

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

% **Date of decision: 23rd May, 2019.**

+ **CS(COMM) 268/2019 & IAs No.7435/2019 (u/O XXXIX R-1&2 CPC) & 7436/2019 (u/O II R-2 CPC)**

TIMES INTERNET LIMITED

..... Plaintiff

Through: Mr. Rajiv Nayar, Sr. Adv. with Mr. Mohit Chadha and Mr. Saurabh Seth, Advs.

Versus

ALT DIGITAL MEDIA ENTERTAINMENT LIMITED

.....Defendant

Through: Mr. Amit Sibal, Sr. Adv. with Ms. Sonam Gupta, Mr. Kaushik Moitra, Mr. Anurag Tandon, Ms. Niyati Asthana, Mr. Sohan Kumar and Mr. Ambar Bhushan, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit “for permanent and mandatory injunction” pleading, (i) that the plaintiff is *inter alia* engaged in the business of production, development, marketing and distribution of media and entertainment content; the plaintiff owns and operates the digital platform namely MX Player; (ii) that the said platform of the plaintiff has become a preferred choice of millions of its customers who are looking for one-stop platform for movies, TV shows, web series, music videos and short videos; (iii) that the said platform of the plaintiff focuses on exclusive original content, with emphasis on high-quality Hindi and regional languages; (iv) that the defendant is engaged in the business *inter alia* of

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production and development of audio-visual content and is the producer and owner of media content, including original shows, web series, videos, sound recordings and other audio visual content; (v) that the defendant also operates and provides an over-the-top platform that offers subscription-based video on-demand services; (vi) that in the year 2018, the defendant offered to grant to the plaintiff, the right to integrate its digital platform / website / channel or other means of distribution of content operated by the defendant or its affiliates, including the platform named ALT Balaji, with the plaintiff's platform, to distribute the existing and additional programs operated by the defendant on Balaji platform and make them available to the viewers of the plaintiff's MX Player platform; (vii) that the plaintiff and the defendant entered into a Content Distribution Agreement dated 11th October, 2018 whereunder the defendant granted to the plaintiff, for the period from 28th September, 2018 to 27th September, 2019 *inter alia*, (a) the right to integrate, incorporate and embed the content of defendant's platform with the plaintiff's platform; and, (b) right to broadcast each of the programs or any parts thereof available on the defendant's Balaji platform on the plaintiff's platform; (viii) that in consideration of the rights granted by the defendant, the plaintiff, out of the total agreed consideration of Rs.12 crores, paid licence fee of Rs.6,48,00,000/- (Rs.4,32,00,000/- + Rs.2,16,00,000/-); (ix) that in terms of the Agreement, the defendant made the content available on its platform to the plaintiff in the format mutually agreed upon between the parties; (x) that during the meeting held on 4th March, 2019, the representatives of the defendant expressed their intention to, with effect from 1st April, 2019, withdraw all the content provided by the defendant under the said Agreement on the plaintiff's platform; (xi) that such sudden

withdrawal was not acceptable to the plaintiff, since the same was in breach of the Agreement which is valid till 27th September, 2019 and was bound to have severe and adverse implications on plaintiff's business plans and viewership; (xii) that the business plans of the plaintiff are devised on the basis of the quantum of content anticipated by the plaintiff from its content partners; thus the unexpected deviation from an agreed understanding by the defendant as a content partner of the plaintiff affected the business plans of the plaintiff; (xiii) that even though there was no obligation to hold discussions with the defendant but the plaintiff held discussions with the defendant; however the defendant was adamant; (xiv) that in the meeting held on 30th March, 2019, it was "agreed" that the programs to be provided by the defendant as per the Agreement would be tapered down, after mutual discussion and approval / consent of the plaintiff; (xv) however, the defendant, vide its email dated 2nd April, 2019 proposed that the defendant would withhold pulling out of its programs till 15th April, 2019; with effect from 15th April, 2019, ten programs would be taken off, similarly on 15th May, 2019, and 15th June, 2019 also ten programs would be taken off, and the plaintiff's platform could continue to use the programs mentioned therein till the end of the licence period; (xvi) however, the aforesaid proposal was not acceptable to the plaintiff; and, (xvii) the defendant abruptly took down the new episodes of the existing programs and stopped making its programs available to the plaintiff.

