IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Arbitration Petition No. 222 of 2008

Rajiv Vyas)
of Bombay Indian Inhabitant)
having his address at 601-A,)
Meghdoot Apartments, Samarth)
Prasanna CHS, Lokhandwala)
Complex, Andheri(West),)
Mumbai 400 059).Petitioner

vs.

1. Johnwin Manavalan s/o Shri)
Shri Groge Mandavalan)
having his resident/office)
at M/30, Himen Shopping)
Centre, Opp: ratna Hotel)
S.V.Road, M.G.Road junction)
Goregaon West,Mumbai 400062)
2. Mr.Ganesh Naidu)
S/o Shri Govindraj Naidu)
having his office at Naidu)

House, Shimpoli village)
Borivli West, 400 092)
3. SCOD 18 Networking Pvt.)
Limited Flat No.3/4,)
Prathmesh Horizon, Link)
Road,Opp. Don Bosco School)
Borivli West, Mumbai 91).Respondents

Judgment Reserved on:3.3.2009.

Judgment Delivered on:6.7.2009.

Mr.C.U.Singh, Sr.Counsel with Ms.Soma Singh i/b Sanjay Udeshi and Co. for petitioners.

Mr.Janak Dwarkadas, Sr.Counsel with Mr.F.Devetri, Sr.Counsel and Mr.Shaqran Jagtiyani i/b Federal Rashmikant for respondent nos. 1 and 2.

Mr.V.R.Dhond i/b M/sKartikeya and Associates for respondent no.3.

CORAM: S.J.KATHAWALLA J
Date : 6th July, 2009.

J U D G M E N T :

1. This petition is filed by the petitioner under section 9 of the Arbitration and Conciliation Act, 1956 (the Act).

2. The learned Senior Advocate

appearing for the petitioner has at the commencement of the final hearing of this petition clarified that the petitioner is not seeking any reliefs against defendant no.3 (SCOD 18 Networking Pvt. Ltd.) and is also not seeking any relief pertaining to or arising out of the management agreement dated 5th September, 2006 entered into between the Company called SCOD Networking Pvt. Ltd. and the petitioner. The main grievance of the petitioner in the present petition is that the respondent nos. 1 and 2 have breached Clause 12 of the Shareholders Agreement (Exhibit-A to the petition) i. e. the non compete and non solicitation clause. The petitioner by the present petition is, therefore, desirous of restraining respondent nos. 1 and 2 from in any manner committing breach of clause 12 of the said shareholders agreement.

3. According to respondent nos. 1 and

2 the Agreement containing the Arbitration Clause is not a concluded Agreement, but is incomplete, inchoate and has not come into existence. It is submitted that if the underlined agreement has not been concluded or is not in existence, the arbitration agreement would not be a valid and existing arbitration agreement and cannot be independently enforced. The question therefore of granting any relief under section 9 of the Act cannot arise. It is submitted that in view of the decisions of the Hon ble Supreme Court in **SBP and Co. Vs.Patel Engineering Ltd. reported in (2005) 8 SCC 61** and **Sundaram Finance Ltd. Vs. NEPC India Ltd.,reported in 1999 2 S.C.C.479,** it is a settled position that if there is no arbitration agreement in existence between the parties, the Court will not exercise jurisdiction under section 9 of the Act. Equally, the Court before which a section 9 petition has been

filed has to satisfy itself of the existence of an arbitration agreement.

4. Briefly set out are the facts in the matter.

i) On 1st September, 1996, SCOD Networking Pvt. Ltd. (hereinafter referred to as the said Company) was incorporated as a private limited company under the provisions of the Companies Act, 1956 with an object of carrying on the business as Multi-System Operators (MSO) and distribute TV channel and provide broadcasting services. The idea of the said company was conceived and conceptualized by the petitioner and respondent nos.1 and 2. According to the petitioner, the idea behind forming the said company was to bring together a group of 18 odd cable operators and distributors who would give access to their networking and customer base for transmission of cable video services. The benefits which

the said company offered to various cable operators was far more favourable than what was being offered by other MSOs and Distributors. The model was designed on the basis of a cooperative like AMUL where the cable operators would have continuous revenues and additionally have a stake in the company which they would be able to unlock after three years.

ii) On 5th September, 2006 the Management Contract was signed between the said company through respondent no.2, and the petitioner, setting out the terms of engagement of the petitioner as Executive Director and CEO of the company and to provide management services for the period and subject to the terms and conditions set out therein.

iii) In January, 2007, YOU Telecom India Pvt. Ltd. (for short YOU)expressed an interest in the said company and negotiations commenced. On 19th January,

2007 the said company engaged the services of Edelweiss Capital Limited (for short Edelweiss) as merchant bankers. Though the term of services of Edelweiss expired in October, 2007, Edelweiss continued to represent the said company till March, 2008.

iv) On 9th August, 2007 the term sheet/letter of intent came to be executed between the parties to confirm YOU s interest in equity investment in the said company. Pursuant to the term sheet, YOU conducted due diligence activities. In the term sheet the Founder group is described as follows:

> *The Initial shareholders of SCOD Networking Private Ltd. (Company) both collectively and severally shall be known as the Founder Group These will consist of not less than 15 distributor shareholders from*

those mentioned in the list of 21 distributors attached vide Annexure 1 .

Annexure I contains the names of 21 distributors/authorized personnel along with their areas of operation set out under the caption Head-end .

v) On 10th August, 2007, a Shareholders Agreement was executed between the petitioner, respondent no.1 and respondent no.2 (first share-holders agreement). According to the petitioner, the petitioner is not in possession of the first shareholders Agreement and, therefore, the same is not produced before the Court.

vi) In September, 2007, Articles of Association of the said company were amended to include the petitioner as a permanent director of the company along with respondent nos.1 and 2.

vii) On 3rd September, 2007, the second Shareholders Agreement (for short agreement) was executed between the petitioner and respondent nos.1 and 2 at the office of M/s Paras Kuhad and Associates, Advocates in presence of Mr.Manish Desai, a senior partner in the said firm. The date on which the said agreement is made and entered into is not filled in and is left blank in the agreement. At the out set, it is set out that the said agreement is between the share holders of the said company whose names are listed in Schedule A to the agreement and who were referred to in the agreement as group A share holders. Recitals A, C and D in the agreement are reproduced hereunder:

A) The Group A shareholders listed in Schedule A have agreed to jointly engage in the business of the Company more

particularly described in Clause 1.1.(c) of this Agreement. The Group A shareholders are further divided into promoter shareholders and distributor shareholders as mentioned in Schedule A to this Agreement;

C) The Group A Shareholders (except Mr.Rajiv Vyas) have agreed to provide to the business of the company access to their entire networking and customer base transmission of cable (video) services in the areas more particularly set out against their names in Schedule A.

D). The group A shareholders of the Company have agreed to reduce to writing their agreement concerning the

ownership, shareholding, management, operation and control of the Company.

Immediately after the recitals it is provided:

NOW, THEREFORE, in view of the foregoing recitals and in consideration of the mutual covenants and promises set forth in this Agreement, and for valuable consideration, the parties hereby set forth their commitments and agreements as follows:

viii) Clauses 1.1(b),(c), (h),(i), (j), (p),(q), (r) and (s) define the words/phrases Agreement , Business , date of Execution , Distributor Shareholders , Group A Shareholders , R.V.Co. , R.V.Co.shareholding , shares , shareholder as under:

(b) Agreement shall mean this agreement including the Schedule (s) hereto.

