

(2023) 04 TDSAT CK 0016

Telecom Disputes Settlement And Appellate Tribunal

Case No: Broadcasting Petition No. 324 Of 2017

Videocon D2H Limited

APPELLANT

Vs

Culver Max Entertainment Pvt.
Ltd

RESPONDENT

Date of Decision: April 11, 2023

Acts Referred:

- Code of Civil Procedure, 1908 - Order 19 Rule 1
- Telecom Regulatory Authority Act, 1997 - Section 2(j), 12, 14, 14A
- Evidence Act, 1872 - Section 91, 92, 102
- Cable Television (Network) Rules, 1994 - Rule 11

Hon'ble Judges: Ram Krishna Gautam, Member

Bench: Single Bench

Advocate: Meet Malhotra, Tejveer Singh Bhatia, Kunal Vats, Ravi S S Chauhan, Pallak Singh, Gopal Jain, Kunal Tandon, Shashank Shekhar, Shivangi Chawla, Swarna Kashyap, Abhinav Dubey

Final Decision: Allowed

Judgement

Ram Krishna Gautam, Member

1. This Petition, under section 14 read with 14A of Telecom Regulatory Authority Act, 1997 (hereinafter called as "TRAI Act"), has been filed

by Petitioner - Videocon D2H Limited, against Respondent "Culver Max Entertainment Pvt. Ltd. (Formerly known as Sony Pictures Networks

India Pvt. Ltd.) with a prayer for quashing the impugned disconnection notices dated 11.07.2017 issued under clause 4.1 of the Interconnect

Regulations as well as public notice dated 14.07.2017 issued under clause 4.3 of the above Regulations, issued by the Respondent with a further

direction to respondent to provide its channel to the petitioner on non-discriminatory basis and at par with other distribution platforms, by disclosing relevant details of agreements/arrangements of the respondent, with other distribution platforms and to direct respondent, to offer refund/ adjustment/ set of the additional payments taken by the respondent from the petitioner, on discriminatory basis, with other reliefs, which the Tribunal deems fit.

Interim prayer of the same effect, was also claimed for not making disconnection, in pursuance of notices dated 11.7.2017 and 14.07.2017.

2. In brief, the petition contends, that petitioner is a corporate body registered under Companies Act 1956 and is a licensed DTH operator, engaged in the business of providing signals of TV channels via satellite, directly to the TVs of the subscribers. It is for the purpose of supplying signals to its subscribers and had agreements with various broadcasters for supplying TV channel signals, including the respondent. It is one of the leading DTH operator and net subscriber base of petitioner was around 13.04 million.

Respondent is a broadcaster of TV channels and is engaged in distribution of various TV channels and is a "service provider" within a definition of "Service Provider" under TRAI Act. Petitioner and the Respondent entered into an MOU dated 07.11.2014 for providing various TV channels to the Petitioner including "Sony Pal" channel. A copy of the MOU dated 07.11.2014 was annexed with the petition as ANNEXURE

P-1.

3. On 7.11.2014, the Respondent was also in the business of distributing various other TV channels, for which also separate MOU, was executed between the Petitioner and the Respondent, detailed in para 9 of the petition and both the MoUs dated 7.11.2014 were annexed as ANNEXURE P-2 (colly). The agreement dated 15.12.2016 for other channels are ANNEXURE P-3.

4. "Sony Pal" channel, which is subsequently provided by the respondent on the free DTH platform, i.e. DD DIRECT+ along with making payment of huge amount of carriage fee to DD DIRECT+ for carriage of its channel on its DTH platform. Whereas, it was a paid channel for petitioner. The respondent continued to raise invoices for all channels including "Sony Pal" on the petitioner, which was a discriminatory and

arbitrary treatment, to the petitioner by the respondent, and the same was in contravention of Interconnection Regulations. The Petitioner, vide communication dated 26.02.2015, requested the Respondent, to reduce the subscription fee payable by the Petitioner, to the Respondent, proportionately, w.e.f. the date on which the "Sony Pal"™ channel was made available free of cost to DD Direct+, a DTH platform. After receipt of this communication, the Petitioner and the Respondent, were engaged in negotiations, but there was no positive outcome. Likewise, Aaj Tak channel, which was also distributed by respondent on cost, was made available to DD Direct + DTH Platform, in and around November 2015, free of cost. Rather on payment of carriage fee, whereas on the other hand, all the DTH platforms had to pay subscription fee for Aaj Tak channel, and accordingly, a communication was sent to the respondent on 16.11.2015 by the DTH Association, pointing out this discrimination and unjust, arbitrary discriminatory treatment meted out to the members of DTH Association. In response to same, an email, dated 24.12.2015, from respondent, had offered to make available Aaj Tak channel to DTH Operators on similar terms, as were being given to DD Direct+, whereas no such response was there with regard to "Sony Pal"™ channel.

The Petitioner, once again on 13.04.2016, wrote a communication to the Respondent inter alia, reiterating its stand that since "Sony Pal"™ channel had been made available to DD Direct+ free of cost, a similar treatment must be offered to the Petitioner, in conformity with the non-discriminatory obligation enshrined under the TRAI Regulations, as well as propounded by Telecom Dispute Settlement & Appellant Tribunal, in its judgment of Noida Software vs. Media Pro Enterprise India Pvt. Ltd. dated 07.12.2015, which is ANNEXURE P-6 to the Petition.

5. The Petitioner, on the basis of the then existing RIO of the Respondent, had taken out weightage percentage of "Sony Pal"™ channel in its bouquet, which came to 15% and had, on that basis calculated the refund/adjustment of the license fees, for the period February 2015 to March 2016, amounted to Rs. 25,97,00,000/- (Rupees Twenty-Five Crores Ninety-Seven Lakhs only). The Respondent vide its communication dated 13.05.2016,

denied discrimination by saying that no prejudice was caused to petitioner, because the subscriber base of DD Direct+ is quite distinct from the

subscriber base of the Petitioner's DTH Platform. Another stand taken by respondent was that prior to execution of the MOU dated 07.11.2014,

â€“Sony Palâ€™ channel was not part of the negotiations, and, therefore, did not form part of the agreement, and so it was made available free of

cost to the Petitioner under the above MOU. Both the stand taken by the respondent were against the fact and law.

6. DD Direct+ is a DTH platform at par with petitioner, and the non-discriminatory regime, as prevalent under the extant Regulations, does not give

freedom to any broadcaster, to act in a whimsical and arbitrary manner. The MOU, dated 07.11.2014, expressly includes â€“Sony Palâ€™ channel, as

one of the channels, provided under the said Agreement, and there is a separate and distinct provision for new channels, to be provided, under the said

MOU. In an email dated 08.07.2014, â€“Sony Palâ€™ channel was one of the specific channel included in the total license fee, to be paid for that

bouquet. In similar circumstances and by the same respondent, â€“Aaj Takâ€™ channel was made available to DD Direct+ free of cost. Hence, a

similar benefit was to be extended to the Petitioner. Whereas for â€“Sony Palâ€™ channel, the same is being discriminated. But in the subsequent

communication dated 27.06.2016, the same reiteration was made by respondent. Ultimately, vide communication dated 06.01.2017, respondent denied

from accepting the reconciliation statement and adjustment of the amount of Rs. 44,51,00,000/- towards the channel â€“Sony Palâ€™. Rather it

claimed for outstanding dues of Rs. 83,21,23,173/- for SPN and Rs. 1,44,42,256/- for TVT. This was annexed with the petition as Annexure P-11.

7. The amounts, claimed as subscription fee and as interest component, claimed by respondent, were not in consonance, with the explicit terms and

conditions of MOU, dated 07.11.2014. Hence, a joint meeting of the respective representative, for appropriate consensus, with regard to

respondentâ€™s claim of license fee, as well as interest was prayed for. Reconciliation statement for the period ending 31st January, 2017, which

was replied vide E-mail dated 23.02.2017, with a clear admission that even though the interest for delayed payment, was not allowed to be charged

under the MOU, the respondent had raised the demand, as apparently, the law duly recognize the concept of charging interest on delayed payment, as

a mechanism for timely payment. But a request for adjustment with regard to subscription fee for "Sony Pal" channel was rejected. Finally, the

respondent claimed an outstanding of Rs. 72.66 Crores for channels of the Sony Network and Rs. 1.32 Crores for channels of TV Today Network.

