IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9175 OF 2018

Star India Private Limited]
a company incorporated under the Companies]
Act, 1956 and having its Registered Office at]
Star House, Urmi Estate, 95, Ganpatrao Kadam]
Marg, Lower Parel, Mumbai 400 013.] … Petitioner

Versus

1) Competition Commission of India,]
represented by its Secretary, 18-20, The]
Hindustan Times House, Kasturba Gandhi]
Marg, New Delhi – 110 001.]

2] Noida Software Technology Park Ltd.]
Scindia Villa, Sarojini Nagar Ring Road,]
New Delhi – 110 023, through counsel]
Juris Corp, 12th Floor, Express Towers,]
Ramnath Goenka Marg, Nariman Point,]
Mumbai 400 021.]
hitesh.jain@jclex.com]

3] Sony Pictures Network India Pvt. Ltd.,]
3rd Floor, Interface Blg. No.7, Off Malad]
Link Road, Malad (W), Mumbai - 400 064.]

4] Indian Broadcasting Foundation (IBF),]
B-304, Ansal Plaza, Third Floor, Khelgaon]
Marg, New Delhi – 110 049.] … Respondents

WITH

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WRIT PETITION NO. 10110 OF 2018

Sony Pictures Network India Private Limited]
a Company incorporated under Companies Act,]
1956 with its registered office at 4th Floor,]
Interface, Building No.7, Malad Link Road,]
Mumbai – 400 064.]… Petitioner

Versus

1) Competition Commission of India,]
The Hindustan Times House, 18-20,]
Kasturba Gandhi Marg, New Delhi–110001.]

2] Noida Software Technology Private Ltd.,]
a Company incorporated under Companies]
Act, 1956 with its registered office at Scindia]
Villa, Sarojini Nagar, New Delhi – 110 023.]

3] Star India Private Limited,]
a Company incorporated under the]
Companies Act, 1956 with its registered]
office at Star, Off Old Padra Road, Baroda,]
Gujarat – 390 020.]… Respondents

Mr. D. J. Khambata, Senior Advocate alongwith Mr.Gautam Ankhad, Mr. Rohan Rajyadhyashya, Mr. Kunal Dwarkadas, Mr. S.Kadam, Mr. S. Rajpurkar, Mr. S. Singhania, Mr.R.Sidhu, Mr. Dhawan for the Petitioner in WP/9175/2018.

Mr. S.K. Cooper, Senior Advocate alongwith Mr.Karthik Somasundram, Ms Kirti Srivastava, Mr. Anand Pathak, Mr. Vijay Purohit and Mr. Avinash Amarnath instructed by Bharucha & Partners for the Petitioner in WP 10110/2018 and for Respondent No.3 in WP 9175/2018.

Mr. Somsekhar Sundaresan alongwith Mr. Venkat Raman, Mr.Abhishek, Ms.

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Yugandhar Khanvilkar instructed by Ms. Priyanka Vegad for Respondent No. 1 in both Petitions.
Mr. Zal Andhyarujina alongwith Mr. Asif Ahmed, Mr. Jahaan Dastur, Mr. Kaushal Sharma and Ms. Devanshi Sethi instructed by Parinam Law Associates for Respondent No 2 in both Petitions.

.....

CORAM : AKIL KURESHI AND
S.J. KATHAWALLA, JJ.

RESERVED ON : 28th AUGUST 2019.
PRONOUNCED ON : 16th OCTOBER, 2019

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JUDGMENT (Per S.J. Kathawalla, J.) :

1. These Writ Petitions impugn an Order dated 27th July, 2018 **("Impugned Order")** passed by Respondent No.1/Competition Commission of India **("CCI")**. By the Impugned Order, CCI has exercised its powers under Section 26(1) of the

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Competition Act, 2002 **("Competition Act")** and directed an investigation to be conducted against the Petitioners herein *viz.* Star India Private Limited **("Star")** and Sony Pictures Network India Private Ltd. **("Sony")** on the basis of a Complaint/Information filed by Noida Software Technology Park Limited **("NSTPL")**.

2. Below, we proceed to capture the factual conspectus of the matter, the applicable law, judicial pronouncements and after considering the parties' submissions, ascertain whether the Impugned Order should be sustained or quashed.

FACTS :

3. Prior to the dealing with the respective arguments canvassed by the parties, it would be necessary to set-out the following :

3.1 On 10th December, 2004, the Telecom Regulatory Authority of India **("TRAI")** notified the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 **("2004 Regulations").** The 2004 Regulations *inter alia* covered arrangements amongst broadcasters such as the Petitioners and distributors of TV channels such as NSTPL.

3.2 On 1st October, 2013, NSTPL entered into an interconnect agreement with one Media Pro Enterprises India Private Limited **("Media Pro")** a content aggregator for Star to off-take bouquets on the basis of the rates specified in Media Pro's Reference Interconnect Offer **("RIO")** for a period between 1st October, 2013 to 30th September,

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2014 **("Star RIO No.1")**. According to NSTPL, it entered into Star RIO No.1 under protest.

3.3 Similarly, on 31st October, 2013, NSTPL entered into an interconnect agreement with one MSM Discovery Private Limited **("MSM")** a content aggregator for Sony to off-take bouquets on the basis of the rates specified in MSM's RIO for a period between 1st October, 2013 to 30th September, 2014 **("Sony RIO No.1")**. According to NSTPL, it entered into Sony RIO No.1 also under protest.

3.4 On 11th January, 2014, RIO No.1 was amended to permit NSTPL to take certain TV channels from Media Pro on an a-la-carte basis.

3.5 On 10th February, 2014, whilst the 2004 Regulations continued to operate, TRAI published new regulations which prohibited content aggregators like Media Pro and MSM from distributing TV channels of multiple broadcasters by bundling them together and prescribed 9th August, 2014 as the cut-off date for transition.

3.6 Media Pro ceased to operate and exist with effect from 1st April, 2014 and MSM also ceased to operate in view of certain alterations in the 2004 Regulations.

3.7 On 10th July, 2014 NSTPL filed Petition No. 295(C) / 2014 before the Telecom Disputes Settlement and Appellate Tribunal **("TDSAT")** against Media Pro and TRAI **("First TDSAT Petition")**. One specific grievance of NSTPL was that a Head-end In The Sky **("HITS")** distributor such as NSTPL can be said to be similar to Direct To Home **("DTH")** operators and pan-India Multi-System Operators

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("MSO") and that therefore, HITS operators should not be offered rates/prices or discounts that are less favorable than those offered by Media Pro to MSOs and DTH operators. It was NSTPL's case that Star RIO No.1 was entered into in violation of the 2004 Regulations. In the First TDSAT Petition, NSTPL sought the following reliefs:

> *"(a) Declare that Regulation 3.2 of the 2004 Interconnection Regulations mandates that all distributors be offered the same rate per subscriber per month, which is the rate specified in the Broadcaster 's RIO, unless the conditions of Regulation 3.6 are fulfilled;*
>
> *(b) Declare that in terms of Regulation 3.6 of the 2004 Interconnection Regulations, any discounted volume related scheme must be disclosed in a transparent manner so as to enable all similarly placed distributors to avail of the same;*
>
> *(c) Direct the Respondent Nos. 1,3 & 4 Companies to disclose the Volume Related Schemes at which they have offered their TV Channel Signals/Content to distributors that are similarly placed with the Petitioner Company herein;*
>
> *(d) Consequently, direct the Respondent Nos. 1, 3 & 4 Companies to refund to the petitioner company any amounts it has paid under the respective Interconnection Agreements, in excess of the prices being offered by the said companies to distributors that are similarly placed with the Petitioner Company herein;*
>
> *(e) Direct that the Respondents Nos. 3 and 4 Companies have an obligation to disclose the existing and future volume related schemes to the Petitioner Company herein and further direct that the Petitioner Company may avail of the same if desired;*
>
> *xxx* "

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3.8 On 1st August, 2014, NSTPL entered into an agreement with Star on the basis of Star's RIO for a period between 1st August, 2014 to 30th June, 2015 **("Star RIO No.2")**.

3.9 On 25th November, 2014, NSTPL entered into another RIO with Sony **("Sony RIO No.2")**. NSTPL once again contends that this RIO was also entered into by it under protest.

3.10 On 17th December, 2014, NSTPL amended the First TDSAT Petition to add Star and Taj Television Private Limited as Respondents therein. In its amendments, NSTPL raised grievances in respect of Star RIO No.2 in addition to its previous grievances against Star RIO No.1.

3.11 On 1st May, 2015, NSTPL entered into a further RIO with M/s. Multi Screen Media Private Limited **("Sony RIO No.3")**.

3.12 Between 18th and 19th June, 2015, Star issued Disconnection Notices to NSTPL for non-payment of Rs.1,69,57,400/- **("Disconnection Notices")**.

3.13 On 31st August, 2016, Sony discontinued providing signals to NSTPL due to NSTPL's failure to repay Sony's outstanding dues amounting to Rs.2,42,00,000/- **("Sony Disconnection Notices")**.

3.14 Aggrieved by the Disconnection Notices, on 9th July, 2015 NSTPL filed a Petition being Petition No.314(C) of 2015 before the TDSAT **("Second TDSAT Petition")**. In the Second TDSAT Petition, NSTPL sought the following reliefs:

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"a) Declare the notice dated 18.06.2015 purportedly issued by the Respondent No.1 Company under Clause 4.1 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as well as the purported public notice dated 19.06.2015 issued under clause 4.3 of the Tele communication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as illegal and null and void;

b) Declare that the outstanding amount to the tune of Rs. 1.69 crores, raised on the Petitioner Company vide Notice dated 18.06.2015 is illegal and must include deductions based on 27.5% hike in a-la-carte rates struck down by this Hon'ble Appellate Tribunal vide its decision dated 28.04.2015 in Appeal No. 1 (C)/2014; TDS amounts; and the incentives under the Respondent No. 1 Company's RIO that are applicable to the Petitioner Company;

c) Direct the Respondent No.1 Company to continue the uninterrupted supply of its TV Channel signals to the Petitioner Company and also to reconcile accounts with the Petitioner Company;

d) Direct the Respondent No. 1 Company to enter into fresh non-discriminatory Interconnection Agreements with the Petitioner Company herein based on the commitments provided in the letter issued by the Indian Broadcasting Foundation dated 09.06.2015;

xxx "

3.15 On 9th July, 2015, TDSAT admitted the Second TDSAT Petition. Interim relief was granted to NSTPL restraining Star from giving effect to the Disconnection Notices provided NSTPL made an on-account payment of Rs.1,00,00,000/- within a month.

3.16 In view of the fact that the questions arisen in the First TDSAT Petition were

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likely to affect the broadcasting sector as a whole, on 30th July, 2015, TDSAT permitted all concerned stakeholders to intervene in the First TDSAT Petition.

3.17 On 7th August, 2015, TDSAT directed that the Second TDSAT Petition would be decided after the disposal of the First TDSAT Petition. Parties have completed pleadings and have filed their respective Affidavit(s) of Evidence in the Second TDSAT Petition. The Second TDSAT Petition is pending as on date.

3.18 On 7th December, 2015, TDSAT passed an Order and Judgment in the First TDSAT Petition **("7th December, 2015 Order")**. Amongst various other findings and directions, TDSAT directed all broadcasters to publish new RIOs in terms of the TRAI Regulations as interpreted by the TDSAT.

3.19 The 7th December, 2015 Order was unsuccessfully challenged by Star before the Delhi High Court and thereafter before the Supreme Court. Both challenges by Star failed.

3.20 Given the passage of time and given the fact that Star continued to supply signals of channels to NSTPL, NSTPL's unpaid dues accumulated to Rs.1,69,00,000/-.

3.21 On 18th December, 2015, TDSAT directed NSTPL to pay star Rs.1,69,00,000/- on or before 31st January, 2016, failing which, Star would be at liberty to disconnect the signals of its channels.

3.22 On 29th January, 2016, TDSAT allowed an application filed by NSTPL in the

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Second TDSAT Petition seeking an extension of one month to make the payment of Rs.1,69,00,000/- subject to 12% interest on the amounts.

3.23 On 1st April, 2016, Star disconnected its signals to NSTPL as NSTPL failed to comply with TDSAT's orders dated 18th December, 2015 and 29th January, 2016.

