

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 19th March, 2013

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CS(OS) No.217/2013

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**IA NO.1907/2013 (OF THE PLAINTIFF UNDER
ORDER 39 RULE 1&2 CPC)**

YOGESH RADHAKRISHNAN

..... Plaintiff

Through: Mr. S. Ganesh & Mr. N.K. Kaul, Sr.
Advs. with Mr. Amit Sibal, Vikram
Mehta, Mr. Sunil Shekhawat & Mr.
Anshuman Srivastava, Advs.

Versus

**MEDIA NETWORKS & DISTRIBUTION
(INDIA) LTD. & ORS.**

..... Defendants

Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr.
Jaspreet Singh Kapoor, Adv. for D-1.
Dr. Abhishek Manu Singhvi & Mr.
Maninder Singh, Sr. Advs. with Mr.
Kunal Tandon, Adv. for D-2 to 4.
Mr. Aman Lekhi, Sr. Adv. with Mr.
Abhishek Malhotra & Mr. Angad
Singh Dugal, Advs. for D-5.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The plaintiff, holding 49% shares in the defendant No.1 Company has instituted this suit as a derivative action, for and on behalf of defendant No.1 Company, to prevent the defendant No.2 Bennett Coleman

& Company Ltd. holding the remaining 51% shares in the defendant No.1 Company and its 100% subsidiaries Times Global Broadcasting Company Ltd. and Zoom Entertainment Network Ltd., impleaded as defendants No.3 & 4 respectively, from illegally and *malafidely* terminating the Business Service Agreement (BSA) dated 18.01.2011 between the defendant No.1 Company on the one hand and defendants No.2 to 4 on the other hand and to restrain the defendants No.2 to 4 from entering into an agreement with the defendant No.5 MSM Discovery Pvt. Ltd. for the same services for which they had entered into the BSA with the defendant No.1.

2. The plaintiff claims, i) a declaration that the BSA is valid, subsisting and binding on the parties; ii) a declaration that the termination of the BSA vide termination letter dated 06.11.2012 is illegal; iii) decree for Specific Performance directing the defendants No.2 to 4 to specifically perform their obligations under the BSA; iv) decree for Permanent Injunction restraining the defendant No.5 from acting under the Agreement entered into by it with the defendants No.2 to 4.

3. The plaintiff, in support of its case relies upon a Joint Venture Agreement (JVA) dated 20.01.2011 between the plaintiff on the one hand and the defendant No.2 on the other hand and to which JVA, the defendant No.1 Company being the Joint Venture Company was also a party. It was however not the plea of the plaintiff in the plaint as originally filed, that the terms of the JVA had been incorporated in the Articles of Association (AoA) of the defendant No.1 Company.

4. The suit came up for admission on 06.02.2013 when doubts as to its maintainability were expressed on the following counts:

- (i) Maintainability in law of a derivative action for the benefit of a Company by a shareholder.
- (ii) Whether the terms of the JVA, notwithstanding the defendant No.1 Company being the Joint Venture Company being party thereto, were binding on the defendant No.1 Company without being incorporated in the AoA of the defendant No.1 Company; reference was made to **V.B. Rangaraj Vs. V.B. Gopalakrishnan** (1992) 1 SCC 160; and
- (iii) The specific enforceability of the BSA.

The counsels for the defendants also appeared on that date and arguments were heard on the aforesaid three aspects.

5. The plaintiff thereafter applied for amendment to plead that material terms of the JVA dated 20.01.2011 were indeed incorporated in the AoA of the defendant No.1 Company pursuant to the Resolution passed in the Extraordinary General Meeting (EGM) of the defendant No.1 Company held on 16.02.2011. The said amendment was allowed and the amended plaint taken on record and the arguments on the aspect of maintainability continued and the order thereon reserved.

6. It is the case of the plaintiff:

- (i) that the defendants No.3 & 4 are the owners of various channels such as Times Now, ET Now, etc.;
- (ii) that in the Digital Media various parties act as intermediaries (such as Cable / Direct to Home (DTH) operators) for the purposes of distributing the services to the end consumers; the said intermediaries collect subscription charges from the consumers and pass it on to the broadcasters and provide allied services;

- (iii) that in the year 2011, the defendant No.2 approached the plaintiff, a professional having expertise in providing such intermediary services, for availing his services for distribution of its channels and other allied functions so as to fetch maximum subscription revenue therefrom;
- (iv) that eventually the JVA aforesaid was executed under which the plaintiff became the Managing Director of the defendant No.1 Company and which provides that the business of the defendant No.1 Company cannot be transferred or alienated without the consent of the plaintiff or his nominee Directors and the AoA of the defendant No.1 Company amended to *inter alia* incorporate the said term of the JVA;
- (v) that the business of the defendant No.1 Company was/is, to distribute all the channels viz. TIMES NOW, MOVIES NOW, ET NOW and ZOOM of the defendants No.2 to 4 and the BSA aforesaid was entered into between the defendant No.1 on the one hand and the defendants No.2 to 4 on the other hand and which BSA was annexed to the JVA;

