TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 26TH SEPTEMBER, 2012

Petition No. 411 of 2011
(M.A. No. 277 of 2011)

Bharti Airtel Ltd. … Petitioner

Vs.

Department of Telecommunication & Anr. … Respondents

BEFORE:

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

For Petitioner : Mr. Maninder Singh, Sr. Advocate
Mr. Gopal Jain, Advocate
Mr. Aman Abhinav, Advocate

For Respondent : Mr.K.P.S. Kohli, Advocate
Mr. Tarveen Singh Nanda, Advocate for
Ms. Maneesha Dhir, Advocate

J U D G E M E N T

1. The relationship between the parties hereto is licensor and licensee. Inter-alia on the premise that the Petitioner has violated the conditions of licence in so far as it got the calls terminated with a wrong CLI, the Respondent herein has imposed a penalty of Rs.50 crores by an order dated 05.10.2011.

The Petitioner is, thus, before us.

2. The case of the Petitioner, shortly stated, is as under :-

(i) It with a view to promote its business established a Call Centre at Indore;

(ii) However, when the said calls were generated, the record of the called party was showing its own number in stead and in place of party A i.e. calling party number, the one of the called party (B party);

(iii) A complaint in relation thereto was made by a customer to BSNL, who in turn forwarded the same to the Respondent on or about 19.01.2011;

(iv) On receipt of the said complaint, the Respondent sent an e. mail at 6.56 P.M. on the same date asking the Petitioner to supply CDRs of 16th, 17th and 18th January 2011 for all the trunks with BSNL as well as for providing Home Location Register (HLR) Dump with complete attributes;

(v) On receipt of the said e. mail at about 8.24 P.M., the Petitioner replied that some CDR informations may be available immediately; whereas with respect to information

sought on HLR, the data would be made available within 48 hours;

(vi) On or about 20.01.2011, the Respondent sent an e. mail at about 12.31 P.M. asking the Petitioner to send CDRs in readable format for 17th to 19th January 2011;

(vii) On or about 21.01.2011, a letter was issued by the Respondent asking the Petitioner to explain certain facts, stating therein :-

"Though M/s Bharti Airtel extended its cooperation during the investigation, certain acts on your end could not be understood.

1. Why the wrong location of mediation server was informed?

2. Why the CLI camouflaged calls did not appear in the 3-hour CDR provided to us.

3. Why the CLI camouflaged calls did not appear in even in whole day CDR of 17.01.2011 provided to us.

4. Why the meeting was not attended by any of your officer?

These aspects need to be answered. So far, CLI has been found camouflaged in more than 8000 calls, which is the straight violation of License agreement. You are hereby asked to explain that why the suitable action is not taken against your company?

Kindly submit your compliance within 7 days to this office."

(viii) The ADJ, TERM Cell, M.P. (Respondent No.2) visited the Petitioner's premise at Indore and Delhi for inspection;

(ix) By another e. mail, the Respondent called the CEO and technical team of the Petitioner for a meeting on 21.01.2012 at 1200 hours as the issue was not resolved;

(x) By letters dated 27.01.2011 and 07.02.2011, the Respondent inter-alia contended that there had been no camouflaging of CLI as contended by the Respondent No.2.

3. We may notice the reply of the Petitioner dated 22.01.2011 which is as under :-

"1. We humbly submit that we have never communicated the wrong location of mediation server rather we have mediation server in Delhi and Data warehouse server in Pune.

The mediation server get the raw data from MSC and push the data to the data warehouse after converting it into readable format. Even Mr. Nilesh Shrivastava (ADG TERM) visited our GNSC and fetched the HLR and configuration data on 20th Jan'11 and simultaneously we have also arranged his visit to the mediation server location in Noida on 21st Jan'11.

2&3. First of all we would like to clarify that we have never camouflage in CLI of calls and being a responsible corporate citizen of country will never encourage such activities. Any such act in no way will be beneficial for any organization.

When the data was asked on 19th Jan'11 evening and looking at the urgency, we have pulled the data from data warehouse and handed over to you as it is. After your investigation only we came to know that some data is missing from CDR. We then tried to pull the data of whole day and handed over whatever we could pull out till 6 AM on 20th January'11 as per your instructions.

When we came to know about the called number, we have to cross checked the same at our call center and taken out some sample numbers to find out the reason for the wrong CLI issue with BSNL numbers. We found all these raw CDRs in our MSC. However while processing the raw data by our mediation server, we are not getting non rated/non chargeable i.e. PRI calls in the CDR fetched from our data warehouse.

4. When the meeting was called on 21st Jan'2011, Investigation was still carried out by Mr. Rakesh Tiwari, ADG (TERM) and due to MNP rollout – our CTO was traveling and all technical and regulatory staff was facilitating the investigation. However we have already admitted that this was mistake on our part of not intimating you the above fact to your good self.