(c) Business for the purposes of this Agreement means doing business as distributors and providers of telecommunication services including but not limited to broadcasting services and distribution of T.V. Channels which amongst other businesses primarily includes business of providing broadcasting services, receiving and distributing signals from broadcasters of various television channels both free to air and encrypted, broadcasted by either satellite or terrestrial means and re-transmission/distribution of all or few of the broadcasting signals so received from the broadcasters to the cable operators affiliated to the Company directly or through the authorized distribution agency or agencies of the Company or to the user directly by means of all media and technology (now or hereafter created) including but not limited to diffusing or

re-distributing such channels by means of co-axial cable and/or optical cable and such other available means of transmission and the equipment associated with them. It also includes re-transmission/ distribution of the broadcasting channels which will be done by the Company through the Cable Operators affiliated with the Shareholder and/or the Company or directly on a subscription basis. It further includes sale by the Company of air time of the local channels to advertisers and acting as an Internet Service Provider (ISP) to carry on the business of Internet distribution services, to offer users access to the Internet and related services including, but without limitation, services relating to Internet transit, domain name registration and hosting, dial-up or DSL access, leasedline access and colocation and development of its infrastructure to provide to the end

users a single platform from where they can access broadcasting, internet and telephony related services integrated with existing technologies or various future technologies and advancements like Voice Over Internet Protocol (VOIP), Telephony, Video on Demand services etc. using Digital Encrypted Boxes or otherwise;

(h) Date of Execution means the date of signing of this Agreement or the date set out hereinabove as the date of making this Agreement, whichever is earlier.

(i) Distributor Shareholders are shareholders listed in Part II of the Schedule A of this Agreement including any new distributor of the Company unless otherwise specified.

(j) Group A Shareholders are shareholders listed in Schedule A of this

Agreement including any new shareholder inducted as a Group A shareholder.

(p) RV Co. shall mean Mr.Rajiv Vyas and SVJ Networking Private Limited jointly.

(q) RV Co.shareholding means the total percentage of the paid up capital of the Company held by Mr. Rajiv Vyas and SVJ Networking Private Limited Jointly.

(r) Shares means all the issued and outstanding shares of the company.

(s) Shareholder of the Company means each party to this Agreement as well as every person who is subsequently inducted as Shareholder of the Company and who signs the Deed of Adherence.

ix) Clause 2 of the agreement pertains to the share capital, shareholding and price. It is provided in clause 2.1 that the authorized capital of the company is Rs.1,00,00,000/- (Rupees One crore only), divided into 1,00,00,000/- (One Crore)

equity shares of Rs.1/- (Rupee One only) each. The shareholders agree that they shall increase the share capital of the Company to Rs.10,00,00,000/- (Rupees Ten crores only) divided into 10,00,00,000 (Ten Crores) equity shares of Rs.1/- (Rupee one only only) each and Memorandum of Association and the Articles of Association of the company shall be amended accordingly. It is provided in clause 2.2 that the Group A shareholders, with the exception of Mr.Rajiv Vyas (petitioner) and SVJ Networking Private Limited (hereinafter jointly referred to as RV Co.), have contributed and made cash payments totalling to a sum of Rs. 3,33,00,000/- (Rupees Three Crore and Thirty Three lakhs only) and each shall be allotted shares of the Company, as and when the authorised share capital of the Company is increased. It is further agreed and provided in clause 2.3 of the

Agreement that in consideration of the contribution made by Mr.Rajiv Vyas (petitioner) in terms of the conceptualization, formation of the company, consultation, providing legal and investment banking tie up as well as actively participating in all aspects to funding of the company and for negotiations to be held in the future, the RV Co. shall be initially allotted 26,00,000/- (Twenty Six Lakhs only) shares of the Company, out of which 13,00,000/- (Thirteen lakhs only) shares will be held by Mr.Rajiv Vyas (petitioner) and 13,00,000 (Thirteen lakh only) shares will be held by his company SVJ networking Pvt. Ltd. Under Clause 2.4 of the Agreement it is agreed between the parties that at all times the share holding of R.V. Co shall be at-least 10% of the Group A shareholding. The remainder 90% Group A shareholding shall, as far as practicable

and subject to what is stated in the agreement, be held by the remainder Group A shareholders in agreed proportion. It is agreed that at no point of time shall the RV Co. Shareholding fall below 10% of the Group A shareholding. In the event, the Group A shareholders are required to dilute their shareholding, the dilution shall take place in such a manner that the agreed proportion of the Group A shareholders remains intact. It is further agreed that R.V. Co. Shareholdings will be equally held between Mr.Rajiv Vyas (petitioner) and his SVJ Networking Private Limited. Under clause 2.5 of the Agreement, the shareholders have authorized the Board of Directors of the Company to identify strategic or financial investors interested in investing in the Company and further negotiate and finalize all the terms and conditions subject to which the investment shall be

made in the company. Upon such identification and finalization of the terms and conditions of the investment, the company shall, authorized by an ordinary resolution passed in the General Body meeting, issue shares to such Investor provided such investor executes a Deed of Adherence agreeing to be bound by the terms and conditions of the Agreement. The investor(s) upon issue of such shares would be referred as the Group B shareholders.

x) Under clause 3(a) of the agreement, it is provided that the Board of Directors shall consist of minimum of 3 (three) and a maximum of 6 (six) Directors appointed by Group A shareholders, out of which 3 (three) Directors shall be the permanent Directors and shall not be liable to retire by rotation. It is clarified in clause 3(b) of the Agreement that the permanent Directors of the

Company will be Mr.Johnwin Manavalan, (respondent no.1) Mr.Ganesh Naidu (respondent no.2) and Mr.Rajiv Vyas (petitioner). Under clause 4 of the Agreement, it is provided that the Distributor Shareholders are required to achieve certain performance parameters as determined by the permanent Directors at the end of each half year and in the event of failure on the part of the distributor shareholder to achieve performance parameters for half year, he will be required to transfer his/its shareholding in the said company to the rest of the Group A shareholders in the manner provided in the Agreement. Clause 6 of the said agreement deals with the subject pertaining to the issue of shares to the new/additional share holders of the company. Clause 7 deals with the general instructions of transfer and right of first refusal for Group A shareholders. It

is provided in clause 9 of the agreement that the revenue generated by the company from the broadcasting and distribution of cable channels will be distributed amongst Group A share holders in the proportion determined by the permanent Directors. Clause 10.1 deals with the effective date and provides that the agreement shall come into force for all purposes and intents from the date of its signing i.e. the date of execution.

xi) Clause 12 of the agreement deals with Non Compete & Non Solicitation and the said clause is reproduced hereunder.

12. Non Compete & Non Solicitation

12.1: The Shareholders covenant that during the term of this Agreement and for a period of atleast 6 months thereafter, the Shareholder shall not directly or indirectly carry on, assist, engage in, be concerned or participate in any business

(whether directly or indirectly, as a partner, shareholder, principal, agent, director, affiliate, Executive, consultant, distributor or in any other capacity or manner whatsoever) which is similar to the business of the Company nor engaqe in any activity that conflicts with the Shareholder s obligations to the Company.

12.2: Further, it is the clear intention of the parties for the purpose of this Agreement, the Shareholder would be deemed to be competing with the business of the Company, if the Shareholder owns, manages, operated, consults or renders services or is employed in a business substantially similar to, or competing with, the present business of the Company or such other business activity in which the Company may substantially engage during the Term of this Agreement or during such extended period.

12.3: Solicit business: During the term of this Agreement and for a period of at least 1 year thereafter, the Shareholder shall not solicit, endeavour to solicit, influence or attempt to influence any client, customer or other person directly or indirectly availing the services of the Company to use the services of himself or any person, firm, corporation, institution or other entity in competition with the business of the company;

12.4: Solicit Personnel: During the term of this Agreement and for a period of at least 1 year thereafter, the Shareholder shall not solicit or attempt to influence any person employed or engaged by the Company to terminate or otherwise cease such employment or engagement with the Company or become the distributor/employee of or directly or indirectly offer services in any form or manner to himself or any person or entity which is a

competitor of the Company.