- (vi) that prior to the BSA, the defendants No.2 to 4 were earning/generating only about Rs.16 crores per annum as subscription fee from their said channels but the defendant No.1 Company, under the BSA agreed to give a minimum guarantee of Rs.100 crores over a period of three years, to the defendants No.2 to 4;
- (vii) that it however appears that the intention of the defendants No.2 to 4 was solely to take undue advantage of the experience of the plaintiff and increase their revenue and thereafter terminate the BSA; with the said intent, the defendants No.2 to 4 on 06.11.2012 terminated the BSA on false, concocted, mischievous, vague and illegal pretext of the defendant No.1 Company's performance being not upto the mark when prior thereto no complaint whatsoever had been made;
- (viii) that the said notice is in violation of Clause 8 of the JVA and thus illegal;

- (ix) that if the defendants No.2 to 4 take away their business, the defendant No.1 would not be able to survive; thus the termination was also *ultra vires* the AoA, particularly Article 87, inasmuch as what is prohibited thereunder cannot be permitted to be done indirectly;
- (x) that upon the plaintiff approaching the defendants No.2 to 4, prolonged negotiations for settling the issues took place and in the middle of January, 2013 the defendants No.2 to 4 represented from their conduct that they will continue the BSA with the defendant No.1 Company and assured that a formal letter revoking the termination would be issued and the defendant No.1 Company should continue providing services under the BSA;
- (xi) that however on 27.01.2013 it was learnt that the defendants No.2 to 4 had started corresponding with various local distributors (Cable Operators) directly to represent that with effect from 06.02.2013, they have appointed the defendant No.5 Company as the sole and exclusive distributor for the

subsequent business of the TV channels and that all rights of the defendant No.1 Company had been withdrawn;

(xii) that the action of the defendants No.2 to 4 of terminating the BSA and appointing a new distributor for the said channels is contrary to Clause 8 of the JVA and Article 87 of the AoA;

(xiii) that the defendant No.2 who has terminated the BSA is the majority shareholder of the defendant No.1 Company and is therefore not taking any action against the illegal termination of the BSA, compelling the plaintiff, being a minority shareholder, to file the suit as a derivative action for the benefit of the defendant No.1 Company;

(xiv) that there are various negative covenants cast upon the plaintiff in the JVA and by which the plaintiff continues to be governed and for which reason also the defendants No.2 to 4 should not be permitted to create a situation in which the defendant No.1 Company will be left with no business whatsoever;

(xv) that the nominees of the defendants No.2 to 4 are in majority in the Board of Directors of the defendant No.1 Company and if at all there are any deficiencies in the service rendered by the defendant No.1 under the BSA, the defendants No.2 to 4 themselves are to blame therefor.

7. It may be mentioned that in the termination letter dated 06.11.2012, 90 days period of termination, in terms of the BSA, expiring on 06.02.2013 was given. The suit though came up first before this Court on 05.02.2013 but could not be taken up for hearing as on the first call passover was sought and thereafter the matter did not reach. The senior counsels for the defendants during the hearing on 06.02.2013 contended that the suit was infructuous as the termination had already come into effect and could not be injuncted. The senior counsel for the plaintiff had on that date insisted on the interim protection even though the hearing on maintainability was inconclusive. Though no interim relief was granted but it was orally observed that if a case was found in favour of the plaintiff, *status quo ante* could always be ordered.

8. The senior counsel for the plaintiff during the hearing on 06.02.2013 relied on the following judgments in support of the maintainability of the derivative action:

- (i) *N.V.R. Nagappa Chettiar Vs. The Madras Race Club* AIR 1951 MADRAS 831.
- (ii) *Globe Motors Ltd. Vs. Mehta Teja Singh* 24 (1983) DLT 214.
- (iii) *Prudential Assurance Company Ltd. Vs. Newman Industries Ltd.* (1982) 1 All ER 354
- (iv) *Daniels Vs. Daniels* (1978) 2 All ER 89.

However during the hearing it was observed that the passages in each of the aforesaid judgments except in *Daniels* supra, were permitting a derivative action only when the action complained of was *ultra vires* the Company and it was as such asked as to whether the action complained of in the present case though stated to be in breach of the JVA but not the AoA could be said to be *ultra vires*. The said question however in view of the subsequent amendment to the plaint becomes irrelevant.

9. It may however be recorded that the senior counsel for the plaintiff has also invited attention to *Narendra Kumar Berlia Vs. Om Prakash Berlia* MANU/WB/0227/2011 and *Prakashchandra Rajmal Jain Vs. Firm Swarupchand Hukumchand & Co.* MANU/MP/0131/1971 in support of maintainability of a derivative action. It has further been contended that *V.B. Rangaraj* supra stands overruled in para 262 of the separate but concurring with the majority judgment in *Vodafone International Holdings BV Vs. Union of India* (2012) 6 SCC 613.

10. Sub-Clause 8.1 (a) of Clause 8 of the JVA, on which the plaintiff bases its case is as under:-

“8. DECISIONS BY AFFIRMATIVE VOTE

8.1 Notwithstanding what is contained in Section 16.12, the Parties agree that till such time that BCCL holds any Shares in the Company and Yogesh holds not less than 49% (forty nine percent) of the paid-up Equity Share Capital of the Company, the following decisions of the Company shall be made by Affirmative Vote:

(a) any sale or other disposal of the whole or any substantial part of the Business and / or any material assets of the Company, including without limitation by way of sale, transfer for consideration, lease, gift, trust,

assignment of rights or any other manner that transfers the benefit of the same to another Person;”

Similarly Article 87 of the AoA of the defendant No.1 Company is as under:

“DECISIONS BY AFFIRMATIVE VOTE

87. *Notwithstanding what is contained in Article 68, the Parties agree that till such time that BCCL holds any Shares in the Company and Yogesh holds not less than 49% (forty nine percent) of the paid-up Equity Share Capital of the Company, the following decisions of the Company shall be made by Affirmative Vote:*

(a) any sale or other disposal of the whole or any substantial part of the Business and / or any material assets of the Company, including without limitation by way of sale, transfer for consideration, lease, gift, trust, assignment of rights or in any other manner that transfers the benefit of the same to another Person;”

11. The senior counsel for the plaintiff has argued that the word ‘Business’ in Clause / Article aforesaid has to take its colour from the definition thereof in the JVA as under:

“Business” means the business of:

- (a) distributing the BCCL Channels in India on various frequencies in analogue mode and digital mode and negotiating the carriage fees where relevant with the multi-system operators and / or local cable operators and any Third Party channels across various distribution platforms like cable, satellite, terrestrial, DTH and internet protocol television and other forms of linear transmission or delivery which may enable the channels to be viewed on a television set. This would include distribution to institutions such as hotels, food and beverage outlets wherein the channels may be viewed on a television set. However, this would not be inclusive of mobiles or delivery onto other devices and technologies;*
- (b) collecting subscription revenue in India from the multi-system operators, local cable operators, including for internet protocol television and other forms of transmission or delivery which may enable the channels to be viewed on a television set. This would include distribution to institutions such as hotels, food and beverage outlets, wherein the channels may be viewed on a television set. However, this would not be inclusive of mobiles or delivery onto other devices and technologies; and*

(c) *distribution of channels on various distribution platforms as specified in (a) and (b) above in the international market at a later point in time when decided by BCCL and on terms to be mutually agreed between the Parties;*”

12. The senior counsel for the plaintiff has argued that the actions of the defendants No.2 to 4 of termination of the BSA amount to “sale or other disposal of the whole or substantial part of the business” of the defendant No.1 Company and “transfer” thereof to the defendant No.5, and which under the JVA and the AoA could be done only by an affirmative vote and is prohibited to be done otherwise and that Clause 8 of the JVA constitutes a negative covenant against termination of BSA by the defendants No.2 to 4. Relying on ***Gujarat Bottling Company Ltd. Vs. Coca Cola Company*** (1995) 5 SCC 545, it is argued that injunction as sought can thus be granted. On query as to whether the injunctions sought are not in the teeth of Section 41 of the Specific Relief Act, 1963 (SRA), the senior counsel for the plaintiff argues that Section 42 thereof is “Notwithstanding anything contained in Clause (e) of Section 41” and thus in granting injunction thereunder to enforce the negative Agreement, the question of specific enforceability is not to be seen.

13. Per contra, the senior counsels for defendants No.2 to 4 argued:

- (I) that the BSA in Clause 20 thereof provides for arbitration of all disputes between the parties thereto and the suit, though by the plaintiff (not a party to the BSA) but being a derivative action on behalf of the defendant No.1 Company which is a party to the BSA, is not maintainable and the remedy of the plaintiff if any, is by way of arbitration only. It is contended that the defendants No.2 to 4 are ready for arbitration and if summons of the suit are issued, will file an application under Section 8 of the Arbitration & Conciliation Act, 1996. It is further argued that impleadment of the defendant No.5 in the suit does not affect the remedy of arbitration;
- (II) that the negative covenant relied on, is in the JVA and not in the BSA and the suit is for enforcing the rights in the BSA and no action has been taken by the defendants under the JVA. It is highlighted that the termination is of the BSA and not of the JVA;

(III) Attention is invited to Clauses 14 & 15 of the BSA (in which the defendant No.1 is described as MNDIL, defendant No.2 as BCCL, defendant No.3 as TGBCL and defendant No.4 as ZENL) which are as under:

“14. TERM and TERMINATION

14.1 This Agreement shall come into effect from the Effective Date and shall continue in force and effect with respect to each Service for the following period:-

- a) For Distribution and Placement Services: for a period of Three (3) years*
- b) For Subscription Services:-*
 - i) with respect to the Channels TIMES NOW and ZOOM three years from the Effective Date and*
 - ii) with respect to the Channels ET NOW and MOVIES NOW two years from the Effective date.*

14.2 TGBCL, ZENL and BCCL shall be entitled to terminate this Agreement pursuant to a 90 days prior written notice, on the following grounds:

- (a) upon failure by MNDIL to provide the Services in the manner contemplated under this Agreement, and such failure not being cured*

within a period of 30 days from the date of receipt from TGBCL, ZENL and BCCL of a written notice informing MNDIL about such failure;

- (b) on the occurrence of any fraud, willful misconduct or gross negligence or failure to comply with any instruction of TGBCL/ZENL by MNDIL in respect of its transactions or Services which could have an adverse impact on the business / reputation of TGBCL, ZENL and BCCL;*
- (c) In the event MNDIL fails and neglects to file the necessary regulatory filings within the time frame prescribed by the Regulator;*
- (d) by mutual agreement of TGBCL, ZENL and BCCL and MNDIL;*
- (e) In the event of change of shareholding pattern of MNDIL, which is detrimental to the business interest of TGBCL/ZENL; or*
- (f) In the event MNDIL fails to maintain the Service Levels as stated in the said Schedule III annexed hereto.*

15.1 Notwithstanding anything contained herein TGBCL, ZENL and BCCL shall have the right to terminate this

Agreement without any reasons whatsoever by giving a 90 (ninety) days advance written notice to MNDIL.”