While Negotiations were going on, to the dismay of the petitioner, on 9th May, 2017 the respondent vide letter of the same date, addressed to the

National Company Law Tribunal, marking a copy to the petitioner, as well as Dish TV India Ltd., stated that a certain proposed merger between the

petitioner and Dish TV should not be given effect to, as there is a huge outstanding on part of the petitioner, rendering the petitioner unviable for such

merger.

8. Petitioner raised this wrongful claims, being made by respondent, in its letter to NCLT, resulting in a representation by the respondent to the NCLT,

that it has no objection for same to any proposed scheme of arrangement between the petitioner and Dish TV India Ltd. Respondent, through their

letter dated 16th June 2017, raised an illegal and unjustified amount to the tune of Rs. 87,07,51,872/-, with interest amount of Rs. 24,37,52,988/-, for

availing signals of SPN channels and Rs. 24,66,62,018/- for availing signals of channels Taj Televisions India Pvt. Ltd. along with interest, which is not

yet quantified. In denial of the contentions, raised by the petitioner through their letters dated 26.02.2015, 13.04.2016 and 30.05.2016, Reply was with

same reiteration, that DD Direct Plus is owned by the government, and does not come under the purview of the TRAI Act. OTT Platforms like

Reliance Jio and Sony Liv, are not governed under the provisions of the TRAI Act.

9. On 11.07.2017, the Respondent issued the impugned disconnection notice under clause 4.2, on the alleged ground of non-payment of alleged

outstanding dues inter alia amounting to Rs. 135,14,33,194/-, which is annexed as ANNEXURE P-21 to the petition, which was against the fact and

law, because, while calculating the outstanding dues, an interest @ 18% per annum, was calculated, whereas no such term was there in MOU,

executed between petitioner and respondent. Hence, the claim towards interest by Respondent to the tune of Rs. 26,52,36,104/- was against the fact.

The claimed amount also erroneously includes an amount of Rs. 9,45,30,000/-, which is the invoiced amount for "Ten Sports" channels, issued by Taj Television India Pvt. Ltd., wherein, the Petitioner enjoys a credit period of 70 days. But, Respondent has failed to give credit for those credit period of 70 days, as well as credit of TDS deducted by respondent, to the tune of Rs. 1,85,30,080/- The Petitioner, has thereafter, made a without prejudice, payment of Rs. 12,00,00,000/- to the Respondent. On account of "Sony Pal", the Petitioner deserves a proportionate reduction in the subscription fee, payable since February 2015 @ 15% per month, as per the weightage percentage, in terms of the RIO, as explained in the communication dated 13. 04.2016. As per the calculation of the Petitioner, the said amount towards "Sony Pal" channel comes to Rs. 57,56,55,000/-. Hence, adjusting those miscalculations, the net amount payable as per above disconnection notice by petitioner to respondent comes at Rs. 27,87,45,000/-.

10. Petitioner is ready and willing to make good the said payment without prejudice to its rights and contentions in-as-much as the Petitioner has also recently learnt that the Respondent had / has been making available signals also of other TV channels to other TV Distribution platforms on favorable commercial terms or for free or paid heavy carriage fees, which is not only against Interconnect Regulations, Tariff orders, but also the land mark judgement of this Hon'ble Tribunal in NSTPL case. Hence, Petitioner is legally entitled to claim back refund/ adjustment for payment already was/is being made for all such channels. This Tribunal on 07.12.2015 as well as in extant regulations, it is axiomatic to state that the freedom to contract of the broadcasters with the service providers and different distribution platform, is limited to regulations and can only be exercised, within the framework provided by it. Interconnection regulations mandatorily require not only that the same offer to be extended to all similarly situated distributors of TV channels, but also to service providers in different distribution platform, in order to establish a level playing field, across all distribution platforms, that is, Interconnect regulations mandate, is to create a non-discriminatory regime, where a broadcaster, such as the Respondent must offer the same terms to every distributor of TV channels, who wishes to enter into such an agreement.

11. Reasonableness, parity, non- exclusiveness, non-discrimination and need to maintain level playing field between similarly placed service providers, as well as different distribution platforms, as stipulated in clause 3 of The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (2012 Regulations). Impugned disconnection notices are devoid of all these legal mandates, wherein Respondent has acted in illegal, unfair and discriminatory manner by offering of Channel "Sony Pal" Pay to Petitioner and Free to DD Free Dish and to other operators. An amount of Rs. 135,14,33,194/- (Rupees One Hundred Thirty Five Crore Fourteen Lakhs Thirty Three Thousand One Hundred and Ninety Four only), as claimed by Respondent, in the impugned Notice is incorrect, not legally due and payable, as such outstanding amount is not legally justified and totally untenable in law. Hence, cause of action had arisen for this discrimination and illegal notices, within the jurisdiction of this Tribunal. Hence, this Petition with above prayer.

12. In the written statement, Respondent denied each and every allegations made by Petitioner, with specific contention that no cause of action, had ever arisen for seeking alleged parity with DD Direct Plus, a DTH Platform of Prasar Bharti, established under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990, a Multi System Operations(MSO), operating on a Pan India basis, as well as alleged parity between two distinct, separately placed channels of two different broadcasters i.e. Sony Pictures Networks India and TV Today, namely, "Sony Pal" and "Aaj Tak" cannot be compared. There is failure of impleading all proper and necessary parties, to the present proceeding. Sony Pictures Networks India Pvt. Ltd. (SPNDIPL), which had issued the impugned notice for and on behalf of Broadcasters, being Sony Pictures Networks India Pvt. Ltd. (SPN), TV Today Network Ltd. (TVT) and Taj Television India Pvt. Ltd. (Taj), as an authorized agent, were in the knowledge of the Petitioner that with effect from 01.03.2017 the channels of Taj are being distributed by SPNDIPL under the banner of SPN channels only and under the knowledge of Petitioner. SPNDIPL is entitled to take all such actions, as may be deemed necessary to recover and collect the subscription fee, by filing cases in

the Court of Law, as it deems fit.

13. MOUs dated 07.11.2014, were also executed by the Petitioner with the Respondent herein and TVTN respectively, through its earlier authorized

agent, MSM Discovery Pvt. Ltd., but Petitioner had not added TVTN, as a party Respondent. Prasar Bharti, an establishment, a creation of an Act of

Parliament, has also not been arrayed as a party. The Petitioner has claimed that since the channel "Sony Pal" has been provided by the

Respondent to DD Direct Plus free of charge, the Petitioner is entitled to receive the said channel on the same basis, and on a non-discriminatory

basis, invoking the provisions of Clause 3.2 of the Telecommunication (Broadcasting and Cable Service) Interconnect Regulations, 2004. Whereas,

Petitioner had been charged a subscription fee for the channel "Sony Pal" while for DTH platform of Prasar Bharti, a statutory body, with DD

Direct Plus, the same channel is being offered free, whereas, there is no discrimination. Pursuant to email dated 8. 07.2014, exchanged between Mr.

Anil Khera of the Petitioner Company and Mr. Rajesh Kaul of the SPNDIPL, it is very well clear that the Petitioner had captured the understanding

between the parties, which didn't include the channel "Sony Pal", (as Sony Pal was launched only on 01.09.2014), the term of proposed

MOU, stated in the mail commenced from 01.09.2014 to 31.03.2018, for a total deal value of Rs. 701 Crores plus applicable service taxes, for the

SPN Channel, TVTN Channels and Discovery Channels -bifurcating, amounting to Rs. 581 Crores for SPN Channels, Rs. 10 Crores for TVTN

Channels and Rs. 110 Crores for Discovery Channels and the Channels included therein were given in Para 5.b (i), (ii), (iii), in written statement

respectively.

14. "Sony Pal" was not included in the list of channels, enlisted in the said e-mail addressed by the Petitioner, and it was only because of fact

that "Sony Pal" was not launched as on the date. Petitioner executed only MOU for SPN Channels on 07.11.2014, which included "Sony

Pal" but for the same, previously agreed amount of Rs. 581 Crores remained intact. For a separate MOU, on 07.11.2014 with TVTN for TVTN

Channels for the same previously agreed amount of Rs. 10 Crores, and the MOU for Discovery Channel was executed for Discovery

Communications and not by SPNDIPL, as the Joint venture that existed between Sony and Discovery in the form of MSM Discovery Private Limited,

was terminated and Discovery commenced distribution of Discovery Channels on its own accord, and Channels of SPN and TVTN were only

distributed through SPNDIPL w.e.f. 01.04.2015. The email dated 08.07.2014 was replied vide email dated 09.07.2014 by SPNDIPL through Mr.

