**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**DATED 30TH AUGUST 2012**

**Petition No.430 of 2011**

Bharti Airtel Ltd. ... Petitioner

Vs.

Tata Teleservices Ltd. & Anr. ...Respondents

**BEFORE:**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON**
**HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioners : Mr. Maninder Singh, Sr. Advocate
Mr. Gopal Jain, Advocate
Mr.Kaushik Mishra, Advocate

For Respondents : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Mansoor Ali Shoket, Advocate
Mr. Nitin Kala, Advocate
Ms. Vibha Dhawan, Advocate

**J U D G E M E N T**

**Introduction**

The issues arising in this petition centre round interpretation of the proviso appended to Schedule IV of the Telecommunication Interconnection Usage Charges (10th Amendment) Regulations, 2009 as also some of the terms of agreements entered into by and between the parties hereto.

**Background Facts**

2. Certain facts are admitted.

Indisputably, the parties had entered into agreements providing for transmission of SMS on diverse dates.

Some of the agreements provided for payment of SMS charges at the rates of 30-40 paise per SMS, as would appear from those dated 16.4.2003, 21.10.2003, 10.11.2005 and 04.9.2008, the last being in respect of the service areas of Assam, Jammu & Kashmir and North-East providing for SMS charges originating from either party and terminating in their respective networks at the rate of 30 paise per SMS.

On the same date, however, another agreement was entered into by and between the parties hereto, the relevant clauses whereof read as under :-

> *"(a) The Parties have executed the Interconnection Agreements listed in Schedule-1 in their capacities as Access Service Providers in their various licenses service areas.*
>
> *(b) The aforesaid interconnection Agreements provide for payment of SMS Termination Charges @ Rs.0.30/Rs.0.40 per SMS for all SMS originated from either Party's Network and terminated on the other Party's Network.*
>
> *(c) TATA has desired to suspend billing of SMS Termination Charges w.e.f. April 1, 2008 and shift to 'bill and keep' mode in all the licensed service areas covered in the Agreements listed in Schedule-1 and AIRTEL has agreed to suspend the billing of SMS Termination Charges*

*till March 31, 2009 and operate on 'bill and keep' mode in the interim subject to certain conditions.*

*(d) The Parties have therefore agreed to record in writing the terms and conditions on which the billing of SMS Termination Charges will be suspended and operated on 'bill and keep' mode till March 31, 2009."*

*NOW THEREFORE, in consideration of the foregoing and intending to be legally bound by this Agreement, the Parties hereby agree as follows:*

> *"1. The Parties agreed to keep billing of SMS Termination Charges in suspension w.e.f. April 01,2008 till March 31, 2009 and operate on 'bill and keep' mode unless any one of the following conditions are fulfilled, in which case billing & payments of SMS Termination Charges shall be resumed at an earlier date at the rate of Rs.0.15 per SMS:*
>
> *a. The Telecom Regulatory Authority of India ("TRAI") issues a determination with regard to payment of SMS Termination Charges at rates to be determined by the TRAI;*
>
> *b. Two or more pan-India operators (i.e. access providers offering services in 20 or more service areas in India) apart from AIRTEL and TATA agree to commence billing of SMS Termination Charges;"*

*"2. The Parties agree that the billing and payment of SMS Termination Charges shall be resumed w.e.f. April 01, 2009 or earlier upon the occurrence of one or more of the events listed in para 1 above."*

*3. The Parties agree that SMS Termination Charges @ Rs. 0.15 per SMS shall be payable by each party to the other w.e.f. April 01, 2009 unless both the parties mutually agree to extend the suspension for a further period of 6 months on the same terms and conditions as mentioned herein, whereafter the parties will once again review the resumption of SMS Termination Charges.*

*4. The Parties further agree to resume billing & settlement of the SMS Termination Charges @ Rs. 0.15 per SMS within 30 days of the occurrence of an even listed in Clause (1).*

*5. The Parties agree that the resumption of billing & settlement of SMS termination charges shall not require execution of any fresh agreement or any other formalities and shall be implemented within 30 days, as stipulated in clause 3, without demur or delay."*

**(Emphasis supplied)**

3. Thus, upon expiry of the said agreement the parties became entitled to the SMS termination charges at the rate of 0.15 paise per SMS in terms thereof.

