TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 19TH OCTOBER 2012

Petition No. 415 of 2011
(M.A. Nos. 282, 283 and 292 of 2011 and 79 of 2012)

M/s. Tata Communications Ltd. … Petitioner

Vs.

Bharat Sanchar Nigam Ltd. … Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioners : Mr. U. Hazarika, Sr. Advocate
Ms. Dharitry Phookan, Advocate
Mr. Paul Roy, Paske, Advocate

For Respondent : Mr. Vikas Singh, Sr. Advocate
Mr. Abhishek Kumar, Advocate for
Ms. Maneesha Dhir, Advocate

J U D G E M E N T

The Petitioner is a licensee under the Indian Telegraph Act, 1885.

2. It is aggrieved by and dissatisfied with a notice of demand dated 24.9.2010 issued by the Respondent herein. It has also prayed for recovery of a

sum of Rs.94,70,782/-, the break-up whereof is contained in paragraph 36 of the petition.

The impugned notice dated 24.9.2010 is said to be for an additional demand for the period June 2006 and May 2011.

3. The fact that interconnect agreement had been entered into by and between the parties hereto is not in dispute. The Petitioner's predecessor in interest was Videsh Sanchar Nigam Ltd. (VSNL).

The said Public Sector Undertaking having been privatized, its name was changed to that of the Petitioner on or about 13.02.2008. By reason of the impugned demand, the Respondent not only levied additional charges but also threatened disconnection of the POIs of the Petitioner.

4. The Petitioner contends, which is not disputed by the Respondent herein that the purported outstanding demands were settled for the period June 2006 and November, 2007.

5 The recovery of the amount to the extent of Rs.9,63,782/- has been prayed for on the premise that as the said amount was paid subject to

verification of the CDRs, which event having not taken place, the Petitioner is entitled thereto.

Secondly, the Petitioner is said to have made payments of a sum of Rs.85,07,000/- erroneously in respect of its demand for the Respondent's Punjab circle was credited to the demand of the U.P. (West) circle of the Respondent for which the aforementioned additional demands have been raised.

6. The Petitioner would in support of its case contend that :-

(i) The impugned demand notices are barred under the law of limitation;

(ii) From the CDRs tendered to the Respondent for the months/ period in question covering the impugned demand brought in evidence before this Tribunal, it would be evident that the Petitioner has refuted its claim so far as the non-CLI or improper CLI calls are concerned.

The Respondent, however, would contend :-

(i) The claim of the Petitioner being vague; particularly with regard to its claim for ADC, the same cannot be entertained;

(ii) The question of supply of CDRs by the Respondent would have arisen provided a dispute with regard to the demand made by the Respondent was raised;

(iii) The Respondent had served all the bills upon the Petitioner and in that view of the matter it was obligatory on its part to raise disputes with regard thereto at appropriate time;

(iv) The claim of the Respondent cannot be held to be barred by limitation as not only the Petitioner made part payments of the bills within the period of limitation but also the Respondent having made adjustments thereof in its books of accounts as provided for under Sections 59 and 60 of the Indian Contract Act, no question with regard thereto can be raised;

(v) It is incorrect to contend that all the disputes and differences between the parties were settled and thus, the Respondent was entitled to raise additional demands for which no settlement had been arrived at;

(vi) The burden of proof, as envisaged under Sections 101 and 102 of the Indian Evidence Act being on the Petitioner and it having failed to discharge the same, this petition is liable to be dismissed.

7. In view of the pleadings of the parties, the following issues were framed :-

"i) Whether the impugned demand notice dated 24.09.11 is barred by limitation?

ii) Whether the Respondents can raise claims for the period of January, 2006 to May, 2011 in view of settlement between the parties dated 6.09.10 for the period June, 2006 and November 2009?

iii) Whether the Respondent could have issued the impugned demand and disconnection notice for the period January, 2006 and May, 2011 in absence of CDRs?

iv) Whether the Respondent can seek payment for violation of CLI without producing the CDRs for the period of such violation?

v) Whether interest amounting to Rs.27,54,094 claimed in the impugned demand notice dated 24.9.11 is maintainable?

vi) Whether the Petitioner is entitled to refund of Rs.9,63,782 paid in pursuance to settlement of September 2010?

vii) Whether the Petitioner is entitled to refund of Rs.85,07,000 remitted to UP (West) circle on 27.09.11?"

8. Before, however, we deal with the said issues between the parties, the claims of the Petitioner as contained in paragraph 22 of its petition may be noticed :-

"22. That the demand notice is vague and not substantiated by any documents whatsoever. Only the months for which such demand have been made are reflected in their notice and the petitioner on its own have to try and conjecture the particulars of the impugned demand notice. The alleged outstanding IUC demand of Rs.1,32,92,156/- on the basis of the petitioner's conjecture includes the following components:

A. Rs.13,55,824/- on account of rate difference of ADC in ISD calls.

B. Rs.58,66,276/- on account of supplementary invoices for No/ improper CLI for the months of November 2007, March 2008, April 2008, April 2009 and June 2009.

C. Rs.18,34,962/- relates to invoices for the period of January 2006 to August 2009 which have not been sent to nor received by the petitioner.

D. Rs.14,08,731/- relates to invoice for the month of March 2007 which was not sent to the petitioner nor received at the relevant point of time but furnished for the first time on 12 October 2011. Rs.27,54,094/- relates to interest claim on Rs.18,34,962/-."

9. We may also notice the purported demand dated 24.9.2011, which reads as under :-

"This is just to bring to your kind notice that an amount of Rs.13292156.00 has not been cleared by you till date in spite of various communications made by this office. The outstanding IUC amount has been updated after taking care of all your representations

received in this office. The outstanding amount immediately payable by TCL is as under :-

1. *Rs.10538062.00 outstanding IUC bills;*
2. *Rs.2754094.00 Applicable Interest on delayed payments.*

This is the final notice for disconnection as per Clause 7.3.2 of 'Interconnect Agreement' due to non clearance of the said amount. Therefore, please pay the outstanding amount of Rs.13292156.00 within thirty days (30) from the date of issue of this notice failing which action for disconnection of POIs will be taken accordingly to recover the BSNL's revenue locked by you."

10. The so-called outstanding are said to be :-

"Details of M/s TATA Communication Ltd. (VSNL)

S. No.	*Billing Period*	*Net O/s of IUC (PSTN)*
1.	*Jan(S)-06*	*424075*
2.	*Apr(S)-06*	*161346*
3.	*Apr(S)-07*	*143166*
4.	*May-07*	*320823*
5.	*Jul-07*	*308054*
6.	*Aug(S)-07*	*74*
7.	*Nov(S)-07*	*2229090*
8.	*Mar(S)-08*	*1975569*
9.	*Apr(S)-08*	*304065*
10.	*Jun(S)-08*	*250804*
11.	*Jul(S)-08*	*277942*
12.	*Aug(S)-08*	*301397*
13.	*Sep(S)-08*	*247644*
14.	*Jan(S)-09*	*1968*

15.	*Feb-09*	*70*
16.	*Feb(s)-09*	*2899*
17.	*Mar(S)-09*	*23915*
18.	*Apr(S)-09*	*669779*
19.	*Jun(S)-09*	*497773*
20.	*Oct(S)-09*	*15993*
21.	*Jan(S)-10*	*160*
22.	*Aug(S)-10*	*10452*
23.	*Apr-11*	*12419*
24.	*May-11*	*10806*
	Total (A)	*8380297*

Cellone IUC-GMSC

Billing Period	*Net O/s of Cellone (GMSC)*
Feb-07	*12803*
Mar-07	*1408731*
Jun-07	*301267*
Jul-07	*425680*
May-09	*9284*
Total (B)	*2157765*

Total A+B 10538062

11. So far as the Petitioner's claim that the dispute between the parties hereto stood settled, would appear from the minutes of meeting dated 06.9.2010, which reads as under :-

> *"1. BSNL UP (W) has provided an outstanding statement viz. fax (Sr. AO (IR) or Aug 05,2010 for Rs.1,01,05,599/- Copy of the open issues statement and correspondence between TCL*

and BSNL UP (W) has been submitted to GM Finance, BSNL, UP (W).