Apart from this, we would also like to intimate you that error was done by the third party (Call Center) as the PRI configured in switch for call center (For multi calling at a time).

Normally in this configuration we configure CLI at switch end only to avoid any non CLI call, (in our case configured CLI was 9893047450

: MPCG MNP Calling). In PRI calling, external agency (Cal Center) can control CLI from there end but if third party (call center EPBX machine) not provide any CLI than switch CLI (Configured CLI in switch by us) will be displayed to subscriber.

If third party provides any CLI than without making any changes we forward this CLI to subscriber, which happened in our case. In EPBX machine of tele caller, they had set the default value of CLI instead of given CLI to them (9893047450). Hence the CLI of calling number displayed to the subscriber's number (Same number for A&B party)."

4. An additional reply was also sent on 07.02.2011, stating :-

"First the calls generated in this particular case by our call centre which is being used by us for service related issues of our customers, channels etc. and for the first time we have used to generate leads during MNP implementation and provide service to customers while on boarding with Airtel. In order to facilitate the whole process we had augmented few new PRI lines to handle the additional volume. We found out that while provisioning the said PRI inadvertently a mistake was committed by our technical staff due to which this occurred. To manage such a large network we are dependent of our work force and humans do make unintentional mistakes at times due to work pressure and over sight. This particular incident was also a case of human error and we are taking steps to ensure that such mistake doesn't happen again by tweaking our process adequately.

In this case the moment we came to know of it from one of the operators we had rectified the issue, which was even before the matter is escalated to TERM cell. So far as the CDR's are concerned; we have all the CDR's in our MSC raw database. We did hand over the CDR's during investigation, by taking it from our call centre EPBX, to Mr. Rakesh Tiwari, ADG (Investigating Officer). These CDR's were not there in the data provided by us on 20th Jan 2011 as we had provided you only the rated CDR's which was stored in our database. We found out during investigation that since the present PRI was used only for internal calls to Airtel subscribers, the configuration was done to filter out not rated CDR's from the database and when the call centre was used for the first time to call customers outside Airtel the configuration was not changed from non rated to rated by our technical staff due to oversight. We could not analyse the same during investigation as our technical staff was assisting the TERM officials in the investigation and we did not get sufficient time to do the same. Whereas during our internal investigation we found that all the CDR's were there in our MSC raw CDR database.

Secondly sir there was no camouflage of identification of the caller, as our agents while contacting customers use to disclose their identity first. Had our intention was to hide or mask our identity why would we tell the customers that we are calling from Airtel. This shows that we never intended to camouflage our identity, as no organization would ever get any benefit by doing so and our bonafide is proven by the facts mentioned above.

Thirdly sir there is no financial loss caused either to the government or any other operator from this incident. Rather had this continued

for some more time we could have inflicted on self huge financial losses as per the terms of the Interconnect agreement between operators. That is why we immediately rectified it soon we came to know of this unintentional mistake of ours from other operator and it was also found to be working fine during your investigation as well. As you are aware in case of such violations of CLI the Interconnect agreement clearly stipulates a penalty at the highest rate of ISD on all calls terminated in that POI of the other operator. Also the presumption of law is that no one will knowingly inflict a financial loss on itself. Therefore ewe once again would like to reiterate that it's an inadvertent mistake on the part of our technical staff and not an intentional violation.

We sincerely apologise for the inconvenience and trouble caused to you all. We assure you that adequate steps will be taken to prevent any reoccurrence of such incident. We thank you for your support and assure our cooperation at all times."

5. Nokia Siemens Network, the concerned equipment manufacturer, issued a certificate with regard to the said purported technical error, which reads as under :-

"Below are the steps of events which happened during PRI Configuration for OBD Dialing

At the time of doing PRI configuration test scenarios as requested were evaluated and successfully completed in the presence of stake

holders Pradip Patidar from NSN and Sumakant from Telematics side. The logs of these tests are maintained by us.

After receiving the complaint from Airtel we tested and found that there was technical configuration issue at OBD server auto dialer supplied and managed by Airtel's third party vendor, the OBD server was sending B Party (called party) CLI to NSN switch and the switch was accordingly passing it through to B Party. In the absence of any other configuration instructions, our switch worked only as a transit to pass through the same CLI which came from the OBD server.

After the issue was brought to our notice by Airtel, we helped to correct the configuration at OBD server's end as per Airtel's specified requirement and the issue is now successfully closed."