It is argued that the BSA is determinable by its nature and injunction preventing the termination thereof having the effect of specific performance thereof is barred under Section 14(1)(c) of the SRA.

- (IV) that Clause 8.1 of the JVA is not a negative covenant. It does not provide that the BSA will not be terminated;
- (V) that the defendants No.2 to 4 have taken away only the four channels from the defendant No.1 and two other remain and the defendant No.1 Company is free to carry on business for other channels also;
- (VI) that an intermediary, as the defendant No.1 Company, not only collects the subscription charges for the channel owner but also fixes the carriage fee to be paid by the channel owner;
- (VII) that the specific enforceability of the BSA is also barred by Section 14(1)(a), (b), (c) & (d) of the SRA;

- (VIII) that the defendants No.2 and 4 cannot be forced to supply channels to the defendant No.1 in whom they have lost confidence and the working of the BSA entails minute details which cannot be supervised by this Court;
- (IX) that derivative action is permitted to a shareholder who is not the decision maker in the Company and is thus allowed by the Court to sue as the Company; here the plaintiff is the Managing Director of the defendant No.1 Company and has all the powers;
- (X) that the derivative action is to vindicate collective rights of the shareholders and not personal rights as is the case here; personal actions can never be derivative ones; in none of the judgments cited by the senior counsel for the plaintiff, was the person permitted to take derivative action on behalf of the Company, the Managing Director of the Company;
- (XI) that derivative action is an exception to the principle of majority rule and can thus be only for collective and not for personal rights;

- (XII) that the plaintiff has the remedy under Section 397 of the Companies Act, 1956 available to him;
- (XIII) that all the cases where derivative action has been permitted, where the impugned actions is of the company; here the plaintiff is not impugning any action of the defendant No.1 Company but the action of the defendants No.2 to 4 and which cannot be permitted;
- (XIV) that the plaintiff has been in breach of his obligations under the JVA. Attention in this regard is invited to Clause 4.3 thereof;
- (XV) that out of the four channels withdrawn also two are out because of efflux of time;
- (XVI) that the plaintiff acting as the Managing Director of the defendant No.1 Company was excessively billing the defendants No.2 to 4 for carriage charges and if the parties are to work together, they will have to settle accounts on a day-to-day basis and which cannot be supervised by this Court. Reliance is placed on *Hindustan Petroleum*

Corporation Ltd. Vs. Sriman Narayan (2002) 5 SCC 760

which though on the aspect of interim order, holds that interim mandatory injunction which would have to be granted to restore *status quo ante* cannot be granted;

(XVII) reliance is placed on ***MSM Discovery Private Limited Vs.***

Viacom 18 Media Private Limited (2011) 2 Comp LJ 658

where this Court denied injunction even in the absence of the contract being terminable, for the reason of the damages suffered being assessable. It is argued that in the present case, in view of the BSA having already run for two years, it will be easy for the plaintiff to assess and quantify damages for the remaining period for which it has not been allowed to so run;

(XVIII) that it is not as if after termination of the BSA, defendant

No.1 Company cannot survive; it has been established to carry on business of distribution of channels and can carry on the business of distributing channels of others;

(XIX) that the case set up in the entire plaint is for the benefit of the plaintiff and not for the benefit of defendant No.1 Company;

(XX) *M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd.* (2009) 7 SCC 696 is relied on to contend that reference to a document in a contract cannot be treated as incorporation of that document in the contract in which it is referred. It is thus argued that the negative covenant even if any in the JVA, cannot be read in the BSA. The reasons for termination are informed;

(XXI) It is denied that after the termination, at any time any assurance to continue with the BSA was given;

(XXII) that in none of the four judgments cited by the senior counsel for the plaintiff did the contract permit 'without cause termination'.

14. The senior counsel for the defendant No.5 has argued that the BSA being terminable in nature is not specifically enforceable; that a shareholder cannot have a superior right in a derivative action and if the

defendant No.1 Company could not have enjoined the termination of the BSA, the plaintiff as a shareholder cannot do so; that Section 42 of the SRA is not a back door for specific performance which is otherwise prohibited; that a derivative action is permitted only in cases of fraud and the plaintiff has not pleaded any particulars of and / or laid any foundation for fraud in the plaint. Reliance is placed on passages from ‘SNELL’S EQUITY’, Thirty-First Edition that a negative covenant within the skin of Section 42 of the SRA has to be severable from the main contract and it is not so in the present case. Reliance in this regard is also placed on *Kirchner & Company Vs. Gruban* (1908-10) All E.R. Rep. 242. Passage from Fry’s Treatise On The Specific Performance Of Contracts, Sixth Edition are cited to contend that if a contract is not fit for specific performance no injunction will be granted even though negative words may be present. It is contended that the plaintiff, by waiting for the last date on which the termination was to come into effect, has allowed rights in favour of the defendant No.5 to be created and is not entitled to any relief on this ground alone. On enquiry, it is informed that the Agreement of the defendants No.2 to 4 with the defendant No.5 was signed on 27.11.2012 and that the Regulatory Body was informed thereof

on 07.01.2013 though press release issued only on 06.02.2013. It is yet further argued that damages if any suffered from the breach if any by the defendants No.2 to 4 of the BSA, are easily computable.

