TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th August, 2017

Telecommunication Petition No.193 of 2012
(M.A.Nos.148, 160, 384, 515, 560, 595, 596 & 625 of 2012)

Tata Communications Ltd. …Petitioner
Vs.
Mahanagar Telephone Nigam Ltd. …Respondent

Telecommunication Petition No. 542 of 2012

Tata Communications Ltd. …Petitioner
Vs.
Mahanagar Telephone Nigam Ltd. & Ors. …Respondents

Telecommunication Petition No.64 of 2013

Mahanagar Telephone Nigam Ltd. …Petitioner
Vs.
Tata Communications 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 (in T.P.Nos.193/12, 542/12 and for Respondent in T.P.No.64 of 2013) : Mr. Upamanyu Hazarika, Sr.Advocate
Mr. Dharity Phookan, Advocate
Mr. Paul Roy Paske, Advocate

For Respondents (in T.P.Nos.193/12, 542/12 and for Petitioner in T.P.No.64 of 2013) : Mr. Chandan Kumar, Advocate

ORDER

By S.K. Singh, Chairperson – Both the Telecom Petitions of 2012 have been preferred by M/s Tata Communications Ltd.(TCL) against Mahanagar Telephone Nigam Ltd. (MTNL) and others. The third petition bearing T.P. No.64 of 2013 is by MTNL against TCL. In T.P. No.193 of 2012, TCL/petitioner has prayed for setting aside of circulars/letters dated 08.04.2009, 09.02.2010, 23.02.2010 and 08.04.2010, all issued by MTNL. Further prayers are to direct the respondents to pay an amount of Rs.74,399,005/- on the ground that it has been wrongfully adjusted by the respondents from the dues of the petitioner as per details in a chart at paragraph 6 of the petition, and for interest @ 18% amounting to Rs.27,065,097/- along with interest at the same rate since 01.04.2012 till realisation of the due amount. The prayer in T.P. No.542 of 2012 is similar. Besides seeking quashing of the four circulars/letters noticed above, the prayer includes quashing and setting aside of three demand notices dated 16.06.2012, 19.06.2012 and 21.06.2012. The amount claimed is Rs.88,00,301/-, said to have been wrongfully retained/adjusted by the respondents from the dues of the petitioner as detailed in the chart at paragraph 6 of the petition. Interest has been claimed at the same rate and in same terms

but the amount specified as interest prior to the filing of the petition is Rs.4,13,334/-.

2. On the other hand, after the Tribunal granted interim stay on further adjustment in T.P. No.542 of 2012 vide order dated 28.09.2012, on account of certain observations made by the Tribunal, on 08.03.2013 MTNL filed T.P. No.64 of 2013 for Rs.38,81,298/- claiming it as the balance amount which it was entitled to recover but could not do so because of the interim stay.

3. Some relevant facts not in dispute are that TCL is a company incorporated under the Companies Act 1956 and is successor of a Government company, Videsh Sanchar Nigam Ltd. (VSNL). It is engaged in providing national, international long distance telecommunication and internet services under licenses granted by the Government of India. The change of name to TCL was with effect from 13.02.2008. MTNL has been impleaded as Respondent No.1, 2 and 3. Respondent No.1 is the Corporate Head Office at Delhi, whereas respondents No.2 and 3 are its offices of the Mumbai and Delhi circles. The issues involved in these petitions relate to these two circles.

4. TCL provides ILD services to the respondents as per terms and conditions of an Interconnect Agreement between the parties dated 27.03.2003. Subsequently, parties entered into and signed a BSO Agreement on 13.03.2008 but effective from 01.05.2006. Another CMTS Agreement with the petitioner

as the ILDO was also signed on and effective from 13.03.2008. Provisions relevant for the subject of the present petitions are same in all the agreements.

The relevant clauses of the Interconnect Agreement relied upon by the parties are extracted herein below:

> "**1.3 Billing Period** means the period of one calendar month commencing on the first day of every month.
>
> **1.27 "Pay by date"** means the 15th day from the date of issue of bill.
>
> **"6.3.1:** Access charges for outgoing and incoming international calls shall be as per Schedule I"
>
> Schedule I relates to payment for carriage and termination of outgoing ISD calls. The relevant clauses of schedule are set out below:
>
> SCHEDULE – 1
>
> ACCESS CHARGES AND REVENUE SHARING
>
> Payment of carriage and termination of outgoing ISD calls
>
> i) "MTNL shall pay to ILDO for carriage and termination of ISD calls originated in India and terminated outside India using ILDO's ILD network on mutually agreed rates.
>
> ii) In case ILDO offers lower rates for carriage and termination of ISD calls originated in India and terminated outside India to any BSO/CMSP, NLDO or ILDO, the same shall apply to MTNL retrospectively from the date of applicability of such lower rates to any other service provider mentioned above.

