TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED : 23RD DECEMBER, 2011

Petition No. 220(C) of 2010

VIACOM 18 Media Pvt. Ltd.	.....	Petitioner
Vs.		
MSM Discovery Pvt. Ltd.	.....	Respondent

Petition No.250(C) of 2010

MSM Discovery Pvt. Ltd.	.....	Petitioner
Vs.		
VIACOM 18 Media Pvt. Ltd.	.....	Respondent

BEFORE :

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. P.K. RASTOGI, MEMBER

In Petition No. 220 (C) of 2010

For Petitioner	:	Mr. Arun Kathpalia, Advocate Mr. Kunal Tandon, Advocate Mr. Angad Mehta, Advocate
For Respondent	:	Mr. Abhishek Malhotra, Advocate Mr. Angad Singh Duggal, Advocate

In Petition No. 250 (C) of 2010

For Petitioner	:	Mr. Aman Lekhi, Sr. Advocate Mr. Abhishek Malhotra, Advocate Mr. Angad Singh Duggal, Advocate
For Respondent	:	Mr. Arun Kathpalia, Advocate Mr. Kunal Tandon, Advocate Mr. Angad Mehta, Advocate

JUDGEMENT

S.B. Sinha

Introduction

Interpretation of some of the provisions of a Memorandum of Undertaking by and between the parties hereto and the consequences of violation thereof arise for consideration in these petitions.

Factual Backdrop

2. The petitioner is a broadcaster. It (hereinafter called and referred to as 'Viacom') at all material times was and still is producer of three channels, MTV, Nick and VH1.

The respondent herein, (hereinafter called and referred to as 'MSMD'), a Content Aggregator, was distributor of the said channels of Viacom and was also the sole and exclusive distributor of One Alliance channels. (It is a joint venture of MSM group of channels and of Discovery Group of channels having 74% and 26% of shares therein respectively.

The distributorship of the said channels of the petitioner had commenced prior to 2008.

3. In the month of July 2008, 'Viacom' launched a Hindi General Entertainment Channel (GEC) commonly known as 'Colors' as a pay channel

except in the CAS notified areas where it was launched as a 'Free to Air' channel. So far as NON-CAS areas were concerned, however no fee in respect of the said channel was being charged.

The parties hereto had entered into correspondences and discussions as regards renewal of the agreement of the said three channels.

The parties also discussed the prospect of taking over of the distribution of the new channel 'Colors' by MSMD wherefor an e-mail was sent by Himanshu Dhoreliya (RW1) to Sanjeev Hiremath – (PW2) with regard thereto.

4. A meeting took place between the representative of MSMD, Mr. Kunal Dasgupta and the representative of Viacom, Mr. Haresh Chawla. The parties also exchanged e-mails in regard thereto on 6th January 2009. Another meeting took place on or about 21st January, 2009 wherein Mr. Kunal Dasgupta, who was at the relevant point of time the Chief Executive Officer of MSMD, said to have made commitments for grant of stake in the said company to Viacom wherefor allegedly Shri Himanshu Dhoreliya sent an e-mail to MSMD.

5. On or about 11.02.2009 an MoU (hereinafter called and referred to as 'the said agreement') was entered into for the purpose of distribution of aforementioned television channels produced by the petitioner including

'Colors'. It was described therein as a 'New Channel', whereas 'MTV', 'Nick' and 'VH1' were described as 'Existing Channels'.

It, however, stands admitted that stake to Viacom in MSMD did not form part of the said agreement.

Communications and meetings between the parties, however, in that regard continued.

6. Not only the exchange of several e-mails between the parties hereto took place, but also meetings took place on or about 15th September, 2009 and 6th November, 2009 with regard.

e-mails were also exchanged in relation thereto on 9th November, 2009 and 23rd November, 2009.

7. As far as grant of stake to Viacom18 in MSMD is concerned, the parties allegedly yet again met on 25th November, 2009.

Upon exchange of a few more e-mails, another meeting took place on or about 12th January, 2010. The parties also met on 16th February, 2010.

8. We may also notice that by an e-mail dated 17th May 2010, Mr. Rajesh contended that proposal for Viacom's stake in MSMD had been turned down even prior to commercial negotiations of the MoU. We would consider the effect and purport thereof at an appropriate stage.

Inter alia on the premise that MSMD had committed several breaches of contract, the said agreement was terminated by a notice dated 13.06.2010.

The said notice was issued by Viacom inter alia on the premise that although in terms of the agreement, its channels were to be placed in prime packages, it was found that 'SET' (Sony Entertainment Television) a product of MSMD was being placed in more attractive packages of the DISH TV and Tata Sky who had captured about 55% of the DTH Market.

9. Whereas, according to Viacom, 'SET' on the DTH platform of DISH TV was placed in 9 out of 10 different packages at the top, the channel of the petitioner was placed only in 4 packs; in the case of Tata Sky, 'SET' had been placed in 5 out of 7 packages; whereas that of 'Colors' was placed only in 3.

10. In its termination notice dated 13.07.2010, Viacom stated :-

> *"9) In these circumstances, without prejudice to the contents of all aforesaid paragraphs, and assuming that the MOU is not vitiated*

and avoided as set out therein, we hereby terminate the MOU with immediate effect and call upon you to forthwith refrain from acting in furtherance of the MOU or representing any association with Viacom18 and/or Colors. This termination has resulted entirely due to your breaches, wrongful acts of omissions and commission and your fraudulent acts, which really constitute a repudiation of the MOU by you. Your own acts/conduct rendered it impossible for you to render your services to us properly in terms of the MOU. We also call upon you to forthwith make payment of Rs.20,34,61,982/- (Rupees Twenty crores thirty four lacs sixty one thousand nine hundred and eighty two only) due from MSMD towards Fixed Fee and Minimum Guarantee for the period until the date of this termination letter. We also call upon you to render true and faithful accounts in respect of the distribution on the digital platform and forthwith pay to us the amount due to us on ascertainment. Your actions, inactions and conduct as stated herein above have resulted in substantial damage to us to the tune of approximately Rs.127 crores for various reasons including without limitation due to unfavourable tiering for Viacom 18 Channels and loss due to disruption of business."

11. MSMD, however, by reason of a letter dated 15.07.2010 denied and disputed the contentions raised therein and stated that although it had complied with its part of the contract, Viacom has committed breaches thereof; having in the meantime found out another distribution agency being the Respondent No.3 in Petition No. 250 of 2010.

We would consider the effect of the said letter of termination at an appropriate stage.

The Proceedings

12. Petition No. 220 of 2010 was filed by Viacom claiming inter-alia the following reliefs :-

> *"(a) direct the Respondent to render true and correct account of the revenues generated by the Respondent in respect of the distribution of the said channels, namely 'Nick', MTV, VH1 and Colors from 1.4.2009 till 13.7.2010 with DTH operators/Cable Operators/Commercial subscribers/CAS Operators/IPTV or another platform and after such rendition direct the Respondent to pay the deficit paid by the Respondent, to the Petitioner along with interest @ 18% per annum;*
>
> *(b) direct the Respondent to pay Rs.20,90,36,289/- along with interest @ 18% per annum being the outstanding sums payable;*
>
> *(c) direct the Respondent to furnish to the Petitioner true and correct information, data, subscriber report in respect of the said channels of the Petitioner, copies of all the agreements entered into by the Respondents with all distribution platforms including cable operators/DTH operators/CAS operators/IPTV Operator and commercial subscribers and provide the details of all active and inactive integrated Receiver Decoders and return the inactive IRDs along with viewing cards;*

(d) direct the respondent to pay damages in the sum of Rs.168 crores (approx.) along with interest @ 18% per annum for various breaches described hereinabove;

(e) permanently restrain the Respondent from representing the Petitioner in all manners and direct the Respondent to remove the said channels of the Petitioner from the Respondent's website/brochures/RIOs/bouquets/tiers/advertisements etc.

(f) permanently restrain the Respondents from directly or indirectly interfering with the distribution and marketing of the said channels of the Petitioner either by Petitioner itself or in alliance."

13. In its reply, MSMD inter-alia raised the following contentions :-

(1) It had not committed any breach of contract.

(2) The termination of the agreement was a motivated one as in the meantime the petitioner has found out a new distributor.

14. Viacom filed an application for amendment of the petition which was marked as M.A No.285 of 2010.

The said application for amendment was allowed by an order dated 16th December, 2010.

MSMD has filed a reply thereto.

It had also filed a separate petition claiming damages for a sum of Rs.166.98 crores.

Viacom has a filed a reply thereto.

MSMD filed Petition No. 250 of 2010 against Viacom claiming inter alia the following reliefs :-

> *"i. Set aside and quash the purported termination notice dated 13th July, 2009 issued by the Respondent No.1;*
>
> *ii. Hold and declare that the Agreement dated 11.2.2009 between the petitioner and the Respondent No.1 is valid, binding and subsisting between the parties;*
>
> *iii. Restrain the Respondents including Respondents 2 and 3 and/or all other persons claiming rights through them (whether as agents/assignees/distributors/sub-distributors) from appointing any MSOs, Cable Operators or DTH operators or any other Service Provider for distribution of the Colors, VH1, Nick and MTV channels and creating any third party rights in respect of the subject matter of the Agreement dated 11th February, 2009 pursuant to any joint venture agreement between the Respondents 1 and 2 inter se or any other agreement between the Respondents 1 and/or 2 persons claiming through or under them (agents/assignees) on one hand and the Respondent No.3 on the other.*
>
> *And/or*

iv. Restrain the Respondent Nos. 2 and 3 and/or all other persons claiming rights through them (whether as agents/ assignees/distributors/sub-distributors) from claiming through Respondent No.1 and providing distribution services with respect to the above four channels of Respondent No.1 to any MSOs, Cable Operators or DTH operators or other Service Providers.

v. Restrain the Respondents including Respondents 2 & 3 or any other persons claiming rights through them (agents/ assignees/distributors/sub-distributors) from interfering with the Petitioner in exercising its exclusive rights under the Agreement dated 11th February, 2009 for distribution of the Colors, VH1, Nick and MTV channels."

Viacom has filed a reply thereto raising by and large similar contentions as contained in its petition being Petition No. 220 (c) of 2010. It furthermore denied and disputed that by reason of alleged wrongful termination of the agreement or otherwise, MSMD has suffered damages as alleged or at all.

Issues

15. By an order dated 24th January 2011 in view of the rival contentions of the parties in both the matters, the following issues were framed :-

"In Petition No. 220 (C) of 2010

1. Whether the Petitioner has illegally terminated the MoU/Agreement dated 11.2.2009, in violation of the said MoU/Agreement?

2. Whether the termination notice dated 13.7.2010 is wrongful or illegal?

3. Whether the petitioner is entitled under the MoU dated 22-2-2009 or otherwise to the data and information more particularly set out in paragraph 12(e) and prayer 'C' of the Petition?

4. Whether the petitioner is entitled to receipt of inactive IRD's lying in the custody of the Respondents or its agents?

5. Whether the Petitioner is entitled to a decree of Permanent Injunction as prayed?

6. Whether the petitioner is entitled to any interest? If so, at what rate?

7. Whether the Respondent is liable to pay an amount of Rs.20,90,36,289/- to the Petitioner alongwith interest thereon?

8. To what relief, if any, the petitioner is entitled to?

In Petition No. 250 (C) of 2010

1. Whether the Respondent Nos.2 and 3 have unlawfully interfered with the rights of the Petitioner?

2. Whether the parties are entitled to claim any damages/specific damages against each other as claimed in the respective petitions?"

Evidence

16. Viacom in support of its contentions examined one Shri Sujeet Jain, its Vice President (Business and Legal Affairs) and Mr. Sanjeev Hiremath, Senior Vice President (Network Development) (hereinafter referred to as PWs). The latter also filed an additional affidavit annexing therewith some documents.

MSMD examined three witnesses viz. Shri Himanshu Dhoreliya, Shri Amol Majumdar and Mr. Shankarnarayan, Director (Operations) in support of its own claim. (hereinafter referred to as RWs)

Submissions

17. Mr. Arun Kathpalia, learned counsel appearing on behalf of Viacom would urge :-

(i) MSMD, as would appear from the materials brought on record had committed serious breaches of the agreement and in particular in failing to give any stake to it in its company as also by not placing Viacom's channels in a preferential tier vis-a-vis the 'SET' and 'SAB' Channels belonging to it.

(ii) From the report submitted by MSMD itself, it would appear that whereas the said channel was made available to about 23 lakh viewers, 'Colors' Channel was made available to only 4,83,572 viewers.

(iii) MSMD without any pleadings, through its witness Mr. Himanshu Dhoreliya (RW1) sought to make a distinction between the terms 'tier' and 'package', although the said words are interchangeable which would be evident from Clause 2(f) of the Regulations framed by the Telecom Regulatory Authority of India dated 23.08.2006 known as – The Standard of Quality of Service (Broadcasting & Cable Services) (Cable Television and CAS areas) Regulations, 2006 (8 of 2006). In the Telecommunication (Broadcasting & Cable Services) Interconnection (4th Amendment) Regulation, 2007 also contains a provision by way of Proviso appended to Clause 13.2.A.11 thereof wherein the term 'package' has been interchanged with the word 'scheme',

(iv) Even from the practice prevalent in the industry it would also be evident that the said words are interchangeable and would furthermore appear from the affidavit filed by RW1 using the word 'package' and 'tier' interchangeably.

(v) From a press interview of Mr. Manjit Singh, it would appear that he upon taking over as Chief Executive Officer of MSMD, clearly gave out that the task assigned to him was that MSMD was required to work in a very systematic way so as to be in the top three channels within a period of 12 months, and at No.1 within 12-24 months, wherefor it was absolutely necessary that one of the top three i.e. the channel of Viacom's 'Colors' was to be displaced.

From his interview it would furthermore appear that it has categorically been admitted therein that the 'Colors' had successfully ousted 'Star Plus' from the number 1 slot and still then MSMD's ambition was that 'SET' should be one amongst the top three.

(vi) The breaches of contract in question being repudiatory ones, wherefor the respondent itself was to be blamed as it had not only failed to get proper tiering/packaging for the petitioner from the DTH operators, but also failed and/or neglected to grant stake in the company to which it was committed, no notice in terms of Clause XX of the agreement was necessary to be served upon MSMD

(vii) No reliance should be placed on the evidence of the RWs as the EPG numbering plan had nothing to do with the functions of MSMD in terms of the agreement or otherwise.

(viii) The purpose of packaging as would appear from Clause X-1 of the agreement being for optimising the reach of viewership for which MSMD was required to make reasonable efforts, so as to make the 'Color' channel available to the viewers on DTH platform for all packages, but it would, however, appear that whereas out of three packages of Tata Sky, namely Super Hit, Super Value and Super Saver, the channel of Viacom was only placed in Super Hit

package; the channel of MSMD were placed in all the three packages.

(ix) From the conduct of the parties it would be evident that had the contention of MSMD been that the chapter relating to giving of the 'stake' to Viacom was closed even before entering into the contract, it would not have been necessary for the parties to meet on several occasions to discuss the said issue.

(x) The entire attempt on the part of MSMD had been that the viewership, keeping in view the popularity of Colors channel should be suppressed by resorting to any means and only when payment of a sum of Rs.150 crores as the minimum guaranteed amount.

(xi) The malafide attitude on the part of MSMD would be evident from the fact that although it's rate was notified at 10.70 paise for the digital mode of supply, the subscription fee fixed for DTH operators for 'Colors' Channel was fixed at Rs.4/-. Although, giving of such discount is not unknown in the Industry but the same should have conferred a commensurate benefit to the broadcaster. Fixation of the rate by MSMD @ Rs.4/- for DTH operators had adversely affected Viacom as for the purpose of obtaining better packages it would have to grant further discounts.

(xii) MSMD had been packaging the 'Colors' with unpopular channels, of which MSMD was a distributor as a result whereof, Viacom has suffered immense loss.

(xiii) MSMD had even gone to the extent of resorting to fabrication of the records in violation of Clause X of the MOU in terms whereof it was obligated to furnish all informations and particularly when specifically asked to submit the same by Viacom in terms of its letter dated 10.5.2010 to which it responded by merely saying that it had fulfilled its contractual obligations despite the fact that there are various materials to show that various local operators had a higher subscriber base, as for example - Bigten Entertainment operating in the territory of Hapur, has shown its subscriber base to be 1093 as against 421 of MSMD, as would be evident from the agreements entered into by and between the said cable operators, which was discovered when Viacom could obtain copies of the agreement.

(xiv) MSMD furthermore, failed and/or neglected to provide access to interconnect agreements with the distribution platforms as was required under Clause XIII.

(xv) It furthermore, failed to activate IRDs of 'Colors' at par with 'SET' in complete breach of Clause I-4 and XXVI-1, which was discriminatory in nature and unfair.

(xvi) From the cross examination of Mr. Amol Majumdar, it would be evident that the subscriber base of the cable operators was shown less, allegedly in terms of some internal formula to compute the same which must be held to be an afterthought as Viacom was entitled to know the true and correct subscriber base of the cable operators and supply the requisite informations to Viacom.

(xvii) MSMD furthermore, in violation of Clause XXIII of the agreement has withheld informations, (although, it, in its letter dated 3.5.2010, expressed its intention to show transparency and access to all the documents) as would be evident from the letters dated 10.5.2010 and 17.5.2010. It is evident that MSMD did not perform its obligations to give access to Viacom so far as the agreements entered into by it with the operators of the digital platforms.

(xviii) So far as supply of signals on analog mode is concerned, although, MSMD in terms of Clause (IX) (I) was to place Viacom's channels in Bouquet II and despite the fact that having regard to the Tariff Order dated 4.10.2007, being the 8th Amendment Order issued by the TRAI, that entry of Viacom's channel in bouquet II might have been prohibited but there was no prohibition to float a new bouquet upon inclusion of the Colors channel with its existing channels. Even otherwise 'Colors' Channel was placed only with some of the unpopular channels of MSMD like 'Aath' a Bengali Channel, Discovery Science and Discovery Turbo.

(xix) Moreover, MSMD itself in issuing the letter dated 7.5.2010 must be held to have rescinded the contract itself and in that view of the matter it was not entitled to 30 days' notice as envisaged under Clause (XX) of the Agreement.

(xx) Viacom could not have waited for 90 days' more time for the purpose of carrying out the affairs of its business further by continuing to have an agent on whom it could no longer repose any trust or faith, having regard to the fact that despite notices it did not remedy the breaches in respect of tiering and moreover asked Viacom to mind its own business apart from fabricating records, not granting any access thereto to Viacom as well as to provide informations etc.

(xxi) In view of breaches of contract on the part of MSMD as an agent, Viacom is entitled to damages for a sum of Rs.168 crores.

(xxii) The loss of revenue suffered by Viacom in respect of Channel 'Colors' from TATA SKY and DTH is to be considered on a going forward basis.

(xxiii) In this case, the breaches being fundamental and leading to repudiation of the contract, Viacom was entitled to elect to avoid the contract, in so as far as :-

(i) MSMD in its capacity as the agent stated that it is not bound by its direction;

(ii) It failed to furnish the informations which it was bound to do in terms of the contract.

(iii) It made wrong disclosure despite having been asked to make correct information is available and as even thereafter refused to rectify the deficiencies and furnish correct declarations.

(xxiv) The termination of contract was not a malafide act on the part of Viacom.

It is incorrect to say that Viacom had entered into a transaction with Sun18 from much before as in fact Viacom had to enter into an agreement with the said concern when it was left with no alternative but to terminate the contract particularly in view of the letter of MSMD dated 17.5.2010 which was issued despite the fact that Viacom was willing to continue the relationship as would appear from its letter dated 10.5.2010. In that view of the matter, the question of causing any damage to the respondent by Viacom does not arise.

(xxv) In any event, the damages payable to MSMD by Viacom, if any, would be for a period of three months. While computing the amount of damages, if found to be payable by MSMD to Viacom, this Tribunal should consider the fact that MSMD has been holding on Rs.20 Crores due towards invoiced amount and Rs.36

Crores which had become payable to Viacom in the third year, totaling Rs.56 Crores and MSMD is to be paid only a sum of Rs.45 Crores.

(xxvi) The fact that Viacom's channel was not placed in the 'Super Value' and 'Super Saver' packages of Tata Sky itself shows that the purported efforts on the part of MSMD were not reasonable.

(xxvii) It is incorrect to contend that 'Colors' channel became No. 1 on the efforts of MSMD. In so far as reference to Target Audience Meters (TAM) is concerned, the report is prepared only on the basis of Gross Rating Point (GRP), which has been referred to in the agreement and maintenance of its position was the responsibility of Viacom.

(xxviii) From a perusal of the tables prepared by MSMD itself, which is proved by RW-1, it would appear that therein a note has been given showing that connectivity is ensured by Viacom directly through placement deals; primarily through placement in cable network/analogue was the responsibility of Viacom.

(xxix) The note made in the said document constitutes an admission. Having regard to Clause XXI of the MOU, MSMD was entitled to reduction of the amount of consideration unless GRP was maintained which was Viacom's responsibility.

(xxx) It stands virtually admitted that when the contract was entered into Viacom had 3,849 IRDs (see Page 400-B) wherewith 1,476 IRDs were to be distributed out of 1,500 IRDs mentioned in the MOU, totaling 5,353, apart from 1,394 viewing cards had also been distributed. (See page 324 of RW-3), but when the contract was terminated, the number of active decoders was found to be only 3,221 as would appear from the statement of RW-3 (See page 260 and Page 325), which would show that the actual number of subscribers had gone down.

(xxxi) The statement of Mr. Amol Majumdar made in paragraphs 24, 25 and 26 of his affidavit-evidence, so far as the purported loss suffered by MSMD is concerned, cannot be relied upon having regard to the following :-

(i) MSMD has failed to prove any correlation between termination of contract by Viacom and termination of contract by NDTV; and

(ii) Even if that be so, it furthers the case of Viacom that MSMD's conduct so far as third-party channels are concerned had not been in order.

(xxxii) There is a clear distinction between the placement/tiering of digital channels and analogue channels inasmuch as so far as digital channels are concerned clause IX(2) does not speak of a mere improvement insofar as it was obligatory on the part of MSMD to

optimise the reach in contrast with the old channels which would be evident from the fact that in respect thereof they were not to be only "less beneficial".

18. (I) The purported claim of MSMD being :-

(i) Loss on account of digital platform for a sum of Rs.61,70,00,000/-;

(ii) Loss on account of analogue platform, suffered by it for a sum of Rs.12.85 crores;

(iii) Costs and expenses borne by it for marketing and promotion of 'Colors' channel, for a sum of Rs.1.04 crores;

(iv) Damages suffered on the ground of NDTV leaving its platform for a sum of Rs.20.00 crores;

(i) Loss of business opportunity as it was forced to take the channel NDTV Imagine, for a sum of Rs.15.00 crores.

(ii) Loss suffered by MSMD as it had to enter into an agreement with NEO Sports wherefor it had to pay an additional amount of Rs.58.38 crores;

must be held to be not maintainable and/or having not been proved, having regard to the fact that :

(a) there was no breach of contract on the part of Viacom.

(b) damages claimed are remote and indirect;

(c) In any event they have not been proved in view of the fact that conditions laid down therefor, have not been fulfilled.

(II) Only evidence adduced by MSMD being the oral evidence of RW-2 Mr. Amol Majumdar, whose testimony;

(a) being tutored;

(b) unreliable

(c) inconsistent, and

(d) evasive,

no reliance can be placed thereupon.

(III) The amount received by MSMD having not been adjusted, no sanctity thereto can be attached to the tabulation submitted by it which is in three parts;

(IV) Even it be assumed that MSMD had suffered any loss; keeping in view the fact that Viacom had lien over Rs.150 crores and the expenditure to be incurred by MSMD would be 10 to 12% of its earning and its profit may also be about 10%, on proper computation it would be evident that Viacom‘s claim for damages is on a higher side.

(V) So far as the purported damages suffered by MSMD in respect of its analogue platform is concerned, it must be held that :-

(i) it has failed to show any basis for claiming growth of 20% having regard to the fact that

(a) TRAI had increased the subscription charges by 7% in terms of 9th Amendment Tariff Order dated 26.12.2008 with effect from 1.1.2009;

(b) in the year 2009, the respondent was awarded the telecasting right of IPL Cricket to SET;

(VI) So far as the purported damages relating to expenses is concerned, it was primarily the responsibility of Viacom to bear the expenditures towards marketting and promotion of the 'Colors' channel which having regard to Clause VIII of the MOU, could have been incurred by MSMD only with

(i) mutual consent and;

(ii) with prior intimation to Viacom and no such document having been brought on record to prove the said fact, no decree can be passed on the said basis.

(VII) So far as the alleged loss suffered by MSMD on the ground of NDTV's leaving its platform is concerned, although a claim of Rs.20.00 crores was made, but RW-2 in his evidence had not quantified the

amount and having merely stated in his affidavit that it has suffered substantial damages, the claim on that account must be held to have not been proved.