2. The following reliefs are claimed in the suit:

- "a) a decree of permanent injunction restraining the Defendant, its partners, directors or shareholders, as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licencees and

agents, from removing the entire or any part of the Program(s) (Existing Program(s) and / or Additional Program(s), as the case may be) or any other content, as agreed under the Agreement from the Licensed Platforms, during the subsistence of the Agreement;

- b) a decree for mandatory injunction directing the Defendant, its partners, directors, or shareholders, as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licencees and agents, to comply with the obligations under the Content Distribution Agreement dated 11.10.2018;
- c) a decree for mandatory injunction directing the Defendant, its partners, directors or shareholders, as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licencees and agents, to not only deliver / make available the Existing Programs on the Licensed Platform, but also provide to the Plaintiff, all Additional Programs that are currently being Broadcasted and in future will be Broadcasted, on the Balaji Platform, in such manner that all the Additional Programs are released on the Licensed Platform simultaneously with the release on Balaji Platform, during the subsistence of the Agreement;”

3. The suit came up first before this Court on 20th May, 2019, when the counsel for the defendant/caveator appeared and the hearing adjourned to the following day. The following day as well as on the date thereafter, the hearing was adjourned on account of non-availability of some counsel or the other.

4. The senior counsel for the plaintiff and the senior counsel for the defendant have been heard.

5. The senior counsel for the plaintiff has argued that out of the total annual licence fee of Rs.12 crores, the plaintiff has already paid Rs.6 crores to the defendant.

6. The senior counsel for the defendant contends that the plaintiff is seeking the relief of specific performance of the Agreement dated 11th October, 2018, without seeking the said relief and without making the requisite pleas therefor.

7. I have straightway enquired from the senior counsel for the plaintiff, whether the present suit is for the relief of specific performance of the Agreement and if so, what are the pleadings in this respect.

8. The senior counsel for the plaintiff, under instructions states that the plaintiff is not seeking specific performance of the Agreement dated 11th October, 2018. It is argued that the plaintiff is enforcing the negative covenant in the Agreement. Attention is drawn to the Agreement, in which the defendant is referred to as the 'licensor' and the plaintiff as 'licensee', relevant clauses whereof are as under:

“WHEREAS:

A. ...

B. ...

C. *The Licensor has offered to grant to the Licensee, the right to integrate the Balaji Platform with the Licensed Platform, distribute the Programs through the Licensed Platform, and exploit the Rights (defined hereunder) in the Programs, and the Licensee has agreed to the aforesaid arrangement for the Territory, in accordance with the terms of this Agreement;*

.....

2. GRANT OF RIGHTS

2.1 Rights. *The Licensor hereby grants to the Licensee, the Rights on a non – exclusive basis, including the following rights in and to each of the Programs, for the License Period and throughout the Territory. Parties agree that the Rights granted to the Licensee hereunder are non – transferable except to the Licensee’s Affiliates and as permitted in this Agreement, and shall be revocable by the Licensor only in accordance with the terms of this Agreement:*

2.1.1. The right to integrate, incorporate and embed the Content API in and with the Licensed Platform and cache the meta data of the Programs on Licensee’s servers, and utilize the Content API and the Programs for the purposes set out in this Agreement;

2.1.2. the right to Broadcast each of the Programs or any parts thereof available on the Balaji Platform as integrated in the Licensed Platform, in the Licensed Languages, during the License Period and in the Territory through any Modes of Exploitation, by means of internet or intranet on an Approved Device, on an unlimited runs basis without any restriction or limitation whatsoever in respect of the number of Broadcasts of any Program. It is hereby clarified that the Licensee / User shall have the right to exploit the Programs on the Licensed Platform through the Balaji Platform integrated with the Licensed Platform using Playback Functionality;