15. The senior counsel for the defendant No.1 has argued that the foundation for a derivative action necessarily has to be, of the shareholders having called upon the Company to take preventive action and the Company having failed to do so; however in the present case, not a single communication was addressed by the plaintiff calling upon the defendant No.1 Company to take action on the termination of BSA affected by the defendants No.2 to 4. It is further argued that the plaintiff as the Managing Director of the defendant No.1 has the duty to protect the Company and there is nothing to show that the plaintiff convened a meeting of the shareholders or that the majority of the shareholders have neglected their obligations to the Company. It is yet further argued that the defendant No.1 is willing to take action of claiming damages for termination of the BSA against the defendants No.2 to 4; that the plaintiff, without convening a meeting of the shareholders could not have instituted this suit. It is yet further argued that the defendant No.1 Company can distribute channels of other channel owners and it is not as

if the foundation or substratum of the defendant No.1 Company would disappear by the termination of the BSA. It is contended that the plaintiff has not been attending office of the defendant No.1 Company for the last three months and has not corresponded with any client and has not developed any business. Reference is made to Clause 10.2(e) of the JVA to contend breach by the plaintiff of the obligations thereunder. It is argued that it is not even pleaded by the plaintiff that the majority of shareholders of the defendant No.1 Company interfered with the defendant No.1 Company taking action against termination. Reliance is placed on *P. Subba Rao Vs. Andhra Association, Delhi (Regd.)* 2008 (4) AD (Delhi) 37 (DB) but which again is in the context of Order 39 Rules 1&2 CPC.

16. The senior counsel for the plaintiff in rejoinder has argued that, of the six channels only four which have been taken away were paid and the other two channels which are argued to have not been taken away are free-to-air-channels and thus only an illusion is created of the substratum of the defendant No.1 Company not disappearing by termination of the BSA. It is further argued that for Clause 8 of the JVA, only the 'existing' business of the defendant No.1 Company is to be seen and the transfer by the defendants

No.2 to 4 of the entire business of the defendant No.1 Company to the defendant No.5 amounts to 'sale' within the meaning of Clause 8 of the JVA. It is further argued that Section 42 of the SRA does not require an express negative covenant and makes even an implied negative covenant actionable. Attention is invited to Clause 17.2 of the JVA to contend that thereunder the plaintiff has undertaken not to terminate the JVA prior to the expiry of three years and even the defendant No.2 is entitled to terminate the same only upon default committed by the plaintiff and no steps have been taken for termination of the JVA. Attention is also invited to Clause 18.1 of the JVA whereunder the plaintiff even after ceasing to hold the shares of the defendant No.1 Company has undertaken not to engage in any business competing with / or in conflict with the obligations of the plaintiff in the JVA. It is thus argued that the defendants, while continuing to hold the plaintiff bound by his obligations under the JVA, are attempting to transfer the business away from the defendant No.1 Company creating a situation in which even though the Joint Venture Company i.e. defendant No.1 will be left with no business, the plaintiff will still be barred from carrying on any competing business. It is further contended that the plea of the plaintiff, of the defendants having assured to revoke the termination, is borne out from

the fact that nothing which was required to be done in the 90 days of the notice period was done. Attention is invited to ***Vijaya Minerals Pvt. Ltd. Vs. Bikash Chandra Deb*** AIR 1996 Calcutta 67 where the negative covenant was enforced even where the breach was compensable by damages. It is contended that this is not a Contract of personal service and the judgment in ***Percept D' Mark (India) (Pvt.) Ltd. Vs. Zaheer Khan*** (2006) 4 SCC 227 relied upon by the defendants has no application. It is contended that the BSA entails only the collection of the subscription amounts and which too is also done at the end of the month and there is no personal skill required and for the reason whereof it cannot be said that the suit is infructuous. It is further contended that in ***MSM Discovery Pvt. Ltd. Vs. Union of India*** MANU/DE/3622/2010 relied upon by the senior counsels for the defendants, there was no negative covenant.

17. The senior counsels for the defendants No.2 to 4 in sur-rejoinder have contended that Clause 18.1 of the JVA does not have the meaning assigned to it by the plaintiff and invite attention to Clause 14.3 of the JVA which is as under:

“14.3 Nothing in this Agreement will prevent, restrict or otherwise limit any Party’s ability to directly or indirectly

establish, undertake, invest in, own, manage, operate or have an interest in any business, whether in India or outside India, except as specifically restricted in Section 18 (Non Compete) of this Agreement.”

It is reiterated that the defendant No.1 Company can carry on business of distribution of channels of other owners also.

18. Though all the arguments made have been recorded but need is not felt to deal with the arguments raising factual controversy inasmuch as at this stage we are only concerned with the maintainability of the suit and for which purpose the test is, whether even if the plaintiff's version were to be believed, the plaintiff would still be disentitled in law to the relief claimed.

19. Though doubts at the commencement of the hearing were raised as to the maintainability of the derivative action but I do not deem it appropriate to discuss the said aspect also or to return any finding thereon inasmuch as it is felt that the suit is not maintainable for the relief of injunction and is liable to be dismissed on that ground alone. The plaintiff in the plaint has reserved the rights for claiming damages and it is felt that any finding on this aspect, though not necessitated at this stage may affect the claim if any permissible to the plaintiff of damages.

20. I have therefore examined the matter only from the aspect whether this Court can grant a decree for injunction restraining the defendants No.2 to 4 from terminating the BSA and decree for specific performance of BSA. For this purpose, it is necessary to examine the nature of the said BSA.

