Market Committee, Viradhunagar & Ors. Appellant v. East India Corporation Ltd. Madurai. The relevant portion reads, "If the plaintiff's allegation as to the date of knowledge of the mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. A fortiori in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake "with reasonable diligence" on a date earlier than that on which the plaintiff bases his cause of action. Reason varies according to times and circumstances in which the individual thinks. Thus the word "reasonable" has always been understood in law as prima facie meaning, reasonable in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know.”

59. Para 9 of the Madras High Court Decision was also noticed by the Division Bench of the Delhi High Court.

60. It is, therefore, trite that :-

- (i) the acknowledgement must be made of an existing debt. The liability must be a subsisting one;

(ii) the acknowledgement must not only be in writing but must be signed either by the parties concerned either himself or an agent duly authorized in that behalf;

(iii) it must be express or implied;

(iv) an acknowledgement in substance should be treated admission of truth of one's liability. An acknowledgement does not create any new right of action but merely extends the period of limitation.

61. Ms.Maneesha Dhir, learned counsel appearing on behalf of the Respondent has relied upon a large number of decisions to contend that Section 8 of the Limitation Act, 1963 should be construed liberally. They are as under :-

<b>S.No.</b>	<b>Name of the Parties</b>	<b>Citation</b>
1	M/s Lakshmirattam Cotton Mills Co. Ltd. & Anr. Vs. The Aluminum Corp. of India Ltd.,	1971(1) SCC 67
2	(Annayya) Janakirama Bhagawathar & Anr. Vs. (Annayya) Narasimha Bhagavathar & Ors.	MANU/TN/0259/1936,
3	Hiralal & Ors. Vs Badkhual &Ors.	AIR 1953 SC 225
4	Khan Bhadur Shapoor Freedom Mazada Vs. Durga Prosad Chamaria Ors.	AIR 1961 SC1236
5	The Mahila Shiksha Sadan, Gandhi Ashram Hatundi Through its Secretary Vs. Jainarayan Mittal	MANU/RH/0041/1975
6	Reet Mohinder Singh Sekhon Vs. Mohinder Prakash & Ors	(1989) 4 SCC 30
7	State of Kerala Vs. T.M. Chacko	(2000) 9 SCC 722

8	Syndicate Bank Vs. R. Veeranna & Ors.	(2003) 2 SCC 15
9	Food Corporation of India Vs. Assam State Cooperative Marketing & Consumer Federation Ltd. & Ors	(2004) 12 SCC 360
10	Tenumal Bishamal Singhi Vs. Amar Mohandas Sindhi & Ors.	MANU/MH/0075/1973
11	Tilak Ram & Ors. Vs. Nathu & Ors.	AIR 1967 SC 935
12	Sarangdhar Singh & Anr. Vs. Laxmi Narayan Wahi	MANU/BH/0080/1955

62. We may, however, refer to some of the judgments as there cannot be any doubt or dispute with regard to the well-settled principles of law laid down therein.

63. In Hira Lal (supra), Mahajan, J opined that an unqualified acknowledgement made by the defendant therein by reason of a statement of account under which the entries had been made were sufficient to furnish a cause of action to the plaintiff therein for maintaining a suit irrespective of the fact as to whether any promise to pay the same has been made out or not.

When an account has been maintained between the parties wherein the jural relationship as also the right to maintain such account is not disputed, a suit will undisputedly be maintainable on

the basis of the said accounts wherefor Section 18 of the Limitation Act shall be applicable.

64. Yet again in Bai Sakinabai v. Gulam Rasul Umarbhai Shaikh, AIR 1981 Guj 142 noticing the decision of the Supreme Court in Khan Bhadur (supra) and Tilak Ram vs. Nathu (supra) as also L.C. Mills (supra), the Gujarat High Court stated the law, thus:-

**"20.** In view of the aforesaid settled legal position it must be held that before any recital in a document is treated to be within the meaning of Section 18 of the Limitation Act, 1963, it must be shown that the statement concerned avers about the existence of a jural relationship and the said statement is made with an intention to acknowledge the said relationship. Thus the assertion about the existence of jural relationship between the parties and an intention to admit one's liability flowing from such a relationship are the essence of any valid acknowledgment within the meaning of Section 18 of the Limitation Act, 1963 (old Section 19)."

