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

Reserved on: 23rd March, 2021

Pronounced on: 5th April, 2021

\+ O.M.P.(I) (COMM.) 106/2021, I.As 4338/2021 & 4448/2021

MX MEDIA AND ENTERTAINMENT PTE. LTD.

..... Petitioner

Through: Mr. Amit Sibal, Sr. Adv. with Mr. Angad Dugal & Mr. Govind Singh Grewal, Advs.

Versus

M/S. CONTAGIOUS ONLINE MEDIA NETWORKS PRIVATE LIMITED ..... Respondent

Through: Mr. Jayant Mehta, Sr. Adv. with Mr. Sulabh Rewari, Ms. Neha Mathen & Ms. Smiti Verma, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**

1. Learned Senior counsel for the parties have been heard at length and, with consent, this judgment disposes of O.M.P. (I) (COMM.) 106/2021.

Facts

2. The petitioner is incorporated and located in Singapore. It is engaged in the production, development, marketing and distribution of media entertainment content, over its Platform "MX Player" ("the Platform").

3. The respondent produces and develops audio-visual content under the brand names "The Viral Fever ("TVF")", "The Screen Patti (TSP)" and "The Timeliners", among others.

4. Appreciation of the rival submissions would require, in the first instance, a chronological excursion through the various documents executed and exchanged in the present case, thus:

(i) It appears that, since some time earlier, programs of the respondent were being distributed and shown on the petitioner's Platform. On 24th February, 2020, the respondent, under the brand name "The Viral Fever (TVF)" confirmed that it would provide six shows, to be hosted on the petitioner's Platform in 2020-2021. The communication read thus:

"Hi Aaron,

As discussed and confirmed:

TVF will provide 6 shows in 2020-21

- Immature S2 – 5 Episodes of 20 min each – 3 yr exclusive + 1 year non exclusive
- UPSC S1 – 5 Episodes of 20 min each – 3 yr exclusive + 1 year non exclusive
- Flames S3 – 5 Episodes of 20 min each – 3 yr exclusive + 1 year non exclusive
- 3 more shows 5 Episodes of 20 min each – 3 yr exclusive + 1 year non exclusive – TBD

All the other clauses remain the same from last time.

All masters will be cleaned / without sponsorship.

Deal Value – 21 cr + taxes
Payment Terms:
35% Advance
65% on Delivery

Look forward to a great partnership.

PS – mark my finance/legal.

@ Megha – pl initiate contract.

Best

Rahul Sarangi
Global Head
Business & Content
The Viral Fever (TVF)"

(ii) As per the petitioner, consequent to an "understanding" arrived at, with the respondent, the respondent forwarded, to the petitioner, an Agreement, dated 18th March, 2020 ("the Agreement"), duly signed by the respondent. The petition seeks to aver that, as the office of the petitioner at Singapore was closed owing to the COVID-2019 pandemic, the petitioner was not in a position to countersign the Agreement and send it back. The undisputed factual position remains, however, that the Agreement was signed only by the respondent. The respondent contends that there was no concluded contract, *inter alia* for the reason that the Agreement was never signed by the petitioner. The petitioner contends, *per contra*, that there was. Some relevant features of the Agreement may be noted thus:

(a) The respondent offered, by the Agreement, to grant the right to distribute, the Programs owned by it, to the petitioner, which agreed to acquire the said rights. Clause 2.1.1 of the Agreement granted, to the petitioner, the right to distribute the Programs, on the petitioner's Platform, during their respective distribution periods. "Program(s)" was defined, in Clause 1.1.24, thus:

> "1.1.24. "Program(s)" means web shows that being distributed under this Agreement namely as below:
>
> i. Immature- season 2 (Program 1)
>
> ii. Aspirants *(tentative title)*- season 1 (Program 2)
>
> iii. FLAMES- season 3 (Program 3)
>
> iv. Additionally, there shall be three more web shows (the titles of which shall be collectively decided by the parties) namely (Program 4), (Program 5) and (Program 6) respectively shall be part of this Agreement.("Additional Programs").
>
> Program l, Program 2, Program 3 and Additional Programs shall be collectively referred to as Program(s)."

"Distribution Period" was defined, in Clause 3.1.1, thus:

> "**3.1. Distribution Period.**
>
> 3.1.1 The Distributor shall be entitled to exercise the Rights granted to it herein and Distribute each of the Programs during the Distribution Period, in accordance with the

terms of this Agreement. The Distribution period of each Program shall commence from the date of delivery of the Delivery Material relating to such Program by the Company and continue for a period of 4 (four) years from the Effective Date of each such Program and includes initial 3 (three) years on an exclusive basis and thereafter 1(one) year on a non-exclusive basis ("Distribution Period")."

(b) Clause 4 of the Agreement provided for "Exclusivity", and sub-clause 4.1, thereunder, reads thus:

> "4.1 Each of the Programs shall be provided by the Company to the Distributor as per the delivery schedule mentioned in Annexure land shall be first released solely on the Platform. All Rights granted by the Company to the Distributor hereunder, in respect of the Program, shall be available to the Distributor on an exclusive basis for a period of 3 (three) years from the Effective Date, and thereafter on a non- exclusive basis for a period of 1 (one) year. Accordingly, the Company shall ensure that no part of the Program is released or distributed anywhere in the Territory through any means or modes of distribution including such modes or mediums which use satellite as the means of transmission, prior to the same being released on the Platform. The Parties further agree that, subject to Clause 4.2, during the exclusivity period of the Programs, the Company shall not and shall not cause each such Program or any parts thereof, whether independently or through any platform or mode of distribution owned or operated by the Company, to be embedded on any website, mobile application, platform or other means of distribution of content including such modes or mediums which use satellite as the means of transmission, owned or operated by a third Person in the Territory."

(c) The consideration, governing the Agreement, was stipulated in Clause 8, more specifically Clauses 8.1 and 8.2 thereof. These clauses read thus:

> "**8. CONSIDERATION**
>
> 8.1 In consideration of the Rights granted by the Company to the Distributor under this Agreement, in respect of the Program, the Distributor shall pay to the Company, the aggregate Minimum Guarantee of the USD equivalent to an amount of INR 21,00,00,000/- (Indian National Rupees Twenty One Crores Only) in accordance with Clause 8.1.1 below,
>
> 8.1.1 The Company shall be entitled to receive from the Distributor against valid invoices raised on the Distributor:
>
> i. 30% of the Minimum Guarantee, within 30 (thirty) days from the Execution Date for each Program except Additional Programs, subject to receipt of valid invoice; and
>
> ii. 70% of the Minimum Guarantee, apportioned for each Program except Additional Programs upon receipt of the Delivery Materials in respect of any relevant Program from the Company in accordance with this Agreement and according to technical specifications, which the Distributor shall be liable to pay within 45 (forty five) days from the date of receipt of the Delivery Materials in respect of the relevant Program by the Distributor subject to receipt of valid invoice.
>
> iii. 25% of the Minimum Guarantee, within 30 (thirty) days from the day, the relevant Additional Program is selected

by Distributor subject to receipt of valid invoice;

iv. 75% of the Minimum Guarantee, apportioned for each Additional Program upon receipt of the Delivery Materials in respect of any relevant Additional Program from the Company in accordance with this Agreement and according to technical specifications, which the Distributor shall be liable to pay within 45 (forty five) days from the date of receipt of the Delivery Materials in respect of the relevant Additional Program by the Distributor subject to receipt of valid invoice.

v. In the event no Additional Programs are selected by Distributor during the Term, then no payment shall be made towards the Minimum Guarantee for each such Additional Show, which has not been selected during the Term.