The above provisions read with the definition clause require that rates be offered on a monthly basis are settled monthly.

The monthly rates for carriage would be mutually agreed between the parties and the Respondents would be entitled to lower rates with retrospective effect only if such lower rates are offered by the Petitioner to other operators.

7.1.2 The BSNL or the ILDO 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 receive the relevant books and/or detailed records of successful calls of the other relating to a period not exceeding one year prior to the date of inspection, for the purpose of verifying the Billing information providing 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 access charges (schedule – 1) for a period of one year 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.

Clause 7.1.2 clearly provides for either party, in the event of a billing dispute to inspect the books and records of the other relating to a period not exceeding one year for the purpose of verifying the billing information for such period. Clause 7.1.3 requires each party to preserve records in respect of IUC for a period of one year from the end of the Billing Period. Billing Period is defined in the definition clause to mean one calendar month.

ISSUE OF BILLS

7.2.1 Traffic Observations and CDRs shall be recorded at each POI separately for outgoing calls, incoming calls and transit call. These CDRs shall be sent to the designated billing authority of MTNL who shall issue the bills after taking into account the application volume discount, if any and minimum monthly guaranteed incoming traffic, if any. The bill shall be issued of bills on monthly basis and shall be payable within 7 days of date of issue of bills or 15 days from the end of month whichever is earlier. The payment shall be by way of banker's Cheque/demand draft in favour of the designated billing authority of MTNL drawn at the local branch of any scheduled bank at the place where such designated billing authority of MTNL is located. Payment by bank transfer electronically is also permissible.

7.3.1 MODE OF PAYMENT

i. The payment of bills will be made by the ILDO within the same time specified in clause 7.2 above.

……..

iii. All payments due to MTNL will be paid without set off (netting) or counter claim and shall be free and clear of any withholding or deductions.

The above provisions show that payments are to be made by the parties without any withholding or deductions.

"7.5: Settlement of disputes regarding wrong/excess billing:

7.5.2. In the event ILDO disputes the accuracy of a bill delivered by MTNL pursuant to this Agreement, it will, as soon as practicable, but in any

case before the pay-by-date notify the billing liaison contact of MTNL of the nature and extent of the dispute along with all details reasonably necessary to substantiate its claim which shall be reasonably capable of being verified by MTNL.

7.5.4 In cases other than those referred in clause 7.5.3, ILDO shall immediately obtain a provisional bill from MTNL before the pay by date of the original bill on the basis is given in clause 7.5.1. The provisional bill shall be paid by the ILDO before the pay by date indicated in the provisional bill….."""

5. In T.P. No.193 of 2012, TCL has pleaded that respondents arbitrarily withheld part of the bill amount and made short payments during the period January 2008 to October 2008 from running invoices of those months and they also made unilateral and arbitrary adjustments from the bills of March 2009 till October 2010 against payments already made for the period May 2005 to October 2008. This was to give effect to the impugned internal circulars/letters dated 08.04.2009, 09.02.2010, 23.02.2010 and 08.04.2010. This way, the respondents allegedly made a wrongful deduction of Rs.74,399,005/-. After calculating and adding interest of Rs.28,084,907/-, the petitioner TCL has arrived at the total claimed amount of Rs.10,24,83,912/-. In its other petition (T.P. No.542 of 2012), TCL has raised a grievance that after filing of T.P. No.193 of 2012, it came to know that the respondents had made further illegal adjustments amounting to Rs.88,00,301/- and had also issued further demand

notices impugned in this petition with a view to make a second round of adjustments. According to TCL, the illegal adjustments were for the period from May, 2005 to May 2009. Further adjustments claimed through the impugned demand notices were also for the period May 2005 to February 2007 and April 2007 to June 2007 respectively. The recoveries were sought to be justified by the impugned internal circulars/letters dated 08.04.2009, 09.02.2010, 23.02.2010 and 08.04.2010. As noted earlier, since this Tribunal stayed further adjustments/recovery, MTNL filed T.P. No.64 of 2013 for the alleged balance dues against TCL.

6. On behalf of TCL, the extracted clauses of the Interconnect Agreement were relied upon to emphasize that the billing period was of only one calendar month and the monthly bill was required to be paid by the 15th day from the date of its issue. Further submissions: Agreement thus contemplates only monthly transaction of billing and payments, and settlements of the bills had to be a monthly transaction. The access charges and revenue sharing is governed by Schedule 1. Clause (i) provides for payment on mutually agreed rates. Additionally, clause (ii) grants automatic advantage to MTNL by providing that, in case TCL (ILDO) offers lower rates for carriage and termination of ISD clause originated in India and terminated outside India to any BSO/CMSP, NLDO or ILDO, the same shall apply to MTNL retrospectively from the date of applicability of such lower rates to any other service provider mentioned above.