6. By a letter dated 06.7.2011, apart from the contentions raised as noticed heretobefore, the Petitioner in a communication to the Respondent No.2, raised an additional ground that it had extended complete support to the TERM Cell in the matter and had provided all the CDRs and other relevant data as sought for by them from time to time. It also reiterated its earlier stand, contending :-

"3. After we had represented the matter before TERM cell, there has not been any communication from their side. We, therefore, thought it appropriate to seek your attention and thus present the facts of the matter which are worthy consideration :

i) The improper/non-CLI had originated from our call center and had primarily occasioned due to an inadvertent technical error. The error was purely due to technical glitch which was immediately rectified on becoming aware of the same and the corrective action was in place even before the matter was taken up by TERM cell with us.

ii) All the non CLI calls in question were domestic calls and were handed over to BSNL at the specified and correct trunk group and thus there was no impact on Interconnect Usage Charges (IUC) in the impugned case and no IUC violation had happened. Neither any operators nor the exchequer has been impacted in this case. We had proof that all such calls had been handed over on the correct trunk group. We would like to reiterate that we have neither attempted to make any direct/ indirect saving in the form of IUC from such calls nor any loss had been caused to BSNL/Government as well as all the applicable IUC was paid.

iii) The calls had originated from our call center and the caller was distinctively identifying himself/herself to be calling from Airtel to the called party. In case of a malafide intention, one always tries to act in disguise. But the mere fact that we never tried to hide or mask our identity substantiates that the error in CLI was unpremeditated and unknown. Thus, it is completely untrue that we had camouflaged or masked our identity. Therefore, the apprehension of any security threat is also completely ruled out.

4. We submit that the original of non CLI calls due to technical reason/faults is a known and accepted fact in the telecom industry and undoubtedly, there are certain fraction of non

CLI calls which are sent/received by every operator due to technical limitations/challenges/faults."

7. The impugned order was passed on 05.10.2011 imposing a sum of Rs.50 crores by way of penalty; whereagainst, the Petitioner filed a representation on or about 13.10.2011 reiterating its earlier stand.

8. This petition thereafter was filed praying inter-alia for quashing/setting aside the impugned communication dated 05.10.2011 issued by the Respondent

9. In its reply, the Respondent inter-alia would contend :-

"9. That keeping in view the above stated facts, the Respondents on 20.01.2011 intimated the Petitioner to come for a meeting on 21.01.2011 to discuss the matter. It may be noted that vide the said email dated 20.01.2011 and the personal call made to the officials of the Petitioner, with a request to send COO/CEO and technical team, so that the matter could be discussed threadbare. It be noted that the Petitioner never turned up for the meeting. No intimation of inability of the Petitioner to attend the meeting was communicated to the

Respondent. In fact, even after 21.01.2011, the Petitioner never approached the Respondent for a meeting to settle the issues.

13. *That subsequently, the Petitioner vide another letter dated 07.02.2011, admitted that the call centre, from where the camouflaged calls originated, is of the Petitioner and the same was being used for promotion of MNP service of the Petitioner. The Petitioner could not sufficiently explain as to why the CLI was camouflaged while making marketing calls to the Subscribers. The Petitioner, however, tried to dilute the issue by alleging that on account of camouflaging, no loss of revenue has occurred to the government. It is submitted that due to acts of camouflaging, the Petitioner is not only violating the license condition, but also putting grave threat to the national security.*

14. *That alongwith the letter dated 07.02.2011, the Petitioner has annexed an alleged certificate from Nokia Siemens Networks, which has not been properly stamped."*

10. The Petitioner filed a rejoinder thereto.

11. As the genuineness of the aforementioned certificate issued by Nokia Siemens was in issue, by an order dated 06.02.2012, the following issues were framed :-

"i) Whether the impugned order imposing penalty was in violation of principles of natural justice?

ii) Whether imposition of Rs.50 crores penalty for one day wrong CLI where all calls were local, is unreasonable?

iii) Whether the Respondent's contention that the Petitioner has tampered CLI is correct?

iv) Whether it is possible to have wrong CLI for technical errors, and if so, whether imposition of penalty for a sum of Rs.50 crores on the Petitioner is justified?

v) Whether the Petitioner was entitled to an opportunity of being heard before the impugned order was passed having regard to the provisions contained in Clause 10.2(i) of the licence Agreement.

vi) Whether any of the licence conditions as alleged in the impugned communication has been violated?

vii) To what relief, if any, the petitioner is entitled to?"

12. The Petitioner in support of its case examined Mr. Joaquim Fernandes of Nokia Siemens.

He, in his evidence, stated as under :-

"Q.2 In which company are you working?

A. I am working in M/s. Nokia Siemens Networks.

Q.3 Is it correct that you are deposing on behalf of M/s. Nokia Siemens Networks?

A. Yes."

13. We shall revert to the cross-examination, to which attention of this Tribunal has been drawn by the learned counsel for the parties, a little later.

