

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 1.11.2012**

**Petition No.15/2012**

MA No.16/2012

Cellular Operators Association of India ... Petitioner

Vs.

Union of India & Anr ... Respondents

**Petition No.25 /2012**

Dishnet Wireless Ltd. ... Petitioner

Vs.

Union of India & Anr ... Respondents

**Petition No.26 of 2012**

Vodafone Spacotel Ltd. ... Petitioner

Vs

Union of India & Anr

... Respondents

**Petition No.27 of 2012**

Bharti Airtel Ltd.

... Petitioner

Vs.

Union of India & Anr

... Respondents

**Petition No.28 of 2012**

Bharti Hexacom Ltd.

... Petitioner

Vs.

Union of India & Anr

... Respondents

**Petition No.29 of 2012**

Idea Cellular Ltd.

... Petitioner

Vs.

Union of India & Anr

... Respondents

**Petition No.41 of 2012**  
**(M.A.No.40 of 2012)**

Reliance Telecom Ltd. ... Petitioner

Vs.

Union of India & Anr ... Respondents

**Petition No.70/2012**

Dishnet Wireless Ltd ... Petitioner

Vs.

Union of India ... Respondents

**Petition No. 71/2012**

M/s Vodafone Spacetel Ltd ... Petitioner

Vs.

Union of India ... Respondents

**Petition No.72/2012**

Reliance Telecom Ltd. ... Petitioner

Vs.

Union of India

... Respondents

**BEFORE:**

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

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

For Petitioner : Mr.Maninder Singh, Sr. Advocate.  
Mr.Navin Chawla, Advocate.

For Respondents : Ms.Maneesha Dhir, Advocate.  
Mr.K.P.S. Kohli, Advocate.  
Mr.Traveen Singh Nanda, Advocate.

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

**S.B. Sinha**

**Introduction**

The Petitioners No.3 to 10 herein being licensees in terms of the `proviso' appended to Section 4 of the Indian Telegraph Act, 1865 and the Petitioners no.1 and 2 being the Associations of the Operators have filed these petitions inter alia questioning the

circular letters issued by the Respondent dated 20.7.2010, 31.3.2011 and 15.7.2011.

### **Earlier Round of Litigation**

2. This Tribunal in Petition No.252/2011 COAI and Ors. vs. Union of India disposed of on 12.4.2012 having noticed the basic fact involving the dispute between the parties, the same need not be stated once over again.

3. In the said judgment and order dated 12.4.2012, this Tribunal while accepting the power of the Respondent herein to issue circular letters as also the guidelines issued in the interest of the security of the nation, opined that the doctrine of proportionality should be applied in the matter of imposition of penalty.

4. Petition No.15 of 2012 was filed prior to the passing of the judgment in the said case.

### **Circular Letters and Correspondences**

5. Before, however, entering into the controversies between the parties relating to issuance of the impugned circular letters, we may notice the relevant circulars involving these petitions as also some other relevant facts.

6. In the matter relating to security of nation, the Central Government had been treating the States of Jammu and Kashmir,

Assam as also the North Eastern States at par so far as the issuance of pre-paid telephony service is concerned.

7. Various circular letters/instructions had been issued in this behalf being dated 23.11.2004, 24.03.2005, 14.3.2006, 21.2.2007, 3.3.2008, 17.12.2008, 11.2.2009 and 17.3.2009, extending the period(s) of sanction for rendition of the said services.

8. So far as verification of the identity of customers and their addresses is concerned, instructions were issued on 22.11.2006.

9. In the aforementioned context, we may notice that the Union of India while suspending grant of new connections and/or recharge of the old connections in the State of Jammu and Kashmir allowed the same to continue in the States of Assam and North-East.

10. The bar with regard to rendition of roaming services also was relaxed whereby the customers of the Assam circle could avail the roaming facilities in the North Eastern States and vice-versa.

11. In the aforementioned context we may notice the circular letter dated 30.9.2009, the relevant portions whereof read as under:-

"Re-verification proposed by ACT may be done in the following manner :-

(i) Re-verification means tele-calling, correcting the CAF for any type of deficiency including PoA/Pol & clauses 3(i) & 3(ii) of DoT order dated 22.11.06, updation in subscriber data base and

putting stamp as re-verified & signed.

(ii) A time-period upto one year may be availed w.e.f 01.11.09 for re-verification of subscribers.

(iii) Within one year all the CAFs (whether re-verified or other wise) shall be scanned & uploaded on service provider's website for password controlled access by TERM Cells. Service Providers shall make such a mechanism that once uploaded in website as re-verified, TERM Cells should be able to know the date of uploading of the CAFs. Service Providers shall make necessary provisions for security of their website."

Other provisions contained therein are procedural in nature.

12. On or about 20.1.2010, the Respondent herein in supercession of the aforementioned circular letter dated 30.9.2009 in the matter of issuance of new mobile connections (pre-paid and post-paid) and re-verification of existing pre-paid mobile subscribers in the circle of Jammu and Kashmir issued the following instructions :-

(i) "It has been decided to restore issuance of pre-paid mobile services in Jammu and Kashmir in accordance with the revised guidelines.

(ii) Upon completion of re-verification, existing pre-paid subscribers shall be allowed the facility of recharge.

(iii) The copy of revised guidelines for re-verification of existing pre-paid subscribers and verification of new subscribers for issuance of new pre-paid and post-paid mobile connections in Jammu and Kashmir Service Area is enclosed as Annex-1."

The guidelines for re-verification inter alia were stated in details in Annexure 1 appended thereto.

13. It is not in dispute that before the said guidelines were issued, the Petitioners herein amongst others were consulted. The said guidelines were in respect of both the heads, namely, re-verification of the existing pre-paid connections and issuance of the new ones.

14. Some of the provisions relating to verification of the existing pre-paid connections read as under :

“3. Every existing pre-paid subscriber/ connection shall be re-verified as per the following procedure.

4. Re-verification shall be done by the service provider’s own outlet or by his franchisee only. The number and addresses of such outlets and franchisee shall be notified within one week to Law Enforcement Agencies (LEA), State Police and the TERM Cell, J&K.

5. Special camps for re-verification may also be organized by the service provider after notifying the venues and dates in advance to LEA, State Police and the TERM Cell, J&K.

6. Re-verification shall mean obtaining another copy of one or more prescribed documents to verify the :

(i) identity

(ii) address

of the subscriber and comparing the information contained in the document (s) with the information already on the records of the service provider.

9.1. The list of documents acceptable for proof of identity and proof of address is enclosed as Appendix I.

10. Each subscriber shall submit four copies of his/her photograph at the time of re-verification. The service provider shall compare the photograph with the subscriber and satisfy itself about the genuineness of the photograph.

11. The service provider shall prepare a new machine-numbered Customer Acquisition Form (CAF) in respect of each subscriber. The previous CAF shall be cancelled and the cancelled form shall be retained for a period of two years. The new CAF shall contain the data relating to name, address and photograph of the subscriber and the telephone number allotted to him/her.

12.2. In case of change of address of an existing prepaid mobile subscriber, the change of address may be permitted after verification of proof of address. A copy of the old address shall be retained by the service provider and the data base shall contain both the old and new addresses of the subscriber.

13. The re-verification of an existing prepaid mobile telephone subscriber will be a one time exercise. Upon completion of re-verification, the subscriber shall be allowed the facility of recharge."

15. The matter relating to issue of new pre-paid connections, may also be noticed by us which reads as under:-

"17. A new prepaid mobile telephone subscriber may be enrolled and mobile telephone connection provided to him/her by following the

procedure outlined in paragraphs 4 to 10 and 16 above and the word "re-verification" shall be read as "verification"."

The security considerations therefor are stated in paragraph 24, which reads as under:-

**"Security considerations**

24. Notwithstanding anything contained in the foregoing paragraphs, if, in accordance with Section 5 (2) of the Indian Telegraph Act, the competent authority of the Central Government or the State Government, advises the licensor or service provider that the mobile telephone connection (Prepaid or postpaid) of any subscriber shall be cancelled on grounds of security, the service provider shall deactivate the connection within two hours of receipt of the advice and inform the Central Government, the State Government or the competent authority, as the case may be, of such deactivation. The service provider shall also inform the subscriber of the cancellation."