65. Acknowledgement of a jural relationship is not the sole criteria of an intention to make acknowledgement. Any intention to admit one's liability must flow from such a relationship. The Courts are also required to find out that the maker had the necessary intention to do so.

66. In Syndicate Bank versus. R. Veeranna (supra) the law was stated thus :-

“We may add that in the light of the acknowledgement of their liability by the defendants in 1978, it is not open to them now to deny to make payment of the amount due to the Bank on the ground that higher rate of interest could not be charged. It is clear from the judgment of this Court in [Hiralal and Ors. v. Badkulal and Ors.](#), that an unqualified acknowledgement of liability as in the present case by a party not only saves the period of limitation but also gives a cause of action to the plaintiff to base its claim.”

67. In Lakshmirattan Cotton Mills (supra), it was clearly held that the acknowledgement must be founded on a subsisting liability, stating:-

“Such an intention need not be in express terms and can be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course does not mean that where a statement is made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. (see Khan Bahadur Shapoor Freedom Mazda v. Durga Prosad Chamaria [1962] 1 SCR 140 and Tilak Ram v. Nathu AIR 1967 SC 935. As Fry, L.J., in Green v. Humphreys (1884) 26 Ch. D. 474. said "an acknowledgement is an admission by the writer that there is a debt owing by him either to the receiver of the letter or to some other person on whose behalf the letter is received but it is not enough that he refers to a debt as being due from somebody. In order

to take the case out of the statute there must upon the fair construction of the letter, read in the light of the surrounding circumstances, be an admission that the writer owes the debt."

68. The said decision, therefore, is an authority for the proposition that there has not only to be an acknowledgement but the same must be intended to be made. What is relevant for construction of such an acknowledgement would be the surrounding circumstances.

69. In Khan Bhadur (*supra*), the acknowledgement made was with regard to the liability in respect of the right in question and it was not needed to be accompanied by a promise either to pay expressly or by necessary implication. Reference was made therein to *Green vs. Humphreys* (1884) 26 Ch D. 474, wherein acknowledgement was held to mean an admission by writer that there is a debt owing by him either to the receiver of the letter for to some other person on whose behalf the letter is received but it is not enough that he refers to a debt as being due from somebody.

70. However, the admission must, on a fair construction of the letter, appear that the writer owes the debt.

71. In Reet Mohinder Singh (supra), Ranganathan, J speaking for a Division Bench was called upon to construe an acknowledgement by the original mortgagee of a subsisting right of redemption on the part of the mortgagor as on the date of the sale deed viz. November, 1 1913.

It contained the following stipulation:-

"....Now I of my own accord have sold all my mortgagee rights along with the original mortgage consideration and interest which according to the terms of the aforesaid mortgage deed has accrued and is payable to the instant vender.... The rights and interest regarding recovery of original mortgage money and interest according to mortgage deeds executed by Jangi Khan Original mortgagor deceased and redemption of the mortgaged land which hence to fore vested in the instant vendor stand vested in the purchaser...."

72. It was held :-

".... It is true, as pointed out in Tilak Ram v. Nathu. that the period of limitation cannot be extended by a mere passing recital regarding the factum of the mortgage but that the statement on which the plea of an acknowledgment is based must relate to a subsisting liability. The words used must indicate the jural relationship between the parties and it must appear that such a statement is made with the intention of admitting such jural relationship. But, in our opinion, the recitals in the sale deed on 1-11-1913 fulfill the above requirements."

73. Thus, the requirements that the statement on which the plea of an acknowledgement rests must be based on a subsisting liability.