Rajesh Kaul with specific insertion in green colour in order to capture the entire understanding between the parties. It included "Sony Pal" and

Sony PIX HD, TLC HD World, Animal Planet HD World and ID, keeping the commercial understanding and the tenure of the contract intact,

"Sony Pal" was added on 09.07.2014 by the Respondent's own volition without any additional fee payable whatsoever, especially, since it

was a new Channel proposed to be launched on 01.09.2014 and the term was commencing from 01.09.2014. "Sony Pal" Channel was added as

a new Channel under the clause "Term" of the email dated 08.07.2014 and Clause D of the MOU dated 07.11.2014, which provides that all new

Channels launched by the Respondent shall be provided to the Petitioner free of any subscription charges. Thus, the contention that the Petitioner is

being charged for "Sony Pal" Channel is absolutely wrong and denied. Hence, the invocation of Clause 3.2 of the Interconnect Regulations, is

absolutely misconceived. Petitioner is not entitled to seek parity with a platform of DD Direct Plus, a direct home to operator of Prasar Bharti,

established under an Act of Parliament, in furtherance of the objects of the Act, as provided in the Preamble and in Section 12 of the Act. Petitioner

and DD Direct Plus are two different and distinctly placed distribution platforms, without any thread of common feature between the two.

15. Prasar Bharti is a statutory autonomous body established under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 and came into

existence on 23.11.1997. It is a Public Service Broadcaster of the nation. The objectives of public service broadcasting are achieved in terms of

Prasar Bharti Act through All India Radio and Doordarshan. As Prasar Bharti is a statutory body with a legislative mandate to Broadcast

Programmes. All India Radio and Doordarshan, don't require any license or permission of up-linking or down-linking from the Central

Government. Hence, Prasar Bharti, not being a licensee, is not required to take permission for broadcasting or for up-linking or down-linking, and therefore, holds a special status, being outside the purview of the Interconnect Regulations, promulgated by the Telecom Regulatory Authority of India (TRAI). It cannot be compared with the private DTH operators, like Petitioner. It is the people of India through their elected representatives, forming the Government of India that funds the capital expenditure of Prasar Bharti to achieve the social objectives, set out in the Prasar Bharti Act. While on the other hand, Videocon, being a private body conducting its business with a sole objective of earning profits, is not bound by the same criteria. Prasar Bharti and Videocon are not, therefore, similarly placed DTH operators.

16. NSTPL Judgment is not derogated by Respondent. The matter and issue, in present Petition, is not covered under above proposition of this

Tribunal. DD Direct, is a statutorily created entity, not requiring to operate under a license from the Central Government, hence, is not a DTH in terms

of the Regulations. Whereas, the above judgment of NSTPL case, relates to a channel being provided for a subscription fee, whereas, â€˜Sony

Palâ€™ Channel in the present case in hand, is being provided to Petitioner, without any additional fee. There is an exception to Clause 3.2 contained

in Clause 3.6, that DD Direct Plus and the Petitioner cannot be considered as similarly placed distributor of TV Channels. Viewers of DD Direct are

different from viewers of paid TV services. Prasar Bharti and Videocon operate under vastly different parameters with different objectives.

Broadcasters with SPN and TVT have given only non-exclusive right to the Petitioner to distribute the TV Channels on its networks. Therefore, the

broadcasters have the freedom to enter into any arrangement for distribution of its channels with or on any other distribution platform, including DD

Direct Plus and by doing so, no prejudice is caused to the Petitioner. Though The Telecommunication (Broadcasting and Cable) Services (Eight)

(Addressable Systems) Tariff Order, 2017 dated 03.03.2017 is sub-judice before the Madras High Court, but the Regulation provides that

Doordarshan are not covered under any permission or license granted by the MIB. The relief extended with regard to â€˜Aaj Takâ€™ Channel may

never be compared with Sony Pal™ channel because Aaj Tak™ Channel was termed as promotional payment Channel. Hence, parity with that may not be claimed. Comparison between DTH Operator and MSO is misplaced, as technologically, both MSOs and DTH are two different and distinct kind of operators.

17. TDSAT vide judgment dated 19.10.2012, titled as Unified Cable Operators Welfare Association Vs. TRAI in Appeal Nos. 3 (C), 5 (C), 11(C),

12(C) and 15 (C) of 2012, has already held that DTH and MSO don't stand on the same footing. Petitioner had unilaterally and arbitrarily reduced

amount from the license fees, to be paid to Respondent, in lieu of the services availed by the Petitioner, arising out of the MOUs dated 07.11.2014, in

blatant breach of the terms of the subsisting contract. Petitioner had unilaterally arrived at a deduction of 15%, which is of no basis and the same

calculation cannot be of a legal base. TRAI Act has no jurisdiction over Prasar Bharti and Prasar Bharti doesn't classify as pay channel or free

channel. Hence, any allegations with respect to the offering of the said channel free of cost to Prasar Bharti, is totally misplaced. More so, Sony

Pal™ was never offered to the Petitioner with any additional cost. The Merger Petition, being Company Petition No. 273 of 2017, before NCLT,

Mumbai, was objected by Respondent vide letter dated 09.05.2017, mentioning the correct outstanding amount of Respondent. Though, subsequently,

no further pressing was there. Rather claim was made against Petitioner. Petitioner was making payment of invoices raised by Respondent for those

Channels, unilaterally, by adjusting amount on its own calculation. Whereas, no such right was there for unilateral deductions, by the Petitioner. Hence,

Petitioner is liable to make good the entire outstanding amount of Rs. 59,98,09,371/- (Rupees Fifty nine Crores Ninety Eight Lakhs Nine Thousand

Three Hundred Seventy One only) pertaining to the Channels of the Respondent SPN and in terms of MOU dated 07.11.2014 taking into

consideration, the payments made pursuant to the Interim Order dated 01.08.2017 and for Taj Channels, Petitioner is liable to pay Rs. 16,03,52,019/-

(Rupees Sixteen Crores Three Lakhs Fifty Two Thousand and Nineteen Only) to SPNDIPL, as on 30.08.2017 and a further sum of Rs. 9,69,96,000/-

for the month of July to August, 2017, which fell due for period September, 2017 and October, 2017. Thus, as on 30.08.2017 a total amount of Rs.

75,01,61,390/-(Rupees Seventy Five Crores One Lakh Sixty One Thousand Three Hundred and Ninety only), is still due and payable by Petitioner to

Respondent, for the Channels of Respondent with a further due of Rs. 9,69,96,000/- for the month of July and August, 2017, for the Channels of Taj

Television India, which fell due and payable in the month of September, 2017 and October, 2017. In addition to the above, for the TVTN Channels,

Petitioner is liable to make payment of Rs. 20,53,200/- as on 30.08.2017. Petitioner is further liable to make payment of interest @ 18% on the huge

outstanding amount for the delayed/non-payment of the subscription fees, which is Rs. 25,99,22,485/-for the period upto 30.06.2017, for the Channels

of Respondent and Rs. 5,313,619/- for the period upto 30.06.2017 for the Channels of TV Today Networks Limited.

18. This Tribunal, vide Interim Order dated 01.08.2017, had directed for making payment of 50% of total amount of Rs. 57.56 Crores to Respondent

and this 50% was paid by Petitioner. MOU dated 07.11.2014 only captured the broad understanding between the parties. The parties were to execute

a long term agreement covering the detailed terms and conditions and the clause on "Late Payment Interest" was very much an integral part of

the draft of the long term agreement, which was exchanged between the parties, but is pending execution till date. It is settled principle in the law, that

even if the agreement doesn't stipulate levy of interest on delayed payment, the creditor is entitled to such claim of interest as just and fair, hence,

there is interest to the tune of Rs. 9,45,30,000/- (Rupees Nine Crores Forty Five Lakhs Thirty Thousand only). Hence, the unilateral deduction and the

payment due along with interest accrued, were specified in the impugned notice, for which this vexatious Petition has been filed. Hence, a counter

claim, with this prayer was raised that a direction to the Petitioner to pay Rs. 84,97,31,856/- for SPN Channels, including interest upto 30.06.2017 and

Rs. 25,73,48,019/- for Taj Channels, totalling to Rs. 110,70,79,875/- (Rupees One Hundred Ten Crores Seventy Lakhs Seventy Nine Thousand Eight

Hundred Seventy Five Only) to the Respondent, including subscription fees for the month of July and August, 2017, for Taj Channels which become

payable in September, 2017 and October, 2017 with a further sum of Rs. 73,66,819/- (Rupees Seventy Three Lakhs Sixty Six Thousand Eight Hundred

Nineteen only), including interest upto 30.06.2017, to SPNDIPL for TV Today Ltd. Channels and further amount towards interest for delay in

payment of the subscription fees for Taj Channels and/or dismiss the present Petition, with heavy costs and/or award litigation cost to the Respondent.

