The Union Of India vs *1. Dishnet Wireless Ltd on 30 March, 2017

Author: Chief Justice

Bench: Chief Justice

THE HIGH COURT OF TRIPURA
AGARTALA
W.A. NO.14/2016

1. The Union of India
Represented by the Secretary
Department of Telecommunications (Access Services Cell)
Sanchar Bhawan, 20, Ashoka Road,
New Delhi - 110001.

2. Telecom Regulatory Authority of India,
represented by the Chairperson,
Mahanagar Door Sanchar Bhawan,
Jawahar Lal Nehru Marg (Old Minto Road),
New Delhi - 110002.

.... Appellant

-: Versus :-

*1. Dishnet Wireless Ltd.,
Represented by Senior General Manager, a Company
incorporated under the Companies Act, 1956 and having its
Registered Office at Spencer Plaza, 5th Floor, 769 Anna Salai,
Chennai - 600002 and having Office at Lake Chowmuhani,
Krishnanagar, Opp. Lake Chowmuhani Bazar, Agartala, Tripura
West - 799001.

..... Respondent.

*2. Cellular Operators Association of India, A society registered under the Societies Registration Act, 1860 and having its registered office at New Delhi - 110001.

..... Intervener. * BEFORE HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE S C DAS Counsel for the appellants : Mr. A Roy Barman, Advocate. Counsel for the respondent : Dr. A K Saraf, Sr. Advocate, Mr. S Chetia, Advocate, Mr. K Roy, Advocate, Mr. R Nandi, Advocate.

Counsel for the intervenor : - do -
Date of hearing : 22-2-2016.
Date of judgment & order : 15-03-2017.

JUDGMENT & ORDER

[T. Vaiphei, C.J.]

This writ appeal is preferred by the Union of India and others against the judgment dated 8-1-2016 passed by the learned Single Judge in WP(C) No.422 of 2012 holding Clause 5.1 and Clause 10.2(ii) of the license agreement executed between the respondent and the appellant and the * Inserted by the corrigendum dated 29th March, 2017.

related circulars dated 24-12-2008, 23-3-2009 and 8-2-2011 issued by the Access Services Cell, Government of India, unconstitutional and illegal.

2. To appreciate the controversy, we will straightaway proceed to the relevant facts of the case as projected by the respondent/writ petitioner in the writ petition. The respondent (Dishnet Wireless Ltd.) is a limited company incorporated under Companies Act, 1956 having its registered office at Chennai and its Branch offices all over the country. The respondent operates cellular mobile by providing GSM, mobile telephony, broadband services in several States on the basis of the license granted by the appellant No.1 under the provisions of the Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933. The petitioner also operates Commercial Company Telecom Service Provider (TSP) and is stated to have made huge investment for creating facilities to provide the best services in the relevant areas/region allotted to it. The appellant No.1 (DOT for short) is the licensor empowered to grant telecom licenses under Section 4 of the Indian Telegraph Act, 1885 ("Telegraph Act" for short), and has granted Unified Access Services Licenses to the respondent in the respective licensed service areas. The appellant No.2 is an independent regulator known as "Telecom Regulatory Authority of India" constituted under the provisions of the Telecom Regulatory Authority of India Act, 1997 ("Regulatory Act" for short) and is charged with the function of making recommendations to the Government of India regarding the terms of the Telecom Licenses.

3. Undoubtedly, the appellant No.1 (A-1) has the exclusive privilege in respect of telegraphs and the power to grant licenses. It was in exercise of this power that license was granted to the respondent. It may be noted that Petition Nos.15 of 2012, 25 of 2012 and 70 of 2012 filed by the respondent before the Telecom Disputes Settlement and Appellate Tribunal was withdrawn by the respondent as the Tribunal has no jurisdiction to adjudicate upon the constitutional validity of the impugned circulars and clauses of the license agreement in question whereupon this writ petition came to be filed before the learned Single Judge. When the said license was granted to the respondent, Clause 5.1 of the license agreement as signed by the respondent was in the following terms:

> "5.1 The LICENSOR reserves the right to modify at any time the terms and conditions of the license, if in the opinion of the licensor, if it is necessary or expedient to do so in public interest or in the interest of security of the State or for the proper conduct of the telegraphs. The decision of the licensor shall be final."

According to the respondent/writ petitioner, taking advantage of the said Clause 5.1, A-1 kept on unilaterally issuing circulars/letters amending the conditions of the licensee, which is arbitrary, unguided and does not satisfy the test of reasonableness and has no reasonable nexus with the object sought to be achieved. It is contended by the respondent that, initially, under the license

issued, there was no Clause 10.2(ii) in the license agreement, and the same was incorporated in the agreement only on 24-11- 2004. Later on i.e. on 24-11-2004, Clause 10(2)(ii) was incorporated in the license agreement by way of a circular, which reads thus:

> "The Licensor may also impose a financial penalty not exceeding `50 crores for violation of terms and conditions of license agreement. This penalty is exclusive of Liquidated Damages (LD) as prescribed in this License Agreement."

After the said clause was inserted, the circular dated 22-11-2006 was issued for subscriber/customer verification for Plan Across Nation (PAN). In the said circular, a minimum penalty of `1,000/- per violation of subscriber number verification was prescribed if any subscriber number is found to be working without proper verification. This circular directed each licensee to take re-verification of the existing subscriber on priority basis and ensure that such re-verification is completed by March 31, 2007. The letter explained that by re-verification, it means there shall be 100% check of CAF (Customer Acquisition Forms)/SAF (Subscriber Acquisition Forms), documentary proof of identity and documentary proof of address. The letter stated that it would be ensured that the subscriber information available in service provider's database matches with that of the CAF/SAF and enclosed documents. The licensee company was also instructed to cross-verify the information by calling the respective subscribers.

4. The Department of Telecommunications thereafter by the letter dated 24-12-2008 introduced the "Scheme of Financial Penalty for violation of terms and conditions of the License Agreement in respect of subscriber verification failure cases". By the said letter, the Department of Telecommunications introduced w.e.f. 1st April, 2009 a scheme of penalty for subscriber verification failure cases based on graded scales. The letter provided the scheme which can be gathered from the provisions as under:

> "(i) The graded scales are based on correct subscriber verification percentage i.e. the correct subscriber verification percentage of a service provider in any service area will be ascertained and based on this percentage, a financial penalty of corresponding amount for each detected case of unverified subscriber shall be levied on account of violation in respect of subscriber verification failures from the service provider in that service area. According to the scheme, the correct subscriber verification percentage vis-a-vis financial penalty per unverified subscriber shall be as per table below :
>
> Correct subscriber verification Amount of financial penalty percentage in a service area per unverified subscriber Above 95% Rs.1000/-
>
> | | |
> |---|---|
> | 90% - 95% | Rs.5000/- |
> | 85% - 90% | Rs.10,000/- |
> | 80% - 85% | Rs.20,000/- |
> | Below 80% | Rs.50,000/-" |