16. We have noticed heretofore that the list of documents acceptable for proof of identity and proof of address as provided for in Clause 9.1 have been stated in Appendix 1 the relevant paragraph whereof reads as under :-

"16. A copy of the CAF with original photograph of the subscriber on each copy shall be sent to the LEA, State Police and the TERM Cell, J&K every fortnight. The fourth copy of the photograph shall be retained by the service provider on its copy of the CAF."

17. The operators sought for a clarification with regard to the village panchayat certificates and caste certificates as also the Election Commission I-card purported to have been issued from the year 2008.

18. By reason of a circular letter dated 20.10.2010, it was directed as under :-

“Subject: Extension of Pre-Paid mobile services in J&K, Assam and North East Service Areas.

This is with reference to the letter of this office of even no. dated 20.07.2010 extending the safeguards applicable in J&K Service Area to Assam and North East Service Areas. In this regard following clarifications are issued:

(i) The reverification of prepaid subscribers as a precondition to recharging is waived off provided that the reverification of all the pre-paid subscribers are completed within three months from the date of issue of these instructions. After expiry of three months no recharge will be allowed for unverified connection.

(ii) The first of valid documents for Proof of Identity (PoI) and Proof of Address (PoA) will be same as per letter No.842-1070/2009-AS-IV/63 dated 20.01.2010 except permanent residency card in J&K.

(iii) The clarifications issued by TERM Cell J&K vide their letters dated 25.01.2010, 28.01.2010 and 02.02.2010 are enclosed for better implementation of guidelines in Assam and NE Areas also.”

19. It appears that in some of the States of North-East India the Voter's Identity Card with hologram were issued by the Election

Commission of India, but were not considered to be a valid document for procuring a SIM card.

20. By a letter dated 11.8.2010 the State of Jammu and Kashmir sought for certain clarifications; one of them being paragraph 9 thereof, it reads as under:-

Para 9 of Ref (2)	Will those documents like POI & POA certified by village Panchayat, caste and domicile certificate with photo etc. be allowed? Further Voter I Card issued from 2008 only is allowed in new method. Whether the earlier issued I-cards are allowed?	All the documents as specified in instruction dated 20.1.2010 shall be valid except for those which are specifically for J&K.
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21. A meeting appears to have been held between the representatives of the operators and the Respondent on or about 22.1.2010, in the minutes whereof it was inter alia stated :-

"As per DOT letter No.842-1070/2009-AS-IV/63 dated 20<sup>th</sup> January, 2010, all the revised guidelines were discussed one by one. The DDG, TERM Cell informed that with the issuance of revised guidelines, re-verification of the existing pre-paid connections and safe of pre-paid & post-paid mobile connections shall be done at the service provider's own outlet or at the outlet of its franchisees only and no such activity is allowed to be done by the retailers.

The service providers raised query as to :-

(a) Whether the retailers can do the activities of recharge & top-up of working prepaid connections.

- (b) Whether the retailers can handle and collect the CAFs."

22. A meeting was held in respect of what was to be done in connection with pre-paid connections and recharge thereof in the State of Jammu and Kashmir. One of the important issues raised in the said meeting reads as under:-

"2. Additional mandatory columns to be added in the CAF

- (a) Reasons for taking second or multiple connections
- (b) List of mobile numbers (pre-paid and post-paid) already having in the name of applicant and members of his family.
- (c) Income of the applicant and that of family members."

23. By a circular letter dated 2.2.2010, some other clarifications were issued with regard to the employees of the State Government and the Central Government.

24. By a circular letter dated 5.1.2011 addressed to the DDC, Term Cell, with reference to its other letter dated 15.11.2010 i.e. after the issuance of the circular letters dated 10.11.2010 and 20.10.2010, it was sought to be clarified :-

"... In this regard it is clarified that after the new guidelines for re-verification was introduced in AS &

NE Service Areas vide this office letter dated 20.07.2010, the earlier instruction of re-verification dated 30.09.2000 ceased to be effective in AS & NE Service Areas.

Further, with regard to recharge of pre-paid mobile connections after re-verification condition mentioned in the letter dated 20.01.2010 (for J&K), it was clarified that the re-verification prior to recharge is waived off provided that the re-verification is completed within 3 months of issue of these instructions. The instructions in this regard were issued on 20.10.2010. Therefore, the three months period for the same should commence from 20.10.2010."

25. On or about 2.2.2011, another circular letter was issued in the following terms :-

"Kindly refer to DOT letter No. I-34/2006-VI(Pt. I) dated 30.9.2010 vide which instructions on subscriber re-verification were issued. A time period of one year with effect from 1.11.2009 was provided for this purpose. Telecom service providers were expected to complete the re-verification exercise within one year."

26. By reason of a circular letter dated 31.3.2011, while extending the pre-paid mobile services in the State of Jammu and Kashmir, Assam and North-East telecom service areas, the Respondent stated as under:-

"Vide this office letter of even no. dated 20.01.2011, permission to provide pre-paid mobile services in J&K Service Areas was extended till 31.03.2011 with conditions mentioned in DoT letter dated 21.02.2010. The pre-paid mobile services in Assam & North East Service were extended till

31.03.2011 with the provisions contained in DoT letter dated 20.07.2010.

2. In this regard, it has now been decided to extend the said permission for continuance of pre-paid mobile services in J&K, Assam & North East Telecom Service Areas for a period of two years with effect from 1<sup>st</sup> April, 2011 subject to the condition that the existing security conditions/safeguards already stipulated by Licensor shall continue to remain in place. It may be noted that the validity of pre-paid mobile connections should be restricted up to 31<sup>st</sup> March, 2013 and in no case the pre-paid mobile connections shall be usable beyond 31<sup>st</sup> March, 2013 on the basis of this permission.

3. The provisions for CAF Auditing and penalty have been modified and are placed at Annexure.

4. The existing provisions of roaming of pre-paid mobile subscribers between Assam and North East Service Area is extended till validity of permission for pre-paid mobile services.

5. The following documents shall also be treated as acceptable document with immediate effect, for the purpose of Proof of Identity and Proof of Address in Assam and North East Areas.

(i) Proof of Identity.

a. Certificate of photo identity issued by Village Panchayat Head

b. Caste and Domicile Certificate with photo issued by State Government

(ii) Proof of Address

a. Certificate of address issued by Village Panchayat Head.

b. Caste and Domicile Certificate with address and photo issued by State Government.

6. The re-verification of subscriber of Assam and North East Service Areas conducted in compliance with the instruction NO.1-34/2006-VI (Pt.1) dated 30.09.2009 till 31.10.2010 shall be treated as valid re-verification and such subscribers shall not be required to be re-verified as per procedure contained in instructions No.842-1070/2009-AS/63 dated 20.01.2010 extended to Assam & NE Service Areas vide this office letter dated 20.07.2010. However, in case it is noted that the provisions of the instruction dated 30.09.2009 has not been complied for re-verification then the re-verification as per procedure contained in instruction dated 20.01.2010 shall be required to be completed before allowing recharge."

27. The relevant paragraphs of the annexure appended to the said circular letter may also be noticed :-

"1. The TERM Cell shall continue to conduct the Sample CAF Audit as per the existing procedure prescribed. The CAF Audit shall be conducted quarterly in place of present monthly sample CAF audit. However, the subscriber database shall continue to be submitted by the Licensee (s) monthly as per existing instructions.

2. The sample size and procedure for taking samples, conducting the audit and calculating the compliance shall remain unchanged.

3. The penalty shall be calculated as per existing instructions. However, the penalty shall be imposed by multiplying the amount by 4 (four)."

28. Yet again in a letter dated 15.7.2011, it was stated:-

" This has reference to your letter dated 11.7.2011 on above subject wherein it has been requested to clarify whether disconnection of CAFs which have been declared non-complaint due to the fact that Pol/ PoA

documents reintroduced vide instructions dated 31.03.2011 (Certificate of identity / address issued by Village Panchayat Head & Cast/Domicile Certificate with address & photo issued by State Government) used as PoI/Po6A with the CAF for the subscribers acquired during the period 20.07.2010 to 31.3.2011, is mandatory if not rectified within 72 hours.