According to petitioner TCL, the above provisions meant and resulted in the rates being offered on a monthly basis and settled monthly. Monthly rates for carriage had to be mutually agreed but otherwise also the respondent MTNL would be entitled to lower rates with retrospective effect if such lower rates were offered by TCL to other operators. Clause 7.1.2 and 7.1.3 were highlighted by TCL to emphasize that in the event of a billing dispute, the books and records of other party could be inspected by the aggrieved party but subject to one year's limitation.

7. The case of MTNL appearing from its reply as well as submissions is to the effect that – (i) The petition is barred by limitation; (ii) The petitioner TCL obtained 100% traffic from MTNL by making an additional representation that it shall offer rates not higher than those received by BSNL from any service provider and for several months TCL issued certificates to that effect. So long as such certificates issued in explicit terms were furnished, there was no dispute over rates but from July 2005, dispute arose because TCL did not issue required certificate. As a result, the rates could not be mutually agreed upon. MTNL withheld parts of the billed amount for that reason alone and ultimately through the impugned circulars/letters the rates for different periods were finally published on the strength of novated clause (ii) of Schedule 1. On implementing the same, further recoveries were made against which TCL has filed petitions without any justifiable reasons. For the amount which could not be recovered

by MTNL, it has filed T.P. No.64 of 2013; (iii) There was an implied novation of the agreement requiring TCL to offer rates on the basis of lowest rates received by a third entity, BSNL, from the ILDOs in India. This was in lieu of 100% outgoing traffic from MTNL routed only through TCL; and, (iv) Since the rates had to be mutually agreed rates, MTNL was within its rights to collect rates received by BSNL during the relevant period and then finalise and publish the accepted rates. Therefore, the exercise of publishing the approved rates through impugned letters/circulars does not suffer from any illegality or violation of agreement.

8. The MTNL denied most of the grounds urged on behalf of the petitioner TCL and prayed for dismissal of the petitions.

9. In T.P. No.193 of 2012, following issues were framed on 30.07.2012 along with an additional issue framed on 11.10.2012:

> "i) Whether the Petition is barred under the law of limitation?
>
> ii) Whether the Petitioner has made out a case for setting aside the circular/letters issued by the Respondent herein dated 08.04.2009 Annexure-P/15, dated 09.02.2010 Annexure-P/23, dated 23.02.2010 Annexure-P/28 and dated 08.04.2010 Annexure-P/31?
>
> iii) Whether the Parties hereto entered into a novation of contract as appeared from 2005 onwards?
>
> iv) Whether the Respondent has justified in adjusting a sum of Rs. 74,399,005/- as mentioned in the chart at paragraph 6 of the Petition?

v) Whether the action on the part of the Respondent in resorting to deduction of the aforementioned amount is barred under the law of limitation as also under the contract?

vi) Whether the Petitioner is entitled to interest @ 18 % p.a. or otherwise?

vii) Whether the Petitioner is entitled to a decree for a sum of Rs.10,24,83,912/-?"

In T.P. No.542 of 2012, the following issues were framed on 21.09.2012:

"i) Whether the impugned demand notices dated 16.6.2012, 19.6.2012 and 21.6.2012 are barred by limitation?

ii) Whether the impugned demand notices dated 16.6.2012, 19.6.2012 and 21.6.2012 and recovery made thereunder is maintainable under the facts and circumstances of the case?

iii) Whether the deductions made by Delhi Mobile-Respondent No.4 is to nullify the effects of the grounds taken in Petition No.193 of 2012?

iv) Whether the impugned circulars dated 8.4.2009, 9.2.2010, 23.2.2010 and 8.4.2010 being internal circulars are not binding on the Petitioner?

v) Whether giving effect to the impugned circulars dated 8.4.2009, 9.2.2010, 23.2.2010 and 8.4.2010 and recoveries made thereunder amounts to unjust enrichment of the Respondents?

vi) Whether the Petitioner is entitled to recovery of Rs.92,13,635/- in Petition No.542 of 2012?

vii) Whether the parties hereto had entered into a terms of contract from 2005 onwards?

viii) What relief, if any, the Petitioner is entitled to?"

10. At the hearing stage, there was no serious dispute that if the main issues in T.P. No.193 of 2012 are decided in favour of or against TCL, the same would also decide the fate of the other petitions accordingly. Hence, the issues in T.P. No.193 of 2012 are of significance and need to be decided as issues material for all the petitions. The issue of limitation followed by Issues Nos.(ii), (iii) and (v) are most material issues on which parties have advanced detailed submissions which are being noticed hereinafter, also keeping in mind their written submissions submitted subsequently. Therefore, now to these relevant issues:

The relevant facts have been taken from T.P. No.193 of 2012 unless stated otherwise.

