REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8107 OF 2010

Bharat Sanchar Nigam Limited ...Appellant (s)

Versus

Vodafone Essar Gujarat Limited ...Respondent (s)

With

Civil Appeal No. 8108 of 2010

Civil Appeal No.1105 of 2013

Civil Appeal No.8269 of 2010

J U D G M E N T

RANJAN GOGOI, J.

CIVIL APPEAL NO.8107 OF 2010

1. The challenge in this appeal is to a judgment dated 11.02.2010 passed by the Telecom Disputes Settlement and Appellate Tribunal, New Delhi (hereinafter referred to as the 'Tribunal') by which the demand raised by the appellant BSNL on the respondent, Vodafone Essar Gujarat Limited, for

alleged tampering with the Caller Line Identification (CLI) has been set aside by the learned Tribunal.

2. The facts in brief may be noticed at the outset.

In the year 1996 the competent authority granted a license to one M/s. Fascel Limited (predecessor-in-interest of the respondent Vodafone) under Section 4(1) of the Telegraph Act, 1885. As the successor-in-interest of Fascel Limited, the respondent entered into an Interconnect Agreement with BSNL for the purpose of interconnecting its network with the BSNL. Under the aforesaid Agreement, the respondent was liable to pay access charges to BSNL for calls originating from its network and terminating in the BSNL's network. Under the Agreement there was an obligation on the part of the respondent to transmit the authentic CLI for the purpose of levy of charges in terms of Agreement. CLI essentially is the information generated by the network which identifies and forwards the calling number.

It must be mentioned, at this stage, that it is during this period of time that the telecommunication sector was undergoing revolutionary changes and witnessing innovations to deal with which both the Department of Telecommunication

(DoT) and the regulatory body i.e. Telecom Regulatory Authority of India (TRAI) had issued a series of advisories and regulatory measures some of which are being indicated hereinafter.

3. To the issues arising in the present case would be relevant the circular dated 23.06.2003 issued by the DoT specifying that CLI cannot be tampered in any circumstances. By the same circular the DoT also gave directions to service providers on how to prevent tampering of CLI. The Telecom Regulatory Authority of India (TRAI) had issued a directive dated 24.11.2003 to BSNL not to tamper with CLI of any call; not to offer calls without CLI and also not to accept any calls without CLI. This was followed by a circular dated 20.01.2004 reiterating the above directions. In exercise of powers under Section 36 of the TRAI Act, 1997 the Regulatory Body also made a set of Regulations known as the Interconnect Usage Charge Regulations, 2003 (IUC Regulations). In terms of the IUC Regulations, the service providers were to raise bills on the basis of Call Detail Records (CDR). Under the CDR based platform in place of the earlier

prevailing system of metered calls in which call duration in number of minutes was multiplied by the pulse rate per minute applicable for the trunk group, under the new regime, reliance was on the CLI to identify the type of call and apply the appropriate rates/charges. The BSNL by circular dated 28.01.2004 implemented the aforesaid circular dated 23.06.2003 of the DOT alongwith IUC the Regulations of 2003. Clause 11 of the aforesaid circular which states that calls received without CLI by BSNL would be charged at the highest slab i.e. at the rate of ISD calls, being relevant to the issues arising, may be noticed below :

> "**The CLI based barring facility shall be activated at the Pols wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever it is technically not feasible to activate CLI based barring, periodic monitoring of the incoming trunk groups shall be done by BSNL to ensure this objective. The calls received without CLI by BSNL from various operators shall be charged at the highest slab i.e. as for ISD Calls. In case such calls are received by BSNL on a trunk group not meant for such calls then all the traffic received on such trunk group month/billing cycle shall be charged at the rates applicable for IUC of incoming ISD Calls."**

4. According to the appellant BSNL, monitoring of the incoming traffic from Vodafone's network from various exchanges at Vododara Trunk Automatic Exchange revealed that many incoming calls were actually international calls which were routed on the BSNL's network as national calls. According to the appellant this was done by Vodafone by tampering with the CLI and thereby violating the terms and conditions of the Interconnect Agreement. On the said facts relying on the circular dated 28.01.2004 particularly clause 11 thereof, the appellant raised a bill of Rs.3,54,94,916/- on Vodafone at the rate of Rs.5.65 per minute for the period between July, 2004 to September, 2004. Though the demand was reiterated from time to time, issues did not get forged until BSNL issued a disconnection notice dated 5.03.2009 prompting the respondent to move the Tribunal challenging the demand raised by the BSNL. The Tribunal, by the impugned judgment, came to the conclusion that the demand raised by the appellant was illegal and unjustified inasmuch as the Interconnect Agreement between the parties did not carry any stipulation that in the event any invalid or tempered