The respondent thereafter by the letter dated 08.02.2010 clarified that where forged documents are submitted by customer and originals are also forged, only FIR/police complaint shall be lodged by the service providers/distributors/franchisee as the case may be as per the Department of Telecommunications letter dated 23.03.2009 and no financial penalty shall be imposed if the process of verification has been followed. The letter stated that there should be prima facie case that the forgery has not been done by the service provider or its representatives. The letter clarified that in cases where verification process is not followed by the service providers, even if the documents are forged, penalty shall be imposed. The letter further stated that in cases where forgery is done by the distributor/franchisee, the respective service provider will lodge police complaint/FIR against distributor/ franchisee. If the service provider does not lodge FIR/complaint against distributor/franchisee or is himself involved in the forgery, the police complaint/FIR shall be lodged by the concerned TERM Cell against the service provider. The telecom service providers stated that the aforesaid levy was incorrect, wrong, unjust and unwarranted and accordingly represented before the Department of Telecommunications, Government of India on various occasions. The Apex Advisory Council for Telecom in India (APC) also represented before the Secretary, Department of Telecommunications and Chairman, Telecom Commission against the said levy and submitted the views expressed by the industry to the government. The Department of Communications thereafter by the Office Memo dated 4-11-2010 issued clarification regarding decentralization of work relating to imposition of penalty to the TERM cells. The respondent no.1, namely, the Department of Telecommunications thereafter issued clarification under No.800-20/2010-VAS dated 03.02.2011 and explained the graded penalty structure under the Scheme of Financial Penalty dated 24.12.2008. The aforesaid letter stated that penalty was to be calculated as per the rate applicable in the slab relating to the percentage of correct subscriber verification for all the failed CAFs in the audit.

5. It is also the case of the respondent/writ petitioner that the license has obligated the respondent to provide the complete list of subscribers which shall be made available by the licensee on their website, having password controlled access, so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list is to be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. Clauses 41.14 and 41.15 of the said licence further provide as under:

"41.14 The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal or hand-held subscriber terminal (where SIM card is not used) shall be registered against each subscriber for his bona fide use. The LICENSEE shall make it clear to the subscriber that the SIM card used in the user terminal registered against him is nontransferable and that he alone will be responsible for proper and bona fide personal use of the service.

> 41.15 A format would be prescribed by the LICENSOR to delineate the details of information required before enrolling a customer as a subscriber. A photo identification of subscribers shall be pre-requisite before providing the service."

6. By the circular dated 22.11.2006, the subscriber/customer verification for Plan Across Nation (PAN) was introduced. Clause-3 of that circular has saddled the licensee with further obligation for purpose of verification of the documents before activating the connections. It has further provided that the licensee company shall authorize one representation who would be directly accountable to the licensee company for that purpose. Sale of pre-activated SIM cards has been completely prohibited. By Clause-4, the following has been provided as the penal measure.

> "4. The Licensee shall also ensure that the information about the subscriber is entered in to the Licensee's database correctly based on the information in Customer Acquisition Forms (CAF)/Subscriber Acquisition Forms (SAF) and supporting documents. For this purpose, the Licensee shall nominate separate officials, who shall be responsible for the process of entry of subscriber information in the database, cross-checking of information from the database with that from each and every original CAF/SAF & documents. If any discrepancy is found at any stage, the mobile connection shall be deactivated immediately and in any case not later than 72 hours. Observations made by each nominated official for the above activities shall be kept in record for security at a later date."

In the said circular dated 22.11.2006, a very stringent measure has been provided in the form of Clause-8 which reads as under:

> "After 31st March, 2007, if any subscriber number is found working without proper verification, a minimum penalty of Rs.1000/- per violation of subscriber number verification shall be levied on the licensee apart from immediate disconnection of the subscriber number by the licensee."

7. By the aforesaid letter/circular dated 22.11.2006, the respondent was directed to take up re-verification of the existing subscribers on priority basis and ensure that such verification is completed by 31.03.2007. By the said letter, it was explained that the re-verification shall apply 100% check of CAF/SAF, documentary proof of identity and documentary proof of address. The respondent was also directed to cross verify the information ensuring subscribers' personal appearance. Further, the respondents by their letter dated 23.03.2009 bearing No.842-725/2005/175 issued instruction and clarification regarding the subscriber verification. The letter, inter alia, provides that:

> "(viii) where CAF is found non-compliant, either proper CAF should be produced within 72 hours or else the connection deactivated and in case of failure to take action, highest penalty of Rs.50,000 shall be levied on each such connection in addition to the penalty for non-compliance during subscriber verification; and (ix) time lines prescribed for adhering to requisitions from security agencies/TERM

cells."

8. By another letter dated 30.09.2009, re-verification of the subscribers was asked to be taken in all telecom circles including J&K, Assam and North-East Telecom Service Areas. By that letter, one year time w.e.f. 01.11.2009 was provided for that purpose. In para (vi) of the said letter dated 30.09.2009, it has been further clarified that during the window period of one year, CAFs which have been re-verified, scanned, uploaded and indicated in the monthly subscriber data-base before the monthly subscriber verification audit by TERM cells shall not attract penalty if found correct during the audit. Service providers can continue re-verification even after the window period of one year but the re-verification forms would not be exempted from the imposition of penalty during the respective audit by TERM cells. The telecom service provider had represented their grievances in respect of levy of financial penalty for violation of terms and conditions of the license agreement. They had categorically complained that the service providers were never consulted about such clause. They had requested the Department of Telecommunication (DoT) to reconsider the amount of penalty and to reduce the same from `50,000/- to `1000/-. By a further letter dated 04.11.2010, clarifications have been made relating to imposition of penalty to the TERM cells. On 03.02.2011 by another letter, the DoT explained the graded penalty structure under the scheme of financial penalty dated 24.12.2008. For the purpose of reference, the example that has been provided in the letter dated 03.02.2011 is reproduced hereunder:

> "For example, if the sample size of the CAF Audit for a month is 1000 and the number of complaint cases is 870, then the CAF audit compliance shall be 87%. The penalty slab applicable as per the letter dated 24.12.2008 for all failure cases shall be @ Rs.10,000. The total penalty shall be calculated after multiplying the total no. of failed cases i.e. 130 with the applicable penalty i.e. Rs.10,000. Thus the total penalty imposed for the CAF audit shall be 130 X 10000 i.e. Rs.13,00,000."

9. As already noticed, the respondent/writ petitioner had challenged the said circulars introducing the scheme of imposition of penalty along with Association of the Operators before the TDSAT in No.252 of 2011. The TDSAT by its order dated 12-4-2012 partly allowed the petitions but on the ground of interpretation of the said circular dated 3-2-2011, but refused to decide the constitutional validity of the said circulars. At this stage, it may be noted that a penalty of `339,59,750,00/- was imposed upon the respondent/writ petitioner for the North East Service area and for Assam Area for the period commencing from April, 2007 to January, 2012. As there was no equally efficacious remedy to challenge the constitutional validity of the said circulars and some of the clauses of the license agreement, the instant writ petition was filed for quashing the said circulars and clauses of the license agreement and the demand notices issued in connection therewith and for restraining A-1 from imposing any penalty upon the respondent on the basis of the impugned circulars. It was submitted by the respondent that the impugned circulars/letters are not only unjust, unfair, unreasonable but also ultra vires the statutory provisions and are in conflict with the doctrine of proportionality. It was submitted that such actions of the appellants infringe the rights of the respondents guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution of India. The respondent also questioned therein the constitutional validity of Clauses 5.1 and 10(2)(ii) of the license agreement dated 12-5-2004 on the ground that they are ultra vires the provisions of Section

20-A and 23 of the Contract Act.