12.5: The shareholder acknowledges and agrees that the above restrictions are considered reasonable for the legitimate protection of the business and goodwill of the Company, but in the event that such restriction shall be found to be void, but would be valid if some part thereof was deleted or the scope, period or area of application were reduced, the above restriction shall apply with the deletion of such words or such reduction of scope, period or area of application as may be required to make the restrictions contained in this Article valid and enforceable.

12.6. The Shareholder acknowledges and agrees that the covenants and obligations with respect to non-compete and non -solicitation as set forth above relate to special, unique and extraordinary matters, and that a violation of any of the Terms

of such covenants and obligations will cause the Company, irreparable injury. Therefore, the Shareholder agrees that the Company shall be entitled to an interim injunction, restraining order or such other equitable relief as a Court of competent jurisdiction may deem necessary or appropriate to restrain the Shareholder from committing any violation of the covenants and obligations contained in this Article. These injunctive remedies are cumulative and are in addition to any other rights and remedies that the Company may have at law or in equity.

Xii) Clause 13.6 of the Agreement provides that the Agreement contains the whole Agreement between the Parties relating to the Project, and supersedes all previous agreements and understandings between the parties in so far as these relate to the subject matter of the

Agreement. (emphasis supplied.)

Xiii) Clause 14 deals with the Dispute Resolution and the same is reproduced hereunder:

14.DISPUTE RESOLUTION:

14.1: Settlement of Disputes through Good Faith Negotiations.

(a) The Parties shall endeavour, in the first instance, to resolve any dispute, disagreement or difference arising out of or in connection with this Agreement, including any question regarding its performance, existence, validity, termination and the rights and liabilities of the parties to this Agreement (a Dispute) through good faith negotiations.

(b) If a Settlement is not reached within thirty (30) days after the date of receipt of the Dispute Notice by the non initiating Party, such Dispute shall be

referred for conciliation to one Conciliator in accordance with the provisions of Arbitration and Conciliation Act, 1996.

14.2: Arbitration:

(a) If good faith negotiations and conciliation have not been able to resolve a Dispute, such Dispute shall be referred to and be finally resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and the rules made thereunder. Each party to the Dispute shall appoint one arbitrator and the two arbitrators so appointed shall mutually agree to and appoint the third arbitrator. The arbitral agency so constituted, shall be the Arbitral Tribunal . The provisions of the Arbitration and Conciliation Act, 1996 as may be amended from time to time and the Rules, if any, made thereunder, shall apply to such arbitration proceedings. The place of

arbitration shall be Mumbai, India. The language of the arbitration shall be English.

(b) Any decision or award of the Arbitral Tribunal, subject to correction/ recourse provided for under the Arbitration and Conciliation Act, 1996 be binding upon the Parties. The Arbitral Tribunal shall give a speaking award.

xiv) Under Clause 16 of the Agreement the parties/signatories thereto have consented to and agreed to be bound by, all the terms and conditions of the Agreement. (emphasis supplied)

xv) The said agreement is signed by the promoters shareholders i.e. the Petitioner, his company S.V.J.networking, respondent nos. 1 and 2 and distributor shareholders. The signatories to the Agreement, according to petitioner, are around 15 including the promoter

shareholders and 11 according to the respondent nos. 1 and 2. It is true that after the promoter and distributor shareholders have signed the Agreement, the word signature is typed several times and a blank has been shown i.e. signature ..... It is also true that under Schedule A of Group A shareholders, though numbers 1 to 16 are set out under the caption Distributor Shareholders , the names of distributor shareholders and their areas of operation are not set out. It is also an admitted fact that the Distributor shareholders who are signatories to the agreement are less than 16. Admittedly, the distributor shareholders have put their initials under Schedule A of the agreement. It is the case of the petitioner that the promoter directors have signed the said agreement on 3rd September, 2007 and that some of the distributor shareholders have also signed

the same on 3rd September, 2007 and the remaining distributor shareholders have attended the office of M/s Paras Kuhad and Associates of the said company and have signed the said agreement in the week after 3rd September, 2007, i.e. upto 10th September 2007.

xvi). Pursuant to the share holders agreement over Rs.2.5 crores were received by the company towards the subscription of the share capital from incoming share holders.

xvii). Between November/December, 2007, exhaustive correspondence (on e-mail) took place between YOU Telecom, petitioner, respondent nos. 1 and 2, Edelweiss, Paras Kuhad and Associates and the Advocates of YOU Telecom with regard to finalisation of the share subscription agreement to be entered into between YOU Telecom and the Company. A separate compilation of such e-mails is submitted

by the petitioner to this Court. The petitioner has pointed out that between September 2007 to February, 2008 various amounts were utilized from the Bank account of the company for purchase and installation of Fibre Optic Cable for the business of the company. It is also pointed out that on 13th December, 2007, YOU Telecom conducted the physical audit which confirms the purchase and laying of fibre optic cables and existence of the network.

xviii). The petitioner has pointed out that on 29th January, 2008, behind the back of the petitioner, respondent nos. 1 and 2 surreptitiously proceeded to incorporate defendant no. 3 company i.e. SCOD 18 Networking Pvt.Ltd. (SCOD 18) as can be seen from the Memorandum of Association and Articles of Association respectively of SCOD 18. Respondent nos. 1 and 2 were the sole promoters and first directors of

SCOD 18. The plaintiff has submitted that the main object of SCOD 18 is virtually identical to the main object of the said company (SCOD Networking Pvt. Ltd.). The petitioner has further alleged that behind the back of the petitioner 16 identical letters all dated 1st February, 2008 purportedly addressed by the Distributor shareholders were generated by respondent nos.1 and 2 requesting the company for refund of the share application money. No reason for seeking refund is found in any of the letters. Even respondent nos.1 and 2 who are the promoter Directors of the company purportedly sought refund of the share application money. According to the petitioner, these letters were never referred to by respondent nos. l and 2 at any time prior to August, 2008 i.e. the petitioner was not even aware of the same even on the date of the filing of the petition i.e. in April, 2008.

xix) On 8th February, 2008 an e-mail was addressed by the Advocate of the said company to all parties, namely, the petitioner, respondent nos. 1 and 2, YOU Telecom and Edelweiss Capital Limited regarding the proposed Agreement to be entered into between the company and YOU Telecom. According to the petitioner, on 12th/13th February, 2008, respondent nos. 1 and 2 unauthorizedly withdrew the money from the account of the said company. The entire bank balance of the company is emptied out by issuing cheques to the recipients other than the shareholders with the exception of two shareholders. No information regarding removal of money was given to the petitioner i.e. the Chairman of the Company, legal adviser of the Company or any other affected party. No Board Resolution was passed for such withdrawal. The petitioner has submitted that even while these surreptitious and

fraudulent acts were being carried out by respondent nos. 1 and 2 behind the back of the petitioner, in the month of February/March, 2008,the said company continued its correspondence with YOU telecom and Edelweiss Capital through the law firm of M/s Paras Kuhad and Associates and INS Legal. The petitioner and respondent nos.1 and 2 were parties to all such correspondence but at no time respondent 1 or 2 informed the petitioner or the company lawyers that the distributor shareholders had allegedly asked for return of their share subscription amount or that the amounts were allegedly being refunded to them. No meeting of the company was held and the petitioner as a Chairman/Executive Director/Permanent Director was never informed about any such purported development. In fact, M/s Paras Kuhad and Associates, the Advocates of the said

Company addressed an e-mail dated 13th February, 2008 to YOU Telecom and also to the Directors of the Company as well as Edelweiss Capital Ltd. regarding the roles to be played by the Directors of the Company, after investment by YOU Telecom in the company.

xx) The petitioner on 26th March, 2008 addressed a letter to respondent nos. 1 and 2 and the auditor of the said company SCOD Networking Pvt. Ltd. as well as the Advocates of the said company to call an A.G.M. and also sought certain information.

xxi) In April, 2008, the petitioner through an announcement on internet learnt that YOU Telecom and respondent nos. 1 and 2 signed an agreement and launched a new company i.e. SCOD-18(respondent no.3) thereby diverting the business of the Company to SCOD 18. According to the petitioner, the said company is granted

permission to operate as Multi System Operator under Rule 11(2) of the Cable TV Net Work Regulations Act,1995.

xxii). On 29th April, 2008 the present Arbitration Petition was filed by the petitioner for the following reliefs.