14. Mr. Maninder Singh, learned senior counsel appearing on behalf of the Petitioner, would urge :-

(i) The impugned order being violative of the principles of natural justice is wholly unsustainable;

(ii) Whereas a hearing was given by the TERM Cell, the impugned order having been issued by the Director of DoT, the same is clearly violative of the principles of Administrative Law, namely "the same officer who hears must decide";

(iii) The Respondent in passing the impugned order could not have lost sight of the technical glitch which takes place on registering the CLI;

(Iv) No evidence having been laid by the DoT contrary to the evidence of PW-1, an adverse inference must be drawn against it;

(v) No loss having been caused to the Respondent and/or any other operator, imposition of penalty for a sum of Rs.50 crores was not warranted;

(vi) Impact of national security, as has been contended by the Respondent, cannot be permitted to be raised in the instant case in view of the fact that although the alleged violation is said to have taken place in January 2011, impugned order has been passed only in October 2011 which has not been explained by the Respondent.

15. Mr. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, urged :-

(i) The instant case should be considered/judged on the purview of the allegations against the Petitioner and/or its conduct;

(ii) The Petitioner made a conscious delay in not supplying correct CDRs and/or committed delay in doing so inter-alia

on the premise that the CDRs would be available at Indore and then at Noida; whereupon the officers visited the Noida Office of the Petitioner whence they were informed that the CDRs would be available only at Pune;

(iii) It is incorrect to suggest that the Respondent has imposed impugned penalty inter-alia on the ground that the concerned officer of the Petitioner did not attend the meeting but in view of the fact that the same merely formed part of a questionnaire sent to the Petitioner;

(iv) The stand taken by the Petitioner in its letter dated 27.01.2011 that calls were not chargeable and therefore it is not in the CDR, appears to be wholly misconceived as all calls were required to be recorded in the CDRs;

(v) It is also incorrect to contend that those calls which terminated in the exchange of the other operators, the IUC was not payable;

(vi) Keeping in view the fact that the CLI calls configured at the exchange of the Petitioner, it cannot be said that there was any technical glitch as alleged or at all;

(vii) Had that been so, the Petitioner was not required to file any additional reply and from the very beginning they could have adopted a fair stand;

(viii) A plea of technical glitch has been raised by the Petitioner for the first time in the petition by attaching the certificate purported to have been issued by M/s. Nokia Siemens;

(ix) The investigation carried out by the Respondent clearly showed that the Petitioner has made attempts to conceal the fact.

Termination of a call with no/improper CLI having a direct impact on the security of nation; particularly when the Petitioner was required to prevent the same at its own exchange, the matter is required to be viewed seriously by the DoT.

(x) The Petitioner deliberately took an incorrect stand contending that in its CDR only rated calls are recorded and not non-rated calls.

(xi) A personal hearing has been granted to the Petitioner, as has been sought for by it by its letter dated 06.7.2011 and furthermore having regard to the fact that a high ranking officer of the Petitioner was asked to visit the Bhopal TERM

Cell on 21.01.2011 and they having been failed/neglected to do so, it does not lie in its mouth to say that principles of natural justice were not complied with;

(xii) The calls with wrong CLI have been made with a view to solicit customers in violation of the licence conditions and, thus, it is not entitled to any equitable relief;

(xiii) From the cross-examination of PW-1, it would appear that technical glitch was not the reason for recording of improper CLI.

16. The instant case poses a technical question.

Indisputably, the Petitioner has an exchange at Indore.

It is now accepted that the Call Centre belongs to it; although in its communication dated 27.01.2011 it used the word "third party" which according to Mr. Maninder Singh, was stated by way of a concept of a call centre and not by way of a statement of fact as would appear from the said letter itself as also various other letters.

17. The Call Centres are allotted separate numbers. In the event calls are made from a call centre, it would show only the number of the calling party. It would not ordinarily show the CLI of a third party.

18. It is, however, not the case of the Petitioner that the said defect, if any, in its software could not be detected. Ordinarily at the main exchange itself the same should have been detected.

19. Mr. Kohli is correct in his submission that the Petitioner ought to have come out with its case of technical glitch from the very beginning. It also should not have made statement that the CDRs were being maintained at different places.

20. There does not appear to be also any reason as to why a statement was made that its Mediation Servers are located at Noida, in regard whereto Mr. Mandeep of the Respondent intimated that he would be visiting the said Mediation Centre to obtain the desired CDRs.

21. It is accepted that one Mr. Mandeep of the Petitioner intimated that as the CDRs for three hours supplied to the Respondent did not maintain the CLIs

in question in respect of the business promotion calls to non-Airtel mobile customers, as an interim solution and for the purpose of obtaining the rest of the data at the earliest possible time, the Petitioner was intimated by Mr. Mandeep that he would be going to access Mediation Server located at Noida to get the desired CDRs and transfer the same to Bhopal. Even the same did not serve any purpose. The Respondent No.2 sent one of the officers to Noida to expedite "the pooling of data" whence he was informed that the CDRs were available at the warehouse of the Petitioner at Pune. Undoubtedly, the same was not desirable as it unnecessarily caused loss of time, money and man power of the Respondent. The Investigating team visited the call centre at Indore on 20.01.2011. The calls were traced to the call centre in question.