74. We would, a little later, consider the question as to what is meant by `subsisting liability`.

75. In the case of T.M. Chacko (supra), the legal position is stated in the following terms :-

“10. It may be noted that for treating a writing signed by the party as an acknowledgement, the person acknowledging must be conscious of his liability and the commitment should be made towards that liability. It need not be specific but if necessary facts which constitute the liability are admitted an acknowledgement may be inferred from such an admission.

11. Here it is necessary to refer to the said documents - Exhibits B-4 and A-8. The trial court as well as the High Court accepted the plea of the Respondent and held that the period of limitation would start from September 19,1974 (Exhibit A8) and the suit was within limitation. Both the court relied upon the judgment of the Kerala High Courts in *Harrisons & Crossfield Ltd. v. State of Kerala* 63 K.L. T. 215. It is laid down therein that it was not necessary that there should be a specific and direct acknowledgement of the particular liability which is sought to be enforced if there was an admission of facts of which the liability in question was necessary consequence then there would be an acknowledgement within the meaning of Section

19 of Limitation of 1908. It is not the correctness of the proposition but its application that is in dispute.”

76. In Food Corporation (supra) the jural relationship between the Appellant therein and the Federation was not disputed.

The Federation admitted that a sum of Rs.2 crores had been received from Food Corporation.

77. What was disputed was the quantum thereof. In that context only, it was observed:-

“16. The two letters dated 29/03/1977 and 30/07/1977(Exhibits 8 and 9) clearly acknowledge the amount of Rs. 2 crores having been received by the Federation from the Food corporation of India whether by way of advance or by way of deposit. The letters also indicate that the amount of two crores was by way of advance or deposit against paddy procurement. This is admission of jural relationship of buyer and seller which stood converted into relationship of creditor and debtor on the failure of the principal transaction. However, the acknowledged liability is sought to be disowned by submitting that on an account being taken nothing would be found due and payable by the plaintiff to the Federation. Disputing the liability to repay the amount acknowledged to have been received does not dilute the fact of acknowledgement in so far as Section [18](#) of the Limitation Act is concerned. The two letters have the effect of extending the period of limitation prescribed for filing the suit and calculated from the date of the latter of the two letters i.e. 30/07/1977,

the suit filed on 30/05/1980 was well within the period of limitation.”

78. In Tilak Ram (supra), the case of Khan Bhadur has merely been followed.

79. We are also not unmindful of the fact that the Supreme Court of India in Commissioner of Central Excise vs. Kalvert Foods India Pvt. Ltd. and Ors. reported in 2011 12 SCC 243 opined that Section 17 would apply when the clandestine removal of the excisable goods came to the knowledge of the authorities under the Act upon conducting raid in the premises. Such is not the position here.

80. The Respondent, as indicated heretobefore, at all material times had sufficient knowledge of the claim of the Petitioner. It is furthermore not understood as to why despite knowledge and/or discovery of the facts as far as back in March, 2007 no bill was raised till January, 2011.

81. These acts of omissions and commission on the part of the Respondent clearly go to show that the billing method applied by it leaves much to desire.

We are making these observations as the Respondent being a Public Sector Undertaking was bound to take all precautions having been dealing with the public money.

82. It is in the aforementioned backdrop of events, the question as to whether there had been an acknowledgement on the part of the Petitioner or not must be considered.

83. The parties entered into an interconnect agreement in respect of their outgoing calls i.e. calls originated from the network of one operator to the network of the other operator, wherefor bills were to be raised.

84. The operator who generated the call meaning thereby 'outgoing calls' is liable to pay the IUC charges to the other operator. It is not a case where the Respondent has exercised its right of set off.

85. The right of the Respondent to raise bills emanates from the following stipulation in the interconnect agreement:-

**"6.4 Interconnect usage charges**

6.4.1 Interconnect usage charges (IUC) shall be payable by USAL to BSNL for the calls originating in

UASL Network and handed over to BSNL Network. Likewise, interconnect usage charges shall be payable by BSNL to UASL for the calls handed over by BSNL Network and terminating in UASL Network. Internet usage charges include termination charge, carriage charge, transit charge and access deficit charge (ADC) as applicable.