2. *Breakup of the Outstanding is as follows :*

   a) ADC Claim – Amount 81,87,560/- pending for decision in Supreme Court.

   b) MoU Variation – Rs.2,62,502/- CDRs requested from BSNL office.

   c) No/improper Calls – Rs.8,34,605/- CDRs requested from BSNL Office.

   d) Invoices not received – Rs.1,41,701/- + 1,50,530/- invoice copy received only on 06.09.2010.

   e) Payment already processed and cleared – Rs.5,28,661/-. These payments had already been received by BSNL, UP (W), however, BSNL, UP (W) records had not been updated. We have re-submitted the payment details to Sh. D. K. Sharma, Senior AO (TR) on 06.09.2010 to update the records, he has confirmed that these payments have been received and that he would update records accordingly.

3. *Rs.81,57,560/- pertaining to ADC claim (Rate issue) which is pending in Supreme Court, GM Finance, BSNL UP (W) has instructed Senior AO (TR) (Sh. D. K. Sharma) to remove this line item from the outstanding statement and not to link the matter with TCL POI approvals since this is a subjudice matter and pending in Supreme Court for decision.*

4. *MoUs Variation and No Improper CLI calls of Rs.262,502 and 834,605 – GM (Finance), BSNL UP (W) assured that CDRs for these bills will be provided to TCL accord priority to analyse these CDRs and settle these based on the merit of the case. Also, if the CDRs reconciliation*

shows that it were an error from the BSNL side they will refund the amount to TCL for No/Improper CLI and MoU variations.

5. *TCL has agreed to release the payment for MoUs Variation of Rs.262,502 and No/Improper CLI Calls of Rs.834,605 and settle the matter post reconciliation of the CDRs.*
6. *M/s TCL will submit the CDR's reconciliation post receipt of date requested for No/Improper CLI and MoUs variation cases.*
7. *GM Finance, BSNL UP (W) has agreed to release all the TCL pending POI approvals files which were on hold due to payment disputes.*
8. *TCL has confined that payment as agreed above under point No.5 will be cleared in September, 2010."*

12. The Petitioner, pursuant to or in furtherance of the said minutes of meetings made the following payments, the particulars whereof are as under :-

Particulars	*Amount (Rs.)*
Outstanding dues :MOU variations – Jan 09 to Oct 2009	*1,37,699.00*
Add : Service Tax	*16,043.00*
Gross Payable	*1,53,742.00*
Less : TDS @ 10%	*15,373.00*
Net payable	*1,38,369.00*

Working of service for Jan 2009 to Oct 2009

Month	*Basic Amt.*	*Rate*	*Ser Tax*	

Jan-09	*54398*	*12.36*	*6,723.59*	*61,122*
Feb-09	*20297*	*11.84*	*2,382.57*	*22,660*
May-09	*12313*	*10.3*	*1,266.24*	*13,581*
Jun-09	*7671*	*10.3*	*790.11*	*8,461*
Aug-09	*12506*	*10.3*	*1,288.12*	*13,794*
Oct-09	*30514*	*10.3*	*3,142.94*	*33,657*
Total	*137699*		*15,675.58*	*153,274.58*

Particulars	*Amount (Rs.)*
Outstanding dues :MOU variations – Jan 07 to Feb 2007	*83,058.00*
Less : TDS @ 10%	*8,306.00*
Net payable	*74,752.00*

Particulars	*Amount (Rs.)*
Outstanding dues :NCLI calls- Jun 06 7 Oct 2006	*3,43,330.00*
Less : TDS @ 10%	*34,333.00*
Net payable	*3,08,997.00*

Particulars	*Amount (Rs.)*
Outstanding dues :NCLI calls – May 09 to July 09 Supp	*4,44,912.00*
Add : Service Tax	*45,826.00*
Gross Payable	*4,90,738.00*
Less : TDS @ 10%	*49,074.00*
Net payable	*4,41,664.00*

Receipt of the said sums is not in dispute.

Analysis of the Respondent's claim

13. One of the questions, which arises for consideration relates to analysis of claim of the Respondent.

14. At the outset, we may notice the submissions of Mr. Vikas Singh.

(i) As regards the claim of Rs.13,55,824/-, our attention has been drawn to the statements made in paragraphs 23 & 24 at page 24 of the Petition as also the reply thereto to contend that the claim of the Petitioner in respect of the aforementioned amount of Rs.14,08,731/- does not relate to ADC;

(ii) According to the learned counsel, if some of the items of the statements of accounts are added i.e. January 2006, April 2006, April 2007, June 2008, July, 2008, August, 2008, September 2008, January 2009, October 2009, January 2010 and August 2010, the total amount claimed would come to Rs.16,83,879/- and, thus, the same may be held to be relatable to the said period;

(iii) It was furthermore contended that each and every claim being distinct and separate, deserve separate consideration on their own merits. If so considered; in respect of claim 'A', no months or period having been mentioned, no credence thereto can be given;

(iv) So far as the claim 'B', for a sum of Rs.58,66,276/- is concerned, the relevant months have been mentioned but the Petitioner even in the aforementioned case did not state that invoices/bills have not been received;

(v) It is only in regard to claims 'C' and 'D', the question of non receipt of the bill/invoice has specifically been stated.

We would deal with this aspect of the matter at appropriate stages.

15. We would now consider the issue-wise submissions made by the parties hereto for convenience.

Re. Issue No. 1 : Whether the impugned demand notice dated 24.9.2011 is barred by limitation?

The period for which the bills have been raised is January 2006 till May 2011 with regard to the IUC charges and for the period February 2007 to May 2009 in respect of CellOne - IUC.

The question of limitation has been raised on two counts :-

(i) That in the event the Petitioner were to file a suit for recovery of the said amount, it was required to do so within a period of three years from the dates from which they fell due;

(ii) It could have raised a supplementary bill only within a period of six months. According to the Petitioner, the demand having been raised in September 2011 the bills for the month of

September 2008 were within the period of limitation, the demands prior thereto would be time barred;

(iii) So viewed, according to the Petitioner, only a sum of Rs.16,83,879/- becomes payable. However, in the event it is held, having regard to the provisions of Clause 7.3.2 of the Interconnect Agreement that the Respondent was entitled to raise bills within six months from the date of issue of the relevant bills except in cases where additional billing becomes necessary due to new tariff/rates charges notified subsequently with retrospective effect by the appropriate authority and in that view of the matter, the total amount payable would be Rs.23,225/- only.