8.2. The Company shall raise all invoices towards all amounts of Minimum Guarantee in USD and the foreign exchange rate shall be calculated as of the date of the relevant invoice. Further, all payments to be paid by Distributor, shall be paid in USD, such that the amount received by the Company shall be the exact INR of Minimum Guarantee as agreed hereinabove under clause 8.1, without any loss as a result of the exchange rate and applicable withholding or any other taxes, to the Company. In case of occurrence of such loses, the Distributor shall make good of the same to the Company."

(d) The Agreement provided for its termination, by the petitioner or by the respondent. Clause 14 dealt with

termination by the respondent, and sub-clauses 14.1 and 14.2 thereof read thus:

> "14.1 The Company shall be entitled to terminate this Agreement in respect of any Program by giving a prior written notice of 30 (thirty) days to the Distributor, in the event the Distributor fails to make payments towards the Minimum Guarantee in respect of any Program in accordance with this Agreement, and fails to remedy such default within 30 (thirty) days of being notified by the Company of the occurrence of such default by the Distributor;
>
> 14.2 In addition to the above, the Company shall be entitled to terminate this Agreement in respect of any Program by providing a written notice to the Distributor in the event the Distributor materially breaches the provisions of Clause 2.1.1, Clause 4.2, Clause 9.2.1, Clause 10.4, 10.4.2, Clause 10.4.4 and Clause 10.4.6 hereinabove, in respect of any Program, and where such breach is curable, fails to cure such breach within 30 (thirty) days from being notified by the Company of the occurrence of such breach."

(e) Clause 15 of the Agreement provided for interest, in the event of any delay, on the part of either party to the Agreement, in making payment to the other, and reads thus:

> "15. **Interest**
>
> In the event of any delayed payment on the part of the either Party of any moneys due to the other Party under this Agreement, the delaying Party shall be liable to pay interest at the rate of 18% per annum on the amounts due to be paid to the other Party which shall be calculated from the date on which the payment of such moneys

was due and until the date of actual payment to the non-delaying Party by the delaying Party. The Parties agree that the amounts payable by the delaying Party to the other Party towards interest pursuant to this Clause are a genuine pre-estimate of the damage that may be suffered by the non-delaying Party."

(f) Disputes, arising under the Agreement, were to be resolved in accordance with Clauses 19.2 to 19.4 thereof, by arbitration, in the event of failure to achieve any resolution by mutual discussions and negotiations. Clauses 19.2 to 19.4 of the Agreement read thus:

> "19.2 In the event the Parties fail to resolve their disputes or differences amicably, within 30 (thirty) days ("Settlement Period") from the date on which any Party first notifies the other Party of such dispute having arisen, then such disputes shall be settled by arbitration of a sole arbitrator, who shall be appointed by the Parties mutually within 30 (thirty) days from the expiry of the Settlement Period or such other period that the Parties may mutually decide. In the event the Parties are unable to appoint an arbitrator mutually within the aforesaid time period, then the arbitration shall be conducted by a panel of 3 (three) arbitrators, where 1 (one) arbitrator shall be appointed by the Distributor, 1 (one) arbitrator shall be appointed by the Company, and the 2 (two) arbitrators so appointed by the Parties respectively, shall appoint the third arbitrator who shall be the presiding arbitrator for the purpose of the arbitration proceedings.
>
> 19.3 The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The language of arbitration proceedings shall be English. Each

Party shall bear its own cost. The venue of arbitration shall be New Delhi.

19.4 This Agreement shall be governed by the laws of India. Subject to the foregoing, courts in New Delhi shall have the exclusive jurisdiction on all matters arising out of or in connection with this Agreement."

(g) Annexure-1 to the Agreement set out the details of the various Programs and their delivery schedule, in the following tabular form:

"**Annexure-1**

Delivery Materials and Delivery Schedule

Sr.No.	Programs	Total No. of Episodes	Apportioned value in INR
1.	Immature season 2 (Program 1)	5	4,00,00,000/-
2.	Aspirants (Tentative title) season 1 (Program 2)	5	5,00,00,000/-
3.	FLAMES season 3 (Program 3)	5	3,00,00,000/-
4.	_____(Program 4)	5	3,00,00,000/-
5.	_____(Program 5)	5	3,00,00,000/-
6.	_____(Program 6)	5	3,00,00,000/-

"

(iii) On 19th March, 2020, the respondent raised an invoice, on the petitioner, for US $ 4,83,222. It is an admitted position that, against this invoice, an amount of US $ 2 lakhs alone has been paid by the petitioner to the respondent, on 23rd April,

2020, though the petitioner claims right to adjustment, additionally, of US $ 1,10,000. Indisputably, even thereafter, an amount of US $ 1,73,222 remains outstanding, to be paid by the petitioner against this invoice. Mr. Sibal submits that his client is willing to deposit the said amount in Court, if the present petition is allowed.

(iv) On 20th May, 2020, the petitioner wrote to the respondent, requesting the respondent to adjust, against the amount invoiced by it, US $ 1,10,000. *Vide* reply mail dated 2nd June, 2020, the respondent agreed to the request, whereupon, *vide* a further mail of the same date, i.e. 2nd June, 2020, the petitioner wrote to the respondent stating that it would "*share the addendum stating the same*". Further correspondence ensued, in this regard, during which the respondent also requested the petitioner to share the Final Executed ("FE") copy of the License Agreement". As it happened, the FE License Agreement was never, in fact, forwarded by the petitioner to the respondent.

(v) On 4th June, 2020, the petitioner forwarded an amendment to the Agreement dated 18th March, 2020, which provided for adjustment, against the consideration stipulated in the Agreement, the amount of US $ 1,10,000 due from the respondent to the petitioner. This was the first amendment proposed, by the petitioner, to the Agreement.