21. Under the BSA:

- (i) Exclusive rights are given to the defendant No.1 of distribution / placement of channels of the defendants No.2 to 4 across various distribution platforms via intermediaries excluding mobile and internet (Clause 2.1).
- (ii) Defendant No.1 is authorized to collect subscription revenue from intermediaries and subscribers for viewing the channels of the defendants No.2 to 4 (Clause 2.2).
- (iii) Defendants No.2 to 4 at the commencement of each year are to communicate to the defendant No.1 the markets in which defendants No.2 to 4 are desirous that their channels should reach and the defendant No.1 is to suggest the best markets and the relevant frequencies in the best interest of the defendants No.2 to 4 and the parties are to hold discussions in this regard and to reach an agreement (Clause 2.3).

- (iv) The parties are to mutually agree upon the revised terms and conditions if the defendants No.2 to 4 desire to make any additions, alterations or reductions in the services to be performed by the defendant No.1 (Clause 2.4).
- (v) Defendant No.1 is to enter into the appropriate agreements granting sub-license and / or appointing intermediaries for the purpose of redistributing / placement of channels across Distribution Platforms on terms no less favourable than offered by the intermediaries for the other channels in the same genre (Clause 2.6).
- (vi) Defendant No.1 is to use all reasonable commercial efforts to procure the business (Clause 2.7).
- (vii) Though defendant No.1 has the sole discretion in relation to the bundling and / or packaging of the channels for distribution pursuant to the BSA, but is required to obtain prior permission from the defendants No.2 to 4 with respect to the said bundling and packaging (Clause 2.12).
- (viii) Defendant No.1 is responsible for timely payment of carriage / placement fees to the intermediaries (Clause 5.2).

- (ix) Defendant No.1 is responsible for compliance of all applicable laws (Clause 5.5.).
- (x) Defendant No.1 is to ensure promotion of the channels of the defendants No.2 to 4 and to take steps to counter and mitigate the effects of any practice detrimental to the business of defendants No.2 to 4 (Clause 5.7).
- (xi) Defendant No.1 to obtain prior written approval with respect to any publicity literature, news release, advertisements etc. (Clause 6.2).
- (xii) Defendant No.1 is not to disclose to any third party any information relating to the defendants No.2 to 4's channels or operations (Clause 6.3).
- (xiii) The parties are to keep their discussions, negotiations and all information exchanged in the course of performance of the BSA confidential and to not disclose it to others (Clause 13.1).
- (xiv) Defendant No.1 upon termination of the BSA is required to assign the Agreements entered into by it with the intermediaries in relation to defendants No.2 to 4 channels, in favour of the

defendants No.2 to 4 or any other party appointed by them
(Clause 15.2(c)).

(xv) The parties are to make a quarterly review of the subscription
revenue collections (Schedule II, Clause 4).

22. A reading of the entire BSA leaves me with no manner of doubt that the BSA is a contract which runs into such minute or numerous details and which is so dependent on the personal qualification and / or volition of the parties or which otherwise from its nature is such that the Court cannot enforce specific performance of its material terms, all within the meaning of Section 14(1)(b) of the SRA. A reading of the BSA further shows that the performance of the BSA involves the performance of a continuous duty which the Court cannot supervise within the meaning of Section 14(1)(d) of the SRA. The BSA thus is non enforceable. The reading of the BSA does not bear out the contention of the senior counsel for the plaintiff that the role of the defendant No.1 under the BSA is confined only to collection of subscription charges. The various Clauses of the BSA which have been highlighted above require a continuous inter-action of the parties for the best commercial interests of the defendants No.2 to 4 to be achieved. Even though the defendants No.2 to 4 have a majority on the Board of Directors of

the defendant No.1 Company but it cannot be lost sight of that it is the plaintiff who is the Managing Director of the defendant No.1 Company. It is the case of the plaintiff himself that the defendants No.2 to 4 had entered into the JVA and the BSA to use his professional acumen in distribution of the channels. The contracts of professional services, it is well established, are unenforceable (See *Pearlite Liners (P) Ltd. Vs. Manorama Sirsi* (2004) 3 SCC 172). The defendants No.2 to 4 cannot be forced to continue with the BSA whereunder the defendant No.1 Company has been entrusted with ensuring compliance of laws and breach whereof is actionable against the defendants No.2 to 4 and capable of causing permanent damage to the said channels of the defendants No.2 to 4. No party can be compelled to unwillingly place its neck in the hands of another. Once this Court on a reading of the BSA finds it to be of such a nature which is unenforceable under Section 14 supra, I fail to see as to why the suit should be entertained and put through the entire process of trial. We are today living in an era where contracts are not written by the parties themselves or by lay persons but are drafted by professionals and thoroughly negotiated. Once the parties have reduced their agreement into writing, that agreement has to be the sole repository of what has been agreed between them and no other evidence

contradicting or expanding or restricting the agreement can be seen and the Court will always be slow to find that the written agreement does not represent the actual agreement between the parties on the matters which it addresses. This is necessary, both to promote commercial certainty and to prevent parties from achieving what is effectively rectification without proving a common intention. No evidence is thus deemed necessary for determining the nature of the agreement. Judge Learned Hand as far back as in *James Baird Co. v. Gimbel Bros., Inc.* 64 F.2d 344, 346 said that in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves. The same sentiment was echoed in *Allied Communications Corporation Vs. Continental Cellular Corporation* MANU/FEFC/0637/1987 where it was observed that when the transaction is commercial, the parties sophisticated, and the contract itself detailed, it is wise for the Courts to rely on express language than to imply a promise on their own.