19. Rejoinder-cum-written statement, with regard to counter claim by Petitioner, are with same reiteration and contention of Petition, specifically, that

there was discrimination in offering channel "Sony Pal"™ to Petitioner as well as to Prasar Bharti, where it was free of cost. More so, with

carriage fee, but for Petitioner, it was a paid channel. As per existing RIO, it amounted to 15% of the bouquet subscription fee, under MOU

concerned. Amount of Rs. 135,14,33,194/- (Rupees One Hundred Thirty Five Crores Fourteen Lakhs Thirty Three Thousand One Hundred Ninety

Four only), as claimed by Respondent in the notice, as well as counter claim, was incorrect, not legally due and payable. Claimed amount for TVTN

Channels and Taj Channels was not due, as per terms of subsisting Agreement. The details of accounts, as on July, 2017, respectively, for SPN

Channel, TVTN Channels and Taj Channels, which itself was proof of the fact that the amount of Rs. 135,14,33,194/- was not due and payable, but it

was illegally claimed by Respondent.

20. Reasonableness, parity, non-exclusiveness, non-discrimination and need to maintain level playing field between similarly placed serviced providers,

as stipulated in clause 3 of The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television

Systems) Regulations, 2012, and subsequent amendments thereto, including the 2017 Tariff Order, and Interconnect Regulations, notified by TRAI,

mandates non-discrimination. The same is the situation in Judgement of TDSAT in NSTPL Case. The RIO of the Respondent as well as

Ala"™carte rates of individual channels comes to 15% for "Sony Pal"™, as has been given in Para 11 of rejoinder/replication. Hence, out of the

alleged invoices due to the Respondent till May 2017, comes to the tune of Rs. 63.48 Crores. Petitioner was legally entitled to claim a deduction for

the period February 2015 to April 2016, a sum of Rs. 27.94 Crores and for the period May 2016 to May 2017, a sum of Rs. 27.45 Crores. It was

vehemently denied that the Petitioner had illegally, unilaterally and arbitrarily reduced the amount from the license fee. Whereas, Petitioner deserves a

proportionate reduction in the subscription fee payable since February 2015 @ 15% per month as per the weightage percentage in terms of the RIO,

as explained in the communication dated 13.04.2016 on account of "Sony Pal" Channel. And as per calculation of the Petitioner, the said amount

towards "Sony Pal" Channel comes to Rs. 57,56,55,000/-. The total amount payable by Petitioner from the aforesaid amount demanded by the

Respondent, in the impugned disconnection notices is Rs. 27,87,45,000/-.

21. In the communication dated 13.04.2016 the Petitioner, on the basis of the then existing RIO of the Respondent, had taken out weightage

percentage of the "Sony Pal" Channel in its bouquet, which came to 15% and had on that basis calculated the refund/adjustment of the license

fee for the period February 2015 to March 2016, which amounted to Rs. 25,97,00,000/-. The invoiced amount raised in the tune of Rs. 9,45,30,000/- by

Respondent in Para 13 of written statement, is wrong because the same is the invoice amount for Ten Sports Channels issued by Taj Television India

Private Limited, wherein the Petitioner enjoys a credit period of 70 days. Further, the Respondent has failed to give credit of the TDS, deducted by

Respondent, to the tune of Rs. 1,85,30,080/-. Thus, the Petitioner had made a without prejudice payment of Rs. 12,00,00,000/- to the Respondent. An

amount of Rs. 1,35,14,33,194/-, as claimed in Para 43 and 44 of the written statement, as well as in the impugned notice, is incorrect. Counter claim

was prayed to be dismissed.

22. On the basis of pleadings of both side, following issues were framed by Court of Registrar on 14.12.2017:-

1) Whether the impugned disconnection notice dated 11.7.2017 and public notice dated 14.7.2017 issued under clause 4.1 and 4.3 respectively are valid in terms of the

TRAI's Interconnect Regulations?

2) Whether any subscription fee has been charged from petitioner by respondent for "Sony Pal" channel?

3) Whether the petitioner is entitled to any relief for reneging from the terms of the MOU dated 7.11.2014 by unilaterally deducting the subscription amount?

4) Whether the "Sony Pal" channel was packaged by the petitioner on the LCN as per terms of MOU dated 7.11.2014 between the parties?

5) Whether the petitioner is entitled to seek parity with a platform of DD Direct Plus?

Vide order of Tribunal dated 21.12.2017, another issue, as issue number 6, has been framed:-

"Whether the petitioner is entitled to similar favourable commercial terms which are being offered by the Respondent to other distribution platforms?"

23. In evidence, affidavit of Mr. Sahil Bhambri for and on behalf of Petitioner and affidavit of Mr. Rohit Arora for and on behalf of Respondent, were filed.

24. Heard, learned Senior Counsel for both side, Mr. Meet Malhotra, assisted by Mr Tejveer Singh Bhatia and Mr. Gopal Jain assisted by Mr. Kunal

Tandon, and gone through the pleadings, evidences and written submissions.

25. Burden of proof:

Hon^{ble} Apex Court in Anil Rishi Vs. Gurbaksh Singh " AIR 2006 SC 1971 has propounded that onus to prove a fact is on the person who

asserts it. Under Section 102 of The Indian Evidence Act, initial onus is always on the plaintiff to prove his case and if he discharges, the onus shifts to

defendant. It has further been propounded in Premlata Vs. Arhant Kumar Jain- AIR 1976 SC 626 that where both parties have already produced

whatever evidence they had, the question of burden of proof ceases to have any importance. But while appreciating the question of burden of proof

and misplacing the burden of proof on a particular party and recording of findings in a particular way will definitely vitiate the judgment. The old

principle propounded by Privy Council in Lakshman Vs. Venkateswarloo " AIR 1949 PC 278 still holds good that burden of proof on the pleadings

never shifts, it always remains constant. Factually proving of a case in his favour is cost upon plaintiff when he fulfils, onus shifts over defendants to

adduce rebutting evidence to meet the case made out by plaintiff. Onus may again shift to plaintiff. Hon^{ble} Apex Court in State of J& K Vs

Hindustan Forest Co. (2006) 12 SCC 198 has propounded that the plaintiff cannot obviously take advantage of the weakness of defendant. The

plaintiff must stand upon evidence adduced by him. Though unlike a criminal case, in civil cases there is no mandate for proving fact beyond

reasonable doubt, but even preponderance of probabilities may serve as a good basis of decision, as was propounded in M Krishnan Vs Vijay Singh-

2001 CrLJ 4705. Hon^{ble} Apex Court in Raghvamma Vs. A Cherry Chamma ^{â€} AIR 1964 SC 136 has propounded that burden and onus of

proof are two different things. Burden of proof lies upon a person who has to prove the facts and it never shifts. Onus of proof shifts. Such shifting of

onus is a continuous process in evaluation of evidence.

26. This Petition, before this Tribunal, is a civil proceeding and in civil proceeding, the preponderance of probabilities, is the touchstone for making a

decision, as against strict burden of proof, required in criminal proceeding.

27. Issue Nos. 5 & 6 -

They are connected with each other and the main dispute, to be adjudged, in between, in this Petition, was appreciated by this Tribunal, in its first

order dated 01.08.2017, which is as follows:

â€œSince the respondent had appeared on advance notice, no further notice need be issued.

Admit.

Four weeks^{â€} time is granted for filing reply. Rejoinder, if any, be filed within two weeks thereafter.

Considering the nature of the controversy, parties are given liberty to file all their documents on affidavit and there will be no need to lead oral evidence.