(vi) The respondent, while agreeing, *vide* reply email dated 6th June, 2020, to review the suggested amendment, pointed out that the FE copy of the Agreement was still awaited. The e-mail read as under:

> "Hi Animesh,
>
> We shall review the shared draft. However, the FE copy of the latest licence deal is still awaited from your side and the related amendment can not take place until we don't receive the aforesaid FE copy in our record.
>
> Tx"
>
> (Emphasis supplied)

(vii) On 8th July, 2020, the respondent again wrote to the petitioner, thus:

> "Hi Aaron,
>
> It was good to connect on call today and as discussed the 2 key action points:
>
> 1. TVF to share the Delivery timelines for the 3 current shows agreed ie UPSC, Flames 3 & Immature 2
>
> 2. TVF to share concepts/show ideas for the other 3 shows in the Agreement which the Mx team can evaluate and respond
>
> Also pls do respond on:
>
> 1. The addendum to the last Agreement
> 2. Digital signature for the final paperwork since we've some audit requirements
>
> Regards
>
> Vijay Koshy"
>
> (Emphasis supplied)

(viii) On 15th July, 2020, the petitioner wrote to the respondent, requesting for "update on the timelines" of the three shows which they had selected. The respondent, *vide* reply mail dated 16th July, 2020, agreed to share the timelines by the next day. Accordingly, *vide* e-mail dated 17th July, 2020, the respondent wrote, to the petitioner, thus, regarding the timelines for the three selected programs:

> "Hi Team Mx,
>
> As per my mail last evening, sharing the timelines across various stages of the 3 shows that have got locked with Mx this year. They are as follows:
>
> **UPSC:**
>
> Pre Production: 25th July to 15th October '20
> Shoot: 16th October to 30th November
> Post Production: December, January, Feb '21
> Delivery: End of February '21
>
> **Immature S2:**
>
> Pre Production: 1st December '20 to 15th January ' 21
> Shoot: 16th January to 15th February '21
> Post Production: Mid February, March, April '21
> Delivery: End of April '21
>
> **Flames S3:**
>
> Pre Production: 1st December '20 to 15 th January '21
> Shoot: 16th January to 10 th February '21
> Post Production: Mid February, March, April '21
> Delivery: End of April '21
>
> Happy to discuss them in detail over a call with the creative/production team at our end. Also please confirm if

Wednesday first half works for the discussion on the balance 3 shows.

Warm Regards

Vijay Koshy
President
The Viral Fever"

(ix) *Vide* e-mail dated 22nd July, 2020, the respondent again reminded the petitioner that the following two points were still awaiting a response from the petitioner:

"1. Mx and TVF Agreement (URGENT)

2. Show timelines for the 3 that we've already locked (not as urgent as point 1)"

(Emphasis supplied)

(x) As there was still no response, from the petitioner, regarding communication of the finalised Agreement, or of the status/timelines of the three shows already "locked", the respondent wrote, on 24th August, 2020, to the petitioner, that it had been trying to reach the petitioner "for a follow-up conversation on the status/timelines of the shows" already locked. The petitioner responded, on the same day i.e. 24th August, 2020, stating that it was awaiting a response from the respondent "on the overall construct of the arrangement", so that the "next steps" could be planned.

(xi) On 11th September, 2020, the petitioner addressed the following e-mail to the respondent:

"Hi Shreyansh,

We have not yet been able to speak – understand that the schedules are crazy but let's keep the conversation rolling.

We have proposed the way we want to progress with this deal *which is a 1 + 1 + 1 show approach* starting with UPSC which was to be delivered in Dec.

Are we on track with that?

Regards
Aaron"

(Emphasis supplied)

(xii) The respondent replied, on the same day, i.e. 11th September, 2020, as under:

"Hi Aaron,

Thanks for understanding. We've been discussing the same internally and I wanted to discuss with you certain reservations that we have in going ahead with the above mentioned approach. It really puts us in a very tough spot.

Do let me know whenever we can have a conversation and I'll make myself available.

Cheers
Sherry"

(Emphasis supplied)

(xiii) That the "1 + 1 + 1" arrangement suggested by the petitioner on 11th September, 2020, was not acceptable to the respondent, and was further reflected by the following e-mail, dated 21st September, 2020, from the latter to the former:

"Hey Aaron,

> Thanks for taking our time the other day to hear our point of view on the proposed arrangement. Like we spoke, starting with the new Title and then deciding on subsequent seasons of established titles puts us in a very tricky spot.
>
> Do let us know your thoughts on how can we proceed and make this a win win for both TVF and MXP.
>
> Looking forward to hearing from you.
>
> Cheers
> Sherry"
>
> (Emphasis supplied)

(xiv) On 23rd September, 2020, the petitioner wrote to the respondent, stating that it would "like to re-look at the episodic count for the shows and overall minutes". The respondent, *vide* e-mail of the next day i.e. 24th September, 2020, requested the petitioner to discuss the matter at 4 PM.

(xv) On 5th October, 2020, the following e-mail was addressed by the petitioner to the respondent:

> "Hi Vijay,
>
> Trust this mail finds you well.
>
> Wanted to circle back on our conversation from last week. I would like to reiterate our intent to work around the situation and move ahead with this deal with a revised structure of a 1 + 1 + 1 approach wherein we greenlight the 2nd show post the launch of the previous based on the output delivered.
>
> Re-emphasising on our intent here – our preferred show to begin this equation with is UPSC but taking your perspective into consideration, we would go ahead with either Flames or Immature.

As discussed, the commercials need to be revisited and addressed as it is not in sync with our deal structures and subsequent costs (internal + market benchmarks).

Below are the 3 approaches we can look at

- Option 1 – Keep the commercials the same and increase the episode count to minimum 8 eps of 25-30 mins

- Option 2 – Keep the ep count and the durations the same & reduce the license fee by 1 cr for the show (which we select between flames & immature)

- Option 3 – We amicably part ways on this deal and TVF gives a refund on the monies paid

Look forward to your thoughts on how to proceed.

Aaron"

(Emphasis supplied)

(xvi) Thereafter, on 12th October, 2020, the following exchange of e-mails took place, between the petitioner and the respondent:

Petitioner to respondent

"Hi Vijay,

Await your response on this and closing at the earliest.

Regards
Aaron"

(Emphasis supplied)

Respondents to petitioner

"Hi Aaron,

> Apologies for the delay in responding. We will call you tomorrow and let's discuss how we can close this asap."
>
> (Emphasis supplied)

(xvii) On 14th October, 2020, the petitioner wrote, to the respondent, as under:

> "Hi Vijay,
>
> It was a pleasure of speaking with you today.
>
> To capture the broad understanding, the current deal would be structured as a 1 + 1 + 1 with MX greenlighting the subsequent shows post the launch of the previous based on the output delivered. This would mean that the amount paid to TVF as a signing fee would be against the 1st show which we chose, which I would confirm to be Immature 2.
>
> We understand and appreciate your reservation towards making this a 8 ep (25-30 mins). I would suggest we do this as a 7 ep (25-30 mins) show.
>
> Please confirm the ep count so we can go ahead and draft the addendum accordingly.
>
> Regards
> Aaron"
>
> (Italics and underscoring supplied)

(xviii) On 28th October, 2020, the petitioner forwarded, by way of an attachment e-mail, a second "amendment draft", attaching a proposed "First Amendment" to the Agreement dated 18th March, 2020. (This, therefore, was the *second* "First Amendment" proposed by the petitioner, after the first

amendment proposed on 4th June, 2020.) Clause 1 of the proposed "First Amendment" envisaged the following amendments, to the Agreement dated 18th March, 2020:

> "1.1 The term "Program(s)" as defined under Clause 1.1.24 of the Principal Agreement shall stand revised and replaced as follows:
>
> *"Program(s)" means the shows that are being distributed under this Agreement namely as below:*
>
> i. *Immature - season* 2 *(Program 1)*
> ii. *UPSC- season 1 (Program 2)*
> iii. *FLAMES -season* 3 *(Program 3)*
>
> 1.2 The term "Minimum Guarantee" as defined under Clause 1.1.18 of the Principal Agreement shall stand revised and replaced as follows:
>
> *"1.1.18 "Consideration" means the amount payable in respect of each Program as specified in Annexure 1 hereto aggregating to INR* 12,00,00,000/- *(Indian National Rupees Twelve Crores Only) for the Programs, by the Distributor to the Company in accordance with this Agreement."*
>
> 1.3 The Annexure 1 of the Principal Agreement shall stand revised and replaced with the Annexure 1 attached herein under this First Amendment..
>
> 1.4 Clause 8.1 under the Principal Agreement shall stand revised and replaced as follows:
>
> *8.1 In consideration of the Rights granted by the Company to the Distributor under this Agreement,* in *respect of the Program(s) and subject to compliance of the terms of the Agreement by the Company, the Distributor shall pay to the Company, the aggregate Consideration of the USD equivalent to an amount of INR* 12,00,00,000/- *(Indian National*

Rupees Twelve Crores Only) in *accordance with Clause 8.1.1 below,*

8.1.1 The Company shall be entitled to receive the Consideration from the Distributor against valid invoices raised on the Distributor in the following manner:

i. 30% *of the Consideration* i.e. *INR* 3, 60, 00, 000/- *(Indian National Rupees Three Crores Sixty Lakhs only) equivalent to an amount in USD, within 45 (forty-five) days from the Execution Date for all the Programs, subject to receipt of valid invoice; and*

ii. 70% *of the Consideration i.e. INR 8, 40,* 00, 000/- *(Indian National Rupees Eight Crores Forty Lakhs Only) equivalent to an amount in USD, shall be paid to the Company in the following manner:*

a. INR 2, *80,* 00, 000/- *((Indian National Rupees Two Crores Eighty Lakhs only) for each Program upon receipt of the Delivery Materials* in *respect of relevant Program from the Company* in *accordance with this Agreement and according to technical specifications, which the Distributor shall be liable to pay within 45 (forty five) days from the date of receipt of the Delivery Materials* in *respect of the relevant Program by the Distributor subject to receipt of valid invoice.*

1.5 INR 1, 52, 84, 500/- (Indian National Rupees One Crore Fifty Two Lakhs Eighty Four Thousand Five Hundred only) equivalent to USD 200,000/- (United States Dollars Two Hundred Thousand only) in accordance with Clause 8.1.1 (I) has already been paid by the Distributor to the Company as an advance amount towards all the Programs upon execution of the Principal Agreement, receipt and sufficiency of which

is hereby acknowledged and confirmed by the Company.

1.6 The balance amount of INR 2, 07, 15, 500/- (Indian National Rupees Two Crores Seven Lakhs Fifteen Thousand and Five Hundred only) equivalent to an amount in USD as per Clause 8.1.1(i) shall be paid within 45 (forty five) days of execution of this First Amendment and subject to receipt of valid invoice.

1.7 Parties expressly agree that the Distributor, shall have the right to green-light the production of the Programs, in any sequence, from Program 2 and/ or Program 3 subject to successful submission of concept development and preproduction deliverables of the respective Programs by the Company to the satisfaction of the Distributor.

1.8 The Company shall deliver the Programs to the Distributor as per the timelines mutually agreed between the Parties and in accordance with the technical specifications as stated in Annexure 2 of this First Amendment."

(xix) It is apparent, from a bare reading of the preceding correspondence, with the "First Amendment" forwarded by the petitioner to the respondent, on 28th October, 2020, that the petitioner did not sign the original Agreement dated 18th March, 2020, which was signed by the respondent and forwarded to the petitioner for signature, the petitioner forwarded, on 28th October, 2020, the aforesaid "First amendment" suggesting amendments to be made in the original Agreement dated 18th March, 2020.

(xx) *Vide* e-mail, dated 2nd November, 2020, the petitioner acknowledged the receipt of confirmation, from the respondent, regarding adjustment of US $ 1,10,000. This fact was also reflected in the following e-mail, dated 3rd November, 2020, from the respondent to the petitioner:

> "Hi Animesh,
>
> This is to confirm that TVF bank account was been credit by Rs 7733000 equivalent to $ 110000 as on 17th Jan, 2020 which will be adjusted against on account of new contract deal with Mx player.
>
> Plz feel free to ask for any further clarification.
>
> Regards,
>
> Nikita Trivedi"

(xxi) On 6th November, 2020, the petitioner addressed the following e-mail to the respondent:

> "Hi Manish and Megha,
>
> As we are currently in talks with the business team for updating certain terms in the new agreement, it will be convenient to execute both the main LFA as well as the related amendment draft together given the restriction in coordination we face during these times.
>
> I am attaching the revised amendment draft for deal 1 which captures our recent discussions on the agreed stance. Please let me know your thoughts on the draft.
>
> Regards"
>
> MX Player Animesh Sukhatankar
> Content Acquisition - MX Player"

(xxii) On 27th November, 2020, the petitioner forwarded, under cover of an e-mail to the respondent, a further revision to the amended draft Agreement "to accommodate the recent discussions". This, therefore, was the *third* "First Amendment" proposed, by the petitioner to the Agreement dated 18th March, 2020, without ever sending back the original countersigned Agreement.

(xxiii) Apropos the programs to be broadcasted on the petitioner's Platform, and the amount payable to the petitioner, this third, and newly proposed, "First Amendment" was identical to the second "First Amendment", forwarded by the petitioner to the respondent on 28th October, 2020. Clause 1 of the newly proposed "First Amendment" to the original Agreement dated 18th March, 2020, which contained the proposed amendments, reads as under:

> "1.1 The term "Program(s)" as defined under Clause 1.1.24 of the Principal Agreement shall stand revised and replaced as follows:
>
> *"Program(s)" means the shows that are being distributed under this Agreement namely as below:*
>
> i. *Immature- season* 2 *(Program 1)*
> ii. *UPSC- season 1 (Program 2)*
> iii. *FLAMES- season* 3 *(Program 3)*
>
> 1.2 The term "Minimum Guarantee" as defined under Clause 1.1.18 of the Principal Agreement shall stand revised and replaced as follows:
>
> *"1.1.18 "**Consideration**" means the amount payable in respect of each Program as specified in Annexure thereto aggregating to INR*

12,00,00,000/- *(Indian National Rupees Twelve Crores Only) for the Programs, by the Distributor to the Company in accordance with this Agreement."*

1.3 The Annexure 1 of the Principal Agreement shall stand revised and replaced with the Annexure 1 attached herein under this First Amendment.