23. It is perhaps for this reason only that the senior counsel for the plaintiff also pegged his case on negative covenant rather than on specific enforceability. However before I discuss the said aspect, it is also deemed appropriate to deal with the plea of the defendants of the specific performance of the BSA being barred under Section 14(1)(c) of the SRA

since it is by its very nature determinable. The BSA, as per Clause 14 thereof is for a period of three years only from 01.01.2011 i.e. till the end of the year 2013. The senior counsel for the plaintiff also agrees that thereafter neither the defendant No.1 nor the plaintiff have any right under the BSA. Specific performance is claimed for the remaining about eleven months only.

24. In spite of exclusive rights, under the BSA, having been granted to the defendant No.1 to distribute the channels of defendants No.2 to 4 for a period of three years, the parties still permitted termination thereof by the defendants No.2 to 4 in the events described in Clause 14.2 thereof and also without any reason whatsoever under Clause 15.1 thereof. There is thus no doubt that the BSA by its specific terms is determinable in nature. Thus Section 14(1)(c) of the SRA is clearly attracted.

25. The argument of the plaintiff also is, that it is only owing to the negative covenant in Clause 8.1 of the JVA, that the BSA cannot be terminated before the end of the year 2013.

26. In my view however, Clause 8.1 of the JVA is not concerned with the determination of the BSA. Clause 8.1 is of the genre as often found in the JVAs whereby notwithstanding one of the joint venture parties being in majority, the decision on certain aspects requires affirmative vote of the minority shareholder also. Such clauses are intended to protect the interest of the minority shareholder. One such decision for which affirmative vote of the plaintiff was agreed to be necessary was of sale or disposal of the whole or any substantial part of the business and / or assets of the defendant No.1

Company in any manner whatsoever. However what that Clause encompasses is a decision of the defendants No.2 to 4 as shareholders of the defendant No.1 Company to transfer the business of the defendant No.1 Company. The defendants No.2 to 4 vis-à-vis the plaintiff had two different status, one as joint venture partners of the plaintiff having majority share in the joint venture company floated / acquired with the plaintiff, and other as the channel owners. The said two status of the defendants No.2 to 4 cannot be mixed up. It is the argument of the senior counsel for the plaintiff himself that the BSA and the JVA are part of the same transaction. Rather when during the hearing, it was put to the senior counsel for the plaintiff that the JVA being of three days subsequent to the date of the BSA should prevail, the response of the senior counsel was that they have to be read together. I am unable to understand as to why, if the understanding of the plaintiff was that the defendants No.2 to 4 as channel owners will not take away the business from the defendant No.1 prior to three years, should the plaintiff have agreed to the BSA being terminable at the instance of the defendants No.2 to 4 without any cause whatsoever also. The BSA, on behalf of the defendant No.1 has been signed by the plaintiff himself and not by any nominee of the defendants No.2 to 4 in the defendant No.1 Company. The plaintiff having made the BSA determinable by its very nature cannot be permitted to rely on Clause 8.1 of the JVA to make it non determinable. Clause 8.1 is concerned with the decision making by the Board of Directors of the defendant No.1 Company and not by the action of the defendants No.2 to 4 as channel owners. It is nobody's case that the defendants No.2 to 4 as shareholders of the defendant No.1 Company or through their nominee

Directors in the defendant No.1 Company have agreed to transfer the business of the defendant No.1 Company to some other person, even though the action of the defendants No.2 to 4 in their capacity as channel owners, of termination of the BSA with the defendant No.1 may have the same effect. If the intention of the parties had been as is being argued now, the plaintiff would not have agreed to the Clauses in the BSA making the same determinable without any reason also.

27. That brings me to the aspect of negative covenant. The defendants No.2 to 4 as joint venture partners of the plaintiff can be said to have agreed to not using their majority on the Board of Directors of the defendant No.1 Company to take any decision of disposal of the whole or any substantial part of the business and assets of the defendant No.1 Company without the affirmative vote of the Directors of the defendant No.1 Company representing the interest of the plaintiff therein. However as aforesaid no decision to the said effect has been taken by the Board of Directors of the defendant No.1 Company.

28. I have also examined the matter from the aspect of inconsistency between the clauses aforesaid of the BSA and the JVA, accepting the argument of the plaintiff of the two being part of the same transaction. In

that eventuality, the undisputed position is that the BSA is anterior in point of time to the JVA; the settled position in law (See *Radha SundarDutta Vs. Mohd. Jahadur Rahim* AIR 1959 SC 24; *Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra DeoDhabalDeo* AIR 1960 SC 953 and *Uma Devi Nambiar Vs. T.C. Sidhan* (2004) 2 SCC 321) is that in construction / interpretation of deeds / documents, except a Will, the clause first appearing in the document / deed, prevails over the one appearing latter in the deed / document. Thus, applying the said test also, it will be the clause in the BSA permitting termination which will prevail over the clause if any to the contrary in the JVA.