However, in the meanwhile the Telecom Regulatory Authority of India (hereinafter called and referred to for the sake of brevity as 'TRAI'), made the aforementioned 2009 Regulations, the relevant clause whereof reads as under:-

*"Inter Connect Usage Charge (IUC) for Short Message Service – Inter Connect Usage Charge (IUC) for Short Message Service (SMS) shall be under forbearance:*
*Provided that such charges shall be transparent, reciprocal and non-discriminatory"*

4. It is furthermore not in dispute that the TRAI issued an Explanatory Memorandum to the said 2009 Regulations, stating :-

*"5.2.6 Concern was raised by some of the service providers on the IUC charges on SMS. It was noted that the issue has been handled in the earlier regulations in the following ways. In the 29th October 2003 IUC regulation IUC for SMS was kept under forbearance and the Authority had stated that it may revisit this matter in the near future based on the exercise of collection of additional data. A consultation paper was consequently issued on 13.6.2006. Based on the consultations, decision of the Authority was issued on 21st August 2006. To quote from the analysis attached to the decision of the Authority*

*"…at present the market for SMS is contested almost exclusively by the mobile operators, which either operate bill and keep regime without any interconnection charges or they have reciprocal charging regime and relatively balanced traffic flow…". In view of the findings the Authority decided to continue with forbearance in the matter."*

*"5.2.7 The cost involved with the handling of SMS in any of the service providers network is insignificant as compared to the cost for handling voice. In addition there are*

*complexities involved in accounting for IUC for SMS. SMS is sent by the SS7 signalling channel and in order to bill and verify SMS termination internally, the mediation system needs to be able to generate SS7 CDRs for billing system to count and rate the number of SMS messages. The terminating operators, in many cases, may have to rely on the originating operator to supply them with records of the SMS count of messages landing on their network. The billing system also needs to be scalable enough to process a large (and increasing) number of SMS arriving on the network. The prevailing trend in the industry is that IUC is not being realized by the service providers from each other.*

*5.2.8 The uptake of SMS by GSM customers has been a major success story for the mobile industry. Also in view of the fact that by and large the arrangement prevalent today are 'bill and keep' and mutually agreed reciprocal arrangements, the Authority believes that the service providers would continue with these arrangements in a fair, transparent and non discriminatory manner. The Authority has therefore decided to continue with the policy of forbearance in the matter of IUC on SMS, however, to keep watch on the market, reporting requirement is being incorporated."*

In its Consultation Paper on Review of Interconnection Usage Charge on 31st December 2008, the TRAI inter-alia stated thus :-

***"4.10.4 "Bill and Keep" or "Sender Keeps All"***

*This approach entails levying no charges on interconnecting carriers at all. Each carrier "bills" its own customers for outgoing traffic that it "sends" to the other network, and*

*"keeps" all the revenue that results. The Bill-and-keep model assumes that if there were interconnection payments, they would roughly cancel each other out, resulting in no real net gain or loss for either carrier. Further, by forgoing payments, carriers avoid the administrative burden of billing one another for exchanged traffic. This model plainly works best if the traffic flows from one network to another are roughly in balance. Otherwise, one carrier will be under-compensated for the costs of traffic that it receives from the other. To ensure that there is such a balance requires measuring and recording traffic and costs on an ongoing basis. Bill-and-keep systems are typically used when competitive local carriers interconnect with one another or with an incumbent local carrier. Moreover, the peering arrangements that traditionally have been used to interconnect Internet backbone networks of comparable size may be viewed as a form of bill-and-keep arrangement."*

***(Underlining is ours)***

**The relevant Regulations – Does it need interpretation?**

5. Interpretation of the aforementioned Regulations, as mentioned heretobefore, is in question.

Before, however, resorting to the process of interpretation of the aforementioned Regulations, which is a law within the meaning of Article 13 of the Constitution of India, we may notice that the Regulator not only took into consideration the fact that some of the parties had resorted to the 'bill and keep' regime that is without charging any Interconnection charges, but did not fail also to notice

the reciprocal charging regime as also the factor of relative balanced flow of SMSs.

Clause 5.2.8 furthermore contains a belief on the part of the Regulator that the providers would continue with those arrangements in a fair and non-discriminatory manner.

It, however, took a decision not only to continue with the policy of forbearance, but also to keep watch on the market, reporting requirements, etc.

The TRAI, therefore, did not prescribe that Bill and Keep regime would prevail and no bilateral agreement could be entered into. It recognized both the systems. It did not say that the Industry Practice is 'bill and keep'.

6. With a view to consider this aspect further, we may notice certain communications, which were exchanged between the parties hereto and their conduct as to how they understood the same.

It is in the aforementioned context, we may also notice the conduct of the parties as also the 'surrounding circumstances' attending thereto to resolve the controversy as regards proper and correct interpretation thereof.

**The Correspondences**

7. The Petitioner, relying on or on the basis of the said agreement dated 21.9.2009 by an e-mail dated 08.6.2009 informed the

Respondent that the charging provisions contained therein having come into force on the expiry of 31.3.2009, it would start billing the Respondent at the rate of 15 paise per SMS w.e.f. 16.4.2009, the arrangement between the parties being reciprocal in nature.

The Respondent raised bills for the months of May 2011 to August 2011 for two circles namely, Jammu & Kashmir and Kolkata. It received the payments therefor.

