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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 30.04.2013.

Decided on : 31.05.2013

+ **LPA 200/2013 and CM 5410/2013**

ASSOCIATION OF UNIFIED

TELECOM SERVICES and ORS.

..... Appellants

Through : Mr.Ramji Srinivasan, Sr.Adv. with
Mr.Umang Gupta, Mr.Faraz
Maqbool, Ms.Kabita Das, Advs.

Versus

BHARAT SANCHAR NIGAM LIMITED and ORS... Respondents

Through : Mr.A.S.Chandhiok, ASG with
Ms.Maneesha Dhir, Mr.Ritesh
Kumar, Mr.K.P.S.Kohli,
Mr.Abhishek Kumar, Mr.Siddharth
Tyagi, Mr.Amit Singh, Mr.Abhishek
Kumar, Ms.Sweta Gupta, Advs. for
BSNL/R-1.
Mrs.Sangeeta Singh, Adv. with
Mr.Kumar Rajan Mishra, Advs. for
TRAI/R-3

+ **LPA 201/2013 and CM Nos. 5418/2013 & 6578/2013**

CELLULAR OPERATORS ASSOCIATION

OF INDIA and ORS.

..... Appellants

Through : Mr.Maninder Singh, Sr.Adv. with
Mr.Gopal Jain, Mr.Manjul Bajpai,
Mr.Sarvajeet Kumar Thakur, Advs.

Versus

BHARAT SANCHAR NIGAM LIMITED

.....Respondent

Through : Mr.A.S.Chandhiok, ASG with
Ms.Maneesha Dhir, Mr.Ritesh
Kumar, Mr.K.P.S.Kohli, Mr.
Abhishek Kumar, Mr.Siddharth

Tyagi, Mr.Amit Singh, Mr.Abhishek Kumar, Ms.Sweta Gupta, Advs. for BSNL.

+ **LPA No. 242/2013 and CM No. 6385/2013**

BHARAT SANCHAR NIGAM LIMITED Appellant
Through : Mr.A.S.Chandhiok, ASG with
Ms.Maneesha Dhir, Mr.Ritesh Kumar, Mr.K.P.S.Kohli, Mr. Abhishek Kumar, Mr.Siddharth Tyagi, Mr.Amit Singh, Mr.Abhishek Kumar, Ms.Sweta Gupta, Advs. for BSNL.

Versus

CELLULAR OPERATORS ASSOCIATION OF INDIA AND ORS. Respondents
Through: Mr.Maninder Singh, Sr.Adv. with Mr.Gopal Jain, Mr.Manjul Bajpai, Mr.Sarvajeet Kumar Thakur, Advs.

+ **LPA No. 243/2013 and CM No. 6389/2013**

BHARAT SANCHAR NIGAM LIMITED Appellant
Through: Mr.A.S.Chandhiok, ASG with Ms.Maneesha Dhir, Mr.Ritesh Kumar, Mr.K.P.S.Kohli, Mr.Abhishek Kumar, Mr.Siddharth Tyagi, Mr.Amit Singh, Mr.Abhishek Kumar, Ms.Sweta Gupta, Advs. for BSNL.

Versus

ASSOCIATION OF UNIFIED TELECOM SERVICES and ORS. Respondents
Through: Mr.Ramji Srinivasan, Sr.Adv. with Mr.Umang Gupta, Mr.Faraz Maqbool, Ms.Kabita Das, Advs.. for R-1

Mrs.Sangeeta Singh, Adv. with
Mr.Kumar Rajan Mishra, Adv. for
TRAI/R-9

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present appeals arise out of common interim order dated 18.03.2013 passed by the learned Single Judge. The facts relating to the present appeals are common. However the facts as brought on LPA No. 242/2013 are as stated herein.
2. The Telecom Regulatory Authority of India (hereinafter referred to as 'TRAI) on 28.05.1999 notified the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations 1999 w.e.f. 01.05.1999. These regulations specify the arrangement amongst service providers for interconnection charges and revenue sharing for telecommunication services including port charges.
3. Bharat Sanchar Nigam Ltd. (hereinafter referred to as 'BSNL') and private service operators entered into interconnection agreements dated 06.12.2001 which incorporated mutually agreed rates for annual port charges. The rates were as follows:-

UPTO 8 PCM	Rs.1,40,000- per PCM
Above 8 and 16 PCM	Rs.16,000/- per PCM
Above 32 PCM	Rs.48,000/-

4. The TRAI issued the Telecommunication Interconnection (Port Charges) Regulations 2001 dated 28.12.2001 by which it prescribed the

port charges payable to the interconnection provider. The port charges were prescribed as under:-

<i>Number of Ports</i>	<i>Port Charges and Rs.</i>
1 to 16 PCMs	$N + 55,000$
17 to 32 PCMs	$88,000 + (N-16) * 30,000$
33 TO 64 PCMs	$1,36,000 + (N-32) * 20,000$
60 to 128 PCMs	$20,00,000 + (N-64) * 15,000$
129 TO 256 PCMs	$2,96,000 + (n-128) * 14,000$

5. In 2002, BSNL filed an appeal challenging the aforesaid Regulations of 2001 issued on 28.12.2001 before the TDSAT. By common judgment dated 27.04.2005 the demands made by BSNL in terms of its circular dated 02.11.2001 were set aside.