CLI is transferred to the BSNL network, BSNL would be entitled to raise the demand at the highest slab rate. The learned Tribunal also held that the IUC Regulations did not contain any such provision and the same could not have been so created on the basis of the unilateral circular dated 28.01.2004 (Clause 11). The Tribunal also held that the BSNL had failed to establish that the respondent Vodafone by tampering or misusing its network could receive an international call and transfer the same to the BSNL's network as a local call. Vodafone, it may be noticed, did not have an International Long Distance Operator (ILDO) Licence.

5. The arguments advanced on behalf of the appellant BSNL by the learned Solicitor General, in short, is that admittedly Vodafone had failed to comply with its obligation under the Interconnect Agreement and had routed international calls as national calls making it liable to pay damages for the loss suffered by BSNL. In this regard the learned Solicitor General has specifically relied on the averments made in Paragraph 1 of the Petition filed by the respondent Vodafone before the Tribunal to contend that the tempering of CLI on the basis of

which demand is raised has been admitted by the respondent Vodafone. Reliance was placed on the decision of this Court in ***Bharat Sanchar Nigam Limited*** Vs. ***Reliance Communication Ltd.***[1] wherein it was held by this Court that Clause 6.4.6 of the Interconnect Agreement in the said case, which is similar to clause 11 of the Circular dated 28.01.2004, was not penal in nature but a pre-estimate of reasonable compensation and further that it was the duty of the licensee to maintain the integrity of the exchange/Point of Interconnect (POI) which the respondent Vodafone failed to honour.

6. In reply, Shri Navin Chawla learned counsel appearing for the respondent submits that Vodafone was not an International Long Distance Operator (ILDO) and could not, in any way, deliver ISD Calls to BSNL's network. Learned counsel has denied that Para 1 of the petition filed before the Tribunal can be construed as an admission on the part of the Vodafone as the averments made therein are merely to the effect that if any international call has been transferred to the BSNL

[1] (2011) 1 SCC 394]

network the same is a handiwork of miscreants. Shri Chawla has drawn the attention of the court that no specific allegations had been made that Vodafone was involved in masking or altering CLI. Learned counsel has further submitted that BSNL has failed to show how any such calls could have been generated in the Vodafone's network for being transferred to the BSNL's network. The reliance placed in ***Bharat Sanchar Nigam Ltd. vs. Reliance Communication Ltd.*** (supra) by the learned Solicitor General is sought to be countered by Shri Chawla by contending that no clause similar to Clause 6.4.6 of the Interconnect Agreement in the said case exists in the Interconnect Agreement between the parties to the present case.

7. The short question that arises for consideration in the above premises is whether the appellant BSNL could levy the highest applicable IUC charges on the basis of Clause 11 of the circular dated 28.01.2004. One of the recitals to the Interconnect Agreement is to the effect that BSNL reserves the right to modify the terms and conditions of the agreement, if it receives a direction from the licensor or any other competent

authority to that effect. The circular dated 28.01.2004, clearly, was not pursuant to any direction from the licensor but was unilaterally issued stipulating that charges at the highest applicable rate would be levied for calls coming with invalid CLI. The circular dated 28.01.2004, being unilateral, does not become a part of the Interconnect Agreement inasmuch as the respondent Vodafone had consented to be bound by any additional/fresh terms and conditions only if the same is/are issued by the competent authority or pursuant to the directions of the competent authority. Admittedly, in the IUC Regulations there was no stipulation for levying charges in the manner it has been done. In so far as the decision of this Court in ***Bharat Sanchar Nigam Ltd. vs. Reliance Communication Ltd.*** (supra) is concerned, it will suffice to notice that Clause 6.4.6 of the agreement between the parties in that case was not existent in the agreement between the parties to the present case. That apart the licencee in the said case ***Reliance Communication Ltd.*** (supra) was holding an ILDO licence unlike the respondent Vodafone in the present case. On the other hand it appears that the Tribunal correctly

placed reliance on the decision of this Court in ***Bharat Sanchar Nigam Limited. Vs. BPL Mobile Cellular Ltd. & Ors.***[2] to hold that circular issued by the DoT does not *ipso facto* become a part of the Agreement.