19. The internal allocation of 8%, 9% and 10% to the declared subscriber base in respect of 'Colors' had a direct impact in as much as if the percentage goes up then allocation of 'Colors' also goes up despite the fact that fees remain fixed and in that view of the matter, the quantum of damages also would increase with higher allocation but MSMD has chosen to keep the quantum of loss confined to internal allocation.

Submissions of the Respondent

20. Mr. Aman Lekhi, learned Senior Counsel appearing on behalf of MSMD, on the other hand, submitted :-

(i) Viacom having entered into the Memorandum of Understanding with MSMD with its eyes wide open and having fully satisfied itself of its performance from 2004 onwards, this petition is not maintainable. Moreover, MSMD was the distributor of Viacom's channel MTV, NICK and VH1 and the said contract was not only renewed but even the new channel produced by it was offered for distribution to MSMD.

(ii) The termination of contract having not occasioned by any breach of the provisions of the contract on the part of MSMD but on the part of Viacom as would be evident from the fact that it must have done its preparatory work for formation of a joint venture undertaking between itself and Network 18 (the CEO of both the companies being common)

(iii) The termination of agreement being admittedly contrary to Clause XX thereof, MSMD must be held to have suffered huge losses in so far as the stipulations contained in the said clause had not been complied with. MSMD's witness Mr. Himanshu Dhoreliya in paragraph 8(a) and (b) of his affidavit having clearly stated about the preparatory work done by Viacom as also creation of some documents before resorting to termination of contract and he having not been cross examined on the said question, the same must be held to have been admitted.

(v) The stipulations contained in the agreement being in writing, before the same could be terminated in terms of Clause XX of the agreement, the following conditions were required to be satisfied :-

(a) The breach must be material and not just any breach.

(b) An opportunity was required to be given to remedy the said breach.

(c) The breach remained unremedied.

(vi) Although in terms of the provisions of the Indian Contract Act a party who has committed breaches cannot enforce the contract but having regard to provisions contained in Clause XX of the MOU providing that no breach is a condition or intermediary term and in view of the clear legal position that breach of intermediary term can be repudiated only if it was sufficiently serious and go to the root of the contract and in any event as there could have been no repudiation without notice, the purported termination was wholly illegal.

(vii) In a case of this nature, the provisions of Section 39 of the Indian Contract Act would be applicable in terms whereof the right to terminate the contract would arise in case of a party refused to perform or disabled itself from performing its promise in his entirety unless he has signified by words or conduct his acquiescence in its continuance.

(viii) Having regard to the fact that the contract was continuing till that date, it was for Viacom to establish that something had happened after 13.7.2009 when the notice of termination was issued.

(ix) In view of the admitted fact that on and from 13.7.2009, 'SUN18' had started distribution of the channel of Viacom, the same must be linked with the notice of termination,

(x) In this case, moreover, the question of any fundamental breach would not arise as the contract did not become a totally different

one; moreover Viacom has not raised any specific grievance of breach or raised any objection thereto.

(xi) From a perusal of the agreement and in particular Clauses (iv), (v), (vi) and (xxvi) thereof, it would appear that MSMD had a right over distribution of even a new channel. The principal was not to pay any commission but in fact was to be paid in terms of contract and MSMD in case of fall of revenue below 20% was to renegotiate the commercial terms and even to otherwise would have been entitled to a pro rata reduction in the event any occasion had arisen therefor, the concept of agency is not attracted in the instant case.

(xii) In terms of Section 206 of the Indian Contract Act, in any event, an agent would be entitled to a reasonable notice which having not been served; MSMD must be held to be entitled to damages.

(xiii) The obligations of MSMD under the MoU being only to make reasonable efforts subject to Regulations and having regard to the fact that the contract was terminated within 15 months from the date of execution thereof during which period, MSMD had made more than reasonable efforts resulting in improvement in the viewership of VIACOM's channel, no breach of contract on its part can be inferred.

(xiv) The background of the events before formation of contract must be viewed from the fact that 'Colors' channel of Viacom having been distributed free, it might have a huge viewership but as with effect

from 01.04.2009 the transmission of the channel was to be on payment basis, its commercial viability was to be tested.

(xv) The fact that 'SET' and 'SAB' channels were part of the 'MSM' channels were known to Viacom and still an agreement having been entered into, it must be held that the decision on its part was a conscious one wherefor no force was applied.

(xvi) Viacom, while entering into the agreement could not compare the 'Colors' channel with 'SET' or other channels which were already in the market inasmuch as it could not have expected to have a reach immediately having regard to the fact that it remained free to air channel for a long time.

(xvii) From a perusal of the e-mail dated 15th February 2010, it would be evident that even according to Viacom, the mechanism was still to be worked out for the purpose of finding out an alternate mechanism to meet the objections of the JV partners which would clearly go to show that not giving any stake in the company to Viacom was not intentional or deliberate.

(xviii) No consideration having been fixed towards the value of the stake, the question of any commitment in relation thereto does not arise.

(xix) Mr. Sanjeev Hiremath, the witness of Viacom was not sure as to the different methods to compute a fair market value for the 'stake' and, thus, there was no demonstrable co-incidence of the terms and conditions thereof.

(xx) From the e-mail dated 22.07.2009, from Shri Haresh Chawla to Shri Manjeet Singh, it would furthermore appear that a formal document was in contemplation and the terms were not settled.

(xxi) The Contract Act postulates that effect of an agreement in writing would depend on its purpose and, thus, it was necessary that the parties would not be bound thereby unless and until both of them sign the same.

(xxii) Viacom has not pleaded the particulars of fraud after misrepresentation by naming the persons who had made such inducements or misrepresentations as also the place where such misrepresentation was made and furthermore Mr. Sujeet Jain in his affidavit having verified the petition as also his affidavit being true to his knowledge as derived from the records of the case, Viacom cannot be said to have raised any pleadings on this behalf.

(xxiii) It is wholly incorrect to contend that there were any serious breaches on the part of MSMD or that it had abandoned its obligations inasmuch as :-

(i) The number of packages in which 'Colors' were placed had increased.

(ii) The number of service providers carrying the said channel also increased.

(iii) It became a number one channel during subsistence of the agreement and its popularity did not diminish.

(iv) It started earning revenue which would imply that it had the liability also to pay carriage fee.

(v) The annual minimum guaranteed charges were being regularly received by it.

(vi) At no point of time before 12th July, 2010 Viacom contended that the contract would be terminated.

(vii) Viacom claimed subscription fee for 13th July onwards and, thus, must be held to have given effect to the terms of the contract.

(viii) The letter dated 09.05.2011 is not one that of repudiation as even revenue overflow had been contemplated thereby therein.

(ix) The question of breach of contract as envisaged under Clause (xx) must be held to be non-existent as 'stake' in MSMD company was not a part of the contract

(x) The reports submitted by MSMD to Viacom were based on informations received from the subscribers and, thus, cannot be said to be incorrect.

(xxiv) It is a well settled principle of law that a contract must be construed having regard to the contents thereof and as in the MoU there was no stipulation that Viacom would have any stake in MSMD company, only because there had been negotiations, meetings and discussions as regards thereto, the same would not lead to an inference that there had been a commitment on the part of MSMD to get stake to Viacom in its company, there being nothing on record to show that any offer of giving stake in MSMD's company having been accepted by it, no concluded contract could be said to have been arrived at.

(xxv) On a proper construction of MSMD's letter dated 17.5.2009 it would appear :-

(a) It was open to discussion

(b) It had talked of revenue overflow.

(c) It was open to any clarification or suggestions as far as receiving practical solutions from Viacom is concerned and, thus, it cannot be said to be a case of repudiation of contract.

(xxvi) The fact that the contract was alive and the objective thereof had been subsisting what was necessary for performance thereof was holding of discussions between the parties.

(xxvii) Having regard to the stipulations contained in the agreement, it would be evident that the relationship between the parties

hereto was on principal to principal basis and not as principal and agent.

(xxviii) The concept of loss of fiduciary relationship being an equitable one, it must be held before a party can be heard to say that it has lost faith and trust in another only if the terms of the contract are not performed in accordance with law as for a breach of faith some basics must be laid down and/or there should be some legal foundations therefor.

(xxix) The repudiation of contract by the petitioner could not have been effected only on its subjective satisfaction and/or expectations or anticipation.

(xxx) From the letter of the respondent dated 17.5.2010 it would furthermore appear that all access have been given to its contracts entered into by it with its MSOs subject to the confidentiality clause and was also open to audit which cannot be termed to be 'repudiation of contract'.

(xxxi) MSMD had all along being hopeful of giving better results and in that view of the matter too, the question of repudiation of contract does not arise.

(xxxii) The termination of contract did not result from any material breach as not only the same did not go to the root thereof but even no new contract emerged therefrom and, thus, it

must be held that the termination of the contract was pre-mature.

(xxxiii)The interpretation of Clause IX(2) as has been urged by Viacom would cause violation to the language, having been couched in the negative language, and in that view of the matter, 'SET' and 'SAB' cannot be permitted to be brought within the purview thereof.

(xxxiv))So far as supply of channels on analogue platform is concerned, Viacom was to be paid fixed fee which was not to be negotiated and in that view of the matter, there is absolutely no reason as to why Viacom wanted to know its stand in the market within a period of 15 months, the term of the agreement being three years.

(xxxv) Damages claimed by Viacom are artificial and not maintainable, it having not given the details of its claim of Rs. 60 Crores wherefrom it would appear that they were aware that there have been no breaches on the part of MSMD. It is, therefore, evident that as regards the claim of damages, the attitude of Viacom was casual in nature.

(xxxvi)TAM report was not only the basis for the opinion of the public that Colors was at No. 1.

(xxxvii) Having regard to the admission of PWs that the viewership had increased to a great extent, it is evident that after the agreement had entered into, the effort of MSMD had contributed in that behalf.

(xxxviii) From a perusal of the terms of the MOU, it would appear that Viacom's channel was at No. 2 but it became No. 1.

(xxxix) The period of 90 days mentioned in Clause XX is not a period of notice but was for remedying the breaches and in that view of the matter MSMD would be entitled to damages as has been claimed.

(xl) The rigors of Clause XX would be attracted in this case as there was neither any ambiguity in the contract nor was there any general misunderstanding with regard to the interpretation thereof and in that view of the matter there was absolutely no reason as to why no notice had been given.

(xli) Having regard to the fact that MSMD did not represent Viacom in any contract, it cannot be said to be the agent of the Viacom.

(xlii) MSMD in view of illegal termination of contract was entitled to receive the amount of remuneration as contained in the agreement, the damages having not been claimed by way of profit.

(xliii) So far as the submission made by Viacom with regard to dealer's commission and bad debts are concerned, no evidence having been led, Clause VI of the MOU on which reliance has been placed in this case is not applicable.

(xliv) Clause VI (2) of the MOU has been misread as only a fixed fee was payable to Viacom.

(xlv) MSMD has not only claimed general damages but also special damages which need not flow from breaches of contract.

(xlvi) Damages claimed so far as contract entered into by and between MSMD and Neo Sports is concerned, were not remote as after the 'Colors' left the network of MSMD, for the purpose of carrying out its business some channel was required to be carried which could take the role of a lead channel.

(xlvii) So far as expenses incurred on promotion and marketing of the channel, by MSMD is concerned the same being the

expenses within the purview of the MOU, the same must be reimbursed.

Analysis

21. Whereas Viacom is the producer of four channels, as noticed heretobefore, MSMD was content aggregator of TV channels namely 'Max', 'SET', 'PIX', 'SAB', 'AXN' and 'Animax' which are owned by 'MSM' and 'AATH' owned by Bangla Entertainment of its parent company 'Sony Pictures Entertainment'.

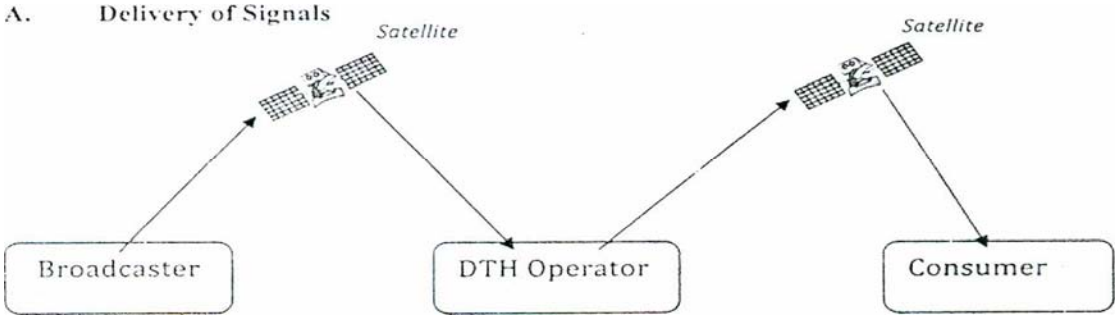
22. Discovery is also a broadcaster and owner of television channels namely 'Discovery', 'Animal Planet', 'PLC', 'Discovery Science', 'Discovery Turbo' and 'Discovery HD World'.

23. MSMD is a joint-venture company of Multi Screen Media Pvt. Ltd. (MSM) and Discovery India (Discovery), the former having 74 % share in MSMD and the latter 26%.

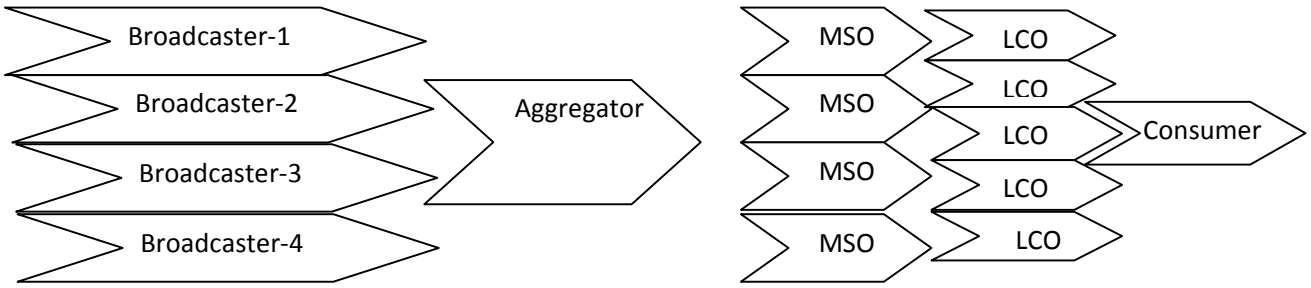
24. The Board of MSMD comprises of three directors, two nominated by MSM, who are CEO and COO of MSM and one Director of 'Discovery'.

They are said to be operating from the same premises.

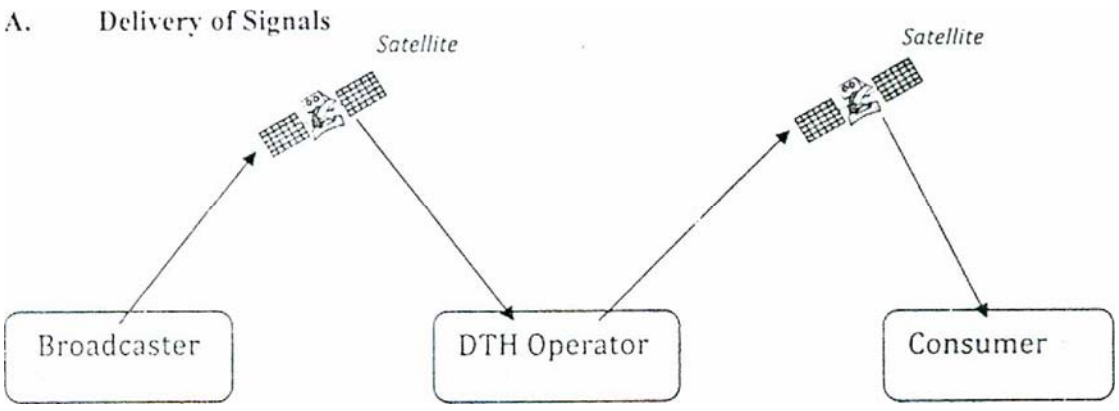
25. Before us, diagrams have been placed to show as to how the distributor would have no role to play so far as the delivery of signal is concerned both in non-addressable and addressable system as also the distribution value chain.



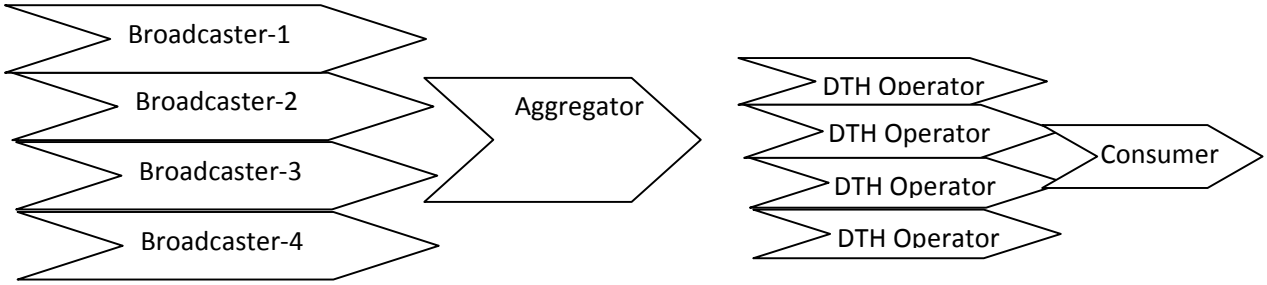
B. Distribution of Channel



ADDRESSABLE PLATFORM/ DIRECT TO HOME(DTH)



B. Distribution of Value Chain



Aggregator's role

26. The fact that MSMD is a content aggregator is not in question. It is also not in issue that the agreement was entered into by and between the parties hereto upon detailed negotiations.

The respondent in its functions as a content aggregator was mainly to provide bundling and negotiation services on behalf of the broadcasters, in respect whereof Mr. Kathpalia had referred to the recommendations of the TRAI on Implementation of Digital Addressable Cable TV System in India dated 05.08.2010.

As a content aggregator, MSMD was not in possession of any head end. It was not required to re-transmit signal. Supply of signals by the broadcaster was to be carried out directly to the MSOs and LCOs with whom the content aggregator had entered into agreements and from them to the consumers. The aggregator's role related to the commercial dealings. Primarily, aggregator was to deal with a large number of MSOs, who in turn would enter into agreements

with LCOs for the ultimate receipt of signals by the consumer. For the aforementioned purpose, the aggregator formed bouquet of various broadcasters' channels and negotiated subscriber fees with non-addressable platforms.

27. So far as addressable platforms i.e. DTH operators are concerned, broadcasters supply all signals to DTH operators via satellite, but, cannot by reason of the said process re-transmit it to the consumers. Similarly, the aggregators enter into agreement with DTH operators upon negotiation on the commercial terms. The aggregator plays a role of the distributor for multiple broadcasters by connecting signals of multiple bouquet of channels and distribute the same to the MSOs/DTH operators/LCOs for the ultimate consumption of consumers.

The principal role of the aggregator was to negotiate subscription fees for supply of signals on digital and analogue platform, so as to achieve the optimum connectivity and revenue of the channels.

Launch of 'Colors'

28. The relationship between the parties is not in dispute. It is also not in dispute that as a Hindi GEC, 'SET' was a rival channel.

The popularity of 'Colors' vis-à-vis 'SET' is also not in dispute.

Although we have noticed heretobefore the manner in which the agreement was entered into but principally we are concerned with the terms of the agreement.

29. The submission that 'Colors' was a new channel having not been charging any fee and/or being a 'Free to Air channel', is, thus, of not much significance as the placement of channel in a tier does not depend on the length of time but its popularity.

The popularity of 'Colors' channel shall be evident from the fact that MSMD had itself put it with the other unpopular channels such as 'Aath', 'Discovery Science' and 'Discovery Turbo', as a driver channel. It would not have done so, but for its popularity.

If 'Colors' channel was considered to be a 'driver channel', it is strange that on who's back the channels of MSMD were to ride there, if not of 'Colors'.

The Agreement

Background Facts

30. The agreement between the parties in respect of three channels was to expire on 30.04.2009 for 'MTV' and 'Nick' and 31.08.2009 for 'VH1'. MSMD approached Viacom not only for renewal of the agreement of the existing channels but also for obtaining distribution rights of new channel 'Colors'.

Viacom allegedly raised certain apprehensions so far as the efficacy of the proposed agreement is concerned keeping in view the rivalry between them. It was Viacom's apprehension which were sought to be allayed by Shri Kunal Das Gupta in a meeting held on 21.01.2009 wherein a commitment was allegedly made to provide a stake to it in the equity of MSMD.

31. We may notice the minutes of the said meeting dated 21st January, 2009 as would appear from para 3 of the Affidavit of Shri Sanjeev Hiremath :-

> *"a) The Petitioner will subscribe to, and the Respondent will issue, stake in Respondent Company, which reflects the value of V18 Channels to the bouquet of channels being distributed by the Respondent, i.e. upto 40% of the paid-up equity capital of the Respondent Company on a fully diluted basis. The subscription price for 40% stake would be proportionate to the fair-market value of the Respondent Company.*
>
> *b) The Petitioner would have equal representation on the board along with the other stakeholders.*
>
> *c) The Petitioner would have an affirmative voting right, inter alia, on all material issues pertaining to distribution of the channels by the Respondent, particularly relating to tiering of the channels and placement of the channels in appropriate bouquets so as to ensure a fair and unbiased distribution of all channels."*

32. Viacom, however, contended that when the Agreement was being drawn up Mr. Das Gupta is said to have requested Viacom to keep the 'stake issue' outside the agreement inter alia for the following reasons:-

1. It was to discuss the modalities with its US office and its joint venture partner namely Discovery which would be time consuming;
2. MSMD wanted to launch V18 channels from April, 2009 as most of its interconnection agreements were executed with operators from April to March;
3. It wanted about 2 months for negotiations in terms of the provisions of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations for promotion and marketing of V18 channels.

33. The agreement was executed by Mr. Haresh Chawla on behalf of MSMD and Mr. Kunal Das Gupta on behalf of MSMD.

34. On the aforementioned backdrop of events, we may notice the Agreement dated 11.02.2009 in terms whereof MSMD was to distribute the 18 channels including 'Colors'.

We may, at the outset, notice the salient features thereof.

35. The agreement contains a background. It provides for the description of the parties. Para 5 of the said agreement stipulates that new channel 'Colors' had been ranked at second position in the Hindi General Entertainment Category and had achieved 271 GRPs.

36. In terms of the said agreement, 'Viacom' was to receive a sum of Rs.125 crores during the aforementioned period in the following terms :-

> *"(a) Year 1 – INR 36,00,00,000/- (Rupees Thirty Six Crores Only)*
>
> *(b) Year 2 – INR 42,00,00,000/- (Rupees Forty Two Crores Only)*
>
> *(c) Year 3 – INR 47,00,00,000/- (Rupees Forty Seven Crores Only)"*

37. The salient features of the existing channels are contained in Clause IX-2 of the agreement in terms whereof respondent was obligated to optimise the reach of V18 channels on digital platform and place 'Colors' in tiers where channels of same language and genre are placed.

38. By Clause VI-2, 'MSMD' undertook to pay a cumulative minimum guaranteed amount of Rs.150 crores for digital platform on a monthly basis for

a period of three years. The said payment was to be made within 60 days of the end of the relevant month. The respondent also agreed to achieve higher revenues for the channels of the petitioner from digital platforms and share 70% of the additional revenues in excess of Rs.195 crores with it, described as 'overflow'.

39. In terms of Annexure A appended to the said agreement, the base tariff of 'Colors' channel for the purpose of distribution thereof was to be raised at Rs.10.70 paise.

40. In terms of Clause XXIII, Viacom was to have access to copies of all agreements entered into by and between 'MSMD' pertaining to the V18 channels on digital platform.

41. Clause I-4 postulated that 'MSMD' was to make necessary arrangements together with all preparatory works in regard thereto but not limited to negotiating and executing an affiliation agreement with the authorised distribution platforms so as to affect their distributorship of V18 channels.

42. By Clause XXVI-1, 'MSMD' was to deploy/activate 1500 IRDs of 'Colors' channel in addition to 3500 IRDs deployed by 'Viacom' prior to execution of the said MoU.

43. Clause XIV of the agreement required the 'MSMD' to deactivate the channels of the petitioner together with 'The One Alliance' (TOA) channels without any discriminatory treatment.

44. Clause I of the said agreement provides for transition of existing agreement. The word 'transition period' means a term covering the execution thereof till 30.6.2009, by which time the parties expected that MSMD would have signed distribution contract with all the major contractors in respect of V18 channel.

Clause II provides for the term of the agreement to be three years.