2. In this regard, the provisions of timely disconnection mentioned in the instruction dated 23.03.2009 may be referred which provides that where a CAF is found non-compliant for a working mobile connection, either proper CAF is to be reproduced within 72 hours or else the connection deactivated. Accordingly, in the present case of non-compliant CAF if the TSSP requests the subscribers to provide a valid PoI/PoA, the subscriber can now provide the same PoI/PoA which he has provided earlier and the TSP is bound to accept it as per instruction dated 31.2.2011. Therefore, there is no reason to disconnect the connection. However, since the CAF was not compliant at the time of acquisition of subscriber, the same may be treated as non-compliant for the purpose of audit and penalty as applicable may be imposed as already being done by the TERM Cell.

3. Further, it is understood that TERM Cells are following the practice of excluding the CAFs audited in a particular sample from future CAF Audits. In case, TERM Cell Assam is not following the above practice, they may follow the same as there appears no reason for calling a single CAF for audit for more than once unless specifically decided for any reason."

29. By reason of a letter dated 25.5.2011, addressed to the operators the Government of Mizoram raised an issue as to why the voter's identity card issued by the Election Commission of India was not being accepted as a proof of the identity of the customer as also his address.

30. A similar letter was issued by the State Public Information Officer, Meghalaya in response to a query made by an Advocate of Tripura Bar Association, stating as under :-

“Point No.1 – As per direction of Election Commission of India the preparation and issue of Voter’s Identity Cards to the Electors of the State was started in 1995 in first spell.

The Electoral Registration Officers (SDMs) of the State have been requested to furnish the number of Voter Identity Cards issued in the Sub-Divisions directly to you with the office letter No. F2 (167)-CEO/RTI/05/Vol III/382)-42 dated 20<sup>th</sup> July, 2011.

Point No.2 Yes Voter Identity Card contains Hologram as a security features.

Point No.3. Yes Voter’s Identity Cards issued in the State of Tripura before the year 2008 contains Hologram as a security feature.

Point No.4. There is no major difference from the security point of view in the voter Identity cards issued in the State of Tripura before the year 2008 and after the year 2008.”

31. Similar response to another query made under RTI Act was issued by the Government of Meghalaya, which is in the following term:

3	Whether the Voter’s Identity Cards issued in the State of Meghalaya before the Year 2008 by the Election Commission of India contains various security features such as hologram.	Yes during 2007 Holograms used as prescribed by the FCI contain security feature.
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## **Demand of Penalty**

32. Indisputably, penalty was imposed on various operators relying on or on the basis of the aforementioned circular letters in terms whereof enhanced penalty was imposed from July, 2011 as would appear from the following table:-

Month	Total Sample	Rejected	Gram Panchayat and Caste Certificates (A)	Voter's Identity Card (b)	Re-verification (C)	Percentage as per term	AFER Excluding (A, C)	Penalty as per Term	Penalty if not multiplied by 4 and excluding A to C)	Remarks
Oct-10	2424	51	0	0	0	97.85%	97.85%	51000	51000	4 times penalty not applicable
Nov-10	2360	174	174	0	0	92.63%	100.00%	870000	0	4 times penalty not applicable
Dec-10	2430	149	146	0	0	93.87%	99.87%	745000	3000	4 times penalty not applicable
Jan-11	2586	1083	1082	0	0	58.12%	99.96%	5415000	1000	4 times penalty not applicable
Feb-11	2721	1041	167	0	869	61.74%	99.83%	5205000	5000	4 times penalty not applicable
Mar-11	2909	1513	226	0	1287	47.99%	100.00%	7565000	0	4 times penalty not applicable
Apr-11	3113	1500	119	0	1381	51.81%	100.00%	7500000	0	4 times penalty not applicable
Jul-11	4046	1130	287	0	843	72.07%	100.00%	2260000	0	4 times penalty not applicable

33. So far as Dishnet is concerned, our attention has been drawn to the following table:-

Month	Total Sample	Rejected	Gram Panchayat and Caste Certificates (A)	Voter's Identity Card (b)	Re-verification (C)	Percentage as per term	% AFER Excluding (A, C)	Penalty as per Term	Penalty if not multiplied by 4 and excluding A to C)	Whether Penalty Demand	Based on Penalty letter or Audit Report	Remarks	Penalty paid or not (part or full)
Nov-10	5913	652	606	0	0	88.97%	99.22%	652000	46000	Yes	Penalty demand	4 times penalty not applicable	Unpaid
Dec-10	5822	440	419	0	0	92.44%	99.64%	220000	21000	Yes	Penalty demand	4 times penalty not applicable	Unpaid
Jan-11	6026	555	549	0	3	90.79%	99.95%	277500	3000	Yes	Penalty demand	4 times penalty not applicable	Paid
Feb-11	6052	492	244	0	154	91.87%	98.45%	246000	94000	Yes	Penalty demand	4 times penalty not applicable	Paid
Mar-11	5949	2083	971	0	1112	64.98%	100.00%	104150000	0	Yes	Penalty demand	4 times penalty not applicable	Unpaid
Apr-11	6199	2793	383	0	2393	54.94%	99.73%	139650000	17000	Yes	Penalty demand	4 times penalty not applicable	Unpaid
Jul-11	6688	4193	398	0	3773	37.31%	99.67%	838600000	22000	Yes	Penalty demand	4 times penalty applied	Unpaid

## **Questions**

34. In this batch of petitions, we are primarily concerned with two questions:-

- (i) Whether, while reintroducing the village panchyat certificate and caste certificate by reason of the circular letter dated 31.3.2011, any penalty could be imposed and that too @ 4 times of the original rate for every quarter;
- (ii) Whether the Respondent no.1 could refuse to accept the Voters' Identity Card issued by the Election Commission of India with hologram issued in the year 2006.

## **Submissions**

35. Mr.Maninder Singh, learned Senior Counsel appearing for the Petitioners would, inter alia, contend :-

- (i) The impugned circular letters have been issued without application of mind in as much as the extension of the restrictions imposed in respect of the State of Jammu and Kashmir had been extended to the State of Assam and North-Eastern

States, are absolutely not applicable for the Assam and North East Circles.

(ii) The Petitioners as also the Term Cells of the DoT having sought for various clarifications, no penalty could have been imposed relying on or on the basis of the impugned circular letters as by reason thereof the clarifications were issued with regard to the process of verification and/or re-verification, after the extended period came to an end.

(iii) Non-inclusion of the voters' identity card issued by the Election Commission of India in the year 2006 in some of the North-Eastern States must be held to be suffering from the vice of total non-application of mind on the part of the Respondent herein.

(iv) The mater relating to the re-verification procedures applicable in the State of Jammu and Kashmir, could not have automatically been extended to the States of Assam and the North-East circle.

(v) The enhancement in the amount of penalty to the extent of 4 times of the penalty applicable in other parts of the country on the premise that the audit is to take place once in every quarter and not once in every month must be held to be arbitrary and violative of the well settled principle of law that no penalty can be imposed with retrospective effect.

36. Ms.Maneesha Dhir and Mr.K.P.S. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, urged:

- (i) The guidelines applicable to the State of Jammu of Kashmir has been applied `mutatis mutandis' to the State of Assam and the North Eastern States and, thus, the same would apply only to the extent found to be applicable.
- (ii) From the reply issued by the Government of Meghalaya in response to a query under the RTI Act, it would be evident that there was a change in security feature in post 2008 voters' identity cards issued by the Election

Commission of India as apart from hologram a printed `unique running serial number' was inserted in the voters' identity card from 2008.