The said payments, however, were returned to the Petitioner purported to be on realization of a mistake on the part of the Respondent only on 13th November, 2009.

8. Keeping in view the aforementioned 2009 Regulations, the Petitioner by a letter dated 15.10.2009 (Annexure 'F') proposed a downward SMS charges at the rate of 10 paise per SMS from 15 paise per SMS w.e.f 01.10.2009.

It, however, started issuing invoices only from 25.10.2010.

9. The Respondent, however, objected thereto in terms of its letter dated 18.10.2009 purported to be relying on or on the basis of the provisions of the aforementioned Regulations.

The matter was referred to the TRAI on or about 23.11.2009.

10. The Respondent, however, by a letter dated 15.02.2010 requested the Petitioner to resort to 'Bill and Keep' regime. The parties met. In the minutes of said meeting, it was stated that all amounts paid in the past would be settled against any future dues payable to Airtel. It is however not clear as to from which account such adjustments were to be carried out.

11. As indicated heretobefore, invoices were raised by the Petitioner on or about 04.3.2010 for the period 01.12.2009 to 31.12.2009. Similar invoices were raised on diverse dates after 12.5.2011. Parties continued to exchange communications.

For the first time, by a letter dated 01.10.2010, the Respondent contended that the agreement had been signed under duress.

Bill at the rate of 10 paise per SMS was raised by the Petitioner on 25.10.2010 and as also subsequently.

12. On 22.02.2011, the TRAI issued a direction against the Petitioner, *inter-alia,* stating :-

> *"6. From the interconnection agreements filed with Authority by various service providers, it is seen that IUC for SMS has not been incorporated in all interconnect agreements of M/s Bharti Airtel Ltd., entered into with other service providers and thus, M/s Bharti Airtel Ltd.,*

*has contravened the non-discriminatory provisions of the principal regulations.*

*7. In view of the above, the Authority, in exercise of the powers conferred by Section 13, read with sub-clauses (ii), (iii) and (iv) and clause (b) of sub-section (1) of section 11 of the TRAI Act, 1997 and with a view to ensure compliance of the provisions of 'Schedule IV' of the Telecommunication Interconnection Usage Charges Regulation, 2003 dated 29th October, 2003, hereby directs M/s Bharti Airtel Ltd., to stop applying discriminatory termination charges on SMS."*

13. A general order communicating the said direction was also issued.

The Petitioner herein by a letter dated 15.3.2011 made a representation to the TRAI, contending that it had complied with its direction and, thus, submitted that the said direction should be withdrawn.

14. Whereas according to the Petitioner, the TRAI, having not responded thereto must be held to have accepted the same; the submission of the Respondent is that unless any order was passed on the said representation, the direction upon the Petitioner shall continue to govern the field.

Nothing much, in our opinion, turns on it as in this matter, we are principally concerned with the interpretation of the agreement between the parties. But, there cannot be any doubt whatsoever that the TRAI should have replied to the said representation one way or the other.

## Issues

15. It is, however, admitted that the Respondent paid a sum of Rs.6.00 crores to the Petitioner, as agreed by it without any demur, whatsoever.

On the aforementioned premise, can the Respondent take shelter under the aforementioned Regulations assuming the same to be interpreted in its favour?

This aspect of the matter would be considered a little later.

16. The further question is as to whether the Respondent, in the event it is held that the contract between the parties subsisted, could refuse to make payments relying on or on the basis of 2009 Regulations?

**Construction of the prevailing Regulations**

17. It is on the aforementioned premise, the said Regulations require interpretation of this Tribunal.

18. What would be the effect of the proviso?

The Supreme Court of India in Sundaram Pillai Vs. Pattabhiraman (1985) 1 SCC 591, laid down the ratio in the following terms :-

> *"36. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.*
>
> *37. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself."*

It was opined :-

> *"43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:*
>
> *(1) qualifying or excepting certain provisions from the main enactment:*
>
> *(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:*
>
> *(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus*

*acquire the tenor and colour of the substantive enactment itself; and*

*(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.*

*44. These seem to be by and large the main purport and parameters of a proviso."*

In the opinion of this Tribunal, paragraphs (1) and (3) of the aforementioned principle are applicable in the instant case.

In Commissioner of Income Tax Vs. Indo-Mercantile Bank Ltd. reported in 1995 Supp (2) SCR 256 : AIR 1995 SC 713, the law is stated thus :-

*"The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. "It is a fundamental rule of the construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso." Therefore it is to be construed harmoniously with the main enactment.*

*"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field*

*which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."*

***(See also Dish TV V. ESPN, P. No.382 (c) of 2011 decided on 10.04.2012, and ESPN Vs. Fastway, P. No. 25 (c) of 2011 decided on 03.06.2011.)***

We are not oblivious that recently in the context of construction of a proviso appended to Section 376 of Indian Penal Code providing for requirement to assign adequate and special reasons for awarding a sentence lesser than the prescribed minimum one, the Supreme Court in State of Rajasthan Vs. Vinod Kumar reported in 2012 (6) S.C.C. 770, opined as under :-

*"22. The natural presumption in law is that but for the proviso, the enacting part of the section would have included the subject-matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided. Proviso is used to remove special cases from the general enactment and provide for them separately. Proviso may change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable. "*

19. It is now a well settled principle of law that the court cannot rewrite a contract. It is also trite that neither the contract can be made nor unmade by a court of law, which is the exclusive prerogative of the parties thereto. Freedom of contract having an universal application, must be interpreted on its own terms.