29. There can be no manner of doubt that the requirement of affirmative vote is a negative covenant. Fry, J. sitting in the Chancery Division as far back as in *Donnell Vs. Bennett* (1883) 22 Ch.D. 835 observed that there can be no substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies negative. The same view was followed by the Courts in this country in *Kirtyanand Sinha Vs. Ramanand Sinha* MANU/BH/0020/1936, *JairamValjee Vs. Indian Iron and Steel Co. Ltd.* AIR 1940 Cal. 466 and in *Navayuga Engineering Company Ltd. Vs.*

Sanghi Industries Ltd. MANU/AP/1508/2001 (DB). This Court though, in *Shubhmangal Merchantile (P.) Ltd. Vs. Tricon Restaurants (India) Pvt. Ltd.* AIR 2000 Delhi 13, sounded a note of caution that Section 42 of the SRA does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things, and that it is a question of interpretation in each case whether a particular contract can be said to be having a negative covenant, express or implied contained within it. The affirmative vote for the decisions mentioned in Clause 8 of the JVA, after its incorporation in the AoA, would thus make any decision and action in pursuance thereto requiring an affirmative vote without such affirmative vote, *ultra vires* the company.

30. I am unable to subscribe to the contention of the senior counsel for the plaintiff that the purport of Section 42 of the SRA is to make agreements which by their very nature are not enforceable, enforceable. The negative covenant, enforcement whereof is provided for in Section 42 of the SRA has to be distinct from the Agreement which is found to be not enforceable. Section 42 of the SRA provides for a situation where even though the agreement may be found to be specifically not enforceable but the defendant has separately agreed not to do a certain act and permits grant of an

injunction restraining the defendant from doing that act. It cannot be interpreted as making the agreement which is non enforceable, enforceable. In fact during the hearing, it was enquired from the senior counsel for the plaintiff whether merely by providing in the contract that the same shall not be terminated, the same can be made specifically enforceable even though not permitted so under Section 14 of the SRA. No plausible answer was forthcoming. If Section 42 of the SRA were to be read in such a manner, it would amount to making of contracts specifically enforceable notwithstanding the provisions of the SRA. The classic example which can be given of Section 42 of the SRA is of a singer who though cannot be forced to sing for the plaintiff for whom he / she has agreed to sing, but if has agreed not to sing for the said duration of the agreement with the plaintiff for any other person, can be restrained from so singing. However Section 42 of the SRA cannot be invoked for preventing termination of a contract which is terminable by its very nature. Section 42 of the SRA will have no application where the positive and negative covenants have the same effect. Mention may be made of *Shree Ambarnath Mills Corporation Vs. D.B. Godbole* AIR 1957 Bom. 119 where a Division Bench of the Bombay High Court observed that the negative covenant must be distinct

from the affirmative agreement, otherwise breach of every affirmative agreement would be restrained by an injunction even if the Court is unable to compel specific performance of the affirmative covenant.

31. It is also not as if the negative covenants are necessarily to be enforced. The House of Lords as far back as in ***Richard Wheeler Doherty Vs. James Clagston Allman and W. C. Dowden*** (1878) 3 App. Cas. 709 held that even where negative words have been used, it may not be reasonable that it should be enforced. This Court recently in ***Fashion Television India Private Limited Vs. FTV BVI*** MANU/DE/4249/2011 also observed that the relief of injunction to enforce a negative covenant is a discretionary one and it is not as if the mere existence of a negative covenant is enough to persuade a Court to grant an interim injunction to enforce it. The appeal being FAO(OS) No.548/2011 thereagainst was withdrawn on 22.11.2011. To the same effect are the ***Percept Talent Management Pvt. Ltd. Vs. Yuvraj Singh*** MANU/MH/1040/2007, ***Interlink Services (P) Ltd. Vs. S.P. Bangera*** 65 (1997) DLT 228 and ***Prestige Pictures Vs. Sree Krishna Cinema (P) Ltd.*** MANU/WB/0348/1969. A Single Judge of the Guwahati High Court also in ***Sati Oil Udyog Ltd. Vs. Avanti Projects & Infrastructure Ltd.*** MANU/GH/0312/2009 observed that Section 42 of the

SRA is not a license to do something which is already prohibited by Section 41 of the SRA and the discretion in the matter of enforcing a negative covenant has not been taken away from the Court.

32. There is another aspect of the matter. The Joint Venture Company defendant No.1 was not formed for a period of three years only; there is nothing to suggest that it was to carry on business for a period of three years only. Nevertheless the plaintiff agreed that the right of the defendant No.1 Company to distribute the channels of the defendants No.2 to 4 was for a period of three years only, of which two years are already over. The plaintiff also agrees that the defendant No.1 Company after the third year has no right to claim any right to distribute the channels of the defendants No.2 to 4. In this light also, it is felt that it is not essential to protect the right even if any, of the defendant No.1 to distribute channels of the defendants No.2 to 4 for the remaining less than one year of the said three years by issuing an injunction and when the damages suffered are easily computable.

33. I may record that the senior counsels for the defendants No.2 to 4 have handed over two volumes comprising of a large number of judgments

and which are kept on record, but in the face of the view taken, need is not felt to deal therewith.

34. The suit for injunction is thus found to be not maintainable and is dismissed. The matter having been examined for this limited purpose, any observation made will not come in the way of the plaintiff / defendant No.1 claiming relief of damages or any other relief to which they may be entitled.

However in the facts, no costs.

RAJIV SAHAI ENDLAW, J

MARCH 19, 2013

‘gsr’