

BHARAT SANCHAR NIGAM LTD. AND OTHERS ETC. A

v.

M/S TATA COMMUNICATIONS LTD. ETC.

(Civil Appeal Nos. 1699-1723 of 2015)

SEPTEMBER 22, 2022 B

[AJAY RASTOGI AND B.V. NAGARATHNA, JJ.]

Administrative Law – Administrative/executive orders or circulars, if can be made applicable with retrospective effect – Held: Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute – Administrative/executive orders or circulars in the absence of any legislative competence cannot be made applicable with retrospective effect – In the present case, applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, the view expressed by the Telecom Disputes Settlement and Appellate Tribunal under the impugned judgment is agreed with – However, once the competence of the appellant in fixing the rates of infrastructure charges in question stands affirmed and is not a subject matter of challenge, the appellant is well within its rights to make their charges leviable on notional fixation by increase of charges by a certain percentage every year in terms of circular dated 12th June, 2012 from each of the service provider-respondents as being notionally applicable from 1st April, 2013 – It was open for the appellant to notionally fix the charges to be computed and became payable from 1st April, 2013, based on 10% annual increase every year or by any other mechanism which may have a reasonable justification – Such notionally increased charges can indeed be leviable on the service providers and to this extent, the order passed by the Tribunal is not sustainable in law – Order of the Tribunal dated 20th August, 2014 followed by the order dated 14th October, 2014 are modified – Indian Telegraph Act, 1885.

Partly allowing the appeals, the Court

1.1 The present dispute survives regarding payment of infrastructure charges for the limited period of two years i.e. from

- A **1st April, 2013 to 31st March, 2015.** That the authority of the appellant in revising the infrastructure charges for active links leased to telecom operators is not a subject matter of challenge and none of the respondents have questioned the authority of the appellant in revising the infrastructure charges for active links leased to telecom operators. The limited question which has been raised for consideration is as to whether the rates prescribed by the appellant under the circular dated 12th June, 2012 could be applied retrospectively w.e.f. 1st April, 2009 or be effective from 1st April, 2013, as observed by the Tribunal and whether the appellant is entitled to claim 10% notional increase every year
- B **from 1 st April, 2009 to be applicable from 1st April, 2013.** [Paras 23,25 and 26][160-D, F-G]

- 1.2 So far as the impugned circular dated 12th June, 2012 is concerned, it stipulates that it shall be made effective from 1 st April, 2009 and the rates would revise from 1st April, 2009 with 10% annual increase w.e.f. 1st April, 2010, particularly, in the circumstances when all the infrastructure and other charges are being paid upfront every year. It is not disputed that each of the service provider has paid upfront for the previous years from 1st April, 2009 in terms of the earlier circular dated 30th May, 2006 until the circular dated 12th June, 2012 was introduced. It is a settled principle of law that it is the Union Parliament and State Legislatures that have plenary powers of legislation within the fields assigned to them, and subject to certain constitutional and judicially recognized restrictions, they can legislate prospectively as well as retrospectively. Competence to make a law for a past period on a subject depends upon present competence to legislate on that subject. By a retrospective legislation, the Legislature may make a law which is operative for a limited period prior to the date of its coming into force and is not operative either on that date or in future. [Paras 27-29][160-H; 161-A-D]**
- G 1.3 The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the**

case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment. So far as the submission made by the appellant with regard to the notional increase of charges by a certain percentage every year as being referred to in the circular dated 12th June, 2012 is concerned, we have not been able to persuade ourselves with the finding recorded by the Tribunal. The reason is that the appellant might not be justified in making the circular dated 12th June, 2012 effective from 1st April, 2009, but once the competence of the appellant in fixing the rates of infrastructure charges in question stands affirmed and is not a subject matter of challenge, the appellant is well within its rights to make their charges leviable on notional fixation by increase of charges by a certain percentage every year in terms of circular dated 12th June, 2012 from each of the service provider as being notionally applicable from 1st April, 2013. In other words, the service provider is not under an obligation to pay any additional infrastructure charges which was prescribed by the appellant under its circular dated 12th June, 2012 for the previous years, effective from 1st April, 2009, but at the same point of time, it was open for the appellant to notionally fix the charges to be computed and became payable from 1st April, 2013, based on 10% annual increase every year or by any other mechanism which may have a reasonable justification. That such notionally increased charges can indeed be leviable on the service providers and to this extent, the order passed by the Tribunal is not sustainable in law and deserves to be set aside. The order of the Tribunal dated 20th August, 2014 followed by the order dated 14th October, 2014 are hereby modified and the appellant is at liberty to revise the notional rates based on 10% increase every year in terms of circular dated 12th June, 2012 as applicable on 1st April, 2013 and to raise its additional demand/bills based on notional increase