In any event no CDRs having been furnished, the impugned demands must be held to have not been proved. The Respondent, however, contends that part payment was made for a sum of Rs.85 lacs and odd.

16. So far as the said question is concerned, we may notice that Issue No. 7 deals with the said question. There is no doubt or dispute that even if the part payment is made, the same would extend to the period of limitation in so far as a fresh period of limitation will start from the said date.

17. Whether payment made by way of mistake would come within the purview thereof, is the question?

We may notice the said provision :-

> **"*19. Effect of payment on account of debt or of interest on legacy.-*** *Where* ***payment*** *on account of a debt or of interest on legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:*
>
> ***Provided that****, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.*
>
> ***Explanation.****--For the purposes of this section.--*
>
> *a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;*
>
> *(b) "debt" does not include money payable under a decree or order of a court."*

18. We may also notice the provisions of Section 59 of the Indian Contract Act:-

> **"59. Application of payment where debt to be discharged is indicated**
>
> *Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment if accepted, must be applied accordingly."*

19. The pleadings with regard to the said issues are as under :-

> *"21. That an amount of Rs.85,07,000 for the month of August 2011 payable to BSNL Punjab Cellone was wrongly credited to the account of the respondent no.2 in the UP (West) circle on 27 September 2011. The petitioner had immediately sought a refund of the amount but the same has been retained illegally by the respondents. The respondents illegally adjusted the same against the present disputed demands and this was communicated to the petitioner on 28 September 2011. This was strongly objected by the petitioner in its letter of 29 September 2011 and the official of the petitioner who visited the office of the Respondent no.2 on 13 October 2011 strongly objected to such illegal adjustment made without the consent of the petitioner and against the disputed claims made under the impugned demand notice dated 24 September 2011. By the present petition the petitioner is seeking refund of the amount of Rs.85.07 lakhs. It is to be noted that when such amounts are wrongly credited to the account of the petitioner by the respondent the same is immediately refunded, even without the respondent seeking for such refund and such instance*

was brought to the notice of the respondent by the petitioner in its letter of 29 September 2011."

20. In para 36 (b), the Petitioner stated :-

> *"Rs.85,07,000 paid only by mistake to respondent no.2 in the UP (West) circle on 27 September 2011 and which amount was illegally adjusted by the respondents towards the present disputed demand without the approval of the petitioner. Such payment was not made in satisfaction of the demand notice and hence the same is to be refunded to the petitioner."*

21. The Respondent in its reply, however, traversed the said paragraphs as under:-

> *"8. That with regard to issue of time barred invoices having been raised by the Respondent on the Petitioner, it is submitted that the said contention is sham and is liable to be dismissed. It may be noted that all the said invoices have been raised as per Interconnect Agreement and not a single invoice is time barred. These IOBAS generated invoices along with day wise summary and POI wise details were issued on month to month basis between Jan-2008 to May-2011. Proof of dispatching these invoices on various dates is enclosed. The Petitioner on receipt of the alleged time barred invoices had made part payment in two such cases (Oct-2009 (s) and Aug-2010(s) as is evident from the Petitioner's letter dated 15.10.2010. Therefore, the contention of the Petitioner with regard to time barred*

invoices is liable to be rejected. Copy of the letter dated 15.10.2010 of the Petitioner is annexed herewith and marked as ANNEXURE-R7."

22. We may now notice the two purported payments made by the Petitioner by way of part payments. According to the Petitioner, it had received a bill towards Cellone - IUC charges.

It made payments with regard thereto upon deducting the component of income tax from the aforementioned sum. The bills were dated 21.9.2011. By mistake, the Petitioner forwarded payment in respect of the aforementioned sum of Rs.85,05,700/- to the U.P. (West) circle on 21.9.2011 in stead and in place of Punjab Circle. On realizing the mistake, by a letter dated 28.9.2011 the Petitioner requested the Respondent to transfer the said amount, in the following terms :-

"This is in reference to BSNL Punjab Cell one invoice (Ref:R-VSNL_2011-000052/53 dated 7th Sep-2011 for the month of August 2011 for Rs.94,52,529.

The net amount payable after TDS of Rs.85,07,276/- was due to BSNL Punjab Circle on 27.09.2011.

Tata Communication Ltd. (TCL) has done the RTGS for the above said invoice on 27.09.2011, however the transfer was done into BSNL UP (W) circle in error instead of BSNL, Punjab Circle.

We have discussed the matter with BSNL UP (W) AO Cash today and got the confirmation that said amount is being received in BSNL UP (W) Bank account.

Since this payment is pertaining to BSNL Punjab Circle for their Cell-one invoice for the month of August 2011, we request your office to transfer the said amount to BSNL Punjab Circle and confirm to us as well for our reference.

We request you to transfer the same payment to BSNL Punjab Circle immediately with intimation to our office and BSNL, Punjab Circle.

We are looking forward for your kind cooperation in this regard."

23. In the meantime, on 28.9.2011 itself the Respondent sought to appropriate the said payment towards the purported bills in respect of the U.P. (West). On receipt of the said letter, the Petitioner by a letter dated 29.9.2011 stated as under :-

"This is in reference to BSNL Punjab Cellone Invoice (Ref: - R-VSNL_2011-000052/53 dated 7th September 2011 for the month of August 2011 for Rs.94,52,529.00 and your letter dated referred above.

We have vide our letter No. TCL/BSNL/Wrong RTGS/UPW_BSNL PB/Aug 2011 dated 28 September 2011 very clearly indicated that the above amount of Rs.85,07,276.00 meant for BSNL Punjab for Cellone Invoice have been erroneously transferred to your account.

We are therefore extremely surprised to receive your letter dated 28.09.2011 mentioning that you have adjusted the amount towards alleged IUC outstanding of Rs.132,92,156.00.

The detail of the invoice for which this payment has been made is as follows :-

BSNL Punjab Cellone Invoice (August 2011)	*Amount (Rs.)*
R_vsnl_2011-000052/53	*8,569,836*
Add : service tax (10%)	*856,983*
Add : Educational Cess (2% of S. tax)	*17,140*
Add: S & H Cess (1% of S. Tax)	*8,570*
Total Amount	*9,452,529*
Less : TDS @ 10%	*945,253*
Net Amount payable to BSNL Punjab	*8,507,276*

We wish to once again reiterate that the transferred amount of Rs.85,07,276/- is against payments due to BSNL Punjab for Cellone and NOT PERTAINING TO YOUR CLAIMS OF OUTSTANDING as mentioned by you. You have therefore no right whatsoever to adjust the same against BSNL UP claimed amount.

Please also note that we have disputed your claims vide our letter dated 08.08.2011. 28.06.2011, 21.06.2011, 31.05.2011, 26.04.2011 and had also asked for details and CDRs, which has so far not been submitted to us by BSNL UP (W) Circle.

Informatively, in an identical case BSNL Maharashtra Circle (MH) had erroneously credited Rs.43 lacs to TCL's bank account which was actually pertaining to Tata Teleservices (Maharashtra) Limited. In this case, TCL proactively informed BSNL MH regarding the excess credit received and immediately refunded the money to BSNL MH circle. We are enclosing an e. mail sent by BSNL MH acknowledging our act, thanking us for cooperation and respecting the business relationship.