- (iii) Matter relating to re-verification of the existing pre-paid connections became applicable to the State of Assam and North-Eastern States by reason of the instructions dated 20.1.2010, in terms whereof the operators were bound to apply the revised procedure.
- (iv) The internal letters dated 5.1.2011 and 15.7.2011, cannot be considered to be a direction upon the operators and thus, it cannot be said that there had been any confusion in the mind of the officers of the term cell with regard to the different circular letters/ instructions issued by the Respondent from time to time.
- (v) The Petitioners themselves by their letter dated 28.7.2010 having acknowledged that once a new verification process is put in place,

it would take precedence over the earlier verification procedures, as would appear from the guidelines issued on 20.7.2010 and in that view of the matter their requests to complete the said process having been allowed upon grant of a period of three months', the Petitioners are estopped and precluded from contending otherwise.

- (vi) In their representation made on or about 27.10.2010, the Petitioners having clearly stated that they be permitted to continue to accept proof of identity/ proof of address as per the circular letter dated 7.10.2009, they must be held to have accepted that the said guidelines dated 20.7.2010 would prevail over the earlier guideline dated 7.10.2009.
- (vii) The Association of the Petitioners (ACT) in its letter dated 29.10.2010, having clearly stated that the operators who have not yet been re-verified the customers would do so as per the revised instructions of Jammu and Kashmir

within a period of three months, the same would be binding on the Petitioners.

- (viii) It does not lie in the mouth of Petitioners to say that they had any confusion with regard to the implementation of the circulars applicable in the State of Jammu and Kashmir which were extended to the State of Assam and North-eastern States of India.
- (ix) Similar letter having been issued by Petitioner no.4 on 2.12.2010, it is difficult to accept that the Petitioner did not understand the implication thereof.
- (x) So far as the issue relating to imposition of four times penalty is concerned, the same being within the power of the DoT, no exception can be taken thereto and it is incorrect to contend that by reason of the aforementioned circular letter dated 3.2.2011 and 23.2.2011, the amount of penalty has been increased to four times as in stead and in place of monthly audits, quarterly audits were to take place.

## **ORDER II RULE 2 CPC ISSUE**

37. The contention of the Respondent that validity and/or legality of various instructions/ guidelines relating to verification of the subscribers as also these relating to imposing penalties having been the subject matter of the petition filed by the Petitioners herein being Petition No.252/2011 which has been disposed of on 12.4.2012, this petition is barred under the principles of Order II Rule 2 of the Code of Civil Procedure, 1908, may be considered.

The said provision reads as under:-

“II - Frame of suit

2. Suit to include the whole claim.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation

shall be deemed respectively to constitute but one cause of action.”

38. The said contention, in the opinion of this Tribunal, has no force in view of the fact that these petitions are not based on the self-same cause of action.

39. In view of the judgment of this Tribunal dated 12.4.2012 in Petition No.252 of 2011, there cannot be any doubt or dispute that the Petitioners cannot question the legality and/or validity of the circular letters impugned therein, but in these petitions we are concerned with validity of different circulars.

40. Both the causes of action of two petitions as also the subject matter thereof being distinct and different from the said Petition no.252 of 2011, these petitions are not barred under the principles of Order II Rule 2 of CPC.

### **Belated Challenge**

41. Ms.Maneesha Dhir furthermore contended that the Petitioners should not be permitted to question the legality and validity of a large number of circulars ranging from 20.7.2010 to 20.1.2011 in as much as by reason of the subsequent circulars issued by the Respondent itself, no confusion can remain in the mind of the Petitioners requiring any determination by this Tribunal.

42. It is not the contention of the Respondent that these petitions are barred under the law of limitation. The Petitioners, as indicated

heretobefore, had only questioned the legality and/or applicability of certain circulars being dated 20.7.2010, 31.3.2011 and 15.7.2011, and in that view of the matter the said purported contention cannot also be accepted.

**The Caste and Re-Caste Certificate of the Village Panchayat Certificate**

43. The history relating to issuance of different circulars concerning the aforementioned two certificates have been noticed by us heretobefore. Although, the Central Government had all along been taking the security concerns of the nation into consideration in respect of the States of Jammu and Kashmir, Assam and North-East areas, at par, there existed a difference, namely, whereas pre-paid services were being extended to the State of Assam and North East from time to time, so far as the State of Jammu and Kashmir is concerned, issuance of any new mobile pre-paid connection and recharge thereof were stopped.

44. Mr.Kohli would submit that by reason of non-recharge of the mobile the mobile does not cease to function and only its function becomes nominal in the sense that calls can be received but no call can be made from the same.

45. We are not concerned with the question as to whether a mobile shall function despite it having not been recharged.

46. The relevant question herein is that continuity of the pre-paid mobile services having come to an end in Jammu and Kashmir and no fresh pre-paid connection of mobile services could be given nor recharge thereof was permissible, whether in that view of the matter, the question of any further re-verification arose.

47. The Central Government considered the matter afresh by holding consultations with the representatives of the operators who agreed to fulfill certain rigorous terms and conditions for restoration of the said services in the State of Jammu and Kashmir.

48. The two circulars which were peculiar to the State of Assam and North-Eastern States were not being used in the State of Jammu and Kashmir.

49. It is in that context only representations were made by the Petitioners herein.

50. In the context of the circular letter dated 20.10.2010, it does not appear that the same was based on any representation made by or on behalf of the Petitioners.

51. Representations were made by ATC only on 29.10.2010.

The said representation is in two parts. The first part related to the procedure of re-verification, namely, as to whether the process of verification has to be carried out on the basis of tele calling, or on

the basis of asking the concerned persons to come to the operator's officer and/or those of its franchisees so as to enable them to verify/re-verify the CAF forms.

52. In the said representation dated 29.10.2010, it was contended that July, 2010 circular shall be complied with within three months. The said representation was also made with regard to the three documents which were not to be treated as a proof of identity or address of the customers.

53. Clarification has been issued by the DoT only on 31.3.2011 with retrospective effect in the sense that the said two certificates were to be treated as acceptable document with immediate effect.

54. However, if the period of three months is taken from 20.10.2010, the same was over in January, 2011.

55. Three months' period was also over from the date of the representation dated 29.10.2010 made by ACT.

56. Paragraph 6 of the said circular letter dated 31.3.2011, must be interpreted keeping in view the aforementioned factual backdrop. At the outset, we may notice that one exception has been curved out therein to the effect that if the instructions dated 30.9.2009, have not been complied with for in purpose of re-verification, as per the procedure contained in the instructions dated 29.1.2010, the same must be complied with before allowing recharge; meaning

thereby that verification procedure can be resorted to in the light of the said circular on and from 31.3.2011.

57. The letter dated 30.9.2009, speaks of re-verification of the identity and addresses of the customers by way of tele calling.

58. If such a procedure has been adopted, the same shall also be valid for the subsequent period and the re-verification of subscriber, therefore, was not required to be conducted after issuance of the said letter.

59. Again thus, those two certificates could be looked into. The later part of paragraph 6 furthermore refers to the procedural aspect, which contains an exception.

60. The controversy between the parties may have to be resolved keeping in view the circular letter dated 2.2.2011 whereby the telecom service providers were expected to complete the re-verification exercise within one year. The said circular letter refers to the earlier circular letter dated 30.9.2009 i.e. a time period upto one year w.e.f .1.11.2009 for the purpose of re-verification of the subscribers was allowed.

61. By reason of the said letter dated 2.2.2011, it was again extended for a period of three months i.e. upto 31.3.2011. The circular letter dated 30.9.2011 refers to tele calling and the confusion arose only having regard thereto, meaning thereby as to

whether paragraph 4 of the said circular letter dated 30.9.2011 was required to be followed.

62. If that be so, the question of imposing any penalty either for not following the procedure or not following the process of verification i.e. the certificate issued by the village panchayat and caste and domicile certificate, did not arise.

63. No reason, far less any cogent reason has been assigned as to why the said certificates which were valid in terms of the circular letter dated 7.10.2009 but became inapplicable only on and from 20.1.2010 till 31.3.2011, would not be treated to be so.

64. In the aforementioned context, it may be noticed that from 2008 onwards the said certificates were considered to be valid.

65. Para 6 of the circular letter dated 16.4.2008 speaks of any other document containing photograph including the document of photo issued by the village panchayat which was issued by way of illustration.

