

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated:- 4th September, 2014

Petition No.634 of 2012

Bharti Airtel Limited

.....Petitioner

Versus

Bharat Sanchar Nigam Limited

.....Respondent

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER**

For Petitioner : Ms. Chimayee Chandra, Advocate
Ms. Stephanie V. Sonawane, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate
Mr. Prashant Jain, Advocate
Ms. Neha Singh, Advocate for
Ms. Maneesha Dhir, Advocate

ORDER

By Aftab Alam, Chairperson – The petitioner, M/s Bharti Airtel Limited has filed this petition challenging the disconnection notices dated 7 July 2012 and 27 August 2012 issued by the respondent, Bharat Sanchar Nigam Limited (BSNL). By the impugned notices, BSNL has made a demand of Rs.51 lakhs as damages for Airtel cutting its optic fibre cables at a number of places, indicated in the enclosures to the notices. The notices further state that failing payment of the amount claimed, BSNL will stop providing services to Airtel in

J&K Telecom circle under the Inter-connect Agreement executed between the parties.

Both Airtel and BSNL hold Unified Access Service Licences and are providing mobile phone services in J&K Telecom circle in terms of their respective licences. In order to provide inter-connection between their networks, Airtel and BSNL executed an Inter-connect Agreement on 26 March 2004 as envisaged under clause 26 of UAS licence and as per the Regulations framed by the Telecom Regulatory Authority of India (TRAI).

The threat in the impugned demand notices is to deactivate the points of inter-connect (POIs) installed at the BSNL exchanges on Airtel's request under the Inter-connect Agreement and thereby deny it the facility to use the BSNL network.

According to BSNL, while laying cables at different places, Airtel's men acting carelessly and negligently, cut BSNL's optic fibre cables running through those places. The cutting of cables caused heavy material losses to BSNL, besides affecting its services very badly. In one of the letters dated 13 July 2009, BSNL described the nature of the damage and its claim arising from it as under:

“Our OF Cable -12 F working between Udampur – Jammu – Katra has been cut by your company while laying cable in that area. We have been repeatedly requesting to all operators to intimate the area where the cable is being laid and take necessary precautions to avoid any damage to BSNL OF cable but despite of all this the operators are not bothered to protect over cable and repeatedly damaging over network.

As per instructions contained in BSNL corporate office New Delhi Letter No: 1107/2002/Regn. Dated: 16-01-2003, the damage as detailed below may be deposited with A.O.% Dy. GM.M. NTR Jalandhar.

S. No	Section of fault	Date of fault	Location	No of occasion	Damages raised	Remarks
1	Udhampur-Tikkri	29-06-2009	At a distance of 22.684 KM's from Udhampur towards Tikkri	One	Rs.1,50,000/- (Rupees One Lac and Fifty Thousand)	
				Total	1,50,000-00	

In another letter dated 7 April 2010 written in connection with the cutting of cable at another place, the nature of allegation is spelt-out more clearly. The relevant extract from the letter is as under:

“Sub: Destruction of OF Cable on Jammu – Srinagar NH by M/s Bharti Airtel Ltd.

Your company is laying cable from Jammu to Srinagar along NHIA where the BSNL cable is already laid along NH. While laying cable your contractor and his supervisors are not taking care of BSNL cable despite of my meeting with project Manager Sh. A.P. Singh and Contractor. At that time it was assured that in future utmost care will be taken to avoid the damage to BSNL OFC but practically failed. The matter is most serious as BSNL is maintaining communication for people of valley, remote terrorist affected area, enroute mobile BTS, hilly districts of Doda, Kistwar&Ramban, paramilitary forces and for defence but your company is damaging our N/W almost on everyday causing great inconveniences.

The cable is thrown open out of trench by breaking RCC, HDPE pipes and joint enclosures. The cable remains on road days together which is being damaged by running vehicles and anti-social elements resulting interruption to our communication. Our staff is repeatedly requesting to concerned contractor/engineer but all in vain. Even half blind persons are working in digging which were found on my visit to route and also show to mate at site.”

