IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: November 4, 2011
Pronounced on: November 8, 2011

O.M.P. 809/2011

FASHION TELEVISION INDIA PRIVATE LIMITED ..... Petitioner

Through: Mr. Ramji Srinivasan, Senior Advocate with Ms. Shally Bhasin, Ms. Misha Rohtagi and Mr. Suresh Kumar Sahu, Advocates

versus

FTV BVI ..... Respondent

Through: Mr. N.K. Kaul and Ms. Indu Malhotra, Senior Advocates with Mr.Vikram Mehta and Mr. Kush Chaturvedi, Advocates

And

ARB A 14/2011 & I.A. No. 17222/2011 (for stay)

FASHION TELEVISION INDIA PVT LTD ..... Petitioner

Through: Mr. Ramji Srinivasan, Senior Advocate with Ms. Shally Bhasin, Ms. Misha Rohtagi and Mr. Suresh Kumar Sahu, Advocates

versus

FTV BVI ..... Respondent

Through: Mr. N.K. Kaul and Ms. Indu Malhotra, Senior Advocates with Mr.Vikram Mehta and Mr. Kush Chaturvedi, Advocates

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the order? No
2. To be referred to the Reporter or not? Yes
3. Whether the order should be reported in Digest? Yes

O R D E R
08.11.2011

1. Aggrieved by an order dated 20th October 2011 passed by the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996 ('Act'), the Fashion Television India Private Limited (hereinafter 'the Appellant') has filed Arbitration Appeal No. 14 of 2011 against the Respondent FTV BVI under Section 37(2)(b) of the Act. The Appellant has also filed O.M.P. No. 809 of 2011 under Section 9 of the Act for directions to the Respondent to comply with the Memorandum of Agreement (`MOA') dated 9th August 2001 with the Petitioner and not act in furtherance of an Agreement dated 19th April 2011 between the Respondent and Media Network of Distribution (India) Ltd. without first giving an opportunity to the Appellant in terms of Clause 21 of the MoA dated 9th August 2001.

2. Since both the appeal and the petition arise out of the same facts between the same parties, they have, with the consent of the parties, been heard together.

3. Modi Entertainment Network Ltd. ('MEN') and the Respondent entered into the MOA on 9th August 2001 whereunder the Respondent appointed MEN as its sole and exclusive distributor in the Territory, i.e., India, Pakistan, Bangladesh, Nepal, Bhutan, Sri Lanka and Maldives, for distribution of the Respondent's international and crypted fashion channels through cable and satellite, through its sales distribution network, carrying a mixture of international and India specific programmes, as mutually decided by the parties. The Respondent also appointed MEN as sole and exclusive air-time sales representative in the Territory to undertake sales of advertising time on the channel. MEN was also appointed the sole and exclusive distributor for merchandising and licensing of the Respondent's

products on a revenue sharing basis and the sole and exclusive distributor for internet including programme sales in the Territory.

4. The period of the MOA was five years from the date of the execution, i.e., 9th August 2001 extendable for a period of seven years as provided in Clause 6(3). Clause 6 and 7 of the MOA are relevant for the purposes of the present case and read as under:

> "6. JOINT VENTURE: It is hereby agreed by and between the Parties that during the subsistence of this MOA, if MEN achieves the gross revenue projections, as mentioned in clause 7, then in that event the parties shall:
>
> 1) Mutually discuss formation of JVCO with equal equity participation.
>
> 2) Mutually agree to the terms of the joint venture, and take necessary steps to incorporate the JVCO within a period of 90 days.
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> 3) If not reached any agreement for the formation of JVCO, then agreed that, this MOA shall stand automatically extended for a period of 7 years from the date of such disagreement.
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> 7. REVENUES: The Parties hereby agree to the following revenue projections:
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> (A) Gross Subscription / Distribution Revenue – in Years 1, 2 and 3 will be US$2,68,527, US$3,366,834 and US$4,168,865 respectively.
>
> (B) Net Advertising Revenue – in Years 1, 2 and 3 will be US$461,892, US$583,083 and US$1,011,399 respectively."