22. I have noticed heretobefore that a meeting was arranged on 21.01.2011 at Bhopal but neither the said meeting was attended by the concerned officers nor any communication to that effect was sent.

23. It may be noticed that the Director, TERM Cell to that effect had made a personal call to one Mr. Naresh Chandra. It was in the aforementioned situation, the notice was issued on 21.01.2011.

24. In its letter dated 27.01.2011 the Petitioner acknowledged that none of its representative attended the meeting nor any communication thereabout was sent to the Respondent No.2.

A hearing was also given to the Petitioner by the TERM Cell on 19.8.2011.

25. I may in this behalf notice Clause 9.1 and 41.19 of the licence agreement.

> *"9.1 The LICENSEE shall furnish to the Licensor/TRAI, on demand in the manner and as per the time frames such documents, accounts, estimates, returns, reports or other information in accordance with the rules/orders as may be prescribed from time to time. The LICENSEE shall also submit information to TRAI as per any order or direction or regulation issued from time to time under the provisions of TRAI Act, 1997 or an amended or modified statute."*
>
> *41.19 (i) Utmost vigilance should be exercised in providing bulk telephone connections for a single user as well as for a single location. Provision of 10 or more connections may be taken as bulk connections for this purpose. Special verification of bonafide should be carried out for providing such bulk connections. Information about bulk connections shall be forwarded to VTM Cell of DoT, DDG (Security) DoT and any other officer authorized by Licensor from time to time as well as all Security Agencies on monthly basis.*

41.19 (iv) Calling Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security. CLI Restriction should not be normally provided to the customers. Due verification for the reason of demanding the CLIR must be done before provision of the facility. It shall be the responsibility of the service provider to work out appropriate guidelines to be followed by their staff members to prevent misuse of this facility. The subscribers having CLIR should be listed in a password protected website with their complete address and details so that authorized Government agencies can view or download for detection and investigation of misuse. However, CLIR must not be provided in case of bulk connections, call centres, telemarketing services."

26. It may also be of some significance to notice the following paragraph from the circular letter dated 06.03.2003 :-

"3.(iv) Calling Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security. CLI Restriction should not be normally provided to the customers. Due verification for the reason of demanding the CLIR must be done before provision of the facility. It shall be the responsibility of the service provider to work out appropriate guidelines to be followed by their staff members to prevent misuse of this facility. The subscribers having CLIR should be listed in a password protected website with their complete address and details so that authorized Government agencies can

view or download for detection and investigation of misuse. However, CLIR must not be provided in case of bulk connections, call centres, telemarketing services."

27. It is not in dispute that such investigation was carried out by the TERM Cell. It is difficult to comprehend as to why the requisite CDRs were not handed over to the Respondent No.2 and why misleading statements with regard to the availability thereof at different places had been made.

While saying so, I cannot also be oblivious to the fact that the Petitioner has raised the contention of technical glitch as early as 07.02.2011. A copy of the certificate was annexed to its said letter. The Respondent appears to have not accepted the same only on the premise that the same did not carry the stamp of the holder of the issuing officer.

28. Mr. Fernandes in his evidence stated :-

"2. That at the time of doing PRI configuration test scenarios as requested by the Petitioner Company various scenarios were evaluated and successfully completed in the presence of stake holders Pradip Patidar from NSN and Sumakant from Telematics. The logs of these tests are maintained by M/s. Nokia Siemens Networks.

3. After receiving the complaint from M/s. Bharti Airtel on 19th January 2011 that some customers are receiving calls from their own CLI. We tested the same at the Petitioner's call centre premises on 19th January 2011 and found that there was technical configuration issue at OBD server auto dialer supplied and managed by the Petitioner, the OBD server was sending B Party (called party) CLI to NSN switch and the switch was accordingly passing it through to B Party. In the absence of any other configuration instructions, the switch worked only as a transit to pass through the same CLI which came from the OBD server."

29. We may notice some of the questions and answers from the cross-examination part of the said witness, to which my attention has been drawn.

"Q.15. Is it correct that the numbering scheme 9893XXXXXX is the numbering scheme for Bharti Airtel in Madhya Pradesh?

A. Yes, it is correct.

Q.18. Can you tell us for this particular Call Centre what was the pilot number and the number range?

A. I am not aware.

Q.19. Is it correct that for a Bharti subscriber in Madhya Pradesh the number has to start from 9893XXXXXX?

A. Yes. Volunteers: post MNP, the scenario has changed. There are other levels also assigned to Bharti.

Q. 20. Is it correct that the incident is pre-MNP?

A. Yes.

Q.26. Can you tell us whether the configuration is done at both ends by you?

A. No, it is done only at our end.

Q.27. Can you tell us step-by-step procedure while provisioning the PRI in question?

A. It is done by my subordinates. Basically as I said above, point codes are defined and test calls are made when the link is up.