1.4 Clause 8.1 under the Principal Agreement shall stand revised and replaced as follows:

8.1 In consideration of the Rights granted by the Company to the Distributor under this Agreement, in respect of the Program(s) and subject to compliance of the terms of the Agreement by the Company, the Distributor shall pay to the Company, the aggregate Consideration of the USD equivalent to an amount of INR 12,00,00,000/- (Indian National Rupees Twelve Crores Only) in accordance with Clause 8.1.1 below,

8.1.1 The Company shall be entitled to receive the Consideration from the Distributor against valid invoices raised on the Distributor in the following manner:

A. Consideration payable for Programs:

i. *INR 1,52,84,500/- (Indian National Rupees One Crore Fifty Two Lakhs Eighty Four Thousand Five Hundred only) equivalent to USD 200,000/- (United States Dollars Two Hundred Thousand only)has already been paid by Company as an advance amount towards all the Programs upon execution*

of the Principal Agreement, receipt and sufficiency of which is hereby acknowledged and confirmed by the Company.

ii. Balance amount of INR 10,47,15,500/- *(Indian National Rupees Ten Crores Forty-Seven Lakhs Fifteen Thousand Five Hundred Only) equivalent to an amount in USD shall be payable* in *the following manner:*

a. INR 3,49,*05*,167/- *(Indian National Rupees Three Crores Forty-Nine Lakhs Five Thousand One Hundred and Sixty Seven only) per Program within 45 (forty five) days upon successful delivery of the Delivery Materials relating to the respective Program, subject to quality checks and acceptance of the same by the Distributor.*

1.5 Parties expressly agree that the Distributor, at its sole discretion, shall have the right to green-light the production in any sequence of Program 2 and/ or Program 3.

> 1.6 The Company shall deliver the Programs to the Distributor as per the timelines mutually agreed between the Parties and in accordance with the technical specifications as stated in Annexure 2 of this First Amendment."

With this, it makes it clear that instead of counter-signing the original Agreement, forwarded by the petitioner to the respondent on 18th March, 2020, the petitioner proposed as many as three "First Amendments" to the original Agreement dated 18th March, 2020.

(xxiv) This fact was highlighted by the respondent, *vide* e-mail dated 9th December, 2020, to the petitioner, which reads thus:

> "Dear Aaron,
>
> We look forward to closing this at the earliest as well. As you are aware that earlier this year (March 2020), TVF and MX were to sign a principal Agreement, recording certain business understanding agreed at the time. The final agreed form of the Agreement was in fact executed at TVF's end, however, the execution at MX's end could not be completed. We understand that this would've been due to unusual circumstances (Covid-19 etc.) at the time and MX has been wanting to relook and reconsider the terms of the principal Agreement.
>
> Keeping this in mind, we have been open for a revised business discussion as and when proposed by MX and so far have received three different proposals over the last two months, as shared by MX team. We assure you that we are committed to offering our best to MX considering the existing partnership. Looking forward to discussing the new combination of deliverables and commercials (including the latest proposed arrangement) with the MX team, which is mutually agreeable to both of us.

Let's set up a time for a call, to take this ahead. Does 1500 tomorrow work for the same??

Warm Regards

Vijay Koshy

President
The Viral Fever"

(xxv) The petitioner responded, on 15th December, 2020, thus:

"Dear Vijay,

Getting this email from you is rather surprising since we have been in constant touch and MX has at all times expressed its desire to work with TVF.

With regards to the execution of the Agreement- Yes there have been delays due to covid & we had suggested modifications in the term keeping in mind the variables & the moving pieces as the teams & talent at your end also went through a change after this contract was signed. In spite of that MX has honoured the equation and also made the initial payment to TVF.

The 3 revised proposals were shared as per your feedback as well as the telephonic conversations where you proposed certain terms- which we quickly turned around as formal proposals. We would have been happy to close the first proposal that was shared with you 2 months back.

You would also appreciate that MX has been extremely patient with TVF this year owing to the major organizational restructuring. While the shows were locked in Jan/Feb this year and the contract was finalized by March –we received no updates on the progress on any shows till date in terms of readiness, completion of writing, shooting dates etc.

Having said that, We at MX reiterate our intent to work with TVF on the shows part of our agreement i.e UPSC, Flames 3 & Immature 2.

> It is great to hear that you are open to a revised business discussion- we can close the same tomorrow over a call- let me know if tomorrow 2.30 pm works.
>
> Look forward to receiving your thoughts on the addendum shared.
>
> Aaron"

(xxvi) The petition also annexes follow-up e-mails, between the petitioner and the respondent, from 16th December, 2020 till 22nd December, 2020, attempting to fix schedules for mutual meetings, to iron out the possible differences.

(xxvii) On 26th December, 2020, the respondent addressed the following e-mail to the petitioner, pointing out that, as "there was no visibility on timelines for execution of the principal agreement from MX's end", the agreement *"could not be concluded between the parties*". Even so, the respondent agreed to explore the amendments suggested by the petitioner, but stated that, in view thereof, the show "Aspirants" would have to be excluded. Regarding the other two shows, the communication went on to state thus:

> "Meanwhile, we also seek your confirmation on MX's continued interest in licensing the remaining two proposed shows i.e. *Immature So2 and Flames S03,* along-with the other combinations of concepts/ shows (which are in the pipeline at our end). Since, we are constantly receiving the interest from the market regarding the above two shows as well, therefore we would appreciate if the same can be closed at your end on a priority basis.

> In case both the parties are not able to arrive at a mutually agreeable proposal regarding the amendments in discussion, then as suggested during the call by MX, TVF can consider of refunding the partial advance [i.e. INR 1.52 cr. (an amount, approx. equivalent to advance license fee for one show)], as received under the principal Agreement. Accordingly, parties can conclude the current discussion and start altogether a fresh business arrangement.
>
> We request that this loop of discussions be brought to closure soon, post which parties can start a new partnership and do something great together.
>
> Looking forward to hearing from you."

(xxviii) Three weeks elapsed before the petitioner chose to respond, on 19th January, 2021, seeking to contend that the "principal understanding, as recorded in the Agreement dated March 18, 2020" stood "concluded", and that it was only on the basis of such "concluded" understanding that the petitioner had paid advance of US $ 2,00,000 to the respondent on 23rd April, 2020. Reliance was also placed, in the said communication, on the e-mail dated 17th July, 2020, from the respondent to the petitioner, communicating the delivery timelines and schedules of the three programs and also stating that the show titled "UPSC" would be delivered by the end of February, 2021, with the remaining two shows being delivered by the end of April, 2021. It was also asserted that the communications, between the petitioner and the respondent from August to December 2020 evinced their intent to honour their "arrangement/agreement" in respect of the aforesaid three shows. Exception was taken, by the petitioner, to the

respondent demurring, for the first time on 23rd December, 2020, from the commitment to deliver the "UPSC" show. In these circumstances, it was asserted that, if the respondent would contract with any third party for these shows, it would breach the Agreement dated 18th March, 2020, after having received advance consideration. The petitioner, therefore, called upon the respondent to deliver, forthwith, the "Immature Season 2", "Flames Season 3" and "UPSC" programs, in default whereof the petitioner threatened legal action.