(a) that pending the commencement of the and during the arbitration/ conciliation proceedings and the making of the Award therein and the enforcement thereof, Respondent nos.1 and 2 be restrained from acting contrary to the second shareholders Agreement.

(b) that pending the commencement of the and during the arbitration / conciliation proceedings and the making of the Award therein and the enforcement thereof, the Respondent nos. 1 and 2 be

restrained, by an order and injunction of this Hon ble Court, from in any manner carrying on any business falling within the objects of the said Company, whether with Eidelweiss Capital Limited and/or You Telecom India Pvt. Ltd. and/or by themselves or through agent/s and/or representative/s in the name of SCOD-18 Networking Private Limited or in any other name.

(c) that pending the commencement of the and during the arbitration/ conciliation proceedings and the making of the Award therein and the enforcement thereof, the Respondent nos.1 and 2 be jointly and severally be directed to deposit a sum of Rs. 1.89 crores in this Hon ble Court and a sum of Rs.10 lakhs per

month from 1st May, 2008 and for every month thereafter.

As set out at the out set the only relief pressed by the petitioner is to restrain the Respondent Nos.1 and 2 from in any manner committing breach of clause 12 of the agreement.

xxiii) Respondent nos. 1 and 2 have filed their affidavits dated 6th May, 2008, 23rd June, 2008 and 13th August, 2008. The petitioner has filed his response thereto by his Affidavits dated 23rd June, 2008 and 14th July, 2008.

5. On behalf of respondent nos.1 and 2, it is strongly contended that the said agreement is not a concluded agreement; it is incomplete, inchoate and never came into existence. It is, therefore, contended that there is no arbitration agreement between the parties. In support of their aforesaid contention the

respondent nos.1 and 2 have relied upon the unreported decision of the Hon ble Division Bench of this Court in **Nazir Husain Films Pvt.Ltd. Vs.Saregama India Ltd. & anr.** (Appeal no.457 of 2007 in Arbitration Petition No.81 of 2007, dated 7th April, 2008) wherein it is held that if the underlying agreement has not been concluded or is not in existence, the arbitration agreement would not be a valid and existing arbitration agreement and cannot be independently enforced. It is further contended on behalf of respondent nos. 1 and 2 that the shareholders agreement is inchoate and incomplete and never came into existence in view of the following:

i) The idea behind forming the said company was to bring together a group of 18 odd cable operators who would give access to their entire networking and customer base for transmission of

cable video services. It is an admitted position that the agreement has not been signed by 18 odd cable operators nor has a single cable operator given access to their networking or customer base as provided in Recital `C' of the said Agreement. Thus, on the petitioner s own showing absent a consensus amongst all 18 odd cable operators and Promoters of the Company and absent the cable operators bringing in their entire network as well as customer base into the common/cooperative pool, the document i.e. the said agreement is not a concluded, binding or enforceable agreement nor capable of being implemented.

ii) The network to be contributed by each of these cable operators i.e. the area in which they operate was to be specifically mentioned against their

names in Schedule A of the said agreement. This is not done. There is no basis for construing the said agreement as being binding on only those parties that signed it even if the other proposed parties did not as contended by the petitioner. Such an interpretation would exclude large network areas of other non-signatory cable operators thereby destroying what, even according to the petitioner, was fundamental basis for the agreement, namely, to form a co-operative.

iii) The Consideration for the cable operators was an equity stake in SCOD Networking and a share of the revenues including carriage fees. This was not done.

iv) The petitioner has not explained why the number of distributor shareholders in Schedule A of the

agreement are numerically indicated as only 16 . Even all the 16 shareholders have not signed the said agreement. The names of all Group A shareholders were to be listed in Schedule A of the agreement which is not done. These facts read with recital A of the said agreement demonstrates that the agreement was not concluded.

v) The date of execution was proposed to be the date of signing of the agreement or the date set out as the date of making the agreement whichever is earlier. In absence of all 18 or odd cable operators signing the document as contemplated clearly the agreement is undated. The said agreement bears the signature of only 13 cable operators / distributors / shareholders and that too on different dates.

vi) The e-mail dated 13th March 2008 (suppressed by the petitioner) refers to unresolved critical issues and differences of opinion between the promoters of SCOD Networking Pvt. Ltd. that remained unresolved even on that day. Such e-mail corroborates the fact that the said agreement had not become effective or come into force. In view of the agreement not being concluded or coming into force the question of any breach thereof or any breach of trust as is alleged cannot and does not arise.

6. It is submitted on behalf of the petitioners that the argument on behalf of respondent nos. 1and 2 that there were 18 distributor shareholders, but in fact there were to be only 15-16, and that therefore, the agreement was not executed or remained inchoate, is based on reading in provisions which do not exist. Merely

because the schedules show numbers 1 to 18 in the margins, does not mean that the agreement was not to come into force without the presence of 18 distributor shareholders. There is nothing in the agreement to suggest that it required any minimum number of distributors, and it is only in the MOU/Term sheets entered into with YOU Telecom that a minimum number of 15 distributor shareholders is insisted upon by the financer/investor. It is submitted that a mere glance at the final agreement as well as letters claiming withdrawals of share monies shows that there were atleast 16 distributor shareholders in place, including respondent nos. 1 and 2. In any event there is nothing in the agreement to suggest that 18 was the minimum number, and the mere fact that a typist has put some numbers in the margin of the schedule cannot be read as altering

the essential terms of the agreement.

7. It is further submitted on behalf of the petitioner that the respondent nos. 1 and 2 have also misconstrued Recital- C of the Agreement by reading in words that are not found in the said Recital, and ignoring the actual words therein. The argument that the distributor shareholders did not bring in their networks at any time prior to their seeking withdrawal of their share monies is completely misconceived as it is contrary to the plain words of the agreement. A network is not a physical product or thing which can be picked up and brought in, or physically handed over, as is sought to be argued. The words used in recital-C are *agreed to provide* to the business of the company *access to the entire net working and customer base for transmission of cable (video) services in the areas as more particularly set out against their names*

in Schedule A. What is agreed is not to bring something into the company but only to provide access to their entire net working and customer base. This access is to be provided for transmission of cable (video) services . The networking and customer base consists of cables laid to different buildings, and the number of users of the television/cable/video feed in each of those buildings. But access to this networking is only for the purpose of transmission of cable (video) services , and therefore, while the commitment to provide access comes into force immediately on signing the agreement, the actual use of this networking and customer base can only be made once the company starts transmission of cable (video) services. It is for this purpose that the investor capable of putting in over Rs.100 crore was needed in order to enable the transmission through a sophisticated head-

end and provision of free set-top boxes capable of receiving signals. Merely because the actual transmission had not began it cannot be said that the agreement in question was inchoate. Dictum of **Mallins J. in Chattock Vs.Muller** 1876 Ch. 406 was cited on behalf of the petitioner wherein the learned Judge has held that where the conduct of the party is fraudulent and is deceitful, the Court must strain itself, if possible to overcome all technical difficulties in order to defeat the unfair course of dealing of the defendant.