The matter may be listed before the Court of Registrar on 15.9.2017 to ensure completion of pleadings and framing issues. Thereafter, the parties will be at liberty to mention the matter for fixing a date for hearing.

A chart has been submitted on behalf of the petitioner to explain its stand in respect of the amount shown as outstanding in the impugned disconnection notice

dated 11.7.2017. As per that chart the petitioner accepts the liability to pay Rs. 27.80 crores immediately. With respect to Rs. 9.4 crores approximately, its stand is

that the amount is not due for payment because of 70 days credit available as per agreement.

The main dispute which requires adjudication is on account of reduction in the total liability of the petitioner on account of Sony Pal, one of the channels

included in the bouquet for which a composite amount appears to be payable under the agreement. The petitioner claims that this channel Sony Pal has been

made available by the respondent free of charge to Doordarshan and, therefore, on the basis of provisions in the relevant regulation, the respondent is under

legal obligation not to discriminate and to provide this channel free of cost to the petitioner as well.

This submission is, of course contested by the respondent and the controversy will need to be adjudicated finally. The amount presently involved on this account is

Rs. 57.56 crores approximately. We are of the considered view that the impugned disconnection notice shall not be given effect to in case the petitioner pays Rs.

27.80 crores upfront within one week since this amount is not under any kind of dispute at all.

With regard to amount under dispute, we are of the considered view that till the issues are resolved, the petitioner should pay to the respondent on account 50%

of Rs. 57.56 crores within a period of four weeks. This payment of the disputed amount shall be without prejudice to the rights and contention of the parties.

It is made clear that in case the petitioner succeeds, it will be entitled to get the 50% of the disputed amount back as per final order of the Tribunal.

It also goes without saying that if the petitioner loses, the respondent will get the balance amount or whatever be the amount on account of this dispute, as per

final order of the Tribunal.

If the matter cannot be finally heard within a year, this Court may consider passing further interim orders to keep the equities balanced.

It is made clear that except the issues under dispute, in rest of the matters, the parties shall be governed by the terms of the contract.â€

Meaning thereby, the only dispute requires to be adjudicated, as to whether the â€Sony Palâ€™ channel, which was there in bouquet and was given

by Respondent to Petitioner and admittedly was made free channel to Doordarshan (Prasar Bharti) but was a paid channel for

Petitioner, was in discrimination, as per the relevant Regulations and Petitioner was to get some relief as against this discrimination, as was being

claimed by him? For adjudicating this very question, the question as to whether the Petitioner is entitled to seek parity with the platform of DD Direct

Plus and whether the Petitioner is entitled to similar favorable commercial terms, which are being offered by Respondent to other distribution

platforms?, is to be adjudged. Hence, the discussions for these two issues require to be made together.

28. The very contention of the petition that Memorandum of Understanding, in between, dated 07.11.2014, which was for a period from 1.09.2014 to

31.03.2018, was admitted to be executed, in between. Hence, this contract is agreed, in between. The "Sony Pal" channel, which was

admittedly made free to Doordarshan, being operated upon by Prasar Bharti later on, was claimed to be free channel for Petitioner too. Whereas, it

was said to be paid channel and admitted to be paid channel, but being said to be given with no charge, in view of previous communications, entered

through emails, in between, and this was very well evident, that the aggregate subscription fees was the same for which emails were exchanged and

which resulted in the preparation of MOU dated 07.11.2014, for the same period of operation for the same channels. Though this aspect needs to be

adjudged in Issue No. 2, 3, 4, because they are interconnected with each other, requiring common analysis and appreciation. But, the main thrust for

decision for these Issue Nos. 5 & 6, is that, the Doordarshan of Prasar Bharti may not be compared with Petitioner company, because Prasar Bharti

is a product of statute over the Central Legislation having different area of field of operation. Whereas Petitioner is a private business concern.

29. For this the submission of learned Shri Gopal Jain, assisted by Shri Kunal Tandon is to be taken into consideration first, then the contention of

Petitioner and written submission is to be considered. The legal proposition by this Tribunal itself, is to be looked in. Learned counsel for Respondent

mentioned that Petitioner and DD Direct Plus are two totally different and distinctly placed distribution platforms. DD Direct Plus is a distribution

platform created by the Prasar Bharti Corporation, to serve a national purpose and is, therefore, treated differently by TRAI and Regulations, framed

there under. Further, the two platforms are technologically also different, have different kind of viewership, as such, are not comparable to each other.

Prasar Bharti is a statutory autonomous body, established under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990, which came in force

on 23. 11.1997. It is a public service broadcaster of nation. The very objective of this public service broadcasting are achieved in terms of Prasar

Bharti Act through All India Radio and Doordarshan, which earlier were working as media units, under Ministry of Information and

Broadcasting(MIB), prior to this legislation. The Preamble of the Prasar Bharti Act and the statement of reasons setting out the public purpose is to be

taken in account. Prasar Bharti owns and operates terrestrial DTH services. Its DTH service is called DD Direct plus and is free of cost to the

customers. As per Section 12 of the Act, the objects enshrined and the Preamble of the Act is to be acted upon, and in this view, the Prasar Bharti is

not a licensee under the MIB's licensing regime for DTH or MSO operators or as per TRAI Act. Thus, Prasar Bharti is only regulated through

the Prasar Bharti Act, except in respect of disconnection of channel, which require a reasonable notice to the channel owner. Whereas, the Petitioner

is a private body, conducting its business with a sole objective of earning profits and subject to the Regulations and Tariff Orders of TRAI, as notified

from time to time.

30. Prasar Bharti is a statutory body, broadcasting by way of direct to home channel of Doordarshan or for free channel, whereas, the operation of

Petitioner company is for paid channel. More so, "Sony Pal" channel was offered to Videocon without any subscription fee. Parity and non-

discrimination is available only in respect of comparable. Whereas, DD Direct plus is not comparable to petitioner or vice versa. TRAI does not

consider Prasar Bharti and Doordarshan under its interconnection Regulation and Tariff Order, which is very well clear in Tariff Order 2017, dated

03.03.2017. Clause 3.2 of the Telecommunications (Broadcasting and Cable) Services interconnection (Addressable Systems) Regulations, 2017 dated

03.03.2017 refers to providing signals on a non-discriminatory basis to the distributors of Television Channels. Distributors of Television Channels has

been defined as - such DTH Operators, MSO, HITS Operator or IPTV Operator, who is granted a registration/ license from the Ministry of

Information and Broadcasting, under its Downlinking and Unlinking Guidelines, or Rule 11 of the Cable Television (Network) Rules, 1994. Whereas,

Prasar Bharti, being a statutory body, created by an act of parliament, is not required to obtain any such license. Even assuming that Clause 3.2 is

universally applicable to the distribution of channels, even then, Prasar Bharti and DD Direct plus, not being licensee of the Ministry of Information

and Broadcasting, cannot be considered as distributors of Television Channels.

31. The very judgement of this Tribunal in Petition of 295(C) of 2014 read with Petition No. 526(C) of 2014 (hereinafter referred to as NSTPL

judgement) would not be applicable to the facts of the present case, because NSTPL judgement, (supra) primarily relates to a channel being provided

for a subscription fee, while "Sony Pal"™ in the present case, is being provided to the Petitioner without any additional fee. As per explanation and

exception to Clause 3.2 contained in Clause 3.6 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004, as

amended and its explanation, that DD Direct and Petitioner cannot be considered as similarly placed distributor of TV channels because of the fact

that viewers of the DD Direct plus are different from the subscribers of paid TV services vis-a-vis Prasar Bharti and Videocon operates under vastly

different parameters with hugely different objectives and the rights granted to the Petitioner are only non-exclusive rights, to distribute the channels on

its network by the Petitioner. Petitioner cannot seek parity with Multi-System Operators (MSOs), operating on a PAN India basis. Technologically,

both Multi System Operators and Direct to Home are two completely different distribution platforms. MSO's are for terrestrial distribution

platforms, which retransmit channels to their subscribers via cable, which is unlike the direct to home platform. The viewers and subscribers of both

these two platforms are of different class. Technological difference is also there. Direct to home deals with geographical location based upon the

licensed area of operation. Whereas, for MSO, the terrestrial cable network is there at.