Under the circumstances you are hereby directed to transfer the said amount directly to BSNL Punjab Circle under intimation to our

office or alternatively we will adjust the amount from the future payments."

24. On behalf of the Respondent, it was contended that the Petitioner had not raised any plea with regard to variance of the said letter dated 28.9.2011 and for the first time, the same was inserted in the evidence of PW-1.

25. This contention on the part of the Respondent appears to be factually incorrect as the Petitioner not only in his letter dated 29.9.2011 referred to its letter dated 28.9.2011 but also annexed the same with its rejoinder.

26. It is not in dispute that the total amount payable under two bills amounting to Rs.94,52,529/- and on deduction of TDS at the rate of ten percent thereof, Rs.85,07,276/- only became payable.

The question as to whether any payment has been made erroneously and it, thus, constitutes an acknowledgement will depend on the intention of the parties. (See Samsung Vs. Ingoo 2 B&C page 72.

(See also Maitra's Contract Act and Specific Relief Act – page 661).

The question as to whether a payment has been made erroneously can be found not only from the materials brought on record but also by bringing on record the circumstantial evidence.

In this case, the circumstances are such that categorically go to show that Section 19 of the Limitation Act would have no application.

By way of example, the Petitioner has annexed two letters to show that similar erroneous payment made by BSNL itself has been returned, as would appear from its e. mail dated 06.01.2011 and the Respondent's e. mail dated 17.01.2011.

27. While the parties entered into a single interconnect agreement, it is not in controversy that separate accounts are being maintained in respect of each circle. Whether the call is incoming one or outgoing one would be known only from the Call Data Records maintained by the parties. Bills are raised only on the basis thereof. There cannot be any doubt or dispute that Section 19 would be applicable when the debt is lawful and actually due. In a recent decision being Monnet Ispat & Energy Ltd. Vs. Union of India reported in 2012 (6) SCALE – page 650 at 726, the Supreme Court of India has clearly held that the principle of 'promissory estoppel' will have no application where an MoU was entered into by mistake and in ignorance of the fact that the minerals in question were reserved for the Public Sector Undertakings.

28. From the discussions made hereinafter it would be evident that the Petitioner, in fact, had raised a serious dispute with regard to the Respondent's claim for a sum of Rs.1 Crore and odd.

29. Mr. Hazarika, learned senior counsel appearing on behalf of the Petitioner would urge that whereas in terms of Section 28 of the Indian Contract Act, a suit for recovery should be filed within a period of three years but a bill can be raised by way of a supplementary demand only within a period of six months and not thereafter.

It is not in dispute that in terms of Clause 7.3.1 of the interconnect agreement that in the event some charges are found to have been omitted from the bills issued, then a subsequent bill may be raised within a period of six months from the date of issue thereof subject to an exception that where additional billing becomes necessary due to tariff/rates charges notified subsequently with retrospective effect by the appropriate authority.

The impugned bill had been sent on 24.9.2011. It was a disconnection notice. This Tribunal in Reliance Communications Ltd. Vs. BSNL – Petition No. 324 of 2010 by a judgment dated 19.4.2012 has held that any coercive step taken by the Respondent to enforce its time barred claim by a notice of disconnection would be illegal being arbitrary.

30. According to Mr. Hazarika, his contention that the bills must be raised by way of a supplementary demand within a period of six months from the date of original demand, has found favour of this Tribunal in Petition No. 186 of 2010 – M/s. Tata Communications Ltd. Vs. BSNL, wherein it has been held –

> *"38. BSNL has not filed any suit for accounts. Indisputably, it was to raise the bill either within a period of six months or file a suit for recovery of interconnection charges within a period of three years. It cannot raise a bill after the period of limitation is over, seeking to enforce its contractual right to disconnect the POIs. The bill has been raised for the months of April and May, 2004."*

The said observations were made in the context of applicability of Article 1 of the Limitation Act. In the aforementioned decision, we have noticed the relevant decisions of the Apex Court.

Keeping in view the fact that the Respondent has two options; namely to file a suit for recovery of amount within a period of three years, issuance of a notice for disconnection which is an additional remedy could also be invoked within a period of three years, we are of the opinion that in a case of this nature where the validity of a disconnection notice is in issue, the period of limitation would be three years.

It has not been denied or disputed that on a threat of disconnection, the Petitioner has made payments of the said sum again in respect of the

aforementioned demand. To the said effect Mr. Vikas Singh conceded on instructions.

31. As the Petitioner has made double payments, we are of the opinion that the Petitioner is entitled to recover the said amount. We also hold that the period of limitation in a case of this nature would be three years.

The Respondent is entitled to a sum by way of IUC charges in respect of it for the period within three years from the date of issuance of the notice.

Re. Section 59 of the Indian Contract Act

32. Mr. Vikas Singh in support of its contention that when an adjustment is made the same would be binding on the creditor, relied on or on the basis of a decision of the Apex Court in Industrial Credit & Development Syndicate now called I.C.D.S. Ltd. Vs. Smithaben H. Patel (Smt.) and Others reported in (1999) 3 SCC 80.

In that case, a decree had been passed. The said decree was put on execution.

The said case involving a decree, adjustment of payment made was to be in terms of general law.

In the aforementioned situation, the Apex Court opined the following in the context of Order 21 Rule 1 of the Code of Civil Procedure 1908 :-

“A perusal of Section 59 would clearly indicate that it refers to several distinct debts payable by a person and not to the various heads of one debt. The principal and interest due on a single debt or decree passed on such debt carrying subsequent interest cannot be held to be several distinct debts. A Full Bench of the Lahore High Court in Jia Ram v. Sulakhan Mal. A.I.R. (1941) Lahore 386 dealt with the scope of Section 59 to Sections 61 of the Contract Act and held:

> *"Sections 59 to 61, Contract Act, embody the general rules as to appropriation of payments in cases where a debtor owes several instinct debts to one person and voluntarily makes payment to him. They do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt, carrying interest on the sum adjudged to be due on the decree. These sections are based upon the rule of English Law, well settled since (1816) 1 Mer 608 = 14 R.R. 166 Clayton's case, that where a debtor, owing several distinct debts to one person, makes a payment to him intimating that the payment is to be applied in discharge of particular debt, the creditor, if he accepts the payment, must apply it accordingly. If, however, the debtor has omitted to intimate and there are no circumstances indicating to which debt the payment is to be applied the creditor may, at his discretion, apply it to any debt actually due and payable to him by the debtor at the time. In case neither party makes the appropriation, the payment is to be applied in discharge of the debts in order of time; and if the debts are of equal standing the payment is made in the discharge of each of them proportionately. It will be seen that these rules have no application to a case in which only one debt is due and at the*

time of payment, besides the principal sum secured, interest has also accrued due. In such cases, the rule of English Law, laid down as far back as 1702 in (1702) 2 Freeman 261 : 22 ER 1197, Chase v. Box. Is that....