8. As regards the dating of the said agreement, it is submitted on behalf of the petitioner that respondent nos. 1 and 2 persist in reading clauses of the said agreement by assuming the existence of words which are absent from the agreement, and/or by reading in words/provisions which are not found in the agreement. A

plain reading of clause 1(h), which defines Date of Execution shows that this expression means either the date of signing or the date set out hereinabove as the date of making this agreement, whichever is earlier. This obviously means that the parties envisaged that there could be different dates of signing and a different date entered hereinabove as the date of making this agreement , otherwise there would have been no need for the words whichever is earlier . The use of words whichever is earlier also indicates that the signing could be earlier than the date entered on the agreement, and equally these words suggest that even if there was different dates of signing, the earliest date on which the agreement was signed would be treated as the date of execution . It is not disputed that the petitioner and respondent nos.1 and 2 as well as atleast

some of the distributor shareholders signed the agreement on 3rd September, 2007. Though much has been made by the respondents about the fact that the petitioner has not been able to specify a particular date on which all signed, and that the petitioner admits that different distributor shareholders signed on different dates during the week following 3rd September, 2007, it is significant that respondent nos.1 and 2 do not deny that they themselves signed on 3rd September, 2007. This has, therefore, to be treated as the effective date of execution . It is further submitted on behalf of the petitioner that there is nothing in the said shareholders agreement to suggest that all parties must sign at the same time or in presence of each other as was sought to be argued. This is a commercial agreement between the shareholders and prospective share holders who are men of

trade, it is not a will. It is well known that commercial agreements are often signed at different times and by different parties in the absence of each other. The factum of signing is not disputed, and that is the crux of the matter.

9. It was further submitted on behalf of the petitioner that the argument that the Schedules form part of the integral part of the agreement, and that therefore the agreement did not get executed, is untenable. Each one of the signatories has signed at the end of the agreement and had initialed every page of the agreement including the schedules. Just because certain details which were already known to the parties, that is the precise territories in which each distributor shareholder was distributing cable networks, were not entered into the Schedule does not mean that the agreement was not executed, or that it was inchoate

or unenforceable. The said agreement is a commercial agreement between men of trade and must be construed in a reasonable manner keeping in mind the realities of cable television networks, which are known to all the people in the trade, and particularly the Petitioner, Respondents and the other distributor shareholders.

10. Dealing with the unreported decision in the case of Nazir Hussain (supra), it is submitted on behalf of the petitioner that the facts of the judgment in that case are completely different from the facts in the present case. In the matter of Nazir Hussain (supra) inspite of the specific pleading that the case was based on a written agreement, the appellants tried to contend that their case was not based on the arbitration agreement, but was based on the arbitral clause contained in the correspondence exchanged [in terms of section 7(4)(b) of

the Arbitration and Conciliation Act, 1996]. It was held by the Hon ble Division Bench that from the pleadings, no conclusion could be drawn that it was the case of the petitioner that the correspondence exchanged between the parties resulted into an arbitration agreement. The Hon ble Division Bench came to the conclusion that the fact that the Appellants contend that there was an arbitration agreement contained in the correspondence must negate the contention that there was a concluded agreement. The Hon ble Division Bench held that there was no concluded agreement from the correspondence and that merely because there was an arbitral clause in the documents exchanged and there was no dispute about the arbitral clause it would not result in holding that there was a contract containing an arbitral clause. It is submitted on behalf of the petitioner

that in contrast to Nazir Hussain s case where it was expressly argued that the petitioner was not relying on the written agreement, in the present case, the petitioner s case is that there is an agreement drafted by the law firm of M/s Paras Kuhad and Associates, and the same was duly executed by the petitioner. Respondent nos. 1 and 2 and some of the distributors on 3rd September, 2007 at the office of the said law firm and the remaining distributors also attended the office of the said law firm and signed the said agreement in the week after 3rd September, 2007. It is submitted that the said agreement was further acted upon in as much as the Merchant bankers were appointed, the said law firm of M/s Paras Kuhad and Associates was holding negotiations and carrying on correspondence with the parties, fibre Optic Cable was purchased and an auditor

was appointed who had given a signed report and balance sheet. The consent of the parties to be bound by the agreement is clear from clause 16 of the share holders agreement. The company was carrying on correspondence (with YOU Telecom, a potential investor and Edelweiss Capital merchant bankers who were brought in by the petitioner to negotiate terms of investment by YOU Telecom) through the law firm of M/s Paras Kuhad and Associates and I & S Legal. The petitioner and respondents were party to all such correspondence, but at no time did respondent nos.1 and/or 2 inform the petitioner or the company s lawyers that the distributor shareholders had allegedly asked for their share subscription amount or that the said amount had been allegedly refunded to them and the petitioner as Chairman/Executive Director and/or Permanent Director was never informed

about any such purported development. Respondent nos. 1 and 2 did not even deem it fit to inform the petitioner about formation of SCOD 18 on 29th January, 2008/ 12th February 2008 in any of their correspondence with the lawyers or the petitioner or inform them about the fact that respondent nos. 1 and 2 were the sole promoters and the First Directors of SCOD 18.

11. I have considered the submissions advanced on behalf of respondent nos.1 and 2 that the said agreement is not a concluded agreement; it is incomplete, inchoate, did not come into existence and there is thus no arbitration agreement between the parties. I have also considered the submissions advanced on behalf of the petitioner in response thereto. It is true that the petitioner has stated in the petition that the idea behind forming of the said company was to

bring together a group of 18 odd cable operators and distributors who would give access to their entire networking and customer base for transmission of the cable (video) services. It is also true that the said agreement is signed by approximately 15 distributor shareholders, including the promoters. However, it is nowhere to be found that if the said agreement is not signed by 18 distributors the said Agreement would be treated as incomplete or unenforceable. It is obvious that when the promoters of the said company perceived forming a company, they had thought of bringing together a group of approximately 18 cable operators and distributors who would give access to their entire net working and customer base for transmission of the cable video services. However, if the group of cable operators ultimately brought together for making such an agreement contains less

than 18 members, it would certainly not mean that the agreement is not concluded, is incomplete, inchoate, did not come into existence and there is thus no arbitration agreement between the parties. Again only because the draftsman or the typist of the agreement has in the execution portion of the agreement under the caption PARTIES stated / typed signature ..... 26 times and has in schedule A, under the caption Distributor shareholders put numbers 1 to 16 in the margin surely does not mean that it is essentially a term of the agreement that there has to be atleast 26 parties to the said agreement or 16 distributor shareholders should be signatories to the said agreement, failing which the said agreement would be incomplete or not a concluded agreement. The agreement itself does not anywhere state that the same is required to be executed by agreed/fixed number of

distributor shareholders. The fact that in the agreement under the caption Parties the word Signature ..... is typed 26 times, and in scheudule-A after 4 promoter shareholders (after the caption Distributor Shareholders), numbers 1 to 16 are put in the margin (i.e. aggregating to 20), defeats the interpretation sought to be given on behalf of respondent nos.1 and 2 that the said agreement is incomplete, in the absence of 16/18 distributor shareholders. It establishes beyond any doubt that the word signature ..... found 26 times in the agreement and numbers 1 to 16 found in margin in Schedule-A are put only at random and no meaning can be ascribed to the same, as sought to be done by respondent nos.1 and 2.

12. In the said agreement, the Distributor Shareholders are defined as those shareholders listed in Part-II of

Schedule-A of the agreement including any new distributor of the company unless otherwise specified. Group-A shareholders are defined as shareholders listed in schedule-A of the said agreement including any new shareholder inducted as a Group A shareholder. Recital- A of the said agreement provides that the Group A shareholders listed in Schedule A have agreed to jointly engage in the business of the company, and that the Group A shareholders are further divided into promoter shareholders and distributor shareholders. Recital- C of the said agreement provides that the Group A shareholders (except the petitioner) have agreed to provide to the business of the company access to their entire networking and customer base transmission of cable (video) services.