32. In judgement of this Tribunal, dated 19.10.2012 in Appeal Nos. 3(c), 5(c), 11(c), 12(c) and 15(c) of 2012, (Unified Cable Operators Welfare

Association Vs. TRAI) had already propounded that DTH and MSO do not stand on the same footing. MSOs have intermediaries like LCO, with whom they share revenue. Whereas, the Direct to home service have no such intermediaries. In DAS, environment of MSO, there is no capacity restrained to carry TV Channels. Whereas, there is capacity constraint due to limited number of transponder capacity for DTH service. MSOs Digital Addressable Cable TV system is a two-way system and is capable of offering a number of interactive and value added services, whereas, Direct to home is a one-way system and it is not possible to provide value added services, which require two-way interaction. Likewise, platform of Petitioner is not comparable with OTT platforms, because OTT is a pull service with works only with internet broadband connectivity where subscribers had to log in and pull content as per their individual preference from the OTT platforms. Whereas, the direct to home as well as MSO services are push service, wherein every subscribers sees the same content at the same time. Hence, alleged claim of parity is of no avail. Thereby petitioner is not entitled to receive non-discriminatory treatment in respect of channel "Sony Pal" vis-à-vis DD Direct Plus in terms of Clause 3.2 of the Telecommunication (Broadcasting and Cable Services) Interconnect Regulations, 2004. Nowhere, it was disputed by the learned Counsel for Respondent that there is a legal mandate in Interconnection Regulations under Clause 3.2 with regard to non-discriminatory treatment for operators and making a level playing field in broadcasting phenomenon. The dispute is being made with regard to non-comparability in Petitioner's working and working of Prasar Bharti in direct to home and Doordarshan service. The basis of this argument, is primarily and solely on the ground that Prasar Bharti is a statutory outcome by the Central Legislation having its own domain requiring no license for its broadcasting services. Whereas Petitioner Company, being a private concern, with a motive of earning profits, the alleged difference in between operation and level playing field of both systems, no parity is to be claimed. The judgement of this Tribunal in NSTPL (supra) and Unified Cables (supra) is also being not challenged, but the same is being said to be non-applicable in the facts and circumstances of the present case in hand.

33. In response to above legal argument, learned Senior Counsel for Petitioner, Mr. Meet Malhotra, has vehemently argued that it is undisputed fact that Petitioner is a DTH operator in the country, who competes with various other DPOs such as Multi System Operators and other DTH platforms Direct to Home Service of Doordarshan DD free dish, formerly, known as DD Direct Plus, is also a direct to home platform. The DD free dish is owned and operated by the statutory body, Prasar Bharti, an outcome of central legislation. But it was vehemently disputed that Prasar Bharti DD free dish, is in no manner different from other DPOs including Petitioner, when it comes to the applicability of Interconnect Regulations framed by TRAI.

34. The same question was raised before this Tribunal in Petition No. 183(C) of 2008, Total Telefilms Vs. Prasar Bharti, whereby it has been categorically clarified and held by this Tribunal that DD Free Dish (Prasar Bharti) is a service provider in terms of Section 2(j) of TRAI Act and thus, amenable to laws laid down by TRAI. It was specifically held that DD Free Dish (Prasar Bharti) is a licensee similar to other DPOs, such as Petitioner. DD Free Dish (Prasar Bharti) is similarly placed, as Petitioner, and both are under bounden obligation to adhere to the laws laid down by the authority with regard to broadcasting sphere. Respondent, being a service provider, is under obligation to maintain a level playing field and for it, to maintain parity amongst all the DPOs including the Petitioner and DD Free Dish, in compliance of mandate of Clause 3.2 of Interconnect Regulation.

The explanatory memorandum to the Telecommunication (Broadcasting and Cable) Services (Eight) (Addressable Systems) Tariff Order, 2017 is of

no persuasive value on account of the fact that the said Tariff Order has failed to discuss the Total Telefilms Judgement (supra) delivered by this

Tribunal. The discrimination with regard to "Sony Pal" channel for free service to DTH Prasar Bharti and paid service to Petitioner, amounts discrimination and is contrary to judgement of this Tribunal in Total Telefilms (supra) as well as Clause 3.2 of Interconnect Regulations of 2004.

"Sony Pal" channel was a paid channel and it was a disputed fact that it had been a paid channel. But since February 2015 till May, 2017, it was

made free channel rather a channel to be broadcasted on carriage fee by Prasar Bharti. Whereas, it was paid channel for Petitioner and it continued

so, which resulted cause of action for making repeated requests for adjustment and meeting the non-discrimination. This Tribunal, in Total Telefilms

case (supra) had settled that DD Free Dish Prasar Bharti is a licensee and a service provider, like the petitioner and other similarly situated DPOs.

Hence, any benefit to competing DTH operator i.e. DD Free Dish Prasar Bharti without offering the same to other stake holders of similarly placed

condition is against the judgement of Tribunal and instant Regulations. In NSTPL (supra) case, this Tribunal had categorically propounded the law with

regard to status of Prasar Bharti DTH Service, DD Plus Service as a licensee and service provider. There is no provision, wherein broadcaster such

as Respondent can discriminate Petitioner or other DPOs of broadcasting industry, including MSOs and other DTH players, on the basis of judgement

dated 19.10.2012 in Unified Cable Operator Welfare Association Vs. TRAI case. Rather in above judgement itself, it has been propounded that level

playing field must be maintained by the stake holders. More so, in other case with regard to Aaj Tak Channel, for which Memorandum of

Understanding, was of same date, in between same parties, on being made free channel, for Prasar Bharti Doordarshan, the representation was made

by Broadcaster's Association, including Petitioner and it was accepted by way of express conduct by Respondent for giving the benefit to

Petitioner and other DTH provider. Respondent chosen to offer Aaj tak Channel to DD Free Dish, free of cost since November 2015. Being

concerned therewith, DTH operators made a representation to respondent on 16.11.2015, objecting such unjust, arbitrary and discriminatory treatment,

being made by Respondent to DTH operators. Respondent vide letter dated 14.12.2015 agreed to make the said channel i.e. Aaj Tak Channel, free of

cost to Petitioner and other objectors. Thus, by offering one channel free of cost to both Petitioner and DD Free Dish, the Respondent has consented

that Petitioner and DD Free Dish are similarly placed service providers and channels are to be offered on non-discriminatory basis. But the same has

not been meted with regard to Sony Pal channel.

35. Considering rival arguments of learned counsels for both side and the pith and substance of the matter in lis, it is very well clear that law

propounded by this Tribunal in M/s Total Telefilms Pvt. Ltd. Vs. M/s Prasar Bharti and another, Petition No. 283(C) of 2008 read with Petition No.

195 (C) of 2008, 216 (C) of 2008, reported at 2008 SCC Online TDSAT 669, wherein the direct matter in issue was with regard to jurisdiction of

TDSAT over Prasar Bharti, has propounded that TDSAT had jurisdiction over Prasar Bharti and Prasar Bharti is a licensee and a service provider,

like other service providers and DTH operators. This jurisdiction matter was assailed before the Division Bench of the Honâ€™ble Delhi High court

as well as Honâ€™ble Apex Court, but the law has been settled with regard to status of Prasar Bharti. It was specifically pleaded by Prasar Bharti in

above Petition, that Prasar Bharti, being a statutory body, is not required to obtain a license under the Indian Telegraph Act. Prasar Bharti does not

require a license under Indian Telegraph Act and hence, is not a service provider. And dispute with regard to Prasar Bharti will not fall under Section

14 of the TRAI Act, resulting no jurisdiction of TDSAT for such disputes.

The Tribunal, in its judgement at Paras 32, 33, and 34, as propounded, is reproduced below:

â€œ32. We accordingly agree with the contentions of the learned counsel, Mr. Maninder Singh and hold that the letter dated 19.11.2003, issued by the Ministry

of Information and Broadcasting, permitting Prasar Bharati to commence its DTH operations using the Ku band, is a licence. It is also significant that none of the

parties have indicated, either in the affirmative or negative, that the Ministry of information and broadcasting does not have the authority to issue such a licence

under the Indian Telegraph Act. We leave this to be looked into by the Department of Telecommunications, to which a copy of this Order may be sent.