(xxix) The respondent replied on 6th February, 2021, categorically denying the existence of any concluded contract with the petitioner. It was pointed out that the terms of the agreement between the petitioner and respondent were still being negotiated. Without sending back the signed Agreement forwarded by the respondent on 18th March, 2020, it was pointed out that the petitioner was suggesting changes till December 2020. In the absence of any concluded contract, the respondent denied any obligation to the petitioner. Insofar as the payment of US $ 2,00,000 was concerned, the respondent pointed out that there was no covenant, in the Agreement dated 18th March, 2020, contemplating any such payment. In any event, it was pointed out, the said payment was even less than the 30% Minimum Guarantee required to be paid by the petitioner as advance under the Agreement. The respondent pointed out that, as the petitioner was not forthcoming with a signed Agreement, the respondent chose to accept the third

option proposed by the petitioner in its e-mail dated 5th October, 2020, to walk away from the deal and return the amount paid by the petitioner. The respondent confirmed, categorically, that, in view thereof, all offers of the respondent, in relation to the three programs, stood revoked, and no obligation remained of the respondent, towards the petitioner. The respondent objected to the attempt of the petitioner to thrust, on it, obligations under an unexecuted agreement. Even so, the respondent expressed its willingness to enter into any "fresh business discussions", if the petitioner so desired.

(xxx) On 23rd February, 2021, the petitioner, by e-mail to the respondent, requested for a confirmation that the balance payable by the petitioner to the respondent as on 31st December, 2020, was US $ 1,73,222. The respondent replied, *vide* e-mail dated 28th February, 2021, that no amount was due from the petitioner, but that it was due to refund, to the petitioner, the amount of US $ 3,10,000 paid by the petitioner. (These documents do not form part of the record filed by the petitioner, and were tendered, across the bar, by Mr. Jayant Mehta, learned Senior Counsel for the respondent. They were not, however, denied or traversed by learned Senior Counsel for the petitioner.)

(xxxi) On 5th March, 2021, the respondent again wrote to the petitioner, stating that, for want of any response from the petitioner regarding its earlier e-mail dated 6th February, 2021,

whereby the respondent had exercised the option (offered by the petitioner) to walk away from the Agreement and return the amount paid by the petitioner, it was presumed that the petitioner did not want to discuss the matter any further. Confirming that it had to refund the amount of US $ 3,10,000 paid by the petitioner, the respondent requested the petitioner to provide details of its bank accounts so that the refund could be made.

5. It is in these circumstances that the petitioner has approached this Court, by means of the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 ("the 1996 Act"). The prayer clause in the petition reads as under:

> "In view of the above stated fact/circumstances and submissions, it is most respectfully prayed that this Hon'ble Court be pleased to:
>
> A. Pass an order of injunction restraining the Respondent from selling, licensing, exploiting or assigning the rights in relation to the Programs titled 'Immature Season 2', 'Aspirants Season 1' (title subsequently changed to 'UPSC'), 'Flames Season 3' created, developed and/or produced by the Respondent, to any other market player and/or digital platform in terms of Clause 4.1, and Clause 5.1 of the Agreement; AND
>
> B. Pass an order of injunction restraining the Respondent from creating any third-party interest in and to the Programs titled 'Immature Season 2', 'Aspirants Season 1' (title subsequently changed to 'UPSC'), 'Flames Season 3' created, developed and/or produced by the Respondent, in favour of any third party; AND
>
> C. Pass an order of injunction, restraining the Respondent from, in any manner, breaching/violating the exclusivity obligations under the Agreement; AND

D. Pass an order directing the Respondent to deposit either in this Hon'ble Court or in an escrow account, an amount equivalent to the INR of USD 310,000/- (United States Dollar Three Hundred and Ten Thousand Only), being the consideration amount admittedly received as advance consideration from the Petitioner, along with interest @18% per annum from the date of receipt of payment till the date of delivery of the said Programs; AND

E. Pass an order directing the Respondent to disclose on affidavit its assets and restraining the Respondent from alienating / transferring / selling or otherwise disposing off its assets in any manner till the conclusion of arbitration proceedings between the parties; AND

F. Pass such further orders as this Hon'ble Court may deem fit in the facts O and circumstances of the present case."

6. Detailed arguments were advanced by Mr. Amit Sibal and Mr. Jayant Mehta, learned Senior Counsel for the petitioner and the respondent respectively, and detailed and exhaustive written submissions have also been filed by the learned counsels. Learned Senior Counsels were agreeable to the petition being disposed of, on the basis of the oral submissions advanced at the Bar and the written submissions tendered.

Rival submissions

7. Mr. Amit Sibal, arguing on behalf of the petitioner, submitted thus:

(i) The contention, of the respondent, that there was no concluded contract between the parties, was not correct, as was apparent from the following:

(a) The e-mails dated 24th February, 2020 and 25th February, 2020, from the respondent to the petitioner[1] confirmed the understanding between the petitioner and the respondent in relation to the programs of the respondent to be broadcasted on the petitioner's Platform.

(b) The respondent had signed the Agreement dated 18th March, 2020 and forwarded it to the petitioner and the inability of the petitioner to sign the said Agreement was owing to circumstances beyond its control.

(c) The petitioner and the respondent had acted upon the terms of the Agreement, as was apparent from the following:

(i) On the very day after the signing of the Agreement, i.e. 19th March, 2020, the respondent raised an invoice, on the petitioner, in terms of the Agreement.

(ii) Against the said invoice, advance consideration of US $ 2,00,000 was paid by the

[1] **Refer para 4(i) (*supra)***

petitioner, which was unequivocally and unconditionally accepted by the respondent.

(iii) *Vide* e-mail dated 3rd November, 2020[2] the respondent agreed for adjustment, against the amount due to it from the petitioner, of the advance amount of US $ 1,10,000 payable by the respondent to the petitioner.

(iv) As such, advance consideration of US $ 3,10,000 stood paid by the petitioner to the respondent. The respondent was not seeking to contend that the said payment was against monies due from the petitioner to the respondent under any transaction not relatable to the Agreement dated 18th March, 2020.

(ii) The petitioner was ready and willing to perform its part of the Agreement. In this context, Mr. Amit Sibal submitted, on instructions, that his client was willing to deposit, with the court, the balance consideration payable under the Agreement dated 18th March, 2020.

(iii) E-mails dated 17th July, 2020[3] and 22nd July, 2020[4] from the respondent to the petitioner, acknowledged the fact that the "UPSC" "Immature" and "Flames" shows were "logged with

[2] **Refer para 4(xx) (*supra)***
[3] **Refer para 4(viii) (*supra)***
[4] **Refer para 4(ix) (*supra)***

MX this year". By using the words "logged", the respondent had acknowledged the fact that a concluded commercial Agreement, for broadcasting of these three shows on the petitioner's Platform, in the 2020-2021 year, was in place, resulting in an enforceable contractual right in the petitioner's favour.

(iv) The discussion, between the petitioner and the respondent, for amendment of the Agreement dated 18th March, 2020, also indicated that there was, in existence, a concluded contract, as there could be no question of any Agreement/addendum to an unconcluded or non-existent contract. [In this context, Mr. Sibal has emphasised the use of the words "we can look at", as used in the mail dated 5th October, 2020[5].]