10. The appellants contested the writ petition and filed their counter affidavit and contended that the impugned circulars have been issued by the DoT in the interest of national security. The appellants are well authorized by the Clause 41.14 of the license agreement whereby the licensee has been obligated to maintain the complete list of subscribers in their website having password controlled access and to update the said list on regular basis so that at any point of time, the hard copy on requisition can be furnished to the security agencies. Non-verification of a customer may endanger the security of the nation. The appellants also asserted that in terms of the direction of the Apex Court, the revised customers verification guidelines were submitted before the Apex Court and later on in supersession of the impugned circulars dated 08.02.2010, 23.03.2009, the circulars dated 22.11.2006, 10.05.2005, 30.11.2004, 26.04.2004, the guidelines dated 14.03.2011 was issued and that had been accepted by the Apex Court in the said judgment dated 27.04.2012. The appellants have further submitted that the said guidelines dated 14.03.2011 also contains various provisions to combat violation of the verification guidelines by the telecom service providers. In para-13 of the counter affidavit the respondents have categorically asserted as under:

> "13. It is also respectfully submitted that at least 2 circulars impugned by the petitioner i.e. circular dated 23.03.2009 and 08.02.2010 have already superseded by the Department of Telecom by the circular dated 14.03.2011 which has been issued on 09.08.2012 after acceptance of the same by the Hon'ble Supreme Court in the judgment dated 27.04.2012. The copy of the Hon'ble Supreme Court judgment dated 27.04.2012 and the instructions dated 09.08.2012 issued in compliance to this judgment are enclosed as Annexure-1 & Annexure-2."

11. The appellants have also stated that Section 4 of Indian Telegraph Act, 1885 confers exclusive privilege upon the Central Government to grant licenses on such conditions and in consideration of such payment as it thinks fit. The license agreement was executed on 12.05.2004 and after eight years of the execution of the agreement, the respondent cannot be permitted to challenge the clauses of the said agreement; they are now estopped from challenging those clauses. They have sought to repel the contention that clause 10(2)(ii) of the license agreement is in violation of Section 20A of the Indian Telegraph Act. According to them, this provision relates to criminal proceedings. Penalty and fine are conceptually different; they cannot be equated. Similar challenge was also made by Reliance Infocom Limited but their challenge was repelled by TDSAT. The judgment dated 04.03.2005 by the TDSAT was challenged in the Apex Court, but the same was later on withdrawn. In para-20 of the said counter affidavit, the appellants have submitted that the respondent along with other service providers had filed a petition being No.252/2011 before the TDSAT challenging various circulars including the circulars dated 24.12.2008, 23.03.2009, 08.02.2010 and 03.02.2011 and the show cause notice demanding penalty. TDSAT decided the said petition by their judgment dated 12.04.2011. Against the said judgment, appeal lies before the Apex Court but no appeal has been preferred by the respondent or other co- petitioners; the respondent cannot challenge again the circulars which were challenged before the TDSAT. The appellants have also asserted that having accepted the terms and conditions of the license, the respondent/writ petitioner cannot challenge the clauses of the said license. In this regard they had referred to a decision of the Apex

Court in Union of India & another vs. Association of Unified Telecom Service Providers of India and Ors., (2011) 11 SCC 543.

12. Later on, the respondent, by way of an additional affidavit dated 28.01.2013, filed a consolidated reply incorporating some additional pleas, such as, incorporation of additional clause in the license agreement is permissible in terms of clause 5.1 of the license agreement, to which the respondents had constructive knowledge and having been satisfied thereto, they had signed the said agreement. On 20.11.2015, by leave of this court the appellant No.1 in particular has raised the question of maintainability of the writ petition having regard to clause 16.2 of the general conditions of the license agreement. The said clause provides that all disputes relating to this license will be subject to jurisdiction of Telecom Settlement and Appellate Tribunal (TDSAT) as per provision of TRAI Act, 1997 and the 'disputes' would naturally include the disputes from amendment or modification. The said appellate tribunal has been constituted for discharging the functions assigned to it under Section 14 of the TRAI Act, 1997. In para-17 of the said additional affidavit the respondent No.1 has asserted further as under:

> "17. That, the territorial jurisdiction of the Court and cause of action are interlinked and to decide the question of territorial jurisdiction it is necessary to find out the place where the "cause of action" arose. In the instant writ petition the license agreement dated 12th May, 2004, circular dated 24.12.2008, 23.03.2009, 08.02.2010 and circular dated 03.02.2011 were issued by the Respondent at New Delhi and as such this wit petition is not maintainable at Agartala in the High Court of Tripura."

13. In the paragraph 4, 6 and 7, the appellants asserted that even the respondent has no operational office within the territorial jurisdiction of this Court. In para-9 of the said additional affidavit, A-1 has stated that the licensor had not received any intimation about the opening of the respondent's office at Agartala, Tripura. In reply, the respondent has categorically stated that in Association of Unified Telecom Service Providers of India (supra), the Apex Court has held that the tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license agreement of a service provider. The tribunal has the jurisdiction to decide the dispute between the licensor and the licensee on the interpretation of the license agreement. The respondent has also annexed one communication of the Department of Telecommunication dated 02.05.2011 addressed to the appellants showing its existing location at Agartala, Annexure-I to the reply dated 01.12.2015. These are the pleadings of the appellants and the respondent.

14. Assailing the impugned judgment, Mr. A. Roy Barman, the learned CGC, reiterates his submissions before the learned Single Judge by submitting that no cause of action for this writ petition has arisen within the territorial jurisdiction of this High Court. At least, there is no such assertion in the writ petition. He also vehemently submits that Clause (2) of Article 226 of the Constitution of India provides that the power conferred by Clause (1) of Article 226 of the Constitution of India to issue directions/orders or writs to any Government, authority or persons may be exercised by any High Court exercising jurisdiction in relation to the territories within which cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat

of such Government or authority or the residence of such person is not within those territories. It is the contention of the learned CGC that after signing the license agreement which contains the clauses as noted under, the respondent cannot raise the question of validity of the license agreement. He draws our attention to Clause 16.1 of the license agreement, which is in the following terms:

> "16.1 The LICENSEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI."

