

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

Dated 4th January, 2018

Telecommunication Petition No. 34 of 2017

Idea Cellular Ltd. ...Petitioner

Vs.

Bharat Sanchar Nigam Ltd. ...Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

HON'BLE MR. B.B. SRIVASTAVA, MEMBER

HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioner : Mr. Gopal Jain, Sr. Advocate
Mr. Harsh Kaushik, Advocate
Mr. Abhay Chattopadhyay, Advocate

For Respondent : Mr. Tejveer Singh Bhatia, Advocate
Ms. Vishakha Ahuja, Advocate
Ms. Nimisha Menon, Advocate

ORDER

By S.K. Singh, Chairperson – This petition was filed on 17.04.2017 under Section 14 and 14A of the Telecom Regulatory Authority of India Act 1997 (TRAI Act).

2. The main prayers/reliefs sought by the petitioner are in prayers (a) and (b) which are as follows:

“In view of the facts and circumstances of the case and the submissions made hereinabove, the Petitioner respectfully pray that this Hon’ble Tribunal may be pleased to:

- (a) Quash the Respondent’s decision recorded in its letters dated 11.12.2012, 26.06.2013 and 08.05.2015 to the extent it seeks to restrict the Respondent’s period of liability for payment of SMS Termination Charges to the Petitioner under the Addenda to the Interconnect Agreements.
- (b) Direct the Respondent to pay to the Petitioner SMS Termination Charges of Rs.99,23,94,075/- as detailed in Paragraph 1 of this Petition along with interest at the rate of interest as mentioned in the Interconnect Agreements executed between the Petitioner and the Respondent and held to be applicable on reciprocal basis by this Hon’ble Tribunal.”

3. The money claimed by the petitioner has been periodwise classified and detailed in paragraph 1 of the petitioner. In order to appreciate the submissions of the parties in respect of the preliminary issue of limitation, it is useful to extract hereinbelow the contents of paragraph 1 which is as follows:

“1. This Petition is for recovery of Interconnect Usage Charges, on account of termination of SMSs by the Respondent on the network of the Petitioner (“SMS Termination Charges”), from the Respondent, along with interest till date of payment, under Interconnect Agreements and the addenda thereto (*effective from the date of signing*) signed between the Petitioner and the Respondent in respect of 15 Licensed Service Areas (“LSAs”) as also with respect to 7 Circles where, though there was no addenda between the Petitioner and the Respondent for the SMS Termination Charge, on principle of non-discrimination and parity, the said charge is being claimed on reciprocal basis, in terms of TRAI’s Regulations. The break-up of amounts demanded from the respondent and invoiced to the respondent as SMS Termination charges and service tax, as on 10.01.2017, is as follows:

Demand		
Period	Charges (INR)	Total Including Taxes (INR)
01.12.2010 to 15.12.2012 (@10 paise/SMS)	73,08,07,405	81,22,50,089

Invoiced		
Period	Charges (INR)	Total Including Taxes (INR)
16.12.2010 to 31.05.2013 (@10 paise/SMS)	9,33,76,389	10,49,12,268
01.06.2013 to 30.11.2016 (as per 2013 Regulations)	6,59,90,684	7,52,31,718
Total	15,93,67,073	18,01,43,986

4. On 16.05.2017 a short reply was filed on behalf of respondent raising the issue of limitation with a plea that it be decided as a preliminary issue on the basis of averments in paragraph 2 of that reply. In that paragraph, the respondent claimed that petitioner was seeking to recover SMS Termination Charges for the period 01.02.2010 to 15.12.2012, 16.12.2012 to 01.06.2013 and 01.06.2013 to 31.10.2014 when major part of claim in question was, according to respondent, *ex facie* barred by limitation because the petitioner was filed on 17.04.2017. It was further averred that the first two time periods are completely time barred whereas the third time period comprised of unseverable monetary liabilities and therefore, whole claim even for the third time period deserves to be rejected *in limine* on the ground of limitation.

5. The respondent availed further opportunity of filing a detailed reply including on the issue of limitation. Such reply was filed on 30.08.2017.