5. Clause 9 provided that MEN would pay to the Respondent a minimum guarantee of US$ 720,000 per annum based on the exchange rate prevailing on the date of execution. Clause 9 reads as under:

> "9. MINIMUM GUARANTEE:

(i) MEN will guarantee fTV, a minimum guarantee of US$720,000 per annum based on the exchange rate prevailing on the date of execution hereof. This guarantee will be pertaining to revenues as mentioned in clauses 7(A) and 7(B) here above i.e. US$ 520,000 for distribution services or 20% of gross subscription revenues, whichever is higher and USD 200,000 for airtime sales revenue or 40% of net advertising revenue, whichever is higher, respectively.

(ii) In case MEN & fTV are not able to reach an agreement in regard to formation of JVCO then as provided in clause 6(3) this MOA will be renewed for an additional term of 7 years.
(iii) At that time MEN and fTV will also negotiate a new business plan and if the Parties are unable to reach any consensus then the Minimum Guarantee amount will increase at the rate of 20% per annum from the fourth year of operation."

6. Clause 21 gave the Appellant the right of first refusal and read as under:

"21. FIRT RIGHT TO REFUSAL : During the subsistence of this MOA and on formation of JVCO, if fTV launches any new channels or any business considered in this MOA in the Territory, it agrees and undertakes to provide MEN with the exclusive first opportunity to acquire distribution, air time marketing and merchandising rights for the same ("the Offer"). Any such Offer shall be in writing and MEN shall have 30 days to accept the Offer of fTV. If MEN fails or declines to accept the fTV Offer, then in that case, fTV may offer the same to any third party, except that if fTV determines to enter an agreement with a third party with respect to distribution, air time marketing and merchandising rights for new channels, fTV shall first re-offer to MEN the opportunity to enter into an agreement on the same terms as with the third party (and will provide MEN with written notice of its determination, the terms of such agreement and the identity of third party). MEN will have a period of 30 days in which to accept such re-offer, failing which fTV shall be free to enter into an agreement with such third party on the terms no less favorable than those described to MEN."

7. Clause 19 of the MOA permitted the assignment by MEN of its rights under the MOA to the company to be formed by it. Admittedly, the rights and obligations under the MOA were assigned by MEN to the Petitioner with the consent of the Respondent. Clause 30 contained the arbitration agreement. The MOA was to be governed by the laws of England. However, the venue of the arbitration was to be in India and held in accordance with the Act.

8. It is the Appellant's case that consequent upon the breach by the Respondent of MOA the appellant filed O.M.P. No. 207 of 2003 in this Court under Section 9 of the Act. The said petition was disposed of in terms of the settlement between the parties. The consent terms were filed in this Court on 22nd January 2004. Both parties agreed that the MOA would continue to be valid and binding on the parties. Clause 4(f),(g) and (h) of the consent terms read as under:

> "f. FTV undertakes that it will make the best efforts to re-encrypt the current Free-to-Air Channel. FTV will revert to MEN with its plan for re-encryption in due course. After, and as and when, the FTV signal into India is re-encrypted, the Parties aver that they will revert to the terms and conditions of the MOA dated 9/6/2001 and will be bound by them, including the Minimum Guarantee payments and the respective obligations of each party.
>
> g. As long as the FTV Channel remains Free to Air, MEN will not be liable to pay any Minimum Guaranteed amounts.
>
> h. The revenue sharing between the Parties, during the period that the FTV Channel is Free-to-Air, will be on a 50:50 basis both ad sales (net of agency commission of 15%) and merchandizing/licensing."

9. On 9th August 2005 an addendum (hereinafter 'First Addendum') was executed by MEN and the Respondent. It was stated that the MOA read with the consent terms was being further amended by the First Addendum which would regulate the terms of commercial business and understanding

of the parties including the assignors and beneficiaries. The Start Date of the First Addendum was 1st April 2005. All other terms of the MOA read with the consent term not modified by the First Addendum were to be made valid and binding. Clause 3 of the First Addendum stated as under:

> "The India signal will be Free to Air and any decision of converting it to an encrypted mode will be mutually discussed and agreed upon between FTV BVI and FTV India, taking into consideration the market conditions in India."

10. The Respondent was to be paid a minimum guarantee of US$ 240,000 per annum or 30% of the net revenue collected, whichever was higher for revenue from advertising sales, sponsorship sales, events, programme placement income and any other revenue to air-time sales in the Territory. The minimum guarantee of US$ 20,000 per month was to be paid to the Respondent by the 15th of the subsequent month and not to be reduced by any costs or tax.