3.24 Pursuant to the 7th December, 2015 Order, Star issued a fresh RIO on 4th May, 2016 **("Star RIO No.3")** and Sony issued a fresh RIO on 5th May, 2016 **("Sony RIO No.4")**.

3.25 On 27th May, 2016, NSTPL filed a Contempt Application in the First TDSAT Petition alleging that Star RIO No.3 was not in compliance with the directives of the 7th December, 2015 Order **("Contempt Application")**.

3.26 On 30th August, 2016 Star filed Execution Petitions seeking payment of Rs.1,69,00,000/- by NSTPL in terms of TDSAT Orders dated 18th December, 2015 and 29th January, 2016 **("Execution Petitions")**.

3.27 On 31st August, 2016, Sony disconnected its signals to NSTPL as NSTPL failed to repay its outstanding dues of Rs.2,42,00,000/-.

3.28 On 6th February, 2017, Sony approached TDSAT by filing Broadcasting Petition No.33 of 2017 seeking to recover the dues payable by NSTPL to the Petitioner **("Third TDSAT Petition")**. The Third TDSAT Petition is pending as on date.

3.29 On 1st May, 2017, TDSAT directed NSTPL to pay Sony Rs.60,00,000/- from Sony's total outstanding.

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3.30 NSTPL failed to repay this outstanding. Sony initiated proceedings under Section 138 of the Negotiable Instruments Act 1881 against NSTPL which proceedings are pending as on date.

3.31 On 7th June, 2017, NSTPL filed an Information against Star, Sony and the Indian Broadcasting Federation **("IBF")** with CCI under Section 19 (1) of the Competition Act alleging that Star and Sony have adopted anti-competitive market practices, owing to their strategic position in the broadcasting sector/market by imposing unfair terms and limiting their services to less favored Distribution Platform Operators such as NSTPL in clear violation of Section 3 and 4 of the Competition Act **("Information")**:

3.32 On 21st July, 2018, Sony filed a Contempt Application before TDSAT in view of NSTPL's failure to comply with TDSAT's order dated 1st May, 2017.

3.33 On 24th July, 2018, TDSAT permitted NSTPL to comply with its order dated 1st May, 2017 on the condition that an additional amount of Rs.1,00,000/- shall be paid by NSTPL to Sony.

3.34 On 10th August, 2017, TDSAT dismissed the Contempt Application filed by NSTPL as also the Execution Applications filed by Star by *inter alia* holding:

> *"Having considered the entire materials in the light of aforesaid rival stands and having gone through the three orders relied upon by the petitioner and also subsequent orders dated 09.02.2016 and 16.02.2016 in MA Nos. 34 and 36 of 2016 in the pending broadcasting petitions relied upon by the respondent, it is*

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evident that the orders on which petitioners are relying to claim a decree for execution were orders passed by way of interim arrangement and that Broadcasting Petition No. 526 of 2014 as well as Broadcasting Petition Nos. 313 and 314 of 2015 preferred by the respondent herein were noticed therein and it was observed that they would be decided on their own merits and if need be, after taking evidences from both sides. Hence, we find merit in the submissions advanced on behalf of respondent herein that the petitioner, Star India Pvt. Ltd. cannot claim any decree in its favour at this stage because the controversy relating to accounts is still pending before this Tribunal and there is no final adjudication on the relevant issues between the parties.

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both E.A. No.10 of 2016 (in B.P. No. 295 of 2014) and E.A. No. 11 of 2016 (in B.P. No.314 of 2015) are dismissed as pre-mature and therefore, not maintainable. However, there shall be no order as to costs. ”

3.35 On 16th November, 2017, NSTPL withdrew Petition No.526 of 2014 against Taj since Taj abandoned/gave up its claims against NSTPL.

3.36 On 21st November, 2017, TDSAT passed the following order in the Second TDSAT Petition:

“2...By a detailed order dated 10.08.2017, this Tribunal held against the petitioner that no contempt was made out and also held against M/s Star India Pvt. Ltd, that the execution applications were pre-matured because the controversy relating to accounts is still pending before this Tribunal and there is no final adjudication on the relevant issues between the parties. This Tribunal observed that the orders on which Star India is relying to claim execution "were orders passed by way of interim arrangement and that

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Broadcasting Petition No.526 of 2014 as well as Broadcasting Petition Nos.313 and 314 of 2015 preferred by the respondent herein (reference petitioner herein) were noticed therein and it was observed that they would be decided on their own merits and if need be, after taking evidence from both sides

4. In the aforesaid facts and circumstances, it has fallen for decision whether anything survives in this petition for adjudication. It is clarified that on 24.08.2017, as is apparent from the order passed on that date, our attention was drawn to observations in an earlier order dated 08.04.2016 that required a consideration of the issue whether anything survived for adjudication in B.P. Nos.313 and 314 of 2015. The observation was in the light of final judgment of this Tribunal in B.P No.295/2014 which was disposed of by a detailed judgment on 07.12.2015. Accordingly, parties have been heard on this issue

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7. On behalf of petitioner, a simple stand is taken that petitioner has also sought a declaration that the demand is illegal and there is a need for reconciliation of accounts and clearly these reliefs cannot become infructuous unless respondent No. 1 agrees to give up its claim over the alleged outstanding against the petitioner. In reply, the respondents refused to give up their right to claim money from the petitioner on account of arrears of dues.

xxx

8. In our considered view, in the aforesaid circumstances, it would not be proper to dismiss the petition as infructuous The issue relating to reconciliation of accounts and also legality and validity of the demand raised by the respondent remains to be adjudicated Hence, the prayer made on behalf of respondent to dismiss the petition on the ground that no cause of action

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survives has to be rejected. We order accordingly."

3.37 On 27th July, 2018 and 31st July, 2018, CCI passed two orders exercising powers under Section 26(1) of the Competition Act *inter alia* directing the Director General to initiate and conduct an investigation to ascertain whether or not Star, Sony and IBF have indulged in refusal to deal by way of discrimination with NSTPL in contravention of the provisions of Section 3(4) of the Competition Act **("Impugned Order")**.

3.38 Aggrieved by the Impugned Order, Star filed the present Petition on 13th August, 2018 and Sony filed its Writ Petition on 1st September, 2018.

3.39 On 16th August, 2018, this Court granted ad-interim relief restraining CCI from taking any coercive steps against Star and Sony in pursuance of the Impugned Order.

4. The aforesaid is the factual conspectus leading to the filing of the present Writ Petitions.

5. We now proceed to record the submissions canvassed by both parties.

SUBMISSIONS BY STAR INDIA PRIVATE LIMITED :

6. Appearing for Star, Learned Senior Advocate Mr. D. J. Khambata submitted that the Impugned Order has been passed without jurisdiction. In this respect, he submitted that as per the ratio laid down by the Supreme Court in *Competition Commission of India vs. Bharti Airtel Ltd. & Ors.*[1] ***("CCI vs. Bharti Airtel")***, CCI could

1 (2019) 2 SCC 521

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only have exercised jurisdiction if and when TRAI and/or the TDSAT had come to a finding that parties have indulged in anti-competitive practices. According to Mr. Khambata, the decision in *CCI vs. Bharti Airtel* considered *in-personam* disputes. It was his argument that in the Second TDSAT Petition, NSTPL has made various *in-personam* specific allegations against Star which remain to be decided. He submitted that CCI has disregarded the fact that the issue of price discrimination by Star in the supply of television channels to NSTPL has not been finally decided by TRAI/TDSAT. On the contrary, this very issue is pending adjudication before the TDSAT in the Second TDSAT Petition. In so far as the 7th December, 2015 Order is concerned, he submitted that the said order was passed on a summary basis without conducting a trial or considering any evidence. It was an order dealing with issues holistically. It did not finally decide the allegations raised by NSTPL against Star. Hence, the allegations of price discrimination, non-disclosure of discounted schemes/ incentive schemes and anti-competitive conduct qua NSTPL by Star remained undecided as on date. He supplemented his argument by submitting that TDSAT has itself held that the issue of the legality and validity of the demand raised by Star has not been finally decided. He thereafter submitted that NSTPL has admitted in Writ Petition No.12319 of 2019 filed by it that the Second TDSAT Petition is pending adjudication and that the issue of discrimination by Star in providing incentives has not been finally adjudicated. He then submitted that the issues raised in the Second

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TDSAT Petition are jurisdictional facts which only TRAI/TDSAT as expert regulatory bodies are equipped to decide. The existence of a jurisdictional fact is a *sine qua non* for the exercise of power. In this context, reliance was placed by him on *S.K. Maini vs. Carona Sahu & Ors.*[2], *Arun Kumar & Ors. vs. Union of India & Ors*[3]. Therefore, according to him, absent a finding by TRAI/TDSAT that Star has in fact engaged in any price discrimination and/or non-disclosure of discounted schemes / incentive schemes and/or anti-competitive conduct qua NSTPL, the necessary jurisdictional fact for exercise of powers under the Competition Act is lacking. Mr. Khambata also submitted that CCI must form a *prima facie* view with some reasons prior to passing an order under Section 26(1) of the Competition Act. This requirement, according to him, is also a *sine qua non* for the exercise of power. In this context, he placed reliance on *Competition Commission of India vs. Steel Authority of India*[4], *Cadila Healthcare Limited & Anr. vs. Competition Commission of India*[5], *Grasim Industries Ltd. vs. Competition Commission of India*[6], *Google Inc. & Ors. vs. Competition Commission of India & Anr.*[7], *Telefonaktibolaget Ericsson vs. Competition Commission of India & Anr*[8]. He submitted that a similar provision exists under Section 231 of the Companies Act, 2013 which provision has also been interpreted to be exercised only

2 *(1994) 3 SC 510*
3 *(2007) 1 SCC 732]*
4 *(2010) 10 SCC 744*
5 *(2010) 10 SCC OnLine Del 11229*
6 *Writ Petition (C) No.7842 of 2017*
7 *LPA No.733 of 2014*
8 *2016 SCC OnLine Del 1951*

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after an opinion has been formed. In this respect, he placed reliance on *Barium Chemical Ltd. vs. Company Law Board*[9] and *Bhikhubhai Patel vs. State of Gujarat*[10]. He then submitted that CCI has not satisfied the ingredients of Section 3(4) of the Competition Act. According to him, in the present case, CCI would necessarily have to render a *prima facie* finding of *(i)* the existence of an agreement refusing to deal; and *(ii)* that the agreement causes/is likely to cause appreciable adverse effect on competition **("AAEC")**. According to him, there is no *prima facie* view by CCI on these 2 critical ingredients. Hence, the mandatory jurisdictional pre-requisite of a *prima facie* view is absent. Mr. Khambata also submitted that in order for CCI to have arrived at a *prima facie* view of a contravention of Section 3(4) of the Competition Act and direct the Director General to investigate the practices of Star, the CCI ought to have undertaken an analysis in terms of factors listed under Section 19(3) of the Competition Act. In the absence of any such exercise, Star could not *prima facie* be found to have contravened Section 3(4) read with Section 3(1) of the Competition Act. Mr. Khambata lastly submitted that an order directing the Director General to investigate is far reaching, conclusive and will stain Star with a stigma. In support of this submission, he placed reliance on *Google Inc. & Ors. vs. Competition Commission of India & Anr. (supra), Telefonaktibolaget Ericsson vs. Competition Commission of India & Anr.*[11]*, Rohtas Industries Ltd. vs. S.D. Agarwal*[12]. Mr. Khambata therefore concluded

9 *AIR 1967 SC 295*
10 *(2008) 4 SCC 144*
11 *2016 SCC OnLine Del 1951*
12 *(1969) 1 SCC 325*

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that CCI, while carrying on a prima facie assessment, has failed to fulfil the jurisdiction pre-requisites laid down under the Competition Act and therefore, the Impugned Order be quashed by this Court.