Q.33. Is it correct that it is not possible to pass on a call if numbering scheme is defined from the number other than the number which is defined?

A. This depends on the configuration which is done at the calling exchange and it also depends on the configuration done at the called exchange which is the terminating exchange.

Volunteers: In our case, we were acting as a transit exchange.

Q.38. Can you tell us how the PRI number is assigned to the Call Centre in your switch?

A. In our case the number was assigned at the calling exchange end and that is the Call Centre. The GMSC was acting as a transit switch.

Q.39. Is it a standard procedure?

A. We were following this procedure in absence of other instructions.

Q.40. Can you tell us who gives you instructions?

A. Bharti.

Q.46. Can you tell us in the normal circumstances what was the CLI appearing to the called party when the call originates from the said Call Centre?

A. During the test calls, the CLI assigned to the Call Centre was appearing to the called party.

Q.47. Is it correct that you can provision/configure in your GMSC that no CLI other than the allocated CLI call can pass through?

A. It is possible that no CLI other than the allocated CLI can pass through in the GMSC but in our case we were acting as a transparent transit switch since the configuration was done at the EPBAX end.

Q.48. Is it correct that if it is a transit switch the Call Centre can choose the number scheme of its choice irrespective of the number allocated to it?

A. Yes, the Call Centre can choose the number scheme irrespective of the number allocated to it but we had tested calls and the CLI was correct.

Q.50. I put it to you when you can restrict the calling CLI/allocated number, why the same was not done so?

A. When the calling CLI is configured the EPBAX which is working for Bharti does the configuration and this configurations should remain unchanged except for some technical glitch.

Q.51. Is it correct that for other PRI subscriber the restricted configuration is done?

A. We were using same configuration for all PRIs.

Q.52. If your answer to Q.51 is correct, I put it to you that any PRI subscriber can alter the CLI even for a brief period when you cannot stop the same?

A. Yes.

Volunteers: Since PRIs are configured only for internal subscribers/Call Centres correct configuration is expected by the Call Centres and other stake holders.

Q.54. I put it to you if your answer to Q.51 is correct, private individuals can also alter the CLIs if they are PRI subscribers?

A. They can alter the CLIs but as mentioned earlier, we make periodic checks and we can restrict the CLIs.

Q.55. Can you tell us how often the periodic checks are carried out?

A. At the time of testing and during the monthly billing cycle the periodic checks are carried out.

Q.57. Is it correct that between one periodic check and the next a PRI subscriber can alter its assigned CLI with no immediate checks?

A. Yes, the subscriber can alter the assigned CLI but for external subscribers, the restrictions are always there.

Q.58. Can you explain what types of restrictions/configurations are made in your GMSC for others to ensure assigned/allocated calling number CLI is not changed?

A. CLI restriction is put in place to filter the calls from the particular number assigned to the PRI. The assigned number is configured for the PRI in the trunk group.

Q.61. Was there any change in the configuration in the GMSC from the date of initial testing and till the date of the dispute in question?

A. No. No configuration changes were made in the GMSC. But test calls were made in manual mode from the Call Centre and the incident occurred in auto dialer mode. In the manual mode one subscriber was calling other assigned subscriber and in auto mode automatic calls were made taking numbers from the data base.

Q.63. If it is only a change in type of calling, can you explain how CLI was changed?

A. This was new auto dialer installed at the Call Centre which was configured in default mode for auto dialing, in default mode called subscriber CLI is passed to the called subscriber. In manual mode this was not reflected in the test calls.

Q.64. Is it correct the auto dialer was not faulty?

A. It was not faulty.

Q.66. Attention of the witness was drawn to para-2 of his affidavit. Can you tell us when the test scenarios were tested and did you test the calls in auto dialing mode also?

A. We tested calls only in manual mode.

Q.75. Is it correct that no changes were made in the Bharti's GMSC even after this incident?

A. The changes were made in Bharti's GMSC after the incident. Now we are restricting calls on all PRIs to pre-assigned numbers. However, this problem was corrected by changes at the EPBAX end."

30. Mr. Kohli would contend that from the aforementioned cross-examination of the PW1, it is evident that he has clearly accepted that the call centres had been assigned a number and, thus, the same should have been attended to at the exchange of the Petitioner.

31. It is difficult for this Tribunal to arrive at a positive finding as to whether the purported act on the part of the Petitioner was a deliberate one and had been so done only for the purpose of approaching the customers by way of advertisement.

32. However, the fact that a certificate had been issued by the supplier of the equipment is not in dispute. It has also not been disputed when it was brought to the notice of the petitioner, requisite rectification thereof was immediately made.

33. It is possible, as has been stated by PW-1 that the calls were tested in manual mode, but the auto trial mode was not tested. It may be correct that a technical person should not make the assumption, but the fact that according to PW-1 it being a new auto dialer, it was configured in default mode for auto dialing, cannot be ruled out.