15. According to the learned CGC, the impugned circulars dated 24.12.2008, 23.03.2009, 08.02.2010 and 03.02.2011 have been issued in exercise of the authority created by the license agreement dated 12.05.2004 and the respondent is under obligation to act in accordance with those circulars. The learned CGC has further submitted that under Clause 41.14 and Clause 41.15, the obligation of verification of the service provider has been clearly stipulated, but there is no challenge to those provisions. The learned CGC has placed reliance on a few decisions of the Apex Court to contend that the respondent is estopped from raising any challenge, so raised in this writ petition inasmuch as a person cannot be permitted to approbate and reprobate at the same time (Pradeep Oil Corporation vs. MCD reported in (2011) 5 SCC 270). Moreover, the respondent had accepted without demur the terms and conditions of the license agreement and it, having taken the benefits extended under the license, should not be allowed to question the validity thereof. To fortify his submissions, he takes us to the decision of the Apex Court in Union of India vs. Association of Unified Telecom Service Providers of India, (2011) 10 SCC 543. The learned CGC has placed reliance on Cauvery Coffee Traders vs. Hornor Resources (Internatinal) Co. Ltd. reported in (2011)10 SCC 420, where a party took advantage of the benefits of an agreement and for that reason, he was not permitted to question the validity.

16. Finally, the learned CGC has submitted that the circular containing the penalty was placed before the Apex Court, which gave its approval in Writ Petition (Civil) No.285 of 2010 in the matter of Abhishek Goenka vs. Union of India and anr.) which was disposed by the judgment dated 27.04.2012; this Court may not like to reopen the said aspect of the matter. In addition, the learned CGC has submitted that by not challenging the judgment dated 12.04.2012 delivered in the petition No.252 of 2011 by the TDSAT, the respondent is debarred from raising the issues which had been decided by the said judgment. TDSAT has held that the writ petitioners cannot be permitted to question those circulars/letters which have been acted upon and in respect thereof undertakings were made. It has been further contended that the appellant cannot be said acted illegally and without jurisdiction in delegating its powers relating to verification/inspection, imposition of penalties, making provisions for determination thereof by the authorities of the Term Cell by the appellate authority. It has been held that each individual case of imposition of penalty is required to be considered on the factual matrix involved therein and the rate of penalty to be assessed separately.

17. After hearing the learned counsel appearing for the rival parties, the learned Single Judge had formulated the following points for consideration:

> 1. Whether this court has got territorial jurisdiction?
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> 2. Whether Clause 5.1 of the license agreement is in conflict with of Articles 14, 19(1)(g) and 21 of the Constitution?
>
> 3. Whether Clause 10.2(ii) of the licence agreement is in conflict with Section 20A of the Indian Telegraph Act, 1885 and Section 74 of the Indian Contract Act and whether in view of provisions of Section 23 of the Indian Contract Act the said Clause 10.2(ii) of the licence agreement is liable to be struck down?
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> 4. Whether the petitioner is estopped to challenge the validity of Clause 5.1 and 10.2(ii) of the licence agreement or whether the petitioner by conduct has waived the right to challenge the validity of those clauses or circulars? Whether this court has got the territorial jurisdiction?

18. Before proceeding further, we may briefly note the findings of the learned Single Judge on the above points formulated by him. His findings with respect to the territorial jurisdiction of this Court to entertain the writ petition and the non-maintainability of the writ petition on the ground of res judicata are as follows:

> "[29] From the averments it has been established that the threat of suffering injury is prevalent or arises within the territorial jurisdiction of this court. The petitioner apprehends injury or prejudice for exercise of unfettered power provided under clause 5.1. The financial penalty clause incorporated for breach of terms and conditions, in exclusion of liquidated damages (LD) has initially threatened of the penal action. Later on, by the impugned circulars, the apprehension of the petitioner to a greater extent became real. The scheme for financial penalty for violation of terms and conditions of the licence agreement in respect of subscribers' verification failure cases has been introduced by the impugned letter dated 24.12.2008 w.e.f. 01.04.2009. Moreover, the respondents (the appellants herein) have not controverted existence of operational office of the petitioner at Agartala. Even, a communication of the Department of Telecommunication, Annexure-I as stated, had been sent to the said operation office at Agartala and as such, this Court is of the view that the writ petition does not suffer from lack of territorial jurisdiction."

(Underlined for emphasis)

19. In our opinion, the view taken by the learned Single Judge that the cause of action partly arose in Agartala does not suffer from any infirmity. The law is now well-settled that for the purpose of deciding whether the facts averred by the petitioner would or would not constitute a part of the cause of action, one has to consider whether such fact constitutes a material, essential or integral

part of the cause of action. Of course, even if a small fraction of the cause of action arises within the territorial jurisdiction of the court, the court would have the jurisdiction to entertain the writ petition. The position has been, with due respect, succinctly explained by the Apex Court in Union of India & others v. Adani Exports Ltd., (2002) 1 SCC 567 on the following facts: (i) A was carrying on business at Ahmedabad; (ii) orders were placed from and executed at Ahmedabad; (iii) documents were sent and payment was made at Ahmedabad; (iv) credit of duty was claimed for export handled from Ahmedabad; (v) denial of benefit adversely affected the petitioner at Ahmedabad; (vi) A had furnished bank guarantee and executed a bond at Ahmedabad, etc. This is what the Apex Court said:

> "17. It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition, in our opinion, falls into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad."

(Underlined for emphasis)

20. In the instant case, it could really be said that the facts pleaded by the respondent in challenging the impugned actions as well as the decisions of the appellant authorities do have material bearing on the dispute involved in the case and that the averments so made in the writ petition, unlike in Adani Exports Ltd. case (supra), give rise to at least a small fraction of the cause of action within the jurisdiction of this Court. Consequently, we have no hesitation to hold that this Court has the territorial jurisdiction to entertain the writ petition.

21. On the question as to whether the writ petition is barred by the principle of res judicata, the learned Single Judge held in the same paragraph as under:

> "..... The other limb of the question of maintainability rests on the judgment and order dated 04.03.2005 delivered in petition No.252/2011 by the TDSAT. Indisputably, the petition was filed challenging the various circulars including the circulars dated 24.12.2008, 23.03.2009, 08.02.2010 and 03.02.2011. Since that judgment has not been challenged by way of an appeal in the Apex Court and the judgment has reached its finality, it has been strongly contended by the respondents that the petitioner should not be allowed to agitate against those circulars,

consequential to the challenge to the validity of the clauses 5.1 and 10(2)(ii) of the license agreement. In this regard, the other question which has been brought within the pale of the challenge is that after accepting the terms and conditions of the license, the writ petitioner cannot be allowed to challenge the clauses of the said license for the reason that the license was executed on 12.05.2004, whereas the writ petition has been filed on 03.09.2012. Whether the principle of res judicata would apply against the petitioner, the answer must be in the negative inasmuch as in Union of India Vs. Association of Unified Telecom Service Providers of India the Apex Court has held in unequivocal term that the TDSAT has no jurisdiction to decide upon the validity of the terms of conditions incorporated in the license but it will have jurisdiction to decide any dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license. It has been further held by the apex court that while the tribunal has no jurisdiction to decide on the validity of the terms and condition of the license, its decision on validity of the terms and conditions of the license or on the consequential relief arising therefrom is without jurisdiction and is nullity. Principle of res judicata cannot apply. Hence, the judgment dated 04.03.2005 cannot operate as the res judicata against the petitioner for filing this writ petition challenging the clauses 5.1 and 10(2)(ii) of the license agreement."