SUBMISSIONS BY SONY PICTURES NETWORK INDIA PRIVATE LIMITED :

7. Appearing for Sony, Learned Senior Advocate Mr. S.K. Cooper submitted that until TDSAT holds that the RIO(s) were in breach of the Interconnection Regulations and/or discriminatory, there can be no question of CCI exercising jurisdiction under the Competition Act. In support of his submission on jurisdiction, he placed reliance on *CCI vs. Bharti Airtel*. He submitted that the jurisdictional basis for passing the Impugned Order is lacking. Mr. Cooper then submitted that the Impugned Order seeks to apply the provisions of Section 3(4)(d) of the Competition Act without stating the basis i.e. the agreement on which such violation is alleged to have occurred. He further submitted that there is no expression of opinion or basis for such expression provided in the Impugned Order that there has been an appreciable adverse effect on competition. He also submitted that the Impugned Order completely ignores the false statements and suppression indulged in by NSTPL which would clearly show that the Information is merely an attempt to wriggle out of NSTPL's defaults. Mr. Cooper then submitted that the Impugned Order suffers from non-application of mind. According to him, CCI has failed to consider or deal with either the law or the facts

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which were on record before it. According to Mr. Cooper, the TDSAT has not adjudicated as to whether Sony's RIO was discriminatory or not. Mr. Cooper therefore concluded that the Impugned Order ought to be quashed by this Court.

8. The aforesaid submissions broadly suggest that the Petitioners herein mainly contend *(i)* that the Supreme Court's decision in *CCI vs. Bharti Airtel* prevented CCI from passing the Impugned Order as the *in personam* and inter-party disputes were not adjudicated under the TRAI Act; and *(ii) CCI* has failed to arrive at a *prima facie* finding as to the existence of an agreement refusing to deal and that such agreement causes/is likely to cause AAEC in India.

SUBMISSIONS BY THE COMPETITION COMMISSION OF INDIA :

9. As opposed to the aforesaid arguments, we have heard Mr. S. Sundaresan appearing for the Competition Commission of India. His submissions can be summarised as under:

9.1 Firstly, Mr. Sundaresan submitted that the decision in *CCI vs. Bharti Airtel* did not lay down the standard as has been canvassed by the Petitioners as a matter of law. According to him, it is not at all the standard, that *in personam* findings after trial of inter-personal disputes should first be rendered for the CCI to even begin its investigations.

9.2 Secondly, he submitted that in the facts of this case, the telecom regulatory

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system has effectively and conclusively ruled that there is anti-competitive behaviour in the relevant market vide the 7th December, 2015 Order. According to him, TDSAT has conclusively found that the RIO(s) were fraught with anti-competitive conduct. TRAI's view that there was indeed violative conduct in the market, was well recorded.

9.3 Thirdly he submitted that the 7th December, 2015 Order caused such serious grievance that a writ petition was preferred by Star before the Delhi High Court. The challenge was, *inter alia*, based on the ground that TDSAT exceeded its jurisdiction. However, not only did the Delhi High Court refuse to entertain the writ, the Supreme Court also dismissed the appeal and upheld the 7th December, 2015 Order. Thereby, the clear and explicit finding of anti-competitive conduct came to be finally upheld. According to him, Section 3(4) deals with, among others, two forms of abuses that appear to exist in the facts of the case viz. "tie-in arrangement" and "refusal to deal". The existence of these two abuses in the facts of the case, is writ large on the face of the Order dated 7th December , 2015, which came to be upheld even by the Supreme Court. CCI has, by applying the ratio in *CCI vs. Bharti Airtel*, sought to investigate the same in discharge of its duty under Section 18 of the Competition Act, applying the due process enshrined in Section 26, read with Section 19, read with the CCI (General) Regulations, 2009 **("General Regulations")**. He submitted that Section 3(4) entails interdiction of agreements among enterprises or persons at different stages of supply of services, if such agreement causes or is likely to cause an AAEC on

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arrangement or a refusal to deal causes or is likely to cause AAEC. Both "tie-in arrangements" and "refusal to deal" are defined in an inclusive manner in the Explanation to Section 3(4). Illustrative types of such arrangements are spelt out in the legislation. The term "agreement" itself is defined in Section 2(b) and is also an inclusive one, bringing within its sweep, *inter alia*, any arrangement or understanding or action regardless of whether such arrangement, understanding or action is formal or in writing. The record discloses that the "RIO" is the agreement terms proposed by broadcasters in the market for television channels in the genre of sports and entertainment. The understanding of the broadcasters in providing their signals in this market is that they would violate the obligation stipulated under the telecom regulatory framework *viz.*, providing the same on an "a la carte" basis i.e. on such basis that any purchaser of the signals can acquire the signals in an itemized manner for the channels he desires. Such finding, in the 7th December, 2015 Order, is being incorrectly sought to be dismissed as a "generic" finding. He further submitted that Section 3(4) would result in a cause of action under the Competition Act only if the types of agreements referred to, cause AAEC. Therefore, CCI has taken care to examine whether the size and scale of the operations of the Petitioners is likely to cause AAEC. Towards this end, the Impugned Order, between Paragraphs 48 and 55 has taken pains to show the scale of market power wielded by the Petitioners. In order to do so objectively, CCI has adopted the indicia and ingredients that are statutorily stipulated

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and available in the Competition Act itself, and only towards this end, looked at criteria that are also contained in Section 19(4). Such objective and transparent approach has been assailed by counsel for the Petitioners as evidence of wrong provisions being applied. The criteria applied by CCI are also criteria for consideration of whether there is abuse of dominance in a manner that would violate Section 4. Merely because some of these criteria are also those stipulated for determination of abuse of dominance under Section 4, it would not follow that the criteria are irrelevant for determination of market power for assessing AAEC under Section 3(4). CCI has taken care to ensure that the freedom of enterprise for enterprises that do not have market power is not interfered with. Applying objective criteria, the Impugned Order explains in detail how the Petitioners have tremendous market power for their actions, and their understanding of how their customers must transact with them, to result in violation of Section 3(4), indeed on a *prima facie basis*.

9.4 Fourthly, he submitted that such conclusive findings in the 7th December, 2015 Order has been noticed in the Impugned Order, and forms, amongst others a *prima facie* rationale, the basis of investigations ordered in the Impugned Order. The Impugned Order also records that the order of this Court in the case of Vodafone *(which, in appeal, led to CCI vs. Bharti Airtel)*, canvassed by the Petitioners, indeed ruled that the telecom regulatory system needs to clarify the regulatory position. In the instant case, at the time the Impugned Order was passed, the confirmation of violative

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conduct was far firmer than a mere clarification.

9.5 Fifthly, he submitted that even the TDSAT, sitting in a successor bench, has clearly and firmly pointed out that the "final" decision on issues had been taken in the 7th December, 2015 Order. While the 7th December, 2015 Order is the judgement that framed the relevant issues and conclusively answered them, subsequent proceedings before the TDSAT involved *in personam* disputes between the parties, and are of no relevance for the issues that need to be determined for purposes of discharging the mandate under the Competition Act.

9.6 Sixthly, he submitted that the strong and repeated emphasis by the Petitioners on the conduct of the NSTPL is irrelevant for purposes of the investigation under the Competition Act. According to him, NSTPL is merely an informant, and has no relevant role to play in the investigations. CCI may conclude that there is no violation or it may conclude that there is indeed a violation as originally suspected, that there is a violation of a nature different from what was originally a statutory exercise. The Competition Act and the Regulations made thereunder provide for a very intense, elaborate and detailed checks and balances against any arbitrary conduct in the course of investigation.

9.7 Seventhly, he submitted that in the teeth of such checks and balances, the Petitions seek to simply stultify the statutory role of CCI by impugning administrative decisions to investigate. In this context, he placed reliance on the Supreme Court's

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decision in *CCI vs. Steel Authority of India (supra)* ***("SAIL")*** which ruled that the decision to investigate is a *prima facie* view taken in an administrative capacity. He placed further reliance on decisions of the Delhi High Court and this Court to demonstrate that there has been reluctance to entertain writs against mere decisions to investigate.

9.8 Eighthly, he submitted that the Petitioners have simplistically characterized the conclusive 7th December, 2015 Order as a *"general"* order that does not conclude allegations between NSTPL and the Petitioners. Disputes between NSTPL and the Petitioners are disputes *in-personam* whereas anti-competitive conduct and market abuse, are matters *in-rem*, which indeed have been conclusively determined by the TDSAT. The legal standard laid down in *CCI vs. Bharti Airtel* is not that every *"general"* inter-personal dispute between a complainant and an alleged market abuser must be conclusively determined by the sectoral regulator. This is not a condition precedent for the CCI to even start exercising its jurisdiction. On the contrary, such an argument was exhaustively repelled in *CCI vs. Bharti Airtel*, and in the facts and circumstances of that case, the Supreme Court ruled that the issues involved in that case were regulatory questions, which needed to be answered. The regulatory issues in the instant case stand answered by the 7th December, 2015 Order, and applying the principles of *CCI vs. Bharti Airtel*, the CCI now has to discharge its duty to conduct the investigation to examine if there is conduct that deserves to be interdicted.

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9.9 Ninthly, he submitted that it is trite and well-settled law that judgements must not be read like legislation much less like fiscal legislation, with a literal reading of specific sentences without context, particularly, context of the facts being adjudicated upon in the judgement. The reference to "respective rights and obligations" in Vodafone, noticed in the Impugned Order, has been rightly interpreted as regulatory rights and obligations. CCI does not have any jurisdiction to sit in judgement and grant any party-specific relief to a complainant. Indeed, the National Company Law Appellate Tribunal has jurisdiction to adjudicate compensation claims after final findings are rendered. According to Mr. Sundaresan, *CCI vs. Bharti Airtel* did not at all deal with a fact pattern similar to the facts of the instant case indeed apart from the relevant market falling within the TRAI administered telecom sector. The instant case in fact shows that the telecom regulatory system has rendered a clear view. Indeed, it is noteworthy that in filing such writ petitions, care is always taken not to make the purported sectoral regulator a party. In fact, the Supreme Court cautioned against "regulatory capture" in *CCI vs. Bharti Airtel*; opposed to bilateral rights and obligations. Lastly, he submitted that the Petitioners have argued that the regulatory framework has changed since the time of the Impugned Order. This argument too is of no avail for stultifying the investigative and inquisitorial jurisdiction of the CCI inasmuch as the investigation to probe, followed by a decision to punish or remedy or both, is a statutory activity that is mandated by Parliament for CCI to conduct.

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9.10 Lastly, Mr. Sundaresan relied upon two documents on EU Competition Law tendered by him during his arguments. He placed reliance on these documents to ascertain the meaning of the terms *"refusal to deal"* and *"refusal to supply"*.

10. Mr. Sundaresan therefore concluded that in the circumstances, the Petitions deserve to be dismissed and the investigations be permitted to be proceeded with.

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11. Lastly, appearing for NSTPL, Ld. Advocate Mr. Z.T. Andhyarujina submitted that CCI had the necessary jurisdiction to take cognizance of the present matter. That Star's own case before CCI was that the allegations in the Information were previously raised before the TDSAT and *"were heard at length and were comprehensively adjudicated before the TDSAT."* Therefore, according to him, Star never proceeded on the basis that the jurisdiction issues had not been decided. In fact, it proceeded on the contrary basis that TDSAT had decided all matters raised in the Information. According to Mr. Andhyarujina, the grounds now taken by Star and the arguments made before this Court are directly contrary to the arguments made by Star before CCI. He therefore submitted that a party cannot be allowed to approbate and reprobate. Mr. Andhyarujina's next submission was that the test laid down in *CCI vs. Bharti Airtel* has been satisfied. It was Mr. Andhyarujina's third submission that the 7th December, 2015 Order has extensively dealt with the issues between the parties with

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respect to the RIOs and the violations of the Interconnect Regulations and the TRAI Act. As such, the 7th December, 2015 Order is conclusive, comprehensive and has finally adjudicated upon the said issues. Mr. Andhyarujina's fourth submission was that the various orders and directions of the TDSAT clearly indicate that the only outstanding issues that remain to be decided in the Second TDSAT Petition is that of settling of accounts. Placing further reliance on these orders, he submitted that the said orders highlight the *mala fide* actions and intent of the broadcasters. Mr. Andhyarujina tendered various charts across the bar to demonstrate how NSTPL was a victim of price discrimination. Mr. Andhyarujina's fifth submission was that this Court, in its Writ Jurisdiction, has a limited and restricted scope to interfere with an order of investigation and therefore, this Court ought not to interfere with the Impugned Order. In this context, he placed reliance on *Google Inc. & Ors. vs. Competition Commission of India & Anr.*[13]*, Kingfisher Airlines Ltd. & Ors. vs. Competition Commission of India & Ors.*[14]*,* and *Shashikant vs. Central Bureau of Investigation & Ors*[15].