2.1.3. the right to Broadcast the Programs or any parts thereof on the Licensed Platform, as part of an On

Demand Service and/or on a video on demand basis or any such similar means or technology as specified under the Agreement;

2.1.4. to create thumb nails of and from the Programs and to display the same on the Licensed Platform through the Balaji Platform to enable end users to click on the thumb nails and access the Programs;

2.1.5. the right to create advertisement slots before, after or during any Program and insert advertisements of third parties or of the Licensee or any Affiliates in any Program, by way of banners, mid rolls, pre-rolls, post rolls and to sell and monetize such advertisement slots in any manner as the Licensee may deem fit, and receive consideration from third parties or displaying their advertisements during such advertisement slots of the Programs. Provided that the Licensee (i) shall ensure that the underlying content of each Program is not edited to create the advertisement slots in terms of this Clause, (ii) shall ensure that the advertisements do not interfere with the creative elements of any Program and does not change the concept and storyline of any Program; and (iii) shall not play advertisements of any Competitors during exhibition of any Programs of the Licensor licensed to the Licensee hereunder;

2.1.6. the right to promote and advertise the Broadcast of the Programs on the Licensed Platform, in subject to Clause 2.2 of this Agreement;

2.1.7. the right to Download and allow Users to Download the Programs (or any parts thereof) for offline viewing of the Programs on the Licensed

Platform, during the License Period; and the right to share and to allow Users to share the Programs or any parts thereof with other Users, for viewing within the Licensed Platform during the License Period;

2.1.8. the right to sue the names, photographs, likenesses of all performers associated with or involved in the creation of the Programs including the names, photographs, likenesses of the artists, composer, lyricist, musicians and other companies (i.e., all persons who have rendered services in connection with the Programs) in connection with the Programs and all other publicity material throughout the Territory for purpose of exploiting the Licensee's Rights under this Agreement, subject to Clause 2.2 of this Agreement; and

2.1.9. the right to superimpose the Licensee's or its Affiliates' trademark on the Licensed Platform, Promotional Materials and Additional Materials in a manner that does not have a material adverse effect on the Licensor's Intellectual Property Rights and/or the Licensor's branding on the Programs.

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5. DELIVERY OF PROGRAMS AND INTEGRATION OF CONTENT API

5.1. The Licensor shall make available the Content API to the Licensee in the format mutually agreed between the Parties in writing separately upon execution of this Agreement (emails allowed), and provide to the Licensee the access of the Content API for necessary integration of

Programs on the Licensed Platform, on or before the Execution Date.

- 5.2. *Simultaneously with the execution of this Agreement by the Parties, the Licensor shall deliver all Existing Programs to the Licensee, through Content APIs, to be integrated on the Licensed Platform.*
- 5.3. *Thereafter, the Licensor shall provide to the Licensee, all Additional Programs that are Broadcast on the Balaji Platform, in such manner as shall ensure that all Additional Programs are released on the Licensed Platform simultaneously with the release on Balaji Platform but no later than 2 (two) hours (solely in case of technical failure) from the release of such Program on the Balaji Platform or Youtube.*
- 5.4. *The Licensor shall ensure that all upgrades, updates, additions to the Programs (“**Updated Programs**”), occurring at any time during the Term, are delivered to the Licensee simultaneously and available for transmission to Users on the Licensed Platform, such that at any time during the Term, the same version of all Programs is exhibited on the Licensed Platform and on the Balaji Platform. All Updated Programs as available on the Balaji Platform shall be deemed to form part of the Programs.*
- 5.5. *The Licensor shall ensure that the Content API and other related integrations as may be required by the Licensee for the purpose of this Agreement, are implemented in a smooth manner, without any disruption, interruption and interference to/with the Licensed Platform, save and except for technical disruption which is not in anyway attributable to the Licensor, its employees, agents and consultant.*

