Dispute Resolution Hotline

November 15, 2011

NO INJUNCTION TO INDIRECTLY COERCE PERFORMANCE OF POSITIVE COVENANTS

INTRODUCTION

The Delhi High Court (**"Court"**) by its order dated November 8, 2011 in Fashion Television India Pvt Ltd (**"Appellant"**) v/s fTV BVI (**"Respondent"**) refuses to grant an injunction enforcing negative covenants that would coerce the Respondent to continue the contractual agreement between the parties.

FACTS

A. MEMORANDUM OF AGREEMENT

Modi Entertainment Network Ltd. (**'MEN'**) and the Respondent entered into the Memorandum of Agreement on August 9, 2001 (**"MOA"**) wherein 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 program, 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 program sales in the Territory. The period of the MOA was five years from the date of the execution. 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 of the MOA. Under Clause 6 (3) of the MOA 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. Clause 9 of the MOA 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 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 Appellant with the consent of the Respondent. Clause 21 of the MOA gave MEN a right of first refusal and provided that if the Respondent determined into enter an agreement with a third party with respect to distribution, air time marketing and merchandising rights for new channels, the Respondent was under an obligation to first re-offer to MEN the opportunity to enter into an agreement on the same terms as with the third party. Clause 30 of the MOA 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.

B. FIRST ARBITRATION PETITION

Upon the alleged breach by the Respondent of MOA the Appellant filed an Arbitration Petition O.M.P. No. 207 of 2003 under section 9 of the Act before the Delhi High Court ("Court") (**"First Petition"**) The First Petition was disposed of in terms of the settlement between the parties. The consent terms were filed in this Court on January 22' 2004 ("**Consent Terms"**). Both parties agreed that the MOA would continue to be valid and binding on the parties.

C. ADDENDUMS

On August 9, 2005 an addendum (**'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 April 1, 2005. By the First Addendum the minimum guarantee was reduced to US$ 240,000 per annum or 30% of the net revenue collected for revenue from advertising sales, sponsorship sales, events, program placement income and any other revenue to air-time sales in the Territory (whichever was higher).

This was followed by a second addendum dated March 31, 2006 ('**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 would regulate the terms of commercial business and understanding of the parties including the assignors and beneficiaries and or their agents on the terms as hereinafter mentioned. The minimum guarantee in the Second Addendum was same as that under the First addendum. 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 March 31, 2011.

D. TERMINATION NOTICE

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On March 28 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 12,500 being the monthly minimum guarantee due from October 2010 to February 2011. The second letter referred to the expiry of the MOA, the Consent Terms and the Second Addendum ("**Termination Notice"**).

E. SECOND ARBITRATION PETITION

The Appellant then filed an Arbitration Petition, O.M.P. No. 390 of 2011, under section 9 of the Act before the Court (**"Second Arbitration Petition"**) seeking the interim relief of restraining the Respondent from giving effect to the Termination Notice 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. In the said petition, the Court passed an interim order on March 24, 2011 by which subject to deposit of 50% of minimum guarantee before the Registrar General of this Court till the July 22, 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, in case not already appointed (**"Interim Order"**).

The Respondent on June 2, 2011 filed an application for vacation of the said interim order. On August 3, 2011 on noting that the parties had nominated their respective Arbitrators, the Court directed that the Second Arbitration Petition should 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.

F. ORDER OF THE ARBITRAL TRIBUNAL

Before the arbitral tribunal the Appellant filed an application on September 2, 2011 for directions to the Respondent to disclose and produce the agreement entered into between it and Media Network and Distribution (India) Ltd (**"MND"**) for distribution, merchandising and licensing the rights of FTV channel. Pursuant thereto the Respondent submitted a incomplete copy of the agreement dated April 19, 2011 between MND and itself (**"MND Agreement"**)

The arbitral tribunal, upon hearing the parties passed an order dated October 20, 2011 rejecting the Appellant's application under Section 17 of the Act and vacated the Interim Order (**"Impugned Order"**).

G. PRESENT CASE

Aggrieved by the impugned order the Appellant filed an Appeal before the Court under Section 37(2) (b) of the Act (**"Appeal"**). The Appellant also filed Arbitration Petition, O.M.P. No. 809 of 2011, under section 9 of the Act for directions to the Respondent to comply with the MOA and not act in furtherance of the MND Agreement.

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.

ARGUMENTS

Contentions of the Appellant

1. Till date there was no formal termination of the MOA. The Consent Terms and First and Second 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.
2. Under Section 42 of the Specific Relief Act ("SRA"), 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 relief and restraining the Respondent from entering into any fresh agreement with third parties.
3. 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 First and Second Addendums. In fact nothing prevented the Respondent from blocking the signals received by the Appellant. Since the MOA was kept alive, the Court could, consistent with the intention of the parties, enforce their respective obligations and require the Respondent to abide by the negative covenant.
4. The MND Agreement 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.
5. 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.
6. 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.

CONTENTIONS OF THE RESPONDENT

1. The MOA was by very nature determinable and therefore could not be specifically enforced in terms of Section 14 (1) (c) and Section 41 (e) of SRA.
2. The Appellant had factually misled the Court when the Interim Order was passed.
3. The First and the Second Addendums were by way of an amendment to the term of the MOA. The MOA 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.
4. The grant of an injunction under Sections 41 or 42 of SRA was discretionary.

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
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5. 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.

6. 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.

7. It was only on account of the Interim Order passed by the Court that a situation was brought about whereby the Respondent was compelled to continue transacting with the Appellant and not otherwise

8. 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.

JUDGMENT

The court stated that the mere existence of a negative covenant is not enough to persuade a court to grant an interim injunction to enforce it. Under Section 14 (1) (c) of SRA, a contract which is in its nature determinable cannot be specifically enforced. Further under Section 41 (e) of 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 of SRA 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 of SRA.

The Court concluded that prima facie the MOA 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. Consequently the conditions envisaged under Section 42 of SRA for enforcement of a negative covenant of the MOA do not appear prima facie to be met.

The Court further observed that as in the present case, the Respondent cannot possibly telecast its channel in India without being an associated with an Indian broadcaster holding a valid license. 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. Thus, 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) of SRA. In other words, the Court would in effect be requiring the Respondent to perform a positive covenants 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 Court thus, concluded that the present case would be a good case to refused interim relief.

ANALYSIS

In the Judgment the Court lays down important principle that an interim relief to enforce a negative covenant under a contract would be refused if the same would render a party to a contract idle unless it continues to perform the positive obligations under the contract.

- **Prateek Bagaria, & Vyapak Desai**