8. Apart from the above it has already been noticed that before the circular dated 28.01.2004 came to be issued by BSNL, TRAI had issued an directive dated 24.11.2003 and a circular dated 20.01.2004 to all operators advising them not to tamper with CLI of any call and not to offer or accept any call without CLI. BSNL's action in receiving calls originating from the respondent's network without CLI and the further decision to charge such calls at the highest rate would, therefore, be clearly against the aforesaid directions of TRAI.

9. Lastly, the appellant BSNL could not also discharge its burden to show as to how respondent even by tampering with its network could wrongly receive and route international calls when it did not have an International Long Distance Operator Licence.

10. For the aforesaid reasons, we cannot find any fault with the conclusions recorded by the learned Tribunal in the

[2] (2008) 13 SCC 597

impugned order under challenge in the present case. The appeal, therefore, is liable to be dismissed which we hereby do without, however, any order as to costs.

CIVIL APPEAL NO.8108 OF 2010 AND
CIVIL APPEAL NO.1105 OF 2013

11. Both the above mentioned appeals having raised somewhat similar issues are being answered by the present common judgment.

12. The appellant – Bharat Sanchar Nigam Ltd. ('BSNL' for short) and the respondent – Bharti Airtel Ltd. entered into an Interconnect Agreement dated 15.02.2002 that governed two licenses under the Indian Telegraph Act that were obtained by the respondent for basic telecom service and mobile telephony respectively. In the year, 2004 a Unified License was obtained and the respondent – Bharti Airtel migrated to a Unified Access License (UAL). The core issue pertains to the validity of two separate demands raised in the two cases by the appellant – BSNL for alleged routing non CLI/invalid CLI calls to the BSNL network by the respondent – Bharti Airtel Ltd.

13. Before proceeding to deal with the facts and circumstances surrounding the demand raised, it will be necessary to note Clause 6.4.6 as contained in the Original Interconnect Agreement between the parties and, thereafter, as amended from time to time. While doing so, the details of certain other circulars/communications etc. would also require a specific notice. Clause 6.4.6 of the Interconnect Agreement as originally contained in the Agreement is in the following terms:

> **"BSNL will pay access charges for STD/ISD calls originating in the BSNL's network and delivered to the BSO's network, at the rate of Rs.0.84 per unit measured call at the point of interconnect to the BSO, only in such cases where the BSNL delivers the call in an exchange other than the BSO's tandem/terminal exchange. However, for STD/ISD calls delivered from BSNL's TAX to BSO's main exchange serving multiple SDCCs, the latter shall be treated as the terminal exchange and no access charges shall be payable by BSNL to BSO.**
>
> **It is acknowledged that BSNL shall not pay any charges for all types of calls including terminating ISD calls in the following cases."**

An addenda was added to the said clause of the Agreement on 21.07.2004, which is in the following terms:

> ***"Unauthorized calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC is higher than the IUC applicable for calls prescribed in that trunk group, then BSNL***

shall charge the UASL the highest IUC, as applicable for unauthorized calls, for all the calls recorded on these ports from the date of provisioning of that POI or for the preceding two months whichever is less. In addition, BSNL shall also have the right for taking other legal actions including disconnection of POIs or temporary suspension of the interconnection arrangements under misuse. In case BSNL wishes to disconnect the POI, it shall give a one week notice to UASL. If the unauthorized routing of calls to BSNL is not removed within one week, BSNL shall disconnect the POI."

Thereafter, with effect from 19.07.2005, Clause 6.4.6 was further amended in the following terms:

"a. Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC is higher than the IUC applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC, as applicable for such unauthorized calls, for all the calls recorded on this trunk group from the date of provision of that POI or for the preceding two months whichever is less.

b. The CLI based barring facility shall be activated at the POIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever, it is technically not feasible to activate CLI based barring, <u>periodic monitoring of the incoming trunk groups shall be done by BSNL without CLI or modified/tampered CLI from UASL shall be charged at the highest slab i.e. as for STD calls.</u> In case such calls are received by BSNL on any trunk group, then all the calls recorded on this trunk group shall be charged at the rates applicable for IUC of incoming ISD calls <u>from the date of</u>

provisioning of that POI or for the preceding two months, whichever is less.

c. When CDR based billing is introduced in BSNL's network some of the trunk groups shall be merged. In such cases also, in case unauthorized or incoming international calls, without CLI call, call with tampered CLI is handed over to BSNL at the merged trunk group, then BSNL shall charge the UASL the highest applicable IUC, as prescribed in clauses 6.4.6 (a) above for unauthorized calls & 6.4.6(b) for incoming international call, without CLI call, call for tampered CLI for all calls recorded on this merged trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.

d. In addition, BSNL shall also have the right for taking other legal actions including disconnection of POIs or temporary suspension of the interconnection arrangements under misuse."