(v) The mere fact that alternative options were being explored, between the petitioner and the respondent, did not indicate that the petitioner in any manner repudiated the contract dated 18th March, 2020. Rather, by suggesting alternatives, the petitioner was accommodating the difficulties expressed by the respondent. A proper construction of the sequence of e-mails exchanged between the petitioner and the respondent, from 24th August, 2020 to 14th October, 2020, would bear out this position.

[5] **Refer para 4(xv) (*supra)***

(vi) Undue advantage was being sought to be taken, by the respondent, of the three "options" suggested by the petitioner in its e-mail dated 5th October, 2020[5]. Mr. Sibal submitted that, in the light of the further e-mails exchanged between the petitioner and the respondent, "option three", proposed in the e-mail dated 5th October, 2020[5], was no longer available for exercise by the respondent.

(vii) A contract, in order to be legal, valid and binding among the parties thereto, was not required, necessarily, to be signed by all parties. Reliance was placed, for the said purpose, on the judgment of the Queens Division Bench of High Court of U.K. in ***Reveille Independent LLC v. Anotech International (UK) Limited***[6], the judgment of the Court of Appeal, in appeal therefrom, as reported in ***[2016] EWCA Civ 443***, as well as the judgments of the Supreme Court in ***Trimex International FZE Limited, Dubai v. Vedanta Aluminium Ltd***[7] and ***Kollipara Sriramulu v. T. Aswatha Narayana***[8].

(viii) In these circumstances, as (a) an arbitrable dispute existed between the parties, (b) the Agreement between the parties contained a valid arbitration clause and (c) irreparable prejudice would result to the petitioner, if the Court would not step in, Mr. Sibal would seek to contend that a clear case for grant of interim protection, under Section 9 of the 1996 Act exits. He submits that, as the petitioner has always been ready

[6] [2015] EWHC 726 (Comm)
[7] (2010) 3 Supreme Court Cases 1
[8] (1968) 3 SCR 387

and willing to perform its part of the contract and had, in fact, paid US $ 3,10,000 to the respondent, it was entitled to specific performance of the Agreement with the respondent. It is further submitted, in this regard, that the content of the programs, to be aired on the petitioner's platform in 2020-2021, is not substitutable and that, therefore, if the right to air such programs were to be granted by the respondent to a third party, it would result in irreparable loss to the petitioner, which could not be compensated by way of costs or damages. The petitioner has also sought to point out that the respondent is admittedly in financial difficulties.

8. To a submission, from the respondent, that no specific performance, of the Agreement between the petitioner and the respondent, could be directed, as the Agreement was determinable in nature [in view of Section 14(d) of the Specific Relief Act, 1963[9]], Mr. Sibal submitted that, in the first place, this argument was not available to the respondent, as its case was that there was no concluded contract with the petitioner. Besides, Mr. Sibal points out that determinable contracts are not, *ipso facto*, excluded from the scope of enforcement, by Section 14(d), which applies only to a contract which is "in its nature determinable". This, he submits,

[9] **14. Contracts which are not specifically enforceable. –** The following contracts cannot be specifically enforced, namely:-

(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;

(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;

(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is *in its nature determinable*."

(Emphasis supplied)

would refer to contracts which are determinable at the sweet will of either of the parties thereto, without reference to the other party and unconditionally, without the requirement of any breach. For this purpose, Mr. Sibal relies on the judgment of the recent decision, dated 12th March, 2021, of this Court, in OMP (I) (Comm) 87/2021 [***Dr. Sharad Sahai v. DIO Digital Implant India Pvt. Ltd***] and of the High Court of Bombay in ***Narendra Hirawat & Co. v. Sholay Media Entertainment Pvt. Ltd.***[10].

9. Responding to the submissions of Mr. Amit Sibal, Mr. Jayant Mehta, learned Senior Counsel appearing for the respondent, advanced the following contentions:

(i) There was no concluded contract between the parties. The contract, as signed by his client, had been forwarded to the petitioner as far back as on 18th March, 2020. Till date, the signed contract has not been sent back, by the petitioner to the respondent. Rather, the petitioner started suggesting one amendment after the other, without responding to the repeated entreaties, of the petitioner, to return the signed contract. The communications exchanged between the respondent and the petitioner clearly indicated that the petitioner was unwilling to abide by the covenants of the contract as originally forwarded by the respondent to the petitioner, and desired to alter various aspects, including a change from a "3+3" to a "1+1+1" regimen, change in the advertisement slots and alterations in the

[10] **2020 (5) MLJ 173**

consideration governing the contract. The respondent, for its part, had never acquiesced to any of these changes. There being no concluded contract between the petitioner and the respondent, no case for specific performance thereof, could at all lie. Clearly, there was no consensus *ad idem* between the parties, regarding the covenants of the Agreement.

(ii) In the anticipation of a response from the petitioner, the respondent had forwarded the invoice dated 19th March, 2020. That invoice, too, remains unpaid even as on date. Mr. Mehta has pressed into service, the principle that a party, in breach of a contract, cannot seek specific performance thereof, for which purpose he cites the judgment of a Single Bench of this Court in ***Enter Tech Entertainment Pvt. Ltd. v. Blueair India Pvt. Ltd.***[11]**.**

(iii) The correspondences exchanged between the petitioner and the respondent clearly indicates that the petitioner has, contrary to its own assertions, never been ready or willing to perform the contract. Readiness and willingness submits Mr. Mehta, have to be reflected from the acts of the party and the onus in that regard rests on the party seeking specific performance of the contract. The petitioner, he submits, has miserably failed to discharge this onus. Reliance has been placed, in this context, by Mr. Mehta, on the judgment of a Division Bench of this Court in ***Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met***

[11] **2016 SCC OnLine Del 5507**

Beparkte Anasprakelijkheid[12], as well as the judgment of the learned Single Judge of this Court, which stands affirmed thereby[13].

(iv) In these circumstances, the respondent had availed one of the three options proposed by the petitioner in its e-mail dated 5th October, 2020, by opting to exit the contract and refund the amounts paid by the petitioner. Mr. Mehta has emphasised the fact that each of the three options suggested by the petitioner amounted to a material departure from the Agreement dated 18th March, 2020 and, therefore, to clear repudiation of the contract by the petitioner. The petitioner, he submits, was clearly unwilling to abide by the covenants of the Agreement dated 18th March, 2020 and could not, therefore, seek enforcement thereof.

(v) Mr. Mehta has also relied on the judgment of the Division Bench and the Single Judge of this Court in ***Inter Ads Exhibition Pvt. Ltd.***[12 & 13] to contend that a contract containing a "termination for default" clause was "in its nature determinable" within the meaning of Section 14(d) of the Specific Relief Act, 1963 and was, therefore, not specifically enforceable. Section 41(e) of the Specific Relief Act, 1963 therefore, proscribed the Court from granting any injunction, towards enforcement of such a contract[14].