6.4.2 Internet usage charges (IUC) payable by UASL to BSNL shall be as per details enclosed in Schedule I. Similarly, IUC shall be payable by BSNL to UASL as per Schedule I. This Schedule I may be amended as per applicable TRAI's Regulation or as mutually agreed from time to time. Interconnect usage charges shall not be linked with any tariff plan provided by BSNL to its own subscribers or any other categories of service providers.

6.4.3 The traffic from / to fully mobile network delivered on any BSNL's LDCC TAX from UASL's GMSC will be measured on the incoming/ outgoing junctions of BSNL's LDCC TAX.

6.4.4 For basic services, the calls originating and terminating within same SDCA are local calls. When such calls are delivered to BSNL for carriage and termination, IUC for STD calls shall apply on such calls. The STD / ISD traffic delivered on any BSNL's LDCC TAX from USAL's LDCC TAX /SDCC tandem / local exchange will be measured on the incoming junctions of the BSNL's LDCC TAX.

6.4.5 For calls delivered form BSNL's TAX to UASL's main exchange serving multiple SDCC's, the latter shall be treated as the terminal exchange and IUC shall be payable by BSNL to UASL as applicable at terminating SDCA only."

They provide for different sets of liabilities.

86. It is not a case where mutual and current account were to be maintained; the liabilities of both the operators being distinct and separate.

The period of bill for which the dispute alleging short payment was raised by the Petitioner was July, 2005 onwards. All the correspondences relied upon by the parties relate only to the said claim of the Petitioner.

87. The parties met with a view to resolve the said dispute and no other.

88. We may notice the agenda of the meeting dated 5.3.2008, which was in respect of the POIs of Berhampur for the month of July, 2005. It reads as under :-

"Agenda - Short payment received from IOBAS cell BSNL (post IOBAS period) to the tune of Rs.13.55 Lacs. Over the period July-05 to May-07 pending reconciliation with BSNL. We have provided Daily summary report for all months. However, BSNL has to provide 03 days CDR for the period July-05 to Dec-06 & April-07 & May-07."

The said agenda refers to the Petitioner's bills relating to its outgoing calls i.e. those which terminated at the network of the Respondent.

89. Only in relation thereto the three days' CDRs were to be supplied. It was in that context by way of follow up action, the parties visited Chennai on 10.3.2005 and 11.3.2005.

90. We may notice the subject matter of the discussions between the parties:-

"IUC BILLING & CDR RECON. RELATED ISSUES

Under mentioned agenda items were deliberated in detail during meeting on 5.3.2008 & joint decisions were taken as reported below."

It is in the aforementioned context in para 6 thereof, it was recorded that :-

"6. Problems in Bherhampuer lex 5ESS & Bhawanipatna WLL TAX II OCB has been identified. Bill for these POIs will be revised for all previous months also & Refund will be make applicable..."

91. Ms.Dhir would contend that keeping in view the dictionary meaning of the words 'acknowledgement', 'liability' and 'debt' as would appear from Oxford's Advance Learners Dictionary of Current English and Black's Law Dictionary, it was not necessary to mention even the exact nature of rights.

92. In Oxford Advance Dictionary the word `revise' has been stated to be :-

**“Revision**

1. [C] a change or set of changes to sth : *he made some minor revisions to the report before printing it out .*
2. [U,C] the act of changing sth , or of examining sth with the intention of changing it : *a system in need of revision*◇*a revision of trading standards.”*

93. In Black’s Law Dictionary 9<sup>th</sup> Edition page 1434 the term `revision' it is stated :-

**“Revision** – A reexamination or careful review for correction or improvement.....”

94. The contention of Ms.Dhir is that the Respondent had issued the original invoice and thus it was entitled to revise the same.