A commercial contract must be given a commercial meaning.

20. In Shin Satellite Public Co. Ltd. vs. Jain Studios Limited (2006) 2 SCC 628, law is stated thus :-

> *"It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one."*

21. In The Correspondent, Malankara Syrian Catholic School vs. J. Rabinson Jacob and Ors. (1998) 3 MLJ 595 the Madras High Court stated the law thus :-

> *"Courts cannot rewrite the contract. Neither the terms can be read into the contract merely because it is reasonable to do so nor put meanings different on the words what they plainly and explicitly expressed."*

Yet again in Orix Auto Finance (India) Ltd. Vs. Jagmander Singh reported in (2006) 2 SCC 598 at page 603, the law is laid down in the following terms :-

> *"It would not be, therefore, proper for the High Courts to lay down any guideline which would in essence amount to variation of the agreed terms of the agreement...."*
>
> **[See also National Highways Authority of India Vs. Bumihiway DDB Ltd. (JV), reported in (2006) 10 SCC 763 at page 779]**

In Ponsford and Others Vs. HMS Aerosols (1979) AC 63, it was stated:-

> *"My lords, clear words may sometimes force the courts into solutions which are unjust and in such cases the court cannot rewrite the contract."*

22. We may notice that the Supreme Court in India in Indian Steel & Wire Products Ltd. vs. State of Madras (1968) 1 SCR 479 opined that:-

> *"Only because law imposes some restriction on freedom of contract, it would be incorrect to contend that there is no contract at all."*

It was also stated:-

> *"So long as mutual accent is not completely excluded in any dealing, in law it's a contract."*

23. If that be so, then subject to the construction of the Regulations, the Respondent was contractually liable to pay the SMS charges at the rate of 15 paise per SMS.

24. The matter might have been different if the contract itself was illegal, keeping in view the proviso appended to Schedule IV of the 2009 Regulations.

It is obviously not. On a plain reading of the provisions of Schedule IV, there cannot be any doubt or dispute that the SMS termination charges being under forbearance, it is legally permissible for the parties to enter into contract with regard thereto and the converse is not true.

25. The issue as regards invalidity/illegality of the contract, if any, in terms of Order VI Rule 4 of the Code of Civil Procedure must be pleaded. Except contending that the Petitioner was bound to resort to the 'bill and keep' regime, no other contention has been raised by the Respondent.

The Proviso appended to the said Regulations cannot curtail the contractual rights of the parties unless the same attracts the mischief thereof. It has to be interpreted having regard to the term 'Forbearance' used therein.

We would consider the said aspect of the matter a little later.

The proviso in this case is not an independent provision. It cannot be read in isolation. It cannot be given any meaning of its own. With a view to give effect thereto, the same must be read with the main provision and thus, required to be construed having regard to the purport and object of the Regulations.

26. 'Forbearance' having been prescribed, the Petitioner contended:-

> *"As far as the TRAI's forbearance from laying down a common termination charge for SMS is concerned, the same has no effect on agreements between the parties.*
>
> *Forbearance is equivalent to refraining. It means that the person do not wish to proceed with a perceivable action that would alter the state of things. By its forbearance policy, TRAI has merely expressed its intention of not interfering in the arrangements between the parties.*
>
> *Tata has, in paragraph (c) of its reply (@ Page 828 Volume VI of 430/2011), resorted indirectly to give a bizarre meaning to the term "forbearance". It claimed that TRAI has exercised forbearance "on the assumption that the practice of Bill & Keep will continue" which is an interpretation that destroys the very meaning of the term forbearance. If what*

*TRAI had intended was to impose the practice of "Bill & Keep" commonly on everyone, then the term forbearance shall never be used by it. It not logically possible for someone to forbear and at the same time intervene and impose something."*

*"Indisputably, both the agreement dated 29th August, 2008 and 4th September, 2008 contains a Clause, namely Clause 5 which says that the resumption of billing and settlement of SMS termination charges shall not require the execution of any fresh agreement or any other formalities. Therefore, it is clear that no amendment/alteration in the agreement is required for both the operators to resume billing.*