12. We have heard the arguments canvassed by the Learned Senior Advocates and Advocates as aforesaid. We have also considered the Written Submissions filed by the respective parties.

THE SUPREME COURT'S DECISION IN COMPETITION

13 *2015 Scc Online Del 8992*
14 *(2010) 4 Comp L.J. 557*
15 *(2007) 1 SCC 630*

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COMMISSION OF INDIA VS. BHARTI AIRTEL LTD. & ORS., *[(2019) 2 SCC 521].*

13. In order to appreciate the present controversy, we propose to first deal with the Supreme Court's decision in *CCI vs. Bharti Airtel*. In the said case, disputes arose between telecom service providers where one service provider alleged that others were discriminating against it by not providing sufficient points of interconnection. The aggrieved service provider filed a complaint with CCI. In turn, like in the present case, CCI ordered an investigation. The said order of investigation was first challenged before this Court by way of a Writ Petition. This Court struck down the order of investigation by holding that before CCI can exercise jurisdiction to investigate anti-competitive activity, it must be first established before the sectoral regulator that there is a regulatory breach and such breach pertains to price discrimination etc. CCI challenged this Court's order before the Supreme Court which challenge failed.

14. We now proceed to analyse what the Supreme Court laid down in the said decision. Whilst we do so, the question really to be ascertained was whether or not, the decision in *CCI vs. Bharti Airtel*, considered *in-personam* disputes between Reliance JIO lnfocomm Ltd. **("RJIL")** and the incumbent dominant operators **("IDOs")** *viz.* Vodafone India, Idea Cellular and Bharti Airtel. In this context, it would be necessary to reproduce certain paragraphs from the said decision which are as under:

> ***"12.*** *As mentioned above, TRAI is the regulatory which regulates the*

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functioning of the telecom service provider i.e. the telecom sector. Section 11 of the TRAI Act enumerates various functions which TRAI is supposed to perform under the Act. Section 13, likewise, empowers TRAI to issue directions, from time to time, to the service provider. In exercise of powers under Section 13 read with Section 11 of the TRAI Act, TRAI issued directions dated 7-6-2005 to all the telecom service providers to provide interconnection within ninety days of the applicable payments made by the interconnection seeker. The purpose behind providing interconnection by one service provider to the other service provider is to ensure smooth communication by a subscriber of one service provider to the cell number which is provided by another service provider. In that sense, this direction facilitates smooth functioning of the cellphone network even when it is managed by different companies as it ensures interconnectivity i.e. connectivity from one service provider to other service provider.

13. *On 21-10-2013, RJIL was granted Unified Licence and Unified Access Service Licence under Section 4 of the Telegraph Act by the Department of Telecom (DoT) for providing telecommunication services in all 22 circles/licensed service areas in India. Soon thereafter, RJIL executed interconnection agreements (ICA) with existing telecom operators inter alia including, Bharti Airtel Ltd. and Bharti Hexagon Ltd. (hereinafter collectively referred to as "Airtel"), Idea Cellular Ltd. (hereinafter referred to as "Idea"); Vodafone India Ltd./Vodafone Mobile Services Ltd. (hereinafter collectively referred to as "Vodafone"). RJIL commenced test trial of its services after intimation and approval of the DoT and TRAI.*

14. *By its "firm demand" letter of 21-6-2016, RJIL vide separate letters requested IDOs to augment point of interconnection (POIs) for access, national*

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long distance (NLD) and international long distance (ILD) services, as according to it, the capacity already provided to it was causing huge POI congestion, resulting in call failures on its network. According to RJIL, these companies intentionally ignored the aforesaid request. Accordingly, RJIL sent a letter dated 14-7-2016 to TRAI stating that the POIs provided by IDOs are substantially inadequate and leading to congestion/call failures on its network in all circles. Hence, TRAI was requested to intervene and direct these telecom operators to augment the POI capacities as per the demands made by RJIL. TRAI vide separate letters dated 19-7-2014 requested inter alia the aforementioned telecom operators to augment POIs as per the RJIL's request. Further, responses of the respective companies were also sought on the issues raised by RJIL, within seven days. Idea responded by sending letter dated 26-7-2016 to RJIL denying that there had been any delay in augmentation of POIs and further stated that it is willing to fully support RJIL and that it had instructed its circle teams to augment the POIs on the basis of traffic congestion as per the ICA. Likewise, Airtel also sent reply dated 3-8-2016 to TRAI, inter alia stating that augmentation of POIs shall be undertaken as per the terms and conditions of the ICA and on the basis of traffic trends post their commercial launch. RJIL was not satisfied with such responses. It sent another letter dated 4-8-2016 to TRAI reiterating its earlier request for augmentation of POIs by the subject telecom operators. In the meantime, even Cellular Operators Association of India (COAI) intervened by addressing communication dated 8-8-2016 to TRAI wherein it took a stand by stating that the RJIL was providing free service to millions of users under the guise of testing which led to choking of POIs. It was further suggested that due to the free service provided by RJIL, a substantial imbalance in voice traffic had occurred for which the existing operators were not adequately compensated under the

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Interconnection Usage Charges Regulations (IUC) in place.

15. *There was further exchange of correspondence between the parties and even by the parties to the TRAI which shows that the parties stuck to their respective positions and it may not be necessary to refer to those communications in detail. Suffice it is to mention that RJIL fixed 5-9-2016 as the launch date, which fact was informed to other service providers as well who were also told that the subscriber base was expected to substantially and swiftly increase resulting in even more POI congestion. On that basis, request was made for urgent POI augmentation vide letter dated 2-9-2016. The TRAI even facilitated a meeting between the representatives of RJIL and other service providers (the respondents herein) to sort out and resolve the differences in the interest of the consumers. At the same time, in the said meeting, the three telecom operators (respondents herein) also raised a grievance that free calls being provided by RJIL has resulted in an unprecedented traffic congestion on their respective networks and the current IUC regime is inadequate to cover the cost of efficiently maintaining such high traffic. Thereafter, vide letter dated 14-9-2016, addressed by Airtel to RJIL, it stated that the POIs (also known as E1s) would be converted into 50:50 ratio to outgoing and incoming E1s. In other words, the E1s provided would be converted to "only outgoing" or "only incoming" i.e. one-way E1s. RJIL replied by stating that it was acceptable to them.*

16. *Soon thereafter i.e. in September 2016 itself, Mr Rajan Sardana, a Chartered Accountant, filed information under Section 19 of the Competition Act (registered as Case No. 81 of 2016) and similar application was filed by Justice K.A. Puj (retired) (registered as Case No. 83 of 2016). Then, it was*

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followed by information under Section 19 of the Competition Act by RJIL in November, 2016 (registered as Case No. 95 of 2016).”

15. After having read the aforesaid, it would also be necessary to reproduce paragraph no.22 which quotes the allegations raised in the complaint :

> **“*22.****It is clear from the above that as per RJIL, the respondent service providers, along with COAI, entered into an anti-competitive agreement/formed a cartel and acted in an anti-competitive manner which is prohibited by the Act. On these allegations, it approached CCI for initiating inquiry into this anti-competitive practice. Insofar as the nature of alleged anti-competitive agreement is concerned, the allegations of RJIL are the following:*
>
> ***22.1.****Delay in provisioning or denial in provisioning of POIs, also known as “E1” in telecom parlance, to RJIL by IDOs during the testing phase and after commercial launch of RJIL services. POIs are the points where the networks of telecom operators connect. Without sufficient POIs it is not possible for subscribers of one service provider to make calls to subscribers of another service provider.*
>
> ***22.2.*** *It was also alleged, inter alia, that IDOs are denying Mobile Number Portability (MNP) requests of customers who wanted to switch to RJIL competing service.*
>
> ***22.3.*** *It was also alleged that COAI was acting at the behest of IDOs against the interest of a competing member i.e. RJIL, and not for the common interest of the industry and consumers as a whole.***”**

16. We now reproduce what exactly the IDOs submitted were jurisdictional facts:

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"100. *In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non-compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute.*

101. *It is a matter of record that before the TRAI, IDOs have refuted the aforesaid claim of RJIL. Their submission is that not only required POIs were provided to RJIL, it is the RJIL which is in breach as it was making unreasonable and excessive demand for POIs. It is specifically pleaded by the IDOs that:*

101.1. *RJIL raised its demand for POIs for the first time on 21-6-2016.*

101.2. *In the letter dated 21-6-2016, it was admitted that RJIL was in test phase.*

101.3. *There was no express mention of any commercial launch date.*

101.4. *As per the letter, immediately on commercial launch RJIL would have a 22mn subscriber base for which number series was already allotted.*

101.5. *As per the DoT Circular dated 29-8-2005 test customers are not considered as subscribers and test customers can only be in the form of business partners. It was highlighted that problem, if any, of congestion has been suffered on account of provisioning of full-fledged services during test phase.*

101.6. *RJIL in its complaint before TRAI was not considering the period of 90 days as was prescribed in the Interconnection Agreement. It was instead proceeding on the basis that the demand for POIs should be met on an immediate basis.*

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101.7. *There were several errors in the forecast made by RJIL.*

101.8. *The tables given by the RJIL are wrong as they take into account its total demand at the end of nine months against what was actually provided.* ***"***

17. Lastly, we record what the Supreme Court held to be jurisdictional facts that were to be determined:

"102. *The learned counsel appearing for the IDOs had also argued that the first firm demand for provisioning of POIs was made by RJIL on 21-6-2016. According to the IDOs, in that letter, RJIL had expressly admitted that it was under test phase and had not commenced "commercial services". RJIL had also stated that the demand for POIs was being made to "provide seamless connectivity to targeted subscribers" as against "test consumers". Their submission was that it was not disclosed at all as to when RJIL was going to launch commercial services. On the basis of the aforesaid stand taken by the IDOs, their argument is that in the first instance it is the TRAI which is not only competent but more appropriate authority to consider these aspects as it is TRAI which is the specialised body going by the nature of dispute between the parties, the following aspects have to be determined by TRAI:*

102.1. *Whether IDOs were under any obligation to provide POIs during test period?*

102.2. *As per the letter dated 21-6-2016 from RJIL, when IDOs were to commence provisioning of POIs to RJIL?*

102.3. *Whether the demand for POIs made by RJIL were reasonable or not?*

102.4. *Whether there was any delay/denial at the end of Vodafone in provisioning of POIs?*

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102.6. *Whether IDOs have provided sufficient number of POIs to RJIL in conformity with the licence conditions?*

103. *We are of the opinion that as TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by TRAI in the first instance. These are jurisdictional aspects. Unless TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated 6-9-2016 that the matter related to interconnectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated 27-9-2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated 21-10-2016 on the issue of interconnection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licences granted to them. The TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIs. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned.*

104. *We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by TRAI*

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which would bring on record findings on the aforesaid aspects, CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of the TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/Tdsat under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 72 and 102 above are determined by TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage CCI can go into the question as to whether violation of the provisions of the TRAI Act amounts to "abuse of dominance" or "anti-competitive agreements". That also follows from the reading of Sections 21 and 21-A of the Competition Act, as argued by the respondents.

105. *The issue can be examined from another angle as well. If CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in para 102 above. Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and CCI on the other, arrive at conflicting views. Such a situation needs to be avoided. This analysis also leads to the same conclusion, namely, in the first instance it is TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out of the telecom licences granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various regulations and*

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directions issued by TRAI itself."

18. Following the aforesaid, the Supreme Court laid down the test for CCI to exercise its jurisdiction as follows:

> *"113. The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well."*

19. The Supreme Court's decision clearly mandates that unless TRAI finds fault with the conduct of a service provider, CCI cannot order investigation. The Supreme court has rightly laid down that despite the overlap between TRAI and CCI's jurisdiction the possibility of conflicting views can be resolved by holding that matters which pertain to issues specifically regulated by TRAI, TRAI has the jurisdiction at the first instance to deal with and render findings on such jurisdictional aspect. Thereafter, once TRAI performs this function *viz.* returning a finding that leads to a

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prima facie conclusion that the parties have indulged in anti-competitive practices can CCI investigate a matter.