Issue No.(i) - Whether the impugned demand notices dated 16.6.2012, 19.6.2012 and 21.6.2012 are barred by limitation?

11. Since the issue of limitation has been raised at the behest of respondent MTNL, it is noted that learned counsel for the respondent has chosen to rely upon Article 104 of the Limitation Act which relates to "a periodical recurring right". The limitation of three years prescribed thereunder begins to run when the plaintiff is first refused the enjoyment of the right. The first submission of learned counsel for the respondent in respect of limitation is based upon an averment in Paragraph 57 of the petition that cause of action for TCL first arose in January 2008. On that basis, it has been claimed that since the petitions were filed in the year 2012, all claims are barred by limitation. This claim deserved

to be noticed only for rejection. Cause of action consists of several material facts which the plaintiff is required to establish in order to succeed. Such fact or facts cannot be equated with the first refusal of the enjoyment of the right claimed. An agreement creating a right may specify a period when the right becomes enforceable. An inaction on the part of the defendant or disregard of any agreed obligation may furnish a cause of action but in all cases such inaction cannot be equated with refusal of plaintiff's right. Limitation of three years under Article 104 of the Limitation Act explicitly begins to run only when the enjoyment of the right is first refused.

12. In alternative, learned counsel for the respondent took the stand that such refusal by the respondent was explicit in their letter dated 21.11.2008 and since that letter was received by TCL, for computing three years' period of limitation, 21.11.2008 should be the starting point. The letter dated 21.11.2008 is by way of reply to TCL's letter dated 21.08.2008 whereby a protest was raised against arbitrary deductions from bills raised as per rates quoted every month by TCL. In reply MTNL did not refuse either the right of TCL to the billed amount or the rates but only insisted that TCL should issue certificates of the nature it used to issue prior to July 2007. It was explained by MTNL that since TCL is not issuing explicit certificates to confirm that its rates are the lowest rates received by BSNL in response to their tender for outgoing ISD traffic, the rates were being approved only provisionally subject to confirmation from BSNL and,

therefore, only 90% payment was being released provisionally. A reading of the letter does not support the contention on behalf of MTNL that his letter amounts to refusal. It only shows that final decision was yet to be taken.

13. On behalf of respondent, on the issue of limitation, reliance was placed upon a judgment of Privy Counsel in the case of **Mt. Bolo Vs. Mt. Koklan – AIR 1930 PC 270** to highlight that there can be no right to sue till there is an accrual of right claimed in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant. That proposition is well established but does not help the respondent because the letter dated 21.11.2008 neither infringed the right of the petitioner nor posed a clear and unequivocal threat to receiving the billed amount on the basis of monthly rate quoted. A reliance was also placed upon judgment of Patna High Court in the case of **Janki Raman Prasad Mishra & Anr. Vs. Koshalyanandan Prasad Mishra & Ors. – AIR 1961 Patna 293**. Para 26 of the judgment which was relied upon is to the effect that when a right is asserted by the plaintiff but without any response and the demand is not met, it may be considered as a refusal for purposes of counting the period of limitation. This does not help the respondent. The letter dated 21.11.2008 contains a clear response and it does not amount to refusal of the demand. The stand in the letter was that only a provisional approval had been granted to the rate quoted by TCL and final decision remained to be taken.

14. On the issue of limitation, the stand of the petitioner TCL is that in the pleadings, bar of limitation was claimed in preliminary objection (B.II) only to the amount set out in the Chart I to paragraph 6 of the T.P. No.193 of 2012. Chart I relates to short payments made by MTNL during various periods between January 2008 to October 2008. According to learned counsel for TCL, it is clear from the letter/circular dated 08.04.2009 that petitioner was informed for the first time about approved ILDO rates. TCL relied upon a letter from MTNL dated 01.11.2008 (Marked "E") to submit that it was misled even about the reason of 10% deduction because in this letter it was indicated that the deduction was on account of verification of trunk routes not being available and not due to any issue over rates. Only on 21.11.2008, it was disclosed that rates were an issue on which a decision was yet to be taken. The first decision on rates came on 08.04.2009 and the cause of action finally accrued on that date because that was first refusal of the petitioner's entitlement to its dues. It has been shown on behalf of TCL that as and when such final decision on rates was taken by the impugned letters/circulars, for the concerned periods, the petitions were filed, well within the limitation period of three years.