11. This was followed by a Second Addendum dated 30th March 2006 (hereinafter 'Second Addendum') executed by the Respondent and the MEN which stated that "the said MOA read with the consent terms are being further amended as per the second addendum." It was further stated that the Second Addendum "will regulate the terms of commercial business and understanding of the above-mentioned parties including the Assignors and beneficiaries and or their agents on the terms as hereinafter mentioned." Clause 3 of the Second Addendum stated that "the India signal will be Free to Air and any decision of converting it to an encrypted mode will be mutually discussed and agreed upon between FTV BVI and MEN Mauritius, taking into consideration the market conditions in India." Clause 4 of the Second Addendum stated that the Respondent was to receive a minimum guarantee of US$ 240,000 per annum or 30% of the net revenue collected, whichever was higher, from advertising sales, sponsorship sales,

events, programme placement income and any other revenue relating to air-time sales in the Territory. Like the First Addendum, the Second Addendum also provided that a minimum guarantee of US$ 20,000/- was to be paid in full to the Respondent by the 15th of the subsequent month without reduction for any costs or tax. The period of the Second Addendum was sixty months from the Start Date and was to be "reviewed after this term." Admittedly, the sixty months period in terms of the Second Addendum, came to an end on 31st March 2011.

12. It is the case of the Appellant that it had made all payments in terms of the Second Addendum up to October 2010. On 28th March 2011 there were two letters written by the Respondent to MEN, and the Appellant. The first was a final notice concerning the outstanding dues aggregating USD 112,500 being the monthly minimum guarantee due from October 2010 to February 2011. Apart from the above minimum guarantee payment, the Respondent alleged that it was also owed the revenue share from various licensees, mobile distribution, internet revenues, advertising etc. Further, RRsat informed the Respondent about the outstanding payments owed to it by the Appellant and MEN. It was stated by the Respondent in the letter dated 28th March 2011 that it wished to settle the dispute in a friendly manner.

13. On the same date, i.e., 28th March 2011, another letter was written by the Respondent to MEN and the Appellant, the subject matter of which referred to the expiry of the MOA dated 1st August 2001, the Consent Terms dated 9th December 2003 and the Second Addendum dated 30th March 2006. The Appellant and MEN were asked to settle all the outstanding dues with respect to the MOA and the First and Second Addendums. Para 5 of the said letter read as under:

> "5. In the meantime, please confirm in writing by 4pm on 31st March 2011, that you accept the offer set out. If we do not hear from you but you nevertheless continue after 31st March 2011 to broadcast Fashion Television, such conduct will amount to an acceptance of the offer:
>
> 5.1 The right to broadcast the local FTV Channel according to the Agreement will be extended subject to the paragraphs set out below until such time as it is determined by any party in its sole discretion.
>
> 5.2 The Agreement and any non-contractual obligations arising in connection with the same shall be governed by the law of England and Wales and in the event of any dispute arising under or in connection with the Agreement (including claims in respect of non-contractual liability and including claims based upon events already taken place or in respect of rights already accrued), the parties hereby irrevocably submit to the exclusive jurisdiction of the Courts of England and Wales.
>
> 5.3 If by 4pm on 31st March, you accept that this offer in writing, then any dispute referred to in 5.2 above shall be referred to arbitration before a sole arbitrator appointed in accordance with the rules of the London Court of International Arbitration ("the LCIA"); the seat of the arbitration shall be England and the rules of the LCIA shall apply."

14. MEN then sent an e-mail to the Respondent in which it stated that the Respondent had failed to fulfill its commitment under the Consent Terms and the attempt of the Respondent to wriggle out of its commitment would amount to violation of the said Terms. Further, it was stated in the alternative that, since the JVCO was not formed, Clause 7 had to be severed. As a consequence, Clause 6 which provided for automatic renewal would be inapplicable to the MOA. It was further maintained by MEN that the addendums "only dealt with commercial aspects which were specific to the terms mentioned within and cannot be read to have modified the original period agreed under the MOA."