*TATA could have easily opted out of the agreement by the end of the suspension period, i.e by April, 2009. If it had some disagreements regarding the terms of the agreement as regards the post suspension period billing, it could have informed its disagreement regarding the same to Airtel, attempt a negotiation and if they failed, opted out of the contract. Instead it resumed billing by raising invoices.*

*Either way, it cannot in any way interpret the contract to mean that 'Bill and Keep' was to resume after the 31st March, 2009."*

In Telecom Users Group of India v. Telecom Regulatory Authority of India (2011) TDSAT 486, it was held thus :-

*"22. Perusal of the said provision would clearly go to show that a discretionary power has been conferred upon the TRAI thereby. Forbearance simplicitor or forbearance with*

*conditions are part of regulation making process. In a given case, the regulator may prescribe a tariff or may not find it necessary to do so.*

*23. The term 'Forbearance' has been defined in Clause 2(g) of the Tariff Order to state that the TRAI has not, for the time being, notified any tariff for a particular telecommunications service and the service provider is, thus, free to fix any tariff and/or such service.*

**(Underlining is ours)**

*Clause 4 provided for 'forbearance'. It reads thus :- "Where the Authority has, for the time being, forborne from fixing tariff for any telecommunication service or part thereof, a service provider shall be at liberty to fix any tariff for such telecommunication services."*

In Mahanagar Telephone Nigam Ltd. v. Telecom Regulatory Authority of Delhi, AIR 2000 Del 208, the Hon'ble Delhi High Court opined :-

*"47. It must be mentioned that the word "Forbearance" as per definition given in Section 2(vii) means that the Authority has for the time being not notified any interconnection charges or revenue sharing arrangement and that the service provider is free to fix any charge for such service.*

*48. That, it is clear that the Authority itself understood that its own function under Section 11(1)(d) was only to intervene in the event of the service providers not being able to arrive at an arrangement. It is clear that an*

*arrangement does not necessarily imply an agreement. However, these are matters in which the service provider must be first given an opportunity to arrive at an arrangement amongst themselves. The question of regulation would only arise if the service providers are not able to arrive at an arrangement. The Authority may lay down guidelines regarding those arrangements, provided the guidelines are not contrary to the terms of a license or a policy -- decision taken by the Government."*

**(Italisation is ours for emphasis)**

27. It, therefore, recognizes the freedom of contract.

The contract however, must satisfy the requirements of the conditions, if any, laid down under a statute. If the contract is valid and can otherwise be given effect to, in a regime where 'Forbearance' is prescribed, the party autonomy cannot be taken away.

Moreover, recently in Grasim Industries Ltd. Vs. Agarwal Steel reported in 2010 (1) S.C.C. 83, it was opined :-

*"6. In our opinion, when a person signs a document, there is a presumption, unless there is proof or fraud, that he has read the document properly and understood it and only then he has affixed his signatures thereon, otherwise no signature on a document can ever be accepted. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it. Hence the presumption would be even stronger in their case. There is*

*no allegation of force or fraud in this case. Hence it is difficult to accept the contention of the respondent while admitting that the document, Ext. D-8 bears his signatures that it was signed under some mistake. We cannot agree with the view of the High Court on this question. On this ground alone, we allow this appeal, set aside the impugned judgment of the High Court and remand the matter to the High Court for expeditious disposal in accordance with law."*

For a detailed discussion on the interpretation of a contract, we may refer to Clear Media (India) Ltd. Vs. Prasar Bharati and Another – Petition No. 174 (C) of 2010.

In United India Insurance Co. Ltd. Vs. M. K. J. Corporation Ltd. reported in 1996 (6) S.C.C. 428, it was opined :-

*"After the completion of the contract, no material alteration can be made in its terms except by mutual consent..."*

In that view of the matter the contention raised by the Respondent that the agreement must be held to be not binding on it, although it has expired, must be rejected.

In Food Corporation of India Vs. Chandu Construction reported in 2007 (4) S.C.C. 697 at page 702, it was stated :-

*"12. In this context, a reference can usefully be made to the observations of this Court in Alopi Parshad & Sons Ltd. v. Union of India wherein it was observed that the Contract*

*Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in Naithati Jute Mills Ltd. v. Khyaliram Jagannath this Court had observed that where there is an express term, the court cannot find on construction of the contract, an implied term inconsistent with such express term."*

**Estoppel Issue**

28. The Respondent in this case, as indicated heretobefore, has given a go-bye to the 'Bill and Keep' method by voluntarily entering into the aforementioned agreement dated 04.9.2009. The Respondent never questioned the legality/validity of the said agreement. It had paid a sum of Rs.6.00 crores as on 31.3.2008. It itself raised invoices on the Petitioner, which were honoured.