33. Lastly and significantly, the preamble to the agreement between the petitioners and the respondent, dated 31.8.2007 is clearly states that Prasar Bharati is

running a DTH service by the name of â€˜DD direct+â€™. Clause 2(Ka) of The Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth

Amendment) Regulation, 2007 dated 3.9.2007 defines DTH service as follows:

â€œ(ka) â€œdirect to home serviceâ€ means distribution of multichannel TV

programmes by using a satellite system by providing TV signals directly to a subscriber's premises without passing through an intermediary such as cable operator or any other distributor of TV channels;â€ In our view, this sufficiently and independently establishes the fact that Prasar Bharati is a service provider.

34. In sum, therefore, the contentions of the 1st Respondent, Prasar Bharati, regarding this Tribunal not having the jurisdiction to settle the petitions herein fail.

We hold, for the reasons discussed above, that Prasar Bharati is a licensee u/s 4 of the Indian Telegraph Act and being a licensee, that Prasar Bharati is covered under the definition of "service provider"™ in section 2 (j) of the TRAI Act. Consequently, the disputes between the Petitioners, who are admittedly service providers, and Prasar Bharati, which is now held to be a service provider, squarely fall within the ambit of Section 14 (a) of the TRAI Act. Accordingly, we hold that these disputes are to be adjudicated by this Tribunal.â€

Meaning thereby considering the relevant legislation, Prasar Bharti Act, TRAI Act, Judgement of Honâ€™ble Apex Court and Indian Telegraph Act,

this Tribunal has held and propounded that Prasar Bharti is a licensee and is a service provider, like other service providers. Hence, the very

contention that there is no requirement of license for Doordarshan / Prasar Bharti is of no avail. As DD Free Dish/Prasar Bharti is like other service

provider i.e., Petitioner, and is amenable to laws and regulations promulgated under TRAI Act. In terms of Clause 3.2 of Inter Connect Regulations of

2004, 2012 and presently 2017, Broadcasters like the Respondent is under and obligation to make available their channels on non-discriminatory basis.

For a clear perception, the relevant notification is being reproduced as below:

â€œ3. General Provisions relating to Non-Discrimination in Interconnect Agreements:

3.1 â€|â€|

3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but

be not limited to a cable operator, direct to home operator, multi-system operator, head ends in sky operator; 14 [HITS operators and multi system operators shall

also, on request, re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators:]

The Explanatory memorandum of Interconnection Regulation of 2004, mandates to maintain a level playing field in the Broadcasting and Cable Sector.

Honâ€™ble Apex Court and also this Tribunal in many judgements have held that stake holders are required to ensure parity and transparency,

Reliance Energy Ltd. Vs Maharashtra State Electricity Development Corporation Ltd. (2007) 8 SCC 1 and TDSAT judgement in HFCL Infotel Ltd.

Vs BSNL 2010 SCC OnLine TDSAT 54 has propounded as mandate of law. Though this legal position has not been denied by learned counsel for

Respondent, but the mere denial is that Petitioner and Prasar Bharti are not at common footing and this has been held in NSTPL judgement (supra),

upheld by Honâ€™ble Apex Court, being reproduced below:

â€™94. Issue no. 4 is thus answered in the above terms and this takes us to the fifth issue, regarding the status of the HITS operator for the purpose of interconnect

arrangements. In this regard, Mrs. Pratibha Singh submitted that â€™HITS has a PAN India footprint and a last mile monopolyâ€™. It, therefore, enjoys the benefits

of both MSOs and DTH operators without any of their deficiencies. She submitted that a HITS operator could, thus, emerge as a monopolistic and a dominant

player in the market. We simply take note of the submission for the sake of record. There is no material to support the apprehensions expressed by Mrs. Singh, and,

in any event, this is a matter to be addressed by the regulator. It is not open to the broadcaster to mete out a discriminatory treatment to the HITS operator on the

basis of a self-serving prediction that at some future date HITS has the potential to dominate the broadcasting sector.

95. Dr. Singhvi and some other counsel submitted that the HITS operator was different from other distributors of TV channels because it worked on a different

distribution technology and referring to the Explanation to clause 3.6 sought to justify the different rates offered to the petitioner as compared to other

distributors of channels. The explanation referred to is intended to clarify the expressions â€™all similarly based distributors of TV channelsâ€™ occurring in

clause 3.6 of the Regulations. According to the explanation, the factors on the basis of which similarity may be judged include geographical region and

neighbourhood, having roughly the same number of subscribers, purchase of similar service, using the same distribution technology. It is contended that the HITS

operator uses a distribution technology different from both the MSO and the DTH operator. The contention, however, ignores the second part of the Explanation that puts the difference based on distribution technology in two broad categories as under:

“For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis-à-vis distributors of TV channels using non addressable systems.”

97. From the above it is clear that the difference based on technology relates to addressable systems and non-addressable systems and not between different technologies among the addressable systems.

98. Any difference in distribution technology can be accounted for in the technological terms stipulated in the RIO but so far as commercial terms are concerned,

it is difficult to see a HITS operator as different from a pan-India MSO and in our considered view a HITS operator, in regard to the commercial terms for an interconnect arrangement has to be taken at par with a pan-India MSO and must, therefore, receive the same treatment.”

36. In view of above, it is manifestly apparent that Broadcaster, such as Respondent, is not permitted to discriminate Petitioner with other DPOs of

the industry, including MSO and other DTH players. But in present case, in hand, there is apparent situation that “Sony Pal” channel was made

free to DD Prasar Bharti and it was a paid channel for Petitioner, for which subscription amount is being said to be unpaid. Though, it is being

admitted that in relevant RIO “Sony Pal” channel was a paid channel but the agreement entered in between on 07.11.2014 MOU was in

continuation and in resultant of previous emails, exchanged in between, and the same was for the same value, with no additional addition for “Sony

Pal” channel, which was a free channel to Petitioner. Now this question is to be discussed in remaining issues. For these two issues No. 5 & 6, it

is well founded that discrimination made towards Petitioner with regard to Prasar Bharti being statutory body, is not permitted under law. Hence,

Petitioner is entitled to seek parity with the platform of DD Direct Plus and is entitled to similarly favourable commercial terms, which are being

offered by the Respondent to the other distribution platforms. Hence, these two issues are being decided in favour of Petitioner.

37. Issue No. 2 & 4 -

Both of these, are one and common issue. The contention of respondent is that that "Sony Pal"™ channel though was included in MOU dated

7/11/2014, but in view of previous E-mails and negotiations entered, in between, annexed with written statement, the same was not charged channel.

Rather the aggregate amount for that bouquet was same one, as was agreed in previous Email. More so, this channel "Sony Pal"™ was not in

existence, on above negotiations. Hence, this channel was free of cost in above bouquet. Meaning thereby, the main thrust, of learned Sh. Gopal Jain,

senior counsel for respondent, is that MOU dated 7/11/2014 is to be considered in the light of previous E-mails exchanged, in between. But this

Tribunal is not going to accept above argument, because of the fact that MOU dated 7/11/2014, by virtue whereof, the petitioner re-transmitted

various channels of the respondent, including the channel "Sony Pal"™, was very well having mention in this un-disputed, rather admitted, MOU

dated 7/11/2014. This "Sony Pal"™ channel was agreed to be made part of the said MOU dated 7/11/2014. Not only this, petitioner has been

casted with an obligation to place the channel "Sony Pal"™ on its platform, at the agreed LCN-112. Meaning thereby, it is very well there in a

written, admitted MOU, that "Sony Pal"™ channel was there in above bouquet and there was a duty casted upon petitioner, for placing the same

at a particular spectrum on petitioner's platform. Hence, the total sum of Rs. 581 Crores for that bouquet including "Sony Pal"™ in above

written, agreed 14 channels, was there. It is in very well expressed term written in un-disputed MOU. Once parties have expressed their terms of

understanding, in written document, the written document itself, is the best evidence and this fact may be proved by that written document itself. No

interpretation other than the literal meaning, which is unambiguous to the document, is to be taken in account. This has very well propounded by

Hon'ble Apex Court in Roop Kumar vs. Mohan Thedani, (2003) 6 SCC 595, in its paragraphs 13 to 21. For correct perspective, Paras 13 to 21

are being reproduced here below " "

13. Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence p.397 and p.398; Phipson Evidence 7th Edn. P.546; Wigmore's Evidence p.2406.) It has been best described by Wigmore stating that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

- (a) the enactment or creation of the act.
- (b) its integration or embodiment in a single memorial when desired;
- (c) its solemnization or fulfillment of the prescribed forms, if any; and
- (d) the interpretation or application of the act to the external objects affected by it.