15. On 1st April 2011 the Respondent wrote to the Appellant, *inter alia*, stating that MEN could buy 1 million euro shares of the Respondent at favourable price and must keep them for validity of the contract. Alternatively, MEN could deposit one million euros with the Respondent which could be returned by it in equal parts over the duration of the extension of the agreements. It was stated that the issues should be resolved by 7th April 2011. The Respondent sent another e-mail on 20th April 2011 stating that the Agreement came to an end by efflux of time on 31st March 2011. It was urged that the problem could be solved if the outstanding amounts would be paid and the easiest way was for MEN to buy shares or make the deposit as guarantee for performance. This was contested by MEN by a reply e-mail in which it maintained that the MOA read with the Consent Terms remained binding.

16. The Appellant then filed O.M.P. No. 390 of 2011 in this Court under Section 9 of the Act seeking the interim relief of restraining the Respondent from giving effect to the termination notice dated 28th March 2011 and also restraining the Respondent from entering any third party agreement for appointing them as distributors of the Respondent's FTV channel during the subsistence of the MoA dated 9th August 2001. In the said petition this Court passed an interim order on 24th March 2011 by which subject to deposit of 50% of minimum guarantee before the Registrar General of this Court till the next date of hearing, i.e., 22nd July 2011, the Respondent was restrained from appointing any third party for distribution, merchandising and licensing the rights of FTV channel in the Territory covered by the MOA dated 9th August 2001 in case not already appointed.

17. The Respondent on 2nd June 2011 filed an application for vacation of the said interim order. On 3rd August 2011 after hearing the parties and after noting that the parties had nominated their respective Arbitrators, this

Court disposed of O.M.P. No. 390 of 2011 and I.A. No. 9848 of 2011 in the following terms:

> "a.50% minimum guarantee amount deposited by the petitioner with the Registrar General of this Court shall be kept in FDR by the Registrar General of this Court for a period of six months.
>
> b. It is agreed between the parties that they have no objection if nominated arbitrators will appoint the Presiding Arbitrator within one week from today.
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> c. The parties are agreeable that the petition under Section 9 of the Act be treated as application under Section 17 of the Act which could be decided by the arbitral tribunal within two weeks from the date of commencement of the first meeting. The petitioners agree to file pleadings of the petition under Section 9 of the Act within the period of seven days from the date of passing of the order and the interim order dated 24.05.2011 shall continue till the disposal of the interim application which would be decided as per its own merit and without the influence of the ex-parte order passed by the Court.
>
> d. The parties will not take any unnecessary adjournments.
>
> 5. The parties shall appear before the Arbitral Tribunal as and when the first of sitting is fixed by the Arbitral Tribunal."

18. Before the Arbitral Tribunal the Appellant filed an application on 2nd September 2011 for directions to the Respondent to disclose and produce the agreement entered into between it and Media Network Ltd. It is submitted that pursuant thereto the Respondent submitted a incomplete copy of the said agreement dated 19th April 2011. Arguments on the application under Section 17 of the Act were heard by the Arbitral Tribunal on 6th September 2011.

19. The Arbitral Tribunal passed the impugned order dated 20th October 2011 rejecting the Petitioner's application under Section 17 of the Act and vacated the interim order passed by this Court on 24th May 2011 which had

remained in operation till then. The Arbitral Tribunal, however, directed that the said interim order would continue to remain in operation up to 4th November 2011 since an abrupt vacating of the interim order might lead to difficulty and the parties required some time to rearrange their business affairs. In the impugned order dated 20th October 2011 the Arbitral Tribunal held as under:

> (a) There was *prima facie* substance in the submissions made by both the sides. For the purpose of grant of ad interim relief the Appellant had a *prima facie* case;
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> (b) The balance of convenience was not in favour of the Appellant. The injury to the Appellant, if any, could well be compensated by awarding damages if the dispute was ultimately resolved in favour of the Appellant. The loss that the Respondent would suffer in the event of being restrained from proceeding with its legal activity in the competitive market by striking new bargains may not be capable of being ascertained, at least in the proceedings under Section 17 of the Act;
>
> (c) Without making any final order on the Appellant's application seeking a direction to the Respondent to produce the agreement dated 19th April 2011, it would not be possible to restrain the Respondent from entering into any business relationship with other parties and just to keep its business activity idle;
>
> (d) The negative covenant could be enforced only if the positive covenant was found to be enforceable and where the positive and negative covenants were inter related. If such circumstances existed in which the performance of positive covenant in favour of the

Appellant would not be enforced by injunction, then the negative covenant would also not be enforced by grant of injunction;

(e) A perusal of the MOA, the consent terms and the two Addendums showed that the parties had entered into a somewhat complex commercial relationship which would not be possible to be supervised by the Court. Under Section 41 (e) of the Specific Relief Act, 1963 ('SRA') an injunction could not be granted to prevent the breach of a contract the performance of which would not be specifically enforced. It could not be said that the Appellant would suffer irreparable injury if an ad interim injunction was not granted.