14. In the discussions in connection with Civil Appeal No.8107 of 2010 (decided by the present order) it has been noticed that the Telecom Regulatory Authority of India (TRAI) vide letter dated 24.11.2003 had advised the appellant – BSNL not to tamper with the CLI of any call and not to offer or receive calls without CLI. The aforesaid letter was followed by a circular dated 20.01.2004 issued to the same effect by TRAI. In the said circular it was specifically mentioned that the appellant – BSNL's decision to accept calls without CLI and

charging therefor at the highest slab was against the TRAI's direction.

15. In the said discussions it has also been noticed that on 28.01.2004, the appellant –BSNL issued a circular for implementation of the Telecommunication Interconnection Usage Charge (IUC) Regulation, 2003 which, *inter alia,* contained Clause 11 dealing with charges leviable on calls received without CLI and also unauthorized calls. The aforesaid Clause 11 having already been extracted as a part of the discussions in Civil Appeal No. 8107 of 2010 will not require a repetition.

16. There is yet another circular dated 13.06.2005 issued by the BSNL which must now be taken note of. In the said circular, it has been stated that there may be many technical reasons for routing invalid/incomplete CLI calls such as, "transient faults in the switch, software version/signalling problem, non-recognition of CLI by exchanges, lack of capability to analyze all digits by some exchanges" etc. In the said circular, it was also mentioned that it has been decided that where non-CLI calls received at the POI were less than

0.5% of the total number of calls received, the access provider would be charged for double the number of such non-CLI calls, at the highest slab i.e. incoming ISD calls .

17. For the period May, 2003 to June, 2005 a demand of Rs.59,40,94,834/- was raised by BSNL for invalid and incomplete CLI calls handed over by Bharti Airtel to the BSNL network. The respondent-Bharti Airtel vide letter dated 21.04.2006 claimed that the irregularities as mentioned were on account of technical faults at the BSNL's end. The said plea was rejected by the BSNL upon due enquiry. Thereafter, the respondent produced a certificate dated 29.05.2006 issued by the supplier of its switch box i.e. Siemens offering technical explanations for non display of CLI in respect of calls with 10 digits to the BSNL network. This was not acceptable to BSNL who thereafter issued a disconnection notice leading to the proceedings before the Tribunal wherein by order dated 11.02.2010 the learned Tribunal had set aside the demand raised by the appellant-BSNL.

18. The basis on which the Tribunal seems to have answered the question is that while Clause 6.4.6 of the Interconnect

Agreement relating to non-CLI calls came into effect only in July 2005 (19.07.2005), the demands raised were prior to the date of coming into effect of the amended Clause 6.4.6. The learned Tribunal also concluded that the certificate issued by Siemens with respect to the technical glitches was not considered by BSNL in proper prospective and further that the respondent was not given an opportunity to perform a simulation exercise to establish the reasons for calls being handed over to the BSNL network without CLI.

19. Aggrieved by the aforesaid order, Civil Appeal No.8108 of 2010 has been filed by the appellant-BSNL.

20. We have considered the respective submissions of the parties. On behalf of the appellant-BSNL it is argued that though Clause 6.4.6 of the Interconnect Agreement had come into force with effect from 19.07.2005, clause 11 of the circular dated 28.01.2004 empowered the BSNL to raise the demands in question. It is urged that Clause 11 of the said circular became effective from 01.05.2003 i.e. date from which the IUC Regulations became applicable. The respondent-Bharti Airtel, according to the appellant, has also

not been able to establish its compliance with the stipulation and conditions incorporated in the DoT circular dated 24.06.2003. The plea of technical glitches alleged by the respondent-Bharti Airtel has been contended to be wholly unsustainable inasmuch as Siemens is the vendor of the service provider (Bharti Airtel) for which reason the certificate issued is unworthy of credit.

21. In reply, learned counsel appearing for the respondent-Bharti Airtel has drawn the attention of the Court to the finding recorded by the Tribunal that the irregularities in the 10 digits CLI calls handed over to the BSNL network was not because of any deliberate violation or wrongful conduct and that such deficiency was on account of technical glitches in the switch box/gear provided by Siemens. The said finding is final and conclusive. It is further urged that the circular dated 28.01.2004 being a unilateral exercise by BSNL cannot authorize the BSNL to raise the demand in question particularly when the IUC Regulations, 2003 did not contain a provision to the said effect empowering the BSNL to so act. Reference has also been made to the circular of the TRAI dated

20.1.2004 particularly in respect of the fact that BSNL's decision to accept calls without CLI and then to charge for such calls at the highest slab rate was against the direction of the TRAI.