6. On the issue of limitation the averments on behalf of the respondent are to the effect that any claim for the period prior to 18.04.2014 being beyond three years is barred by limitation. A rejoinder was filed on behalf of the petitioner. The specific reply on the issue of limitation is to be found in

paragraphs 1, 2 and 3. The petitioner has repeatedly dwelt on the legality and acceptability of its claim. On the issue of limitation raised as a preliminary petition, the claim for even the periods which are beyond three years has been defended by raising a plea that the respondent has admitted and acknowledged in writing its liability to make payment for the periods apparently barred by limitation and that such admissions and acknowledgements are contained in letters/communications dated 11.12.2012, 26.06.2013, 19.11.2014 and 08.05.2015. On account of such acknowledgements/admissions of liability, the respondent, according to petitioner, is precluded from seeking dismissal of the claims as barred by limitation. It has also been claimed (but not pressed) that limitation cannot be applied against the petitioner because it has maintained a running account in respect of the SMS Termination Charges, more so when partial payments were being made and continue to be made towards the SMS Termination Charges under the Addenda to Interconnect Agreement dated 23.05.2010. It was also pleaded that limitation being a mixed issue of fact and law cannot be decided at the initial stage unless evidence is lead by the parties in support of facts pleaded by them.

7. Both parties were heard in detail on the issue of limitation. When defence of limitation is based upon facts which need to be proved by leading evidence, it may not be proper to take up the issue of limitation at the initial stage. However, in the present case, the relevant facts relating to issue of limitation are

not under dispute and the documents upon which the petitioner has placed reliance have been accepted as correct or admitted documents and arguments have been advanced accordingly.

8. There is no denial that period of limitation for a monetary claim like the one made by the petitioner is three years. In that view of the matter, ordinarily the claim by the petitioner for the period prior to 18.04.2014 should be treated as a claim barred by law of limitation. In order to overcome this difficulty and get over the bar of limitation, learned senior counsel for the petitioner initially attempted to highlight the merits of the petitioner's case by submitting that there was no good ground available with the respondent not to pay termination charges for SMS at the agreed rate from 23.02.2010 i.e., the date of execution of the Addenda to the respective interconnect agreements. Again on merits, it was submitted that the respondent cannot and could not have taken the stand that the Addenda shall be effective from 16.12.2012 instead of 23.02.2010.

9. It was pointed out that this aspect will be considered on merits at appropriate stage and presently the consideration is confined as to the issue of limitation and whether claims for the period prior to three years from the filing of the petition i.e. earlier to 18.04.2014 are barred by law of limitation. On this issue learned senior counsel advanced the sole submission that the period of limitation stands extended till the filing of the petition and even beyond on account of written acknowledgement by the respondent of their liability to pay

the claims of the petitioner even for the period prior to 18.04.2014. In support of this plea, reliance has been placed upon four documents. These are:-

- (i) Letter of BSNL (respondent) dated 11.12.2012 (Annexure P-5)
- (ii) Letter of BSNL (respondent) dated 26.06.2013 (Annexure P-7)
- (iii) Letter of BSNL (respondent) dated 19.11.2014 (Annexure P-10)
- (iv) Letter of BSNL (respondent) dated 08.05.2015 (Annexure P-13)

10. A perusal of letter dated 11.12.2012 (**Annexure P-5**) shows that it contains, as per the subject, minutes of the meeting held on 03.12.2012 regarding SMS Termination Agreement with the petitioner, two other service providers and the BSNL. In the last paragraph bearing number 4.0, it is recorded in clear terms that after considering relevant materials, BSNL decided to make the agreement dated 23.02.2010 with the three operators including the petitioner, operational w.e.f. 16.12.2012. The second document, the letter dated 26.06.2013 (**Annexure P-7**) has been addressed to various other operators except the petitioner and two others, namely, M/s Bharti Airtel and M/s Vodafone India Ltd. The subject is "Implementation of SMS Termination Agreement with private operators". This letter contains arrangement with regard to charging of SMS in respect of other entities. For the purposes of rate, in their case the Addenda Agreement appears to have been made effective from 01.04.2011 to 31.05.2013. From 01.06.2013, the charges are shown to be regulated by and in accordance with SMS Termination Charges Regulation 2013.