### **Privilege Issue**

66. The Respondent apart from filing a short reply at the time of passing of the interim order has not filed a detailed reply. It, however, not only has annexed several documents with its short reply but also filed certain additional documents alongwith a compilation containing the guidelines dated 23.11.2004, 24.3.2005,

14.3.2006, 21.2.2007, 3.3.2008, 17.12.2008, 11.2.2009 and 17.7.2009.

67. The Respondent, however, has produced before us the original records and referred to certain documents contained therein contending the same to be confidential in nature.

68. Mr. Maninder Singh would contend that this Tribunal either for the ends of justice or otherwise in absence of any reply filed by the Respondent wherein the contentions raised by the Petitioner had not been traversed, should not permit the Respondent to refer to the original file as it would not be possible for the Petitioner to make any submission with regard thereto. The learned counsel appears to be correct.

69. The Respondent in these matters have not sought for any privilege as is provided for in Section 123 of the Indian Evidence Act. It reads as under :-

“123. Evidence as to affairs of State.- No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.”

70. The Supreme Court of India in R.K. Jain vs. UOI reported in (1993) 4 SCC 119 stated the law thus :-

**15.** Section 123 of the Evidence Act gives right to the Government, in other words, to the Minister or in his

absence head of the department, to claim privilege, in other words immunity from disclosure of the unpublished official State documents in public interest. In a democracy, governed by rule of law State is treated on a par with a person by Article 19(6) in commercial/industrial activities. It possessed of no special privileges. This Court in *State of U.P. v. Raj Narain* [(1975) 4 SCC 428, 443 : (1975) 3 SCR 333, 349] held that an objection claiming immunity should be raised by an affidavit affirmed by the head of the department. The court may also require a Minister to affirm an affidavit. They must state with precision the grounds or reasons in support of the public interest immunity. It is now settled law that the initial claim for public interest immunity to produce unpublished official records for short "State documents" should be made through an affidavit generally by the Minister concerned, in his absence by the Secretary of the department or head of the department. In the latter case the court may require an affidavit of the Minister himself to be filed. The affidavit should indicate that the documents in question have been carefully read and considered and the deponent has been satisfied, supported by reasons or grounds valid and germane, as to why it is apprehended that public interest would be injured by disclosure of the document summoned or called for. If the court finds the affidavit unsatisfactory a further opportunity may be given to file additional affidavit or he may be summoned for cross-examination. If the court is satisfied from the affidavit and the reasons assigned for withholding production or disclosure, the court may pass an appropriate order in that behalf. The court though would give its utmost consideration and deference to the view of the Minister, yet it is not conclusive. The claim for immunity should never be an administrative routine nor be a garb to avoid inconvenience, embarrassment or adverse to its defence in the action, the latter themselves a ground for disclosure. If the court still desires to peruse the record for satisfying itself whether the reasons assigned in the affidavit would justify withholding disclosure, the court would, in camera, examine the record and satisfy itself whether the public interest subserves

withholding production or disclosure or making the document as part of the record.

16 On the one side there is the public interest to be protected; on the other side of the scale is the interest of the litigant who legitimately wants production of some documents, which he believes will support his own or defeat his adversary's case. Both are matters of public interest, for it is also in the public interest that justice should be done between litigating parties by production of all relevant documents for which public interest immunity has been claimed. They must be weighed, one competing public interest in the balance as against another equally competing public administration of justice. The reasons are: there is public interest that harm shall not be done to the nation or the public service by disclosure of the document in question and there is public interest that the administration of justice shall not be frustrated by withholding the document which must be produced, if justice is to be done. The court also should be satisfied whether the evidence relates to the affairs of the State under Section 123 or not: whether evidence is relevant to the issue and admissible. As distinct from private interest, the principle on which protection is given is that where a conflict arises between public and private interest, private interest must yield to the public interest. In *S.P. Gupta v. Union of India* [1981 Supp SCC 87 : (1982) 2 SCR 365] this Court by a seven Judge Bench held that the Court would allow the objection to disclosure if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document."

71. It is, therefore, clear that in the event any privilege with regard to certain documents is claimed, the procedure laid down by the Supreme Court of India would be required to be followed.

72. No affidavit has been filed by the Secretary, DoT. The question of excluding any document in public interest from the realm of evidence would arise provided there are pleadings to that effect supported by an affidavit.

73. Even ground of the 'affairs of the State', as has been held by the Supreme Court of India, would not preclude the Court from considering as to whether the privilege applied for should be granted or not.

74. In the event the privilege is granted, only to the said extent the Court will not permit the Applicant from leading any evidence contained in any document involving the affairs of the State.

75. In this case the Respondent has not filed any reply.

76. There is nothing on record to show as to why the question with regard to the reasonableness or otherwise of the circular letters should be considered to be connected with the security of the nation.

77. The question involved herein relates to the interpretation of certain circular letters.

78. It is true that the legality of the said circular letters is not in question herein but that would not mean that original records would only be produced and that too for the purpose of perusal of the Tribunal only.

79. If the aforementioned procedure as advocated by the Respondent is accepted, the Petitioner would be deprived from making inspection of the said documents and thus for all intent and purport being deprived of an opportunity to meet the case of the Respondent.

80. It is a well-settled principle of law that justice is not only to be done but also manifestly seem to be done.

81. The principles of natural justice which the Courts and Tribunals are bound to comply with, cannot be pushed out of the purview of an original petition through a side door.

82. It may be true that the decision might have been taken on behalf of the DoT at the highest level. It may also be true that Secretaries of several departments met and considered as to whether certain security aspects should be given preference.

83. The same, however, would not mean that only by reason thereof, namely, formulation of a policy decision at the highest level would make the entire decision making process beyond the purview of consideration by a Court of law. If such a method is adopted, the

sanctity of a judicial institution would be lost, particularly, in view of the fact that although this Tribunal is not bound by the Code of Civil Procedure, it is bound to comply with the principles of natural justice.

84. The principles of natural justice having been embedded in the Telecom Authority of India Act, 1997 cannot be given a go bye either completely or partially unless an exceptional case is made out with regard thereto.

85. It is only for the ends of justice the Parliament thought it fit to introduce sub-Section 7 of Section 14A in the Act. It reads as under :-

**"Section 14A – Application for settlement of disputes and appeals to Appellate Tribunal –**

(7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness, of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to disposing of such application or appeal and make such orders as it thinks fit."

86. The discretion on the part of the Tribunal is general in nature.

87. If the provision of Section 14 A is to be considered in its entirety, it would mean that in all such cases the Tribunal subject to an exceptional case having been made out i.e. having regard to the

provisions of Section 123 of the Indian Evidence Act, must give inspection to the other side the entire file so that they can make proper representations on their part.

88. Had an opportunity been granted to the Petitioners herein to inspect the original files, it would have been possible for it to show that the decisions taken by the Union of India whether by one officer or by a group of officers from different departments suffer from vice of non-application of mind.

89. It is not correct to contend that the UOI has a privilege with regard thereto. The question of privilege in the matter of compliance and/ non-compliance of principles of natural justice cannot be a ground for the Respondents in not filing reply and producing the original file for the purpose of tying the loose ends of its submissions.

90. We, therefore, are of the opinion that this Tribunal should not look into the original files only for the purpose of consideration as regards the justifiability and/or application of mind on the part of the DoT in the matter of issuance of impugned circular letters/ several guidelines.

### **Estoppel Issue**

91. Before proceeding to consider the other rival submissions, as noticed heretobefore, some of the letters issued by the Petitioners

and/or their Association relying on or on the basis whereof the plea of estoppel has been raised, may be noticed.

92. The Petitioner no.2 by a letter dated 28.7.2010 addressed to the Secretary, DoT stated as under :-

“3) Unlike J & K, where the prepaid service was being reinstated after a gap of about 3 months, and the guidelines were discussed with the Industry before implementation, in case of Assam & North East, this consultative approach has not been followed. Our member service providers have millions of prepaid customers, who are currently availing the recharge facility from these channel partners and any abrupt disruption in operation will lead to huge inconvenience to these customers.”