- 5.6. *The Licensee shall be entitled to undertake all tests required to assess and examine the functionality and operation and the integrations undertaken by the Licensor pursuant to this Agreement (“**Acceptance Testing**”). If during the course of the Acceptance Testing or at anytime thereafter during the License Period, the Licensee identifies or discovers any errors or defects or other functionality issues in the Content API provided by the Licensor (“**Errors**”), then the Licensor shall rectify the same within a maximum period of 3 (three) working days from the time the Error is reported by the Licensee to the Licensor in writing (emails allowed) and skype/wechat of any authorized representatives of the Licensor.*
- 5.7. *Further, the Licensor shall ensure that any changes or modifications to the Content API undertaken by the Licensor shall be implemented without any hindrance in the functioning of the Licensed Platform (save and except for technical disruptions which are not in anyway attributable to or are not in control of the Licensor, its employees, agents and consultants) and transmission of the Programs on the Licensed Platform, and without any changes to the user interface and user experience on the Licensed Platform. In the event of any interruptions in the audio/video signals of the Balaji Platform on the Licensed Platform, the Licensor will rectify the same as soon as possible and no later than 24 (twenty four) hours from the time such interruptions occur.*
- 5.8. *The Programs shall be hosted on the Licensor’s server(s) and will be delivered using Licensor’s delivery network. The Licensee shall cache the meta data on Licensee’s server to avoid frequent calls to Licensor’s servers.*

- 5.9. The Licensor shall be responsible for providing, procuring, maintaining and supporting all the hardware and all third party software licenses related to the Content API of the Balaji Platform required throughout the Term, to operate the Balaji Platform and the Content API and to grant the license hereunder, and to deliver and exhibit the Programs through the Licensed Platform, without any interruptions or disruptions (save and except for technical disruptions which are not attributable to or not in control of the Licensor, its agents and consultants). It is hereby agreed by the Parties that the transmission of the Programs on the Licensed Platform shall be simultaneous with that of the Balaji Platform. All business, administrative and other expenses in relation to delivery of the Programs on the Licensed Platform, by the Licensor shall be incurred solely by the Licensor.
- 5.10. The Parties further agree that if at any time during the Term, any Program(s) are not available/accessible on the Licensed Platform as a result of a delay in adherence to any of the timelines set out above in this Clause 5, the License Period shall stand automatically extended with such period for which the Program(s) remained unavailable on the Licensed Platform.

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11. TERMINATION

- 11.1. Either Party shall be entitled to terminate this Agreement, by giving a written notice of 7 (seven) days to the other Party (“Defaulting Party”) in the event:

11.1.1. the Defaulting Party breaches any of its covenants or obligations hereunder or any other terms of this Agreement, including the Licensor’s failure to delivery any Programs in

accordance with the terms of this Agreement, and failure to cure such breach within 7 (seven) days from being notified of the occurrence of such breach. In the event of any payment default by the Licensee, the cure period specified above shall be 30 (thirty) working days; or

11.1.2. any representation and/or warranty of Defaulting Party is found to be false, misleading, untrue, or inaccurate in any manner, and failure of the Defaulting Party to rectify the same within 7 (seven) days of being notified of the relevant representation and/or warranty being false, misleading, untrue, or inaccurate; or

11.1.3. any claims or proceedings being made against the Defaulting Party which is not resolved or in respect of which no injunction is granted (where applicable) for a period of more than 60 (sixty) days, and the continuance of which claim/proceeding(s) adversely hampers the arrangement or business contemplated between the Parties hereunder;

11.1.4. any petition for winding up, liquidation, insolvency or bankruptcy is admitted against the Defaulting Party in any competent court.