22. In our opinion, the above findings of the learned Single Judge also do not call for our interference. The view taken by the learned Single Judge is a possible view and such view cannot, in an intra court appeal, be interfered with by us on the ground that there could some other view which could be a better view. When the Apex Court has already decided that the TDSAT does not have the jurisdiction to decide the constitutional validity of the impugned clauses of the license agreement and circulars, we are at a loss to understand as to how such issue could be said to have been heard and finally decided by the Tribunal, which has no jurisdiction at all to decide the same. On the question as to whether the writ petitioner is estopped from challenging the terms and conditions of Clause 5.1 and Clause 10(2)(ii) of the license agreement as well as the impugned circulars/letters including the Scheme of Financial Penalty dated 14-12- 2008, the learned Single Judge held that inasmuch as the contentions of the respondent relate to challenge against the constitutional and statutory provisions and against public policy, the doctrine of estoppel cannot apply. This decision cannot also be disturbed by us inasmuch as there can be no estoppel against a statute or Constitution.

23. This then takes us to the meat of the matter, namely, whether Clause 5.1 of the license agreement is in conflict with Article 14, 19(1)(g) of the Constitution. Clause 5.1 of the license reserves to A-1 the power to modify at any time the terms and conditions of the license in public interest or in the interest of security of the State or for proper conduct of the telegraphs. Thus, a stamp of finality is accorded to the decision of A-1 thereby making such decision binding upon the licensee. It may be noted that the license agreement was executed between the appellants and the respondent under Section 4 of the Indian Telegraph Act, and is, therefore, a statutory contract. It is by now a settled position of law that a license granted under Section 4(1) of the Telegraph Act is a contract between the licensor and the licensee. The provisions of Section 4 of the Telegraph Act are in the following terms:

"4. Exclusive privilege in respect of telegraphs, and power to grant licences.-- (1) Within India], the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain, or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working--

(a) of wireless telegraphs on ships within Indian territorial waters and on aircrafts within or above India, or Indian territorial waters, and

(b) of telegraphs other than wireless telegraphs within any part of India.

Explanation.-- The payments made for the grant of a licence under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under sub-section (1) of Section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997).

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose."

24. The width and amplitude of this exclusive privilege and power vested with the Central Government by Section 4 of the Act have been explained by the Apex Court in Bharati Airtel Ltd. v. Union of India, (2015) 12 SCC 1 in the following manner:

"39. However, the licensor being the Union of India, its discretion to stipulate terms and conditions is regulated by certain constitutional mandates apart from stipulations of any law applicable.

40. Insofar as the constitutional mandates in the context of a license under Section 4 of the Telegraph Act are concerned, this Court in 2G Case1 at para 85 held as follows:

"85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State

> vis-à-vis its Centre for Public Interest Litigation v. UOI, (2012) 3 SCC 1 people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties."

(emphasis in original)

41. The licensor/Union of India does not have the freedom to act whimsically. As pointed out by this Court in 2G Case in the above- extracted paragraph, the authority of the Union is fettered by two constitutional limitations: firstly, that any decision of the State to grant access to natural resources, which belong to the people, must ensure that the people are adequately compensated and, secondly, the process by which such access is granted must be just, non- arbitrary and transparent, vis-à-vis private parties seeking such access.

42. By a statutory declaration made under Section 4 of the Indian Telegraph Act, 1885, it is declared that the Government of India shall have the exclusive "privilege for establishing, maintaining and working telegraphs" (which includes telephones). The proviso to Section 4 of the said Act authorizes the Government of India to grant license to establish, maintain and work telegraphs (which includes telephones) "on such conditions and in consideration of such payments" as it thinks fit. Telephones include both wired and wireless telephones like cellular mobile phones, the establishment and working of which necessarily requires access to spectrum which again is controlled by the Government of India as it is already declared to be a natural resource by this Court. It can thus, be seen that no person other than the Government of India has any right to establish, maintain and work telephones. It is the exclusive privilege of the Government of India, which could be permitted to be exercised by others by a grant from the Government of India.

43. In other words, such licenses are in the nature of largesse from the State. No doubt, the authority of the State to distribute such largess is always subject to the condition that the State must comply with the conditions of Article 14 of the Constitution i.e. the distribution must be on the basis of some rational policy. Even the language of the proviso to Section 4 of the Telegraph Act, which stipulates that the grant of license should be "on such conditions and in consideration of such payments as it thinks fit", must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of license must be non-discriminatory. The conditions contained in the licenses in question stipulate that the term of the license could be extended on mutually agreed terms, if the Government of India deems it expedient. The obligations of the Government of India flowing from the Constitution as well as a statute necessarily require the Government of India to grant licenses as rightly pointed by the Tribunal (TDSAT) only "in public interest and for public good".

44. This Court in 2G Case after elaborate discussion on the nature of the State's authority to deal with the natural resources held that:

> "77. Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to the States as per international norms."

45. While recognizing the power of the State to distribute natural resources, this Court held that the State is bound to "act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest". (2G Case, SCC p. 53, para 75)

46. In para 89, the Court concluded as follows: (2G Case, SCC p.

58) "89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."

47. This Court further held:

> "95. ... the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property ... it is the burden of the State to ensure that a non- discriminatory method is adopted for distribution and alienation, which would necessarily result in national/public interest."

This Court opined that a "duly publicized auction conducted fairly and impartially is perhaps the best method for discharging the burden of the State to ensure protection of public interest".

48. The conditions of licenses/contracts in whatever language provided for consideration for the extension of a license are necessarily required to be interpreted in consonance with the obligation of the licensor/Union of India under the Constitution and the laws. Otherwise, the contract would be rendered void for being inconsistent with public policy, the principle expressly incorporated under Section 23 of the Contract Act, 1872."