Clause IV provides for the distribution platforms authorizing MSMD to enter into the agreement with distributors of said TV channels for distribution of the authorized distribution platforms; whereas Clause VI provides for distribution of channels through analogue and digital mode respectively.

45. MSMD was to pay a fixed fees for transmission of the channels on analogue mode amounting to Rs.125 crores for three years i.e. Rs.36 crores in the first year, Rs.42 crores in the second year and Rs.47 crores in the third year. The said amount was to be paid in 36 equal monthly instalments at the end of the month, to which the said instalment pertained.

It was stipulated :-

> *"Even fixed fee is not subject to any deduction on account of MSMD's commission, Dealer's Commission or bad debts."*

Grace period for 60 days was to be given for the payment of instalment.

46. Para 2 of the said Clause provides for a minimum guaranteed amount for transmission of signals on digital platform for a sum of Rs.150 crores payable in three years i.e. Rs.28 crores in the first year, Rs.52 crores in the 2nd year and Rs.70 crores in the 3rd year. Similar grace period was also to be given as in the analogue.

Clause VII, however, provides for overflow and revenue share in digital platform. In the event the overflow is up to Rs.195 crores i.e. a sum of Rs.45 crores, no amount would be payable to Viacom by MSMD. However, if it exceeded Rs.195 crores, the MSMD was to pay 70% of such excess revenue to

Viacom within 60 days of the expiry of the term. It contains a provision for revenue share, which is to the following effect :-

> *"(1) revenue would be shared amongst the channels in all the TOA bouquets based on their percentage allocation which shall be in the ratio of their a-la-carte pricing for DTH platform as specified in Annexure-A hereto. "Rate of the Channel as specified in Annexure-A divided by the summation of the a-la-carte rates of all the TOA Channels multiplied by 100". This shall be applicable only in cases wherein agreements with such digital platforms have been entered into or renewed post execution of this MOU.*
>
> *Illustration if a distributor operating a Digital Platform subscribes for all the TOA channels wherein Rs.83.49/- is the summation of the a la carte DTH prices of all the TOA Channels, then the total of the Base Tariff of the V18 Channels, MTV, Nick, Vhi and Colors shall be Rs.19.27 and, the percentage share of the V18 Channels as per the formula would be (Rs.19.27/Rs.83.49)x100=23.08%.*
>
> *(2) For Digital Platforms with whom MSMD has subsisting agreements as on the date of execution of these presents, the introduction of the New Chanel shall form a separate and distinct subject matter of commercial understanding to be entered into with such platforms by way of an Addendum to existing agreements and any revenue arising as a result thereof shall be allocated to Viacom 18 completely. For Existing Channels on such Digital Platforms, the revenue sharing shall continue to be in terms of the proportion that the summation of ala carte rates of such Existing Channels bears to the summation of the ala carte rates of all the TOA Channels excluding the New Channel."*

It is, therefore, evident that there was a 'stand alone' clause for the 'Colors' channel and a provision had also been made as to what would happen in the event the 'Colors' channel was taken out.

Annexure 'A' appended to the said agreement provides for the rates of MTV at Rs.3.75, NICK TV at Rs.3.21, BH1 at Rs.1.61 and 'Colors' at Rs.10.70 totalling a sum of Rs.19.27.

47. Clause VIII provides for trade marketing budget.

It reads as under :-

> *"Trade Marketing Budget :*
>
> *Viacom 18 have agreed to spend following amounts for marketing and promotion of the V18 Channels.*
>
> *i. INR 3,50,00,000/- (Rupees Three Crores Fifty Lakhs Only) in Year 1 (of this approximately Rs. Two Crores to be spent on launch of the New Channel in between February and April 2009).*
>
> *ii. INR 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) in Year 2.*
>
> *iii. INR 1,00,00,000/- (Rupees One Crore only) in Year 3.*
>
> *It is agreed that such expenses shall be incurred only on mutual consent of the parties and may be incurred directly by Viacom 18 with the prior intimation to MSMD or in the event the same has been incurred by MSMD with the prior intimation to*

Viacom 18. The parties further agree to work out a detailed activity than in consultation with each other and freeze time lines with regard to the incurrence of such expenses."

Clause IX is important for our purpose and will be noticed by us at appropriate stage.

48. Clause X provides for a Subscriber Management System, whereby and whereunder MSMD agreed to send monthly reports to Viacom furnishing details of all subscribers receiving signals of its channel on Cable TV Platform as also digital platform. The said reports were to be furnished on the basis of the declarations obtained by MSMD in relation thereto.

49. Clause XI provides for Carriage Fee. It reads as under :-

"Carriage Fees

Viacom18 shall expend reasonable efforts during the Tam, at least 85% of the cable revenues passed on TAM weightage for HSM market on which the V18 Channels are currently carried would continue to carry the New Channel with no significant change in band placement.

Illustration : Viacom 18 shall ensure that the New Channel is not placed in a position that is not more than two bands below its

existing placements for eg. If the New Channel is presently placed in Prime band, it shall not shift below S band."

50. Clause XII provides for Audit Rights.

Clause XIII provides for Taxes.

Clause XIV provides for 'Switch off' in the following terms :-

"Subject to regulatory constraints, in case MSMD is required to deactivate any of the V18 Channels, it shall deactivate the V18 Channels together with all TOA channels provided to such party. However, none of the V18 Channels shall be targeted or be subjected to any kind of discriminatory treatment in so far as deactivation or switch offs are concerned. In so far as the V18 Channels are concerned, Viacom 18 shall effect switch offs within 1 working day of receipt of request thereof, from MSMD."

51. The consequence for delay in making payments is postulated in Clause XIV.

Clause XIX provides for a long term agreement. It is accepted that no such long term agreement has been entered into by and between the parties.

Clause XX provides for termination of the said agreement. It reads as under :-

"Either Party shall be entitled to terminate this MOU or the long form Agreement on material breach of any term or terms contained in such MOU or the Long Form Agreement. However, no such termination shall be effected unless the aggrieved party submits a 90 day notice upon the other party so alleged to be in breach and offers the latter reasonable opportunity to cure such alleged breach. In the event the material breach is suitably addressed or cured to the satisfaction of both the Parties, no further cause shall sustain of such notice for termination. The consequences of breach, including penalty, if any, shall be dealt with in the Long Form Agreement."

52. In terms of Clause XXIII, the petitioner was to have access to copies of all agreements entered into by and between the parties pertaining to Viacom 18 channels with digital platforms.

In terms of Clause XXVI, MSMD was to deploy all the activated 100 IRDs of 'Colors' channel vis-à-vis 500 IRDs deployed by it prior to execution of the said agreement.

We may notice sub-clauses 2 and 5 thereof.

"2. Viacom 18 undertakes that it has no contractual obligation in trade excepting the carriage/placement deals with Operators pan India, with effect from 1st April 2009 and TATA Sky free Promotional Period deal that shall terminate on 20th July 2009 with no post termination obligations thereto.

5. In the event Viacom 18 is not in a position to ensure uninterrupted supply of signals of the V18 channels for a

continuous period of 5 days or more, MSMD shall be entitled to a pro rata deduction in the corresponding respective pay out for that particular month wherein such interruption occurs provided MSMD suffers such loss."

Development during currency of the agreement

53. Viacom contends, which is neither denied nor disputed, that Mr. Kunal Das Gupta resigned on 19.02.2009 and Mr. Manjit Singh was appointed CEO of MSMD.

We would refer to his interview before the Press on his assignment in the said capacity, at an appropriate stage.

Interpretation/Application of the Agreement

54. The Agreement is a commercial document. It must have been entered into presumably after prolonged negotiations.

We have noticed heretobefore the background facts.

A commercial document, as is well settled, should be given its ordinary effect. It should ordinarily be given commercial meaning.

However, questions regarding construction of the agreement having been raised, we may notice certain basic principles.

Although a literal interpretation of the agreement is to be preferred, what is necessary is to understand the real meaning wherefor the background, the nature of the covenants, the conduct of the parties as to how they themselves understood the terms may be held to be relevant.

(See Reliance Communication Ltd. Bharat Sanchar Nigam Ltd. (Petition No. 264 (C) of 2010 disposed of on 22.7.2011), Clear Media (India) Pvt. Ltd. Vs. Prasar Bharti & Anr. (Petition No. 174 (C) of 2010 disposed of on 21.04.2011) and Aircel Ltd. Vs. Bharat Sanchar Nigam Ltd. (Petition No. 57 of 2010, disposed of on 01.9.2010).

The parties hereto were competitors; whereas Viacom is owner of the Viacom 18 channels, MSMD was the exclusive distributor of the 'One Alliance Group' of Television Channels. MSMD was to be appointed as an exclusive distributor not only of V18 channels, being the 'existing channel', but had also a right of priority on the channel(s) which was/were to be produced by Viacom at a later date, as 1st offer was to be made and minimum 45 days of negotiation was to be held. The commercial interest of Viacom subject, of-course, to payment of the fixed fees and minimum guaranteed charges was to be on the MSMD. It's growth and fall was also in the hands of MSMD.

The Colors channel at the relevant point of time ranked 2nd in the Hindi General Entertainment Channels category, Viacom was to take such steps, which were necessary for maintenance of the GRPs and TAM rating and in case

of its not being able to do so, MSMD was to be given substantial benefit in terms thereof.

55. By way of minimum guaranteed amount, a fixed fee was provided subject to MSMD's receiving invoices.

So far as the digital platform is concerned, which was growing by leaps and bounds, not only a minimum guaranteed amount was to be paid, the agreement contemplated a financial growth and above Rs.195 crores, Viacom was to receive 70% thereof. The revenue share was to be on the basis of the formula laid down therein.

The Viacom was to expend for marketing and promotion of its channel. In the aforementioned backdrop, the relevant provisions of the MoU are required to be construed.

The principal provisions being the packaging of V18 channel – Clause IX, Subscriber Management System – Clause X, Carriage Fee – Clause XI, Switching of Provision – Clause XIV, Termination – Clause XV, Annul Review – Clause XXI, Change in Regulation or Law – Clause XXII, Agreements on digital platform distribution – Clause XXIII as also Misc. Clause XXVI. A bare reading of the aforementioned provisions (although interpretation of the individual clauses would be considered in some details at an appropriate stage), clearly go

to show that for all intent and purport, a bonafide action on the part of the MSMD was the heart and soul of the agreement.

56. Mr. Kathpalia has relied upon the decision of the Supreme Court in U.P. Boodan Yagna Samiti Vs. Braj Kishore (1988) 4 SCC 274 wherein the Supreme Court was concerned with question of the construction of statute. It is, therefore, not necessary to consider the said judgment.

Gowramma Vs. Yella Reddy Chenga Reddy AIR 1965 Andhra Pradesh page 226, wherein again reliance has been placed by Mr. Kathpalia, was a case of Family Partition Deed as envisaged under Section 88 of the Indian Succession Act. The words "take the properties" with reference to all the sharers was held to be conferring on the beneficiary a similar interest and not a lesser interested".

57. Harmonious construction is the rule propounded by the Supreme Court in Narmadaben Maganlal Thakker Vs. Pranjivan Das Maganlal Thakker (1997) 2 SCC 255, while construing a deed of gift in the light of the question of delivery of the property so as to make the gift complete as required under Section 122 of the Transfer of Property Act.

Yet again, in the Union of India Vs. M/s. D.N. Revri & Co. (1976) 4 SCC page 147, an Arbitration Clause contained in a commercial document was held to be entitled to be given full effect, stating :-

> *"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation".*

Rankin, C.J., speaking for a Division Bench of Calcutta High Court in Khetra Mohan Dey & Co. Vs. Benode Behary Sadhu (AIR 1930 Cal 382), while construing a single contract with a subsidiary agreement as to delivery and payment, held :-

> *"But it appears to me to be equally clear that the House of Lords did affirm the proposition that, if the breach that had taken place was one which went to the root of the contract, the consequence was that the party who was in default could not insist upon the remainder of the contract being carried out."*

Therein the contract having been made for supply of goods weighing 300 tonnes, it was opined that the same could not have been changed to 150 tonnes.

These decisions relied upon by Mr. Kathpalia stricto sensu have no application in the instant case.

Breach of the Agreement

58. The core issue between the parties is as to whether there had been any breach of the provisions of the agreement, apart from its failure to fulfill its commitment of granting stake to Viacom 18 in MSMD.

Viacom, before us, has highlighted the following breaches :-

(a) Failure to package and tier clearance, as a result whereof the overflow from digital platform was avoided and, thus, there has been a violation of Clauses IX.2 and X.1 as also Clauses 2 and 7 thereof.

(b) Fabrication of Subscriber Report and, thus, there is a violation of Clause X.

(c) Failure to have access to Interconnection Agreement distribution platform and, thus, MSMD violated Clause XIII.

(d) Failure to activate the IRDs of 'Colors' at par with 'SET', as a result whereof Clause I (iv) and XXVI (i) were violated.

(e) De-activation of the 18 channels being discriminatory in nature, it violated Clause XXIV.

Tiering and Packaging

59. The submission made by MSMD so far as interpretation/application of Clause IX (2) is concerned, cannot be accepted, as evidently it has taken recourse to a different interpretations thereof which was not its case earlier as at the stage of entering into agreement, it had no objection to place 'Colors' in the channels having same genre and language.

The said clause IX (1) on proper interpretation must be construed to mean : -

(a) optimum reach was to be achieved;

(b) 'Colors' channels was to be placed in all the packages;

(c) it was not only the petitioner's understanding but also the understanding of MSMD which would appear in the cross-examination of RW-1 Mr. Himanshu Dhoreliya in the following terms :-

"Q: Is it correct that you were obliged to make reasonable efforts to ensure that Colors was placed in a tier with other channels of the same genre and language?

A: Yes, we were obliged as per the Regulatory mandates.

Q: Did your RIO also provide/contemplate that Colors would be placed in the same tier as other channels in the same genre?

A: The RIO indicates that all the channels of MSMD shall not be disadvantaged or otherwise treated less favourably by the operator with respect to the competing channels on a genre basis.

Q: Would I be correct in understanding that by competing channels on genre basis, you mean channels of the same genre and language?

A: Yes.

Q: Was Colors placed in the same tier as SET or SAB on the DTH platform?

A: Yes.

Q: In the light of your answers to the tiering of Colors and SET in various packages, would you still maintain that the two channels were in the same tier?

A: Yes, I do.

Vol. Tiering on DTH is the prerogative of the service provider as per the relevant Regulations. We have made all the reasonable efforts to get the same tiering for Colors with all the DTH service providers. We will have to look at things in totality and I want to refer to the tiering of Colors before and after the signing of the MOU with all the DTH service providers. In respect of all DTH service providers there is a clear matrix showing Viacom18 channels before and after the MOU became effective i.e. 31.3.2009 till 19.7.2010. Reference

is invited to pages 221, 241, 245, 250 of Vol-II of the petition no. 250 (C) of 2010) and to pages 129 and 142 of Vol-I of the compilation of documents.)

Q: Did your reasonable efforts, as you say, result in Colors being in the same tiers as SET?

A: Yes.

Q: Would you call a Super Saver Pack as a tier?

A: If I may clarify, tiering is the segment where all the genre-wise channels are placed with the DTH service provider and Packages is what they sell to the consumer. There is therefore a difference between tiering and packaging. So Colors as a channel was placed in the same tier with all the service providers where all the GECs were placed and so Colors was very much part of it. If you log into any DTH set-top boxes, colors would remain part of GEC tier."

MSMD has interpreted the said clause one way in its submissions and in another as regards the business head of digital in respect whereof RW-1 stated that 'tiering' means EPG numbering for the purpose of evading its clear liability.

Evidence of Mr. Dhorelia besides being not convincing, is evasive and contrary to record.

60. From the materials brought on record, it would clearly appear that the parties had understood that 'Colors' was to be placed in the same package as 'SET' and 'SAB'.

The carriers, although were to be made subject to the Regulations, MSMD has taken umbrage thereunder by misusing its position inasmuch as the 'Colors' channel was not placed in all the packages.

The language used in clause 2 of paragraph IX of the MoU may not be happy but on a proper reading it would appear that the same being in two parts, the second part cannot be divorced from the first one.

If a literal meaning is given to the said clause, both parts would be inconsistent with each other, and in that view of the matter it should be held that MSMD was obligated to place the 'Colors' channel in the same genre and language in all the packages.

From the materials brought on record by the parties, it appears that once a channel gets placed in a basic package, it should get entry in the add-on packages.

61. Mr. Himanshu Dhoreliya, in his evidence, raised a contention that tiering and packaging do not mean the same thing.

He, however, in his deposition sought to clarify that tiering is the segment where all the genre-wise channels are placed with DTH service providers and packages is for sale to consumers. According to him, therefore, there is a difference between tiering and packaging. We have noticed heretobefore his contention as to whether Super Saver Pack is a tier

The two answers are contradictory and inconsistent with each other. However, we may not dilate on the subject as Mr. Lekhi submitted that assuming that the terms 'tiering' and 'packaging' are interchangeable, MSMD has not violated the terms of the contract.

We would, therefore, proceed on that basis.

Re: Clause IX(2) (Re: Reasonable Efforts)

62. We may now consider Clause IX of the agreement.

We may at the outset, however, notice the 2nd part of Clause IX, which refers to the Digital Platform.

> *"2. MSMD in their negotiation with any distributor of channels operating in DTH or any other Digital Platforms for the TOA channels shall use reasonable efforts to optimize the reach for the V18 Channels. MSMD shall subject to regulatory mandates expend reasonable efforts to ensure that (a) Existing Channels shall not be placed in a tier which shall be less beneficial than their current tiers; and (b) New Channel shall not be placed in tiers other than those where other channels in same language and genre are placed."*

63. A great deal of argument has been advanced at the Bar as to what should be the true construction of the said Clause.

Emphasis has been laid by Mr. Lekhi on the words "reasonable efforts", whereas emphasis has been laid by Mr. Kathpalia on the words "optimize the reach for V18 channels".

The term, 'Reasonable Efforts', has a definite connotation. It connotes an explicit undertaking in that behalf, although there may not be any undertaking as regards accomplishment of a goal.

Standard of "Reasonable Efforts", however, is higher than that of good faith. Even some decisions provide for a reasonable standard. It would imply that parties must pursue all reasonable methods. The words sometimes are interchanged with 'reasonable best efforts' or 'with best efforts'.

The parties, however, have not placed any material before this Tribunal to show the existence of any industry practice in this behalf. It is yet to develop in India. For the said purpose, however, the nature of business plays an important role.

We may, however, notice that to a great extent the question has been dealt with by Kenneth A. Adams in an article "Understanding 'Best Efforts' and Its Variants (Including Drafting Recommendations)."

64. The words 'reasonable efforts' in the context of a commercial agreement and the intent and purport of the exclusive distributorship agreement would mean reasonable commercial efforts. Interest of Viacom was to be protected to

ensure that the existing channels were not placed in a less beneficial tier. MSMD is an experienced aggregator. The new channel i.e. 'Colors' was not to be placed in tiers other than those where other channels in same language and genre are placed.

65. Tata Sky and Dish TV occupied about 55% of the market share of the DTH operators. Grievances have been expressed in particular to the tiering and/or packaging of 'Colors' channel and Tata Sky. It is true that the agreement does not refer to two Channels, 'SET' and 'SAB' but it is conceded that they are also the channels of same language and genre. Whereas in Tata Sky, 'SAB' and 'SET' found place in all three important packages, namely 'Super Hit', 'Super Value' and 'Super Saver' pack, 'Colors' found place only in 'Super Hit' pack, which is a basic tier.

The viewership of all the three packages was more than 23,000,00; whereas viewership of 'Super Hit' in March 2010 was 4,68,278 which depleted to 4,04,306 in July 2010; whereas those of 'Super Value' and 'Super Hit' rose from 7,85,002 to 11,30,312 and in 'Super Saver' it marginally dipped from 11,71,638 to 11,61,148.

Indisputably, all other channels, which were in the 'Super Hit', found place both in 'Super Value' and 'Super Saver'.

Similarly, in Dish TV, the 'Colors' channel was placed only in four out of ten packages, whereas 'SET' had been placed in nine out of ten packages.

66. In the aforementioned backdrop, we may notice that Viacom (Sanjeev) sent an e. mail to MSMD (Rajesh), concerning tiering of 'Colors' and 'Tata Sky' at par with other GECs. Yet again, on 24.7.2009, Sanjeev sent an e. mail to Rajesh concerning better caring of 'Colors' and 'Dish TV' and update on Tata Sky negotiations. Yet again, on 10.12.2009, Deb Kumar of Viacom sent an e. mail to Himanshu of MSMD, complaining about wrong tiering of 'Colors', in Tata Sky and Dish TV.

In reply thereto, Kunal of MSMD sent an e. mail to Deb Kumar of Viacom, stating that (i) tiering is Tata Sky's prerogative; and (ii) Dish TV would improve the tiering in next 3-4 months.

On or about 16.12.2009, Viacom (Sanjeev) sent an e. mail to MSMD (Kunal) complaining on tiering of 'Colors' in Tata Sky and Dish TV. A request was also made to apprise it on the tiering of 'Colors' and Dish TV on 16.12.2009.

By an e. mail dated 16.12.2009, MSMD contended that notice had been sent to Dish TV for improper tiering of Colors. Viacom made a complaint both with regard to tiering and offer of more than 50% discount of Colors to Tata Sky i.e. Rs.4/- in stead and in place of Rs.10.71.

Yet again on 16.12.2009, an e. mail was sent by Deb Kumar of Viacom addressed to Kunal/Himanshu of MSMD requesting them to appraise him on 'Colors' and 'Dish TV'.

On 29.4.2010, Sanjeev of Viacom sent an e. mail to MSMD concerning poor tiering of 'Colors', in Tata Sky and Dish TV.

On or about 03.5.2010, a review of existing DTH contract and placement of Colors and Tata Sky was sought for. Complaint was again made for poor tiering and more than 50% discount by Viacom to MSMD on 10.5.2010.

The letter of MSMD dated 17.05.2010 in this context may be noticed, which reads as under :-

> *"In terms of the relevant TRAI regulations, we as aggregators do not have the right to determine the tiering and packaging of a channel which is the sole prerogative of the distributor, who cannot be forced to accede to any particular demand in respect thereof. You have had an experience where despite payment of huge carriage fees you were able to place Colors only on the "add-on" tier of Tata Sky. Further even under the new Competition Act, any attempt by us to force an unwilling or reluctant distributor to package our channels only in a manner as determined by us will be treated as anti-competitive and lead to sanctions being imposed on MSMD.*
>
> *We have been able to negotiate placement of Colors in the Super Hit Pack on Tata Sky and in Platinum Pack on Dish TV. It is noteworthy that we have been successful in continuously receiving the subscription revenues without any corresponding outgo in the form of carriage fees. I am sure you will agree with me that Colors*

marquee position amongst Hindi GECs also owes much to the reach it has achieved thanks to the unlisting efforts of MSMD's distribution team and the inherent strengths of the One Alliance's diverse bouquet of channels and its countrywide network."

Notice of termination was issued inter alia on the ground of an improper tiering.

67. Respondents, however, would contend that :- (i) tiering and packaging are not the same; (ii) the said provision having been worded in the negative, there was no positive obligation to place 'Colors' in all tiers where channels of the same language and genre are placed and thus, where there being no other channel of the same language and genre, Clause 9.2 would not be breached unless it is placed in such a package; (iii) the reasonable efforts on the part of respondent to optimize the reach would depend upon a report or analysis.

68. The word 'optimize' means to make the best or most effective use. The word 'reasonable' would mean fair and sensible and able to reason logically. See Oxford Dictionary page 1001 and 1193.

In Black's Law Dictionary, the word 'reasonable' is stated to be 'fair, proper or moderate under the circumstance'.

69. Mr. Lekhi may be correct in contending that on a plain meaning being given of Clause 9.2, it was not necessary to place 'Colors' in the same manner as those of 'Colors', 'SET' and 'SAB'.

Viacom, however, had been making complaints. MSMD acknowledged the case of Dish TV, as was said to have taken up the matter, but it had maintained its silence on Tata Sky.

It is difficult to comprehend that despite reasonable efforts on the part of MSMD, a channel which ranked second in GRP rating and which according to one of the witnesses of the petitioner became No. 1 channel in TAM towns, would not be tiered in all the packages in the Hindi speaking areas despite reasonable efforts of MSMD.

70. It was for the MSMD to show what efforts were made in that direction. It's representatives must have met the DTH operators. Correspondence must have been exchanged. The consultative process was required to be resorted to and it was for it to remedy the breach contemplated under the agreement and, thus, to show as to what action had been taken by it.

No material has been brought on the record in this behalf.

71. Reasonable efforts to optimize the reach would mean real and sincere efforts and not merely a lip service.

What efforts had been made by it in dealing with DTH operators was within its special knowledge. The burden in terms of Section 106 of the Indian Evidence Act was, therefore, on it.