22. Having considered the respective submissions of the parties, we find that the matter lies in a short compass. The allegation against the respondent operator is with respect to handing over calls with invalid CLI to the BSNL network. Clause 6.4.6 of the original Interconnect Agreement between the parties dealt with the computation of access charges. The July, 2004 amendment, prospective in nature, dealt with the liability in case of unauthorized calls i.e. calls other than specified for a particular trunk group. The subsequent Addenda dated 19.07.2005 dealt with calls without CLI and the charges applicable. The recital to the Addenda clearly states that it is prospective in operation. If that is so, we do not see how on the strength of Clause 6.4.6 which came into effect from 19.07.2005 the demand for the period upto June 2005 could have been raised by BSNL. The contention of BSNL that the said demand would be justified on the strength

of clause 11 of the circular dated 28.01.2004 also cannot have our acceptance in view of the fact that we have held the above issue against the BSNL in Civil Appeal No.8107 of 2010 (BSNL v. Vodafone Essar Gujarat Limited), decided today. Furthermore, the finding of the Tribunal that the demand raised by BSNL would not be justified in view of the certificate issued by Siemens, the manufacturer of the switchgear instituted in the Respondent's POI, a pure finding of fact, would provide an additional plank for our decision to dismiss the present appeal filed by the appellant-BSNL, which we hereby do.

CIVIL APPEAL NO.1105 OF 2013

23. Two bills raised by BSNL against the respondent-Bharti Airtel in respect of its cellular services form the subject matter of the present appeal. The first bill is for the period May, 2003 to January, 2004 and the second bill dated 03.06.2009 is for the period February, 2004 to November, 2004. The learned Tribunal vide its judgment dated 11.02.2010 partly allowed the demand for the period 21st July, 2004 to November, 2004

by holding that for the said period the appellant-BSNL would be entitled to charge the respondent for double the number of actual calls which did not have any CLI on the basis of the circular of BSNL dated 13.06.2005 whereas for the period May, 2003 to 21st July, 2004 its judgment dated 11.02.2010 in the case between same parties (subject matter of Civil Appeal No.8108 of 2010 would govern the issue).

24. Having heard the learned counsel for the parties and on due consideration, we find that the Tribunal failed to notice bill dated 23.07.2008 for the period May, 2003 to January, 2004 was solely with respect to calls with invalid CLI. The period of demand therefore is before the date of the addendum to Clause 6.4.6 i.e. 19.07.2005. This issue, therefore, will stand decided by the present order insofar as Civil Appeal No.8108 of 2010 is concerned. The second bill dated 30.06.2009 for the period February, 2004 to November, 2004 was a consolidated bill for non-CLI calls as well as trunk group violation. For the latter violation the demand as mentioned in the said bill is Rs.76.26 lakhs. This later

demand, in part, appears to be in order in light of the Addenda to Clause 6.4.6 dated 21.07.2004.

25. Accordingly, the appeal is allowed to the aforesaid extent, namely, by holding that the liability for trunk group violation for the period 21.07.2004 to November, 2004 can be legitimately levied on the respondent-Bharti Airtel in terms of Clause 6.4.6 added in the Interconnect Agreement by Addenda dated 21.07.2004. The appellant may work out the precise quantum of penalty on the aforesaid basis which will be paid by the respondent.

CIVIL APPEAL NO. 8269 of 2010

26. The respondent – Tata Teleservices Ltd. had challenged the demand notices dated 03.09.2006, 23.03.2007 and 09.04.2007 issued by the appellant - BSNL whereby it called upon the respondent to pay an amount of Rs.10,63,88,772/- in terms of Clause 6.4.6 of the Interconnect agreement which is in the same terms as introduced by the addenda dated 19.07.2005 in the case of Bharti Airtel (supra), details of which have been noticed herein above in the discussion pertaining to

the said appeal (Civil Appeal No.8108 of 2010). The demand notices were issued for the period from May 2003 to May 2004 and the irregularity/illegality alleged is transfer of non CLI/wrong CLI calls to the BSNL network.