11. The contents of aforementioned two documents do not show any kind of

acknowledgement *qua* the claim of the petitioner, particularly, for the period prior to 16.12.2012.

12. The third letter dated 19.11.2014 (**Annexure P-10**) is addressed to the petitioner on the relevant subject i.e. "Regarding implementation of SMS Termination Charges". It refers to the meeting held on 03.12.2012 as well as to the decision to implement the Addenda Agreement w.e.f. 16.12.2012. Thereafter, BSNL noticed the grievance of the petitioner and two other operators with whom it had signed the Addenda Agreement. The grievance appears to be that BSNL is giving effect to the agreements with the three signatories w.e.f. 16.12.2012 whereas in respect of operators who had not signed the Addenda Agreements, the provisions were being given effect from 01.04.2011. The letter further justifies the stand of the BSNL by explaining the conduct of other private operators. After recording that for payment of SMS charges uniformly on reciprocal basis BSNL is ready w.e.f. 01.06.2013 as per TRAI Regulations, BSNL reiterated only its earlier stands without acknowledging any liability for the period prior to 01.06.2013. In the fourth letter dated 08.05.2015, addressed to all the players on the subject of implementation of SMS Termination Agreement with private operators, BSNL has mentioned in Para 1.4 that all operators (except M/s Bharti Airtel Ltd., M/s Vodafone India Ltd. and M/s IDEA Cellular Ltd.) were asked by BSNL from time to time to enter into a similar Addenda Agreement as signed by BSNL with

the aforesaid three entities but none of the other operators have signed such agreement with BSNL. In Para 1.7, the material decision is to the effect that two letters dated 26.06.2013 were being partially withdrawn and the earlier decision would be effective only to a limited extent. The effective decision is that SMS Termination Charges shall be regulated and raised w.e.f. 01.06.2013. In respect of Addenda Agreement signed between the petitioner and BSNL on SMS Termination Charges, the letters are consistent in acknowledging that the charges shall be effective as per agreement, from 16.12.2012. This appears to be a possible conclusion from Para 2 of the letter dated 19.11.2014(**Annexure P-10**). Hence, the claim of the petitioner based on the Addenda Agreement for the period on and after 16.12.2012 appears to have been acknowledged as late as on 19.11.2014 i.e. within three years of filing of the present application on 17.04.2017.

13. Considering the main defence based upon acknowledgement through the four letters discussed above, it can be safely held that the claim of the petitioner relating to period 01.12.2010 to 15.12.2012 shown in the first Table of Para 1 of the petition is based upon stand of the petitioner that the Addenda should be effective from 23.02.2010 and not from 16.12.2012. This claim of the petitioner was unequivocally rejected by the respondent since the decision to this effect, as appeared from **Annexure P-5** dated 11.12.2012, the cause of action to sue on the basis of Annexure P-5 also got barred by limitation due to lapse of more

than three years. The respondent never acknowledged or admitted the claim of the petitioner to treat the Addenda Agreement effective from 23.02.2010. Hence, there is no merit in the main defence based upon acknowledgement so far as claim for the period 01.12.2010 to 15.12.2012 are concerned. Such claim is barred by limitation on all account and does not deserve to be entertained. It is, thus, rejected as time barred.

14. Learned senior learned for the petitioner tried to persuade us to take a different view on the basis of Explanation (a) of Section 18 of the Limitation Act, 1963 and has also placed reliance upon the following three judgments:

- (i) Judgment of Supreme Court in **Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prasad Chamaria & Ors. – AIR 1961 SC 1236**
- (ii) Judgment of High Court of Karnataka in **AIR 2014 Knt 6** decided on 25.06.2013 in **Sudarshan Cargo Pvt. Ltd. Vs. M/s Techvac Engineering Pvt. Ltd.;** and
- (iii) Judgment of High Court of Calcutta in **AIR 2007 Calcutta 280** decided on 16.07.2007 **In Re: Deepika Housing Projects Pvt. Ltd. and etc.**

15. Section 18 with Explanation (a) may be extracted for the purpose of appreciating the argument that even if the acknowledgment omits to specify the exact details of the property or right or is accompanied by some negative averments, it can amount to a sufficient acknowledgment.