11.2. Each Party shall be entitled to terminate this Agreement, by giving a prior written notice of 7 (seven) days to the other Party, in the event of a Force Majeure Event affecting the other Party continuing for a period of more than 60 (sixty) days.

9. The senior counsel for the plaintiff contends that the negative covenants which the plaintiff is enforcing by this suit are contained in Clauses 5.5 and 5.9 of the Agreement by use of the words “.....without any disruption, interruption and interference....”. It is argued that the defendant having agreed to supply and deliver its creative content to the platform of the plaintiff and having further agreed to not cause any disruption, interruption or interference therewith, can be restrained by a decree of permanent injunction as sought, from so refusing to supply its creative content for viewership by the customers of the plaintiff on the platform of the plaintiff. It is further contended that the defendant, without even terminating the Agreement, is causing interruption, disruption and interference in supply and delivery of creative content and the plaintiff is entitled to a decree for permanent injunction for restraining the defendant from causing interference, disruption and interruption in supply and delivery of creative content.

10. The senior counsel for the plaintiff, on enquiry, states that the plaintiff was getting the entire content in terms of the Agreement, till 17th April, 2019, whereafter the defendant has stopped supplying the entire content.

11. Per contra, the senior counsel for the defendant has argued that, (a) the plaintiff, in the garb of permanent and mandatory injunction, is seeking the relief of specific performance, without even paying the requisite court fees therefor; reliance in this regard is placed on **Mujeeb Rehman Vs. Mohd. Nabi** 2017 SCC OnLine Del 11393; (b) the plaintiff in the plaint has admitted withdrawal by the defendant of all the content of the defendant from the platform of the plaintiff, thereby admitting the termination of the

Agreement; (c) attention is invited to the communication dated 13th March, 2019 of the defendant to the plaintiff intimating the plaintiff of the defendant's desire to withdraw the Agreement on account of the same being unworkable; attention is also invited to the communication dated 26th April, 2019 of the defendant to the plaintiff referring to the communication dated 13th March, 2019 and it is argued that the plaintiff also understood the Agreement to have been terminated by the defendant; (d) the Agreement is not specifically enforceable owing to the bar contained in Section 14(b) and (d) of the Specific Relief Act, 1963 since it entails performance of a continuous duty which the Court cannot supervise and because the contract contained in the Agreement is in its nature determinable; attention is invited to Clause 11 supra of the Agreement which provides for termination thereof; (e) on enquiry, whether not Clause 11 provides for termination of the Agreement only in the eventualities mentioned therein and not otherwise at the wish of the parties, and whether from such a clause it can be said that the contract by its nature is determinable, it is stated that such a clause does not affect the determinability of the agreement; reliance is placed on ***Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*** 2000 (55) DRJ (DB) and on ***Turnaround Logistics (P) Ltd. Vs. Jet Airways (India) Ltd.*** MANU/DE/8741/2006; (f) there is no balance of convenience or irreparable loss to the plaintiff by termination of Agreement and there are no pleadings also to the said effect; (g) Section 41(e) of the Specific Relief Act bars the grant of injunction to prevent the breach of a contract the performance of which would not be specifically enforced; (h) since the contract is not specifically enforceable owing to the bar of Section 14(b) and (d), no injunction also for breach by the defendant of the Agreement can be granted;