It would be of some interest to notice that recently in CEP Holdings Limited and CEP Claddings Limited v. Steni AS reported in [2009] EWHC 2447 (QB) a case involving the question as to whether the exclusive distributor of a company was in breach of its obligations to use 'reasonable endeavours to promote sale of its products', it was observed thus:

> "*In my judgment, a reasonably competent exclusive distributor, using all reasonable endeavours, would have engaged in a far more positive dialogue with its supplier, Steni, than Holdings actually did, in order to maximise the promotion and sales of Steni products in the Territory. The evidence clearly demonstrated that Holdings' responses to Steni's enquiries about prospective marketing and sales performance were habitually negative. Having read the correspondence, and heard the evidence of the participants on both sides, I am not surprised that Steni became increasingly frustrated with what it regarded as Holdings' stalling tactics. I have little doubt that the reluctance on Holdings' part to share information arose out of a wish to conceal what it must have appreciated was its inadequate performance as a distributor of Steni products."*
>
> *(See the briefing note on the case by Mark Alsop published in November, 2009 wherein the learned author commented:*
>
> > *"The analysis of reasonable endeavours is interesting because of judicial consideration of the various obligations that a distributor could reasonably be expected to undertake. It is perhaps worth mentioning that compliance with all the reasonable endeavours*

activities will not of itself necessarily produce success; for that, targets are necessary.)"

72. MSMD's submission is that as per TAM report, there had been a slight increase in the viewership of the Colors channel i.e. from 62.1 to 62.3.

In a situation of this nature, it is not decisive keeping in view the phenomenal growth in the DTH sector. (Now connections are said to be over a million per month). MSMD does not say, it did not achieve any growth.

Malafide on the part of the MSMD would also appear from the fact that its witness, Mr. Himanshu Dholeriya has sought to confuse the issue of Tiering/Packaging with GRP. We have noticed his deposition in this behalf heretobefore.

He, in his cross-examination, accepted that 'Colors' channel was not in many important and significant packages.

It is not disputed that except 'Colors', in 'Super Value' pack and 'Super Saver' pack, all other channels are there.

If all other channels could be packed in such significant packages; why the 'Colors' could not be, is difficult to comprehend.

It will bear repetition to state that no document has been brought on record to show that any serious attempt was made by MSMD in that behalf.

If fruitful talks could have been started with Dish T.V., why no such attempt was made so far as Tata Sky was concerned, has not been stated.

It has not been denied or disputed that placement in number of tiers would result in increase of larger number of viewership in each channel.

The reasonable efforts on the part of MSMD, therefore, ought to have been to see that subject of-course to the regulatory mandate and to some extent, discretion on the part of the DTH operators, that 'Colors' channel, if not better, similar treatments received by other Hindi channels including 'SET' and 'SAB'.

Carriage Fee

73. On a perusal of clause XXVI (2) of the agreement read with Clause 11, it would appear that carriage fee was not to be paid for digital channels, but only for analogue channels.

74. Mr. Lekhi has drawn the attention of the Tribunal to the reply of MSMD to the Viacom's notice of termination, wherein it has inter-alia been contended that 'Colors' was available on Life Style Gold Category of Tata Sky and have to be placed in Super Hit packages without any carriage fee obligation unlike its earlier 'Avtar', when it was part of the Life Style Gold package entailing payment of carriage fee without the commensurate revenue.

So far as Dish TV is concerned, it was contended that 'Colors' was available only in the Platinum package prior to the agreement at the relevant time and it was available in Platinum as also Gold packs enhancing its reach.

75. The question, which arises for consideration, therefore, is as to whether Viacom was to pay any carriage fee.

Payment of carriage fee was to be kept confined only to analogue mode, which is evident from Clause XI. If that be so, MSMD cannot, on the one hand, complain that carriage fee although was not to be paid but was only expected to be paid but despite agreement carriage fee would be payable for the DTH operators. If that was the contention, the same could have very well been raised in response to various e. mails sent by Viacom to it.

It, as an experienced content aggregator as also exclusive distributor of both Viacom and TOA and other channels, could have even before entering into the agreement stressed the need of payment of carriage fee to the DTH operators.

It was from that angle only, the question as to whether in a case of this nature, Clause XXI providing for annual review would be applicable or the same could have been enforced or not, must be considered.

If maintenance of the GRPs was the obligation of Viacom, MSMD was concerned only with its performance in terms of the agreement, which excluded payment of any carriage fee.

MSMD even could have taken up the matter with Viacom in its annual review.

Termination of Contract

76. Viacom by reason of a letter dated 13.7.2010 terminated the agreement, inter alia, contending :-

(a) The actions on the part of MSMD resulted in its loss of faith and confidence in MSMD which has acted as slow poison for the present and the future growth of Viacom 18 Channels.

(b) The actions of MSMD are mala fide and fraudulent in nature as a result whereof damage to the fabric of the MoU resulting into long term and permanent damages to Viacom has been caused.

It by the said e-mail attempted to discuss and resolve the issue and, thus, held back any formal correspondence.

77. The fact, which was intended to be placed on record, was stated as under:-

(i) MSMD was appointed as Viacom's agent for rendering its personal services for distribution of its channels.

(ii) It falsely represented that it would give substantial stake to it in MSMD.

Upon reciting the background of events leading to entering into the agreement as also relevant clauses thereof, Viacom specified the following causes for termination of the said agreement:

A. Prejudicial packaging of Viacom 18 Channels vis-a-vis MSM Discovery Channels

(i) It had failed to maximize the revenues arising from the DTH and other digital platforms as also analogue platform.

(ii) Whereas MSM channels are available in all or most of the packages of DTH operators, `Colors' channel was not available in most of them despite the fact that on several occasions Viacom had indicated about non-placement of channels to it; wherefor MSMD had either requested for time to suitably resolve its apprehensions or completely ignored them.

(iii) MSMD's attempt to take shelter behind TRAI Regulations was a feeble and baseless one and, thus, unacceptable.

(iv) MSMD channels were favourably packaged with a view to diminish the reach and connectivity of Viacom18 Channels.

B. Isolation and unfavourable packaging/tiering of Colors channel 'Colors' channel had unfavourably been packaged with 'Aath', 'Discovery Science' and 'Discovery Turbo' so as to popularize its unpopular channels.

C. Avoidance of overflow of revenue shares from Viacom 18 Channels on Digital Platform.

(a) The DTH revenue for Colors is substantially lower than the DTH revenue for 'SET' compared to what ought to and could have been achieved, had MSMD acted properly and in due performance of its contractual obligations.

Heavy discount of more than 50% of the normal channel price had wrongly been given.

(b) The breaches committed are fundamental in nature which are incapable of being remedied.

(c) Failure to deploy 1500 IRDs in addition to the existing 3,500 IRDs.

(e) Withholding of information/fabrication of subscriber report.

(f) Discriminatory deactivation of Viacom 18 Channel.

(g) Unfair practice in distribution of Viacom 18 Channels while executing agreements with cable operators.

(h) By reason of the said breaches irreparable loss and damage has been caused to Viacom.

(i) The breaches are such, which cannot be remedied by MSMD and resulted in a total loss of confidence.

78. We may also notice the paragraphs 8 and 9 of the Notice of termination issued by Viacom 18 dated 13.07.2010 thereof :-

> *"8. By your malafide intention and fraudulent conduct, you have completely shattered and ruined our confidence which is indispensable for our relationship. It is manifest that your act of inducing us to enter in to the MOU on the basis of false assurance and commitment was a premediated effort in pursuance of the larger design of relegating Viacom 18 Channels to an unfair position and undermine our present and future prospects. The breaches committed by you are irremediable and incurable since it has resulted in permanent and irreparable damage to rights, interests and to our faith and confidence. The cumulative effect of all these omissions and commissions on MSMD's part has resulted into loss of the submission of the MOU. Your several omissions and commissions are clear criminal offences under the Indian Penal Code, 1860 for which each of your directors, officers and employees in India and abroad, concerned with the aforesaid have conspired and are therefore jointly and severally liable for the same. In the absence of a smooth relationship, you have left us with no alternative but to opt for a complete severance of any existing relationship between us and you without any further notice as every*

continuing day of relationship from now will further cause irreparable damage and injury to our business and reputation and put in danger our obligation to provide quality to millions of our subscribers across country.

9. In these circumstances, without prejudice to the contents of all aforesaid paragraphs, and assuming that the MOU is not vitiated and avoided as set out therein, we hereby terminate the MOU with immediate effect and call upon you to forthwith cease from acting in furtherance of the MoU or representing any association with Viacom18 and/or Colors. This termination has resulted entirely due to your breaches, wrongful acts of omissions and commission and your fraudulent acts, which really constitute a repudiation of the MOU by you. Your own acts/conduct rendered it impossible for you to render your services to us properly in terms of the MOU. We also call upon you to forthwith make payment of Rs.20,34,61.982/- (Rupees Twenty crores thirty four lacs sixty one thousand nine hundred eighty two only) due from MSMD towards Fixed Fee and Minimum Guarantee for the period until the date of this termination letter. We also call upon you to render true and faithful accounts in respect of the distribution on the digital platform and forthwith pay to us the amount due to us on ascertainment. Your actions, inactions and conduct as stated hereinabove have resulted in substantial damage to us to the tune of approximately Rs.127 crores for various reasons including without limitation due to unfavourable tiering for Viacom 18 Channels and loss due to disruption of business."

79. We intend to deal with each of the grounds separately, so far as they are relevant for the purpose of determining the issues between the parties.

Respondent, however by its letter dated 15.7.2010 inter-alia contended that the termination was not occasioned by any breach, far less any intermediary breach and the same was only a ploy to avoid contractual obligations towards it in favour of a bargain to negotiate with Network 18 & Sun Group during the subsistence of the agreement and prior to its termination.

80. By its letter dated 15.7.2010 MSMD, in response to the notice of termination, stated as under:-

> *"Your purported notice of termination of the MOU was received at our office at 1:05 p.m. on 13th July 2010 and at 2:45 p.m. the same afternoon you together with the Sun Network announced a purported distribution joint venture. This very act speaks volumes of a calculated and pre-mediated move on your part motivated only by an opportunistic desire to avoid the binding contractual provisions of the MOU. We are astonished that a Viacom entity could stoop so low as to seek rake up untenable allegations to avoid its express obligations under a contract. It seems to us that the shock you seek to express in the preamble to your letter is nothing but a mere pretence and a sham to avoid your contractual obligations."*

MSMD, moreover, contended that the termination was not occasioned by any breach of the agreement on its part and it was mala fide as immediately after service of the notice of termination through e-mail at about 1.15 p.m. a

joint press release was issued in conjunction with the respondents No.2 & 3 of Petition No.250 of 2010, announcing their strategic alliance for creation of a new distribution platform and intention to create a proposed joint venture company.

81. Mr. Himanshu Dhoreliya (RW/1), in his evidence, stated as under :-

> *"A. I became aware of the termination at around 1:30 P.M. on 13.7.2010. I further became aware that within an hour of such termination, a press conference was held to announce that henceforth, distribution of Respondent No.1's channels shall be done by Respondent No.3, a new joint venture in which Respondent No.2 was a partner. A news report dated 13.7.2010 is filed in the proceedings at pages 475-477 of Petition No.250 (C) of 2010 and is also annexed hereto and may be exhibited as Exhibit PW-1/2.*
>
> *A. I also say that subsequent to the purported termination, my attention was drawn to a report containing intimation to the Bombay Stock Exchange, of a board meeting of Respondent No.2, held on 07.07.2010, where Respondent No.2 (which owns a 50% stake in Respondent No.1) decided to consolidate the entire TV businesses of the Respondent No.2 group (including the interests of Respondent No.2 in the four channels of the Respondent No.1) in a new entity. I say this that the purported termination of the MOU was planned and it was not a case of sudden loss of trust and faith. A copy of the said intimation is annexed hereto and may be exhibited as Exhibit PW-1/3."*

82. Mr. Lekhi would contend that the said witness having not been cross-examined in material particulars on the fact that there had been a pre-mediated action on the part of the respondent, the same must be held to have been accepted.

Mr. Kathpalia, on the other hand, urged that the VIACOM started a venture with SUN 18 only after it was found that it is not possible for it to carry on its activities with MSMD.

83. Reliance has been placed on Rattan Lal Dhirajlal's Law of Evidence 20th Edition, wherein it is stated:-

> *"In HALSBURY 4th Ed., Vol. 17, Para 278, Page 194 it is observed : Failure to cross-examine a witness on some material on his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.*
>
> *It is a well-established rule of evidence that a party should put to each of his opponents' witnesses so much of his case as concerns that particular witness; if no such questions are put, the courts presume that the witnesses' account has been accepted.*
>
> *When a party has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed the testimony given could not be disputed."*

The aforementioned issue between the parties, to our mind, is not a very important one, except that the statement of Mr. Dhoreliya was his opinion being based on the newspaper reports and as no other evidence has been brought on record. The reporter has not been examined.

84. We may notice that in Borgaram Deuri V. Premodhar Bora (2004) 2 SCC 227, at page 234, the Supreme Court in regard to the evidentiary value of First Information Report opined:-

> *"Spreading of hatred on communal basis is an offence. The appellant herein did not lodge any first information report. No contemporaneous documentary evidence has been brought on record to show that the first respondent had spread hatred towards member of another community or caste. The contents of the news item whereupon Mr. Sanyal relied having not been proved by examining the reporter, the same could not have been exhibited legally on the statement of the witness that the report had been published in the newspaper. It was, therefore, inadmissible in evidence."*

85. However, the fact that immediately after termination of the agreement, VIACOM had started distributing its channels through SUN 18 is not in dispute.

It may be noticed that according to the VIACOM, it, even as late as on 10.5.2010, intended to carry out the ongoing relationship with MSMD as would appear from its letter of the said date. In absence of any clear evidence whether direct or circumstantial, it is difficult to hold one way or the other in regard to conduct of the parties so far as the motive leading to termination of contract is concerned.

By reason of the said letter VIACOM had been asking for giving it a stake in the MSMD. The termination was effected by reason of a letter dated 13.7.2010 much after the causa causan arose therefor, namely, the MSMD's letter dated 17.5.2010.

86. It may be true that cross-examination of a witness is not a mere formality. It is necessary for the party cross examining the witness to put-forth its own case. When, however, there are other evidences brought on record, evidence of a witness on a particular point even if there is no cross examination must be considered in its entirety for the purpose of arriving at a finding upon applying the principles of appreciation of evidence.

87. We do not intend to lay much emphasis on this aspect of the matter in the facts and circumstances of the case, as this Tribunal is mainly concerned with the issues relating to the effect of wrongful termination.

It is, however, in absence of any pleadings of malice of fact on the part of the VIACOM, difficult to accept the contention of MSMD that the termination was without any reason.

88. The main issue is as to whether the VIACOM is correct in its contention that in view of the conduct on the part of the MSMD, it had lost faith and confidence in it.

It is also to be considered as to whether the VIACOM could have waited for 90 days' more time for carrying out its affairs of its business with MSMD by issuing a formal notice in this behalf.

89. Admittedly the respondent No.1 did not serve the mandatory notice of 90 days.

90. Mr. Himanshu Dhoreliya, (RW1) in his evidence stated the said fact and referred to a news report dated 13.7.2010 and furthermore annexed a copy of the intimation marked as Ex.PW 1/3 containing an intimation to Bombay Stock Exchange as regards a Board meeting of respondent No.2 held on 7.7.2010 to consolidate the entire TV business of respondent No.2 group in a new entity and thus the same was preplanned.

However, Mr. Himanshu Dhoreliya was not cross-examined on the said averments and, thus, the same must be held to have been admitted.

91. Mr. Lekhi has strongly relied upon J.W. Carter's Breach of Contract, Second Edition, at page 59.

Paragraph 304 of the said Treatise, upon which reliance has been placed, reads as under :-

> *"[304] Applicable to all contracts. It is usually open to contracting parties to agree on the circumstances which give rise to a right to terminate the performance of a contract. If they have reached such an agreement resolution of the issue of whether a right to terminate exists will depend on whether the particular circumstances of the case make the provisions applicable. Where this is the case then, subject to the possible application of a statutory rule rendering the right to terminate invalid, the party in whose favour the right exists may exercise the right"*

However, in 2011 Edition of the same treatise at page 87, it is stated :-

> *"Introduction. Contracting parties may agree expressly on the circumstances which will entitle a promise to terminate the performance of a contract. That includes a right to terminate for breach. Such rights may be termed 'express' or 'contractual' rights to terminate, and the provisions 'termination clauses'.*
>
> *If the parties have reached such an agreement, there are three principal issues which may arise :*

(1) In what circumstances does the right arise?

(2) What steps must be taken to exercise the right?

(3) What are the consequences of exercise of the right?

These are issues of construction. However, in relation to the requirements for exercise of the right, and also the consequences of exercise, the parties may not have complete freedom of contract."

Questions

92. The questions which, therefore, arise for our consideration are as to :

(i) Whether termination of contract was in terms of Clause XX of the MOU?

(ii) Whether MSMD, having committed a fundamental breach of contract, no notice was required to be issued?

93. A subsidiary question would also arise as to whether MSMD was an agent of Viacom within the meaning of the provisions of Section 182 of the Indian Contract Act.

94. We may take up the said question first.

RE: Agency

95. Section 182 of the Indian Contract Act reads as under :-

An "agent" is a person employed to do any act for another, or to represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

96. At this juncture we may also notice the definition of `Broadcaster' as contained in Clause 2(e) of the Regulations, being as under :-

"2(e) ***"Broadcaster"*** *means any person including an individual, group of persons, public or body corporate, firm or any organization or body who/which is providing broadcasting service and includes his/her authorized distribution agencies;"*

Bowstead & Reynolds on Agency 18th Edition at page 1 describes an agent as under:

"(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as the third party.

(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's relations with third parties.

(3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

(4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."

In 'On Law of Contract' by Treitel, 11th Edition, `Agency' is defined as under:

> *"AGENCY is a relationship which arises when one person, called the principal, authorizes another, called the agent, to act on his behalf, and the other agrees to do so. Generally, the relationship arises out of an agreement between principal and agent. Its most important effect, for the purpose of this book is that it enables the agent to make a contract between his principal and a third party."*

97. We have noticed heretobefore the agreement between the parties.

By reason thereof, concedingly the signals do not pass through the head ends of MSMD.

Re: Agency or Principal to Principal

98. It was urged by Mr. Kathpalia that MSMD, having regard to the statement made in paragraph 67 of Petition No. 250 (C) of 2010 (page 493 Vol. VII) wherein agency coupled with interest has been pleaded, it is estopped and precluded from contending that the MoU dated 11.02.2009 was on a principal to principal basis.

In any event, MSMD was only a distributor and having no ownership or possession so far as the signals of 'Colors' channel is concerned and even the copyright thereof having been retained by Viacom only, the relationship between the parties was that of principal and agent particularly in view of the fact that Viacom would be bound by the agreement entered into by the third parties so far as fixation of rate is concerned.

The amount of consideration mentioned in the agreement being the minimum guaranteed amount of Rs.150 crores merely provides for a methodology to determine the quantum of compensation and not for any other purpose.

99. It was urged that this Tribunal, in its order dated 27.10.2010, as also the High Court of Delhi in its judgment clearly held that MSMD had no interest in the corpus of the property of Viacom.

Reliance placed by MSMD on a decision of this Tribunal in MSMD v. NDTV that there was no relationship of 'principal' and 'agent' is not applicable in this case.

Moreover, even therein it has been held :-

> **"***Even otherwise, it appears that having regard to the provisions of the said Regulations, both the petitioner and the respondent no.1 are broadcasters. The agreement between them is on a principal to principal basis. Prima facie, there does not exist any element of `agency' within the meaning of Chapter X of the Indian Contract Act.*
>
> *Even if there exists any such relationship, it can be terminated upon giving reasonable notice. The rights claimed by the petitioner arise from the term of a contract qua contract. The matter is governed by the provisions of the Specific Relief Act, 1963."*

Alternatively, it was submitted that even the respondent is not an agent having regard to the fact that it itself has approached this Tribunal which would clearly go to show that it is a service provider being within the purview of the definition of 'broadcaster'

Mr. Kathpalia's contention that the amount of fixed fee related only to methodology to determine the amount of remuneration or compensation is not entirely correct.

It may also be true that third party contracts were binding on Viacom so far as the rates thereof fixed thereunder is concerned but the same by itself cannot be a ground for holding that MSMD was the agent of Viacom.

Moreover, the copyright of the contents of the channels also remained with Viacom.

MSMD admittedly in its reply has pleaded 'Agency coupled with interest'.

100. As the order passed by this Tribunal or for that matter the one by the High Court of Delhi having been passed at an interlocutory stage, the same, however, shall not operate as 'Res-Judicata'.

At that point of time this Tribunal as also the High Court proceeded to consider the contentions of the parties without going into the details of conduct of the parties and other circumstances connected thereto. No occasion also arose for them to consider the other materials brought on record.

(See Petition No. 151 (C) of 2010 – Jak Communications Pvt. Ltd. V. Sun Distribution Services Pvt. Ltd.; and Petition No. 332 (C) of 2010 – M/s. Silverline Entertainment Vs. ESPN Software India Pvt. Ltd.), State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha, (2009) 5 SCC 694

MSMD did not enter into any agreement with a third party in the name of Viacom. It was free to fix the rates. It was free to enter into any agreement with the third party including DTH operators. MSMD was not to receive any commission. The amount of commission payable by MSMD to its distributor was on its own account.

MSMD was accountable to Viacom only in terms of the agreement. It was not accountable for its acts of omission and commission so far as enforcement of rights and obligations arising out of its agreements with third parties are concerned. It was to pay a fixed fee subject to the exceptions contained in the agreement irrespective of the fact as to whether it was in a position to recover the said amount or not.

If MSMD was to suffer loss Viacom was not to reimburse it to that effect. We, therefore, are of the opinion that the agreement was entered into by the parties hereto was on a principal to principal basis and it did not create any agency.

101. Construction of a document moreover is a question of law.

Procedural rules of `Estoppel' would not bind any party to deprive it from its statutory rights. Status of a party in terms of a contract again may not be binding on it in law, they being different.

Despite pleading 'agency coupled with interest', MSMD, in our opinion, would not be an `agent' within the meaning of Section 182 of the Indian Contract Act.

The term `Agency' coupled with interest has a definite connotation.

In a case of this nature and having regard to the terms of the contract MSMD did not have any interest in the corpus of the petitioner.

That would, however, not mean that the agreement did not create any distributing agency.

102. The Regulations contemplate such an agency as is evident from the definition of `broadcaster' contained in Clause 2(e) of the Regulations.

The content aggregator would, thus, be a broadcaster and in that capacity it would also be a service provider.

We have heretobefore noticed that the TRAI in its recommendations on Implementation of Digital Addressable Cable TV System in India published on 05.8.2010 had acknowledged the role of a content aggregator.

103. The relationship between parties, therefore, was between a broadcaster and a distributing agency. Such distributing agency subject to the terms of the

contract may be an agent within the meaning of Section 182 of the Contract Act or may not be.

To what extent, if any, the principal would be bound by the act of the agent would, thus, depend on the terms of the agreement. As in this case except the rate, Viacom was not bound by any third party agreement entered into by MSMD, it would not be an agent.

An agent must in law consents himself to act as such. An authority claimed in him as an agent must be express or implied. He must by words or conduct represents or permits it to be represented that another has authority to act on his behalf.

It, however, does not mean that an agent cannot be an independent contractor. In the latter case, the employer would not be answerable for the acts of tort either of the contractor himself or his servants.

104. In Ganesh Import and Export vs. Mahadev Lal Nathmal reported in AIR 1956 Calcutta 188, a Division Bench of the Calcutta High Court opined that the Court may not have any hesitation in holding that relationship of agency has not arisen although the concerned party was described as an 'Agent' in the agreement.

Re – Agency coupled with Interest

105. When the authority gives the factual security of the interest of the agent only the authority cannot be revoked. Such an authority must be sufficient considering the fact that the interest must be created in the property, which is subject matter of the agency. An authority coupled with interest is not ordinarily contemplated in a case of contract involving mutual rights and obligations. Even where the agent has a special property in or a lien upon goods, to which the authority relates, it does not amount securing the claims of the agent.

Trust & Confidence

106. It is, in that context only, the issue of trust and confidence would arise having a limited application, which in turn is also required to be considered with the terms of the agreement.

MSMD, although was not an agent, was bound to render serious consideration to the complaint(s) of Viacom and to do its best to remedy the breach.

Individual opinion, as has been submitted by Mr. Lekhi, may not matter but what is obvious from the record also cannot be ignored keeping in view the nature of business, particularly having regard to tough competition amongst the channels of same language and genre, MSMD was expected to perform its role as exclusive distributor in its capacity as a content aggregator (whose

principal duty is to provide marketing and negotiation services on behalf of the broadcasters).

We would assume that MSMD to some extent, as contended by Mr. Lekhi, was helpless.