20. In our considered opinion, each of the issues raised in *CCI vs. Bharti Airtel* were *in-personam* disputes between the RJIL and IDOs. In view of the aforesaid, it is evident that the principles of law laid down by the Apex Court in *CCI vs. Bharti Airtel* applies to in personam / inter party disputes i.e. after the rights and obligations of the parties have been determined by TRAI the sectoral regulator - TRAI.

21. In view of the Supreme Court's decision comprehensively reproduced hereinabove, we are to ascertain whether or not the 7th December, 2015 Order decided the necessary jurisdictional facts which in turn enabled CCI to pass the Impugned Order commencing investigation. We may however clarify that as cautioned by the Supreme Court in paragraph no. 120 of *CCI vs. Bharti Airtel*, we shall not be adjudging the validity of the Impugned Order on merits.

Reasons and Findings :

22. With the aforesaid test laid down by the Supreme Court in mind, we now proceed with necessary analysis of the 7th December, 2015 Order. In order to do so, it would be necessary to reproduce the following paragraphs from the 7th December, 2015 Order.

> ***INTRODUCTION :***
>
> *This case raises some very basic issues concerning the broadcasting services. The Interconnect Regulations are founded on the principles of "must provide" and non-*

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exclusion. A broadcaster must give its signal to every distributor, indeed on reasonable terms. The Regulations further mandate the broadcaster to publish a Reference Interconnect Offer (RIO) setting forth the technological and commercial terms on which it would give its signal to a distributor. The RIO is a sort of offer to the world at large and if a distributor expresses willingness to take the broadcaster's signals on the RIO terms the broadcaster must give its signals to the distributor without ado (provided of course the distributor's system are technologically compliant with the regulatory prescriptions!). At the same time, the Regulations also seem to allow for inter-connect arrangement between the broadcaster and a distributor, based on mutually negotiated agreement. To cap it all, the Regulations dictate parity and non-discrimination in the inter-connect arrangements that a broadcaster may enter into with different broadcasters. These demands, that to some may appear incompatible or even conflicting and that go into the making of the Regulations give rise to a number of questions. Does the RIO have precedence over mutual negotiations and does it circumscribe the scope of negotiations and limit it to the framework of the RIO within which negotiations may be held to agree upon some changes in the terms of the RIO ? Does this view interfere with the broadcaster's freedom to contract on the basis of voluntary negotiations said to be guaranteed under the Constitution and further sanctioned by the Copyright Act ? Is the converse of the above the correct view, that for entering into interconnect agreement, mutual negotiation has primacy and RIO is the fall back device, in case negotiations fail to satisfy both sides ? But in that case if the broadcaster does not disclose to everybody the terms of the agreement brased on negotiation with a certain distributor, how are the rights of party and non-discrimination of other similarly situated distributors impacted ? What is the parameter to judge similarity between different distributors of TV signals ? What weight should be assigned to mutual negotiations, RIO and parity and non-discrimination in the over-all scheme of interconnection to best sub-

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serve the intent and purpose of the Regulations. These are some of the main questions, along with some ancillary issues that come up for consideration before the Tribunal.

II. THE CASE OF THE PETITIONER :

The Petitioner is a head-end in the sky (HITS) operator and a distributor of TV channels within the meaning of the Regulations. It makes the grievance that it is being discriminated against from the beginning and its very entry in the broadcasting sector was sought to be blocked at the threshold. According to the Petitioner, the present Petitions are a sequel to its earleir Petition before the Tribunal and the present proceedings may be viewed as continuation of its efforts to find a fair place in the broadcasting sector on the basis of parity and non-discrimination.

Based on the submissions made by all the counsel, and in order to lend some structure to the observations and findings that we have arrived at, the issues may be enumerated as under (which in substance remain the same as the questions framed by the order dated 30.7.2015) :

1. Whether, in the facts of this case, a dispute requiring the adjudication of issues framed by the Tribunal's order dated 30 July 2015, at all arises ?

2. Whether the right to freedom of contract is embedded in the Interconnect Regulations and consequently mutually negotiated agreements are outside the purview of not only the non-discrimination obligation in clause 3.2 of the Interconnect Regulations, 2004 but the regulatory regime itself ?

3. Whether, in light of the scheme of the Copyright Act and the fact that what is being transmitted is licensed content, the Interconnect Regulations 2004 must necessarily be interpreted as according complete freedom of contract and primacy of mutual negotiations in matters of interconnection ?

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4. What interpretation ought to be placed on the various clauses of the 2004 Regulations ? Specifically, what is contemplated by an RIO, and what is the extent of negotiation that is permissible in deviating from the terms of the RIO ? Specifically, can parties – by mutual negotiations – contract out of mandatory norms laid down both in the Regulations (e.g. 13.2A.11 and 13.2A.12) and the conditions/methodology contained in Schedule III ?

5. Can a HITS operator be regarded as similarly situated as compared with MSO/DTH in terms of Clause 3.6 of the 2004 Regulations, thus enabling it to claim non-discriminatory treatment ?

On a consideration of the relevant provisions of the Regulations, 2004, the submissions made on behalf of the parties and the interveners and the earlier decision of the Tribunal in the Hathway's case we are unhesitatingly of the view that reasonableness, parity and non-discrimination, as mandated in clause 3.2 of the Regulations are essential and un-violable elements of an interconnect agreement. We accept as correct, the submission made on behalf of TRAI that Clause 3.2 is the essence of the Regulations and that clauses 3.1 & 3.2 stipulate the "most essential conditions of the interconnection regulations".

Having thus disposed of the main contentions made on behalf of the broadcasters and some others in favour of leaving the field completely open for negotiated agreements and having arrived at some primary findings we now proceed to examine the question that was left open in the Hathway decision namely, the extent of freedom of negotiation enjoyed by the provider and seeker of signals and the extent to which the RIO of the provider regulates, limits or expands the area of negotiation.

This brings us to the RIO which is the most basic in this controversy. Once the nature of the RIO and its position in the Regulations is correctly understood

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everything falls into place and a number of points raised by the different counsel are either answered or appear to lose relevance, including the issue of disclosure of commercial terms raised by Mr. Sibal.

Mr. Kathpalia, learned Counsel appearing for Hathway, as one of the interveners in the proceedings hit the nail on the head in submitting that what are passed off as RIOs by the broadcasters are no RIOs at all. Mr. Kathpalia submitted that the RIO was intended to be a standard, or a reference point. Instead, in its current form, it can be empirically established that less than 5% of the actual deals are on RIO basis and that too, for very short periods. In other words, Mr. Kathpalia submitted that the present RIO (as published by broadcasters) was nothing but a threat, or a bullying tool in negotiations, where distributors were presented with a 'my way or the highway' choice, with the RIO being the highway. The RIO rates were also divorced from commercial or market realities, that neither party actually wanted an agreement on RIO basis. This, Mr. Kathpalia submitted, was borne out by the fact that when distributors did – in certain cases – agree into an agreement on RIO basis, the broadcasters themselves were forced to rush to this Tribunal. Mr. Kathpalia further submitted that the RIO was structured in a manner to make the a la carte offering of channels a non-starter. Mr. Kathpalia submitted that discrimination was inherent in the faux RIO that exists today.

We agree with Mr. Kathpalia's submissions on RIO and we proceed to examine in how many ways the RIOs, currently offered by the broadcasters, do not conform to the Regulations.

The RIO offered by every broadcaster to the distributors has three main features :

i) It gives only a list of individual channels with their a la carte rates
ii) It does not give any bouquets of channels or the prices thereof
iii) Even the a la carte rates of channels are fixed with no regard to the

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market realities, as reflected in the negotiated deals, but at the highest permissible rate under the tariff order framed by TRAI

This faux RIO gives the broadcaster immense advantages. First, as every distributor of channels much prefers to take channels in bouquet forms and not individually, and specially not at the higher rates fixed in the RIO, the omission to give any bouquets in the RIO makes the broadcaster by and large free of the Regulations and gives it complete freedom of negotiations for entering into interconnect arrangements with the distributors. The broadcaster is thus able to retain the choice to take the "high road" of negotiations and thereby not to submit to the regulatory provisions or to take the "low road" of the RIO in which case alone it would submit to the Regulations. Secondly, by not giving in the RIO the bouquets and their prices that it offers for distribution in all its negotiated deals the broadcaster completely bye passes the mandate of clause 13.2A.12 that fixes the ratio between the a la carte rate and the bouquets rates channels. Thirdly, as the a la carte rates given in the RIO do not follow the ratio under clause 13.2A.12 of the Regulations and are also completely divorced from the actual market prices of the channels, the broadcaster acquires great bargaining power in any negotiation with the distributors. It can always refuse to enter into negotiations or terminate a negotiation asking the seeker of the channel to take the RIO that would be highly disadvantageous and quite often commercially unviable for the distributor. The RIO thus puts the broadcaster in a position where it can flout not only the non-discrimination clause but quite effectively also the "must provide" clause. Fourthly, the RIO in its present form completely defeats the thrust of the Regulations towards giving the subscriber the option to take only a few channels of his/her choice and not to be burdened with a very large number of channels in the form of a bouquet to sub-serve the broadcaster's interests in securing the advertisement revenue.

The broadcaster seeks to justify the faux RIO by taking the following

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positions. It first, relies upon the untenable theory, as argued by Dr. Singhvi that the Regulations recognise the negotiated agreement as a separate regime, independent of the RIO and the Regulations give the broadcaster complete freedom for entering into a negotiated agreement. The preposition is misleading and incorrect.

The provisions that form the basis for the submissions are contained (i) in clause 3.5 that provide that the broadcaster to whom a request for providing TV channels signals is made should provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which it is willing to provide TV channels signals ..... and (ii) in the proviso to clause 13.2A.6(i), providing that the broadcaster may enter, on non-discriminatory basis, into agreements with different direct-to-home operator modifying the reference interconnect offer on such terms and conditions as may be agreed upon.

It must be understood that provision of mutually agreed terms in clause 3.5 mainly relates to the areas under analogue mode of transmission. In analogue system, there is absolutely no scientific or objective way to ascertain the number of viewers watching any particular channel and in analogue mode gross understatement of the subscriber base by the distributor is a well-known and recognised fact. There is thus no other mode for the broadcaster and the distributor to agree upon the subscriber base and/or the licence fee payable by the distributor excepting mutual negotiations. The position is, however, entirely different in addressable systems of transmission in which the computerized subscriber management system keeps record of every single viewer watching every channel given by the distributor. Unlike analogue mode, in addressable systems, there cannot be any dispute or any negotiations in that regard. Hence, Mr. Saket Singh rightly submitted on behalf of TRAI that once the RIO regime is introduced in any area under addressable transmission, the provision of clause 3.5 gets ousted. As regards,

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the proviso to clause 13.2A.6(i), it is to be noted that "the mutually agreed terms and conditions are qualified by the condition of non-discriminatory basis and provide only for modifying the RIO and not to discard it altogether".

It is secondly contended that by putting up the RIO on its website offering the channels individually and on a la carte rates the broadcaster satisfies the requirement of non-discrimination. Additionally that the broadcaster is free to fix the a la carte rates of channels upto the upper limit allowed under the tariff order and regardless of the actual market price of the channels. It is further contended that the broadcaster is not obliged to give any bouquets in the RIO because the Regulations mandate it to offer all its channels for distribution on a la carte basis; there is no mandate to give the channels in the form of bouquets. The submission is quite fallacious. As discussed earlier, offering channels in the form of bouquets is the preferred mode in the broadcasting sector. There is no need for any mandate for that. The Regulation requires that apart from the bouquets, channels must also be offered on a la carte basis. That was intended for the benefit of the ordinary subscriber. But that objective too is totally frustrated as the a la carte rates are artificially raised with no reference to the market prices of the channels. Moreover, Schedule III to the Interconnect Regulations enumerate "Terms and Conditions Which Should Compulsorily Form Part of Reference Interconnect Offer .....". The Annexure to schedule III clearly requires the compositions of different bouquets with their respective prices to be stated in the RIO, apart from the a la carte rates of the channels. The omission to give the bouquets in the RIO is thus plainly a contravention of the Regulations. Furthermore, the submission has already been rejected in the Hathway decision.