> *'if a -man is indebted to another for principal and interest and payees the money generally, it shall be applied in the first place to sink the interest before any part of the principal should be sunk,'"*

Re. Issue No.2

33. It is not in dispute that the parties had met on 06.9.2010.

The parties had also discussed their disputes with regard to the outstanding amounts purported to be for a sum of Rs.1,01,05,549/-. The said demand was made on the basis of a fax received by the Petitioner.

34. Mr. Vikas Singh would contend that the same has not been signed by any authorized representative of the Respondent. A bare perusal thereof would clearly go to show that the fax was sent to the Petitioner on or about 06.08.2010 demanding the sum specified therein for the period June 2006 to May 2010. It appears that the said meeting was held inter-alia on the premise that the Respondent contended that unless and until such payments are made, the PCM approvals for further POIs would not be given.

So far as the claim of improper CLI calls are concerned, payments were made post reconciliation of the CDRs as also the MOU variation amounting to Rs.2,62,502/-.

Such payments made by September 2010 were contingent in nature. The impugned bill has been issued for the period, as indicated heretobefore, January 2006 and May 2011 towards IUC (PSTN) and for a sum of Rs.21,57,765/- towards the demand of Cell One-IUC. The Petitioner has rightly contended that if the period of limitation is taken to be three years, the total amount payable by it would be about Rs.16 lacs and the rest would be barred by limitation.

35. We have noticed heretobefore that Mr. Vikas Singh sought to raise the question of limitation on two grounds; namely acknowledgement of the stakes and/or adjustment of the payments in terms of Section 59 of the Contract Act. So far as the applicability of Section 19 of the Limitation Act and Section 59 of the Indian Contract Act is concerned, we have rejected the said contentions.

36. Reliance has also been placed by Mr. Vikas Singh on Domingo John Picardo Vs. Gregory Pinto reported in AIR 1962 Karnataka page 190, wherein the law was laid down, in the following terms :-

> *"6. Upon the facts of this case, there cannot be any doubt that the circumstances in which the payment was made to the creditor agent in India without intimating to her the appropriation proposed by the debtor and the intimation of appropriation to the creditor which reached him some days after money had been received by this agent, were certainly circumstances in which the creditor had no opportunity whatever of either accepting or refusing to accept the payment on the stipulations made by the debtor."*

37. Therein, the decision of the Madras High Court in Chegganmull v. Manicka Mudaliar reported in AIR 1926 Madras 792 was noticed, holding that the circumstances may exist where a debtor may have reasonably short interval after payment to make the appropriation provided the creditor had not made any appropriation.

The decision of the Karnataka High Court, thus, is not applicable in the instant case.

It is, therefore, evident that having regard to the fact that the period of limitation is three years, and the disconnection notice having been issued on 24.9.2011, the claim for January, 2006 to 23.9.2008 could not have been raised in view of the settlement of the dispute between the parties for the period January 2006 to May 2011. There cannot, however, be any doubt or dispute that for the month of June 2011, the Respondent was entitled to raise its demand.

Issue Nos.3 & 4

38. A sum of Rs.9,63,782.00 was agreed to be paid by the Petitioner subject to reconciliation of CDRs. So far as supply of CDRs is concerned, it has an important role to play, where a bill is raised for termination of calls either without any CLI or improper CLI.

Any amount payable by way of liquidated damages or otherwise and/or by way of IUC would be payable provided any finding of fact is arrived at that the Petitioner was guilty of the some acts of omission and commission in that behalf.

39. The Respondent with regard to the CDRs has raised three different issues.

By its letter dated 21.10.2011, the Petitioner was informed that the Respondent is not in a position to supply CDRs, stating :-

> *"With reference your office letter no. Tata comms/BSNL/UPW/OS/2011/12 dated 28 June 2011 regarding request for CDR for Non CLI Claims it is intimated that vide our office letter no. UPW/NC/31-210/10-11/75 dated 03.02.2011 & no. UPW/NC/31-210/10-11/89 dated 21.02.2011, the CDR is not possible for provide the CDR because the ITPC Pune (Tech Mahindra) has been closed and also confirm for ITPC Pune the data of Non CLI is not available."*

40. It is not in dispute that non CLI calls can be detected only from the CDRs. It is also not in dispute that the Petitioner has supplied all the CDRs to the Respondent herein.

In its rejoinder, the Petitioner contended :-

> *"The present dispute relating to CLI violation does not require tallying of the day wise summary. To find out if any violation has occurred with respect to CLI the same can be determined only with the CDRs and not the day wise summary it does not contain the numbers from which calls have been made or received. Day wise summary can only assess minute variations, if any and which is not the nature of dispute in the present case. A sample of day wise summary and CDRs for one of the dispute month will clearly demonstrate the same. The CDRs are therefore the only source from which it can be determined if there has been a CLI violation and what is the nature of such violation and if the same constitutes a violation at all in the circumstances prevalent at that point of time. In the absence of the CDRs the petitioner submits that the impugned demand notice cannot be issued as there is no data on the basis of which the respondent is claiming such huge amounts for CLI violation."*

41. It is the case of the Petitioner that the day-wise summary and the CDRs contain different statements. A part of the CDRs has been annexed to the rejoinder, from a perusal whereof, there cannot be any doubt or dispute that CDRs were being maintained by the Respondent.

The Respondent indisputably had been raising the regular bills only on the basis of the CDRs. We may notice the contention of the Petitioner with regard to difference in the daily summary and the invoices whereby a request has been made to provide the correct data for the respective months as well as the POIs. A similar e. mail was issued only 26.10.2010 in respect of the invoice for the month of January 2007, whereby also the similar request was made.

A large number of correspondences have been annexed by the Petitioner with its petition to show such differences.

We may for the sake of completion of record, also notice that by its letter dated 26.4.2011, the Petitioner stated as under :-

> *"4.* ***Invoices not received – Rs.18,34,962/-***
>
> *We would like to inform you that there are invoices appearing in your outstanding statements which were never received by TCL. The list of these invoices is indicated in Annexure 4 to this letter.*
>
> *You would also appreciate that the invoices indicated in Annexure 4 were not included by BSNL UP (W) in the statement of outstanding claims dated 05.08.2010."*

42. It is, therefore, difficult to agree with the contention of Mr. Vikas Singh that no demand for the CDRs was made, except for a period of two months, out of the disputed period of five months.

If CDRs were to be preserved for the relevant period, it was required to be supplied. When a bill is raised, it must be supported by documentary evidences; the CDRs being the only relevant record which would provide for the

proof that the operator is guilty of breach of provisions of the interconnect regulations.

43. We may in this connection notice the evidence of PW-1, Shri Dhiraj Kumar. The said Mr. Dhiraj Kumar not only participated in the meeting but is also author of several documents. He categorically stated that the contents of the said MOU had never been disputed. He states that CDRs were furnished only for a few months and most of them contained incorrect data and, thus, it did not match with the claims. The Petitioner sought for the CDRs by its letter dated 22.10.2010. A specific request was also made to the Respondent to furnish the same by letters dated 21.6.2011 and 28.6.2011 with regard to the demand of the Respondent for a sum of Rs.58,66,176/-.