25. Before proceeding further, it may relevant to reproduce below the findings of the learned Single Judge in this behalf:

> "In this case, Section 4 of the Indian Telegraph Act, 1885 has not been challenged. Section 4 has unequivocally granted 'exclusive privilege' and the power to grant a license on such conditions and in consideration of payment as it thinks fit, to any person to establish, maintain or work a telegraph within a part of India. When the statutory source provides unfettered power without any guidance though the central Government has been provided with power to frame rules for operation of this Section but there is no rule in this regard or to provide guidance, restriction, control or check in exercise of that power. As Clause 5.1 has been structured in congruity with the provisions of Section 4 of the Indian Telegraph Act it would not be apposite to

> hold it ultra vires inasmuch as the attempt of the court should be to preserve and not to destroy the statutory provisions, in this case, which is not even under challenge. The presumption of the constitutionality in such circumstances demands so. Even a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction. The doctrine of reading down is one of such judicial innovations. A just respect for the legislature requires that obligation of its laws should not be unnecessarily and wantonly assailed. There cannot be any amount of debate that often it is practically useless to lodge power in a public functionary without giving him a large measure of discretion for the situation which might arise in public affairs which are multifarious and very often unpredictable and unforeseen. This is particularly so when a volatile technology of communication is handled with. The security vulnerability has to be kept under closewatch. A potential danger always exists while wide discretionary power is invested with a person or authority, as it might be abused or exercised in a discriminatory manner. However, much the legislature might try to hedge the power with safeguards or effective mechanism of redressal from the abuse of power, it essentially forms a question of striking the balance by way of effectively hedging the potential excess. As stated, this Court cannot take a view by declaring Clause 5.1 of the license agreement ultra vires or opposed to the public policy. As the license agreement is essentially within the domain of contract, before exercising the authority as provided by Clause 5.1 of the license agreement for amendment, expansion/addition, modification, alteration etc. after the license agreement had come into being on acceptance by the licensee, there must be effective 'communication' and 'acceptance' within the meaning of Section 3 of the Indian Contract Act when liquidating the damage. Without observing such requisite exercise, the licence agreement would be void and inoperative, despite such power is available in Clause 5.1 of the license agreement. [*Willis, "constitutional Law" pp. 586-87]"

26. Assailing the above findings of the learned Single Judge, the learned CGC, appearing for the appellants, contends that the learned Single Judge has failed to appreciate that UAS license is not a contract in its ordinary sense, but rather a privilege granted to the licensee on certain conditions for establishing, maintaining and working telecommunications in this Country in terms of Section 4 of the Telegraph Act whereunder the Central Government is empowered to put any conditions as it deems fit by parting away its exclusive privilege. Moreover, argues the learned CGC, assuming without admitting that the license agreement is a normal contract, and not a statutory contract also, the respondent signed the agreement containing Clause 5.1 therein with its eyes wide open unequivocally and unconditionally; it should not have signed such an agreement if the same is found to be onerous, burdensome and unfair or else should have surrendered the license. According to the learned CGC, the licensee, being a company with legal expertise, would have the occasion to go through the license agreement before signing it and cannot, therefore, at this point of time, question the constitutionality of Clause 5.1 of the license agreement. It is the contention of the learned CGC that there is absolutely no ambiguity in Clause 5.1, which could not have been misunderstood by the respondent so as to claim subsequently that the impugned clause is arbitrary, onerous and unfair. In our considered view, in the light of the decision of the Apex Court in Bharti Airtel Ltd. case (supra)

that as the license issued to the respondent is in the nature of largesse of the State, such largesse is always issued subject to the condition that the State must comply with Article 14 of the Constitution i.e. distribution must be on the basis of some rational policy and that all the conditions of the license in whatever language provided for the performance of the agreement must be interpreted in consonance with the obligation of the licensor/Central Government under the Constitution of India and the laws. Otherwise, the contract would be rendered void for being inconsistent with public policy, the principle expressly incorporated under Section 23 of the Contract Act, 1872. In this view of the matter, we do not find any infirmity in the aforesaid findings of the learned Single Judge. All we said is that the provision of Clause 5.1 of the license agreement does not confer unfettered, unbridled and unguided power/right upon the licensor to do whatever it chooses to do but such provision should be read down so as to subordinate the exercise of such power/right to the requirements of Article 14 of the Constitution and the law of contract. Sixty-seventy years ago, the argument of the learned CGC might have prevailed, but not so after the coming into force of the Constitution of India. There is no longer such thing as prerogative, privilege or arbitrary power unregulated by Article 14 of the Constitution. However, we make it clear that having the power is one thing, but the exercise of such power is an entirely different transaction and that the possibility of its abuse or misuse cannot be a ground to strike down a particular clause when it can be read down wherever necessary. Courts should not be too trigger happy to shoot down any clause on the ground of its possible misuse/abuse in future.

27. This then takes us to the other contentious issue raised by the learned CGC in attacking the findings of the learned Single Judge over the question as to whether Clause 10.2(ii) of the license agreement is in conflict with Section 20A of the India Telegraph Act, 1885 and Section 74 of the Indian Contract Act and whether in view of provisions of Section 23 of the Indian Contract Act, the said Clause 10.2(ii) of the license agreement is liable to be struck down? At this stage, it may be noted that the respondent had contended that Clause 10.2(ii) was originally not a part of the license agreement executed by the parties and the same was incorporated in the license agreement by way of a circular dated 24-1-2004, but this is not borne out by the record of this case. Anyway, Clause 10.2.(ii) reads thus:

> "The Licensor may also impose a financial penalty not exceeding `50 crores for violation of terms and conditions of license agreement. This penalty is exclusive of Liquidated Damages (LD) as prescribed in this License Agreement."

28. It would appear that this clause seems to provide unfettered right upon the licensor to impose financial penalty to the extent of `50 crores for violation of the terms and conditions of the license. This penalty is apparently exclusive of the liquidated damage contemplated in the license agreement. As already noticed elsewhere, under this scheme, penalty of corresponding amount for each detected unverified case has been prescribed in a graded manner by providing a table therein the scheme which has been reproduced elsewhere in this judgment. By applying the scheme, the respondent has been slapped with a financial penalty to the order of `339,59,7500/- for the North East Service area and for Assam area for the period commencing from April to January, 2012. This prompted the respondent to challenge Clause 10.2(ii) by contending that the circulars/letters dated 24-12-2008, 23-3-2009, 28-2-2010 and 3-2-2011, which were issued in terms of Clause 10.2.(ii) of

the license agreement, are unjust, unfair, unreasonable and ultra vires the provision of Section 20-A of the Contract Act, against public policy and are in conflict with the doctrine of proportionality. Mr. Dr. AK Saraf, the learned senior counsel maintains that when there is already a provision under Clause 35 of the license agreement for payment of liquidated damage for breach of contract and when there is also a provision in Clause 35.2 for terminating the license in the event of the failure of the licensee to pay to liquidated damage for more than 52 week and also when there is a provision under Clause 10 for suspension, termination or revocation of license for violation of the terms and conditions of the license agreement, the prescription of penalty under Clause 10.2.(ii) is illegal and cannot be sustained in law. The findings of the learned Single Judge on this issue are as follows:

> "85. ..... In view of BSNL vs. Reliance Communication Ltd. the dominant test is "pre-estimate of reasonable compensation". If there is pre-estimate of reasonable compensation, Section 74 of the Indian Contract Act is not violated but if there is no pre-estimate of reasonable compensation, Section 74 of the Indian Contract Act is violated and as such the clause cannot be treated for liquidated damages and such clause is bound to be treated as penalty for ensuring performance. Such penal clause cannot be enforced and hence such clause would be in conflict with the provisions of Section 23 having opposed to the public policy which term has been put to a definite meaning in ONGC Ltd. vs. Saw Pipes Ltd. It can be stated that concept of public policy concerns public good and public interest. If any provision is patently illegal, that is opposed to the public policy meaning that any clause in an agreement or the agreement as a whole could be declared unenforceable or void, if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. That apart, in Fateh Chand vs. Bal Kisen Das it has been unambiguously held that the aggrieved party is entitled to receive compensation from the party who commits the breach of the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of actual loss of damage. It does not justify the award of compensation when in consequences of the breach, no legal injury at all has been resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things or which the party knew when they made the contract, to be likely to result from the breach. This proposition is the reflection of the doctrine of proportionality. There cannot be any doubt or dispute keeping in view the decision in Regina (Daly) v. Secretary of State for the Home Department reported in [2001] 2 WLR 1622 that in regard to the cases involving common law constitutional rights, the doctrine of proportionality must be applied. The other limb of the argument on the challenge to the validity of clause 10.2(ii) and the financial penalty scheme is that those are opposed to the provisions of Section 20A of the Indian Telegraph Act which provides for breach of conditions of licence. Section 20A, as provided statutorily, cannot be challenged on the touchstone of Section 73 and 74 of the Indian Contract Act. The penal consequences as provided by clause 10(2)(ii) and the financial penalty clause are in conflict with Sections 73 and 74 of the Indian Contract Act and provisions of Section 20A of the Indian Telegraph Act and hence the said clause and provisions are

un-enforceable and void in view of Section 23 of the Indian Contract Act. But the respondents may reframe the said clause by way of addition or modification or alteration in the mode of amendment or issue instruction in conformity with the provisions of Section 4 of the Indian Telegraph Act, 1885 by "pre-estimate of reasonable compensation" for breach of the licence agreement or at their option they may deal with the breach in terms of Section 20A of Indian Telegraph Act. This Court categorically holds that Clause 10(2)(ii) of the licence agreement and the financial penalty scheme as introduced by the impugned communication dated 14.12.2008, Annexure-3 to the writ petition and the clarification dated 03.02.2011 (Annexure-9 to the writ petition) are not within the meaning and import of liquidated damages and those are clearly penalty which fail to pass through the test of pre-estimate of reasonable compensation. That apart, this scheme or the clause 10.2(ii) of the licence agreement stands opposed to Section 20A of the Indian Telegraph Act and the public policy in the manner as aforesaid. Above all, while incorporating the Clause 10(2)(ii), the requisite compliance as stated for invoking the authority as provided under clause 5.1 is conspicuous by absence. Such requisite exercise in incorporating the financial penalty clause would render the very clause or provision by letters/communication unenforceable. The cumulative result of such observations is that those communications dated 24.12.2008, Annexure-3 to the writ petition and 03.02.2011, Annexure-9 to the writ petition, cannot be enforced and hence those are treated void and inoperative. To recapitulate, the Government of India as the licensing authority under Section 4 of the Indian Telegraph Act would be within its competence notwithstanding this judgment to incorporate additional clause liquidating the damages that may occur for breach of instructions dated 10.05.2005, 04.06.2007, 30.04.2008, Annexure-1A to the writ petition. It is to be further clarified that the instruction dated 22.11.2006 is a composite instruction containing instruction in respect of verification of the subscribers and penal clause which provides that after 31.03.2007 if any subscriber's number is found working without proper verification a minimum penalty of `1000/- per violation of subscriber verification number shall be levied on the licensee. That instruction dated 22.11.2006 is not entirely interfered with but the financial penalty as prescribed is declared unenforceable and void, subject to the leave as granted to the licensor. However, the latter part containing immediate disconnection of the subscriber number by the licensee is not interfered with, keeping an eye on the internal security of the country. For the same reason, the impugned circulars/instructions for re-verification of the subscribers' identity on the basis of prescribed papers/documents are not interfered with. Since the financial penalty clause which emanated from Clause 10(2)(ii) has been interfered with, the procedure as laid down to be observed by the Term Cell has become inoperative till such time the Central Government takes appropriate measures having due regard to the observations made in this judgment. The Central Government may take appropriate measure, if they are so inclined to, within a period of six months from today. The Central Government shall remain within its competence to recover the damages if those are liquidated in the new measure for breach of instruction as to verification of identify of subscribers, treating the same as breach of term or

> condition of the licence agreement subject to compliance of the requisite of communication and acceptance. Since this Court has interfered with the financial penalty clause and instruction, the cause for realising liquidated damage shall be treated to have arisen from the date when the new measure would be notified, if at all, by the Central Government. It is further clarified that all consequential instructions emanating from the financial penalty clause i.e. Clause 10.2(ii) of the licence agreement shall stand inoperative but with severability, meaning without any effect on the content in respect of verification of the subscribers' identity in the manner as prescribed by the Central Government."

29. In our opinion, the learned Single Judge has misdirected himself in confining himself to the issue of liquidated damage and penalty, which is not the issue raised in the writ petition. The wrong question should not be asked to get the right answer. Ask the right question, you will never get the wrong answer. In the instant case, the first question to be considered is whether the impugned circulars have the effect of unilaterally altering the terms and conditions of the license agreement by the appellants? If the answer is in the affirmative, naturally, the impugned circulars shall have to go. However, before proceeding further, it may be noticed that the writ petition does not challenge the legality of Clause 16.1 of the license agreement, which has been reproduced earlier. By means of this clause, the licensee, i.e. the respondent has bound itself by the terms and conditions of the license agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act as amended from time to time and of the instructions as are issued by the licensor/TRAI. By Clause 10.2(ii), as already noticed, the licensor is given the discretion to impose a financial penalty not exceeding 50 crores for violation of the terms and conditions of license agreement. This penalty is exclusive of liquidated damage damages as prescribed under cause 35 of the license agreement. In our opinion, Clause 5.1, Clause 10.2(ii) read with Clause 16.1 of the license agreement have been accepted by the appellants and the respondent, and the contract was entered into by them after reaching a consensus with the clear understanding that (i) the appellant reserves the right to modify at any time the terms and conditions of the license, if, in its opinion, it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the telegraphs, which decision is to be final and binding upon the licensee; (ii) a discretion is conferred upon the appellants to impose financial penalty not exceeding `50 crores for violation of the terms and conditions of the license agreement, which penalty should be exclusive of liquidated damages as prescribed under clause 35 of the license agreement; (iii) the respondent has agreed to abide by the terms and conditions of the license agreement as well as by such orders/directions/regulations of the TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the appellants. The respondent, being a company with legal expertise, must have adequate time to peruse the said license agreement before signing it and chose to sign it with their eyes wide open and knowing fully well the full implications of the terms and conditions of the agreement. In our judgment, they should not be allowed to resile from the agreement at this stage and challenge the legality of the license agreement. This is usually the modus operandi adopted by big business to first sign the contract fully aware of all the implications and complications involved therein, grab maximum benefits available under the scheme and thence try to find fault with the contract and challenge the validity of thereof by inventing one hundred and one reasons. This cannot be permitted. This reminds of the observations of the Apex Court in Air India Ltd. v. Cochin

International Airport Ltd., (2000) 2 SCC 617. Though that decision was rendered in the context of the award of tender, the underlying principle therein should be kept in mind by Courts. This is what the Apex Court said:

> "..... The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

30. It is, however, argued on behalf of the respondent that the impugned conditions of license in the agreement by the Government with private persons on the basis of its standard terms and conditions are unreasonable, unfair and irrational and is the result of their unequal bargaining power; it had to sign on the dotted line and in a dotted line contract, there would be no occasion for a weaker party to bargain as it has to accept or leave the dotted line. It is true that where an unfair and untenable, or irrational clause in a contract, is also unjust, the same is certainly amenable to judicial review. Thus, it may be necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract, that has been entered into by the parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such condition or provision becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the simple reason that freedom of contract must be founded on the basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule. Consent or consensus ad idem as regards the weaker party may, therefore, be absent. Thus, the existence of equal bargaining power between parties becomes largely an illusion. This principle is more easily applicable in the case of termination of service where the bargaining power of the employer is much greater. However, the instant case is one where it can be reasonably said that the bargaining power between the contracting parties is, to our mind, almost equal, if not equal. In this context, we may profitably quote the observations of the Apex Court in Mary v. State of Kerala & others, (2014) 14 SCC 272, which reads thus:

> "24. We have given our most anxious consideration to the submission advanced and we do not find any substance in the submission of the learned counsel for the appellant and the decision relied on by her, in fact, carves out an exception in case of a commercial transaction. The duty to act fairly is sought to be imported into the statutory contract to avoid forfeiture of the bid amount. The doctrine of fairness is nothing but a duty to act fairly and reasonably. It is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where an action is administrative in nature. Where the function is quasi- judicial, the doctrine of fairness is evolved to ensure fair action. But, in our opinion, it certainly

cannot be invoked to amend, alter, or vary an express term of the contract between the parties. This is so even if the contract is governed by a statutory provision i.e. where it is a statutory contract.

25. It is one thing to say that a statutory contract or for that matter, every contract must be construed reasonably, having regard to its language. But to strike down the terms of a statutory contract on the ground of unfairness is entirely different. Viewed from this angle, we are of the opinion that Rule 5(15) of the Rules cannot be struck down on the ground urged by the appellant and a statutory contract cannot be varied, added or altered by importing the doctrine of fairness. In a contract of the present nature, the licensee takes a calculated risk. May be the appellant was not wise enough but in law, she can not be relieved of the obligations undertaken by her under the contract. Issac Peter8 supports this view and says so eloquently in the following words:

"26. ... In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions i.e. where it is a statutory contract--or rather more so. It is one thing to say that a contract--every contract--must be construed reasonably having regard to its language."

26. Now, referring to the decision of this Court in Brojo Nath Ganguly6, the same related to the terms and conditions of service Excise Commr. V. Isaac Peter, (1994) 4 SCC 104 Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 and the decision in the said case has been approved by this Court in Mazdoor Congress7. But while doing so, the Constitution Bench7 explicitly observed in unequivocal terms that doctrine of reasonableness or fairness cannot apply in a commercial transaction. It is not possible for us to equate a contract of employment with a contract to vend arrack. A contract of employment and a mercantile transaction stand on a different footing. It makes no difference when the contract to vend arrack is between an individual and the State. This would be evident from the following text from the judgment: Mazdoor Congress case "286. ... This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction."

31. In our opinion, the respondent/writ petitioner is unduly worried by the penalty imposed upon it by the various circulars including the "Scheme of Financial Penalty for Violation of the terms and conditions of the License Agreement in respect of subscriber verification failure case". As already noticed, this Scheme has been launched in terms of Clause 10.2(ii) of the license agreement, which has not been found by us to be contrary to law. This scheme is to be in addition to the liquidated damage contemplated by Clause 35 of the license agreement. In our opinion, the payment of penalty named in Clause 10.2.(ii) read with said Scheme cannot be read in isolation but shall have to be read with the provisions of Sections 73 and 74 of the Contract Act. The relevant parts of Sections 73 and 74 of the Contract Act are as under:

> "73. Compensation for loss or damage caused by breach of contract.--When a contract has been broken, the party who suffers DTC v. Mazdoor Congress, 1991 Supp (1) SCC 600 by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> * * *
>
> 74. Compensation for breach of contract where penalty stipulated for.--When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation.--A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

(emphasis supplied)

32. The Apex Court in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705 has the occasion to consider the scope of the aforesaid two provisions and observed as follows:

> "46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for

> proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same."

33. Thus, there is no, nor can there be an, automatic realization of the sum named as penalty by the appellants. Even though the license agreement is in the nature of a statutory contract, the subsequent actions and decisions/circulars/instructions impugned herein must conform to the law laid down by the Apex Court in Bharati Airtel Ltd. case (supra) and Sections 73 and 74 of the Contract Act. If the respondent is aggrieved by the penalty imposed upon it by the impugned decisions of the appellants, the burden is on it to prove that the stipulated amount is not reasonable amount. The question as to whether the penalty so stipulated is a reasonable compensation or not is a question of fact, which can even be complicated, and cannot, therefore be decided by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution. As already noticed, the impugned clauses, scheme and the circulars/letters/instructions issued by the appellant authorities do not suffer from any legal/constitutional infirmity warranting our interference. Consequently, the impugned judgment of the learned Single Judge cannot be sustained in law and is, therefore, liable to be interfered with.

34. The last question for determination is whether Clause 10.2(ii) is in conflict with Section 20A of the Telegraph Act, 1885? Section 20A of the Telegraph Act is in the following terms:

> "20-A. Breach of condition of license.--If the holder of a license granted under Section 4 contravenes any condition contained in his license, he shall be punishable with fine which may extend to one thousand rupees, and with a further fine which may extend to five hundred rupees for every week during which the breach of the condition continues."

Even a cursory look at Section 20-A of the Telegraph Act will indicate that what is provided for under this section is punishment with fine where a licensee under Section 4 contravenes any of the conditions of the license granted to it. In other words, Section 20-A creates a criminal offence, which can, by virtue of Section 20(2), be tried only by a Magistrate in accordance with the provisions of the Code of Criminal Procedure. A financial penalty not exceeding `50 crores imposed for violation of the terms and conditions of the license agreement, however, imposes a civil obligation, even though it may be remedial or coercive in nature. Penalty and fine have different concepts. The issue as to whether financial penalty for violation of the terms and conditions of the license agreement can be imposed in the teeth of a provision for payment of fine under Section 20-A of the Telegraph Act for violation of the terms and conditions of the license agreement is, in our opinion, completely

answered by the Apex Court in Gujarat Travancore Agency, Cochin v. CIT, (1989) 3 SCC 52. This is what the Apex Court said:

> "4. ..... It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person willfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasize the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, Vol.85, p. 580, para 1023:
>
> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

35. For the reasons stated in the foregoing, this appeal succeeds. The impugned judgment is, therefore, set aside subject, however, to observations made elsewhere in this judgment. The parties are directed to bear their respective cost. Interim order, if any, stands vacated.

JUDGE CHIEF JUSTICE

Sukhendu