If it was helpless or unable to live upto the expected performance, Viacom may be correct in forming an opinion that it was not competent or efficient to remain its exclusive distributor. We would, however, have to consider the fallout of holding such opinion a little later.

107. A subsidiary question will also have to be considered, namely as to whether mutual trust and confidence, which is based on a principle of equity, is required to be read into the agreement.

Goff and Jones in its treatise 'The Law of Restitution', 5th Edn. citing Dhitts Vs. Boartman, 1964 Weekly Law Reporter 993 at page 1010, states the law thus :-

> *"There is a broad principle of equity developed by this court in order to ensure that trustees or agents shall not retain a profit made in the course of or by means of their office."*

The principle is said to have established for 250 years and is applied in wide variety and circumstances and not only to trustees and agents.

The Canadian Supreme Court in Lac Minerals Ltd. Vs. International Corona Resource Ltd., 1989 2 SCR page 574 inter-alia relying on the aforementioned authority, states the law thus :-

> *"in which a fiduciary obligation have been imposed seem to possess three general characteristics:*
>
> *(1) The fiduciary has scope for the exercise of some discretion or power.*
>
> *(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.*
>
> *(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.*
>
> *It is possible Relationships for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.*
>
> *The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in Hospital Products Ltd. v. United States Surgical Corp., supra, at p. 488, that:*
>
> *There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other . . .*

The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in Guerin, supra, at p. 384 that:

> *". . . the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."…*

The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected. (citation omitted).

This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy."

The decision of the Australian High Court in Hospital Products Ltd. has also been followed in several other jurisdictions e.g. in the judgment of Lord Brown Wilkinson in Kelly Vs. Cooper (1993) Appeal Cases 205 where an implied term was read with the contract that estate agent, who acts for more than one principal would not disclose confidential information. (See also in Re Golcord Exchange Ltd. in Receivership (1995) 1 Appeal Cases page 74).

In Carter's Breach of Contract 2011 Edition at page 59, it is stated :-

"If a client engages a professional person such as a solicitor, and the contract is of an informal nature, a term will be implied to define the standard of duty. It is presumed that the professional assumes a contractual responsibility to exercise reasonable care and skill, rather than to bring about a particular result. A term requiring the exercise of reasonable care and skill will therefore be implied to define the standard of duty in performance, that is, the quality of service. Thus, a solicitor engaged by a client to conduct litigation is assumed not to have undertaken a strict duty, that is, a duty to ensure that the client wins (or successfully defends) the case even though that is the result which the client desires.

A standard of 'reasonable care and skill' is presumed to apply to all professionals, including solicitors, brokers, architects, auditors, consultant engineers, valuers and medical practitioners. Therefore, unless the parties have agreed otherwise, the term will be implied (to define the standard of duty) as an incident of any contract with a professional person. Although expressed in terms of 'reasonable care and skill', the element of special skill distinguishes this duty from that applicable to an ordinary employee.

Of course, this implied obligation relates to the quality of the professional services. There may be other implied obligations, relating to matters such as confidential information, to which a strict standard of duty applies."

In Hospital Products (Supra), Mason, J. stated the law thus :-

"The notion underlying all the cases of fiduciary obligation that (is) inherent in the nature of the relationship itself is a position of

disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other."

In Arklow Investment Ltd. Vs. Maclean (2000) 1 WLR 594, the law has been stated in the following terms :-

"Duty of loyalty

The description of the duty under consideration as being one of loyalty was not seen by Mr. Underhill as being the most appropriate one, but for present purposes it is convenient to label it in that way. In the present context, the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal. An example of the obligation relevant to the present case is not to exploit or take advantage of the position of fiduciary at the expense of the principal. The existence and the extent of the duty will be governed by the particular circumstances."

In Bristol & West Building Society Vs. Mothew 1997 (2) Weekly Law Reporter page 436, which has been approved by the Privy Council in Arklow (Supra), it is stated "the distinguishing obligation of fiduciary is the obligation of loyalty".

We may also notice a recent observation of one of the learned Judges of the Supreme Court of India (G.S. Mishra, J.) in a differing opinion in A.C.

Muthiah Vs. B.C.C.I. & Anr. reported in (2011) 6 SCC 617 wherein in the context of the fiduciary duties of the Director of B.C.C.I., it was observed :-

> *"28. In fact, the concept of `conflict of interest management' has increasingly drawn the attention of governments and citizens alike in all advanced countries including United States of America over the last several years as has been the case in much of the rest of the world. Even a century ago in the case of Bray vs. Bradford (1896) A.C. 44, it was held that the directors as fiduciaries must not place themselves in a position in which there is conflict of interest between the duties to the company and their personal interests or duties to others. The courts have adopted a severe method of ensuring that the trust and confidence reposed in a fiduciary such as a director are not abused and the fundamental principle was stated by Lord Herschell in the aforesaid case (supra) when it was held as follows:-*
>
> > *" it is an inflexible rule of a court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principle of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus, prejudicing those whom he was bound to protect. It was therefore deemed expedient to lay down this positive rule".*

We are not oblivious that recently Supreme Court of India in CBSE Vs. Aditya Badopadhyay (2011) 8 SCC 497, upon referring to various authorities and decisions including Bristol (Supra), has held thus :-

> *"39. The term `fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term `fiduciary relationship' is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected not to disclose the thing or information to any third party."*

A content aggregator like the respondent was acting in its professional capacity. It had been dealing with more than one broadcaster.

If it has expressly or by necessary implication undertook to protect the interest of the petitioner by making reasonable efforts, it should have shown by reason of being a person of trust and confidence, as to how and in what manner, it had discharged its duties.

As a party to a contract, it could not have refused to disclose it's actions vis-à-vis its obligations under the agreement to make all reasonable efforts, where there was an apparent conflict of interest. It should not have withheld the best evidence in its possession.

Material Breach

108. Clause XX of the agreement provides for termination occasioned by material breach. What would constitute a material breach has been stated in Stroud's Judicial Dictionary 6th Edition at page 1565 in the following terms:

> *"MATERIAL BREACH. "Material" was to be defined as "serious" or "important" in a partnership deed where the parties agreed that a material breach by one would entitle the other to purchase the interest of the one in breach (DB Rare Books Ltd. v. Antiqbooks [1995*] 2 B.C.L.C. 306)."

In Black's Law Dictionary, 9th Edition at page 214, it is stated :-

> *"A breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages."*

109. When a material breach occurs, a party to a contract would be entitled to avoid the contract. The party will have a lawful excuse from performing the

terms of the contract. Excuses for non-performance of the contract may be provided by the contract itself which may contain exceptions absolving a party from its duty to perform if he is prevented from doing so by specified circumstances. Each event of failure to perform, if brought about by any, is not a breach at all.

{See *The Angelia* 1973 (1) Weekly Law Report page 210 at page 213}

Treitel on the Law of Contract, Eleventh Edition at page 838 on Standard of Duty, stated thus :-

> *"Many contractual duties are strict. The most obvious illustration of the principle is provided by the case of a buyer who cannot pay the price because his bank has failed or because his expectation of raising a loan has not been fulfilled, or because he is prevented by exchange control regulations from remitting money to the place where he has agreed to pay or because his supply of the currency in which he has agreed to pay has become exhausted and cannot be replenished. In such cases there is no doubt that he is liable to pay money, even if it occurs entirely without the fault of the party who was to make the payment, is not an excuse for failing to make the payment. The same principle of strict liability applies to the duty of a seller of generic goods to make delivery. It is no defence for him to say that he was prevented from making delivery because he was let down by his supplier or because no shipping space was available to get the goods to their agreed destination. A charter party similarly imposes a strict duty on the chartererer to provide a cargo, so that inability to find one is no excuse. In all these example, by a force majeure clause, but unless this is done liability is quite independent of fault.*

The principle of strict liability also applies to certain cases of defective performance. At common law, a carrier of goods by sea was held to give an "absolute" warranty of seaworthiness, it was not enough for him to show that he had taken reasonable care to make the ship seaworthy. In practice, sea carriers often contracted out of this strict liability; and in many cases the duty is now reduced by statute to one of due diligence.

Liability is, again, strict where goods delivered under a contract of sale are defective, for example, because they do not comply with the seller's undertakings as to quality. It is no defence for the seller to show that he took all reasonable care to see that there were no defects, or that he could not have discovered the defects because he was a retailer selling goods in packages sealed by the manufacturer. The position appears to be the same where goods are supplied under a contract for the supply of goods other than one of sale, e.g. under one of hire or hire-purchase."

All the alleged breaches on the part of the MSMD, as would appear from the discussions made hereinafter, were not material breaches.

Repudiation Issue

110. We, thus, are required to deal with the contentions of Viacom on their own merit.

111. Clause XX containing severe consequences for its breach should as far as possible be construed literally, so as to be in conformity with the intention of the parties, which would mean :-

(i) The breaches are to be serious in nature.

(ii) An opportunity to remedy the breach was required to be given.

(iii) For the said purpose notice of 90 days' was required to be served.

(iv) A reasonable opportunity to remedy such alleged breach was to be given.

(v) In the event of the breach being suitably addressed or cured to the satisfaction of both the parties, no further cause shall subsist if the consequences of such breach including penalty can be dealt within the provisions of the long term agreement.

112. Mr. Kathpalia, however, in support of his contention that the breaches in question were repudiatory ones has relied upon a large number of judgments. We may notice the same.

In Northern Foods PLC vs. Focal Force Ltd. 2003(2) Lloyds Law Report page 728, the main issue in the lis between the parties therein was as under :-

> *"1.7 The main issue in the second trial was whether Northern was in repudiatory breach of the Contract by its admitted failure to order the required percentages of sliced/diced onions from Focal."*

It was observed that various tests have been laid down to identify breaches of intermediate terms in a contract that are sufficiently serious to entitle the innocent party to quit the contract at an end.

In that case refusal on the part of the respondent therein to supply of onions at the contract price was treated as an acceptance of the appellant's repudiation of contract. Such is not the position here.

113. For constituting a fundamental breach, the breach must form core of the contract. The exception clause, however, will have no application if there has been a breach of fundamental terms.

To constitute a repudiatory breach of contract, the same must go to the root thereof. A breach is likely to occur or recur cannot of course be treated to be 'repudiation' unless it would have the effect when it did occur or recur. The remedy open to an innocent party will depend entirely upon the nature of the breach and its foreseeable consequences.

114. In a concurring judgment McGonigal J. however, in Northern Food PLC v. Focal Foods Ltd. reported in (2001) All E.R.(D) 306 (Jul) observed thus :-

> *"If a party without professing to terminate a contract fails to perform his side of the bargain in circumstances such that his failure is judged to be repudiatory, can he justify his failure on*

the ground that the other party had wholly disabled himself from performing his own obligation. The answer to my mind is that he can. The essence of an executory contract is that the performance or promise of one party provides the consideration for the promise of the other and it would seem both unjust and contrary to principle to hold that one party should remain bound to perform his side of the bargain after the other has wholly put it out of his power to perform his own (any more than he would remain bound after the contract had been made incapable of fulfillment by some frustrating intervention of a third party). As to authority, this conclusion is consistent with British & Beningtons Ltd. and Cooper, Ewing & Co. Ltd. Vs Hamel & Harley Ltd."

115. We may, however, notice that when the breach of the stipulation go so much to the root of the contract that it make further commercial performance of the contract impossible, a fundamental breach may be held to have been committed.

[See Hong Kong Fir Shipping vs. Kawasaki Kisen Kaisha reported in (1962) 2 Q.B. 26 at page 60)

Recently in Ontario Inc. vs. Boa-France Inc. (2005) 78 DR (3rd) 81 (C.A.), the Court of Appeal for Ontario by a judgment dated 01.11.2005 held as under:

"The test for determining whether a breach amounts to a fundamental breach that deprives the innocent party of

"substantially the whole benefit of the contract" was recently restated by this court in Shelanu Inc. v. Print Three Franchising Corp. *, (2003), 64 O.R. (3d) 533. In that case, the court adopted the application of five factors extrapolated by Professor Waddams from the case law, to analyze whether there has been a substantial failure of performance amounting to fundamental breach. They are: (1) the ratio of the party's obligation not performed to the obligation as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation. Writing for the court, Weiler J.A. observed that the first and fifth factors appear to be aimed at ascertaining whether the contract was substantially performed; the second and fourth factors are aimed at measuring the effect of the breach on the innocent party; and the third factor assesses whether the aggrieved party should be released because repetition of the breach would make continued performance intolerable: see* Shelanu, supra*, at paras. 119-120."*

"If a party, without professing to terminate a contract, fails to perform his side of the bargain, in circumstances such that his failure on the ground that the other party had wholly disabled himself from performing his own obligations? The answer to my mind is that he can. The essence of an executor contract is that the performance or promise of one party provides the consideration for the promise the other, and it would seem both unjust and contrary to principle to hold that one party should remain bound to perform his side of the bargain after the other has wholly put it out of his power to perform his own (any more that he would remain bound

after the contract had been made incapable of fulfillment by some frustrating intervention of a third party).”

116. Reliance has also been placed on Maharashtra State Electricity Distribution Vs. DSL Enterprises Pvt. Ltd. reported in 2009 (4) Bom. C.R. 843, wherein the law is stated thus :-

“48. It would do well to understand the concept of what is "fundamental ".

49. The Thesaurus would show the following synonymous: basic, key, crucial, primary, vital, central, major, principal, main, chief, central, integral, indispensable.

50. Hence a "fundamental breach ", as the term itself suggests is a breach of a basic, main term of the contract, so primary that upon such a breach the other reciprocal promises cannot be performed by the other party to the contract. Lord Reid has enunciated the ambit of this term in the case of Suisse Atlantique Societe d' armament Maritime S.A. v. N.V. Rotterdams che Kolen Centrele 1966 AC 361 @ 397 (H.L) to which my attention was drawn by Mr. Dada. In that case the charterer as the contracting party committed willful and deliberate (though not fraudulent or malafide) breaches by delaying loading and discharging the cargo even upon the pain and result of paying demurrage charges for such cargo which was calculated to be of lower rate than to pay for freight of the coal which they would have had to use as fuel for more voyages that would have resulted.

51. It was observed that in such a case the Charters would have committed a "fundamental or repudicatory breach " or a breach "going to the root of the contract ". He further observed:

One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was mad....

Lord Reid has thereafter held what would be the consequence or the aftermath of such breach at page 398 thus:

If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages.

52. Lord Reid further considered the case law dealing with the right of the party guilty of breach to rely upon the exclusion clause in the contract i.e., the clause excluding the liability of the party in breach upon rescission of the contract. Following, amongst others, Lord Denning's opinion in the case of Karsales (Harrow) Ltd. v. Wallis 1956 1 W.L.R. 936 he held that such party cannot use the umbrella of the exclusion clause if the breach "goes to the root of the contract " i.e., if it is a breach "of a fundamental term" thus:

It must mean that the law does not permit contracting out of common law liability for a fundamental breach.

2 principles, therefore, follow from the rule of law, (as His Lordship called) from earlier cases cited in that judgment.

a) A fundamental breach is a breach of the most basic and essential term of the contract, which goes to the root of the contract.

b) A breach of the fundamental term enables the aggrieved party to repudiate the contract and sue for damages."

117. Mr. Lekhi has relied upon the decision of House of Lords in AFOVOS Shipping Co. SA vs. Romanao Pagnan & Pietro Pagnan reported in 1983(1) WLR 195 wherein it was held that a breach does not occur until the time for performance arrives.

Therein a right of withdrawal was exercised by a charter by the Ship owner from a time charter of a ship let to charterers for a period of two years three months.

The said decision does not have any application to the fact of the present case.

The contract does not contain an exception clause, by reason whereof a new contract has come into being. A fundamental breach cannot be presumed having regard to the perception of a party to the contract.

In this case, however, the alleged breach of contract and the effect thereof as to whether they are serious enough to terminate the contract without issuance of any notice under Clause XX of the agreement must be considered on its own merits.

The contract, however, it must be placed on record, does not provide for any exemption clause so as to hold that Viacom could take recourse to the repudiatory breach of its own.

[See Suissee Atlantique Societe D Armement Maritime SA vs. NV. Rotterdamsche Kolen Centrale (1966) 2 AII ER 61}.

There cannot, therefore, be any doubt or dispute that the termination has been effected in violation of Clause XX of the agreement as the respondent has not been given an opportunity to remedy the breach as indicated heretobefore. The effect thereof shall be considered hereinafter.

Effect

118. It is in the aforementioned context, we may notice the alleged breaches committed by the MSMD.

Stake

119. Admittedly, grant of 'Stake' to Viacom in MSMD was not a part of the agreement. The premise, on which the same has been made an issue, was Viacom's assertion that keeping in view the conflict of interest, it was to be given some say in the control of the MSMD.

120. It must, however, be borne in mind that although 'stake' was not a part of the agreement, there are a large number of communications including the letters dated 03.8.2009, 18.8.2009, 10.9.2009, 09.11.2009, 23.11.2009, 30.11.2009, 06.10.2010, 07.01.2010, 15.01.2010, 15.02.2010 and 10.5.2010 to suggest that the said issue had been discussed both prior to and after entering into the agreement dated 11.02.2009.

Exchange of the said communications is not in controversy.

121. On or about 29.01.2009 an e. mail was said to have been issued for the purpose of recording the said understanding, but both the said documents have not been proved, which would appear from the following piece of deposition of RW2 :-

> *"Q: Please refer to any document prior to or contemporaneous with the agreement wherein the respondent's commitment to your stake in the respondent company is recorded?*
>
> *A: Yes. I had a mail from Himanshu Dhurelia dated 29.1.2009, before the MOU was signed. This document, however, has not been filed. Said document can be produced.*
>
> *Q: Can you explain why the said document was not filed earlier?*
>
> *A: By oversight.*
>
> *Q: I put it to you there was no agreement between the petitioner and the respondent for stake in the respondent's company?*

A; There was no formal agreement but there was verbal commitment given by Mr. Kunal Das Gupta, the then CEO. There was a clear understanding that we would be granted equity in the company which would be based on the value that we bring to the bouquet of channels and in that point of time, our value was determined around 40 %. This was based again very scientifically on the television audience measurement data and reflected the value of four channels brought to the bouquet. Further, we were supposed to get equal representation on the board with affirmative voting rights on all key matters that impacted our business."

In the aforementioned context, we may notice an e. mail dated 22.7.2009 from Mr. Haresh Chawla to Mr. Manjit Singh.

It reads as under:-

"As you may be aware we had a review of the Viacom18 channels with the One Alliance team last week and one of the things that came up was the discussion we had on Viacom18 becoming a partner in the One Alliance JV and get a stakeholding which reflects the value our channels bring to the bouquet. This commitment was the one of the key considerations for us signing up our channels with you but at that time, Viacom18 agreed to hold off any written commitment on this matter since MSMD requested for time to handle the issue with your other shareholders, plus we had a looming deadline of the IPL to get Colors (and our other channels) into the bouquet.

Now I believe that we should pursue this discussion with great earnestness, since our Board is keen that we conclude this matter

asap. Do let me know when we could convene on this subject and move things forward.

Meanwhile, I should tell you that our teams seem to work very well together and this augurs well for our relationship."

122. Our attention, however, has been drawn to another e. mail dated 15.02.2010 from Mr. Haresh Chawla to Mr. Manjit Singh to contend that there was no concluded contract. It is, however, beyond any controversy that the parties had been negotiating on giving 'stake' to Viacom, which would also be evident from the letters dated 30.11.2009 and 15.01.2010.

123. Mr. Lekhi would urge that in a case of this nature, the 'mirror image' clause will have no application. There cannot, however, be any doubt or dispute that so as to make a contract binding, it should be a concluded one.

MSMD, however, does not deny or dispute, nor indeed could it do so in view of a large number of correspondence between the parties as also the oral evidence brought on record that grant of stake was a major issue. It is not a case where there had been no understanding between the parties at all.

In the aforementioned context, the letter of MSMD dated 17.5.2010 must be considered, wherein it was categorically stated by it that Viacom's stake was turned down even prior to the commercial negotiation of the agreement.

124. In the meetings, which were being held in September and November, 2009 as also in January and February, 2010, resolution of disputes was sought for.

However, in April 2010, it was given out that the partners of MSMD based in United States, had some reservations with regard to grant of stake. Moreover, even as late as in November 2009, the parties wanted to move forward. It is true that an alternative mechanism was still to be worked out. It is also true that value of 'stake' was also required to be determined as Mr. Sanjeev Hiremath stated in his deposition that there was no written communication in that behalf, but the same had been subject matter of discussion.

Mr. Hiremath, however, in his evidence explained Viacom's stand that the matter was not pushed in the background of the MoU as respondent had not discussed the same to its partners in U.S.A. as also its partner – Discovery, which would have taken some time.

125. Although there can be no doubt or dispute that before a binding contract is entered into, the provisions contained in the Indian Contract Act as also in the Companies Act, 1956 are required to be complied with, but in this case we are not concerned with the question of specific performance of contract but only with the question as to whether there were enough justifications for Viacom to lose faith and confidence in the MSMD.

Stricto sensu, therefore, it cannot be a case of misrepresentation or fraud, particulars of which were required to be pleaded and proved in terms of the provisions of Order VI of the Code of Civil Procedure.

The broad question is whether despite overwhelming documentary evidence, the respondent could have denied even the fact that the chapter was closed even prior to entering into the agreement. Answer to the said question must be rendered in the negative.

126. The very fact that the parties had been carrying out negotiations from all angles, we have no doubt in our mind that legal issues apart, there had been commitment on the part of MSMD to take the discussion between the parties forward to explore the possibility of grant of stake to Viacom in its company so that a legal shape in that regard could be given. In the legal sense, a concluded contract has not been arrived at, but it is difficult to comprehend the stand of MSMD that even the negotiations had been closed prior to the said agreement. The MSMD's contention that the deal was closed even before the execution of the agreement, is, therefore, not correct.

Re : Clause IX (1)

127. Clause IX (1) of the MoU reads thus :-

"Packaging of the V18 Channels

1. The V18 Channels shall be part of the existing Bouquet-2 of MSMD subject to regulatory mandates. Viacom 18 is assured that any addition of new channels and deleting of existing channels from the TOA bouquets of MSMD shall not adversely affect Viacom 18's share of potential revenue vis-à-vis scenario if such change in the TOA bouquets would not have happened. In the event there is any such material adverse effect on the allocated revenue to Viacom 18 the same shall be duly addressed by the parties through a mutually consultative process of review.

2. MSMD in their negotiation with any distributors of channels operating in DTH or any other Digital Platforms for the TOA Channels shall use reasonable efforts to optimize the reach for the V18 Channels. MSMD shall subject to regulatory mandates expend reasonable efforts to ensure that (a) Existing Channels shall not be placed in a tier which shall be less beneficial than their current tiers; and (b) New Channel shall not be placed in tiers other than those where other channels in same language and genre are placed."

Shri Himanshu Dhoreliya, RW-1 in his evidence, in relation to the analogue mode of transmission, categorically stated :-

"Q: Could you please explain as to what is meant by "TAM"?

A: TAM is an agency who monitors GRPs and TRPs and reach of all the channels available in the country."

From the statements made in the cross examination of RW-1, it would appear that he had no personal knowledge in the matter and thus it is fallacious to give any credit in regard thereto by MSMD.

128. The contractual provision between the parties, in our opinion, is clear and explicit. The 'Colors' channel in bouquet II was subject to the regulatory mandate. So far as the second part of the said clause is concerned, no violation, in the facts and circumstances of this case, is alleged.

MSMD, however, contends that placing of a new channel in bouquet II was impermissible having regard to the provisions of Telecommunication (Broadcasting & Cable) Services (2nd Tariff) (8th Amendment) Order, 2007 (3 of 2007).

Viacom in its petition contended :-

> *"Isolation and Unfavourable packaging/tiering of Colors*
>
> *i) Under Clause IX (1), it was agreed that said Channels shall be part of the existing Bouquet II provided by the Respondent. It was further assured that any addition of new channels and deletion of existing channels from the One Alliance bouquets of the Respondent shall not adversely affect the Petitioner's share of potential revenue.*
>
> *ii) Instead of including Colors as part of the existing Bouquet II, the Respondent created a New Bouquet III with one of the most popular Hindi general entertainment channel 'Colors' and other unpopular new channels owned by the joint venture*

partners of the Respondent namely (i) 'Aath' (Bengali Movie Channel) of MSM and (ii) 'Discovery Science' & 'Discovery Turbo' (Infotainment Channel) of Discovery which are least customer preferred. The said Channel of the Petitioner, in specific 'Colors', was deliberately downgraded in the tiers. It is apparent that the Respondent's sole intent is to drive the interests of its joint venture partners to popularize their unpopular channels and further use Colors to benefit the unpopular channels of its joint venture partners, at the cost of Colors and the Petitioner. This has severally impacted the reach and the connectivity/subscriber base of New Bouquet III (including Colors) gravely affecting the connectivity and has damaged the fundamental understanding which forms the essence of the MoU.

iii) The Petitioner craves leave of this Hon'ble Tribunal to copies of the print out of the website of the Respondent showing that 'Colors' has been put in the least preferred bouquet whereas the MSM Channels have been put in the most beneficial bouquet being Tier I shows the mischief, which are annexed hereto as Annexure P-4."