The invoice could be revised in the context of the provisions of the interconnect agreement entered into by and between the parties hereto and not otherwise.

No bill had been raised in respect of the Berhampur –POI. A consolidated demand was made therein. However, details of all the POIs were furnished.

Even if such bills could be revised, the same was to be within the stipulated period of limitation and not in the year 2011, ie. not within the period of limitation.

95. Reliance placed by Ms.Dhir on the definition of the word `liability' in the context of Section 18 of the Limitation Act is of some significance.

It reads as under :-

**“Liability** - The quality or state of being legally obligated or accountable; legal responsibility to another or to society; enforceable by civil remedy or criminal punishment”

96. The liability is to the society. It is not to the State.

97. However, the meaning of the `debt' is clear and specific.

98. In the Black's Law Dictionary at Page 432, it is stated that a specific sum of money due by agreement or otherwise will fulfill the term of the liability of the claim.

It is not a case where specific sum was mentioned in the purported acknowledgement.

99. Moreover, the minutes of meeting drawn up by both the parties are absolutely distinct and separate. The liability of the Petitioner would accrue in respect of the incoming calls originated from the network of the Respondent and not the vice-verse.

100. The Petitioner might have some liability, but the same liability was required to be crystallized when the bill is raised in terms of different sub-clauses of Clauses 6 and 7 of the interconnect agreement. A monetary liability incurred in terms of an inter connect agreement cannot be indefinite. Acknowledgement of liability cannot be in a vacuum. If the Respondent was contractually obligated to raise bills in respect of each of the POIs, liability on the Petitioner would have to be proved only on issuance of a bill. As no bill was raised in respect of the Behrampur POI, the question of any liability in relation thereto, in our considered opinion, cannot be culled out from the said purported minutes of meeting or otherwise.

101. Concedingly, the Minutes of Meeting drafted by the Respondent does not bear the signature of the authorized representative of Petitioner. It, thus, does not satisfy the legal requirements of Section 18 of the Act.

102. In the aforementioned situation, we may notice the draft Minutes of Meeting submitted by the Petitioner.

<b>Agenda of Meeting (RCOM) As was on 11.03.08 &amp; 12.03.08</b>	<b>Decision taken in meeting on 11.03.2008</b>
6.Regular high variation between BSNL records & RCOM records for BSNL OG calls in Berhampuer Lex 5ESS, Koraput TAX . II AXE, Rourkela Lex WLN 5ESS Bhawanipatna WLL TAX II OCB & Rourkela L-II TAX POIs .	6. Problems in Bherhampuer lex 5ESS & Bhawanipatna WLL TAX II OCB has been identified. Bill for these POIs will be revised for all previous months also & Refund will be make applicable. For rest POIs we have analyzed DSR & will further analyze CDRs for highlighted POIs once received from IOBAS Chennai.

103. The so called agreement between the parties as specified on the right side thereof must be read in the context of the agenda. It specifically states that the agenda related to `OG Calls' meaning thereby outgoing calls from the Petitioner's exchange.

104. The parties in this case have never discussed in regard to the right of the Respondent herein to receive any payment in respect of Berhampur PIO.

105. There was, thus, no intendment on the part of the Petitioner to make any admission with regard to its liability vis-à-vis the right of the Respondent to receive any amount.

106. It furthermore is evident from the materials brought on record that even there is no correspondence that any discussions took place even so far as the Respondent's right to raise the bill is concerned.