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- A **of infrastructure charges effective as on 1st April, 2013 to the service providers/respondents herein and if the service providers/ respondents fail to pay, consequences in terms of the agreements executed between the parties shall follow.** [Paras 30-32][161-D-H; 162-A-C]

- B **CIVIL APPELLATE JURISDICTION :** Civil Appeal Nos. 1699-1723 of 2015.

From the Judgment and Order dated 20.08.2014 of the Telecom Disputes Settlement and Appellate Tribunal in Petition Nos.403, 20 of 2013, 577, 578, 579, 583, 584, 586, 612, 620, 655, 660, 666, 817, 818, 819,

- C 932, 944, 978 of 2012, 322, 323, 324, 283 of 2013 and Order dated 14.10.2014 in M.A. No.276 of 2014 in Petition No.322 of 2013 and M.A. No.277 of 2014 in Petition No.324 of 2014.

Tejveer Bhatia, Ms. Vishakha Ahuja, Rohan Swrup, Gaurav Sharma, Advs. for the Appellants.

- D Meet Malhotra, Gopal Jain, Sr. Advs., Mansoor Ali Shoket, Nitin Kala, Pukhrambam Ramesh Kumar, Kunal Singh, Tanmay Jain, Karun Sharma, Sunil Kumar Jain, Ms. Pallavi Langar, Kunal Singh, Ravi Chauhan, Ms. Shally Bhasin, Chaitanya Safaya, Prateek Gandhi, Aakarsh Kamra, Peehu, Lakshmeesh S. Kamath, Ms. Samriti Ahuja, Ms. Suvarna

- E Kashyap, Harsh Kaushik, Ms. Adrija Mishra, Ravi S. S. Chauhan, Ms. Pallak Singh, Anoop Rawat, Saurav Panda, Prateek Gupta, Ms. S. Singh, S. S. Shroff, Advs. for the Respondents.

The Judgment of the Court was delivered by

AJAY RASTOGI, J.

- F 1. The instant batch of appeals has been preferred by the appellant, Bharat Sanchar Nigam Ltd. assailing the judgment dated 20th August, 2014 passed by the Telecom Disputes Settlement and Appellate Tribunal, New Delhi, followed with the order dated 14th October, 2014 rejecting the application filed by the appellant seeking clarification of judgment

- G dated 20th August, 2014 to the extent that the rate of infrastructure charges for Active Links of Licensed Telecom Service Providers to be charged in terms of the circular dated 12th June, 2012 has been made effective from 1st April, 2013 instead of 1st April, 2009 taking note of increase of 10% per annum between 1st April, 2009 to 31st March, 2013 as payable on 1st April, 2013. As consequence thereto, the revised rates introduced

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by the appellant as per circular dated 12th June, 2012, which although were proposed from 1st April, 2009, shall be applicable with effect from 1st April, 2013 but that was declined by the Tribunal under the order impugned. A

2. It will be apposite to take a narration of facts for better appreciation of the controversy raised in the instant appeals. B

3. The respondents herein who have been granted licenses under Section 4 of the Indian Telegraph Act, 1885, for providing telecom services such as Universal Access Service/Cellular Mobile Telephone Service/ National Long Distance Service, etc. and the service providers entered into Interconnection Agreements with the appellant which is a public sector undertaking for interconnection of their telecom networks with that of the appellant. C

4. Whenever a new operator wishes to start operations, it is necessary for such an operator to interconnect with various other networks of the incumbent operators that are already in existence. It is for this reason that interconnection as well as the terms on which the same is to be provided, is regulated by the telecom regulations. The various operators designate some of their switches/exchanges as points of interconnect (POI) from which the interconnection facility is provided by a physical connection on the ports available in such points of interconnect. Sometimes, the newcomer called the interconnection seeker in common parlance, may ask for certain other facilities/resources from the incumbent operators, which may not be mandated by the regulations, on mutually agreeable terms. D