15. On a careful consideration of rival submissions and relevant materials, we have no difficulty in rejecting the plea of limitation raised on behalf of MTNL. We find the petitions to be within the period permitted by law of limitation.

16. By consensus, Issues Nos.(ii) and (v) were treated to be interconnected and dealt with together. Issue No.(ii) is: **Whether the petitioner has made a case for setting aside the circulars/letters issued by the respondent herein dated 08.04.2009, 09.02.2010, 23.02.2010 and 08.04.2010?** Issue No.(v) is: **Whether the action on the part of the respondent in resorting to deduction of the aforementioned amounts is barred under the law of limitation as also under the contract?**

17. For deciding the aforesaid two issues, it is useful to keep in mind that the dispute primarily relates to the period July 2007 to October 2008. Prior to July 2007, TCL issued certificates every month to the effect that the rates offered were better than the rates offered even by third parties to BSNL. However, the tone and tenor of the certificates changed from July 2007. MTNL did make queries in respect of such change but on receipt of reply from TCL, it kept quiet and continued to make full payment till February 2008. After March 2008, the language and phrase used in the certificates in respect of rates offered every month by TCL underwent further change. Till March 2008, TCL used the expression that it "firmly believes" its offers to be amongst the lowest rates received by BSNL from other ILDOs. But for the period of April 2008 to October 2008, its certificates were only to the effect that the monthly offers were "highly competitive". Between March 2008 and October 2008, MTNL paid only 90% of the bill amount without disclosing during that period the reason for such short payment. It was much later that it disclosed its disagreement with the

rates offered by TCL and that such difference over rates was the real reason for 10% deductions. It is remarkable that even through a communication dated 01.11.2008 (Marked "E"), MTNL attributed the deductions to be on account of technical issues such as verification of trunk routes etc. The materials on record show that within the disputed period i.e. till October 2008, MTNL neither communicated the existence of any dispute over rates nor supplied reasons for such dispute. No doubt, changes in the wordings of certificates that accompanied the monthly rates offered by TCL were pointed out and TCL sought to explain the same, the offer was never rejected, rather it was acted upon and services were utilised with full payment till February 2008 and with 10% deduction every month till October 2008, the last of the disputed period.

18. In the aforesaid factual background, the submission on behalf of TCL is that respondent MTNL was not authorised by law or by contract to make short payments between March 2008 and October 2008 nor it was entitled to unilaterally ignore the contract by unilaterally reopening past transactions without consent of TCL and make adjustments of its alleged excess payment in the past from the current dues receivable by TCL. Such adjustments/ deductions made from earlier concluded contracts, when services had already been provided, accepted and payments made, is according to TCL, wholly impermissible under the contract governing the parties or under law.

19. In support of its stand, petitioner has highlighted clauses 1.2, 1.3, 1.7 and 7.2.1 of the contract to point out that the bills were to be raised and settled on a monthly basis. The entire cycle was monthly because the rates offered were for every month which were the basis for billing as well as payment on approval/acceptance of the offered rates by the respondent. According to learned counsel for the petitioner, since the contract provided fresh agreement for each month in respect of rates and monthly billing and payments, any dispute in respect of rates or the bills had to be raised within one month's period prescribed for payment. Further reliance was placed upon clause 7.3 of the agreement relating to the terms of payment and various sub-clauses such as clause 7.3.1(iii), (iv) to highlight that the terms were binding on both the parties on the basis of principle of reciprocity accepted by the Hon'ble Supreme Court in several such cases of contract and hence, the bills had to be paid in less than a month from the date of issue. All payments were to be made without any set-off or counter-claim. The rates of BSNL were easily discoverable and in any event claims against the bills could be made only within 12 months from the date of issue of the relevant bill. It was pointed out an impermissible method of dispute raising and its resolution was adopted by MTNL to reopen the concluded and accepted rates by issuing letters/circulars in April 2009 and on later dates in February and April 2010. This according to petitioner TCL, was impermissible on account of gross delay and through this kind of unilateral action, MTNL not only disregarded the concluded transactions as well as the contract but also

attempted to circumvent the law to make recoveries which were barred by law of limitation.

20. On behalf of petitioner TCL, it has been strongly contended that MTNL received the best offers available in the market and therefore, it accepted such offers of the petitioner to avail the services. To support this stand, it was pointed out that admittedly MTNL invited bids to ascertain the best rates in March 2006, but that did not suit them and hence, the invitation was cancelled and rates offered by the petitioner continued to receive approval. Even after some controversy since July 2007, MTNL invited bids in October 2007, only to cancel the same once again on 30.04.2008. In respect of a letter/circular dated 21.06.2008 issued by MTNL to publish post-verification rates for the period July 2007 to December 2007, it was pointed out that TCL raised objections against such rates and ultimately this letter which was like an internal communication, was cancelled. After re-verification, MTNL issued for the same very period, fresh rates through letter/circular dated 09.02.2010 which is one of the impugned decisions. Before that, the first impugned letter/circular dated 08.04.2009 was issued by MTNL to publish verified rates for the period January 2008 to August 2008. Through another impugned letter/circular dated 23.02.2010, MTNL published rates for the period September 2008 to May 2009. The last impugned letter/circular is dated 08.04.2010 whereby MTNL published rates for the period May 2005 to February 2007 and April 2007 to June 2007.