The invoices were raised on 31.8.2009 but allegedly when the purported mistake was realized, and the amount was refunded, in respect whereof by a letter dated 13.11.2009 it was contended :-

*"As per the instructions received from our corporate office, the following original invoices towards SMS Charges are returned herewith for your kind information :-*

| *Sl. No.* | *Invoice No.* | *Date* | *Month* | *Amount* |
|---|---|---|---|---|
| *1.* | *BAL/AP/SMS/ 03/Jun-09* | *14.09.2009* | *June-09* | *8,019,063* |
| *2.* | *BAL/AP/SMS/ 04/Jun-09* | *14.09.2009* | *July-09* | *10,322,561* |
| *3.* | *BAL/AP/SMS/ 05/Jun-09* | *14.09.2009* | *August-09* | *13,052,536* |

It has, thus, understood the context of the 'proviso' in the same way the Petitioner did. It cannot, thus, take a different stand.

29. The Respondent in view of its conduct, to our mind, is estopped and precluded from raising the aforementioned question.

In R. N. Gosain Vs. Yashpal Dhir (1992) 4 SCC 683, it was stated as under :-

*10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that :*

*"a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it*

*is valid, and then turn round and say it is void for the purpose of securing some other advantage".*

*(See Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co.Ltd. {(1921) 2 KB 608 : 1921 All ER Rep 215 (CA)} at p. 612, Scrutton L.J.).*

*In Halsbury's Laws of England, 4th Edn., Vol. 16 it was stated : -*

*"1508. Examples of the common law principle of election – after taking on advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside.'"*

In Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International) Company Limited, (2011) 10 SCC 420 at page 432, the Apex Court opined:-

*34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience."*

In Shyam Telelink Limited Vs. Union of India (2010) 10 SCC 165 at page 172, the Apex Court stated the law thus :-

*"21. The unconditional acceptance of the terms of the package and the benefit which the appellant derived under the same will estop the appellant from challenging the recovery of the dues under the package or the process of its determination. No dispute has been raised by the appellant and rightly so in regard to the payment of outstanding licence fee or the interest due thereon. The controversy is limited to the computation of liquidated damages of Rs.8 crores out of which Rs.7.3 crores was paid by the appellant in the beginning without any objection followed by a payment of Rs.70 lakhs made on 29th May, 2001.*

*22. Although the appellant had sought waiver of the liquidated damages yet upon rejection of that request it had made the payment of the amount demanded which signified a clear acceptance on its part of the obligation to pay. If the appellant proposed to continue with its challenge to demand, nothing prevented it from taking recourse to appropriate proceedings and taking the adjudication process to its logical conclusion before exercising its option. Far from doing so, the appellant gave up the plea of waiver and deposited the amount which clearly indicates acceptance on its part of its liability to pay especially when it was only upon such payment that it could be permitted to avail of the Migration Package. Allowing the appellant at this stage to question the demand raised under the Migration Package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate.*

*23. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English*

*Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.*

30. The terms of the agreement dated 29.9.2008 clearly demonstrate that although the Respondent had been making payments of the SMS charges as provided for in diverse agreements; only an exception for the period mentioned therein, that is, till March, 2009, was created thereby.

**Effect of 2009 Amendment**

31. Indisputably, the TRAI had prescribed forbearance throughout. In that view of the matter, there cannot be doubt or dispute that the parties could enter into any bilateral contract.

Once forbearance has been defined, even the TRAI could not lay down any norm which would be in deviation thereof.

In this case, the contracts have been entered into by and between the parties hereto much prior to the said 2009 Amendment came into being.

32. In Appeal No.1 of 2012 Aditya Thackeray Vs. TRAI decided on 17th July, 2012 this Tribunal has held that the purported Regulations, keeping in view a decision of the Delhi High Court in Telecom Regulatory Authority of India Vs. Telecom Disputes Settlement & Appellate Tribunal, being WP (C) No. 2838 of 2005 decided on 23rd December, 2005 and other decisions of this Tribunal, are mere directions and not subordinate legislation.

33. In that view of the matter, the purported directions contained in the amended Regulations of 2009 cannot be given any retrospective effect. It cannot, thus, affect the contractual rights of the parties.

If directions are prospective in nature, the same in absence of any clear provisions contained in any statute to over-ride it, the terms of the contract will occupy the field.

Even in regard to a subordinate legislation that affects substantive rights cannot have a retrospective effect.