5. The dispute in the present batch of appeals pertains to charges for infrastructure facilities which are being provided by the appellant to the batch of respondents, which were increased by a circular dated 12th June, 2012, w.e.f. 1st April, 2009. The question that arose was as to whether the appellant was justified in raising charges for infrastructure facilities with retrospective operation from 1st April, 2009, more so, when the yearly charges are paid by the service providers (respondents) upfront in advance every year. E

6. Interconnect Agreements are executed between the parties and as per clause 2.1.9, infrastructure facilities will be provided, subject to availability and feasibility. Rental for use of such space and mounting shall be determined by the provider of such facility. As per clause 6.3.3 F

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A of the Interconnect Agreement, it is not mandatory for the appellant to provide any infrastructure to the respondents, which they are themselves supposed to arrange. The extract of clauses 2.1.9 and 6.3.3, which are relevant for the purpose is reproduced hereinbelow:

“Clause 2.1.9

B Irrespective of who owns a transmission system of the link interconnecting one party’s exchange to the exchange of the other party, each party subject to availability and feasibility may provide accommodation for the terminals of such equipment of the other party located in its premises. Each party may permit mounting of antennae for interconnect link owned by the other party on its transmission towers subject to feasibility. Rental for use of such space and mounting shall be determined by the provider of such facility. Arrangements for installation, operation and maintenance of such equipment will be arrived at by mutual agreement.”

D “6.3.3 Other charges

E It shall not be mandatory for BSNL to provide any infrastructure to BSO which BSO himself is supposed to arrange. In case the BSO is not able to bring his interconnecting transmission link upto the BSNL’s designated exchange for the POI, BSNL may subject to availability and payment of the prescribed charges by BSO, provide inter exchange junctions on PCMs from the exchange upto which the BSO has brought its transmission link to the location of POI. These charges shall be same as prescribed by TRAI for leased lines from time to time or on R&G & conditions as the case may be.

F For any other infrastructure like space BSNL’s building, provision of power supply, air conditioning, mounting of antenna on towers or building tops if feasible, the charges and other terms & conditions for the same shall be as prescribed by BSNL from time to time separately.”

G 7. The appellant, in the first instance, by circular dated 19th February, 2001 fixed the rental charges for providing facilities i.e. accommodation, power supply, tower space, cable ducts, etc. to the private licensed service providers and it was specifically mentioned that

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the appellant reserve the right to renew the charges as well as the electricity charges as and when being revised by the State Electricity Boards. In furtherance thereof, Interconnect Agreements were executed between the appellant and the respondents/service providers herein earlier on 31st March, 2004 and it was made explicit that the appellant has no obligation to provide infrastructure facilities and it is for the respondents/service providers to arrange the same at their own and in case infrastructure facilities are taken from the appellant, it shall be on the rates prescribed by the appellant from time to time.

8. In furtherance thereof, the appellant revised the infrastructure charges for Active Links leased to the operators by its circular dated 30th May, 2006 w.e.f. 1st April, 2006 and all such charges are to be leviable upfront every year and the circular indicates the justification of revising the infrastructure charges based on classification of cities introduced by the Central Government for the purposes of determining the House Rent Allowance. The extract of the Circular dated 30th May, 2006, although not under challenge, but may be relevant for proper appreciation of the grievance raised by the appellant is reproduced as under:

“Bharat Sanchar Nigam Ltd.
(A Government of India Enterprise)
613-B, Statesman House, B-148,
Barakhamba Road, New Delhi – 110001
(Commercial Branch)

No. 103-1/2006-Comm.Dated: 30th May, 2006

**Subject: Infrastructure charges for Active Links of
Licensed Telecom Service Providers**

In view of various reference received in this office on the subject, the competent authority has reviewed the infrastructure sharing charges prescribed vide Circular No.116-14/96-PHC (pt) dated 19th February, 2001 and decided to revise the charges as given below:-