21. On behalf of petitioner TCL, plea of limitation has also been raised against the respondent on the ground that they could not have revised rates for periods which were more than three years old on the principle that they cannot be permitted to act in a way which is not in accordance with law and therefore, could not have overreached the contract to recover money which they could not have recovered by filing a suit. In support of this plea of limitation, reliance has been placed on a judgment and order of this Tribunal dated 16.11.2011 passed in **Petition No.423 of 2010 (M/s Tata Communications Ltd. Vs. Bharat Sanchar Nigam Ltd.).**

22. Paragraph 22 of that judgment and order shows that in that case BSNL had raised bills after a delay of more than five years and on the facts it was held that limitation was only of three years. In paragraph 38, it was pointed out that BSNL, under the contract could raise the bill either within a period of six months or file a suit for recovery of the charges as per law of limitation within a period of three years. Learned counsel for the petitioner has also relied upon the law of limitation as explained in the case of **Bharat Sanchar Nigam Ltd. Vs. Pawan Kumar Gupta – (2016) 1 SCC 363**. This case decided by the Supreme Court related to a suit filed by BSNL which was dismissed on account of limitation of three years. The Apex Court affirmed the view in the facts of that case. So far as judgment and order of this Tribunal in Petition No.423 of 2010 is concerned, that clearly provides strength to the case of the petitioner but only

against part of the impugned letter/circular dated 08.04.2010 insofar as it seeks to revise the rates applicable for the period May 2005 to February 2007 are concerned. The attempt to create a basis and make recovery after three years of the period May 2005 to February 2007 cannot meet the approval of this Tribunal for the simple reason that such an attempt amounts to taking advantage of its dominant position by MTNL in apparent violation of law of limitation which is, in the facts of the case, three years from the relevant period. Since the claims and recoveries by MTNL relate to period only till October 2008, for the above reasons the claims in T.P. No.64 of 2013 also cannot be accepted.

23. We would like to clarify that law of limitation only bars a plaintiff from filing a suit or a petitioner from filing a petition or application but nonetheless, when the legality, propriety and correctness of impugned decisions of MTNL is an issue, this Tribunal does not think it proper to ignore long delay of more than three years on the part of the MTNL and therefore, where the delay is apparent and clearly debars MTNL from filing a suit for making the required recovery, it would not be just and proper to permit MTNL to do so indirectly by resorting to set-off or adjustments which is contrary to the express provisions in the contract and cannot be supported by statutory provisions.

24. On behalf of respondent, an attempt was made to rely upon Section 60 of the Contract Act to show that it is empowered under law to make the impugned adjustments/deductions. It was also submitted that the dispute was not really

over billing but over rates and therefore, the actions of MTNL were not contrary to any provision in the agreement including clause 7.

25. In the context of issue under scrutiny, we find that learned counsel for the respondent cannot derive any advantage from Section 60 of the Contract Act which provides as follows:

> "**60. Application of payment where debt to be discharged is not indicated.** — Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits."

26. In the facts of the present case, Section 60 can have no application. The petitioner cannot be held to be a debtor of the respondent nor the petitioner has made any payment with express or implied understanding that the payment is to be applied for the discharge of some debt. For understanding the implication of Section 60, it has to be read with Section 59 which applies to a situation where the payment by the debtor is accompanied by a clear intention as to the debt to be discharged.

27. Another contention advanced on behalf of respondent is to the effect that by a letter/circular dated 21.06.2008, the respondent had published final rates for a particular period and although this letter/circular was superseded by another letter/circular for the same period, dated 09.02.2010, the petitioner by choosing

not to challenge the decision of 21.06.2008, must be deemed to have acquiesced and hence the right of the respondent to re-determine the rates stands admitted. According to learned counsel for the respondent, once the petitioner chose not to challenge the decision of 21.06.2008, it cannot be allowed to challenge the exercise of similar right through issuance of impugned letters/circulars on later dates.