It may be noticed that by a letter dated 15.6.2011, the Respondent stated that such CDRs have been supplied in the following terms :-

> *"Reference : Your letter numbers TataComms/BSNL UPW/05/2011/09 dated 26.04.2011 and TataComms/BSNL UPW/05/2011/10 dated 31.05.2011*
>
> *This is with reference to your letters Numbers cited above. The matter has been examined in detail as per this office record and with reference to provisions of Interconnect Agreement on this subject. The categorized reply of your letter is as under :-*
>
> *1. No/Improper CLI Calls : All the CDRs, required by you have been provided to you and the analysis is pending at your end resulting in huge blockage of BSNL's revenue."*

44. According to PW-1, the said assertion on the part of the Respondent was false which would be evident from the letter of the Respondent dated 13.7.2011, wherein it was stated :-

> *"Please refer to your above cited letter number in response to this office letter for clearance of IUC outstanding locked by you assigning various and variable reasons. In this connection, it is once again reiterated that :-*
>
> *1. No/Improper calls Disputed – Rs.5866276 - The requisition of CDRs has been sent to the NC Wing as and when routed through the IOBAS Finance wing. The relevant letter has already been emailed to you on 18.06.2011 with request to settle the issue within the purview of Interconnect Agreement and pay the amount immediately."*

45. It is interesting to notice that the Respondent by a letter dated 14.7.2011 categorically stated :-

> *"Kindly refer to the letter from CDR Pune vide letter No. ITPC/IOBAS/Migration/2011-12/77 dated 06.07.2011 regarding preserving of CDR on monthly basis. The following action in the IOBAS Finance of Circle Office is to be taken for the above process.*
>
> *1. Detail of POI location and type of service for which there is dispute may be provided to NC wing for provision of CDRs for CDR mismatch/Non CLI cases separately on every month (Separately for I/C and O/G).*

2. If request for providing CDR is received after one month of issuing the IUC bills, it will be very difficult task to retrieve the data from the CDR server as it will be preserved only for preceding 3 months in CDR server at Chandigarh. (Vide letter no. ITPC/IOBAS/Migration/2011-12/77 dated 06.07.2011).

Therefore your kind attention is invited towards the above mentioned point. Here it is also worth to mention that till now no detail of such information is being received in Operation cell despite of pursuance from your good self too. Kindly ensure to provide the above detail on monthly basis so that reconciliation process would be started timely."

46. A copy of the said letter was forwarded to the Petitioner.

The Respondent despite the request of the Petitioner for furnishing the CDRs, a demand for a sum of Rs.1,04,78,669/- and an interest for a sum of Rs.27,54,094/- was raised. This Tribunal in Tata Communications Ltd. Vs. BSNL – Petition No. 186 of 2010 in paragraph 54 of its judgment has emphasized the need of furnishing CDRs.

In Sistema Shyam Teleservices Vs. BSNL – Petition No. 417 of 2011, decided on 17.07.2012, this Tribunal held as under :-

86. If that be so, the contention of the Respondent on technical ground that in the event of a conflict between two records, that its record would prevail, cannot be accepted firstly because in a

situation of this nature such a contention cannot be permitted to be raised (See Tata Teleservices versus BSNL P.No.111/2007 disposed of on 11.2.2010).

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

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

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

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

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

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

> *"46. Clause 6.4.6 appended to the Addenda provides for a drastic civil consequence. It is in anature of the penal provision. There are some pre-conditions of its applicability. They are as under:*

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

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

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

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

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

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

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

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

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

In a given case, on reconciliation of CDRs it can be shown that whereas from the calls might have been sent with CLI, the same, in the CDR of the Respondent for certain technical reasons would be recorded as non-CLI or improper CLI calls.

47. This aspect of the matter has recently been taken into consideration in Bharti Airtel Vs. BSNL (Petition No. 328 of 2011 disposed of on 19.7.2012).

We may also place on record a communication of the Petitioner dated 26.4.2011 (Exb. PW-1/12), wherein the Petitioner clearly stated that with no CDRs having been furnished the matter should be treated as closed.

Re : CDRs

48. The Respondent, therefore, raised four different contentions with regard thereto :-

(i) CDRs have already been supplied;

(ii) CDRs have been requisitioned;

(iii) CDRs are kept only for a period of three months;

(iv) It is difficult to provide CDR after one month.

There is absolutely no reason as to how the daily summary would not match with the invoices. If the Respondent had CDRs, it was obligatory on its part to show as to on what basis additional demands were raised after a few years.

49. In this context, we may also notice Clauses 7.1.2 and 7.1.3 of the Interconnect Agreement which read as under :-

> *"7.1.2 - The BSNL or the NLDO shall have the right in case of dispute, having given the other not less than 10 clear and working days advance written notice to such effect, to inspect the books and records of the other relating to a period not exceeding two years prior to the date of inspection, for the purpose of verifying the Billing information provided by the other in respect of such period.*

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

50. In the light of the aforementioned provisions of the Interconnect Agreement, it is difficult to conceive as to why despite the fact that a dispute had been raised, CDRs and other records were not preserved.

In any event, the CDRs were to be preserved at least for a period of two years for the purpose of replying to the billing informations needed, if any.

51. There is nothing on record to show that any authorized representative of the Respondent had in fact, analysed the CDRs supplied by the Petitioners. The matter might have been different if on analysis thereof, it could have been pointed out that even the Petitioner's CDRs recorded non-CLI or improper CLI calls.

It is interesting to note that in the cross-examination of PW-1 on 17.4.2011, certain questions were raised with regard to CDRs.

"Q42. Is it correct that exhibit PW 2/2 is not made by you?

A. As mentioned in para 8 of my affidavit the same had been provided under my supervision.

Q44. Did you personally verify the contents of Exhibit PW 2/2 with your records?

A. Yes.

Vol. The CDRs are extracted as mentioned in para 7 and 8 of my affidavit."

The CDRs supplied by the Petitioner could not be opened in the computer. The said CDRs, however, were opened in another computer.

We may notice the following from the deposition of PW1 :-

"Exhibit PW 2/2 was asked to be played by the Ld. Counsel for the respondent. On observing that exhibit PW 2/2 was a DVD, he pointed out that he had been supplied with two CDs.

Ld. Counsel for the respondent stated that the copy of the exhibit PW 2/2 supplied to respondent is in two CDs and there is no specific folder as to which CDRs pertain to CELLONE and which to PSTN. He also stated that he was unable to open most of the files.

The ld. counsel for the petitioner clarified that although the official record exhibit PW 2/2 is in the form of a DVD with separate folders for CELLONE and PSTN however, all the 29 folders present in the DVD are also available in the two CDs made available to the respondent. Further since the months relating to IUC PSTN and CELLONE are different there should be no difficulty in finding out as to which file relates to IUC PSTN or to CELLONE. The witness clarified that the files are huge in size and should be opened up in oracle database or any such database. Microsoft office programs

like Word, Notepad, Excel may not be sufficient to read the voluminous data due to inherent software limitations."

52. The payments, thus, having been made subject to supply of CDR and no CDR having been made available to the Petitioner, this issue must be answered in favour of the Petitioner.

53. It is now a well settled principle of law that a party cannot in absence of any cogent reason, refuse to examine its witnesses and/or would refuse to produce the documents within its power and possession.