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- A **2. Definition of links connected to BSNL network:**
- a. **Active Links:** These are the links of Licensed Telecom Service Providers for which transmission equipment of service provider is installed in BSNL's exchange premises and their network is connected through it. The rental charges of infrastructure in this case have been streamlined and are given below in Para 3.
- b. **Passive Links:** These are the links of Licensed Telecom Service Providers for which their transmission equipment is installed close to BSNL exchange premises and only transmission cable (with/without modem) is brought in the BSNL's telephone exchange premises. Charges for this have already been prescribed vide Circular No.103-4/2004-Comml dated 29th April, 2005.
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- D 3. Rental changes for infrastructure sharing have been divided into following components:
- a. Charges for sharing of building space.
- b. Electricity and miscellaneous charges.
- c. Charges for Tower sharing.
- d. Charges for duct sharing.
- E a. Charges for sharing of building space:
- F (i) To simplify rent assessment, it has been decided to classify the areas/cities based on the classification followed by Government of India for House Rent Allowance i.e. A1, A, B1, B2 and C class cities. For the sake of simplicity, it has further been decided to have only in four categories i.e. A (for A1 and A), B (for B), C (C) and Unclassified cities.
- G (ii) Accordingly, the rates for one transmission bay (including space for one box of OF termination and DDF as required) in these categories of cities may be charged as under. The space is normally given in technical area of exchange building, which is having high specifications for installation of telecom equipments. The Licensed Telecom Service Providers are given space for installation of their various equipments by officer-in-
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charge of building on approval of equipment installation plan by A
Head of SSA:

Categories of City	Charges
A	Rs.36000 per bay per annum
B	Rs.28000 per bay per annum
C	Rs.20000 per bay per annum
Unclassified	Rs.13000 per bay per annum

b). Miscellaneous Infrastructure service charges: These charges include the sharing of following services:

- 1). DCT power at – 48V up to 10A/ transmission bay;
- 2). AC power for lights, fans, testing instruments etc;
- 3). Air Conditioning charges (sharing of existing air conditioning system);
- 4). Generator Backup;
- 5). Earthing charges (Tapping from exchange earth bar is allowed)
- 6) Fire equipment (Sharing in case of requirement).

As the rates of electricity and capital expenditure of BSNL in developing these facilities is varying as per the size of city, the rates for one transmission bay in these categories of cities will be as under:

Categories of City	Charges
A	Rs.2,00,000 per bay per annum
B	Rs.1,80,000 per bay per annum
C	Rs.1,50,000 per bay per annum
Unclassified	Rs.1,20,000 per bay per annum

C. **Tower Charges:** Charges per antenna will be as under:

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Sl.	Tower	HeightAll Cities
1.	Up to 30 meters	Rs.1,20,000 per annum
2.	31-60 meters	RS. 2,50,000 per annum
3.	More than 60 meters	Rs.4,00,000 per annum

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The above charges will be multiplied by no. of antennas in case multiple antennas are installed by Licensed Telecom Service Providers.

d. **Duct Charges:** Permission may be granted to Licensed Telecom Service Providers to lay one 50 mm pipe inside the

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BSNL exchange premises to lay their OF cable. It will be the responsibility of Licensed Telecom Service Providers to restore telecom exchange building and its premises in original shape after their construction work is over which should be done within one month. A refundable security of Rs.50,000 may be obtained

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from Licensed Telecom Service Providers before the permission is given.

BSNL will not lease its own DUCTs as far as possible. Duct rental for already leased ducts of BSNL may be continued to be charged as at present, i.e.:

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= [Cost of Duct x No. of Cable x 36%] / [Total no. of pipes in duct]

4. Applicability of above charges-

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a) These revised rates will be applicable w.e.f. 1st April, 2006 with a provision of 10% annual increase every year i.e., 01.04.2007 onwards. Billing cycle shall be from 01.04 to 31.03 of every year. Hence, billing cycle for all existing links may be shifted to the new arrangement;

b) All these charges will be leviable in advance every year;

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c) In case of change of classification of cities, high classification will be applicable at the time of yearly renewal only. The charges will be applicable financial year wise;

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d) No cash refunds shall be made and any excess payments received by BSNL, due to difference in charges based on old and new formula, shall be adjusted in future bills of party concerned.