28. The aforesaid contention is based upon a misunderstanding that the decision of 21.06.2008 does not get obliterated on account of its supersession by decision of 09.02.2010 only because the later decision does not say that the supersession is with retrospective effect. In our considered view, an executive or administrative decision which was not given effect to and was subsequently superseded by a fresh decision, loses all its significance and therefore, need not be challenged when already superseded. Therefore, the contentions do not carry any merit. Since the petitioner has challenged the subsequent decision of 09.02.2010 and also similar other letters/circulars, no case of acquiescence is made out. The facts do not attract the principle that a party cannot be permitted to approbate and re-approbate at the same time.

Issue No.(iii) is : Whether the Parties hereto entered into a novation of contract as appeared from 2005 onwards?

29. In their reply as well as in course of arguments, the respondent MTNL has advanced a defence that since July 2007 the petitioner acted against the terms of

the agreement. The relevant provision in this regard is contained in Schedule 1 of the agreement and reads as follows:

> "ii) In case ILDO offers lower rates for carriage and termination of ISD calls originated in India and terminated outside India to any other BSO/ CMSP, NLDO or ILDO, the same shall apply to MTNL retrospectively from the date of applicability of such lower rates to any other service provider mentioned above."

30. A plain reading of the aforesaid clause discloses that as an ILDO, the petitioner was obliged by the agreement that in case it offers lower rates to any other specified service providers, it had to offer the same or else such lower rates shall automatically apply to MTNL retrospectively from the date of their applicability to any other service provider. Since the case of the respondent is not that the petitioner offered lower rates during the relevant periods to any other service provider, rather case of MTNL is clearly that third parties had allegedly offered better rates to BSNL, the respondent MTNL has pleaded and argued that the aforesaid provision in the agreement got novated by conduct of the parties which can be inferred from the certificates issued by petitioner between May 2005 till July 2007 that its rates were not inferior to rates offered by any other entities to BSNL. According to MTNL, such stringent clause by way of novation was accepted by the petitioner for a good consideration that if such lower rates as per certificate are offered, then MTNL shall route all its outbound traffic through the petitioner. Such request by the petitioner through

its letters was highlighted to support the plea of novation of the contract by conduct. This issue has been formally framed as Issue No.(iii) already noticed above.

31. On the other hand, learned counsel for TCL has strongly contested and refuted the plea of novation by conduct. It has been submitted on behalf of petitioner TCL that obligation of the petitioner in respect of rates was strictly as per the relevant clause in Schedule 1 (already extracted earlier). It was under obligation to give the lowest of all rates it offered to other service providers and there is no complaint that the petitioner failed to comply with such contractual obligations. The stand of the TCL is that so long BSNL obtained rates from different service providers through open tender, the procedure was transparent and the petitioner could know the lowest rates and in practice offered the same for a long period although it was under no contractual obligation to issue such kind of certificates and make such offers. Such certificates were issued by way of feasible concession beyond the contractual obligation. Once, BSNL discontinued the practice of obtaining rates through tender and started finalising rates through negotiation, the petitioner could only assure that its rates were, as per its belief, the best rates or highly competitive. Even on such certificates, full payments were made till February 2008 because the rates were actually competitive which MTNL affirmed by inviting tenders that were later cancelled.

32. Petitioner has placed heavy reliance upon Interconnect Agreement dated 13.03.2008 to point out that had the parties intended any novation of the contract during 2005 to 2007, such novated provisions would have definitely found place in the Interconnect Agreement between the parties dated 13.03.2008. The fact that the same old clause was preferred and continued even in the agreements of 13.03.2008 and one of these was made effective from an earlier date, i.e., 01.05.2006, clearly negatives the defence of the respondent MTNL that the parties intended and brought about novation of relevant clause in Schedule 1 of the agreement by conduct.

33. Learned counsel for the respondent submitted that because of the conduct of parties being different from contractual provision in Schedule 1, as evident from certificates issued by the petitioner for a number of months, the contract required interpretation and the same should be done keeping in view "commercial common sense" in order to arrive at a fair result, as held by the Hon'ble Supreme Court in the case of **Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. – (2015) 9 SCC 172**.

34. On the issue of novation of contract, learned counsel for the petitioner has placed reliance upon judgment of the Apex Court in the case of **Bharat Sanchar Nigam Ltd. & Anr. Vs. BPL Mobile Cellular Ltd. & Ors. – (2008) 13 SCC 597**. Paragraphs 42, 43 and 44 show that after considering the relevant earlier case law, the court held that since the relationship between the parties

arises out of the contract, therefore, its terms and conditions had to be complied by both the parties. The terms and conditions of the contract can be altered and modified but it cannot be done unilaterally unless there is a provision for the same either in contract itself or any law.