What was possible was that the auto dialer was put in the default mode.

The witness has further stated, as is the case of the Petitioner, that to the said effect there was an human error.

34. The said contention of the Petitioner may have some substance. It would not have been possible for this Tribunal to arrive at a firm decision, if the Respondent had also examined one of its experts.

It could have done so; particularly in view of the fact that the correctness of the certificate issued by the manufacturer of the equipment had not been accepted by it.

35. In absence of two differing opinions of two experts, this Tribunal is of the opinion that in a case of this nature the principles of natural justice should have been complied with.

No show cause notice was issued to the Petitioner by the authority who was entitled to impose penalty. The Respondent only did so by its letter dated 21.01.2011. It furthermore appears that the technical questions were raised along with certain overt and covert acts on the part of the Petitioner.

36. In Bharti Airtel Ltd. Vs. BSNL –Petition No.108 of 2008 decided on 11.02.2010, this Tribunal opined :-

> *"75. We have noticed heretobefore that the petitioner made another representation wherewith the certificate issued by Siemens was*

annexed. In response to the representation of the petitioner dated 15.04.2008, the respondent gave the benefit to the clause of 0.5% non-CLI calls to the petitioner. It did not arrive at a finding that there had been any deliberate violation on its part. It, however, painted all the calls alleged to be invalid with the same brush although a non-CLI and an invalid CLI call stand differently, as also the calls made in the wrong trunk group or otherwise modified or tampered.

94. Some reasons ought to have been assigned by way of justification by the respondent for the said inconsistent demands. Furthermore, as it appears that even the certificate of the supplier of the said EPBAX Switch Box was furnished having been annexed to the representation of the petitioner which had pointed out various technical reasons for non-receipt of CLI at the end of the respondent, which had not been considered by the respondent despite the circular dated 13.06.2005, purported to be on the basis of the report of its AT Wing and that too without giving an opportunity to the petitioner to make the stimulation exercise as was sought for by it.

97. The respondent unfortunately did not pose unto itself the right question. It took into consideration irrelevant facts not germane for arriving at a decision which would conform to its circular letter and failed to take into consideration the relevant facts ; as pointed out heretobefore, including the certificate of 'Siemens'."

37. Yet again, in Tata Teleservices Ltd. Vs. Bharat Sanchar Nigam Ltd. – Petition No. 111 of 2007 disposed of on 11.02.2010, it was stated as under :-

"In a case of this nature penalty is not immediately attracted. The circular letters issued by the respondent itself in 2005 provides for application of mind. Cases even on the basis thereof must be divided in two categories. Even percentage of non-CLI calls received in the network of the BSNL is less than 0.5% only twice the charges are to be levied whereas in the case, where it exceeds 0.5%, charges on all calls received for the last two months at the maximum slab may have to be levied.

It, therefore, involves inquiry, verification of records, exchange of datas and other informations and thus, in the instant case it cannot be said that levy of penalty is automatic and immediate."

"*In this case not only the respondent but also Government of India accepts that there exists a 'grey market' which is operated by some miscreants or unscrupulous persons as a result whereof not only the security of the State is at threat, but loss of revenue is also suffered by all private operators including the respondent. The DoT was thus, grappling with a problem of both security of State as also loss of revenue. If a private operator loses revenue, the Government of India also suffers loss. Furthermore, as noticed hereinbefore in the event of non-CLI calls, having regard to the statutory requirements made by TRAI, all parties were to reject the same, there was absolutely no reason as to why the respondent shall stand alone in the matter of implementation thereof. Its request for exemption has met with an order of rejection by TRAI as noticed in the respondent's circular letter dated 20.01.2004."*

In Tata Teleservices Ltd. vs. Bharat Sanchar Nigam Ltd. – Petition No. 134 of 2007 decided on 11.02.2010, it was opined :-

"The contention that all calls were intra-circle calls is not in dispute. The presentation made on behalf of the petitioner and as contained in Annexure-II to the petitioner categorically goes to show that all calls were wrongly routed calls. If that be so, we have no doubt in our mind that sub-clause (a) of clause 6.4.6 would be attracted in this case and not the sub-clause (b) thereof.

So far as the non-CLI clauses are concerned, we may notice that according to the petitioner only two such calls were detected. We have been taken through the reply filed by the respondent. The allegations to the aforementioned effect made in the petition have not been specifically traversed by the respondents. In that view of the matter, the statements made in the petition to the aforementioned extent would be deemed to have been admitted that only two calls were not having CLI. They should, in the facts and circumstances of the case, in our opinion, should be ignored."

38. It is a well settled principle of law that all the penalty clauses contained in the licence agreement having provided for a discretion to the licensor. In a case of this nature, a show cause notice should have been issued as has been held by this Tribunal in Idea Cellular Ltd. Vs. Union of India in Petition No.143 of 2011 decided on 17.08.2012 :-

"The penalty clause contained in the license agreement provides for a discretion in favour of the licensor. It was for it to invoke or not to invoke the same.