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(R P Bhalla)

Assistant Director General (Commercial)" B

9. It may further be noticed that the revised rates applicable w.e.f. 1st April, 2006 with a provision of 10% annual increase every year i.e. 1st April, 2007 onwards and the billing cycle shall be from 1st April to 31st March and the charges will be leviable upfront in advance every year with a further stipulation that in case of change of classification/ categorization of cities, higher classification will be applicable at the time of yearly renewal only and charges will be applicable on each financial year.

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10. The Government of India, Ministry of Finance, by its circular dated 29th August, 2008, revised the classification of cities effective from 1st September, 2008 and the cities have been revised as follows:

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“2. Based on the recommendations of the Sixth Central Pay Commission, the earlier classification of cities has been revised viz., A-1 to “X”; A, B-1 & B-2 to “Y” and C & Unclassified to “Z”. In determining the revised classification, the population of Urban Agglomerate area of the city has been taken into consideration. Accordingly, the rates of House Rent Allowance shall be as under:

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Classification of Allowance	Rates of House Rent
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Cities/Towns	as a percentage of (Basic Pay
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NPA where applicable)

X	30%
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Y	20%
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Z	10%
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11. The Government of India re-classified the cities w.e.f. 1st September, 2008 but so far as the appellant is concerned, the circular

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- A revising the infrastructure charges for telecom service providers in terms of circular of the Government of India dated 29th August, 2008 came to be introduced by a circular dated 12th June, 2012, but charges stood revised retrospectively w.e.f. 1st April, 2009 with a provision of 10% annual increase every year w.e.f. 1st April, 2010 onwards and rest of the conditions remained the same. The impugned extract of part of the circular dated 12th June, 2012 is reproduced hereinbelow:-

“Rates & Costing Cell, Bharat Sanchar Nigam Limited
 Bharat Sanchar Nigam Limited, A Govt. of India Enterprises
 Corporate Office,
 C Janpath,
 New Delhi – 110001
 No.2-2/2009-R&C[CFA] Dated: 12.06.2012

Circular R&C – CFA No.11/11-12
Subject : Infrastructure Charges for Active Links of Licensed Telecom Service Providers

In view of re-classification of cities and revision of rates of house rent vide Govt. of India Department of Expenditure letter No.2(8)/2008-E-II(B) dated 29.08.2008, the existing rental charges for Infrastructure Sharing by the other licensed service providers fixed vide BSNL HQ No.103-1/2006-Comm. Dated 30.05.2006 has been reviewed by Competent Authority and it has been decided to revise the charges w.e.f. 01.04.2009, as details given below:

F 1. Charges for building space.

(Rates for one transmission bay including space for one box OF transmission and DDF as required)

S.No.	Classification of Cities/Towns	Charges w.e.f. 01.04.2009
1.	X	Rs.61,606 per annum per bay
2.	Y	Rs.47,916 per annum per bay
3.	Z	Rs.26,620 per annum per bay

2. Misc. Infrastructure Service Charges : These A charges include the sharing of following services.

1. DC power at – 48V up to 10A/transmission bay;
2. AC power for lights, fans, testing instruments etc.;
3. Air conditioning charges (sharing of existing air B conditioning system);
4. Generator Backup;
5. Earthing charges (Tapping from exchange earth bar C is allowed);
6. Fire equipment (sharing in case of requirement).

S.No.	Classification of Cities/Towns	Charges w.e.f. 01.04.2009
1.	X	Rs.2,95,778 per annum per bay
2.	Y	Rs.2,66,200 per annum per bay
3.	Z	Rs.1,99,650 per annum per bay

3. The other two infrastructure Sharing rentals viz **Tower Sharing Charges and Duct Charges**, which are not dependent on re-classification of classification of city and house rent rates, shall remain unchanged and be charged as per this office letter No.103-1/2006-Comml. Dated 30.05.2006.

4. Other terms and conditions applicable to above charges are:

- i) These revised rates will be applicable w.e.f. 01.04.2009 with provision of 10% annual increase every year i.e. 01.04.2010 onwards. Billing cycle shall be from 01.04.2004 to 31.03.2013 of every year. Hence, billing cycle for all existing links may be shifted to the new arrangement; F
- ii) All these charges will be leviable in advance every year; G
- iii) In case of change of classification of cities, higher classification will be applicable at the time of yearly renewal only. The charges will be applicable financial year wise; H

- A iv) TAXs, duties as per Govt. orders from time to time will be levied extra.

v) This Circular is issued based on the approval of Competent Authority in NOW-CFA file No.6-9/2010-POI (Infra)(Pt.). For any Clarification/ correspondence, in this regard, matter may be taken up with NOW-CFA Section, BSNL Corporate Office, Janpath, New Delhi – 110001 [Tel No.011-23711795 Fax No.011-23734135].