93. By a letter dated 29.10.2010, ACT stated :-

“Subsequently, our members are in receipt of the clarifications issued by DoT through its letter dated 20<sup>th</sup> October 2010 on the queries raised by us. Sir, we would like to respectfully submit the following for kind your consideration:

1. Re-verification

a) As you are aware the re-verification of subscribers had commenced in all service areas, including Assam & North East as per the DoT guidelines dated 30 September 2009. Significant amount of time, effort and manpower resources have been invested in carrying out the re-verification exercise that is still underway. As a significant percentage of the subscriber base identified for re-verification efforts have already been re-verified, to now prescribed a new process at this late stage would not only undo the efforts of the last several months but also result in further unnecessary delays.

b) Given this fact, it would be impossible to go back to the re-verified customers spread across remote areas in different parts of Assam and North East Service Areas and ask them to undergo a repeat re-verification – many of the customers will have to be disconnected since the commonly available documents have not been allowed leading to large scale customer issues. This would definitely cause huge hardship to the public at large and the activity of the second re-verification would result in uproar.

c) Since the clarification from DoT has only been received very recently, when the re-verification drive is at an advanced stage, we would like to submit that:

- The past re-verification that has been carried out by our member operators in the Assam and North East Service Areas may be considered as complied.
- Going forward the customers who have not yet been re-verified would be re-verified as per the revised instructions of J&K which is to be completed in next 3 months (by 20<sup>th</sup> Jan 2011)."

94. The Petitioners by a letter dated 28.7.2010, purported to have acknowledged that once a new verification process commences, it would take precedence over the existing guidelines stating :-

"8) We understand that TERM cell in Assam and North East are insisting on following the earlier process of verification by witness as well as SIM delivery in addition to the new process, which is not possible as once a new process has been set up, it automatically takes the precedence over the earlier verification process. It is requested

that a clarification should be issued in this regards.”

95. In the said letter the following requests were made :-

“i. Please allow minimum 3 months time to our member service providers to implement the new acquisition process referred to in the DoT Letter No.800-14/2010-VAS-III Vol.II dated 20<sup>th</sup> July, 2010.

ii. Please provide clarification on re-verification of prepaid subscribers as per DoT guideline No.1-3/2006-VI(Pt 1) dated 30/9/2009 and till the clarification is issued new instructions of 20<sup>th</sup> July, 2010 may be kept in abeyance.”

96. By a letter dated 27.10.2010 it was stated :-

“ We have been requesting that in Assam & North East service areas, we should be allowed to continue to accept Proof of Identity /Proof of address documents as per the DoT approved list of 7 October 2009. Sir, as you are aware, the list of documents acceptable as POI/POA as given in the J&K guidelines do not contain several POI/POA documents as per the DoT Circular of 7 October 2009 that are currently being accepted to issue mobile connections in Assam & North East service areas.”

97. We may also notice the letter of the Petitioners dated 2.12.2010:-

“ This is with reference to the DoT instructions and clarifications issued vide above referred letters regarding subscriber verification and applicability of special instructions given for prepaid services in J&K service area and their applicability in Assam and North East area effective from 20.07.2010.

Subsequent to the clarifications issued by DoT,

ACT has made submissions vide letter dated 29.10.2010 (copy attached as Annexure-1), same is reiterated as follows for your kind consideration and support –

#### Reverification

- As was submitted in ACT representation, we have already done reverification of majority of the subscribers and there is no rational of doing the verification again and again with revised process as it will cause lots of customer paid and disconnection in addition to the double cost involved.
- TERM Cell in Assam and North East service areas to be suitably advised that the reverified subscribers prior to clarifications issued by the DoT vide letter dated 20.10.2010 should be considered as complied and meeting the reverification requirements as per DoT instructions of 30.09.2009. Going forward, any customer who has not yet been re-verified would be re-verified as per the revised instructions and to be completed in next 3 months (by 20<sup>th</sup> Jan 2011).

#### Subscriber Documents for POA :

- As has been explained in the ACT letter, following Assam and North East specific documents need urgently to be allowed in place of J&K specific documents –
  - (i) Gram Panchayat Certificate issued by Gram Panchayat Head or its equivalent authority.
  - (ii) Caste and Domicile Certificate issued by Govt. of Assam

These are majorly available proof of identity and address hence will held larger masses to use these documents for getting mobile

connections in these service areas. A sample of these documents is attached herewith as Annexure-II.

We hope that our above submissions will merit your kind consideration.”

98. We have noticed the letters issued by the petitioners and/or by their association in some details only to show that the purport and object thereof were two fold, namely, seeking clarifications as regards the procedural aspect of the matter and secondly making representations with regard to certain certificates etc. which have been omitted. The respondent it goes beyond any doubt or dispute had been issuing clarifications from time to time not only having regard to the letters it had been receiving from the Term Cells but also the representations made by it.

99. We have analyzed the contents of the said circular letters. Suffice, however, it to indicate that if the pre-paid mobile services was extended for a period of two years, the proof of identity and proof of address by reason of certificate of photo identity issued by village panchayat head and caste and domicile certificate issued by the State Government were again introduced. If that be so, it is difficult to hold as to how penalty could be imposed unless and until the clarifications were issued and implemented.

100. The representations made by the association no doubt asked for certain time to comply with the re-verification process but it's a trite law that such communication should be read in their entirety and reasonably. So read, there cannot be any doubt or dispute that the principles of 'estoppel' in a case of this nature would not be attracted. If it is to be held that the action on the part of the respondent herein were wholly without jurisdiction and/or suffers from total non-application of mind, the same would be nullities. The procedural pleas, as for example 'estoppel' or waiver cannot be imported while the orders are passed wholly without jurisdiction. In Chief Justice of Andhra Pradesh and Ors. vs. L.V.A. Dixitulu and Ors – (1979) 2 SCC 34 it is stated :-

“Moreover, this is a pure question of law depending upon the interpretation of Article 371D. If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in this case.”

101. The said decision has been followed by the Tribunal in several cases.

102. In this view of the matter we are of the opinion that the subject matter of the petition being imposition of penalty on the individual operators, petition cannot be thrown out only on the ground of estoppel.

### **Quantum of Penalty – Whether Retrospective in Nature.**

103. By reason of the circular letters dated 3.2.2011 and 23.2.2011, a provision of enhanced penalty was laid down.

104. This Tribunal while upholding the powers of the Respondent in issuing guidelines/ circulars in Petition No.252/2011 (supra) opined that the quantum of penalty may be subjected to the guidelines subject, of course, to application of the doctrine of proportionality.

105. While laying down the said law this Tribunal opined :-

“182. Respondent itself has contended that imposition of penalty may be deterrent in nature, the same by itself cannot be said to be a revenue generating process. If that be so, in absence of a statute providing for mandatory imposition of penalty, the quantum thereof cannot be fixed.

183. Imposition of penalty cannot be a mechanical act. The action on the part of the officers of the Respondent must be reasonable. They must act independently and impartially.”

106. Ms.Dhir would urge relying on or on the basis of a decision of the Supreme Court of India in Padma Srinivasan vs. Premier Insurance Co. Ltd. (1982) 1 SCC 613 and SEBI vs. Ajay Aggarwal (2010) 3 SCC 765 that imposition of penalty on the basis of the non-compliant CAF forms would not be retrospective in nature.

107. In Padma Srinivasan (supra) a contract of insurance was entered into by and between the parties thereto. The Motor Vehicles Act, 1939 provided for a limited liability at the time of

entering into the contract of insurance. The certificate of insurance was issued to the Petitioner on 31.5.1969 for the period June 30, 1969 and June 29, 1970.

108. Section 95 (2) of the said Act was amended by Act 56 of 1969 which came into force on and from 2.3.1970 whereby and whereunder the liability of insurer was raised to Rs.50,000/- in all.

109. While considering the question as to whether the liability of the insurer would be in terms of the original Act or the amended Act, it was held that the liability as determinable under Chapter VIII thereof at the relevant time would be, when the liability arises and such liability having arisen when the 1969 amendment was in force, the same would not mean to have retrospective operation, namely, the same would apply as on the date of issuance of the policy.