129. MSMD, however, in para 22 of its reply, stated thus :-

"Viacom claims in its notice (Please refer to paragraph 7 (b) at pages 389-90 of the Relevant Documents-II) that Viacom 18 channels were to be part of existing bouquet II of MSMD. The averment is repeated in paragraph 12 (b) (at page No.8) of Petition No. 220 (C) /2010. In its reply, MSMD in paragraph 22 (at pages 540-41) of the Relevant Documents-II) stated as follows :

"With reference to 7(b)(ii), it is denied that our only interest is to drive the interest of joint venture partners or popularize their unpopular channels and use Colors to benefit the unpopular channels of its joint venture partners at the cost of Colors. Please note that the MoU in Clause IX (1) records that the Viacom channels shall be part of existing Bouquet 2 of MSMD subject to regulatory mandates. Your exiting channels namely MTV, VH1 and Nick continue to be part of Bouquet 2 of MSMD till date. However, the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 (3 of 2007) clearly provides that any new pay channel that is launched after 1st December 2007, or any channel that was free to air channel as of 1st December 2007 and is converted as a pay channel shall have to be offered on a stand alone basis or as part of a new separate bouquet if the mandated pricing ceilings were to be exceeded. MSMD therefore has no choice by to place Colors in new Bouquet 3 as it was converted to pay channel after 1st December 2007. It is denied that MSMD created the Bouquet 3 to drive the unpopular channels of its joint ventures partners. The fact remains that channel AATH came into Bouquet 3 by the same logic as explained above. Further in view of the same regulations new channels like Discovery Science & Turbo were recently added to the Bouquet 3 in 2010. All your allegations to the contrary are baseless and a work of your imagination and devoid of facts. The fact further remains that it was during this period only that Colors has been within the top three GEC channel position and yet you allege that your reach, connectivity and subscriber base is adversely impacted. All these contentions are completely illogical and it is denied that the allocation of bouquets in any manner

impacted the reach or connectivity/ subscriber base of the new bouquet 3 includes Colors or that it has gravely affected the connectivity or has damaged the fundamental understanding which forms the essence of the MOU."

130. Only during oral hearing, Viacom contended that MSMD should have formed a new bouquet after the agreement was entered into.

In support of the said contention, Mr. Kathpalia would bring to our notice a communication dated 07.01.2009 from Mr. Sanjeev Hiremath to Mr. Himanshu Dhoreliya, the relevant portion whereof reads as under :-

"Colors will be the only channel in B3 initially. Should any other channel be added on, the same above principle will apply, however, Viacom18 should have the option to agree that the same be included in B3."

131. It is, however, not disputed that after negotiations and despite the said Tariff Order holding the field, the parties had specifically opted for Bouquet II. The fact that MSMD could not have placed the 'Colors' channel in Bouquet II in view of the said statutory mandate is not in controversy.

It is also difficult for us to accept the submissions of Mr. Kathpalia that although there was no statutory embargo that 'Colors' ought to have been made a part of a new Bouquet, no such demand was made apart from the fact

that there was no such contractual obligation on the part of the MSMD. The validity of the said Tariff Order is not in question before this Tribunal.

The matter was pending before the Supreme Court of India. An order of status quo was passed.

132. It was placed in Bouquet III with two other new channels of MSMD as they were said to have been launched sometimes in January, 2010.

It is true that by reason of an e. mail dated 02.03.2009, MSMD stated that the matter may be fought out in the Supreme Court to get a favourable order, but the same does not mean such as a favourable order from the Supreme Court of India could have been predicted. We are, therefore, of the opinion that MSMD cannot be said to have violated the provision of Clause IX (1) of the Agreement.

Mr. Lekhi submits that as Viacom had received payments, despite knowledge that 'Colors' remains in Bouquet III, it must be held to have waived its right.

133. We intend to deal with the question of waiver separately as we are satisfied that MSMD has not violated Clause IX (1) of the MoU.

Suppression of the Subscriber Reports

134. The obligation on the part of the MSMD in this behalf is contained in Clause X of the MoU.

By reason of the said provision, MSMD had agreed to send monthly report to Viacom giving details of all subscribers receiving of its channel both on analogue as also digital platform. Such reports were to be furnished on the basis of the declarations made by MSMD. Indisputably, the figures were to be declared on the basis of the declarations and not on the basis of its own internal arrangement.

MSMD, however, has principally raised three contentions; viz. :-

(i) An internal arrangement was required to be made as the report was not to disclose the exact number of subscribers, but merely to furnish information;

(ii) No information had been shut out; and

(iii) No prejudice has been caused as the purpose for which the informations were required to be furnished, were necessary to be possessed by Viacom only after termination of the agreement and not during the currency thereof.

Re: Fabrication of Record :-

135. In the context of analogue mode of carriage of channels, Viacom had already attained No. 1 position and, thus, in that view of the matter, it was necessary :-

a. To make known the Universe of MSMD including those of LCO,

b. The SLRs were to be on the basis of the declarations made and

c. The declared subscriber base as contained in the agreements between MSMD and the LCOs.

136. A bare reading of Clause X would clearly go to show that the informations were to be furnished on the basis of the declaration of those who received the signals and, thus, not on the basis of viewership.

137. MSMD, in any event, has not disclosed the method of declaration.

138. A bare perusal of Clause X of the MoU would clearly go to show that the obligation on the part of the MSMD was absolute. It was not for MSMD to deny

such informations to Viacom on the premise that the same was not required by it. It was not for MSMD to say, what is required and what is not by Viacom.

139. The fact that the correct information had not been supplied is not in dispute. In its e. mail dated 16.6.2010, the number of subscribers with Big Ten Entertainment was shown at 421; whereas from the Validation Form furnished by the said affiliate, it would appear that the number of subscribers declared by it was 1093.

It is not in controversy that different figures were also shown in the case of Digi Neon News Network Pvt. Ltd. (Delhi), Birender Cable Network ((Delhi), Carry Cable Network (Bhutan, Barra Bazar), Jindal Cable Network, Imli Bazar, U.P., Virender Cable Network, Bulandshahar, U.P.

140. Submission of Mr. Lekhi that in analogue mode the actual number of subscriber would not be known may be correct but that is the principal reason why the declared subscriber base by the affiliates were to be disclosed.

Such figures of declared subscriber base/negotiated subscriber base being available, we fail to see any reason as to why the same could not have been disclosed.

It is not for MSMD to suggest as to the purpose for which the said Clause had been inserted. If there was a contractual obligation on its part, it was

bound to comply therewith. We are unable to accept that as against the figure 1093 subscribers, so far as the operator 'Big Ten Entertainment' is concerned, prescribing a number 421 of 'Colors' is fair reflection of the weightage given to 'Colors' as contended by MSMD or at all.

141. It is stated that the said internal allocation was based on past practice in respect of MTV, Nick, and BH1.

Even if that was so, the same could have been stated explicitly in the agreement. It is, therefore, not correct to contend that MSMD has complied with its obligations under the Clause. Whatever be the purpose for which Viacom intended to have such an information, it would take a back seat as it is not for us to probe into the matter any further.

Thus, MSMD has, thus, violated the provisions of Clause X of the MoU.

Unfair or Impermissible Discount

142. It is not in dispute that in the ROI, the rate of 'Colors' channel was fixed at 10.70 paise. It is also not in controversy that 'Colors' channel was provided to the DTH operators @ Rs.4/- per subscriber per month.

143. In para 8 (c) (iii & (o)) of his affidavit, Mr. Sanjeev Hiremath stated that heavy discount of more than 50% was granted by MSMD. It is not in dispute

that grant of such discount is permissible. Emphasis, however, was laid only on the contention that commensurate benefit should have been granted to Viacom. With a view to prove breach of contract on that account, Viacom should have pleaded and established what was the existing business practice and how and to what extent it has been financially prejudiced.

144. It is not in dispute that ordinarily, the wholesale tariff of DTH platform provides for a much lower rate than the RIO rate.

Mr. Himanshu Dhoreliya in his cross-examination contended that such discounted rate of SET and SAB channels was as high as 80%. MSMD had kept Viacom informed thereabout. No protest was raised. We are, therefore, of the opinion that Viacom has not been able to establish the said breach on the part of the MSMD.

Had the contract entered into by and between MSMD and the DTH operators impacted the over-flow, Viacom should have taken up the matter with it before issuance of the notice of termination.

145. Our attention, however, has been drawn to the evidence of Mr. Sanjeev Hiremath, which is to the following effect :-

> *"Q: Does it generally happen that contracts with DTH operators are executed at rates lower than the RIO rates?*

A: Subject to the desired tiering, it is yes.

Q: That means there is nothing rigid about the rate of 10.7?

A: Not entirely correct. In case you have no deal in place and the channel is not in basic, Rs. 10.7 would be applicable.

Q: So you deny the suggestion that broadcasters generally negotiate rates with DTH operators, which are 25-30 % of non CAS rates?

A: No, I do not deny.

Q: Is there any specific instance of a particular deal which would be of the nature of the reply which you had given to the question prior to the previous question?

A: This will automatically apply if there is no deal.

Q: Is Colors presently earning Rs.10.7?

A:In instances where we don't have a negotiated deal, yes we were are billing at 10.7.

Q: Is there any such deal in existence today?

A:No. It is an automatic rate applicable in absence of a deal."

146. In its e. mail dated 16.12.2009, Mr. Sanjeev Hiremath stated as under :-

"I anticipated something amiss here. What are the incremental subs we get with just basic? Can we get their current nos. I don't think the nos are significant as Tata Sky has mostly basic + subscribers. I think the economics favors them more if you consider that they can't move us out of the current Lifestyle and if they have to pay us at RIO rate for this then the payout is 20Cr in year 1 itself, so far a more

than 50% discount incrementally what we get is their lowest other package. Though I don't have the exact revenue nos this is the sense I have. In fact it will be disconcerting to see what the actual rate works out to if you factor the Super Hit Base and Lifestyle sub nos.

We had categorically requested you to share the deal terms prior to confirmation and seek our inputs but we have not been taken into confidence.

Kindly share the agreed terms at the earliest since your comments below confirms that the deal is done."

147. To the similar effect, is an e. mail of Mr. Sanjeev Hiremath addressed to Rajesh Kaul of MSMD on 29.4.2010.

148. There is, however, nothing to show as to what would have been the reasonable amount of discount. In any event, the same should have been discussed and sorted out and, thus, it cannot be said to be a material breach on the part of the MSMD.

At most, it could be one of the factors supplementing the contention of Viacom that there was a lack of reasonable efforts being made by MSMD to ensure proper tiering but the lack of any specific pleadings or records to indicate the contours of a permissible discount, it is difficult for us to consider the contention of Viacom in this regard.

Quality of Evidence:-

149. The witnesses examined on behalf of MSMD and in particular Mr. Amol Mazumdar, Mr. Kathpalia urged, having deposed only on hearsay evidence, the same is inadmissible in nature. (See *Suraj Mal vs State* reported in AIR 1979 SC 1408), being tutored witness (see *Sh. Mahesh Dhingravs Smt. Kamla Dhingra*- unreported decision of Delhi High Court and *Abdul Wahid v. State of Rajasthan* reported in (2004) 11 SCC 241 at Page 245 Para. 6).

150. He also contended that the evidence of Mr. Himanshu Dhoreliya being evasive, no reliance can be placed thereupon as MSMD failed to establish any direct and substantial loss or the quantum of damages allegedly suffered by it as is required under law.

151. Reliance in this behalf has been placed on :-

(a) M/s Polimer Channel v. M/s Sumangali Cable Vision, Petition No.132(C) of 2010, Paragraphs 26, 27, 28 for the proposition.

(b) IndusInd Media & Communications Ltd. v. City Cable & Ors. Petition No.67(C) OF 2008 disposed of on 27.07.2011 (Page 63 and 67)

(c) *Abdulali Moosabhoy v. Gokaldas Lalji,* AIR 1927 Sind 49 @ Page 52

(d) *W. Jayaraghavan* v. *The Leo Films*, *AIR*1948 Mad 442 @ Para 9 & 14 wherein it has been held that the burden in this behalf.

(e) the Decision of Bombay High Court in *Union of India (UOI) v. Godrej Industries Ltd.* reported in 2008(3)BomCR827 which has been noticed by this Tribunal in Polimer (supra).

In view of the discussions made hereinafter, it may not be necessary to deal with the aforementioned decision.

152. Submission of Mr. Lekhi, on the other hand, is that this Tribunal is concerned only with probity vis-a-vis the relevant provisions of the Indian Evidence Act, viz. the rule of prescribing best evidence.

In a case involving a limited company, Mr. Lekhi urged, it cannot be expected that an officer would know the working of each and every department and as such feedback from the other concerned departments would be essential.

153. Section 60 of the Evidence Act provides that oral evidence must be direct. In the event a witness refers to a fact which he has heard from another, the witness from whom he has heard must also be examined subject of course to

the exceptions contained in the Indian Evidence Act, as for example, Section 32 thereof.

In Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri reported in (2011) 2 SCC 532, at page 544, it is stated as under:-

> *"33. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.*
>
> *34. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act."*

154. So far as Hearsay Evidence is concerned and its appreciation, the law was stated, thus:-

> *"37. Here comes the rule of appreciation of hearsay evidence. Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than by a witness in giving evidence and a statement contained or recorded in any book, document or record whatsoever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. That this species of evidence cannot be tested by cross-examination and that, in many cases, it supposes some better testimony which ought to be offered in a particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetence to satisfy the mind of a judge about the existence of a fact, and the fraud which may be practiced with impunity, under its cover, combine to support the rule that hearsay evidence is inadmissible."*

Why such hearsay evidence is not received as relevant, the following reason was assigned :-

> *"The reasons why hearsay evidence is not received as relevant evidence are :-*
>
> *(a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility i.e. every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is concerned, he has a line of escape by saying "I do not know, but so and so told me",*
> *(b) truth is diluted and diminished with each repetition, and*
> *(c) if permitted, gives ample scope for playing fraud by saying "someone told me that…". It would be attaching importance to false rumour flying from one foul lip to another. Thus, statement of witnesses based on information received from others is inadmissible."*

In Surajmal Vs. The State (Delhi Administration) reported in AIR 1979 SC 1408, the law was stated as under:-

> *"It is well-settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses."*

155. It is, however, difficult to accept that the evidence of Mr. Majumdar can be ignored on the premise that he was a tutored witness.

156. We may notice that in Abdul Wahid Vs. State of Rajasthan reported in (2004) 11 SCC 241, which dealt with a criminal case, the evidence of a witness was not accepted on the premise that he was a tutored witness.

157. Mr. Lekhi himself has placed reliance on Mohd. Ikram Hussain Vs. The State of Uttar Pradesh and Others reported in AIR 1964 SC 1625 (V51 C 218), wherein it was held :-

> *"As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the Doctor who examined Kaniz Fatima, though that report was not before them. Reference to it was made in the affidavits of Mahesh and the Sub Inspector which were both hearsay and not admissible under the Evidence Act in proof of the contents of a document. The primary documentary evidence ought to have been summoned. The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it."*

Black's Law Dictionary (8th Edition) defines hearsay as under :-

> **"***hearsay. 1. Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependant on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence. 2. In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."*

158. We will have to consider the best evidence rule as propounded by the Apex Court while considering the respective claim of damages in both the petitions.

Consequences of the termination not being valid

159. Once it is found that parties have with their eyes wide open and full knowledge of the implications of the termination clause contained in Clause XX of the Agreement and the breaches alleged by VIACOM on the part of the MSMD would not amount to fundamental breaches leading to repudiation of contract, what would be the consequences thereof?

The consequences, in our opinion, would be that the termination could be illegal but the same by itself may not mean that MSMD would be entitled to damages under different heads as has been prayed for.

160. It is one thing to say that a party in view of a breach of a termination Clause would be entitled to damages but quantification thereof would depend upon (i) the nature of injury; (ii) the injured party's responsibility therefor and the extent thereof; and (iii) the nature and extent of injuries caused to the parties on each other.

161. The measure of damages may, therefore, have to be resorted upon considering the amount payable by one party or the other and whether they have taken recourse to mitigation of damages.

Damages, the Principles of:-

162. Both the parties have claimed damages against each other.

Whereas Viacom claims damages on the ground that MSMD has failed and/or neglected to perform its part of contract; MSMD's claim for damages principally rests on the ground of non compliance of Clause XX of the MOU.

163. The principles governing award of damages although are well settled, we may notice some of them.

Damages can be granted inter-alia for wrongful termination of contract. In a claim for award of damages, the petitioner was obligated to prove the

quantum by raising proper pleas and establishing the same by leading appropriate evidence.

164. The damages principally are of two kinds, general or special.

The special damages claimed, if any, are required to be specifically pleaded and proved.

The leading case in this behalf is ***Hadley v Baxendale*** reported in [1843-60] All ER Rep 461, wherein, Alderson B. stated the law thus:-

> *"We think the proper rule in such a case as the present is this. Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly*

unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

165. The principle of law stated in ***Hadley v Baxendale*** must be applied having regard to the terms "type of damage", "loss of a kind which" and "the type of consequence" as used in the formulation in its second Rule. In a case of loss of profit, where the type of profits expected from the normal use of a profit earning machine is used to place a cap on a claim for a loss of different type of profit caused by the breach of contract, quantum of damages would be determined on that basis.

(See Vacwell Engineering Company Limited Vs. BDH Chemicals Limited, reported in [1971] Queens Bench 88).

The said question has also been dealt with at some details in Mc. Gregor on Damages, 18th Edition under the heading "Special Damages" at Page 1793.

166. In Anson's Law of Contract, at Page 592, it is stated that the damages are not to be penal.

Hadley Rule excludes all other kinds, as being too remote other than the appropriate subject of compensation.

167. The measure of damages, however, should not be confused with the principles thereof.

168. We may notice that one of the heads for claim of damages is the "Performance or Expectation measure" which has been noticed in Anson's Law of Contract, 28th Edition at Page 596 in the following terms:-

> ***"THE 'PERFORMANCE' OR 'EXPECTATION' MEASURE***
>
> *The object of an award of damages for breach of contract is to place the claimant, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed. Claimants are thus enabled to recover damages in respect of the loss of gains of which they have been deprived by the breach. For example, if machinery is not delivered to a person or delivered late in breach of contract, that person will have a claim for loss of profits for being deprived of its use. Such a claim, however, is not peculiar to an action in contract, since a similar claim would lie if the machinery were damaged or destroyed by a tort. But the law of contract goes further*

and entitles claimants (in appropriate circumstances) to damages for the loss of the bargained-for performance, that is to say, for the loss of the particular benefit which it was expected would be received by the contract which has been broken: an art dealer contracts to purchase a painting which is worth far more than the agreed price; a record company by contract obtains for a relatively modest sum the sole right to distribute the records of what proves to be a highly successful pop-group; a caterer obtains an extremely lucrative contract to cater for a banquet in each case, if the contract is broken by the other party, the damages will be assessed by reference to the claimant's 'performance' or 'expectation' loss, consisting of what would have been received had the contract been duly performed."

In M/s. Polimer Channel Vs. M/s. Sumangali Cable Vision, Petition No. 132 (C) of 2010, disposed off on 04.02.2010, this Tribunal, referring to an earlier decision rendered in Indian Cable Net Company Limited Vs. Grabss. Com & Ors., Petition No. 159 (C) of 2009 decided on 05.05.2010, opined that in some cases even without any proof, a petitioner may be held to be entitled to damages, which it must have suffered by reason of non service of notice as contractually agreed.

Yet again in IndusInd Media and Communication Limited Vs. City Cable & Ors., Petition No. 67 (C) of 2008, disposed off on 27.07.2011, it was observed:-

"Damages are of different kinds. It can be compensatory; it can be consequential also. Compensatory damages would be payable to the

plaintiff for all the natural and direct consequences of the defendant's wrongful act. The measure, therefore, must be real and tenable although it may be difficult to fix the amount with certainty. For the said purpose loss of profit resulting from the injury may be a relevant factor.

The burden of proof in this behalf was on petitioner. It should have brought on record some materials to prove the period during which it remained out of business, being unable to operate its network. No document has been brought on record to prove the details of the damages suffered by the petitioner."

169. Mr. Kathpalia has relied on an old decision of Judicial Commissioner, Sind in "Abdulali Moosabhoy Vs. Gokaldas Lalji & Anr., reported in AIR 1927 Sind 49, wherein the law was stated as under :-

"11. It is a well-known principle of law that the loss or damage for which compensation is recoverable in case of breach must be either (1): such as arises naturally in the usual course of things from the breach or (2) such as the parties knew at the time of the contract to be likely to result from it. Now the profit which plaintiffs would have made out of their contract with Snnderji and Valabdas, if the defendants had fulfilled their contract, could be recovered only if the defendants knew about it or were informed at the time of making the contract. But there is not an iota of evidence on the record which would avail to prove that defendants were aware at the time they made the contract with the plaintiffs that the latter were to make a profit out of the transaction by the re-sale of the property. Hence in the present case plaintiffs cannot recover by

way of damages the profit of Rs. 5,000 that they would have made if the defendants had fulfilled their part of the contract, by the sale to Sunderji and Valabdas of the property in suit at the price of Rs. 80,000. Section 73 of the Contract Act makes it compulsory for the plaintiff to prove that he has suffered damages and the extent to which he has suffered before a Court can award him damages for breach of contract.

12. In Joseph v. Shew Bux [1919] 36 M.L.J.151, a Privy Council case, it was laid down that in a suit for damages for not taking delivery of goods if the party whose duty it is to prove damages does not give the best evidence, every presumption should be made against him ; if there is any range, the range should be taken against him, but this case does not relieve the Court altogether of the duty of assessing the damages, as best it can on the evidence and materials actually before it. Nor is the Court empowered to give nominal damages merely. Plaintiffs appear to me to have entirely failed to prove any damages sustained by them arising in the usual course of things out of the breach of the contract by the defendants and there are no materials before me to enable me to assess any damages in their favour."

170. It was opined that the court has a duty of assessing the damages as best as it can on the evidence and materials actually before it and it is not empowered to give nominal damages merely.

We do not think such a strict view is possible to be taken in all the cases in the days when globalization of trade is governed by international treaties and covenants.

However, evidently in that case, the plaintiffs therein failed to prove that any damage had been sustained by them.

Reliance has also been placed on W. Jayaraghavan Vs. The Leo Films, reported in AIR 1948 Madras 442, wherein it was observed that the nominal damages are not recoverable in view of Section 78 of the Contract Act and that proof of damages is necessary to enable recoverability. Section 78 of the Act (as it was then) dealt with Sale of Goods. The said decision, therefore, has no application.

171. Mr. Lekhi, on the other hand, would strongly rely upon a passage from McGregor on damages, Para 29.002 under the heading "Contracts for Profession and Other services".

The contract in question, however, is not for rendition of services and, thus, the said passage need not be referred to.

172. Reliance has also been placed on Union of India & Ors. Vs. Sugauli Sugar Works (P) Ltd., reported in (1976) 3 SCC 32, wherein it has been stated:-

> ***"22.*** *The market rate is a presumptive test because it is the general intention of the law that, in giving damages, for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. The rule as to market price is intended to secure*

only an indemnity to the purchaser. The market value is taken because it is presumed to be the true value of the goods to the purchaser. One of the principles for award of damages is that as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally flows from the breach. Therefore, the principle is that as far as possible the injured party should be placed in as good a situation as if the contract had been performed. In other words, it is to provide compensation for pecuniary loss which naturally flows from the breach. The High Court correctly applied these principles and adopted the contract price in the facts and circumstances of the case as the correct basis for compensation."

The said decision was rendered with regard to a Railway claim.

173. Our attention has also been drawn to the following passage in Ramachandran on the Law of Contract in India.

"A distinction must be drawn, however, between cases where the difficulties are due to uncertainty as to the causation of damage, where questions of remoteness arise, and cases where they are due to the fact that assessment of damages cannot be made with any mathematical accuracy. Lack of relevant evidence may make it possible to assess damages at all, as where the extent of the loss is dependent upon too many contingencies, nominal damages only may be awarded. Where it is established, nominal damages only

may be awarded. Where it is established, however that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court.…doing the best that can be done within sufficient material may have to form conclusions on matters on which there is no evidence, and to make allowance for contingencies even to the extent of making a pure guess."