107. In *Union of India vs. Raman Iron Foundry* AIR 1974 SC 1265, it stated :-

"The first thing that strikes one on looking at cl. 18 is its heading which reads: "Recovery of Sums Due". It is true that a heading cannot control the interpretation of a clause if its meaning is other-wise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clauses and affording a key to a better understanding of its meaning. The heading of cl. 18 clearly suggests that this clause is intended to deal with the subject of recovery of sum due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in present. It would be profitable in, this connection to refer to the concept of a 'debt', for a sum due is the same thing as a debt due. The classical definition of 'debt' is to be found in *Webb v. Stenton* (1) where Lindley, L. J., said : "a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be *debitum in praesenti*; *solvendum* maybe in *praesenti* or in future that is immaterial. There must be an existing obligation to pay a sum, of money now or in future. The following passage from the judgment of the Supreme Court of California in *People v. Arguello*. (2) which, was approved by this Court in *Kesoram Industries v. Commissioner of Wealth Tax* (3) clearly brings out the essential characteristics of a debt

"Standing alone, the word 'debt,' is as applicable to a sum of money which has been

promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is debt due."

This passage indicates, that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation, is to pay a sum of money in praesenti, it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti or in other words, which is presently payable Recovery-of such sums is the subject matter of clause. 18 according to the heading. That is the dominant idea running through the entire clause.18."

108. It is trite that although the provision has to be read holistically, the same should not be given a stretched meaning.

109. Moreover, the word `payable' means legally recoverable. (See Hughes Communications India Ltd. vs. DoT, Petition No.327/2007 decided on 3.5.2010; HFCL Injotel Ltd., Punjab vs. BSNL, Petition No.119/2008 decided on 15.1.2010 and Modern Industries vs. SAIL, (2010) 5 SCC 44.

110. Mr.Chawla would contend relying on or on the basis of the decision of the Supreme Court of India in Food Corporation of India vs. The New India Assurance Co. Ltd. AIR 1994 SC 1889 at 1896

that the period of the limitation was six months, wherein the law was stated thus :-

“From the agreement it is clear that it does not contain any clause which could be said to be contrary to Section 28 of the Contract Act nor it imposes any restriction to file a suit within six months from the date of determination of the contract as claimed by the company and held by the High Court. What was agreed was that the appellant would not have any right under this bond after the expiry of six months from the date of the termination of the contract. This cannot be construed as curtailing the normal period of limitation provided for filing of the suit. If it is construed so it may run the risk of being violative of Section 28 of the Contract Act. It only puts embargo on the right of the appellant to make its claim known not later than six months from the date of termination of contract. It is in keeping with the principle which has been explained in English decisions and by our own court that the insurance companies should not be kept in dark for long and they must be apprised of their liabilities immediately both for facility and certainty. The High Court erroneously construed it as giving up the right of enforceability of its claim after six months. Since the period is provided under the agreement the appellant had to move within this period asserting its right and apprising the company of the breach or violation by the miller to enable it either to pay or to persuade the miller to pay itself. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the Corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals

with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. Since admittedly the Corporation did issue notice prior to expiry of six months from the termination of contract, it was in accordance with the Fidelity Insurance clause and, therefore, the suit filed by the appellant was within time.”

After the said decision was rendered, Section 28 of the Indian Contract Act has been amended.

111. In a case of this nature, moreover, the Court is required to consider that although in terms of the agreement a supplementary bill could be raised within a period of six months, the period to approach the Court of law or in the alternative to disconnect the interconnect agreement to which the Respondent was specifically authorized to, is taken away when there are different remedies to enforce the claim keeping in view its other right under the agreement.

112. In this case the parties had been negotiating with regard to the short payment of the bill raised by the Respondent. In a given

case the Respondent could have shown to the Petitioner that by reason of technical fault it became disabled to raise the bill.

113. A bill has to be raised of course within the prescribed period of limitation but if there are other inabilities, namely, physical impossibility to raise a bill by way of ignorance or otherwise, the six months limitation may not be held to have any application.

114. The decision of this Tribunal in M/s Tata Communication vs. BSNL being Petition No.186/2010 must be considered from this angle. However, the said question need not be finally decided being not necessary.

137. For the reasons aforementioned this petition is allowed. In the facts and circumstances of this case, however, there shall be no orders as to costs.

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

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

**June 18, 2012/`ns'**