The aforesaid definitions of Distributor Shareholders , Group-A

Shareholders and Recitals A and C makes it clear beyond any doubt that the agreement to jointly engage in the business of the said company is only between the promoter shareholders and distributor shareholders (i.e.Group A shareholders) who are signatories to the said agreement and whose names and initials are found in Schedule A to the said agreement (emphasis supplied). As stated earlier only because the numbers 1 to 16 are typed in the margin under the head of distributor shareholders in Group A, it cannot be read or understood to mean that 16 distributor shareholders have to compulsorily be parties or signatories to the said agreement without which the said agreement would be incomplete.

13. The submission advanced on behalf of respondent nos.1 and 2 that in the absence of the cable operators bringing in their entire net working as well as

customer base into common/cooperative pool and share of revenue not being fixed the said agreement is not concluded, binding or enforceable and not capable of being implemented is in my view also incorrect. From recitals A and C of the said agreement as also clauses 2 and 9 thereof it is clear that the Group A shareholders, which include the distributor share holders, have **agreed** to jointly engage in the business and to provide to the business of the company access to their entire networking and consumer base transmission of the cable (video) services in the areas as more particularly set out against their names in Schedule A. Under clause 2 of the said agreement, it is agreed between the parties as to how the shares would be allotted. Under clause 9 of the said agreement, the parties have agreed that the revenue generated by the company from the broadcasting and

distribution of the cable channels will be distributed amongst Group A shareholders in the proportion determined by the permanent directors. None of these agreements between the parties have been made Dependant on any future events / decisions. Since nothing in the agreement is deferred to a later point of time or made dependent on any future events/decisions, respondent nos. 1 and 2 cannot be heard to say that the said agreement is incomplete because the shareholders have not provided to the business of the company the access to their networking and customer base or that the shares have not been allotted or that the permanent directors have not determined how the cable channels revenue has to be distributed amongst Group A shareholders. The agreement stood concluded binding and enforceable and capable of being implemented, the moment

it was executed. If there would be any breach of the agreement i.e. not providing to the business of the company access to the networking and customer base of the distributor shareholders or shares not being allotted as agreed, or issue of distribution of cable channels revenue not being decided as agreed, the parties would surely have a right to invoke the arbitration agreement, but the party which has invoked the arbitration, complaining of such breaches cannot be told that since what was agreed to be done under the agreement has not been adhered to, the agreement is not a concluded agreement and, therefore, the arbitration clause is also non existing.

14. The submission advanced on behalf of Respondent Nos. 1 and 2 that the shareholders Agreement in order to be a binding/concluded contract, was required to be executed by all the 18 odd cable

operators and by the petitioner and respondent nos. 1 and 2 is already rejected by me hereinabove. The argument that since the Agreement never came into existence it has remained undated is equally untenable and baseless. In the said Agreement the date of execution is defined as the date of signing of the agreement or the date set out as the date of making the agreement, whichever is earlier. The effective date was proposed to be the date that the agreement was to come into force, i.e. the date of its signing. In the absence of the date of making the agreement the execution / effective date of the agreement would be the date of signing of the agreement. According to the petitioner the petitioner and respondent nos.1 and 2 and some of the distributor shareholders signed the agreement on 3rd September 2007 and some of the distributor shareholders signed/

executed the said agreement during the week following 3rd September,2007 i.e.on or before 10th September, 2007. Respondent nos.1 and 2 have not seriously disputed what is stated by the petitioner nor have they stated in any of their Affidavits as to when the said agreement was signed by the parties. None of the parties have chosen to lead any oral evidence on any issue under consideration. The factum of signing is not disputed. Though it is submitted on behalf of the petitioner that the agreement came into force from 3rd September 2007 since the petitioner and defendant nos. 1 and 2 admittedly signed on that day, I am of the view that since all the signatories to the said agreement had signed the said agreement by 10th September 2007,according to the definition of effective date in the agreement, the agreement came into force for all intent and purposes from 10th September, 2007.

15. Since the distributor shareholders have admittedly put their initials on the said Schedule A of the agreement, respondent nos.1 and 2 are also not correct in their submission that the agreement is incomplete because Schedule A to the agreement does not provide the names of the distributor shareholders. It is true that the areas of operation of the distributor shareholders are not mentioned in Schedule A to the said agreement. However, in my view, the agreement cannot be treated as incomplete or not a concluded agreement on this ground because the areas of operation of most of the signatory distributors are already shown in Annexure I to the term sheet annexed to the Letter of Intent dated 9th August, 2007 issued by YOU Telcom and signed by the petitioner and respondent no.1. Again in view of this being the commercial agreement pertaining to commercial

transactions in which all the parties are aware of the areas of operation of each other, the question of the agreement being incomplete in absence of the areas of operation mentioned in Schedule A of the said agreement does not arise.

16. The submission made on behalf of respondent nos.1 and 2 that the interpretation that the shareholders Agreement is binding on only those parties that signed it, would exclude large net work areas of other non signatory cable operators thereby destroying what even according to the petitioner was the fundamental basis for the purported agreement, namely, to form a cooperative, cannot be accepted and is defeated by annexure I to the term sheet annexed to the letter of intent dated 9th August, 2007 issued by YOU Telecom. In the said annexure to the term sheet, names of 21 distributors along with their areas of

operation are set out and the condition provided in the term sheet is that the initial shareholders of the said company will consist of not less than 15 distributor shareholders from those mentioned in the list of 21 distributors.

17. It is submitted on behalf of respondent nos. 1 and 2 that the petitioner has suppressed his e-mail dated 13th March, 2008 which refers to the unresolved critical issues and difference of opinion between the promoters of the said company that remained unresolved even on that day. From the said e-mails, it is obvious that there are differences of opinion between the promoters of the said company who were finalizing the deal with YOU Telecom i.e. the share subscription agreement. In the course of such discussion, it appears that certain issues/disputes were raised regarding the protection of equity of respondent nos.1

and 2 enshrined in the shareholders agreement and also pertaining to increase in salary for all promoter directors. However, in my view any subsequent dispute or issue raised by respondent nos. 1 and 2 cannot affect the binding nature of the said agreement and it certainly cannot be contended that the shareholders agreement is incomplete or is not concluded or is not enforceable or cannot be implemented.

18. The petitioner has insisted that the company has carried on its business and the shareholders agreement has been implemented. The respondents have disputed this fact. It is clear that after execution of the said agreement, shareholders have made certain payments as agreed under the said agreement and apart from the letter of intent and term sheet executed earlier, the directors of the said company have pursuant to clause 2.5 of the said agreement proceeded to

identify strategic or financial investors interested in investing in the Company and further negotiate and finalize all the terms and conditions subject to which the investment shall be made in the Company. However, as held earlier by me none of the agreements in the said agreement are based on any conditions and the said agreement has come into effect forthwith upon execution. The question as to whether the said agreement was implemented or not, therefore, need not be gone into.