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(i) the argument that the plaintiff by this suit is enforcing a negative covenant is also not correct; reliance is placed on ***Yogesh Radhakrishnan Vs. Media Networks & Distribution*** 201 (2013) DLT 773 to contend that Clauses 5.5 and 5.9 of Agreement do not constitute a negative covenant within the meaning of Section 42 of the Specific Relief Act; (j) though the suit itself is not maintainable, but even if were held to be maintainable, the plaintiff is not entitled to the interim relief claimed which is the same as the final relief; reliance is placed on ***Bank of Maharashtra Vs. Race Shipping & Transport Co. Pvt. Ltd.*** (1995) 3 SCC 257 deprecating the practice of granting interim orders which practically give the principal relief sought; (k) the entitlement of the plaintiff if any is only to damages for breach of contract and the plaintiff also, being conscious of the same, has applied under Order II Rule 2 of the CPC to subsequently sue for the relief of damages; (l) on enquiry, whether not there is also an element of public interest in the customers of the plaintiff being not deprived of watching the creative content of the defendant on the platform of the plaintiff, it is contended that the Agreement in any case was for a period of one year only and whereafter the customers of the plaintiff in any case would be deprived of the said creative content of the defendant unless the defendant agreed to continue to supply and deliver such creative content to the plaintiff; it is also contended that the programmes / serials mostly run for more than a year and thus there was no public interest in entering into the Agreement for a period of one year only; it is further contended that the said customers, after 27th September, 2019 or now, will have an option to shift to another platform including of the defendant or of others to whom the defendant is so supplying the creative content; and, (m) on enquiry, whether not the plaintiff

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must have arranged its affairs till 27th September, 2019 on the premise of the creative content of the defendant continuing to be available to the plaintiff, and upon refusal of the defendant to so supply the creative content, will be left high and dry without any creative content, it is argued that the plaintiff has not even pleaded that it has no other content to replace the content which was to be supplied by the defendant; it is argued that the plaintiff, on its platform has content available from Hungama.com, T-Series and Sony Live as well as plaintiff's own substantive content, the plaintiff being a part of the Times of India Group.

12. Both the senior counsels also drew attention to Clause 5.10 of the Agreement providing that if at all any time during the term of the Agreement any programme was not made accessible by the defendant to the plaintiff, the licence period shall stand automatically extended for such period for which the programme remained unavailable to the plaintiff. While the senior counsel for the plaintiff contended that the same shows that the creative content agreed to be provided was to be provided in any case, the senior counsel for the defendant contends that the same demonstrates that time was not of the essence. It is argued that even if interim injunction is not granted but ultimately it is found that the content was to be so provided by the defendant to the plaintiff, it can be so ordered to be provided after final adjudication of the suit.

13. The senior counsel for the defendant, with reference to Clause 7 titled "Consideration" of the Agreement providing for the licence fee of Rs.12 crores payable in two tranches, of Rs.6 crores at the time of entering into the Agreement and the balance Rs.6 crores after six months, has contended that

the defendant, on the expiry of six months, informed its intent to the plaintiff.

14. The senior counsel for the plaintiff, in rejoinder (i) drew attention to para no.10 of the plaint to contend that the plaintiff therein has pleaded “...that considering the business plans of the plaintiff for any period are devised basis the quantum of content available or anticipated by the plaintiff from its content partners like, defendant in the instant case, any unexpected deviation from an agreed understanding with any content partner adversely affects its business plans, viewership, programming and other commercial aspects of the plaintiff’s business” and also to para no.13 of the plaint where the plaintiff has pleaded that deprivation of the creative content agreed by the defendant to be provided would have long-term monetary as well as business repercussions to the plaintiff; (ii) drew attention to the communication dated 12th April, 2019 of the defendant to the plaintiff enquiring when the episodes launched by the defendant of “*Dil Hi Toh Hain Season 2*” and “*Kehne Ko Humsafar Hain Season 2*” would be live on the platform of the plaintiff, to contend that the defendant, after 31st March, 2019 also was treating the Agreement as subsisting and it is now wrongly argued that the defendant in the beginning of March, 2019 only had given notice to the plaintiff of termination of the Agreement with effect from 31st March, 2019; (iii) argued that the plaintiff is not asking for specific performance because the creative content which the defendant has already delivered / given to the plaintiff cannot be taken back by the defendant and the plaintiff is thus seeking permanent injunction against the defendant to restrain the defendant from doing so and is claiming mandatory injunction

with respect to the new content which also the defendant under the Agreement had agreed to provide / deliver; and, (iv) argued that the negative covenant, besides in Clauses 5.5 and 5.9, is also contained in Clause 5.7, also providing that the defendant shall implement the Agreement without any hinderance. On enquiry whether there was any plea in the plaint, of the suit being to enforce the negative covenant, it is argued that the said plea is to be found in para 9 and last part of para no.10 of the plaint, though “not very happily worded”.