110. The said decision, therefore, has no application to the fact of the present case.

111. In the case of SEBI (supra), the question of imposition of penalty was interpreted in the context of Article 20 (1) of the Constitution of India. The Apex Court observed that imposition of a lesser penalty having not been made under Section 11 (B) of the Security and Exchange Board of India Act, 1992 but only in terms of Section 11 (4) (b) thereof.

It was opined :-

“24. The right of a person of not being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a Fundamental Right guaranteed under our Constitution only in a case where a person is charged of having committed an “offence” and is subjected to a “penalty”.

25. In the instant case, the respondent has not been held guilty of committing any offence nor has he been subjected to any penalty. He has merely been restrained by an order for a period of five years from associating with any corporate body in accessing the securities market and also has been prohibited from buying, selling or dealing in securities for a period of five years.”

112. It was furthermore held :-

“31 Even if penalty is imposed after an adjudicatory proceeding, persons on whom such penalty is imposed cannot be called an accused. It has been held that proceedings under Section 23(1A) of Foreign Exchange Regulation Act, 1947 are adjudicatory in character and not criminal proceedings ([See Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd. and others](#), (1996) 2 SCC 471). Persons who are subjected to such penalties are also not entitled to the protection under Article 20 (1) of the Constitution.”

113. The Apex Court, however, in *Soni Devrajbhai Babubhai vs. State of Gujarat and Ors.* reported in AIR 1991 SC 2173 with

reference to the provisions of Section 304-B of the IPC opined that the sentence which was applicable as on the date of commission of the offence would be relevant and not when an order of punishment was being imposed, stating :-

“ It is clear from the above historical background that the offence of dowry death punishable under section 304-B of the Indian Penal Code is a new offence inserted in the Indian Penal Code with effect from 19.11.1986 when Act No. 43 of 1986 came into force. The offence under section 304-B is punishable with a minimum sentence of seven years which may extend to life imprisonment and is triable by Court of Session. The corresponding amendments made in the Code of Criminal Procedure and the Indian Evidence Act relate to the trial and proof of the offence. Section 498A inserted in the Indian Penal Code by the Criminal Law (Second Amendment) Act, 1983 (Act No. 46 of 1983) is an offence triable by a Magistrate of the First Class and is punishable with imprisonment for a term which may extend to three years in addition to fine. It is for the offence punishable under section 498-A which was in the statute book on the date of death of Chhaya that the respondents are being tried in the Court of Magistrate of the First Class. The offence punishable under section 304-B, known as. dowry death, was a new offence created with effect from 19.11.1986 by insertion of the provision in the Indian Penal Code providing for a more stringent offence than section 498-A. Section 304-B is a substantive provision creating a new offence and not merely a provision effecting a change in procedure for trial of a pre-existing substantive offence. Acceptance of the appellant's contention would amount to holding that the respondents can be

tried and punished for the offence of dowry death provided in section 304-B of the Indian Penal Code with the minimum sentence of seven years' imprisonment for an act done by them prior to creation of the new offence of dowry death. In our opinion, this would clearly deny to them the protection afforded by clause (1) of Article 20 of the Constitution which reads as under:

"20. Protection in respect of conviction for offences -(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.""

114. Yet again in Mohd. Abdul Sufan Laskar and Ors. vs. State of Assam (2008) 9 SCC 333, the Apex Court held that if an offence was a compoundable one, the date on which the same was committed, and subsequently became non-compoundable, the earlier provision shall prevail over the later stating :-

**"16.** It is no doubt true as stated by the learned counsel for the appellants even at the time of preliminary hearing of this matter that by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005) the above entry has been deleted. In other words, an offence of voluntarily causing hurt by dangerous weapons or means punishable under Section 324 IPC is no more compoundable. The Amendment Act of 2005 came into force from 23-6-2006.

**17.** As we have already noted, according to the prosecution, the appellants had committed the offence on 15-6-1995. In view of the above fact, in our

opinion, Act 25 of 2005 has no application to the facts of the case. We, therefore, see no ground to refuse permission as sought by the parties who have compromised the offence which was compoundable under the Code as it stood in 1995. If it is so, compounding can be permitted and the accused (the appellants) can be acquitted.”

115. There cannot be any doubt or dispute that the certificates issued by the village panchayat and/or equivalents thereof apart from other documents play an important role in the rural areas. The said documents, it is not in dispute, were not available in the State of Jammu and Kashmir. If they were not available in the State of Jammu and Kashmir, the question of exclusion thereof in the areas where such certificates were not only being issued but also were being acted upon, could not have arisen.

116. Ms. Maneesha Dhir would contend that the doctrine of incorporation of a document in the other i.e. by way of reference by incorporation being ‘mutatis mutandis’ in nature is not applicable in this case.

117. The learned counsel relied upon some dictionaries in that behalf.

118. In Black’s Law Dictionary it is stated that the said words mean “all necessary changes having been made; with the necessary changes”.

119. Although, the said argument was made in connection with the contention of the petitioner that the permanent residency card was not applicable in Assam and North East service area, the said principle may apply in the instant case also. The restrictions which were applicable in the State of Jammu and Kashmir mutatis mutandis were to apply in the States of Assam and North Eastern States. Those two documents being applicable in the North Eastern States and/or State of Assam, while they were not considered to be relevant in Jammu and Kashmir were required to be expressly excluded. The respondent does not state that any fresh consideration or a new aspect was taken into consideration for the purpose of restoration thereof w.e.f. 31.3.2011.

120. If that be so, it was also for the Central Government to explain as to why the said document should not have been treated to be valid throughout. The contention of the Petitioner is, therefore, not without any force that the respondent did so upon realization of a mistake. If it had partially waived the condition of re-verification in respect of a pre-paid subscriber as a precondition to recharging subject of course to the consideration that re-verification of all the pre-paid subscribers were completed within three months from the date of issue of instructions.

121. There is also some force in the contention of the petitioner that the same did not entirely solve the query raised by it, namely, as to whether the re-verification was to be done as per the procedure laid down in the circular letter dated 30.9.2009 or the new circular letter dated 20.7.2010. It was also necessary to give a clarification as to what would happen to those subscribers who had been subjected to verification of identity as also the address in terms of circular letter dated 30.9.2009.

122. The Respondent by reason of the circular letter dated 5.1.2011 issued a clarification to the effect that the guidelines contained in the circular letter dated 20.7.2010; shall prevail over the guidelines contained in the earlier circular letter dated 30.9.2009, by raising a legal fiction. Three months period was granted in terms of circular letter dated 20.10.2010. The said period came to an end on 19.1.2011.

123. The pre-paid services which have been permitted for only beyond 22.2.2010 were also extended till 31.3.2011, by the aforementioned circular letter dated 20.1.2011.

124. Verification upto 31.10.2010 in terms of the instructions dated 20.9.2009 were to be treated to be valid.

125. There cannot be any doubt or dispute that the security of nation was to be given top most priority but then it appears from

the record that the uncertainties pertaining to the said circular letters were also in the mind of the Term cells as would appear from the Respondent's letter dated 5.1.2011. When commission of some mistake was realized with regard to the aforementioned two documents and keeping in view the fact that the said circular letter dated 31.3.2011 was applicable in respect of the entire country; there is no reason as to why an exception thereto shall be made in case of Assam and North Eastern States. In any event, such an exclusion should have been explicitly stated. It furthermore appears that re-verification till 31.10.2010 as per the procedure laid down in the circular letter dated 30.9.2009 was allowed and thus, the operators could follow the procedure laid down therein. It is on that ground only clarifications were sought for from the DoT by the Petitioners.

126. It appears that only after 31.3.2011 the Term cells started imposing penalty. We are, therefore, of the opinion that an uncertainty of some sort having been in the mind of everybody as regards the legal position so far as the re-verification procedure for the period 20.7.2010 to 31.3.2011 is concerned; it was not a case where penalty should have been imposed.