As the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for

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distribution along with the rates of each of the formation or bouquet. Further, the a la carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition, any volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations.

A proper RIO would, thus, form the starting point for any negotiations which would be within the limits allowed by the ratio between the a la carte and the bouquet rates as stipulated under clause 13.2A.12 and the margins between different negotiated agreements would be such as they would hardly be any requirement for disclosures.

VI.d. Issue 5

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 "HITS has a PAN-India footprint and a last mile monopoly". 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,

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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.

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 expression "all similarly based distributors of TV channels" 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-a-vis distributors of TV channels using non addressable systems."*

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.

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

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an interconnect arrangement has to be taken at part with a pan-India MSO and must, therefore, receive the same treatment.

VII. Operative Directions

In light of the discussions made above, both Star and Taj, as well as the other broadcasters who have joined the proceedings as intervenors, are directed to issue fresh RIOs, in compliance with the Interconnect Regulations, as explained in this judgment within one month from the date this order becomes operational and effective. It will be then open to the Petitioner to execute fresh interconnect agreements with Star and Taj, and with any other broadcasters on the basis of their respective RIOs or on negotiated terms within the limits, as described hereinabove. Star and Taj must execute fresh interconnect agreements with the Petitioner within two weeks from the date of issuance of their fresh RIOs. The agreement with Star would relate back to 30 October 2015 and with Taj to 30 June 2015.

This issuance of the fresh RIOs by the broadcasters will also give right to other distributors of channels with whom the broadcasters may be in interconnect agreement to have their agreements modified in terms of clause 13.2A.7.

It is noted in the earlier part of the judgment that the Petitioner executed an RIO based agreement with Media Pro. At that time, it did not complain before the Tribunal that it was being forced into the RIO based agreement even though it had ample opportunity to do so as the Media Pro application was pending before the Tribunal. Later on, after Media pro ceased to be an agent of the broadcasters, the Petitioner, even after filing the present Petition, signed RIO based agreements both with Star and Taj. The agreement with Star was for the period upto 30 July 2015 and the two agreements with Taj were upto 31 March 2015.

The Petitioner must, therefore, be held bound by those agreements till the

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periods of those agreements and further, three months beyond that in terms of clause 8 of the Interconnect agreement. After those dates (29 October in case of Star and 30 June in case of Taj) the arrangement will be governed by the fresh agreements.

IX. Suspension of the judgment.

We are conscious that in interpreting the Interconnect Regulations, 2004, it has been necessary to reconcile seemingly inconsistent strands of the Regulations. The non-discrimination obligation, which TRAI acknowledges as the pivot of those Regulations, appears inconsistent with a regime where parties are allowed full latitude to mutually negotiate their agreements and also not disclose the commercial terms of the agreement to other market participants. The task before this Tribunal has been to reconcile these different facets of the Regulation such that no one part is rendered completely hollow, redundant or otiose. Thus, in the interpretation that we have placed on the Regulation, there is the obligation to frame a meaningful RIO in which all bouquet and a la carte rates are specified, and there is also some room for mutual negotiation (even on rates) within certain specified parameters. This will achieve the objective of introducing a transparent non-discriminatory regime whereby distributors can obtain access to content, while still retaining some latitude to mutually negotiable the terms and conditions of access. It will also make the nexus between a la carte and bouquet rates, which the regulator thought fit to introduce, applicable to all mutually negotiated agreements. Negotiations must be within the parameters to those mandatory conditions specified in the Regulations that cannot be avoided or waived, and the mutual negotiation course cannot be used as the means to completely step out of the Regulations. It would be plainly opposed to any common sense principle to first set out an elaborate cumbersome regulatory architecture, only to allow parties to opt out of it as will.

At the same time, we are conscious that the present judgment may unsettle

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the way in which various parties in the broadcasting sector have entered into existing agreements. We are further conscious that while the TRAI has taken a position broadly in line with our conclusions in this case, that has not always been the case. As the Amicus Curiae and the counsel for the Petitioner have pointed out, the positions taken by TRAI in the past have not always been fully consistent. In particular, we note the observation of TRAI in Consultation Paper No.15/2008 that in view of the confidentiality restrictions, "the automatic implementation of non-discrimination clause in Interconnect Regulation is practically difficult". Thus, as far back as 2008, TRAI was aware that the non-discrimination clause – which, in these proceedings, it has sought to place on a very high pedestal – was effectively inoperative. And yet, matters in the broadcasting sector have been allowed to lie where they are by TRAI.

There are, undoubtedly, important issues of regulatory policy that underlie the interpretative issues that this Tribunal has had to confront. It is incumbent on this Tribunal to interpret the Regulations as those stand, and place an interpretation that is aligned with the legislative and regulatory intent. But in a matter where TRAI has not been entirely consistent at every point in time, in a matter where the Regulations have evolved with frequent and successive amendments, and in a sector which has undergone some technological change with the shift from analogue to digital transmission, it is better if an opportunity is given for the Regulator to comprehensively consider such issues, initiate appropriate consultations, and frame a comprehensive code for the broadcasting sector.

We have, on past occasions as well, made similar suggestions with the hope of nudging the Regulator to take proactive steps to reduce the scope of disputes arising out of the Regulations. At the same time, the fact that regulatory intervention may be the ideal way forward cannot and should not be an excuse for this Tribunal to shirk the interpretative issues that have come before use. This is particularly so when

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there appears to be regulatory inertia.

It is in this background, and having given our anxious consideration to this matter, that we resolve to suspend the operation of this judgment till 31 March 2016. The judgment shall take effect on 1 April 2016. While we are aware that this is not a common procedure, we are of the view that it is appropriate in the peculiar facts and circumstances of this case, since the effect of this judgment may be to unsettle a number of existing agreements and necessitate re-negotiation.

In the meanwhile it will be open to TRAI, if it elects to do so, to undertake a comprehensive restructuring of the Regulations which would hopefully clarify many of the issues that arise in these proceedings. We make it clear that this Tribunal is issuing no such direction to TRAI. The delayed operation of the judgment is only to afford an opportunity to TRAI to consider the matter and act in the intervening period, if appropriate.

Having regard to the fact that the greater part of the country would come under the DAS regime with effect from 1.1.2016, it would be advisable that TRAI should try to frame a consolidated Broadcasting Code instead of the large number of Regulations dealing with different aspects of the service and each having undergone numerous amendments. In order to make a serious effort in that direction, TRAI would be required to get hold of all the negotiated interconnect agreements between the broadcasters and the distributors of channels, which the broadcasters are in any event obliged to submit to TRAI. The analysis of the commercial terms of the negotiated agreements would give TRAI a clear picture of the market prices of the broadcasters' channels. A comparison of the prices in the negotiated agreements and those shown in the current RIOs will then show how far the RIOs are removed from market realities. Having examined the negotiated agreements between the broadcasters and the distributors of channels, TRAI may even feel the need to take a re-look at the tariff orders framed by it. But for any meaningful exercise for

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reviewing and consolidating the broadcasting Regulations it would be imperative for TRAI to get hold of the negotiated agreement between the broadcasters and distributors which alone would give the correct picture of the market reality.

Needless to add that in case TRAI issues any fresh Regulations before 1 April 2016, the Petitioner and the broadcasters would be obliged to execute agreements on that basis. In case, however, no fresh Regulations are issued by TRAI, this judgment and order will come into effect from the aforesaid date and the parties would be obliged to follow the directions given above.

X. Trying up the loose ends.

Suspension of this judgment, as explained above is in the larger interest of the broadcasting sector. It does, however, leave open the question of the Petitioner's liability to pay licence fees to the broadcasters, Star and Taj, for their signals received by it during the pendency of the Petitions before the Tribunal and further until execution of fresh agreements in terms of this judgment or in terms of fresh Regulations, if any, framed by TRAI. It will not be fair that the broadcasters should continue to supply signals to the Petitioner without any payment for the next several months. It is, therefore, necessary to make some interim arrangement under which the Petitioner should make payment of licence fees to the two broadcasters until after execution of fresh agreements accounts are finally reconciled. The determination of payment liability by the Petitioner may also require some evidence to be taken. For this purpose, Petition No. 526 (C) of 2015 is de-tagged from this judgment and kept pending. Star has already filed an application (M.A. No.377 of 2015) in Petition No.314 (C) of 2015 claiming the dues of licence fees from the Petitioner. Petition No.526 (C) of 2015 is directed to be tagged with Petition No.314 (C) of 2015. In these two Petitions, the Tribunal proposes to determine the Petitioner's liability to pay the license fees to Star and Taj on an ad hoc basis and as an interim measure

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until the execution of the agreements with the two broadcasters, and when the accounts of the two sides may be reconciled to determine any final liability of the Petitioner or Respondents to make any further payments.

Before concluding we would like to put on record our deep appreciation for the assistance rendered by all the counsel who appeared in these proceedings. We also record our gratitude, particularly to the amicus curiae for the very valuable assistance he provided to us by his thorough work and painstaking research of the evolution of the regulatory regime for the broadcasting sector not only in India but in some other jurisdictions as well.

In the result, Petition No.295(C) of 2014 (along with all applications pending in it) is disposed of in the above terms. Petition No.526(C) of 2014 is held back and kept pending as directed above.

23. Having ascertained that the decision in *CCI vs. Bharti Airtel* applies to *in personam / inter party* disputes, we propose to juxtapose the decision in the said case with that of the grievances of NSTPL. It is NSTPL's case that its grievances in so far as price discrimination is concerned have already been decided in the 7th December, 2015 Order. In order to test the aforesaid submission, it would be necessary to list below the issues as were framed in the First TDSAT Petition. These read:

1. Whether, in the facts of this case, a dispute requiring the adjudication of issues framed by the Tribunal's order dated 30 July 2015, at all arises ?

2. Whether the right to freedom of contract is embedded in the Interconnect Regulations and consequently mutually negotiated agreements are outside the purview of not only the non-discrimination obligation in clause 3.2 of the Interconnect Regulations, 2004 but the regulatory regime itself ?

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3. Whether, in light of the scheme of the Copyright Act and the fact that what is being transmitted is licensed content, the Interconnect Regulations 2004 must necessarily be interpreted as according complete freedom of contract and primacy of mutual negotiations in matters of interconnection ?

4. What interpretation ought to be placed on the various clauses of the 2004 Regulations ? Specifically, what is contemplated by an RIO, and what is the extent of negotiation that is permissible in deviating from the terms of the RIO ? Specifically, can parties – by mutual negotiations – contract out of mandatory norms laid down both in the Regulations (e.g. 13.2A.11 and 13.2A.12) and the conditions/methodology contained in Schedule III ?

5. Can a HITS operator be regarded as similarly situated as compared with MSO/DTH in terms of Clause 3.6 of the 2004 Regulations, thus enabling it to claim non-discriminatory treatment ?

24. When juxtaposed, the conclusion that emerges is that the grievances raised by NSTPL in the Information are materially distinct from the five issues which were actually framed in the First TDSAT Petition. Issue Nos. (ii) and (v) listed above have not been raised in any petition filed by NSTPL against Star before TDSAT. However, these issues came to be decided in view of the fact that TDSAT allowed all stakeholders to intervene in the First TDSAT Petition because it was considering questions that were likely to affect the broadcasting sector as a whole. In so far as Issue Nos. (i) to (vi) are concerned, the 7th December, 2015 Order does not decide whether NSTPL was similarly situated with and thus entitled to the same rates, bundles / bouquets, incentives and/or volume based discounts as those entities with whom Star

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had agreements. The findings of the TDSAT related to general industry wide issues *in rem*. In fact, the *in personam* dispute between NSTPL and the Petitioners is pending final adjudication. This is evident from the subsequent orders of TDSAT itself. The key issue that is specific to the dispute between Star and NSTPL is whether NSTPL is "similarly situated" with other distributors of Star, given its subscriber base, channel off-take, geographic reach, placement location of channel etc. and thus, whether it is entitled to parity in rates and incentives as such similarly situated entities. NSTPL will have to discharge the burden of showing how it is "similarly situated" before it can avail itself of the incentives / rates / bundles / bouquets offered to other similarly situated entities. In so far as findings specific to NSTPL's claims of parity / nondiscrimination and disclosure are concerned, the TDSAT specifically directed that NSTPL will continue to be bound by Star RIO No.2 and that the determination of NSTPL's payment liability under Star RIO No.2 requires evidence, which shall be determined in the Second TDSAT Petition. NSTPL has admittedly raised allegations of price discrimination, non-disclosure of discounted schemes / incentive schemes and anti-competitive conduct all of which remains to be decided in the Second TDSAT Petition.