15. I have considered the rival contentions.

16. In *Mujeeb Rehman* supra cited by the senior counsel for the plaintiff, I was concerned with the question whether relief in the nature of enforcement of contractual obligations can be claimed by seeking a mandatory injunction. It was held that (i) the law relating to specific performance as well as relating to injunctions is contained in the Specific Relief Act but which deals with the two separately; (ii) to hold that the plaintiff has a choice, either to sue for specific performance or to sue for mandatory injunction, would result in defeating the legislative scheme contained in the Specific Relief Act as well as in the Court Fees Act, 1870 and in Suits Valuation Act, 1887, separately providing for the reliefs of specific performance and injunctions; and, (iii) a relief in the nature of specific performance cannot be claimed by seeking the relief of injunction and if was claimed, the plaint would be liable to be rejected.

17. The plaintiff herein has not only not claimed the relief of specific performance but chosen to claim reliefs of injunction and valued the said

reliefs accordingly, but the senior counsel for the plaintiff also expressly states that the plaintiff is not suing for specific performance.

18. However the relief which the plaintiff is claiming and which as per the terms of the Agreement is the remedy in law of the plaintiff, is of specific performance and which has not been claimed. The argument that the defendant is sought to be restrained by a decree of permanent injunction from taking back what it has already delivered / given to the plaintiff in pursuance of the Agreement, cannot be accepted. A bare reading of the Agreement shows that such delivery was not in a tangible form i.e. in the form of a tape recording or recording on a compact disk or a hard drive or in any other medium, but by giving by the defendant a right to the plaintiff to integrate, incorporate and embed the creative content of the defendant in and with the Licensed Platform and cache the meta data of the programmes on the plaintiff's servers. Thus for the said creative content to be continued to be delivered / provided by the defendant to the plaintiff, the defendant was required to, for the period of the contract, continue to allow such integration and which required performance of a continuing obligation. Thus the creative content of the defendant, which in the past may have been available to the plaintiff would cease to be so available on the defendant ceasing to perform its obligation. Similarly, for the plaintiff to be entitled to additional programmes i.e. the programmes of the defendant not existing on the date of the Agreement, the defendant was required to continuously allow / permit integration thereof with its servers to enable the plaintiff to integrate with the server of the defendant. The remedy of the plaintiff thus, for breach by the defendant of the Agreement, was / is of specific performance, which has

not been claimed. The contention of the senior counsel for the defendant, of the suit filed for the reliefs of specific performance in the garb of injunction being not maintainable, has to prevail.

19. While allowing specific performance, injunction can be issued; but where the remedy in law is found to be of specific performance and which has not been claimed, injunction cannot be granted.

20. It is for this reason only that Section 41(e) supra bars grant of injunction to prevent breach of contracts which are not specifically enforceable.

21. One of the arguments of the senior counsel for the defendant relying on ***Rajasthan Breweries Ltd.*** supra is that the contract between the parties was determinable and when it is so, it is not specifically enforceable.

22. In ***Rajasthan Breweries Ltd.*** supra, the Division Bench of this Court, noticing that the Agreement subject matter before them permitted termination at the occurrence of any of the events mentioned therein, held that all revocable deeds and voidable contracts may fall within the determinable contracts and the principle on which specific performance of such an agreement would not be granted is, that the Court will not go through the idle ceremony of ordering execution of a deed or instrument which is revocable at the will of the executant. Reliance was placed on ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service*** (1991) 1 SCC 533 and on ***Classic Motors Ltd. Vs. Maruti Udyog Ltd.*** (1997) 65 DLT 166. In ***Turnaround Logistics (P) Ltd.*** supra also, it was held that even if the determination of the agreement between the parties was not in accordance

with the terms and condition on which the Agreement was terminable, it will only entitle a party for damages and not specific performance.