## **Quantum of Penalty Issue**

127. For the purpose of enhancement of penalty some reason ought to have been assigned. It may be true that the audit was to take place in a quarter and not every month. The question as to whether the same would conform to the concept of the security of nation is not material for us. But except making bald statements in the aforementioned circular letter, for enhancement of 1.33% in the quantum of penalty, no reason has been assigned.

128. It has also not been explained as to what would happen if even after 31.3.2011 for the period preceding the same i.e. from 20.7.2010 to 31.3.2011, the said documents were relied upon by the operators for the purpose of reverification.

129. During the period in question for any violation, namely, from 23.7.2010 to 31.3.2011, no penalty at the enhanced rate could have been imposed.

130. It is a matter of some significance that the subscribers acquired by the operators during the said period on the basis of the said verification although were not to be disconnected but the penalties at the enhanced rates were to be collected as stated in the circular letter dated 15.7.2011.

131. It is only in that sense we have held heretofore that the imposition of penalty at the enhanced rate with retrospective effect would be bad in law.

### **Re- Voter Identification Card**

132. Voters' identification card is not applicable in the State of Assam. We are, therefore, concerned only therewith in the matter involving the North Eastern States. It has not been disputed that in the North Indian States unlike the Jammu and Kashmir, the voters' identity cards with a hologram were issued by the Election Commission of India; whereas in the State of Jammu and Kashmir such cards by the Election Commission of India were issued only in 2008. Prior thereto the State Government only used to issue such cards.

133. By reason of a circular letter dated 16.4.2008, not only the Election Commission ID card but also any other document containing photograph including those as enumerated therein were to be treated as a valid identity/ address proof of the customer. Circular letter dated 7.10.2009, again provided for Election Commission ID Card, both for proof of identity as also proof of address. There was no cut off date therefor. They were issued in the North Eastern States with hologram by the Election Commission of India. The said document was not withdrawn. The said document

did not say that the voter identification card could be relied upon only if the same had been issued in 2008 or thereafter.

134. With regard to re-verification, it was stated :-

“ Apex Advisory Council for Telecom in India (ACT), vide letter dated 29.04.09 addressed to DOT on the subject has stated that, “in the present guidelines on mobile subscriber verification, there is no scope of subscribers’ re-verification and requested to allow re-verification to carry out checking for completeness of forms & documents, tele-calling the customer and collecting correct documents (including photo for the period Nov 2001- May 2005”, when as per ACT, instructions were not clear) and putting correct stamp wherever incorrect. ACT further requested that CAFs stamped by company as re-verified should not be treated as negative for checking retailer/distributor stamp and undertaking i.e. clauses 3(i) & 3(ii) of DoT letter 22<sup>nd</sup> Nov 20.06, since this will carry a separate date much after activation date and same will be the case for PoA/Pol. ACT requested that such re-verified cases should not be treated as failed and should not attract penalty during audit by TERM.

2. On the subject, it was felt that it would be appropriate for Service Providers to re-verify their subscribers & data base, which would also be in the interest of National Security. In order to facilitate the same, a time frame may be provided for re-verification such that re-verified & scanned CAF shall be made available to the TERM Cells in a password protected website of service providers. Service Providers will also make an arrangement such that TERM Cell will know the date of re-verification and uploading. Even though mobile service providers had been repeatedly asked by DOT to issue SIM only after proper subscriber verification, and were asked finally to re-verify all the customers by 31.03.07 vide DOT letter dated 22.11.06, keeping in view that industry wants to make further efforts in this regard, another chance can be given for re-verification within a prescribed time limit. Industry requested for 1 year period citing the volume of work for re-verification. In order to make re-verification process effective and to see that procedures are not circumvented, Service

Providers shall ensure that during the window of re-verification they scan CAF & documents, including the one which will be re-verified.

3. The scanned CAFs should be available to TERM Cells online so that they know in advance that the CAF has been re-verified during this period and any possibility of mentioning the date afterwards can be avoided. During this period of re-verification, normal subscriber verification audit will continue.

4. Re-verification proposed by ACT may be done in the following manner :-

(i) Re-verification means tele-calling, correcting the CAF for any type of deficiency including PoA/Pol & clauses 3(i) & 3(ii) of DoT order dated 22.11.06, updation in subscriber data base and putting stamp as re-verified & signed.

(ii) A time-period upto one year may be availed w.e.f 01.11.09 for re-verification of subscribers.

(iii) Within one year all the CAFs (whether re-verified or other wise) shall be scanned & uploaded on service provider's website for password controlled access by TERM Cells. Service Providers shall make such a mechanism that once uploaded in website as re-verified, TERM Cells should be able to know the date of uploading of the CAFs. Service Providers shall make necessary provisions for security of their website."

135. By reason of a circular issued on 20.7.2010, extension was granted so far as pre-paid mobile connections are concerned. However, only on 20.1.2010, the pre-paid mobile services were allowed in Jammu and Kashmir subject to the conditions mentioned in the Appendix appended therewith, which we have noticed heretobefore.

136. By reason of Appendix I, the Election Commission I-Card was treated to be a valid document. By reason of the said circular letter, therefore, the voters' identity card issued from 2008 was applied. It did not say that the voters' identity card with hologram although issued by the Election Commission from 2006 onwards in the North Eastern States shall become invalid as there was no reason therefor.

137. It is in the aforementioned situation the circular letter dated 6.9.2010 may be noticed.

138. Before, however, referring thereto it is of interest to notice the pleadings of the parties :-

"ee – Because Respondent No.1 has failed to carve distinction about Voter Identity Cards in Jammu and Kashmir and North Eastern Areas as the Voter Identity Cards issued in J&K prior to 2008 did not have the required security hologram whereas the Voter Identity Cards issued in North Eastern States (barring Assam) prior to 2008 have the required security hologram. Also the Voter Identity Cards in Jammu and Kashmir prior to 2008 were issued by Local Government and not by Election Commission of India whereas in North Eastern States (barring Assam) the Voter Identity Cards prior to 2008 are issued by Election Commission of India. But the same has escaped the consideration of Respondent No.1."

139. The Respondent did not traverse the said paragraph as is required in terms of Order VIII Rule 3 read with Order VIII Rule 5 of

the Code of Civil Procedure. The letter dated 6.9.2010 was issued to the DDG, Term I with reference to its letter dated 11.8.2010. We have already noticed the purported clarification made in response to para 9 of the said letter.

140. There was thus no clarification. It is, therefore, evident that even the concerned 'Term Cell' had certain doubts. Even in the letter dated 5.1.2011, addressed to the Term Cell, some clarifications were issued by the DoT. It refers to a letter of the Term Cell dated 15.11.2010. Yet again in the letter dated 15.7.2011, another clarification was issued with reference to the letter of DDG Term, Assam dated 11.7.2011. The said letters did not make any reference to the representations made on the part of the petitioners.

141. Representations were made only on 29.10.2010. In the said representation, it was stated that the instructions contained in the circular letter of July, 2010 would be complied with within three months.

142. Ms.Dhir would contend that from the reply to the RTI query on behalf of the Meghalaya Government, it was stated after 2007, additional security feature in the I.D. Card issued by the Election Commission of India was provided, but it may be noticed that the

Tripura Government clearly stated that there was no substantial changes therein.

143. The Respondent in its reply has not raised the said contention.

144. Nothing has been brought to our notice that the purported improvement in the I.D. Cards issued by the Election Commission of India so far as the same related to the Security aspect is concerned, had been considered by the concerned officers of the Central Government.

145. When an issue was raised by the Petitioners, it was obligatory on the part of the Respondent to bring the materials on record to disprove the same.

146. Nothing of that sort was done.

147. Moreover, it will bear repetition to state that whereas in Jammu and Kashmir, Election I.D. Cards with hologram were issued for the first time in 2008, the same had been issued in the North Eastern States in 2006.

### **Conclusion**

148. For the reasons aforementioned this petition is allowed in so far as the penalties imposed upon the Petitioners on the ground that reverification of the CAFs have been carried out by them relying on or on the basis of the Gram Panchayat Certificates, Caste

Certificates and the Voters' ID Card issued by the Election Commission of India. There shall, however, be no order as to costs.

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

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

**November 1, 2012**  
**`ns'**