174. In Organo Chemical Industries Vs. Union of India reported in (1979) 4 SCC 573, the law was stated in the following terms:-

> ***"38.*** *What do we mean by "damages"? The expression "damages" is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrongdoing of another, (b) reparation awarded to the injured through legal remedies, and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law. For instance, "exemplary damages" are damages on an increased scale, awarded*

to the plaintiff ever and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money". It is sufficient for our present purpose to state that the power conferred to award damages is delimited by the content and contour of the concept itself and if the Court finds the Commissioner travelling beyond, the blow will fall. Section 14-B is good for these reasons."

Hadley Rule has been noticed by the Supreme Court of India in Pannalal Jankidas Vs. Mohan Lal, reported in 1950 SCR 979 wherein it has been observed that it is not possible to lay down any universal formula; the dominant rule of Law is the principle of 'Restitutiom Integrem'.

Claim for Damages by Viacom

175. So far as damages claimed by the VIACOM is concerned, it comprises of two parts: (a) a sum of Rs.108 crores purported to have been suffered by it by way of damages up to 31.7.2010 and a sum of Rs.60 crores from the said date till 31.3.2010.

We may, at the outset, notice that the claim of Rs.60 crores said to have been suffered by way of damages by VIACOM has been given up.

The claim of damage for a sum of Rs.108 crores has been calculated only on the basis of the connectivities of 2 principal DTH operators, namely DISH TV and TATA SKY which controlled about the 55% of the market share. The calculation proceeds on the basis that had the business continued and MSMD realized the subscription fee @10.70p per subscriber per month in stead and in place of Rs.4/-, an amount of Rs.192 crores could have been collected by it, to which VIACOM's share would have been Rs.108 crores being 70% thereof, i.e, in terms of the agreement, which admittedly provides that for the revenue between Rs.150 and Rs.195 crores, the share of VIACOM would have been 77% and beyond 195 crores it would have been come down to 70%.

176. VIACOM also claims a sum of Rs. 80 crores which MSMD allegedly has collected from M/s DISH TV and M/s TATA Sky for supply of signals of Colors channel.

The loss of revenue has been claimed on a going forward basis.

177. Claim (A) reads as under:-

"Claim A *:*

4. The attached computation sheet (refer "Exhibit D") suggests that if the Respondents had placed 'Colors' in the right tier/package and distributed it at a right price of Rs.10.70, the total revenues collected by the Respondent for 'Colors' from Tata Sky and Dish TV for the period April 1, 2009 to August 12, 2010 would have been about Rs.180 Crores.

5. Assuming, the Petitioner was entitled to only 70% (ideally Petitioner was entitled to 77% until certain amount), the Petitioner's share of revenues would have been Rs.126 Crores, i.e. 70% of Rs.180 Crores.

6. Admittedly, as per the reports provided by the Respondent to the Petitioner, the Respondent has collected revenue of Rs.18 Crores (approx.) from Dish TV and Tata Sky DTH platforms for 'Colors' channel (refer Exhibit C Colly). Assuming, the Respondent has paid such entire sum of Rs.18 Crores (approx.) to the Petitioner, the Petitioner is still entitled to loss of Rs.108 Crores (approx.), i.e. Rs.126 Crores less Rs.18 Crores."

178. It also proceeded on the basis that had Colors channel been placed in right tier at the right price, the revenue collected for the period 01.4.2009 and July, 2009 would have been Rs.180 crores.

The contents of the petition were verified by one Shri Suresh Amesar. In support of its case, Viacom has examined Shri Sujeet Jain and Shri Sanjeev Hiremath.

So far as proof of damages is concerned, reliance has been placed by VIACOM on the evidence of Shri Sanjeev Hiremath only.

For the said purpose, VIACOM has relied upon the TRAI's Quantity Indicative Reports and the Reports published in SCAT Magazine in May 2010.

179. In this connection, Viacom has placed on record the quarterly report of TRAI as on 30.6.2010, for a perusal whereof it would appear :-

"Snapshot
(Data As on 30th June 2009)

Telecom Subscribers (Wireless +Wireline)

Total Subscribers	*464.82 Million*
% change During Quarter	*8.17%*
Urban Subscribers	*328.55 Million (70.7%)*
Rural Subscribers	*136.27 Million (29.3%)*
Teledensity	*39.86*
Urban Teledensity	*95.05*
Rural Teledensity	*16.61*

Wireless Subscribers

Total Wireless Subscribers	*427.29 Million*
% change During Quarter	*9.07%*
Urban Subscribers	*301.34 Million (70.5%)*
Rural Subscribers	*125.95 Million (29.5%)*
GSM Subscribers	*328.83 Million (77.0%)*
CDMA Subscribers	*98.46 Million (23.0%)*
Teledensity	*36.64*
Urban Teledensity	*87.18*
Rural Teledensity	*15.35*

Wireline Subscribers

Total Wireline Subscribers	*37.53 Million*
% change During Quarter	*-1.14%*
Urban Subscriber	*27.21 Million (72.5%)*
Rural Subscribers	*10.32 Million (27.5%)*
Teledensity	*3.22*
Urban Teledensity	*7.87*

Rural Teledensity	*1.26*
Village Public Telephones (VPT)	*0.56 Million*
Public Call Office (PCO)	*6.11 Million*

Internet & Broadband Subscribers

Total Internet Subscribers	*14.05 Million*
% change During Quarter	*3.80%*
Broadband Subscribers	*6.62 Million*
Wireless Data subscribers	*126.97 Million*

Broadcasting & Cable Services

Total Number of Registered Channels with I&B Ministry	*447*
Number of Pay Channels	*136*
Number of FM Radio Stations	*248*
DTH Subscribers	*15.17 Million*
Number of Set Top Boxes in CAS areas	*816,192*

Telecom Financial Data (for the QE June-09)

Gross Revenue during the quarter	*Rs. 39,108.33 Crore*
% change in GR during Quarter	*-3.30%*
Share of Public sector undertaking's in GR	*23.92%*
Adjusted Gross Revenue (AGR)	*Rs. 29,732.52 Crores*
% change in AGR during Quarter	*0.02%*

Revenue & Usage Parameters (for the QE June-09)

Average Revenue Per User (ARPU) GSM	*Rs. 185*
Average Revenue Per User (ARPU) CDMA	*Rs. 92*
Minutes of Usage (MOU) GSM	*454 Minutes*
Minutes of Usage (MOU) CDMA	*342 Minutes*
Minutes of Usage for Internet Telephony	*131.94 Million"*

180. That total DTH subscriber is 15.17 million for one quarter for the months of April to June, 2010 which on a yearly basis would be thrice the amount.

Viacom has also relied upon the report as published in SCAT Magazine which is to the following effect :-

"At present there are 7 pan-India operators. They include Dish TV, Sun Direct, Tata Sky, Big TV, Airtel, Videocon and Doordarshan's FTA Ku band transmissions.

1. *Dish TV : 7 Mn*
2. *Sun Direct : 5.3 Mn*
3. *Tata Sky : 5.2 Mn*
4. *Big TV : 2.5 Mn (Approx.)*
5. *Airtel DTH : 2 Mn*
6. *Videocon D2H : 0.2 Mn*

Approx. DTH Subscriber Counts (Source: Press Reports)"

181. For the month of May, 2010 the quantum of damages has been claimed by Viacom on the premise that its bouquet ought to have been placed in all the packages of Dish TV and TATA Sky.

182. Having regard to the fact that IPL had started which made the 'SET' channel very popular in 2009, the situation could have been continued despite increase of the subscription fee by the TRAI to the extent of 7% in as much as there was a substantial increase in the viewership also.

A channel placed in a bouquet carries with it an internal strength. The increase in revenue results from increase in viewership and popularity.

Nobody has been examined to prove the report of TRAI nor anybody has been examined to prove the report of the SCAT Magazine.

Having regard to the provisions contained in Section 60 of the Indian Evidence Act, so far as opinion evidence is concerned, a witness is required to state the grounds on which the opinion is held in as much as such opinion evidence must be based on the said grounds.

Shri Sanjeev Hiremath, in his cross examination, clearly admitted that he has not participated in the study as to on what basis, SCAT Magazine prepared the said report. He, furthermore, was not sure as to whether the subscribers mentioned in the report were all active subscribers or all of them subscribed to Colors. We have also noticed heretobefore that the rate of the channel being at Rs.10.70p fixed by VIACOM in its RIO was not sacrosanct.

We have held heretobefore that the notice of termination was not in consonance with Clause XX of the Agreement.

183. We, therefore, are of the opinion that keeping in view the nature of evidence produced by VIACOM, it cannot be said to have proved that it suffered any damages.

VIACOM has also claimed a sum of Rs.20,90,36,289/- on the premise that the said amount was payable up to 13th July, 2010. MSMD does not deny or dispute the same but merely contends that it has suffered a larger amount by way of damages.

184. Clauses VI (1) and VI (2) provides for payment of amount of fixed fee in the first year, the second year and the 3rd year of the agreement. In the second year of agreement the amount payable was Rs.42 crores, which was to be paid on or before expiry of 60 days from the end of the month, to which the said instalment became due.

In terms of the said provision the above fixed fee was not subject to any deduction.

185. So far as digital platform is concerned, VIACOM was entitled to a sum of Rs.52 crores in the second year as a minimum guarantee, which again was not subject to any deduction on account of MSMD's commission, Dealer's commission or Bad Debts etc.

VIACOM was, thus, entitled to Rs.20,90,36,289/- by way of fixed fee and Minimum Guaranteed amount for the relevant period.

Election/Estoppel Issue

186. Mr. Lekhi, in support of his submission that Viacom in estopped form claiming damages would rely upon Section 39 of the Indian Contract Act, contending that Viacom having not taken recourse thereto, the repudiation cannot be held to be justified. For the purpose of attracting Section 39 of the Indian Contract Act, the 'promisee' may put an end to the contract but he, in a

case of this nature, would be entitled to do so after he puts his house in order. He cannot, by repudiating a contract, afford to stop his entire business and, thus, in fact its entire business in future. In order to attract Section 39 of the Contract Act, a party must refuse altogether to perform his part of the contract. Termination of a contract undoubtedly should be in clear terms. It is not a case involving sale and purchase of goods. It is not a case where an agency has been terminated by a principal. It is also not a case where a person has disabled himself from performing the contract.

In a business involving broadcasting & cable services, a broadcaster appoints a distributor to see that his production reaches the viewers.

By terminating the agreement in question, immediately, the viewers would not have been able to view its production, Loss to that extent, if any, could have been entirely that of the producers as for the purpose of viewership, a lot of efforts were required to be made.

For the purpose of invoking a provision of law in a new type of contract like the present one, the Tribunal cannot lose sight of the ground realities. The action and/or inaction on the part of the promissor or promisee to a contract cannot be judged bereft of their respective positions vis-à-vis the ground realities as regards the nature of the trade.

Unlike contract of employment, the rights and obligations of the parties were noticed. We, therefore, do not find any reason to hold that in a case of this

nature, the provision of Section 39 of the Indian Contract Act will have any application.

The concept of affirmation of a contract refers to affirmation of the promisee to go on with the contract notwithstanding his right to terminate the same. It may be either a matter of positive choice or election to perform its own obligations. It can, however, be inferred only from the unequivocal conduct.

187. In United Australia Ltd. Vs. Barclays Bank Ltd. (1941) AC1 at 30, Atkin, LJ, stated the law thus :-

> *"....if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose."*

Knowledge in the context of breach means at least knowledge of the circumstances which in law give rise to the right to terminate. Ordinarily, election should be communicated and communication will be essential if there would otherwise be no unequivocal act. (See China National Foreign Trade Transportation Corporation V. Evlogia Shipping Co. (1979) 2 All ER 1044 and Peyman V. Lanjani (1985) Ch 457 at 493).

Affirmation does not, as a general rule, affect the promisee's right to claim damages for the promisor's breach. (See Compagnie de Renflorement de

Recuperation et de Travaux Sous-Marins V.S. Baroukh et Cie v. W. Seymour Plant Sales and Hire Ltd. (1981) 2 Lloyd's Rep. 466).

Waiver and Election are two different concepts as was opined in Super Chem Products Ltd. v. American Life and General Insurance Co. Ltd. (2004) UKPC02 : (2004) 2 All ER (Comm.) 713 : (2004) Lloyd's Rep. IR 446.

Some Judges, however, used different words to mean the same thing and the same word mean to different things i.e. waiver, total waiver, waiver of remedy, waiver of rights, election, abandonment, equitable estoppels, promissory estoppels, quasi estoppels and waiver by estoppels. It is considered to be one of the most complex and difficult area in the modern law of contract. The law is still in a state of development.

Lord Denning, however, has used the words 'waiver', and 'estoppel' interchangeably. (See Woodhouse AC Israel Cocoa Ltd. Vs. Nigerian Produce Marketing Co. Ltd. (1971) 2 QB 23).

Unlike election, which concentrates mainly on the conduct of the promisee, the principal focus of estoppel is on conduct of the promissor in reliance on what the promise has said or done following the breach which provides the basis for termination. Estoppel, ordinarily, is based on a representation which need not be expressed in all situations, although requires to be unequivocal.

In this case, we are of the view that the said principle has no application.

Waiver Issue

188. Contention of Mr. Lekhi is that as during the intervening period between 17.5.2010 and 13.7.2010 VIACOM having :

(i) continued the distribution of its channel,

(ii) accepted payments, and

(iii) acted in terms of the agreement, it must be held to have elected to continue the same upon waiving all of its rights.

189. In a case of breach of contract ordinarily a party will have three options, i.e., (i) to terminate the contract; (ii) to ignore the same and to continue to act on the basis of the terms of the contract; (iii) to sue for damages.

A party to a contract indisputably may waive a contractual right. The common law principle puts a man to election between alternative inconsistent recourses to conduct, that is, by 'approbation or reprobation', which is distinct and different from the equitable doctrine of 'election'.

When a doctrine of election is resorted to, a party must have two inconsistent remedies and by choosing one of them induces the other to alter his position. In such a case, he cannot take recourse to and/or force the other party to alter the other remedy available.

190. The doctrine of approbation and reprobation, on the other hand, is merely a specie of estoppel. The said doctrine will have no application in respect of the provisions of statute. Ordinarily such inconsistent positions are taken in different stages of the same action or even different actions. Before, however, the doctrine of 'approbation and reprobation' is held to be applicable there has to be an 'estoppel' in one form or the other. If rule of 'estoppel' does not apply, the rule of approbation or reprobation shall also not apply.

The ordinary rule known as Tinkler's Rule (Tinkler Vs. Hilder, (1819) 4 Ex 187) must be confined to those cases where the person elected to take a benefit otherwise on the merit of the claim in the lis under an order to which beneficiary could not have entitled except for the order.

Mr. Lekhi will, however, rely upon a judgment of the Calcutta High Court in Irpan Ali Laskar vs. Jogendra Chandra Das Patni AIR 1932 Calcutta 708. In that case, payment was accepted to which the plaintiff was not entitled to.

Before, however, the doctrine of estoppel/election/approbation and reprobation is resorted to, we may consider one question.

191. Can it be said that the VIACOM has accepted some payment to which it was not entitled to under the agreement?

The answer to the said question must be rendered in the negative. For the purpose of application of the said doctrines, the nature of business, the

position of the parties, the terms of the contract are also required to be considered. The Tribunal cannot lose sight of the ground realities. It has to take a pragmatic approach.

Only because VIACOM has sought for payments in this petition and/or received payments during the period 17.5.2010 and 13.7.2010 by itself may not amount to waiver of its right.

VIACOM did not do anything and at least nothing has been pointed out before us as to whether it has taken recourse to any extraordinary steps. It was entitled to some payments under the contract, it was entitled to claim the amount. VIACOM did not treat it as a fresh obligation. If it had taken a stand, to which it is otherwise entitled to take as a prudent businessman, no exception thereto can be taken. The said contention, therefore, in a situation of this nature cannot be accepted.

Re: Damages suffered by MSMD

(a) Damages are said to have been suffered by MSMD by reason of unlawful termination of the agreement as it had not committed any material breach of the contract.

According to it, the total projected revenue earned from the digital platform was expected to be at Rs.250.68 crores and, thus, an over flow of Rs.55.68 crores was to be distributed between the parties hereto in the ratio of 70:30, which coupled with its share upto Rs.195 crores i.e. Rs.45.00 crores, would come to Rs.61.70 crores.

(b) It is also said to have suffered a loss of Rs.12.85 crores so far as analogue platform is concerned as the fixed fee payable by MSMD to Viacom during the period 01.4.2010 and 31.3.2011 as also the period 01.4.2011 and 31.3.2012 would have been Rs.89.00 crores.

(c) Marketing and promotional expenses incurred by it to the extent of 1.04 crores.

(d) Damages of Rs.20 crores suffered on the ground of NDTV's leaving its platform.

(e) A sum of Rs.15.00 crores on account of loss of business opportunity in regard to distribution of NDTV Imagine.

(f) Damage of Rs.58.38 crores as it was made to pay the said amount for the purpose of entering into an agreement with Neo Sports.

MSMD in support of its claim for damages has examined Shri Amol Mazumdar.

We may now consider the claim of Damages allegedly suffered by MSMD under the following heads.

Evidence of Shri Mazumdar

192. So far as the alleged loss suffered by MSMD on digital platform is concerned, Mr. Mazumdar stated :

> *"22. I say that the calculation of the amount of Rs.75.59 crores, due and payable to the Petitioner, is explained below:-*

A. Digital Platforms

i) I say that Petitioner's revenue on account of the distribution of the Channels of Respondent No.1 on the Digital Platforms for the term of the MOU, i.e., April1,2009 to March 31,2012, was likely to be Rs.250.68 Crores (Rupees Two hundred and fifty crores and sixty eight lakhs).

ii) I say that the basis of the above figure is the actual amounts accrued to the petitioner between April1, 2009 and July 13, 2010, and projections for the period July 14, 2010 and March 31, 2012, arising out of and based on agreements entered into between the petitioner and various digital distribution platforms in relation to distribution of the channels of respondent No.1.

iii) I say that the details of the revenues of the petitioner set out and explained in the table prepared under my instructions and filed in the present proceedings as an enclosure ot the e-mail dated May 17, 2010. Copy of the details of revenue of the petitioner is filed in Petition No.250(C) of 2010 at page 895 and is also annexed hereto and may be exhibited as Exhibit PW-2/3 and a copy of the e-mail dated May 17, 2010 is filed in Petition No.220 (C) of 2010 at pages 150 to 151 and also annexed hereto and may be exhibited as Exhibit PW-2/4.

iv) I reiterate that the petitioner has made all payments due to the respondent No.1.

v) I say that based on the calculation above as also as set out in Exhibit PW-2/1, the petitioner would have earned Rs.61.70 (45 + 16.70) Crores, from the digital

platform distribution, if the MOU had not been illegally terminated and run its course till 31.3.2012."

He, furthermore, with regard to the losses allegedly suffered so far as the analogue platform is concerned, stated :-

"B. Analogue Platform

i) I say that the petitioner has earned revenue from the analogue platforms for the period 1.4.2008 to 31.3.2009 in the amount of Rs.341.40 crores (Rupees three hundred and forty one crores and forty lakhs).

ii) I say that the petitioner has earned revenue from the analogue platforms, for the period 1.4.2009 to 31.3.2010 in the amount for Rs.404.85 crores (Rupees four hundred and four cores and eighty five lakhs). Certified copies of the extracts of financial statement of the petitioner for the financial years 2008-09 and 2009-10 are annexed herewith and may be exhibited as Exhibit PW-2/5.

iii) I say that a comparison of the two amounts demonstrates that the petitioner has generated a growth in revenue, of approximately 20%.

iv) I say, based on my experience and internal projections, that this growth rate was expected to be continued year on year for the duration of the MOU.

v) I say that the petitioner's projection for allocable revenue on account of the Channels of respondent No.1 for the period 1.4.2010 to 31.3.2011 and 1.4.2011 to 31.3.2012, is Rs.101.85 crores (Rupees One hundred and one crores and eighty five lakhs). The said projection is

based on the data for previous years and is further recorded in a table, which is filed in the present proceedings in Petition No.250 (C) of 2010 at page 1203-A and also annexed hereto and may be exhibited as Exhibit PW-2/6.

vi) I say that in terms of the MOU, the fixed fee payable by the petitioner to the respondent No.1 in respect of the said period, i.e., 1.4.2010 to 31.3.2011 and 1.4.2011 to 31.3.2012, is Rs.89 crores (Rupees eighty nine crores only).

vii) I say that as per the above calculation and explanation, the petitioner would have earned Rs.12.85 crores (Rupees Twelve crores eighty five lakhs).”

So far as Marketing and Promotional expenses are concerned, Mr. Mazumdar stated:

“ C. Marketing and Promotional Expenses:

I further say that the petitioner had spent an amount of Rs.1.04 crores (Rupees one crore and four lakhs, only) on account of launch and promotion of the Colors channel in its bouquet 3. The petitioner is also entitled to recover the said amount from the respondents. The details of the expenditure incurred by the petitioner for launch of Colors channel is set out in the table annexed hereto and the same may be exhibited as Exhibit PW-2/7.”

On the MSMD's alleged sufferance of loss towards loss of opportunity to distribute NDTV Imagine and Neo Sports, the witness stated as under:

> *"23. I say that the petitioner is also entitled to a sum of Rs.71.38 crores on account of damages calculated in the succeeding paragraphs below.*
>
> *24. I say that petitioner is entitled to Rs.15 crores (Rupees fifteen crores only) on account of loss of business opportunity in distribution of NDTV Imagine.*
>
> *25. I say that the petitioner received an offer from M/s ND TV Imagine for joining petitioner's distribution bouquet. Based on its assessment, the petitioner's projection was that it would have earned a minimum of Rs.5 crores (Rupees five crores) per annum by distributing NDTV Imagine after paying a fixed fee to the said channel.*
>
> *26. I say that the petitioner had to forego the opportunity to distribute NDTV Imagine as it opted to distribute Colors and the unlawful termination by the respondent No.1 has resulted in consequential loss of business earnings from distributing NDTV Imagine, which amounts to Rs.15 crores. A copy of the proposal sent to the petitioner by NDTV Imagine that demonstrates the revenue that the petitioner would have earned, is annexed hereto and may be exhibited as Exhibit PW-2/8.*
>
> *27. I say that after the respondent No.1 illegally terminated the MOU, the other broadcasters started renegotiating their executed deals even prior to the expiry of their respective agreements for continuing the distribution of their channels*

on the petitioner's platform. I say that on account of such illegal termination by the respondent No.1, the petitioner was exposed to the risk of losing the other third party channels that were part of its distribution platform. I further state that drawing cue from such illegal termination of a validly executed contract by the respondent No.1, another broadcaster namely New Delhi Television Limited illegally and prematurely terminated its contract with the petitioner just to reap monetary gains and without any breach on the part of the petitioner and causing a substantial loss to the petitioner.

28. I further say that in view of the illegal and premature (purported) termination of the MOU, the petitioner's Bouquet 3 was left without a strong 'driver' channel in the absence of Colors. I say that the petitioner was compelled to bring in new driver channels in order to strengthen its Bouquet 3. I say that it is for this reason the petitioner was compelled to pay an exorbitant price to Neo Sports in comparison to what it was paying to the respondent No.1 for distribution of its channels. This resulted in additional/extra outflow of Rs.56.38 crores to Neo Sports. This loss to the petitioner is directly attributable to the illegal actions of respondent No.1 and hence the petitioner is entitled to the said amount of Rs.56.38 crores. Table evidencing loss of Rs.56.38 crores caused to the petitioner on account of illegal termination by Respondent No. 1 is annexed hereto and may be exhibited as Exhibit PW-2/9."

Mr. Amol Mazmudar further deposed:

"25. I say that the Petitioner received an offer from M/s. NDTV Imagine for joining Petitioner's distribution bouquet. Based on its assessment, the Petitioner's projection was that it would have earned a minimum of Rs.5 crores (Rupees Five Crores) per annum by distributing NDTV Imagine after paying a fixed fee to the said channel."

193. The entire claim of damages is based on projection revenue.

We may notice the same :-

"i. I say that Petitioner's revenue on account of the distribution of the Channels of Respondent No.1 on the Digital platforms for the term of the MOU, i.e., April 1, 2009 to March 31, 2012, was likely to be Rs.250.68 Crores (Rupees Two hundred and fifty crores and Sixty Eight Lakhs).

ii. I say that the basis of the above figure is the actual amounts accrued to the Petitioner between April 1, 2009 and July 13, 2010, and projections for the period July 14,2010 and March 31, 2012, arising out of and based on agreements entered into between the Petitioner and various digital distribution platforms in relation to distribution of the Channels of Respondent No.1.

iii. I say that the details of the revenues of the Petitioner set out and explained in the table prepared under my instructions and filed on the present proceedings as an enclosure to the e. mail dated May 17, 2010. Copy of the details of revenue of the Petitioner is filed in Petition No.250(C) of 2010 at page 895 and is also annexed hereto and may be exhibited as Exhibit PW-2/3 and a copy of the e. mail dated May 17, 2010 is filed in Petition No. 220 (C) of 2010 at pages

150 to 151 and also annexed hereto and may be exhibited as Exhibit PW-2/4."