20. On behalf of the Appellant it was submitted by Mr. Ramji Srinivasan, learned Senior counsel and Ms. Shally Bhasin, learned counsel as under:

(i) Till date there was no formal termination of the MOA dated 9th August 2001. The consent terms and two Addendums did not alter the essential features of the MOA, particularly the renewal of the MOA for a further period of seven years after 31st March 2006.

(ii) Under Section 42 SRA, notwithstanding anything contained in Section 41 (e), where a contract contained an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the mere fact that that the court was unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. Consequently, in the present case the Arbitral Tribunal erred in not granting ad interim injunction requiring the Respondent to perform the negative

covenant and restrain it from entering into any fresh agreement with third parties. Reliance is placed on the judgments in ***Gujarat Bottling Co. Limited v. Coca Cola Co. (1995) 5 SCC 545, Dirk India Private Limited v. Mahagenco 2007 (5) BomCR 207, Old World Hospitality Private Limited v. India Habitat Centre 73 (1997) DLT 374, Goyal MG Gases Limited v. M/s. Griesheim Gmbh*** [decision dated 23rd October 1998 in FAO (OS) No. 251 of 1998]**,** ***Modi Rubber Limited v. Guardian International Corporation 141 (2007) DLT 822*** and ***Lady Navigation Inc. v. Lauritzencool AB (2005) EWCA Civ 579.***

(iii) Till date the Appellant was receiving fTV signals and this contradicted the plea of the Respondent that there was a termination of the MOA and the addendum. In fact nothing prevented the Respondent from blocking the signals received by the Appellant if indeed there was a termination of the MOA as amended by the Addendums, between 1st April 2011, i.e., after the term of the Second Addendum expired, till 24th May 2011 when a stay was granted by this Court against the Respondent at the instance of the Appellant. Since the MOA was kept alive, this Court could, consistent with the intention of the parties, enforce their respective obligations and require the Respondent to abide by the negative covenant.

(iv) The agreement dated 19th April 2011 entered into by the Respondent with M/s. Media Network and Distribution (India) Limited was a highly suspicious document and appeared to have been introduced only to defeat the legitimate right of the Appellant under the MOA and to overreach the Arbitral Tribunal. Even today the Appellant was prepared to pay whatever is the money owing by

it to the Respondent. It had already demonstrated its *bonafides* by depositing 50% of the amount in this Court. The Appellant was prepared to deposit remain 50% without prejudice to its rights and contentions.

(v) The Arbitral Tribunal had misread Clauses 6 and 7 of the MOA. It failed to appreciate that Clause 6.3 was independent of Clauses 6.1 and 6.2, therefore, not subject to Clause 7. Even in the correspondence with the Appellant, the Respondent referred to Clause 17 (a) and 17 (b) of the MOA. Once the Arbitral Tribunal found that the Appellant had a *prima facie* case, the balance of convenience lay in favour of the Appellant to continue the status quo as of that date. The business relationship between the parties continued notwithstanding the First and Second Addendums.

21. On behalf of the Respondent Mr. N.K. Kaul and Ms. Indu Malhotra, learned Senior counsel submitted as under:

(i) The contract was by very nature determinable and therefore could not be specifically enforced in terms of Section 14 (1) (c) and Section 41 (e) SRA.

(ii) The Appellant had misled this Court when the interim order dated 24th May 2011 was passed as was evident from the para 6 of the said order. Even in para 10 of the memorandum of appeal the Appellant had persisted with making an erroneous statement that the Respondent had held out to the Appellant that the transmission of the fTV channel would be encrypted. This was contrary to what had been specifically agreed to between the parties at the time of

signing the First and Second Addendums, both of which made it clear that the telecast of the fTV channel would be free to air.