6. On 02.02.2007, TRAI issued the Telecommunication Inter-Connection (Port Charges) Amendment Regulations, 2007. The said Regulations came into force on 01.04.2007. The revised charges were as under:-

<i>S.No.</i>	<i>Number of Ports</i>	<i>Port Charges and (In Rs.)</i>
1	1 to 16 PCMs	$N * 39,000$
2	17 to 32 PCMs	$6,24,000 + (N-16) * 22,500$
3	33 to 64 PCMs	$9,84,000 + (N-32) * 14,500$
4	65 to 128 PCMs	$4,48,000 + (N-64) * 11,500$
5	129 to 256 PCMs	$21,84,000 + (N-128) * 10,500$

7. BSNL challenged the said Regulation of 2007 before the TDSAT. The TDSAT on 28.05.2010 remitted the matter back to TRAI to have a fresh consideration on the issues raised by BSNL. However, BSNL was

not entitled to claim any amount in terms of the said judgment from any operator from the date of coming into force of the 2007 Regulations till the date of judgment i.e. 28.05.2010. BSNL challenged the said judgment dated 28.05.2010 before the Hon'ble Supreme Court to the extent that BSNL was not entitled to claim any amount for the interregnum period. The TRAI and other operators also challenged the said judgment before the Hon'ble Supreme Court. On 02.08.2010, the Supreme Court issued notice in the appeals and directed the operators to give an undertaking in the form of an affidavit securing the revenue of BSNL and also give liberty to BSNL to raise the demand for quantification. On 15.12.2010 further orders were passed by the Hon'ble Supreme Court in the said appeals where it was held as follows:

“.... Pending hearing and final disposal of these civil appeals, in of each additional Port, the Operators/Service Providers, who are before us, will give Bank guarantee of a Nationalised Bank on the difference between the rates applicable between 2001 and 2007 per Port. However, it is made clear that the Registry will not accept the Bank guarantee unless and until the Chief Executive Officer of the Operators/Service Providers shall give an undertaking in the form of an affidavit that in the event of BSNL succeeding in the matter, each of the applicants who has given Bank Guarantee, would have to pay interest at the rate which may be fixed by the Court at the time of final hearing of the matters.”

8. On 18.09.2012, TRAI issued the Telecommunication Interconnection (Port Charges) (Second Amendment) Regulations 2012 which came into force w.e.f. 01.10.2012. The Regulations introduced separate charges for GMSC and tax and also abolished slab rates. The said Regulations were also challenged by BSNL before learned TDSAT. On

31.10.2012 TDSAT declined to stay the Regulations.

(viii) Aggrieved by the said interim order, BSNL preferred W.P.(C) No.7218/2012 titled as BSNL vs. TRAI. On 29.11.2012, the said writ petition i.e. W.P. (C) No. 7218/2012 was disposed of directing as follows:-

“The counsels have consented that the impugned order may be varied only to the extent and in line with the interim arrangement put in place by the Supreme Court in Civil Appeal no.5253/2010 in the matter of BSNL vs. TRAI and Ors. vide order dated 15.12.2010.

Accordingly, it is directed that pending disposal of the appeal before the TDSAT, in respect of each additional port, the operators/service providers before the TDSAT, will furnish a bank guarantee of a nationalized bank qua the difference between the rates per port, arising on account of applicability of the 2012 regulations as against 2007 regulations.

It may be noted that TDSAT, by way of the impugned order, has already directed the respondents to furnish an undertaking, which is a direction which will continue to operate.

Furthermore, the bank guarantees for the difference in rates, as indicated above, will be furnished every four weeks to the petitioner.

With the aforesaid in place, the writ petition and the application are disposed of. The parties are liberty to move the TDSAT for disposal of the appeal as expeditiously as possible.”

9. On 08.02.2013, BSNL issued a circular with respect to billing of port charges. Similarly, clarificatory circulars dated 22.02.2013 and 28.02.2013 were also issued. The respondents, namely, Association of Unified Service Providers of India and Cellular Operators Association of India filed writ petitions being W.P.(C) No. 1764/2013 and 1765/2013

respectively challenging the said circulars dated 08.02.2013 along with its clarificatory circulars dated 22.02.2013 and 28.02.2013 respectively. After hearing the parties, the learned Single Judge vide impugned order dated 18.03.2013 stayed the circular dated 08.02.2013 along with clarificatory circulars dated 22.02.2013 and 28.02.2013.