35. There is yet another aspect of this controversy. The determination of rates on monthly basis may take place on the prevailing market conditions and level of competition. Offer of different rates for different months cannot be treated as an act at variance with the contract between the parties. Hence, the necessity of interpreting the contract cannot arise in absence of any variance by conduct. On this ground also the defence of novation of contract does not hold any water. Further the BSO Interconnect Agreement dated 13.03.2008 made retrospective from 01.05.2006 clearly negates the plea of novation because the relevant clause in Schedule 1 remains the same so as to once again govern the major part of period under dispute, leaving no scope for the plea of novation to succeed.

36. Having considered the rival submissions and the relevant facts relating to Issues Nos.(ii) and (v), we find that the impugned circulars/letter issued by the respondent are against express terms of the contract and also against law for the following reasons:

(i) They seek to vary the express provisions of the contract to the effect that there shall be monthly mutual agreement over rates and the billing and payment cycle shall be also on monthly

basis. Evidence has been led followed by cross-examination on the issue whether at the relevant time when the bills were paid fully or in part, there was approval of the rates or not. The stand of the respondent is that rates were approved only provisionally and evidence is to that effect. However, no documentary proof has been filed to support that only provisional approval was granted when the bills were fully paid. Even if it is presumed that there was provisional approval leading to only part payment of 90% of the bills between March 2008 to October 2008, no communication was made that rates were accepted or approved only provisionally. Such silence on the part of the respondent along with acceptance of the services followed with part or full payment, clearly supports the case of the petitioner that the transactions were complete and concluded. Only later MTNL attempted to reopen the issue of rate contrary to the requirement of settlement of rate on monthly basis and payment also on similar basis.

(ii) Admittedly, the rates were to be settled mutually for time bound monthly payment. The impugned letters/circulars are clearly a unilateral act of deciding the rates belatedly without having any element of mutuality. Such act of MTNL is bad

not only on account of delay but also it runs contrary to the provisions requiring finalisation of rate promptly by mutual settlement. In case of dispute, MTNL had to take recourse to legal proceedings and could not have attempted to force its views by unilateral action.

(iii) As indicated earlier, learned counsel for the respondent could not point out any provision in the agreement or in any law which empowers MTNL to make short payments on account of any dispute over rate nor Section 60 of the Contract Act is of any help to the respondent in claiming power through law to make deductions or adjustments without lawful settlement or judicial intervention.

37. Since the Issue No.(iii) on the implied novation of relevant clause in Schedule 1 is based upon such claim of MTNL which has not been proved, this issue is also decided against MTNL. Since rates revised/finalised through the impugned letters/circulars are on the strength of alleged novation which MTNL could not establish, the entire exercise must be declared bad in law, based upon misunderstanding of contractual rights and obligations.

38. For the aforesaid reasons, the impugned letters/circulars dated 08.04.2009, 09.02.2010, 23.02.2010 and 08.04.2010 are found to be against the contract as well as law and therefore, fit to be set aside. It is also held that the action on the

part of the respondent in resorting to deduction of various amounts is not contemplated or permitted by the contract and at least part of the deductions are based on rates determined after the period of limitation had expired in respect of the period May 2005 to February 2007. The aforesaid Issues Nos.(ii) and (v) are accordingly decided in favour of the petitioner and against the respondent. Further, in the light of discussions held earlier on the plea of novation of contract as raised by the respondent MTNL, it is held that there was no novation of contract. Issue No.(iii), therefore, also stands decided against the respondent.

39. On account of findings recorded in respect of material issues relating to merits of the case, the petitioner TCL is held entitled to the reliefs prayed for. Accordingly, the four impugned letters/circulars dated 08.04.2009, 09.02.2010, 23.02.2010 and 08.04.2010 are set aside along with a direction to the respondent to pay an amount of Rs.7,43,99,005/- as claimed in T.P. No.193 of 2012 along with interest @ 18% amounting to Rs.2,70,65,097/- which is the interest already calculated and claimed till the filing of the petition. However, the pendente lite interest is allowed only @ 8% per annum from April 2012 till realisation of the due amount. In T.P. No.542 of 2012, the further prayer to set aside three demand notices dated 16.06.2012, 19.06.2012 and 21.06.2012 is also allowed and the respondent is also directed to pay Rs.88,00,301/- along with interest amounting to Rs.4,13,334/- as claimed in the petition. The pendent lite interest

from filing of the petition till realisation of the due amount is, however, allowed only @ 8% per annum.

40. Both the petitions are allowed to the aforesaid extent. Let a decree be drawn accordingly.

41. Since the claim of the MTNL as petitioner in T.P. No.64 of 2012 is based upon its defence and case which has been considered but not accepted while deciding claim petitions (T.P. No.193 of 2012 and T.P. No.542 of 2012), for the same very reasons, T.P. No.64 of 2012 has to be dismissed. It is dismissed accordingly but without any order as to costs.

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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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