14. The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible

elements.

15. The enactment or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated,

whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or

memorial commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in

the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain

subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

16. The practical consequence of integration is that its scattered parts, in their former and incoherent shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally

immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties,

evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this

object. When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that

there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the

contracting parties and it is natural they should be treated with careful consideration by the Courts and with a disinclination to disturb the conditions of matters

as embodied in them by the act of the parties. (See Mc Kelvey's Evidence p.294). As observed in Greenleaf's Evidence page 563, one of the most common and

important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase ""best evidence"" is

now exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence

accounted for before testimony to its contents is admitted.

17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the

parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict

or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher

degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were

liable to be impeached by loose collateral evidence. (See Starkie on Evidence p. 648)

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no

such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such

words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract

has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely

with the mode of proof of a document which limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced

to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the

purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative

without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

20. The two sections are, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not,

whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike

Section 92 the application of which is confined to only to bilateral documents. (See: Bai Hira Devi and Ors. vs. Official Assignee of Bombay AIR 1958 SC 448).

Both these provisions are based on ""best evidence rule"". In Bacon's Maxim Regulation 23, Lord Bacon said ""The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law"". It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.

21. The grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when

parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form

a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.â€

Meaning thereby, when parties have deliberately put their agreement in writing, it is conclusively presumed, between themselves and their privies, that

they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy

bad faith and treacherous memory. All previous negotiations, deliberations exchange of Emails etc., are the process of offering, standard form of

offering, acceptance or counter offering etc. But the final agreement entered, in between, by way of reducing the same in writing, may never be

interpreted in view of previous negotiations. Rather the final agreed MOU, has to be looked in.â€ Hence, in present case, it is very well there that the

agreed amount of Rs. 581 crores for the bouquet was with specific mention of â€Sony Palâ€™ Channel in it and it was a paid channel.

38. More so, the pleading may never take place of proof, whatsoever is pleaded, is to be proved, by way of evidence. For valuing the evidence of both

side, and preponderance of probabilities in a civil adjudication, the value of evidence led by both side are to be adjudged. In present case, the evidence

filed by respondent is the evidence, by way of affidavit, for and on behalf of respondent and the same is of witness Mr. Rohit Arora. But the very

perusal of this affidavit reveals that the same is not qualifying with the essentials, to be fulfilled for a document, to be treated as an affidavit. The

places are kept blank in Paras 36, 37 and 40. Para 40 along with the verification clause reveals that the averment made in so called affidavit, are

vague with no verification of the same.

39. Order XIX of CPC provides for Affidavits. Rule 1 provides for Power to order any point to be proved by affidavit, wherein any Court may, at any

time, for sufficient reason, order that any particular fact or facts, may be proved by affidavit, or that the affidavit of any witness may be read at the

hearing, on such conditions as the Court thinks reasonable. Rule 2 provides for Power to order attendance of deponent for its cross-examination. Rule

3 provides for matters to which affidavits shall be confined. Which provides Affidavits shall be confined to such facts as the deponent is able of his

own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof

are stated. Rule 6 provides the format and guidelines of affidavit of evidence.

40. "Black's Law Dictionary" (Ninth edition), by Bryan A Garner, Editor-in-chief, while defining "affidavit" gives "affidavit (af-efa-

de-vit)(16c), is a voluntary declaration of the facts written down and sworn to by the declarant before an Officer authorized to administer oath." A

great deal of evidence is submitted by affidavit especially in pre-trial matters, such as "summary- judgment motions". Meaning thereby declaration

by declarant and this declaration be voluntary and sworn by the declarant. This swearing or administering of oath must be before an Officer,

authorized to administer oaths. "Oath" has been given in this very dictionary that a solemn declaration, accompanied by a swearing to God or a

revered person or thing that once statement is true or that one will be bound to a promise. The person making the oath implicitly invites punishment, if

the statement is untrue or promise is broken. The legal effect of an oath is to subject a person to penalty for perjury, if the testimony is false. Hence,

the oath is to be administered, before the authority in power, to administer oath and this verification of this swearing is to be there. "Verification"

has been meant in this very illustrative dictionary - a formal declaration made in the presence of an authorized officer, such as Notary Public or (in

some jurisdiction) or under oath, but not in the presence of such officers, whereby once swears, the truth of the statements in the documents.

Traditionally, a verification is used as a conclusion for all pleadings, that are required to be sworn.

41. Honâ€™ble Justice Mr. V.R. Krishna Iyer in Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot & Ors. (1974) 2 SCC 706 at para 28 had

given the development of law of evidence, wherein affidavits have been given place of evidence as follows â€œbreaking traditions and introducing the

system of affidavits, verified statements and certificate in many area of judicial inquiry, leaving a discretion to the court to call the author into court-is

an experiment well worth making by default our law of evidence and procedure as is being attempted in other countriesâ€™.

42. In the present case, the verification clause itself is with a gap and no mention of the words, for which gap was made, nor it was with any

specification, as to which para are true to personal knowledge and, which are believed to be true on the basis of official record. Rather the affidavit,

as a whole is the reiteration of the pleadings, as well as proposition of precedents. Hence, whatever counter- claim was made in the pleading, and for

proof of which, this affidavit was filed, had not been proved by respondent. Rather it may be said that there is no iota of evidence for and on behalf of

respondent. Whereas, the affidavit filed by petitioner, as of Mr. Sahil Bhambri, is with proper verification and in reiteration and corroboration of facts

pleaded in petition, making this affidavit uncontroverted evidence, for and on behalf of petitioner. Hence, the channel â€™Sony Palâ€™ was charged

from petitioner and it was packaged by respondent for above said amount of Rs. 581 Crores, which was subsequently made free to Prasar Bharti.

Hence, both these issues are decided in favour of petitioner, as against respondent.

43. Issue Nos. 1 & 3

A credit of 70 days was there as a credit period in MOU executed on 15/12/2016, in its terms in clause 11, whereas the same was not there in

disconnection notice. The RIO, which was displayed by respondent itself at that point of time, accounted share of â€™Sony Palâ€™ channel in the tune

15% of the total subscription fees, payable by petitioner in terms of MOU dated 1/11/2014, and the statement of account, for which repeated request

was being made to respondent, calculated for Rs.27.94 crore from Feb 2015 to April 2016 and Rs. 27.45 crore from May 2016 to May 2017. In

this disconnection notice, the statement of account and the amount for which claim was made, could not be proved by any evidence by respondent,

discussed as above. But the discrimination, against the existing Interconnect Regulations and level playing field, mandated was to be meted by

reducing the 15 % bouquet charge, to be paid for Sony Pal channel by petitioner to respondent and the Tribunal in its first order had directed

for making deposit of Rs. 50% of Rs.57.56 Crores, to be adjusted along with final judgment of this petition and it has been admitted by respondent that

this 50% amount, in the tune of Rs. 28,78,27,500/-, had been deposited by petitioner, in favour of respondent. Hence, petitioner is entitled for refund of

Rs. 28.78 crores from respondent. So far as interest is concerned, it was not there in initial order, hence, no addition in it, may be made, nor it is being

claimed by petitioner, in its written submission, wherein Rs. 28.78 crores rupees is being prayed for refund.

The disconnection notice, dated 11/7/2017, and public notice, dated 14/7/2017, was made inoperative by interim order of this Tribunal and by the lapse

of period of effect, the MOU dated 7.11.2014 had become inoperative by the efflux of time. Hence, the relief prayed for cancellation of disconnection

notice is of no fruits, because of the flux of time. But it is being propounded that this notice was against the amount due for payment and it was against

the mandate of Interconnect Regulations.

Accordingly, these two issues are being decided in favour of petitioner.

44. Hence, this Petition, merits to be partly allowed against Respondent.

ORDER

On the basis of discussions made above, the counter claim of the respondent stands dismissed.

The petition stands allowed to extent of Rs. 28.78 crores (Rupees Twenty Eight Crores and Seventy Eight Lakhs only).

Respondent is being directed to make refund, by way of deposit, in Tribunal Rs. 28.78 crores (Rupees Twenty Eight Crores and Seventy Eight Lakhs

only) within two months of judgment, for making payment to petitioner.

Formal order/decreed be got prepared by office, accordingly.