Mr. Hazarika in this behalf has placed reliance on Hira Lal Vs. Badkulal reported in AIR 1953 SC 225, wherein it was held as under :-

"The fact that the entry was signed by both the defendants who represented their family was not denied. Hiralal, defendant, in the witness box admitted that the defendants deal in gold, silver and kirana and maintain regular books of account. It was also admitted that two or three muneems are in their employ for maintaining regular books of the business dealings. Hiralal was questioned " How much money was due from the defendants-firm to the plaintiffs" He couldn't firm?". The answer was evasive, viz., say how much was due". When questioned about his accounts, he replied that he had not filed them as he was ill. He further deposed that he had looked into his accounts and Rs. 10,000 to Rs. 15,000 as

principal and interest were due but he could not say what was the correct amount. When asked whether on the date of signing the acknowledgment he looked into the books to see what amount was due from him, his answer was in the negative. He further said that even after receiving notice he did not look into his own accounts to check as to what the correct balance was. A leading question was put to him whether on Bhadon Sudi 11 Samvat 2006 there Was an entry of Rs. 34,000 in the defendants' khata as being the balance due from them to the plaintiffs. The answer was again evasive. He said " I could not say whether there was any such entry in his books." In these circumstances there was no justification for throwing out the plaintiffs' suit on the ground that the accounts were not explained to the defendants by the plaintiffs. The defendants had written the accounts in their own books from which the true balance could be ascertained. An inference from the statement of Hiralal can easily be raised that the balance entry of Rs. 34,000 also existed in his own books. Mr. Bindra tried to get out of this situation by urging that it was no part of the defendants' duty to produce the books unless they were called upon to do so and the onus rested on the plaintiffs to prove their case. This argument has to be negatived in view of the observations of their Lordships of the Privy Council in Murugesam Pillai v. Manickavasaka Pandara(1), which appositely apply here. This is what their Lordships observed:

> *"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the courts the best material for its decision. With regard to third parties this may be right enough they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their*

Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition."

This rule was again reiterated in Rameshwar Singh v. Rajit Lal Pathak)."

To the similar effect is the decision of Supreme Court in Gopala Krishnaji v. Mohammed Hazi Latiff reported in AIR 1968 SC 1413. The said decision has recently been followed by this Tribunal in Ortel Communications Ltd. Vs. Taj Television Ltd. – Petition No. 427 (C) of 2010 decided on 25.7.2012.

(See also Vidyadhar Rao Vs. Manik Rao reported in 1999 (3) SCC 573 and Punit Rai Vs. Dinesh Choudhary reported in 2003 (8) SCC 204.

An adverse inference, therefore, must be drawn to the effect that had the Respondent produced the said evidence, the same would have run counter to its case.

General Observations

54. It may be true that the Petitioner questioning the notice of disconnection of its POIs has approached this Tribunal and, thus, initial burden would be on it.

It has raised certain preliminary issues, as for example interpretation of the Interconnect Agreement vis-à-vis the question of limitation. If prima facie, a part of the claim is found to be barred under the law of limitation, the burden will be upon the Respondent to show as to how the provisions of Sections 4 to 19 thereof could be invoked.

55. The Respondent has not examined any witness.

It apart from the admitted documents, thus, has not proved any document. The Respondent is a 'State' within the meaning of Article 12 of the Constitution of India. It's conduct even in relation to enforcement of a contract is expected to be fair and reasonable.

It is difficult to comprehend that a Public Sector Undertaking would not examine any witness and/or prove any document and/or suppress any fact/document relying on or on the basis of the abstract doctrine of burden of proof. The Respondent's attitude appears to be so. The Petitioner contends that the claim relates to ADC, which is being denied and disputed by the Respondent. It, however, stops at that. It does not say that to what the claim related to? It does not take any specific defence. It does not make any assertion as to under which head the said claim falls. The claim of the Respondent, if no disconnection notice was issued, was to be proved by it. It was required not only to prove the documents but also examine witnesses to show that the

discrepancies/inconsistencies pointed out by the Petitioner do not exist; in which event, the burden would have been on it.

Subject to any statement made by the witnesses and/or any admission made by a party, it is a trite law that both parties must prove documents and examine witnesses. It was so held in Hira Lal Vs. Badkulal reported in AIR 1953 SC 225. To the same effect is the judgment of the Supreme Court in Gopal Krishnaji Kektar Vs. Mohamed Haji Latif reported in AIR 1968 SC 1413. The said decision has been noticed in S.V.R. Mudaliar v. Rajabu F. Buhari reported in (1995) 4 SCC 15, Shakir Hussain v. Administrator, Nagar Palika, Mandsaur reported in (1998) 9 SCC 613 at page 614, Designated Authority (Anti-Dumping Directorate) v. Haldor Topsoe A/S reported in (2000) 6 SCC 626 at page 636, Punit Rai v. Dinesh Chaudhary reported in (2003) 8 SCC 204 at page 213, CITI Bank N.A. v. Standard Chartered Bank reported in (2004) 1 SCC 12 at page 32 and several other judgments. Hiralal's case (supra) has also been followed in Standard Chartered Bank v. Andhra Bank Financial Services Ltd. reported in (2006) 6 SCC 94.

We shall notice some of these decisions a little later.

56. So far as non-examination of the witnesses by the parties is concerned, recently in Rasiklal Manikchand Dhariwal v. M.S.S. Food Products reported in

(2012) 2 SCC 196, reliance has been placed by the Apex Court in Gopal Krishnaji Ketkar (supra).

57. The Privy Council as far back as in Sardar Gurbaksh Singh Vs. Gurdial Singh & Anr. 1927 Privy Council 230 has clearly deprecated the practice of a party not examining himself or hrself. The said decision has been followed in a large number of cases by the Apex Court as also by this Tribunal.

58. In law, therefore, an adverse inference is to be drawn against the Respondent that had the documents in its power and possession been produced before this Tribunal, the same would have gone against its contentions and the adverse inference has also to be drawn against the Respondent for not examining any witness.

59. The distinction between 'onus of proof' and 'burden of proof' has been noticed by the Apex Court in Anil Rishi Vs. Gurubaksh Singh reported in (2006) 5 SCC 558, stating the law thus :-

> *"19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes*

importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

20. In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr. [JT 2004 (6) SC 442], the law is stated in the following terms :

> *"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence*

thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

60. The term 'Evidence' has many facets. Apart from oral evidence and documentary evidence, circumstantial evidence, presumptive evidence etc. would also come within the purview thereof. Ordinarily, when no evidence is laid by a party, it would not be entitled to any relief.

(See Food Corporation of India Vs. Laxmi Cattle Feed Industries reported in (2006) 2 SCC 699.

Re. ADC Calls

61. In the aforementioned background, we may consider that the component 'A' of the demand notice amounting to Rs.13.5 lacs was on account of rates differences of ADC. The impugned demand notice does not disclose the details. It has specifically been averred in paragraph 22 of the petition.

62. We have noticed the details of the claims of the Respondent furnished by the Petitioner at page 46 of the Paper Book.

63. For the month of May 2007, a sum of Rs.3.23 lacs was claimed. According to the Petitioner, this relates to an invoice for a sum of Rs.18,95,758/-. Upon deducting TDS, a sum of Rs.15,74,935/- was paid by a communication dated 22.6.2007.