19. The decision of the Hon ble Division Bench in the matter of Nazir Hussain Films Pvt. Ltd. (supra) will not be of much assistance to the respondents in the present case. The facts of the said judgment are completely different from the facts in the present matter. In the matter of Nazir Hussain Films Pvt.Ltd. (supra) as correctly submitted on behalf of the petitioner inspite of the specific

pleadings that the case was based on a written agreement the appellants therein during arguments contended to the contrary by submitting that their case was not based on arbitration agreement but was based on the arbitral clause contained in the correspondence exchanged between the parties (in terms of section 7(4)(b) of the Arbitration and Conciliation Act, 1996). It was held by the Hon ble Division Bench that from the pleadings, no conclusion could be drawn that it was the case of the petitioner that the correspondence exchanged between the parties resulted into an arbitration agreement. Keeping in mind the facts of that case, in paragraph 14 of the said judgment, the Hon ble Division Bench has referred to certain English authorities and the principles derived therefrom have been summarized. The Hon ble Division Bench observed The very fact that the

appellants contend that there is an arbitral agreement evidenced by communication upto 10th March 2006 must negate the contention that there was a concluded agreement on 8th May 2006 . It was held by the Hon ble Division Bench that there was no concluded agreement from the correspondence and that merely because there was an arbitral clause in the documents exchanged and there was no dispute about the arbitral clause it would not result in holding that there was a contract containing an arbitral clause. In the present case, there is an agreement executed between the parties. As stated aforesaid, the parties have not made the agreement dependent upon any terms to be agreed upon in future. The parties are ad idem on the terms of the contract including the arbitral clause. The consent of the parties to be bound by the agreement upon execution is clear from

clause 16 of the said agreement. The decision in Nazir Hussain Films Pvt. Ltd. (supra), thus, does not lend any support to the submissions advanced on behalf of respondent nos.1 and 2.

20. In view of the aforesaid I am of the considered view that the said agreement is complete and binding between the parties and the arbitration clause is valid subsisting and binding between the parties.

21. The next contention advanced on behalf of respondent nos. 1 and 2 is that from the allegations in the petition itself it is clear that the petition is substantially in the nature of a derivative action for and on behalf of the company. It is contended that in a recent decision of this Court **[Onyx Musicabsolute.Com Pvt. Ltd. v/s. Yash Raj Films Pvt. Ltd. & Ors., reported in 2008(6) Bom.C.R. 418]**, it has been held that

derivative petition on behalf of the company by the shareholders of a company, would not lie under section 9 of the Act. It is submitted that the present petition being in the nature of such an impermissible derivative petition, is not maintainable. On behalf of the petitioner, the aforesaid contentions of respondent nos.1 and 2 have been denied and disputed. It is contended that the petition is not in the nature of derivative action. The petition has been filed by the petitioner to protect his right and his shareholding in the company.

22. I have considered the submissions advanced on behalf of respondent nos.1 and 2 that the petition is in the nature of derivative action and is not maintainable. I have also considered the response on behalf of the petitioner, thereto. It is true that in the petition the petitioner has at several places averred that the

conduct of respondent nos. 1 and 2 would cause loss and damage to the said company which has no means to remedy the loss and damage and that respondent nos.1 and 2 have an obligation to the said company and are duty bound to act in the manner most beneficial to the company and also that respondent nos.1 and 2 have breached their commitments to the said company. However, only because certain averments, which are normally made in a derivative action are found in the petition, the same will not preclude the petitioner from filing the petition and it cannot be held that the petition is in the nature of derivative action and is not maintainable. The petitioner has also made averments in the petition to the effect that the conduct of respondent nos. 1 and 2 is prejudicial to the petitioner and will cause loss to the petitioner. In view thereof, the contention raised on behalf

of the respondent nos. 1 and 2 that the petition is in the nature of a derivative action and is not maintainable, cannot be accepted and deserves to be rejected. The decision in Onyx Musicabsolute.com Pvt. Ltd. (supra) lends no assistance to the submissions made on behalf of respondent nos.1 and 2. What the decision holds is that the arbitration cannot be enforced by minority shareholders who obviously are not parties to the arbitration agreement. This is based on the principle that the Arbitral Tribunal gets jurisdiction only on agreement between the parties. In the instant case, there exists an arbitration agreement between the parties and, therefore, the arbitral tribunal gets jurisdiction to decide the disputes raised therein and which are referred to the Tribunal.

23. Respondent nos. 1 and 2 have also contended that under clause 12.6 of the

agreement the shareholders have agreed *that the company shall be entitled to an interim injunction, restraining order or such other equitable relief as a court of competent jurisdiction may deem necessary or appropriate to restrain the shareholder from committing any violation of the covenants and obligations contained in this Article*. Respondent nos. 1 and 2 have therefore submitted that the shareholders cannot seek reliefs in the event of breach of the said non compete and non solicitation clause and it is the company which has to approach a Court of competent jurisdiction for appropriate reliefs. I am not in agreement with this submission made on behalf of respondent nos.1 and 2. The arbitration agreement does not bar any dispute between the parties to the said agreement arising out of the agreement between them under any of the clause/s contained therein. The

shareholders, therefore, have every right to refer the disputes arising out of the breach of non compete and non solicitation clause to the arbitral tribunal. Since, as expressly recorded, the non compete and non solicitation clause relates to the special, unique and extra ordinary matters and that violation of any of the terms of such covenants and obligations would cause the company irreparable injury and since the said company is not a party to the said shareholders agreement, it is obvious that the shareholders have agreed that the company shall also be entitled to an interim injunction, restraining order or such other equitable relief as the court of competent jurisdiction may deem necessary or appropriate for restraining the shareholder/s from committing any violation of the covenant and obligations pertaining to the non compete and non solicitation clause. Clause 12.6 of the

agreement also provides that *these injunctive remedies are cumulative and are in addition to any other rights and remedies that the company may have at law or in equity* . Such an agreement between the shareholders which enables the company to also take independent action against the shareholders for breach of the non compete and non solicitation clause, in my view certainly cannot be interpreted to mean that the right of the share holders under the said agreement to refer the disputes pertaining to the said clause to the arbitral tribunal is lost or has been taken away.

24. This brings me to the final issue i.e. whether the petitioner is entitled to any relief/s under section 9 of the Arbitration and Conciliation Act, 1996. As set out earlier the petitioner has not pressed for prayer clause (c) of the petition. The petitioner has informed the

Court that the petitioner is not seeking any relief against respondent no.3 company and the relief that the petitioner is trying to seek by prayer clauses (a) and (b) of the petition is mainly to restrain respondent nos. 1 and 2 from in any manner committing breach of clause 12 of the shareholders agreement. It is submitted by the petitioner that the negative covenant contained in clause 12 of the said agreement is valid and not in restraint of trade and, therefore, the petitioner is entitled to seek enforcement of the said covenant.

25. In response to the above submission of the petitioner, relying on the decisions in **Percept D Mark (India) Pvt.Ltd. Vs.Zaheer Khan and another (AIR 2006 SC 3426 at paragraph 65/page 3438); M/s Gujarat Bottling Co. Ltd. Vs. Coca Cola Company (AIR 1995 SC 2372 at paragraph 46/page 2388)** it is submitted on behalf of

respondent nos.1 and 2 that the Hon ble Supreme Court of India has held that even if the negative covenant is per se valid and not in restraint of trade, an injunction does not follow as a matter of course when the covenant is sought to be enforced. The Court will have to consider the grant of an injunction in the context of the generally applicable principles such as prima facie case and balance of convenience and irreparable injury. Equally, the Court will have to consider whether it results in granting the specific performance of personal services, which is prohibited by section 14(1) of the Specific Relief Act, 1963.

26. It is further contended on behalf of respondent nos.1 and 2 that the grant of an injunction in such cases (even if otherwise a case is made out) is always subject to the test of idleness i.e. an injunction will not be granted if it

results in an individual being rendered idle. Negative covenants, which are legal at their inception, may be rendered unenforceable if at the time they are sought to be enforced, they result in sterilization as against the continued Absorption of services by the party who enforces the negative covenant. In support of this contention, respondent nos.1 and 2 have relied on the following cases.