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Sd/-

C (AGM(T&C-CFA))”

12. It may be relevant to note at this stage that the circular dated 12th June, 2012 revised the infrastructure facilities retrospectively w.e.f. 1st April, 2009, however, the fact is that all the telecom service providers have made their payments for the previous years in terms of the circular

- D have made their payments for the previous years in terms of the circular dated 30th May, 2006 according to the terms of Interconnect Agreements where the charges are leviable upfront every year and after introducing the circular dated 12th June, 2012 w.e.f. 1st April, 2009, additional bills were raised by the appellant for the previous years for which the upfront payment was made by each of the telecom service provider and that became the subject matter of challenge at the instance of the telecom service providers (respondents herein) by approaching the Tribunal.

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13. The learned Tribunal, after taking note of the submissions and the pleadings on record, arrived to a conclusion that the appellant is well within its rights to revise the rates according to classification of cities

- F and it was for the respondents to continue to use the resources of the appellant at the revised rates or take the same from other resources if available and it was open to the service provider to avail the infrastructure facilities such as building space, etc. either from the appellant or from any other service provider, if any.

G 14. The limited question which the Tribunal considered was regarding the rates prescribed by the appellant under the circular dated 12th June, 2012 could have been made applicable retrospectively w.e.f. 1st April, 2009 and taking into consideration the backdrop of the matter, while upholding the right of the appellant (BSNL) to revise the rates of the infrastructure facilities in question held that the circular dated 12th

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June, 2012 of the appellant shall be applicable prospectively w.e.f. 1st April, 2013, which is the next financial year instead of 1st April, 2009 and upto 31st March, 2013, the infrastructure facilities provided by the appellant to the telecom service providers shall be charged at the rates and as per classification of cities prescribed in the circular dated 30th May, 2006 and the consequential effect is either for refund or for realization of charges, if any, the same may be accounted for by the appellant in terms of the judgment impugned dated 20th August, 2014. Relevant extract of the judgment dated 20th August, 2014 is reproduced hereinbelow:

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“In view of the aforesaid circumstances, while upholding the right of the respondent-BSNL to revise the rates of the infrastructure facilities in question, we direct that the revised rates as per the circular dated 12.06.2012 of the Respondent shall be applicable with effect from 01.04.2013 which is the next financial year. Up to 31.03.2013, the infrastructure facilities provided by the respondent to the petitioners shall be charged at the rates and as per classification of cities as prescribed in the circular dated 30.05.2006. The excess rates, wherever realised from the petitioners, shall be refunded back to the petitioners along with interest at the rate as is prescribed in the interconnect agreements for delayed payments from the date of realization of these amounts and till the time of filing of the petitions along with pendente lite and future interest @9% till the payment is made. The refunds shall be made within a period of four weeks. If any amount is found payable by the petitioners in terms of this order, the same shall also be paid along with interest, as payable in case of refunds, and shall be paid within four weeks.”

15. The appellant, at this stage, filed an application before the Tribunal seeking clarification of the judgment and order dated 20th August, 2014 on the premise that the rate of infrastructure charge for active links of licensed telecom service providers indicated in the circular dated 12th June, 2012 has become effective from 1st April, 2013 instead of 1st April, 2009. In the given circumstances, the 10% notional increase per annum between 1st April, 2009 to 31st March, 2013 is leviable and can be charged from 1st April, 2013 but that application was dismissed by the Tribunal by its later order dated 14th October, 2014 with a clarification that the revised rates as per the circular dated 12th June, 2012 shall be