27. The learned Tribunal by its impugned judgment dated 11.02.2010 had set aside the demand(s) on the ground that as Clause 6.4.6 was added to the Interconnect agreement between the parties to the present case by the addendum dated 01.12.2005 with effect from 14.11.2003, the same, therefore, can have no application to the period prior thereto. It was also held that a comparison of the CDRs of both parties showed that CLI was available on the CDR of Tata Teleservices Limited and not with the BSNL. Therefore, the fault lay in the system of B.S.N.L. for which the respondent cannot be penalized. The Tribunal further held that the Circular dated 13.06.2005, relied upon by BSNL to support the impugned demand, details of which have already been noticed in the case of Bharti Airtel (supra), itself provides for due application of mind necessitating an enquiry as to the reasons for the irregularities/shortcomings in the display of the CLI. No such

opportunity was afforded to the respondent by BSNL before resorting to the impugned demand(s).

28. Elaborate arguments had been advanced on behalf of both sides, the core of which, insofar as BSNL is concerned, is that Tata Teleservices Limited having taken the benefit of the Circular dated 13.06.2005, (made effective from 01.05.2003) for the latter part of the period involved, its liability would accrue from the said date and the demand has been worked out on the basis that 48.9% of the calls are non-CLI calls and therefore Clause 6.4.6 would apply. It is urged that the contention of the Tata Teleservices Limited that the calls are less than 0.5% is plainly incorrect.

29. In reply, it is urged that Clause 6.4.6 of the Interconnect agreement, in the form and content in which it has been applied to the case of the respondent, was introduced by the addendum dated 01.12.2005, effective from 14.11.2003. In the present case, the alleged violation of Clause 6.4.6 is on the ground of transmitting calls without CLI. It is urged that upto the date on which Clause 6.4.6 came into operation i.e. 14.11.2003, the demand raised on the said basis is without

any authority. It is further submitted that the receipt of calls without CLI having been disapproved/rejected by the TRAI and there being express directions requiring BSNL to reject such calls, the appellant cannot take advantage of its own action contrary to the directions of the Regulator i.e. TRAI. Furthermore, according to the respondent, the Circular dated 13.06.2005 prohibits BSNL to mechanically apply Clause 6.4.6 and it is only upon elimination of technical failures, incompatibility between exchanges, etc. that Clause 6.4.6 can be resorted to and that too for the period after 14.11.2003.

30. In a situation where it is the case of the appellant BSNL itself that non-CLI calls transmitted by the Tata Teleservices Limited to the BSNL network was more than 0.5% and hence Clause 6.4.6 of the Interconnect agreement would be applicable, *ex facie,* the demand raised for the period from May 2003 to November 2003 would be without any legal authority inasmuch as Clause 6.4.6 became a part of the Interconnect agreement between the parties with retrospective effect from 14.11.2003.

31. In view of the aforesaid finding recorded by the learned Tribunal with which this Court is in full agreement, it will not be necessary to go into any other issue so far as the demand for the said period is concerned. For the remaining period i.e. November, 2003 to May 2004 during which period Clause 6.4.6 was in force, the finding of the learned Tribunal that Tata Teleservices Limited should be given an opportunity and the quantum of loss suffered by B.S.N.L. should be computed accordingly would, however, require a close look. In ***Bharat Sanchar Nigam Ltd.*** *V*s. ***Reliance Communication Limited*** (supra), this Court has held that Clause 6.4.6 prescribes a pre-estimate of reasonable compensation. The premise on which the learned Tribunal had held the necessity of affording an opportunity to Tata Teleservices Limited for determination of the quantum of loss suffered by BSNL for the period from November 2003 to May 2004 proceeded on the basis that Clause 6.4.6 is a penal clause. As the said basis stands altered by the decision of this Court in ***Bharat Sanchar Nigam Ltd.*** vs. ***Reliance Communication Limited*** (supra), computation of liability for the period from November 2003 to May 2004,

during which period Clause 6.4.6 was in operation, must necessarily be made in accordance with the terms of the said clause. The order of the learned Tribunal, therefore, to the aforesaid extent, is set aside and the appeal is partly allowed. The demand raised for the period from May 2003 to November 2003, as held earlier, shall stand set aside while for the period from 14.11.2003 to May, 2004 shall be determined in accordance with Clause 6.4.6 of the Agreement as brought into effect with retrospective effect from 14.11.2003.

.....,J.
[RANJAN GOGOI]

.....,J.
[PRAFULLA C. PANT]

NEW DELHI;
SEPTEMBER 23, 2016.