It has been so held in Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others reported in (1999) 8 SCC 16 in the following terms :-

> *"21. Mr. Sanyal, learned Counsel appearing for the appellant has urged that in view of rule of interpretation as settled by this Court in catena of decisions the only view that could be taken is that the amending Act would apply prospectively. The learned Counsel has further urged that if it is held to be retrospective, the vested right of the appellant would be taken away which is not permissible under law.*

*22. In view of the facts and circumstances of the case and in the alternative Mr. Agrawal, the learned Counsel for the respondent has urged that the amending Act being substituted legislation would have retrospective effect.*

*23. In Garikapatti Veeraya v. N. Subbiah Choudhury [1957] SCR 488, Chief Justice S.R. Das speaking for the Court observed as follows:*

*The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.*

*24. We may also refer to Francis Bennion's Statutory Interpretation, 2nd Edn., at p. 214 wherein the learned author commented as follows:*

*The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States Constitution and in the Constitutions of many American States, which forbid it. The true principle is that Lex prospect non respect (law looks forward not back). As Willes, J. said, retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be*

*regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.*

*25. This Court in Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors. has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows:*

> *(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
>
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
>
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*
>
> *(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*

*(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.*

*26. We are unable to accept the contention of the respondent-State that Section 6 of the Amending Act of 1974 is retrospective. In Sub-section (2) of Section 1 the legislature clearly stated that Act would come into force at once i.e., from the date of publication in the Gazette. Neither in Section 6 or any other section of the amending Act it was mentioned that the Act would have retrospective effect. If we hold that the Act would have retrospective effect it would go against the intention of the legislation."*

34. In that view of the matter, the 2009 Regulations cannot affect the existing contract between the parties, including the one dated 04.9.2008.

**Duress Issue**

35. The parties hereto are Public Limited Companies. They have wide experience in business transactions. They have, it can be presumed, been taking legal advice. It has not been proved that any coercion was made by the Petitioner.

The Respondent did not plead the ingredients of the acts of duress which are said to have been exercised by the Petitioner. If a contract in law is to be set aside, the requisite pleadings therefor must be raised and proof in respect thereof must be brought on record. It cannot be contended that the contract is unreasonable or irrational unless pleaded and proved. Moreover, cost incurred by a party in carrying SMS may be based on several factors. Principally amongst them, as noticed by the Regulator itself it is the balance in traffic flow.

There is nothing on record to show that the demand levied per SMS could not have been raised having regard to the fact that earlier contracts provided for SMS charged even at the rate of 30 paise per SMS.

The rationality or reasonableness of the demand must be viewed from that angle.

No vitiating factor in this case exists.

No actual duress has been pleaded or established.

No case has also been made out that there was an economic duress. There was no illegitimate threat to the Respondent's interest.

If legality of an interconnect agreement is to be questioned, the same must be done immediately after its execution.

No case of wrongful threat has also been made out.

If the terms of a contract are to be questioned on the ground of unreasonableness, the particulars thereof are required to be pleaded.

No representation had even been made to the TRAI prior to 2009 Amendment.

Concedingly the parties had been paying higher charges to each other in terms of the agreement.

36. The contention of the Respondent that the Petitioner had resorted to 'bill and keep' method with other operators like Vodafone or BSNL is incorrect. If a big operator like Vodafone agreed to pay SMS charges at the rate of 10 paise, it is puerile to assume that it would become unreasonable in the case of the Respondent.

37. It had entered into a contract with its eyes wide open. It acted thereupon. It paid an amount of Rs.6.00 crores. It itself by way of reciprocity raised invoices on the Petitioner. By way of an after-thought, it must have refunded the amount paid by it.

The said contention of the Respondent must, therefore, be rejected.

**'Transparent, reciprocal and non-discriminatory' Issue**

38. We may now consider the meaning of the terms 'transparent', 'reciprocal' and 'non-discriminatory'.

39. Transparency between two parties to a contract cannot be given the same meaning as given in the Statute as for e.g. Section 11 (4) of the 1997.

In BALCO Employees' Union (Regd.) v. Union of India, (2002) 2 SCC 333 at page 373, it was opined :-

> ***"67.*** *.... Transparency does not mean the conducting of the government business while sitting on the crossroads in public. Transparency would require that the manner in which decision is taken is made known. Persons who are to decide are not arbitrarily selected or appointed. ..."*

Entering into contract is even not an administrative act on the part of the parties herein.

We have held heretobefore that the contract was otherwise valid.

40. The term 'transparent' would not mean that parties to a contract must adduce proof with regard to the costs incurred by it. The cost is absorbed in several other areas as for example human resources.

Transparency does not mean that it has to be 'cost based'.

41. Only because the Regulator itself adopted a 'cost based' method at some point of time in prescribing the rates of Interconnection Usage charges, the same would not mean that the said principle should ipso facto be applied in contractual matters and, thus, taking away the freedom of contract. Cost incurred by a party may be based on several factors. It, in view of the flow of SMS, may have to maintain a larger establishment.

42. The TRAI in the IUC Regulations itself has defined the term 'Forbearance'.

> *"(vii) "Forbearance" means that the Authority has not, for the time being, notified any charge for a particular telecommunication service and the service provider is free to fix any charge for such service. The Authority, however, has a right to intervene at any stage after the introduction of the charge."*

43. If the service provider was free to charge any amount from the other operators, we see no reason as to why the same meaning would not be assigned to the Regulation IV.