- A applicable w.e.f. 1st April, 2013 and the rates which were applied w.e.f. 1st April, 2009 are to be applied w.e.f. 1st April, 2013 without any notional increase and consequently disposed of the application filed by the appellant. Relevant extract of the order dated 14th October, 2014 is reproduced hereinbelow:
- B “We, however, do not find any such direction in the judgment. On the contrary, if the rates mentioned in this circular are to be taken w.e.f. 01.04.2009 and then notionally increased by certain percentage every year to arrive at a rate to be applicable from 01.04.2013, it will be contrary to the letter and spirit of the judgment. The direction in the judgment is clear that revised rates as per the circular dated 12.06.2012 shall be applicable w.e.f. 01.04.2013 and, therefore, the rate which was applied as per the circular w.e.f. 01-04-2009 is to be applied w.e.f. 01.04.2013 without any notional increase. We, however, make it clear that this will be without prejudice to the right of the respondent-BSNL to revise the rates prospectively, and in accordance with the agreement between the parties.”
16. That both the orders passed by the Tribunal dated 20th August, 2014 and 14th October, 2014 became the subject matter of challenge in the instant batch of appeals before us.
- E 17. It may be further noticed that in furtherance of the circular dated 12th June, 2012, circular dated 13th May, 2015 has been notified revising the infrastructure charges for active links of licensed telecom service providers w.e.f. 1st April, 2015 leviable in advance for the year 2015-16 onwards and the justification tendered by the appellant was
- F that it is based on commercial viability and enhanced maintenance cost and the appeals filed by the service providers assailing the circular dated 13th May, 2015 came to be dismissed by the Tribunal by judgment dated 18th October, 2019 and the appeal preferred against the judgment of the Tribunal came to be dismissed by this Court by an order date 17th February, 2020 in Civil Appeal No.1438 of 2020.
- G 18. Counsel for the appellant in the first instance has tried to persuade this Court that the rate of infrastructure charges stood revised on the basis of the circular issued by the Government of India, Ministry of Finance, revising the classification of cities vide its circular dated 29th August, 2008 and that became effective from 1st September, 2008 and it
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was the reason for which the circular dated 12th June, 2012 became effective in revising the infrastructure charges for telecom service providers w.e.f. 1st April, 2009. The appellant revised the rates based on the classification of cities and such revision was permissible in relation to commercial agreements duly supported with the evidence on record.

19. Counsel for the appellant further contended that once the competence of the appellant in laying down the charges has been upheld by the Tribunal, retrospective application to the circular dated 12th June, 2012 should not have been interfered with by the Tribunal, but in the next breath, has submitted that if the retrospective applicability of the circular dated 12th June, 2012 effective from 1st April, 2009 is not sustainable, at least the appellant is within its rights to make the charges leviable after notional fixation by increase of 10% every year w.e.f. 1st April, 2009 and, to this extent, the finding of the Tribunal is not legally sustainable and deserves to be interfered with by this Court.

20. Counsel further submits that so far as the notional fixation of charges to be effective from 1st April, 2013 is concerned, in terms of circular dated 12th June, 2012, there is a provision of 10% annual increase every year w.e.f. 1st April, 2010 onwards and, in the given circumstances, even if the infrastructure charges as levied by the appellant to be charged from service providers at the revised rates applicable w.e.f. 1st April, 2009 are not chargeable because of the impugned judgment of the Tribunal still the service providers are under an obligation to pay w.e.f. 1st April, 2013 the notional increase of charges based on 10% annual increase and this was a manifest error which the Tribunal has committed in passing the judgment impugned and the same needs to be interfered with by this Court.

21. Counsel for the respondents, on the other hand, submits that the right of the appellant to revise the rate of infrastructure facilities indeed after the finding has been recorded by the Tribunal has not been questioned by the respondents in the later proceedings, but if the circular dated 12th June, 2012 could not be given retrospective effect w.e.f. 1st April, 2009, at least no notional increase of 10% every year could have been permissible to be charged from the service providers w.e.f. 1st April, 2013 and if that is being made permissible, what could not have been directly chargeable from the service providers can be indirectly charged at the rates which the appellant is entitled to claim as the infrastructure charges w.e.f. 1st April, 2013 and that was the reason the

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- A Tribunal intervened in the matter and clarified in its latter order that there shall be no notional increase of 10% every year as being indicated in the circular dated 12th June, 2012 and the appellant is under an obligation to charge the rates as applicable on 1st April, 2009 to be applied w.e.f. 1st April, 2013 without any notional increase. The circular dated 12th June, 2012 applicable prospectively w.e.f. 1st April, 2013 was to be purposively interpreted and the plea of notional increase by 10% every year in revising the rates, to be charged from 1st April, 2013 is not legally sustainable.