Note-2, which is at the bottom of the said communication, states that the differences amounting to Rs.3,20,823.00 was owing to ADC variation and this was the demand made by the Respondent in item No.4. Similarly, for the month of July, the demand for a sum of Rs.3,08,054/- is relatable to the demand of Rs.19,45,111/- dated 23.8.2007.

64. Payments against the said bill have been made for a sum of Rs.16,73,057/- stating that the balance sum was not payable because of difference of the rates between the IUC charges claimed or IUC charges fixed by the Regulator.

65. There are ample evidences borne out from the record that the Respondent raised bills at the rates fixed by the TRAI.

66. On the right side of the chart, which relates to CellOne- IUC, bills for the months of June 2007 and July 2007 being for a sum of Rs.3,01,267/- and Rs.4,25,680/- respectively have been raised.

This difference also, according to the Petitioner, relates to the charges raised in excess of the IUC charges fixed by the TRAI.

By a communication dated 05.8.2009, the Petitioner annexed a statement of ADC variances. A chart has also been annexed for the aforementioned months (at page 246 of the Paper Book) stating that the difference was the claim of ADC for sums of Rs.2,68,127.00 and Rs.3,78,853/-. If the Service Tax at the rate of 12.36% is added thereto, the same would be the same being the outstanding claim for the aforementioned months.

67. The relevant clauses relating to the preservation of CDRs are contained in the Interconnect Agreement are clauses 7.1 and 7.2, which read as under :-

> *"7.1 BILL INFORMATION*
>
> *7.1.1 BSNL shall provide to NLDO information relating to detailed billing/trunk group bulk billing as may be reasonably required for ascertaining the charges payable by NLDO under this agreement on monthly basis.*
>
> *7.1.2 - The BSNL or the NLDO shall have the right in case of dispute, having given the other not less than 10 clear and working days advance written notice to such effect, to inspect the books and records of the other relating to a period not exceeding two years*

prior to the date of inspection, for the purpose of verifying the Billing information provided by the other in respect of such period.

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

7.1.4 In the event that at any time during the continuance of this Agreement the Billing System of either Party malfunctions and is unable to provide all or part of the Billing Information necessary for such party to prepare a bill to the other, the other party shall at the request and expense of the first mentioned party use its reasonable endeavors to supply the necessary Billing Information to the first mentioned Party without any legal liability to the first mentioned party for the contents of such Billing Information.

7.1.5 Either party shall be responsible to cover its liability for payment of taxes imposed by the Central or State Government as the case may be.

7.2 ISSUE OF BILLS

7.2.1 Bills for Interconnect Usage Charges will be issued on monthly basis by the designated unit of BSNL to the NLDO and such bills shall be payable within 15 days from the date of issue.

7.2.2 Bills for telecom resources and other support facilities, such as connection charges, charges for leased facilities and charges for enhancement of features, if availed by the NLDO will be issued by

BSNL and paid by the NLDO at the intervals specified in this agreement."

68. CDRs are to be presrved at least for a period of two years as enjoined under the interconnect agreement. If that be so and keeping in view the divergent and inconsistent stand taken by the Respondent herein, there cannot be any doubt or dispute that the Petitioner has unjustly been deprived from analyzing the CDRs maintained by the Respondent.

69. This Tribunal in the case of Bharti Airtel has recently laid down that reconciliation of CDR would be treated to be essential for the purpose of arriving at just conclusion in favour of one party or the other. When the Petitioner has not received the invoices, the question of raising any protest would not arise. When an extraordinary claim, which is by way of liquidated damages envisaged under Section 74 of the Indian Contract Act is made, not only the service of invoice has to be proved but also the foundation on the basis whereof such claim has been raised must also be established.

70. Mr. Vikas Singh would contend that no statement has been made in the petition as regards any settlement having been arrived at by the parties.

The Respondent does not deny or dispute the payments made to it; whereas the payments in question have been taken to be by way of part payment, the contention of the Petitioner is that it has been paid towards the amount arrived at during settlement. The payment of Rs.3,90,834/- has been made under protest.

The minutes of meeting, which is neither denied nor disputed, clearly goes to show that the payments were made subject to CDRs. We have, therefore, no hesitation in rejecting the contention of the Respondent.

Re. Item-D

71. The Petitioner in no certain terms stated that a sum of Rs.14.08 lacs was not supported by any invoice, which is said to have been dispatched on 11.4.2007. According to the Petitioner, it has received the same only on 12.10.2011. Apart from the bare assertion, the Respondent has not produced any proof as to how the invoice concerned has been dispatched.

72. The Petitioner has raised a few other issues.

According to it, the PW-1 in paragraphs 28 to 29 has dealt with the components of the impugned demand which has been detailed in pages 23 to 29. The said witness has not been effectively cross examined on the said issue.

In that view of the matter, the statements made by PW-1 would be deemed to have been admitted.

73. The Respondent has claimed a sum of Rs.25,54,094/- by way of interest in respect whereof Issue No.5 was framed. The said claim of the Petitioner is in two parts. One for a sum of Rs.12,58,611/- purported to have been under settlement of 2010 and the second was with regard to its bill dated 22.01.2007, for the month of May, 2007 wherefor payment has been made on 22.6.2007.

According to the Petitioner, the said claim was time barred. We have noticed heretobefore the contention of the Petitioner that the payment in September 2010 were subject to reconciliation of CDRs, which had not been furnished and in that view of the matter, payment of any interest does not arise. The Respondent did not specifically traverse the allegations made by the Petitioner to the aforementioned effect in paragraph 28-29 of the petition.

The Petitioner has also led evidence through PW-1 in the following terms:-

> *"29. I say that the interest component of Claim (E) is not maintainable for the following reasons :*

a. No interest with respect to payments made under protest after the settlement of September 2010 can be claimed as such payment was made subject to reconciliation of CDR for the relevant period. The parties have further agreed that after reconciliation if it is found that no amounts were payable by the respondent, the same would be refunded to the petitioner. Since correct CDR for the relevant period have not yet been furnished to the petitioner there is no question of claiming interest on such amount before reconciliation of CDRs are complete.

b. No interest can be claimed on the component of Rs.18,34,962 for two reasons first being that the invoices were never received by the petitioner and second when the invoices were handed over in 2011 it was found that the same also relates to violation charges for No/Improper CLI. The petitioner's records show that there is no violation and the respondents have shied away from producing its CDRs which now from their own admission appears to be not available with them. In such circumstances when the main alleged claim of Rs.18,34,962 itself is not sustainable, to claim interest on such an amount is ridiculous to say the least.

c. No interest can be claimed on a bill amount which was already processed and paid by the petitioner. The bill relating to the month of May 2007 was paid by a cheque and re-payment of such cheque was done only on the request of the respondent. The fact re-payment was made after two years for the failure on the part of the respondent to encash the cheque sent by the petitioner in lieu of the bill cannot now unjustly benefit the respondent. The petitioner cannot be penalized for mistake/negligence on the part of the respondent when it was forthcoming to make the payment immediately when the same was brought to its notice."

In this aspect there has been no cross examination and, thus, this statement would be deemed to be admitted.

74. For the reasons aforementioned, this petition is allowed in part and to the extent mentioned heretobefore without any order as to costs.

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(S.B. Sinha)
Chairperson

.....

(P.K. Rastogi)
Member

rkc