In sub-clause (viii) of Clause 2 of the 2003 Regulations, 'Interconnection' has been defined in the following terms:-

> *"Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers."*

44. Interconnection charges levied by the 2003 Regulations merely modified the 2001 Regulations.

An amendment has been carried out as mentioned in Clause 3. Similarly, without analyzing and/or putting an appropriate meaning thereto, the definitions of the terms 'forbearance' and 'interconnection' having not been amended by the 2009 Regulations, no other meaning can be assigned to it.

If it was the intention of the Regulator that the definition of the said terms should also be changed, it could have done so.

45. A statute has to be read in its entirety. It's terms are to be given their due meaning. Therefore, the word 'non-discrimination' would carry the same meaning as is understood in the ordinary parlance. The same must mean application of the same principle amongst the persons similarly situated. It means that the SMS charges should be the same keeping in view the nature and flow of traffic. However, in

this case the Petitioner states that by levying the same charge it has given effect to the direction of the TRAI dated 22.02.2011.

46. That even in the Explanatory Memorandum, the Regulator has only stated that the prevailing trend in the industry is that the IUC is not realized but it added that the billing system also needs to be suitable enough to process an increasing number of SMSs terminating on the network.

47. Clause 4.2.8 of the Regulations specifically mentions 'mutually agreed reciprocal arrangements' apart from the term 'bill and keep'. Such arrangements, the Regulator believed would be fair, transparent and non-discriminatory. It, therefore, does not say that no agreement can at all be entered into and/or the agreement entered into by and between the parties hereto would otherwise be illegal and bad in law.

48. The Regulator stated that it would monitor. It would keep a watch. If that be so, the Regulator could have amended Schedule IV. It did not take any such step. It appears that the TRAI itself is of the view that to charge 5 paise per SMS would be reasonable.

49. The word 'reciprocal' does not mean that both the operators must agree. The word 'reciprocal' means that the parties to the contractual should charge each other. The Respondent had done so. It, thus, itself was of the opinion that it is entitled to charge the Petitioner at the rate of 15 paise per SMS. It is, therefore, difficult to conceive as to on what basis the Respondent now contends that the charge of 10 paise per SMS would be violative of the agreement and/or the proviso appended to Schedule IV of the Regulations.

50. Moreover, in any event if any case is made out to establish discrimination the same has to be pleaded. In the context of Article 14 of the Constitution of India, the Apex Court in Bank of Baroda Vs. Rednam Nagacharya Devi reported in 1989 SC 2105 opined as under:-

> *"7. ....This Court had rejected the attack on S.4(e) on grounds of violation of Art. 14. That apart, the burden of showing that a classification is arbitrary is basically on the person who impeaches the law. If any state of facts can reasonably be conceived as sustaining the constitutionality, the existence of that state of fact, as at the time of the enactment of the law, must also be assumed. The allegations on which violation of Article 14 are based must be specific, clear and unambiguous and must contain sufficient particulars."*

51. It appears to us that the diverse comments made by the TRAI are not consistent with each other. In any event, by way of an Explanatory Memorandum, it is trite, the main provision cannot be interfered with.

It was stated in the Explanatory Memorandum :-

> *"5.2.7 The cost involved with the handling of SMS in any of the service providers network is insignificant as compared to the cost for handling voice. In addition there are complexities involved in accounting for IUC for SMS. SMS is sent by the SS7 signaling channel and in order to bill and verify SMS termination internally, the mediation system needs to be able to generate SS7 CDRs for the billing system to count and rate the number of SMS messages. The terminating operators, in many cases, may have to rely on the originating operator to supply them with records of the SMS count of messages landing on their network. The billing system also needs to be scalable enough to process a large (and increasing) number of SMS arriving on the network. The prevailing trend in the industry is that IUC is not being realized by the service providers from each other.*
>
> *5.2.8 The uptake of SMS by GSM customers has been a major success story for the mobile industry. Also in view of the fact that by and large the arrangement prevalent today are 'bill and keep' and mutually agreed reciprocal arrangements, the Authority believes that the service providers would continue with these arrangements in a fair, transparent and non-discriminatory manner. The Authority has therefore decided to continue with the policy of forbearance in the matter of IUC on SMS, however, to*

*keep watch on the market, reporting requirement is being incorporated."*

The terms used are 'by and large'. It does not use the word 'only'. It does not say that under any circumstance, parties would not enter into a bilateral contract. The contention of the Respondent, therefore, cannot be accepted.

52. Moreover, if 80 percent of the operators feel that the SMS charges at the rate of 10 paise is payable, it is prima-facie indicative of the fact that the charges are reasonable.

53. For the reasons aforementioned, this petition should be and accordingly is allowed.

However, in the facts and circumstances of this case, there shall be no order as to costs.

**.....**
**(S.B. Sinha)**
**Chairperson**

**.....**
**(P.K. Rastogi)**
**Member**

*HKC/rkc*