Re : The Digital Platform

194. MSMD in support of its case has not filed any primary document.

A projection of revenue is different and distinct from loss of actual profit.

It has also not produced its books of account. It has not filed its balance sheet. Even the auditor's report has not been filed.

Mr. Lekhi would submit that along with the letter dated 17.5.2009, an excess Chart was communicated to Viacom which was neither denied nor disputed by Viacom in its pleadings and thus, the same must be held to have been admitted.

This submission in our opinion is not correct.

An excess chart which was allegedly annexed with a communication was required to be proved on its own in accordance with law. It need not be denied or disputed in pleadings.

Only when a fact is pleaded, the same is required to be traversed. In no pleadings, a party to the lis is either required to plead evidence nor deny or dispute the same.

Question of appreciation of evidence must be determined upon taking into consideration the entire material on record. It is also incorrect to contend that the figures given in the chart had been proved. The figures could have been proved only by placing on record the primary evidence. Only because somebody has produced a chart which in absence of any primary document and/or admission within the meaning of the provisions of Indian Evidence Act cannot per se be held to have been proved, particularly, having regard to the fact that the same by itself cannot be said to be a documentary evidence.

Mr. Amol Mazumdar in paragraph 22 of his evidence merely stated that the projections were based on his experience on internal projection. An internal projection is for internal consumption of the officers. It, without any primary evidence by itself cannot be held to be a proof for claiming damages.

Mr. Majmudar does not state that what was the basis for his contention or as to how the same has anything to do with his experience.

He verified the entire statement made in his affidavit as true to his knowledge derived from the records of the case. No record has been produced in support of the statement contained in his affidavit. The affidavit, therefore, does not meet the requirements of law as envisaged under Order XIX Rule 3 of the Code of Civil Procedure.

It is, furthermore, difficult to accept Mr. Lekhi's submission that the said chart is corroborative in nature. A chart is relevant if the same refers to some

evidences. It must be in consonance with the material brought on record. It by itself is no evidence; even by way of corroboration.

A corroborative evidence must corroborate some other evidence which in turn would mean evidence brought on record in accordance with law and not otherwise.

We are also not in a position to accept the submission of Mr. Lekhi that the said chart constitutes a proof or has any evidentiary value. Moreover, the said chart does not take into consideration the fact that before a profit can be said to have been earned, the expenses incurred therefor must also be taken into consideration.

There cannot be any doubt or dispute that the damages are required to be assessed by way of restitution.

The same would not, however, mean that the projection of a revenue can be the only criteria for computation of damages without taking into consideration the expenditure involved in the process.

The agreement itself suggests that for the purpose of running a business of this nature, inter alia, the distributor's commission has to be paid. There may be cases of bad debts.

We are also not in a position to accept the submission of Mr. Lekhi that having regard to the nature of establishment of MSMD the fixed cost stood incurred and there would be negligible variation, if any, in the variable costs.

MSMD has claimed a huge amount by way of damages. It was, therefore, required to show if not with a mathematical exactitude as to how much damages have actually been suffered by it.

It cannot brush aside the contentions of Viacom on the ground that it was concerned only with a fixed fee. If MSMD raises a claim by way of damages, it was obligatory on its part to establish that it would have expected to earn a huge amount by way of revenue and consequently would have earned profits.

It could have filed a balance sheet to show how much profit it had been earning in the past years and what would have been the quantum of expenditure including the revenue expenditure.

With the increased amount of revenue, the amount of expenditure ordinarily is likely to go up. It could have easily shown that how much amount it had received, earned and retained in the past years, so as enable this Tribunal to give credence to the evidence of Mr. Amol Mazmudar.

Moreover, the said Ex.PW2/2 (page 264) is in three parts. Part-A refers to the concluded contract. Part-B represents the revenue deals and Part-C is the addition of Part-A and Part-B.

If it be assumed even hypothetically that MSMD had suffered loss, an expenditure of about 10% to 12% was to be incurred. It has to meet its

liabilities in respect of both direct tax and indirect tax. The expected rate of profit would be also 10% to 15%.

For the financial year 2011, a sum of Rs.71.50 crores is said to have been earned. The projected revenue is Rs.13.93 crores. A claim for damages of Rs.61.70 crores for all the three years, ex facie, is on a higher side. The figures of the concluded contract have been changed. The figures of projections have also been changed, as would appear from a comparison of the said exhibit and the annexures said to have been enclosed is made with the e-mail dated 17.5.2010.

The figure of total revenue of Rs.235.42 crores has become Rs.250.68 crores. The spill over revenue has been shown to be Rs.230.62 crores.

Mr. Mazmudar did not say so. The same is stated to be a typographical error. The projected figure of Rs.3.60 crores and Rs.4.00 crores in respect of SUN Direct TV Pvt. Ltd. became Rs.5.00 crores and Rs.7.00 crores.

A comparison of both the tabulations, therefore, would clearly go to show that the figures mentioned therein do not reflect the correct figure arising out of a concluded contract.

Re-Analogue Platform

195. The basis for claiming damages on analogue mode is said to be on the premise that the growth of MSMD would have been 19%. A growth of 20% has been claimed for the year 2008. No report of the TRAI has been brought on

record. It is not disputed that in the year 2008 the TRAI increased the subscription charges by 7%. Thereafter there has been no increase in the subscription fee.

It is also not in dispute that in the year 2000, MSMD was awarded the casting right in respect of IPL Cricket. Mr. Lekhi would contend that with the telecasting right in respect of IPL Cricket, the respondent has acquired a higher viewership. The viewership, however, may undergo a change. A channel may be popular if there is a sports event or any other popular event. Its popularity may, however, go down, if its future productions are not to the expectation of the viewing public and/or otherwise not upto the mark.

Respondent had referred to a chart wherein an allocation of Rs.17.10 crores has been shown for the financial year 2009, 32.51% for the financial year 2010 and 43.54% for financial year 2011 and a sum of Rs.58.31 crores for the financial year 2012 have been mentioned, totaling a sum of Rs.134.36 crores. It has not been shown as to on what basis Rs.32.51 crroes in the financial year 2010 has been allocated out of Rs.404.85 crores.

Even otherwise earnings of the revenue projected for the relevant years does not take into consideration the expenditure including the amount of tax payable by MSMD.

Expenditure incurred towards Marketing and Promotion

196. MSMD is said to have incurred an expenditure of Rs.1.04 crores towards launch and promotion of Colors Channel in Bouquet III.

Clause VIII of the agreement provides that expenses towards marketing and promotion were to be on account of Viacom. Such expenses were required to be incurred with the mutual consent of the parties.

It is not the case of the MSMD that consent of Viacom was obtained or that any prior intimation therefor had been given. No invoice or any other document furthermore has been produced to show as to how and in what manner the said expenditure has been incurred. In absence of such primary documents, it is difficult to accept that MSMD has been able to prove that it had incurred loss of business opportunity.

Re: NDTV Imagine

197. Mr. Mazmudar in his affidavit stated as under:

> *"25. I say that the Petitioner received an offer from M/s. NDTV Imagine for joining Petitioner's distribution bouquet. Based on its assessment, the Petitioner's projection was that it would have earned a minimum of Rs.5 crores (Rupees Five Crores) per annum by distributing NDTV Imagine after paying a fixed fee to the said channel."*

The assessment of damages, thus, was again based on the projection of MSMD. No factual basis therefor has been laid. Moreover, the process of negotiation between NDTV and MSMD began on 05.3.2009 which would appear from the e- mail dated 06.3.2009 issued by Shri Ram Kumar Darpan to Shri Himanshu Dhorreliya from a perusal whereof it would appear that the distribution proposal for NDTV Imagine channel was annexed therewith.

The proposed contract was for a period of three years commencing from 01.4.2009. However, the commercials were yet to be finalized. A distribution proposal which is at page 278 of the paper book is also dated 05.3.2009. If that be so, MSMD ought to have shown as to how it could not successfully negotiate with the said channel. It has also not been shown as to how termination of contract by Viacom led to abandonment of the negotiations and/or talks. It has furthermore not been shown that exit of the channel of Viacom had anything to do with NDTV's going out of negotiation process, as it is not the case of the MSMD that it did not have the requisite capacity on its part.

Mr. Amol Mazmudar, in his evidence, stated as under:

> *"24. I say that Petitioner is entitled to Rs.15 crores (Rupees Fifteen Crores only) on account of loss of business opportunity in distribution of NDTV Imagine.*
>
> *25. I say that the Petitioner received an offer from M/s. NDTV Imagine for joining Petitioner's distribution bouquet. Based on its assessment, the Petitioner's projection was that it would have*

earned a minimum of Rs.5 crores (Rupees Five Crores) per annum by distributing NDTV Imagine after paying a fixed fee to the said channel.

26. I say that the Petitioner had to forego the opportunity to distribute NDTV Imagine as it opted to distribute Colors and the unlawful termination by the Respondent No.1 has resulted in consequential loss of business earnings from distributing NDTV Imagine, which amounts to Rs.15 crores (Rupees Fifteen Crores only). A copy of the proposal sent to the Petitioner by NDTV Imagine that demonstrates the revenue that the Petitioner would have earned, is annexed hereto and may be exhibited as Exhibit PW-2/8."

In his cross-examination, he stated :-

"Concluded deal did not change. Value for said concluded deal remains to be Rs.4.32 crores only. Since we were to renegotiate the entire deal, we projected it to be total Rs.8 crores. Hence summarized in Block B of my affidavit. This Projections are basis inputs from our business team."

198. We may also refer to distribution proposal that a sum of Rs.60.00 crores at the end of the period of three years had been deliberated upon which is in the following term:

In INR Crs.

Average GRPs	*Year 1*	*Year 2*	*Year 3*	*Total*
60-100	*17*	*20*	*23*	*60*
101-20	*25*	*30*	*35*	*90*
Above 200	*30*	*45*	*60*	*135*

20% of Rs.60.00 crores would be Rs.12.00 crores i.e. Rs.4.00 crores per annum. On that basis, therefore, the sum of Rs.20.00 crores could not have been claimed as damages.

Here again no expenditure has been shown. No profit was even calculated.

Mr. Mazmudar in his cross-examination has accepted that he did not have any personal knowledge in the matter. He did not indicate as to who had the requisite personal knowledge with regard thereto. His evidence that MSMD would have earned a minimum Rs.5.00 crores per annum by distributing NDTV Imagine after paying a fixed fee is, therefore, speculative in nature. He in his cross-examination stated that he was also not aware as to whether NDTV stated in writing that they had terminated their contract because Viacom's terminating its with MSMD. He accepted that he was not aware that the NDTV terminated its agreement only because of breach of agreement by MSMD. In any event this is otherwise indicative of the fact that even NDTV Imagine did not think it apposite to appoint MSMD as it distributor.

RE: NEO Sports

199. So far as the claim for a sum of Rs.56.38 Crores for entering into an agreement with Neo Sports is concerned, Mr. Amol Majumdar stated as under:-

> *"I further say that in view of the illegal and premature (purported) termination of the MoU, the Petitioner's Bouquet 3 was left without a strong 'driver' channel in the absence of Colors. I say that the Petitioner was compelled to bring in new driver channels in order to strengthen its Bouquet 3."*

From the said statement, it would appear that the 'Colors' channel was the driver channel although bundled with new channels of MSMD in bouquet III.

The only evidence adduced in support of the said claim was the tabulations made in his affidavit by Mr. Amol Majumdar but in support thereof no document has been filed including the agreement entered into by and between MSMD and NEO Sports.

Paragraph 28 of the affidavit of Mr. Amol Majumdar indicates that the damages to the extent of Rs.56.8 Crores was claimed on the premise that because of Viacom leaving the network of MSMD, it was forced to find out some other channel and had to pay something extra which is belied by the following facts :-

(a) MSMD had already been negotiating with Neo Sports as would appear from paragraph 87 of the petition which reads as under :-

"87. The petitioner submits that while it was in negotiation with Neo Sports, the circumstances created by the purported notice dated 13.7.10 had an adverse effect on the Petitioners' bargaining position."

(b) the amount of damages claimed was remote and speculative;

(c) had there been an adverse impact on negotiation by reason of Viacom's exit from the network of MSMD, it should have been established by adducing cogent and reliable evidence;

For the purpose of establishing the quantum of damages on that account, the respondent was bound to establish as to what was the proposed amount before the entry of Viacom and what was the agreed amount after its departure?

The Neo channel could have been brought in the network of MSMD independent of Viacom's channel, being of different genre.

Mr Amol Majumdar, in his cross examination clearly admitted that the 'Colors' channel being in GEC and 'Neo Sports channel being a sports channel, there was no comparison between the two.

Mr Majumdar, in his cross examination, stated as under : -

<u>"The witness is shown para 28 of the affidavit.</u>

Q: Is it correct that NEO Sports is a channel of a different genre from the channels of Viacom 18?

A: Yes.

Q: Would you be aware of the average GRPs of Neo Sports?

A: I am not aware.

Q: Are you aware that the GRPs of Colors are far higher than the average GRP of Neo Sports?

A: I am not aware.

Q: From where have you got these figures pertaining to Neo Sports as set out in the tabulation at exhibit PW2/9?

A: As per commercial agreement between Neo Sports and MSMD.

Q: Is this agreement on record?

A: No.

Q: This figure of Rs. 82.38 is for which period?

A: This figure of Rs.82.38 crores is for the period of April, 2011 upto March, 2012."

It is, therefore, evident that he is not a competent witness to establish sufferance of the alleged damages by MSMD on that count.

The said claim cannot be allowed as :-

(a) it was remote and speculative in nature;

(b) it is contrary to pleadings;

(c) there was no comparison either of genre and/or rating;

(d) no evidence has been adduced to prove the actual loss;

(e) the witness having no personal knowledge as regards negotiations between MSMD and Neo Channel, no reliance can be placed his deposition;

(f) the witness having failed to make a proper disclosure, no decree can be passed relying on or on the basis thereof;

(g) Remoteness of damages, as has been dealt with in *Hadley v Baxendale* reported in (1843) 60 All ER (Reprint) 461 at page 467 in regard to the claim of MSMD, relating to Neo Sports and NDTV Imagine would apply in this case;

(h) Viacom had no knowledge in regard thereto as there had been no communication by and between the parties in that behalf.

Mr. Lekhi, however, would contend that Colors being a rival channel it was essential that after Viacom left it, any other channel should have been included in Bouquet III as a lead channel. Bouquet III constituted of new channels including Discovery Turbo and Discovery Science.

Neo Sports is a channel of different genre. Each contract must be entered into by the parties on their own volition. There is nothing on record to show that Neo Sports had exerted any pressure to which willingly or otherwise, MSMD had to give in keeping in view the situation in which it was. There is nothing on record to show that Neo Sports had taken undue advantage of its position.

RE: NDTV

200. So far as purported claim of damages for Rs.15.00 crores for NDTV, terminating its distributorship agreement with MSMD is concerned, no details of the loss having been produced, the same cannot be entertained.

Re: IRD Boxes

201. A contention has been raised that the respondent has committed breaches of the agreement entered into by and between the parties as contained in the MoU dated 11.02.2009, in terms whereof, the respondent agreed to distribute 1500 more decoders apart from the 3500 decoders which had already been distributed.

202. RW-3 in his cross-examination stated as under:-

> *"Q: How many IRDs of SET were active when the MOU between Viacom18 and MSMD was signed?*
>
> *A: At this point of time, I would not know how many IRDs of SET were active at that point of time.*
>
> *Q: Do you know how many IRDs of SET are active today?*
>
> *A: Approx. 3900-4000.*
>
> *(witness is shown page 372 of the Affidavit)*
>
> *Q: Is it correct that as per this tabulation, 3859 IRDs of Colors were active when the MOU was signed?*

A: At the time when the MOU was signed, we were given a list of 3847 IRDs. Subsequently, we were given additional information about 12 IRDs but whether they were active or inactive was not known to us. They were given to us as Data of IRDs that were seeded on the ground by Viacom directly. This seeding had been done prior to the execution of the MOU.

Q: Would I be correct in understanding that you requested for deactivation of 1628 of these 3859 IRDs?

A: Yes, we asked for deactivation of 1628 viewing cards in respect of these IRDs, for various reasons.

Q: You have also stated in this tabulation that 162 IRDs were to be regularized. Were these regularized?

A: Subsequently many of these were regularized. Some were remaining to be regularized and remained in that state and we did not request for their viewing cards to be deactivated."

203. According to the petitioner, however, the respondent upon termination of the contract has returned only 2900 decoders. It is stated that the respondent has not returned 1541 IRD Boxes to the petitioner. The respondent denies and disputes the said figure. The respondent moreover contends that all the deactivated decoders which are lying with the LCOs/MSOs/Subscribers can be returned provided petitioner pays a sum of Rs. 11 Lacks which amount respondent would be incurring by way of 'incentives' payable to the distributors of MSMD.

Mr. Sanjeev Hiremath in his cross examination stated as under :-

"…It is correct that 3500 IRDs mentioned in Para (d) (I) on page 43 were already on the ground. It is further correct that these 3500 IRDs were not seeded through the respondent. It is correct that additional IRDs were to be supplied by the petitioner in terms of the MOU. It is correct that the IRDS also require to be paid with viewing cards.

Q: *Is it correct that you were provided with the list by the respondent showing the absence of complete pairing between IRDs and viewing cards furnished by you?*
A: *Yes, these are constant operational issues, which need to be correlated. It is correct that of the IRDs provided, some have to be kept in stock for service requirements*
I deny the suggestion that the number of IRDs seeded through the respondent as mentioned at page 43 in the affidavit is incorrect.

Q: *Is it correct that there was a scheme with regard to replacement of IRDs of M TV, Nick and VH1 in order to give effect to change in encryption software for which you were to make payments to distributors of respondent?*
A: *Yes.*

Q: *I put it to you that the petitioner did not make the payment in terms of the scheme so devised and agreed?*
A: *It is correct. There is an amount of approximately Rs. 11 Lacs pending and we have asked the respondent to deliver the balance stock of IRDs and collect this payment.*

Q: *I put it to you that. dispute regarding the IRDs is only because of the outstanding reconciliation in terms of the scheme as devised by you?*

A: *It is incorrect. The crux of the matter was the 1500 + IRDs for Colors which had to be mass deactivated in the absence of sign ups.*

Q: *I put it to you that deactivation can only be done by the petitioner?*
A: *Yes, subject to authorization from the distributor, in this case the respondent.*

Q: *Has the respondent insisted upon continued activation without simultaneously raising the issue about outstanding reconciliation?*
A: *These are two separate matters.*
I deny the suggestion that there is any outstanding dispute with regard to the IRDs.
It is correct that the respondent was distributing other channels prior to execution of the MOU.

Mr. Kathpalia, the Learned Counsel for the petitioner submitted that in that view of the matter petitioner is ready and willing to pay the said sum of Rs. 11 lakhs to the distributors.

204. For the aforementioned purpose, we are of the opinion that the parties should meet for reconciliation of accounts in respect of IRDs/decoders/viewing cards. Subject to the petitioner's making payment of the incentive charges to the distributors of the respondent, the IRDS/Decoders/Viewing Cards must be returned to the petitioner by the respondent.

205. We, therefore, direct that the authorised representatives of the parties meet within two weeks for reconciliation of accounts in respect of the decoders and viewing cards and on such reconciliation; the respondent shall adjust the incentive charges therefor from the amount payable to Viacom by it after the parties reconcile their accounts with regard to the number of IRD boxes/viewing cards.

The parties shall also work out the modalities of retrieving the IRD boxes/viewing cards for the distributors of the respondent.

The petitioner subject to the aforementioned and subject to adjustment of the requisite amount would be entitled to return of the IRD boxes/viewing cards.

This issue is decided accordingly.

Quantum of Damages - Conclusion

206. What should be the quantum of damages will depend upon various factors. We may, for the aforementioned purpose, summarise our findings :-

(a) Termination of contract being stricto sensu not in terms of Clause XX of the Agreement, it was not legal;

(b) It is not a case where there had been a fundamental breach of contract justifying repudiation of the agreement;

(c) The relationship between the parties was not that of a principal and agent but between a principal and principal;

(d) Despite the same, there was a fiduciary relationship between the parties which, to a great extent, has been breached by MSMD in so far as it has not given proper tiering and/or packaging to its channels be it;

(e) The contention of MSMD that there had been no commitment to grant stake to MSMD, and the talks failed even prior to entering into the agreement in question was also not in spirit of the maintaining good relationship between the parties;

(f) It had been fabricating subscriber reports;

(g) It had failed to provide access to interconnection agreements with the distribution platforms.

(h) It's attitude towards Viacom vis-à-vis its own channel was to some extent discriminatory.

MSMD, on the other hand, has not committed any material breach as regards :-

(i) Clause IX (2) of the agreement;

(ii) To activate IRDs of 'Colors';

(iii) Packaging of the 'Colors' bouquet;

(iv) Grant of any unjust discount.

We have noticed heretobefore the principles and/or measures for grant of damages. We, therefore, are of the opinion that grant of three months' profit as damages subject of-course, to the adjustment of due amount to Viacom in terms of the agreement would sub-serve the ends of justice; claim of damages under other heads having not been proved.

We are unable to agree with Mr. Kathpalia that the Courts cannot award nominal damages. In our opinion, they can if any case has been made out therefor.

In Farley Vs. Skinner 2002 (2) A.C. 732, it is stated 'damages should not be awarded, unless perhaps nominally for the fact of a breach of contract – distinct from the 'consequence of a breach'.

It is, however, true that the principle that a claim of damage should extend only to compensation for the real losses, which is said to be the bedrock of law (See Rowly Vs. Cenberes Software Ltd. 2001 EWC A (C) 78 Per Sadley J (para 27).

What, thus, should be the quantum of damages would depend upon fact situation obtaining in each case.

Without multiplying decisions on this point, we may refer to "The Law of Contract", Third Edition of Butteworth's Common Law Services (Edited by Andrew Grubs at page 1575), which reads thus :-

"In Farley v Skinner Lord Clyde stated that "…damages should not be awarded, unless perhaps nominally, for the fact of a breach of a contract distinct from the consequences of the breach. The principle that a claimant's damages should extend only to compensation for 'real losses' has been said to be 'a bedrock of our law'. In British Westinghouse Electric and Manufacturing Co.Ltd. v Underground Electric Rlys Co of London Ltd. Viscount Haldane LC said : 'the fundamental basis {of an award of contractual damages} is thus compensation for pecuniary loss naturally flowing from the breach …'. In Johnson v Agnew Lord Wilberforce observed that : the general principle for the assessment of damages is compensatory. More recently in A-G v Blake Lord Nicholls reiterated that : "…with breaches of contract ..(t) the general principle regarding assessment of damages is that they are compensatory for loss or injury".

In exceptional cases a different aim might be pursued. In Chester v. Afshar the House of Lords justified a departure from the usual principles of causation by reference to the need to vindicate a patient's right to exercise an informed choice prior to consenting to medical treatment. This vindicatory function is more usually associated with an award of nominal damages. In other cases the focus of the court's attention may shift from the effect upon the claimants of the defendant's wrong to that the defendant has gained from his wrong-doing. Such cases where an account of profits may exceptionally be awarded also seek to promote a different aim- restitution through the reversal of unjust enrichment.

This general compensatory aim of an award of damages for breach of contract has been confirmed many times and has recently been said to be 'beyond dispute' and 'axiomatic'. In the same case the House of Lords acknowledged that there was 'a light sprinkling of cases' where courts had, under different rubrics, granted financial

remedies which went beyond compensating the claimant for his loss and required the defendant to account for the profit he derived from his breach of contract. There was therefore 'no reason, in principle, to rule out an account of profits as a remedy for breach of contract'. However the members of the House of Lords in A-G v Blake who endorsed a non-compensatory award emphasized repeatedly the exceptional nature of such a remedy. The focus of the 'usual' award is therefore the loss to the victim consequent on breach rather than the gain, if any, made by the perpetrator of that breach. Sometimes, however, it is difficult to reconcile a supposedly compensatory award with established principle."

For the financial year 2011, the total collection was Rs.71.50 crores. For three months, therefore, the amount would be around Rs.17.87 crores. We may assume that the profit element would amount to 15% of the said amount.

The amount of damages payable in favour of MSMD would, thus, be Rs.2.68 crores.

207. In the result, both the petitions are allowed in part and to the extent mentioned heretobefore.

MSMD, upon adjusting the amount of Rs.2.68 crores and Rs.11 lakhs payable to it by Viacom, is directed to pay the balance sum to Viacom within four weeks from date, failing which interest @ 12% p.a. shall become payable till realization thereof.

208. In the facts and circumstances of this case, there shall be no order as to costs.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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