Perusal of Clause 10.2 (ii) of the License Agreement would clearly go to show that the penalty of Rs.50 crores was the

maximum amount and thus for the levy thereof, adequate reasons were required to be assigned. It was therefore, for the DoT to explain by assigning reasons as to why the said decision was rendered.

Had reasons in support of the said order been assigned; the Petitioner could have questioned the same by filing appropriate petition before this Tribunal.

It is well-known that the discretion cannot be a substitute for whim or caprice.

An order involving civil or evil consequences, unless the Statute otherwise requires, must be preceded by complying with the principles of natural justice. Assignment of reason is also a part of the aforementioned principle."

39. It is now a well settled that when a complicated question of fact arises for consideration before a competent authority, an opportunity of being heard is imperative in character.

40. Quantum of penalty for a sum of Rs.50 crores, which is the maximum amount, would also attract the principles of natural justice.

(See Idea Cellular Ltd. Vs. Union of India –Petition No. 238 of 2011 decided on 05.12.2011 and Idea Cellular Ltd. vs. Union of India – Petition No. 143 of 2011 decided on 17.8.2012).

Even in Bharti Airtel Ltd. Vs. Bharat Sanchar Nigam Ltd. – Petition No. 108 of 2008 principles of natural justice was directed to be complied with.

41. Submission of Mr. Maninder Singh that the principle that person who has been brought in this case hears must decide, in support whereof strong reliance has been placed on Kolapalli Nageshwar Rao Vs. A.P. State Transport Corporation reported in 1959 Suppl. 1 SCR 319 and a recent decision of the Supreme Court of India in Automatic Tyre Manufactures Association Vs. Designated Authority reported in (2011) 2 SCC 258 may not have any application in the instant case as either the Respondent No.2 was competent to issue a notice to show cause or it was not.

Once it is contended that it was DoT alone, which could issue the show cause notice is accepted, it is idle to contend that despite the same the aforementioned principle shall apply.

42. In that view of the matter I am of the opinion that the Petitioner should be given a notice to show cause.

43. There is another aspect of the matter which cannot also be ignored.

The Respondent No.2 in its correspondences categorically proceeded on the basis that the Petitioner is guilty of originating camouflaged calls.

If it was so pre-determined, the Respondent No.2 could not have been expected to be acting neutrally while adjudicating the issue namely as to whether there is a technical glitch or not.

44. In B.B. Gupta Vs. State of Haryana reported in (1973) 3 SCC 149 the Apex Court opined as under :-

> *"As one reads the first paragraph of the notice, the questions that at once assail ones mind are many: In what way was the explanation of the appellant unsatisfactory? Which part of the appellant's explanation was so unsatisfactory? On what materials did the Government think that the appellant's explanation was unsatisfactory. It is to our mind essential for a "Show Cause notice" to- indicate the precise scope of the notice and also to indicate the points on which the officer concerned is expected to give a reply. We have no manner of doubt that the "Show Cause notice" in the instant case did not give the appellant any real opportunity to defend himself against the complaint that his previous explanation of 18 December 1956 had been unsatisfactory. 'The appellant did not, therefore, get any chance at all to show that he did not deserve a censure upon his conduct."*

45. Yet recently, in Oryx Fisheries Pvt. Ltd. vs. Union of India reported in (2010) 13 SCC 427, the Apex Court opined that at the stage of show cause notice the concerned Respondent could not have made up his mind, stated the law thus :-

> *"27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge- sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony.*
>
> *28. Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi- judicial authority has to inspire confidence in the minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against.*
>
> *29. In the instant case from the underlined portion of the show cause notice it is clear that the third respondent has demonstrated a totally close mind at the stage of show cause notice itself. Such a close mind is inconsistent with the scheme of Rule 43 which is set out below. The aforesaid rule has been framed in exercise of the power conferred under Section 33 of The Marine Products Export Development Authority Act, 1972 and as such that Rule is statutory in nature."*

46. In that view of the matter too, I am of the opinion that it would be necessary that the Petitioner is given an opportunity of hearing by the DoT. It is necessary, keeping in view the technical aspects involved in the matter, which may require resolution of a technical dispute, the Respondent may consider the desirability to grant a personal hearing to the Petitioner.

47. While the impugned demand cannot be upheld on the ground stated hereinbefore, there cannot be any doubt that the conduct of the Petitioner is not free from any blemish.

I am, therefore, of the opinion that in the event the Respondent refunds the amount within four weeks from date, it will not have to pay any interest to the Petitioner on that count. However, in the event of it's failure to do so, interest at the rate of twelve percent per annum shall be payable from the expiry of the four weeks from date till realization.

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(S.B. Sinha)
Chairperson

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