23. Though I am bound by the judgments aforesaid, but entertain reservations. In my view, the meaning which is required to be given to Section 14(d) is, that only where the agreement is determinable at the whim of either party i.e. without any reason also, is specific performance thereof barred. Holding that even those agreements which provide for termination in specific eventualities, cannot be specifically enforced even if are terminated without such eventuality occurring, would lead to a situation where no agreement would be specifically enforceable making the part relating to specific performance of the Specific Relief Act redundant. Thus in my view where the agreement which is otherwise specifically enforceable is terminated on the ground of any of the eventualities in which termination was permitted occurring, it is for the Court to decide whether such eventuality has occurred or not and if finds the eventuality to have not occurred, shall be entitled to grant specific performance. I am supported in this view by the judgments of this Court in *Upma Khanna Vs. Tarun Sawhney* 2012 SCC OnLine Del 2716 (DB), *Ascot Hotels and Resorts Pvt. Ltd. Vs. Connaught Plaza Restaurants Pvt. Ltd.* (2018) 249 DLT 329 and *Brokers & Brokers Pvt. Ltd. Vs. Om Prakash Bhola* (2007) 143 DLT 736 [Section 14(d), prior to the amendment of the year 2018 to the Specific Relief Act, was Section 14(1)(c)].

24. That brings me to the question, whether the plaintiff is entitled to injunction to the defendant to perform the negative covenant.

25. Section 42 of the Specific Relief Act permits such injunction where the contract “comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act”. I have in ***Yogesh Radhakrishnan*** supra cited by the senior counsel for the defendant, held as under:

“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.*

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.”

26. It is the contention of the senior counsel for the defendant that in the present case there is no negative agreement not to do a certain act, separately

from the affirmative agreement to do a certain act; there is only an affirmative agreement to, without any disruption, interruption and inference, continue to supply creative content and the case is not covered by Section 42 of the Specific Relief Act.

27. Merit is again found in the contention of the senior counsel for the defendant, which prevails. Section 42 of the Specific Relief Act is attracted where though the agreement to do something is not specifically enforceable, but to prevent the defendant from dishonestly and for the sake of better commercial exploitation not doing that thing, the defendant has also agreed to not do something other than that agreed. Reference in this regard may also be made to *Vinod Chandra Hiralal Gandhi Vs. Vivekanand Mills Ltd., Ahmedabad* AIR 1967 Guj 255 (DB) and *Urmila & Co. Pvt. Ltd. Vs. J.M. Baxi & Co.* AIR 1986 Del 336, which remained to be noticed in *Yogesh Radhakrishnan* supra.

28. It is not as if in the present case the creative content to be supplied / delivered by the defendant to the plaintiff, if not delivered, was coupled with a covenant restraining the defendant from delivering it to a competitor of the plaintiff. In fact, the Agreement expressly records the delivery to be on a non-exclusive basis and the counsels during the hearing also informed that the same creative content, besides on the platform of the defendant, is also available on other platforms during the time of the agreement and even now. Thus no case for injunction under Section 42 of the Specific Relief Act also is made out.

29. The purport of the findings aforesaid is, that the suit filed is not maintainable. Once it is so, the need to keep the suit pending is not felt.

30. The suit is dismissed with costs. Professional fee assessed at Rs.2 lacs.
Decree sheet be drawn up.
31. The plaintiff shall however be entitled to claim any other remedy to which it may be entitled to from the actions impugned of the defendant.

MAY 23, 2019

‘bs/gsr’

(Corrected & released on 2nd July, 2019)

RAJIV SAHAI ENDLAW, J.

सत्यमेव जयते