- 22. Counsel for the respondents, while supporting the finding recorded by the Tribunal under the impugned judgment, further submits
 - C that if what is being prayed for by the appellant is accepted by this Court, each service provider will have to bear the additional financial burden for the period for which they have not charged any additional charge from their customers and since the respondents have not charged from their customers for the previous years from 1st April, 2009 onwards,
 - D it will carry a financial burden on the service providers for which they are not at fault.

- 23. As a matter of fact, the present dispute survives regarding payment of infrastructure charges for the limited period of two years i.e. from 1st April, 2013 to 31st March, 2015.

- E 24. We have heard learned counsel for the parties and with their assistance perused the material available on record.

- F 25. That the authority of the appellant in revising the infrastructure charges for active links leased to telecom operators is not a subject matter of challenge and none of the respondents have questioned the authority of the appellant in revising the infrastructure charges for active links leased to telecom operators.

- G 26. The limited question which has been raised for our consideration is as to whether the rates prescribed by the appellant under the circular dated 12th June, 2012 could be applied retrospectively w.e.f. 1st April, 2009 or be effective from 1st April, 2013, as observed by the Tribunal and whether the appellant is entitled to claim 10% notional increase every year from 1st April, 2009 to be applicable from 1st April, 2013.

- H 27. So far as the impugned circular dated 12th June, 2012 is concerned, it stipulates that it shall be made effective from 1st April,

2009 and the rates would revise from 1st April, 2009 with 10% annual increase w.e.f. 1st April, 2010, particularly, in the circumstances when all the infrastructure and othercharges are being paid upfront every year. A

28. It is not disputed that each of the service provider has paid upfront for the previous years from 1st April, 2009 in terms of the earlier circular dated 30th May, 2006 until the circular dated 12th June, 2012 B was introduced.

29. It is a settled principle of law that it is the Union Parliament and State Legislatures that have plenary powers of legislation within the fields assigned to them, and subject to certain constitutional and judicially recognized restrictions, they can legislate prospectively as well as retrospectively. Competence to make a law for a past period on a subject depends upon present competence to legislate on that subject. By a retrospective legislation, the Legislature may make a law which is operative for a limited period prior to the date of its coming into force and is not operative either on that date or in future. C

30. The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, we are of the view that applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment. D

31. So far as the submission made by the appellant with regard to the notional increase of charges by a certain percentage every year as being referred to in the circular dated 12th June, 2012 is concerned, we have not been able to persuade ourselves with the finding recorded by the Tribunal. The reason is that the appellant might not be justified in making the circular dated 12th June, 2012 effective from 1st April, 2009, but once the competence of the appellant in fixing the rates of infrastructure charges in question stands affirmed and is not a subject matter of challenge, the appellant is well within its rights to make their E

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- A charges leviable on notional fixation by increase of charges by a certain percentage every year in terms of circular dated 12th June, 2012 from each of the service provider as being notionally applicable from 1st April, 2013. In other words, the service provider is not under an obligation to pay any additional infrastructure charges which was prescribed by the appellant under its circular dated 12th June, 2012 for the previous years,
- B effective from 1st April, 2009, but at the same point of time, it was open for the appellant to notionally fix the charges to be computed and became payable from 1st April, 2013, based on 10% annual increase every year or by any other mechanism which may have a reasonable justification. That such notionally increased charges can indeed be leviable on the
- C service providers and to this extent, the order passed by the Tribunal, in our considered view, is not sustainable in law and deserves to be set aside.

32. Consequently, the appeals stand partly allowed. The order of the Tribunal dated 20th August, 2014 followed by the order dated 14th October, 2014 are hereby modified and the appellant is at liberty to revise the notional rates based on 10% increase every year in terms of circular dated 12th June, 2012 as applicable on 1st April, 2013 and to raise its additional demand/bills based on notional increase of infrastructure charges effective as on 1st April, 2013 to the service providers/respondents herein and if the service providers/respondents fail to pay, consequences in terms of the agreements executed between the parties shall follow.
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33. Pending application(s), if any, shall stand disposed of.

Divya Pandey
(Assisted by : Bodhi Ramteke, LCRA)

Appeals partly allowed.