(iii) Both the Addendums were by way of an amendment to the term of the MOA. The contract between the parties had come to an end by efflux of time. There was no question therefore of enforcing the negative covenant once the contract itself had come to an end. Even assuming, without admitting, that the contract subsisted and the termination of the contract by the Respondent was in breach of the terms thereof, the contract could not be specifically enforced. Reference was made to the decision of the Supreme Court in ***Indian Oil Corporation v. Amritsar Gas Service (1991) 1 SCC 533.***

(iv) In terms of the law explained in ***Gujarat Bottling Co. Limited v. Coca Cola Co.***, the grant of an injunction under Sections 41 or 42 SRA was discretionary. Reference was made to the decision in ***Rajasthan Breweries v. The Stroh Brewery Company AIR 2000 Delhi 450.***

(v) The Appellant was in default and had failed to comply with its obligations under the contract in the matter of making the payment of the guaranteed sums within the stipulated time. The plea of the Appellant to the contrary was not bonafide and the proviso to Section 42 of SRA precluded the Appellant from seeking enforcement of any negative covenant.

(vi) Being a foreign fashion television channel, it was not possible for the Respondent to telecast its channel directly in India without an agreement with an Indian counterpart holding a valid licence.

Therefore, if the Respondent were to be restrained from entering into an agreement with a third party, then to avoid being rendered idle, it would have no option but to continue its arrangement with the Appellant. It was only on account of the interim order dated 24th May 2011 passed by this Court that a situation was brought about whereby the Respondent was compelled to continue transacting with the Appellant and not otherwise.

(vii) The scope of the powers of this Court under Section 37 of the Act to interfere with an order passed by the Arbitral Tribunal under Section 17 of the Act was limited. There was nothing or perverse in the impugned order which called for interference.

22. Having considered the above submissions, this Court does not find any valid ground having been made out by the Appellant for interference with the impugned order dated 20th October 2011 passed by the Arbitral Tribunal rejecting the Appellant's application under Section 17 of the Act. The reasons for this conclusion follow.

23. At the outset, it requires to be stated that the reasoning that follows is only a prima facie view of the court on the basis of the existing pleadings and the submissions of the counsel for the parties in regard to the grant of interim relief in an application under Section 17 of the Act. In other words it is not to be construed as a final view on merits.

24. The term of the MOA was essentially for a period of five years beginning 1st August 2001. The MOA envisaged that there would be a joint venture company ('JVCO') incorporated by the two parties in India with equal equity participation. Clause 6 of the MOA made the formation of the JVCO, during the subsistence of the MOA, contingent upon MEN

achieving the gross revenue projections stated in Clause 7. When the fTV channel became free to air, it was plain that the revenue earnings projected under Clause 7 would be unable to be achieved. The changed market conditions meant that revenues would have to be generated mainly from advertisement and not from subscription. Consequently, the conditionalities under Clause 6 for the formation of the JVCO could not be met. Under Clause 6 (3) it was agreed that if no agreement was reached between the parties for the formation of JVCO then the MOA would stand automatically extended for a period of seven years from "the date of such disagreement". The narration of events indicates that there was no 'disagreement' as such on the formation of the JVCO. The parties accepted that the conditions for the formation of the JVCO, as set out in Clause 7, could not be met. Consequently, the conditionality envisaged under Clause 6.3 of the MOA, viz., a 'disagreement' between the parties as to the formation of the JVCO, was not fulfilled and therefore the question of an automatic extension of the MOA by a further seven years did not arise.

25. The First and Second Addendums were by way of an amendment to the MOA. The First Addendum dated 9th August 2005 was to be valid for 12 months from the Start Date, i.e., 1st August 2005. It clearly stated that the fTV channel would be free to air in India and a minimum guarantee would be payable to the Respondent. This was also stated in the Second Addendum dated 30th March 2006, which was for a period of 60 months from the Start Date i.e., 1st April 2006. The term of the Second Addendum came to an end on 31st April 2006. There is nothing in either of the Addendums which indicates that on completion of the term of the Addendums, the MOA would stand revived. Prima facie it does appear that the MOA as amended by the Consent Terms, and the First and Second Addendums came to an end by efflux of time on 31st March 2011.