25. Further, the issues as raised by NSTPL in the Second TDSAT Petition are jurisdictional facts which only the TDSAT as an expert regulatory body is equipped to decide as per the ratio laid down in *CCI vs. Bharti Airtel*. Absent a finding in the

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Second TDSAT Petition that Star and Sony have in fact engaged in price discrimination and/or non-disclosure of discounted schemes / incentive schemes and/ or anti-competitive conduct qua NSTPL, CCI could not have proceeded with the investigation.

26. In our considered opinion, a bare perusal of the 7th December, 2015 Order demonstrates that it pertains only to general / industry-wide issues relating to the concept of RIO and the law declared therein is intended to be prospective in operation. This is evident from the fact that TDSAT did not deal with the finer and specific issues of discriminatory conduct alleged by NSTPL against Media Pro, Taj and Star in the First TDSAT Petition. In fact, none of the specific reliefs sought against Media Pro, Star and Taj in the First TDSAT Petition were even considered, let alone granted, when passing the TDSAT Order. The specific reliefs against Media Pro, Star and Taj were:

> *"(c) Direct the Respondent Nos. l, 3 & 4 Companies to disclose the Volume Related Schemes at which they have offered their TV Channel Signals I Content to distributors that are similarly placed with the Petitioner Company herein;*
>
> *(d) Consequently, direct the Respondent Nos.1, 3 and 4 Companies to refund to the Petitioner Company any amounts it has paid under the respective Interconnection Agreements, in excess of the prices being offered by the said Companies to distributors that are similarly placed with the Petitioner Company:*

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(e) Direct that the Respondent Nos. l, 3 and 4 Companies have an obligation to disclose the existing and future volume related schemes to the Petitioner Company here and further direct the Petitioner Company may avail of the same if desired;"

27. The 7th December, 2015 Order does not consider, let alone find, that NSTPL is "similarly placed" with other distributors. The order merely holds that HITS technology operators, being part of the addressable systems (as opposed to analogue / non-addressable systems) are at par with other addressable system technology operators and must, therefore, receive the same treatment. The factors peculiar to NSTPL's market position, which would determine whether NSTPL is in fact "similarly placed with other distributors" such as *(i)* viewership, *(ii)* advertisement revenue potential, *(iii)* regional, cultural, linguistic considerations, and *(iv)* other special considerations have not even been considered in the 7th December, 2015 Order. Instead, TDSAT passed an order on 30th July, 2015 noting that some of the questions that arose for consideration in the First TDSAT Petition were likely to affect the broadcasting sector as a whole. For this reason, all stakeholders were allowed to intervene in the First TDSAT Petition. After various stakeholders intervened, the five issues that were eventually framed in the First TDSAT Petition were industry-wide / general issues. Of these issues, not one relates to the specific conduct of Media Pro, Star or Taj. In Part IV of the 7th December, 2015 Order , TDSAT noted various facts concerning the broadcasting sector as a whole. Of these facts, not one relates to

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NSTPL or the Petitioners' market position in the broadcasting sector. In Part V of the 7th December, 2015 Order , TDSAT noted various provisions of the TRAI Act and Regulations, with particular reference to the non-discriminatory mandate and the "must provide" obligation. These were particularly referred to and interpreted when considering the questions relating to the scope of mutual agreement and freedom to contract under the TRAI Act and Regulations. In Part VII of the 7th December, 2015 Order, TDSAT passed its operative directions in light of the discussions on the five industry-wide issues decided by it. The operative direction was to issue fresh RIOs, in compliance with the Regulations *"as explained in this Judgment within one month from the date of this order"*. This direction was not specific to Star and Taj, but applied to all other broadcasters who joined the proceedings as intervenors. Despite this, TDSAT held that NSTPL was bound by Star RIO No.2, not only for the period of the agreement but for three months beyond that as well. This operative direction was clearly prospective. Pertinently, the TDSAT did not impose any penalty or direct any other broadcaster to refund any amounts collected from charging allegedly discriminatory / excess prices to NSTPL. In Part IX of the 7th December, 2015 Order, TDSAT suspended the operation of its own Order and directed that it would take effect prospectively, with effect from 1st April 2016. When doing so, TDSAT *inter alia* noted as under:

> *"103 .... The task before this Tribunal has been to reconcile these different*

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facets of the Regulation such that no one part is rendered completely hollow, redundant or otiose. Thus, in the interpretation that we have placed on the Regulation, there is the obligation to frame a meaningful RIO in which all bouquet and a la carte rates are specified, and there is also some room for mutual negotiation (even on rates) within certain specified parameters ...

xxx

104. At the same time, we are conscious that the present judgment may unsettle the way in which various parties in the broadcasting sector have entered into existing agreements. We are further conscious that while the TRAI has taken a position broadly in line with our conclusions in this case, that has not always been the case

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107. It is in this background, and having given our anxious consideration to this matter, that we resolve to suspend the operation of this judgment till 31 March 2016. The judgment shall take effect on 1 April 2016. While we are aware that this is not common procedure, we are of the view that it is appropriate in the peculiar facts and circumstances of this case, since the effect of this judgment may be to unsettle a number of existing agreements and necessitate re-negotiation…"

28. The 7th December, 2015 Order further expressly noted:

"111. Suspension of this judgment, as explained above is in the larger interest of the broadcasting sector. ***It does, however, leave open the question of the petitioner's liability to pay licence fees to the broadcasters****, Star and Taj, for their signals received by it during the pendency of the petitions before the Tribunal and further until execution of fresh agreements in terms of this*

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judgment or in terms of fresh Regulations, if any, framed by TRAI. It will not be fair that the broadcasters should continue to supply signals to the petitioner without any payment for the next several months. It is, therefore, necessary to make some interim arrangement under which the petitioner should make payment of licence fees to the two broadcasters until after execution of fresh agreements accounts are finally reconciled. The determination of payment liability by the petitioner may also require some evidence to be taken. For this purpose, Petition No. 526 (C) of 2015 is de-tagged from this judgment and kept pending. Star has already filed an application (M A. No. 377 of 2015) in Petition No. 314 (C) of 2015 claiming the dues of licence fees from the petitioner. Petition No. 526 (C) of 2015 is directed to be tagged with Petition No. 314 (C) of 2015. In these two petitions, the Tribunal proposes to determine the Petitioner's liability to pay the license fees to Star and Taj on an ad hoc basis and as an interim measure until the execution of the agreements with the two broadcasters, and when the accounts of the two sides may be reconciled to determine any final liability of the Petitioner or Respondents to make any further payments." *(emphasis supplied)*

Therefore, this liability, once determined, will constitute the final adjudication of the rights and liabilities of the Petitioners and NSTPL *inter se*.

29. We find credence in Mr. Khambata's argument that in the Second TDSAT Petition, NSTPL has made various *in personam* specific allegations against Star. Admittedly, in response to the Second TDSAT Petition, Star has denied all of NSTPL's Allegations. In the 7th December, 2015 Order, TDSAT has itself recognized the different factors / parameters that may play a role while determining whether a

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broadcaster had actually discriminated against a distributor. Therefore, according to us, the critical issues / aspects identified by NSTPL in its oral arguments are pending adjudication in the Second TDSAT Petition. None of them have been decided by TDSAT in the 7th December, 2015 Order. In fact, at the time of passing the 7th December, 2015 Order, TDSAT specifically directed in paragraph 111 that the question of liability and therefore the inter-party disputes between NSTPL and Star would be decided in the Second TDSAT Petition. Thus, the issue of "reconciliation of accounts" includes whether NSTPL was entitled to the same price, bouquets and incentives as "similarly situated distributors". Logically, if NSTPL does not establish that it is "similarly situated" then it would not be entitled to the same price / incentives etc. on reconciliation of accounts. These are jurisdictional aspects and facts, which must be decided before CCI could have ordered investigation.

30. Another aspect that leads us to hold that the Impugned Order cannot be sustained is that the Petitioners as also CCI were *ad idem* as to the onus cast upon CCI under Section 26 (1) of the Act. This meant that a *prima facie* finding AAEC would be an essential and mandatory finding before CCI could direct investigation. However, the Impugned Order lacks this necessary finding. In our considered opinion, the Impugned Order cannot be sustained on this count alone. In this respect, it would be necessary to place reliance on the Supreme Court's decision in *CCI v Steel Authority of India (supra)* and the following findings therein:

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*"**93.** We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision-making process. That is the precise reason that the legislature has used the word "direction" to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission.*

***94.** The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in CCT v. Shukla & Bros. [(2010) 4 SCC 785 : (2010) 2 SCC (Cri) 1201 : (2010) 2 SCC (L&S) 133] , wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies.*

***97.** The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of*

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> *forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.* "

31. The aforesaid decision of the Supreme Court as also various other decisions cited before us clearly lay down that the formation of an opinion is a *sine qua non* for CCI to exercise its jurisdiction.

32. Further, whilst considering a contravention of Section 3(4) of the Act, CCI ought to render a *prima facie* finding as to the existence of an agreement refusing to deal and that such agreement causes/is likely to cause AAEC in India. However, as already held by us hereinabove, such material finding is lacking in the Impugned Order. Faced with this difficultly, CCI has attempted at defending the Impugned

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Order by stating that it evidently contains an analysis of whether Star and Sony are in dominant positions in the relevant market. CCI admits and accepts that the Impugned Order assesses the conduct of Star and Sony under Section 4 of the Act, and therefore, the Impugned Order has considered the factors set out under Section 19 (4) of the Act. In fact, the CCI submitted that every vertical agreement / refusal to deal is not interdicted by CCI. Instead, CCI conducts a threshold analysis to ascertain whether the person is in a dominant position before proceeding to analyze whether the agreement amounts to a refusal to deal. This is because, according to CCI, parties who are not in a position of dominance have the freedom to contract and deal with whomsoever they choose. However, the oral arguments and the Written Submissions tendered by CCI do not provide any reason whatsoever as to why, after ascertaining that Star and Sony are in dominant positions in the relevant market, no analysis of the likelihood of AAEC has been carried out when passing the Impugned Order. Before directing an investigation, the CCI ought to have applied its mind to and scrutinized the Petitioners' conduct based on the factors set out under Section 19(3) of the Competition Act. Apposite from this discussion, it would be necessary to reproduce the following finding from the Supreme Court's decision in *ShriSitaram Sugar Co. Ltd. vs. Union of India*[16],

> ***"30.*** *The words "having regard to" in the sub-section are the legislative instruction for the general guidance of the government in determining the price*

16 *(1990) 3 SCC 223*

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> *of sugar. They are not strictly mandatory, but in essence directory. The reasonableness of the order made by the government in exercise of its power under sub-section (3-C) will, of course, be tested by asking the question whether or not the matters mentioned in clauses (a) to (d) have been generally considered by the government in making its estimate of the price, but the court will not strictly scrutinise the extent to which those matters or any other matters have been taken into account. There is sufficient compliance with the sub-section, if the government has addressed its mind to the factors mentioned in clauses (a) to (d), amongst other factors which the government may reasonably consider to be relevant, and has come to a conclusion, which any reasonable person, placed in the position of the government, would have come to. On such determination of the price of sugar, which, as stated in Panipat [(1973) 1 SCC 129 : (1973) 2 SCR 860] is the fair price, the sub-section postulates the calculation of an amount, with reference to such price, for payment to each producer who has complied with an order made with reference to sub-section (2)(f). The "price of sugar", unlike the "amount", is arrived at by a process of costing in respect of a representative cross-section of manufacturing units, bearing, of course, in mind the legislative instruction contained in clauses (a) to (d).***"**

33. In the Impugned Order, in order to hold a *prima facie* contravention of Section 3(4), CCI ought to have formed a *prima facie* view that there exists an agreement either between Star/Sony and NSTPL which provides for a refusal to produce, supply, distribute, store or trade in goods or provision of services with/to NSTPL and that such agreement causes AAEC. However, there is no finding that the Petitioners have

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refused to produce, supply, distribute, store or trade in goods or provision of services with/to NSTPL. CCI was under an obligation to arrive at a *prima facie* finding that the conduct of the Petitioners causes AAEC. Since there is no *prima facie* finding by CCI on AAEC, according to us, the mandatory jurisdictional pre-requisite of a *prima facie* view of contravention of Section 3(4) is absent. Therefore, once again, we are unable to find any reasonable justification justifying CCI's failure to apply the aforesaid analysis whilst passing the Impugned Order. This being so, the Impugned Order cannot stand the test laid down under the Act.