From the letters issued by BSNL, it is evident that the alleged cuttings of cables occurred at places far away from the points of interconnect installed under the Inter-connect agreement. The Counsel for BSNL was repeatedly asked whether there was any connection between the cutting of the cables at the places as mentioned in the BSNL's letters and the installation of the points of

inter-connect or the working of the inter-connect agreement. It was specifically asked whether the cutting of cables took place in the process of installation of the points of inter-connect or as a result of the working of the points of inter-connect. Learned Counsel was unable to say that there was any nexus between the inter-connection of the two networks as provided in the Interconnect Agreement and the cutting of cables.

On a consideration of the materials on record we are satisfied that the alleged cuttings of cables have no relationship with the Inter-connect agreement. The question, therefore arises whether it is open to BSNL to try to realise damages for the alleged cuttings of cables by threatening to discontinue the inter-connect services.

Learned Counsel for BSNL referred to the letter from Airtel dated 23 December 2010. In this letter it is stated that as against the alleged 25 cuts, the Airtel contractor had admitted to 3 cuts and a request is made for joint survey. He then invited our attention to a survey report dated 9 September 2011. From this report it appears that a team of BSNL and Airtel personnel jointly made a survey on the Jammu-Banihal route in course of which “all the cuts claimed were shown to Airtel personnel”. Learned Counsel also submitted that Airtel had actually paid damages for some of the cuts admitted by it.

In our view none of the above facts and circumstances is of any help to BSNL. First, the survey report dated 9 September 2011 does not seem to relate to places where cuts of cables are alleged to have taken place in the impugned

notices. Secondly, simply because Airtel admitted to certain cuts and paid damages for those cuts would not authorise BSNL to realise from it damages for cuts not admitted by it by threatening to discontinue the inter-connect services. In order to succeed the BSNL must establish that cuts of cables at the places indicated in the impugned notices in fact took place; that those cuts were committed by Airtel and that in case of failure to pay for the damages it is open to BSNL to discontinue the inter-connect services provided to Airtel in terms of the Inter-connect Agreement.

In this case none of the three conditions are established. But even if the first two conditions are assumed as proven, we are still unable to see how BSNL can realise the damages by threatening to discontinue the inter-connect facilities to Airtel. It needs to be borne in mind here that inter-connect arrangements between two UAS licence holders, at least in respect of certain services, is based on the “must provide” principle under Regulations framed by TRAI. There is no provision in the agreement that provides for its termination for non-payment of a claim completely unrelated to the terms of the agreement. Learned Counsel for BSNL relied upon clause 7.2.2 of the Inter-connect agreement. Clause 7.2.2 falls under chapter 7 of the agreement that deals with Interconnect Billing System and it reads as under:

“Bills for telecom resources and other support facilities, such as connection charges, charges for leased facilities, charges for value added services and charges for enhancement of features, if availed by the UASL will be issued by BSNL and paid by the UASL at the intervals specified in this agreement.”

The impugned demand for damages is not covered by any of the charges mentioned in the clause and clause 7.2.2 does not have any application in the facts of this case.

In view of the discussions made above, we are unable to uphold the impugned notices. Those are accordingly set aside.

Before concluding the order, we must, however, observe that in case in the process of laying its own cables Airtel actually caused cuts in the BSNL's cables that were already laid at those places, its actions were indeed highly reprehensible and BSNL without doubt suffered grievous losses. But unfortunately BSNL has taken a completely ill-advised and misconceived course for recovery of its dues that has no legal sanction. The impugned attempt to recover its damages must, therefore, fail. It will, however, be open to the BSNL to take steps of recovery of its damages by taking a proper legal course as may be available to it in law.

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(AftabAlam)
Chairperson

.....
(Kuldip Singh)
Member