Thereafter while the Respondent proposed a month to month contract, the Appellant did not agree to the conditions imposed by the Respondent and maintained that the MOA stood revived. The stand of the Respondent on the other hand was that the MOA as well as the Addendums had come to an end by efflux of time. There was no implied continuation of the contract on the terms specified in the MOA. There was thus no agreement as such between the parties after 31st March 2011. There is merit in the contention of the learned Senior counsel for the Respondent that the mere fact that the Respondent did not withdraw the signals to the Appellant immediately did not mean that the Respondent had consented to the extension of the MOA. The Respondent would have otherwise had to remain idle till it found another Indian party holding a broadcast licence to enter into an agreement with. It is not possible to accept the contention of learned Senior counsel for the Appellant that after 31st March 2011, the automatic extension clause of the MOA dated 9th August 2001 stood revived and the MOA was meant to expire only on 8th August 2013. Consequently, the question of a negative covenant in the MOA, i.e., Clause 21 thereof, being enforceable thereafter.

26. The relief of an injunction to enforce a negative covenant under Section 42 SRA is a discretionary one. It is contingent upon the injunction seeker performing its obligations. Section 42 SRA reads as under:

> "42. Injunction to perform negative agreement: - Notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:
>
> Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

27. It is therefore not as if the mere existence of a negative covenant is enough to persuade a court to grant an interim injunction to enforce it. Under Section 14 (1) (c) SRA a contract which is in its nature determinable cannot be specifically enforced. Further under Section 41 (e) SRA an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Although Section 42 is an exception to this rule, and a court can grant an injunction to perform the negative agreement in a contract which is coupled with an affirmative agreement, it is conditional upon the contract subsisting at the time such injunction is sought and further the injunction seeker complying with the contractual obligations placed on him in terms of the proviso to Section 42 SRA. As discussed hereinbefore, the Court is prima facie of the view that the contract came to an end by efflux of time on 31st March 2011. Further, on its own admission the Appellant did not pay the Respondent any amount from October 2010 onwards. The deposit of 50% of the minimum guaranteed amount in this Court was only to meet the condition imposed by this Court while passing the interim order dated 24th May 2011. Consequently the conditions envisaged under Section 42 SRA for enforcement of a negative covenant of the MOA do not appear prima facie to be met.

28. In ***Gujarat Bottling Co. Limited v. Coca Cola Co.*** the Supreme Court explained in para 42 that "the Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer." The Supreme Court referred to the earlier decision in ***Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Limited AIR 1967 SC 1098.*** In the present case, the Respondent cannot possibly telecast its channel in India without being an associated with an Indian broadcaster holding a valid licence. A restraint

on the respondent from entering into an agreement with third parties would certainly render it idle if it were not to permit the Appellant to downlink the signal. Therefore, by continuing the ad interim injunction restraining the Respondent from contracting with third parties the Court would be doing indirectly what it cannot directly under Sections 14 (1) (c) read with Section 41 (e) SRA. In other words the Court would in effect be requiring the Respondent to perform a positive obligation to keep alive a contract which is not only by its very nature determinable but has in fact come to an end by efflux of time and is therefore not specifically enforceable. The decisions cited by learned Counsel for the Appellant are distinguishable on facts.

29. This Court does not find any error committed by the Arbitral Tribunal in its conclusion that the balance of convenience does not lie with the Appellant and that it is not likely to suffer any irreparable injury if an ad interim injunction is not granted in its favour. This Court also concurs with the *prima facie* opinion expressed by the Arbitral Tribunal that the injury likely to be suffered by the Respondent by grant of an ad interim injunction in favour of the Appellant outweighs the injury which could be suffered by the Appellant if such injunction were not granted.

30. This Court does not find any ground having been made out by the Appellant for interference with the impugned order of the Arbitral Tribunal. The relief prayed for in OMP No.809 of 2011 under Section 9 of the Act also cannot be granted. This Court however reiterates that this order represents the *prima facie* view of this Court at this stage. The Arbitral Tribunal will, in passing the final Award form an independent view uninfluenced by what has been stated in this order or the impugned order of the Arbitral Tribunal on merits.

31. A prayer was made by Mr. Ramji Srinivasan, learned Senior counsel for the Appellant that in the event of this Court not holding in favour of the Appellant, the interim injunction which remained in force till 4th November 2011 should be continued for a further period to give time to the Appellant to challenge the order. However, for the reasons set out hereinbefore, this Court is not inclined to grant any such further relief.

32. Arbitration Appeal No. 14 of 2011 and OMP No. 809 of 2011 are dismissed with costs of Rs. 20,000/- which will be paid by the Appellant to the Respondent within a period of two weeks.

S. MURALIDHAR, J

NOVEMBER 8, 2011
ak/rk