10. BSNL has now filed the present appeals, namely, LPA No. 242/2013 and 243/2013 to quash the order dated 18.03.2013 to the extent that the circular dated 08.02.2013 along with clarificatory circulars dated 22.02.2013 and 28.02.2013 are stayed with respect to existing port charges with directions to the respondent to furnish bank guarantees to BSNL Circles in terms of order dated 29.11.2012 passed by this Court and to pay service tax/surrender charges at the rates provided in the Interconnect Agreements i.e. Rs. 55,000/- per port.

11. Cellular Operators Association of India filed LPA No. 201/2013 while the Association of Unified Service Providers of India and another have filed LPA 202/2013. By these LPAs, the said parties seek quashing of condition incorporated in the order dated 18.03.2013 requiring appellants to file undertaking/affidavits wherein the Chairman and the Managing Director has to undertake that till the next date of hearing, the assets of the Company shall not be alienated except in the ordinary course of business and also disclosing the book value of the assets etc.

12. Learned Additional Solicitor General appearing on behalf of BSNL has contended that the impugned order dated 18.03.2013 gives absolutely no reasons for passing stay of circulars dated 08.02.2013 and the clarificatory circulars dated 22.02.2013 and 28.02.2013. Learned ASG has also contended that the circular dated 08.02.2013 is in consonance with the

orders passed by the Hon'ble Courts. It is further submitted that an anomalous situation has been created to the extent that for new/additional ports, money will be recovered by furnishing the bank guarantee but for renewal of old port on which substantial amounts have to be covered, port amount has to be applicable in terms of 2012 Regulations and no bank guarantee to secure the interest of BSNL would be given by the private operators. He further states that the impugned order wrongly directs BSNL to recover service tax as per the rates provided in the 2012 Regulations inasmuch as the amount of service tax is to be deposited with the Tax Authority/Department on the amount of bill raised and BSNL is liable to deposit the service tax on amount of Rs. 55000/- per port failing which BSNL is liable for penalty and fine in terms of Service Tax Act/Rules. He further argued that the impugned order wrongly directed BSNL to recover the surrender charges at the rate provided in 2012 Regulations. It is further stated that there is no prayer in the writ petitions qua the surrender charges and hence the orders could not be passed. The learned ASG also relies upon interconnect agreement especially clause 6.3.2 which stipulates port charges which are specified. Hence, it is submitted that the private operators having agreed to the said port charges, they cannot now wriggle out the terms of the agreement.

13. On the other hand, the learned Senior Counsel appearing for the private operators namely the Cellular Operators Association of India and Association of Unified Service Providers of India submits that the directions in the impugned order directing them to furnish undertaking that they shall not alienate their assets except in the ordinary course of business till the next date of hearing is harsh and dis-proportionate. Learned Senior

counsel also submits that there was no reason or occasion for the learned Single Judge to direct that they will have to disclose the book value of their assets as against the differential liability that may get fastened in case the petitioners are called upon to pay as per the demand of BSNL is also a harsh direction.

14. The impugned order is an interim order and learned Single Judge is yet to adjudicate upon the respective submissions and contentions being raised by the parties before us. In our view the submissions of the parties are best to be adjudicated before the Single Judge, as the main writ petition is pending. However, while remanding the parties back to the learned Single Judge we would in the interest of justice like to modify only two aspects in the impugned order. We modify the directions of the learned Single Judge regarding filing of undertaking. Impugned order dated 18.03.2013 directs as follows:-

“However, the petitioners shall file undertakings, in the form of affidavits, of Chairman and Managing Director, (or by a Director if CMD is not appointed) that they shall not alienate their assets, except in the ordinary course of business, till the next date of hearing. The undertaking will also indicate that the petitioners shall pay the differential amount in case they are called upon to do so if their challenge to the impugned circulars fails. The undertaking will also indicate that the monies will be paid by the petitioners with an appropriate rate of interest as may be determined by the court at the time of final adjudication. The undertaking will disclose the book value of the assets as against the differential liability that may get fastened in case the petitioners are called upon to pay as per demand made by respondent no.1, i.e. BSNL.”

15. The aforesaid part in the impugned order will now be read as below:

“The petitioners shall file an undertaking in the form of an affidavit of their Chief Executive officer that they undertake to pay the differential amount in case they are called to pay if their challenge to the impugned order fails. They will also undertake that the amount mentioned will be paid by the said petitioners with an appropriate rate of interest as may be determined by the Court at the time of final adjudication.”

16. We also modify the direction in the impugned order as regard the recovery of service tax is concerned. BSNL will be entitled to recover the service tax in accordance with law, and not as stipulated in impugned order dated 18.03.2013

17. With these above indications, we dispose of the appeals. The parties are left free to make all their contentions and submissions before the learned Single Judge when the petitions are taken up for final disposal.

JAYANT NATH, J.

CHIEF JUSTICE

MAY 31, 2013/rb