34. The impropriety of the Impugned Order stands further buttressed from the fact that whilst it says that the Petitioners have *prima facie* violated Section 3(4) read with 3(1) of the Competition Act, the factors to arrive at such finding *viz.* Section 19 (3) have not been considered. The Impugned Order is once again found lacking in the requirement to analyze and apply the factors laid down under Section 19(3) of the Competition Act and therefore cannot be sustained.

35. Moving further, it was Mr. Andhyarujina's submission that Star has changed its stand regarding the scope of the issues that were decided by TDSAT in the 7th December, 2015 Order and the Second TDSAT Petition. In this context, Mr. Andhyarujina placed reliance on the 10th August, 2017 Order, 16th November, 2017 Order and Star's Written Submissions filed with TDSAT on 8th November, 2017. It was Mr. Andhyarujina's submission that Star had always maintained that the 7th

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December, 2015 Order conclusively adjudicated all issues pending between the parties and therefore; nothing survives in Second TDSAT Petition for adjudication. However, in this respect, it is pertinent to note that whilst Star filed its Written Submissions with the CCI on 8th November, 2017, by an order dated 21st November, 2017 TDSAT rejected Star's contention that the Second TDSAT Petition was infructuous and that TDSAT itself held that the legality and validity of demand raised by Star against NSTPL is pending adjudication in the Second TDSAT Petition. In our opinion, once TDSAT rendered a finding that there were issues that survived and were required to be adjudicated in the Second TDSAT Petition despite having passed the 7th December, 2015 Order, what Star contended prior to such finding in its Written Submissions is irrelevant. It is for this reason that Mr. Khambata brought to our notice paragraph no. 29 of Star's Writ Petition which reads:

> *"29. Bearing the above in mind, it is submitted that it is evident that the Respondent No.2 has itself raised the issue of alleged non-provisioning of TV Channels by the Petitioner leading to alleged refusal to deal and price discrimination before the Hon'ble TDSAT which is pending adjudication as per its own case and order dated 10 Aug 201 7 of the Hon'ble TDSAT. Thus, the Respondent No.2 ought not to be permitted to forum shop and re-agitate the same issues before the Respondent No. I, in order to avoid its payment obligations and contrary to the clear mandate and regulatory regime and adjudicatory body prescribed under the TRAI Act, which bars the jurisdiction of the Respondent No. I to adjudicate upon issues which are within the scope of TRAI Act and Ld. TDSAT."*

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36. Additionally, Star has taken a specific ground in its Writ Petition contending that the rights and obligations of the parties under the TRAI Act are still pending adjudication under the TRAI Act and that the TDSAT is still considering the issue of discrimination and denial of incentive scheme in the Second TDSAT Petition. At this stage, it is pertinent to note that none of these grounds taken by Star has been contravened by NSTPL in as much as NSTPL has not even chosen to file a Reply to the Writ Petitions.

37. It was Mr. Andhyarujina's next argument that Star RIO No.2 was signed by NSTPL under protest. To deal with this submission, it would first be necessary to note that it is not NSTPL's case pleaded on Affidavit as NSTPL has not filed any reply in these petitions. Star has specifically asserted in its Writ Petition that Star RIO No.2 was voluntarily entered into by NSTPL. However, NSTPL has not filed any reply controverting the said assertions at all. In fact, in the 7th December, 2015 Order, TDSAT has noted:

> *"101. It is noted in the earlier part of the judgment that the petitioner executed an RIO based agreement with Media Pro. At that time, it did not complain before the Tribunal that it was being forced into the RIO based agreement even though it had ample opportunity to do so as the Media Pro application was pending before the Tribunal. Later on, after Media Pro ceased to be an agent of the broadcasters, the petitioner, even after filing the present petition, signed RIO based agreements both with Star and Taj. The agreement*

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with Star was for the period upto 30 July 2015 and the two agreements with Taj were up to 31 March 2015.

102. The petitioner must, therefore, be held bound by those agreements till the periods of those agreements and further, three months beyond that in terms of clause 8 of the Interconnect agreement. After those dates (29 October in case of Star and 30 June in case of Taj) the arrangement will be governed by the fresh agreements. **"**

38. The aforesaid passage from the 7th December, 2015 Order reflects that even TDSAT did not accept NSTPL's contention that Star RIO No.2 was not binding as being "under protest" or "without prejudice".

39. We are further unable to place any reliance on the various charts submitted by NSTPL to submit that Star and Sony have indulged in price discrimination. It is now clear that the issue as to whether Star and/or Sony indulged in price discrimination is still pending adjudication in NSTPL 's Second TDSAT Petition. Therefore, we cannot pass any finding in this respect. In any event, the Supreme Court in *CCI vs. Bharti Airtel* has clearly laid down that this Court ought not to go into the merits of the Impugned Order. Keeping in line with the Supreme Court's directions in *CCI vs. Bharti Airtel*, we also refrain from making any observations as to the conduct and on-going insolvency proceedings of NSTPL.

40. With respect to the Respondents' submissions that this Court ought not to interfere with the Impugned Order and the various citations tendered by them to

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prevent this Court from judicially reviewing the Impugned Order, we deem it appropriate to refer to the following findings from *CCI vs. Bharti Airtel* :

> ***"B. Whether the writ petitions filed before the High Court of Bombay were maintainable?***
>
> ***115.*** *Here comes the scope of judicial interference under Article 226 of the Constitution. As per the RJIL as well as CCI, the High Court could not have entertained the writ petition against an order passed under Section 26(1) of the Competition Act which was a pure administrative order and was only a prima facie view expressed therein, and did not result in serious adverse consequences. It was submitted that the finding of the High Court that such an order was quasi-judicial order is not only erroneous but it is contrary to the law laid down in SAIL [CCI v. SAIL, (2010) 10 SCC 744] . The respondents, on the other hand, have submitted that the judgment in the above case had no application in the instant case as it did not deal with the sector that is regulated by a statutory authority. Moreover, such an order was quasi-judicial in nature and cannot be treated as an administrative order since it was passed by CCI after collecting the detailed information from the parties and by holding the conferences, calling material details, documents, affidavits and by recording the opinion. It was submitted that judicial review against such an order is permissible and it was open to the respondents to point out that the complete material, as submitted by the respondents, was not taken into consideration which resulted in an erroneous order, which had adverse civil consequences inasmuch as the respondents were subjected to further investigation by the Director General.*
>
> ***116.*** *We may mention at the outset that in SAIL [CCI v. SAIL, (2010) 10 SCC 744] , nature of the order passed by CCI under Section 26(1) of the*

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Competition Act [here also we are concerned with an order which is passed under Section 26(1) of the Competition Act] was gone into. The Court, in no uncertain terms, held that such an order would be an administrative order and not a quasi-judicial order. It can be discerned from paras 94, 97 and 98 of the said judgment, which are as under: (SAIL case [CCI v. SAIL, (2010) 10 SCC 744] , SCC pp. 785 & 787)

> *"94. The Tribunal, in the impugned judgment [SAIL v. Jindal Steel & Power Ltd., 2010 SCC OnLine Comp AT 5] , has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in CCT v. Shukla & Bros. [CCT v. Shukla & Bros., (2010) 4 SCC 785 : (2010) 3 SCC (Civ) 725 : (2010) 2 SCC (Cri) 1201 : (2010) 2 SCC (L&S) 133] , wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies.*
>
> ***
>
> *97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections,*

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requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well-reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well-reasoned.

98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for

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investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act."

117. *There is no reason to take a contrary view. Therefore, we are not inclined to refer the matter to a larger Bench for reconsideration.*

118. *It was, however, argued that since SAIL [CCI v. SAIL, (2010) 10 SCC 744] was not dealing with the telecom sector, which is regulated by the statutory regulator, namely, TRAI under the TRAI Act, that judgment would not be applicable. Merely because the present case deals with the telecom sector would not change the nature of the order that is passed by CCI under Section 26(1) of the Competition Act. However, it raises another dimension. Even if the order is administrative in nature, the question raised before the High Court in the writ petitions filed by the respondents touched upon the very jurisdiction of CCI. As is evident, the case set up by the respondents was that CCI did not have the jurisdiction to entertain any such request or information which was furnished by RJIL and two others. The question, thus, pertained to the jurisdiction of CCI to deal with such a matter and in the process the High Court was called upon to decide as to whether the jurisdiction of CCI is entirely excluded or to what extent CCI can exercise its jurisdiction in these cases when the matter could be dealt with by another regulator, namely, TRAI. When such jurisdictional issues arise, the writ petition would clearly be maintainable as held in Barium Chemicals Ltd. v. Company Law Board [Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295] and Carona Ltd. [Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559]*

119. *In Carona Ltd. [Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8*

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SCC 559] , this Court held as under: (SCC pp. 569 & 571, paras 26-28 & 36)

"26. The learned counsel for the appellant Company submitted that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to "paid-up share capital" of a company can be said to be a "preliminary" or "jurisdictional fact" and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the "jurisdictional fact" did not exist and the Rent Act was, therefore, applicable.

27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

28. In Halsbury's Laws of England (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it has been stated:

'Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to

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its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive.'

The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.

***

36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue."

120. *Thus, even when we do not agree with the approach of the High Court in labelling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power under Article 226 of the Constitution. The writ petitions were, therefore, maintainable. "*

41. In view of the authoritative finding of the Supreme Court, we hold that the present Writ Petitions against the Impugned Order are maintainable and this Court ought to interfere with the Impugned Order in view of the fact that the procedure laid down under the Competition Act and the Supreme Court's pronouncement in *CCI vs. Bharti Airtel* was not adhered to whilst passing of the Impugned Order.

42. Lastly, we now deal with the two documents on EU Competition Law tendered by Mr. Sundaresan during his arguments. In so far as these documents are concerned,

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we note that firstly, the document titled *'Refusals to Deal 2007'* dated 3rd September, 2009 states that under EU law, the term *"refusal to deal" "refusal to supply"* refers to a situation in which one firm refuses to sell to another firm, is willing to sell only at a price that is considered "too high", or is willing to sell only under conditions that are deemed unacceptable. It further explains that such situations are analyzed by reference to Article 102 of the Treaty on the Functioning of the European Union **("TFEU")**. Article 102 of the TFEU deals with unilateral conduct of dominant firms which act in an abusive manner. On a reading of Article 102 of the TFEU, it appears that the *sine qua non* for the application of Article 102 is that the enterprise from whom supply is requested must enjoy substantial market power in the market for the refused input, not simply by reference to its market share but also by taking account of the full range of constraints which it faces, and in particular the ease with which its position may be challenged by existing or potential competitors. As such, under EU law, refusal to deal forms a facet of abuse of dominance. However, in the prevalent Indian regime, abuse of dominance is an independent provision which falls under Section 4 of the Competition Act. On the other hand, refusal to deal falls under Section 3 (4) of the Competition Act. Hence, it appears that EU Competition Law on refusal to deal is materially different from Indian law on the subject. Further and in any event, even under EU Law, a refusal to deal will only be unlawful if it can be shown that it will have an anti-competitive effect, with consequent long-lasting consumer harm. However, the

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Impugned Order did not consider whether the Petitioners' actions of will have any AAEC. Therefore, according to us, this submission of Mr. Sundaresan's cannot help sustain the Impugned Order.

43. In view of the findings herein, we proceed to pass the order as below.

CONCLUSION :

44. Both the Writ Petitions are allowed.

45. The Impugned Orders dated 27th July, 2018 and 31st July, 2018 passed by the Competition Commission of India under Section 26(1) of the Competition Act, 2002 and all consequent actions/notices of the Director General are quashed and set aside in exercise of our power under Article 226 of the Constitution of India.

There shall be no order as to costs.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**

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