“18. Effect of acknowledgment in writing.— (1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or

liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

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

Explanation.—For the purposes of this section,—

- (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;
- (b) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and
- (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.”

The issue as to when an acknowledgement is sufficient, can arise only when the alleged acknowledgment is found to be really an acknowledgement but is either found lacking in some specification or is accompanied by some comments such as – the time of payment is not due as yet or refusal to pay, etc. In the present case, the claim for the first period which we have dealt above has not been acknowledged at all by the respondent as their liability. Hence, the explanation does not help the case of the petitioner in respect of the first period which is found to be barred by limitation.

16. In the case of **Khan Bahadur (supra)**, the Supreme Court was dealing with a claim made by the plaintiff mortgagee that the mortgager had acknowledged his liability by two letters signed by him and, therefore, suit must

be treated as within time. The Supreme Court noticed in Para 15 the general tenor of the letter as a whole and agreed with the findings of the Court of Appeal that the letter amounts to an acknowledgment. The judgment of the Calcutta High Court in the case of **In Re: Deepika Housing (supra)** dealt with issue of acknowledgment in respect of a claim for money. A careful reading of that judgment shows that the acknowledgment of the debt by the defendant company in its balance sheet was alleged to be sufficient acknowledgment but the discussion shows that the company was held liable on a different principle, as it had admitted to receiving the money but failed to prove that the money stood forfeited in the company's hands.

17. The judgment of the Karnataka High Court in the case of **Sudarshan Cargo (supra)** has been relied upon for the limited purpose of showing how the meaning of "acknowledgment" has been explained in various dictionaries.

18. Learned counsel for the respondent, on the other hand, has placed reliance upon judgment of the Apex Court in **Tilak Ram & Ors. Vs. Nathu & Ors. – AIR 1967 SC 935**. He placed reliance upon Para 9 to show that two conflicting lines of judgment existed in respect of implications from admission of jural relationship in cases relating to mortgage. Para 10 of that judgment however, shows that the court did not go into details and did not decide which of the views is correct, in view of judgment in the case of **Khan Bahadur (supra)**. This judgment has already been noticed and discussed above.

19. Although respondent has argued for rejection of the second category of claim also, covering the period 16.12.2012 to 31.05.2013 and part of the claim beginning from 01.06.2013 till 18.04.2014 as barred by limitation, this plea cannot be accepted because the basis for the claim of the petitioner has been clearly acknowledged in writing in some of the letters noted above.

20. The letter dated 19.11.2014 admits that in the meeting on 03.12.2012 it was agreed to implement the Addenda Agreement with the petitioner w.e.f. 16.12.2012. Similarly, the liability to pay the IUC SMS charged w.e.f. 01.06.2013, based on the TRAI Regulations is also clearly acknowledged and admitted. Taking a liberal view, on overall reading of this letter along with letter dated 08.05.2015 in which also the Addenda Agreement with the petitioner is admitted in Para 1.4, it is not possible to accept the plea of respondent that although the petitioner filed its claim within three years from the letter dated 19.11.2014, the claims acknowledged by these letters be rejected on the ground that they basically relate to the period 01.06.2013 till 18.04.2014. These claims are admittedly not barred by limitation.

21. In the light of aforesaid discussion and findings the preliminary issue of limitation raised by the respondent is decided in their favour only in part as indicated earlier and against the petitioner for claims relating to period 01.12.2010 to 15.12.2012. The plea of limitation in respect of later claims is not found acceptable. The issue is decided accordingly. No other contention was

pressed for consideration. The trial for the surviving claims shall proceed in accordance with law.

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(S.K. Singh, J)
Chairperson

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member

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