1) M/s Gujrat Bottling Co.Ltd. Vs.,Coca Cola Company (AIR 1995 SC 2372 at para 45/page 2388)

2) Esso Petroleum Co. Ltd. Vs.Harpers Garage (Stourport) Ltd. (House of Lords) (1967) 2 WLR 871 at pages 905-906 (cited with approval in Gujarat Bottling, at paras 21,26,27,30, 31, 34 and 36) Shell U.K.Ltd. Vs.Lostock Garage Ltd.(Court of Appeal) (1976) 1 WLR 1187 at pages 1197-1198)(Relies on Esso

Petrochemicals (supra) at page 1195)/.

27. It is also contended on behalf of respondent nos.1 and 2 that the said company has never commenced any business and is in no position to commence or carry on any business. It is submitted that admittedly the proposed business of the said company as a Multi System Operator (MSO) is impossible without cable networks of the distributor shareholders/cable operators. Presently, there are no distributor shareholders of SCOD Networking. The petitioner has not taken any steps to enforce the said agreement or the negative covenant therein against them. The Commencement of business by the company in these circumstances is an impossibility. Enforcement of the negative covenant in the absence of distributor shareholders would thus be unreasonable and effectively not serve any commercial purpose or further any commercial

objective. The grant of any injunction in these circumstances, would be contrary to the above settled principles of law.

28. The petitioner apart from denying/disputing the aforesaid contentions raised on behalf of the respondent nos.1 and 2 have strongly relied on paragraphs 47, 48, and 49 of the judgment in the matter of Gujarat Bottling (supra) Paragraph 49 of the said judgment reads thus:

> *It is contended by Shri Nariman and, in our opinion, rightly, that the GBC having itself acted in violation of the terms of the agreement and having breached the contract, cannot legally claim that the order of injunction be vacated particularly as the GBC itself is primarily responsible for having brought about the state of things*

complained of by it. Since GBC has acted in an unjust and inequitable manner in its dealings with Coca Cola, there was hardly any occasion to vacate the injunction order and the order passed by the Bombay High Court cannot be interfered with not even on the ground of closure of factory, as the party responsible, prima facie, for breach of contract cannot be permitted to raise this grievance.

It is contended on behalf of the petitioner that the conduct of respondent nos.1 and 2 has been shocking. They are the first directors of SCOD 18 a company formed on 29th January, 2008/ 12th February 2008, without any information to the petitioner. They were the first shareholders of SCOD-18. If the said

company failed to carry on business as a multi-system operator (MSO) and is not in a position to carry on the said business even today and if injunction granted in favour of the petitioner leads to sterilisation or idleness of respondent nos.1 and 2, respondent nos.1 and 2 cannot complain about the same because they are solely responsible for having brought about the set of things complained of by them. It is submitted that respondent nos. 1 and 2 who are responsible for the breach of contract cannot be permitted to raise this grievance.

29. I have considered the submissions made on behalf of the petitioner and the response of respondent nos. 1 and 2 on the issue as to whether the petitioner is entitled to an injunction restraining respondent nos.1 and 2 from carrying on any business in breach of clause 12 of the said agreement i.e. the non compete and

non solicitation clause. The petitioner has through out contended that the said agreement came into force and became binding on the parties immediately upon its execution. Amongst others the petitioner himself has relied upon clause 16 of the said agreement wherein the parties have consented to be bound by the agreement. This Court has already accepted this submission advanced by the petitioner for the reasons set out in the preceding paragraphs of this judgment. Therefore, in my view the non compete and non solicitation clause, i.e. clause 12 of the said agreement also came into effect immediately upon the said agreement coming into effect. It is not in dispute that the petitioner did not object to respondent nos.1 and 2 and/or any of the distributor shareholders carrying on their respective businesses i.e. cable T.V. and distribution business on or after the date

on which the agreement came into effect, despite being in conflict with the business as defined in the shareholders agreement.

30. Section 9(2) of the Arbitration and Conciliation Act, 1996 provide for an interim measure of protection in respect of any of the matters set out therein. The idea is to grant protective relief to the party as an interim measure before or during the arbitral proceedings or at any time after making of the arbitral award but before its enforcement in accordance with section 36 of the said Act. In the instant case, the parties have committed breach of non compete and non solicitation clause right from the day of the agreement coming into effect and the petitioner never objected to the same and for the first time objected through this petition that too only on the ground that respondent nos.1 and 2 have incorporated a

company in January, 2008, objects of which are identical to the objects of the said company. In fact, respondent nos.1 and 2 in support of their contention that the agreement has not come into force have in paragraph 3 (iv) pointed out this fact that respondent nos.1 and 2 and all distributor shareholders continued to carry on the cable TV and Distribution business from 2006-07 onwards to which the petitioner did not raise any objection. This fact is not dealt with and/or denied by the petitioner in paragraph 22 of his affidavit dated 14th July, 2008 which reads thus:

> *22. With reference to paragraph 3(iv) of the said Affidavit, I deny that the Agreement never came into being and/or existence on the grounds set out therein or for any other reason. I deny that there was no*

business of the Company. I say that the Respondents Advocates have given copies of the Bank statement of SCOD Networking Pvt.Ltd. Which itself goes to show that money was spent by the Company for purchase of Fiber Optic Cables. I crave leave to refer to and rely upon the emails for their true meaning and interpretation....

The petitioner has, therefore, admitted that the respondent nos. 1 and 2 and other signatories to the agreement had throughout carried on business inspite of clause 12 of the said agreement and the petitioner had never objected to the same. In view thereof, the petitioner is not entitled to any relief to the effect of restraining respondent nos.1 and 2 from carrying on the business similar to the business of the said company as defined

under the said agreement.

31. Faced with this difficulty, the petitioner, has tried to argue that though the said agreement becomes binding and enforceable upon its execution, the non compete and non solicitation clause i.e. clause 12 did not come into effect immediately upon execution of the said agreement i.e. on 3rd September, 2006 or 10th September 2006. The petitioner has argued that clause 12 of the agreement would come into force only when the parties would have actually provided access to the entire networking and customer base for transmission of cable (video) services. If that be the case, admittedly, the said cable operators have till date not provided access as proposed. In fact, they have taken a refund of the amounts paid by them to the said Company.

32. Admittedly, the said company has not commenced its MSO business and is also

not in a position to commence the said business in the absence of the distributor shareholders. It is not disputed that there is abandonment of the agreement by the distributor shareholders who were to bring in their business, and the said company is not in a position to carry on its proposed business even if the negative covenant under the agreement is enforced against respondent nos.1 and 2. The petitioner, therefore, cannot be heard to say that respondent nos.1 and 2 cannot raise the plea of idleness or sterilization. I am of the view that balance of convenience on this aspect is in favour of respondent nos.1 and 2 and against the petitioner.

33. The petitioner is also not entitled to any relief as sought since the petitioner has himself in paragraph 14 of the petition stated that *the petitioner has now learnt that few of the Cable*

Operators have started distributing cable channels to various customers from the new company of which the petitioner has no part. Admittedly, respondent nos.1 and 2 each have only 3.5% of the total paid up capital of the third respondent company. The entire paid up capital of the third respondent company is held by the aggregate number of 23 shareholders including respondent nos.1 and 2. Therefore, even if the negative covenant is enforced against respondent nos.1 and 2, balance 21 shareholders including the distributor shareholders shall continue to carry on the business. Therefore, the order passed by this Court enforcing the negative covenant against respondent nos.1 and 2 will not be effective in substance and will not serve any purpose. It cannot be disputed that the Courts are not to pass orders which cannot be made effective or which would not serve the purpose

behind passing of such orders.

34. For the aforesaid reasons the petitioner is not entitled to any relief as sought under section 9 of the Arbitration and Conciliation Act, 1996 and the petition is dismissed. However, there will be no order as to costs.

(S.J.KATHAWALLA J.)

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