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[12] **AIR 2020 Delhi 107**

[13] **2020 SCC OnLine Del 351**

[14] **41. Injunction when refused. –** An injunction cannot be granted –

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(e) to prevent the preach of a contract the performance of which would not be specifically enforced;"

Analysis and Conclusion

10. To my mind, it is clear, from a bare reading of the correspondence between the parties, that no relief, whatsoever, can be granted to the petitioner, at least in exercise of the jurisdiction vested in this Court by Section 9 of the 1996 Act.

11. The *troika* of a *prima facie* case, balance of convenience, and irreparable loss, it is trite, apply as much to Section 9 of the 1996 Act, as to Order XXXIX of the Code of Civil Procedure, 1908, apart from the issue of whether grant of interim protection would be "just and convenient".[15]

12. The petitioner has, in my considered opinion, been unable to make out a *prima facie* case for grant of the reliefs sought. As such, no occasion arises to consider the issues of balance of convenience and irreparable loss, the *troika* considerations requiring cumulative, not alternative, satisfaction.

The "concluded contract" conundrum

13. The tone and tenor of the communications between the parties, apropos the Agreement dated 18th March, 2020, are clear and unmistakable.

[15] Refer **Adhunik Steels Ltd v. Orissa Manganese & Minerals Pvt Ltd, (2007) 7 SCC 125**, **Transmission Corporation of A.P. Ltd v. Lanco Kondapalli Power Pvt Ltd, (2006) 1 SCC 540**

14. As far back as on 18th March, 2020, the respondent forwarded, to the petitioner, the contract signed by the respondent. Till date, the petitioner never condescended to return the said contract, duly signed.

15. A cohesive and conjoint reading of the e-mails exchanged between the petitioner and the respondent clearly indicate that the petitioner was unwilling to abide by the covenants contained in the Agreement dated 18th March, 2020, as signed by the respondent and forwarded to the petitioner. The respondent repeatedly requested the petitioner by e-mails dated 2nd June, 2020, 8th July, 2020, 17th July, 2020 and 22nd July, 2020, *inter alia*, to send back the Agreement, duly signed. The petitioner did not do so.

16. The petitioner, instead, required the respondent *vide* e-mail dated 15th July, 2020, to communicate the schedule of the programs to be aired on the petitioner's website. The respondent communicated the said schedule *vide* reply e-mail 17th July, 2020. Even thereafter, the petitioner did not forward the signed Agreement to the respondent.

17. Rather, starting 24th August, 2020, the petitioner started to propose changes in the "the overall construct of the arrangement".

18. On 11th September, 2020, the petitioner stated that it wanted to air the program as a "1+1+1 show". At this point, I may note that an attempt was made by Mr. Amit Sibal, on behalf of the petitioner, to state that, by requiring the program to be aired in "1+1+1 format", the petitioner was not suggesting any change from the regimen contemplated by the Agreement dated 18th March, 2020, which was

also on a "1+1+1 format", even if it did not expressly say so. On the face of the correspondence between the parties, I am unable to accept this contention. On 21st September, 2020, the respondent had expressed its difficulty in the new arrangement proposed by the petitioner, of "starting with the new Title and then deciding on subsequent seasons of established titles".[16] Neither in its further communications to the respondent, nor during submissions in Court, did the petitioner seek to deny that this was a revised arrangement, proposed by it.

19. In this context, Mr. Mehta has further invited my attention to the e-mail dated 5th October, 2020[5], in which the petitioner transparently, stated that it desired to "move ahead with this deal *with a revised structure of a 1 + 1 + 1 approach wherein we greenlight the 2nd show post the launch of the previous based on the output delivered*". This intent was again reflected in the following passage from the subsequent e-mail dated 14th October, 2020[17]:

> To capture the broad understanding, *the current deal would be structured as a 1 + 1 + 1 with MX greenlighting the subsequent shows post the launch of the previous based on the output delivered. This would mean that the amount paid to TVF as a signing fee would be against the 1st show which we chose, which I would confirm to be Immature 2*.

The Agreement dated 18th March, 2020, as signed by the respondent, did not contemplate any "greenlighting", by the petitioner, of the second show, based on the "output delivered" on the first. It envisaged, clearly, three shows, namely Immature, Aspirants and Flames, being delivered by the respondent to the petitioner, for

[16] **Refer para 4 (xiii) (*supra*)**
[17] **Refer para 4 (xvii) (*supra*)**

broadcasting on the petitioner's platform. The remaining three shows were optional. The Annexure to the Agreement, too, did not contemplate any such arrangement, as was reflected in the e-mails dated 5th October, 2020 and 14th October, 2020, from the respondent to the petitioner. Without, at any point of time, sending back a countersigned Agreement, the petitioner suggested as many as three Amendments to the original Agreement dated 18th March, 2020. There was no acquiescence, by the respondent, to any of the said Amendments.

20. By no stretch of imagination can it be said, therefore, that there was consensus *ad idem* between the parties, at any stage of the proceedings, starting 18th March, 2020, regarding the covenants of the Agreement executed. That being so, in the absence of any contract duly signed by both parties, no concluded contract enforceable in law could be said to have come into being.

21. The submission of Mr. Amit Sibal, that the law does not require a contract, to be enforceable, to be signed by both parties, has no application in the facts of the present case. The issue is not one of want of *signatures* of both parties, but want of *consensus* regarding the Agreement. As a general proposition of law, it cannot be gainsaid that the a contract, even if not signed by both parties, may be enforceable, *provided consensus ad idem, regarding the terms of the contract, exists, and the parties have acted in accordance with the contract, thereby evincing the intent to be bound by the covenants thereof*. Neither of these requirements is, unfortunately for the

petitioner, met in the present case. Clearly, there is no consensus *ad idem* between the petitioner and the respondent. Nor can it be said that the petitioner and the respondent had acted on the basis of the contract. Clause 8.1.1 of the Agreement dated 18th March, 2020 required the petitioner to pay advance of 30% of the Minimum Guarantee within 30 days of the execution of the Agreement. Neither has the Agreement been executed, nor has 30% of the Minimum Guarantee been paid, till date. Mr. Mehta correctly points out that the petitioner has not even made payment in accordance with the invoice dated 19th March, 2020 raised by the respondent. Rather, the e-mail dated 23rd February, 2021, from the petitioner to the respondent[18] (which the petitioner has not chosen to file), impliedly acknowledged that, even as per the Agreement dated 18th March, 2020, US $ 1,73,222 remained outstanding from the petitioner to the respondent. The belated suggestion, by Mr. Amit Sibal, during arguments in Court, that the petitioner be permitted to deposit the balance payment in Court, cannot advance its case an inch, or make out any case for grant of interim protection by this Court.

22. Even otherwise, given the number of aspects on which there has been want of meeting of minds between the petitioner and the respondent, it can hardly be said that consensus *ad idem* existed between them.

23. The petitioner proposed as many as three amendments to the Agreement dated 18th March, 2020. The respondent, by its

[18] **Refer para 4(xxx)** ***(supra)***

communications to the petitioner, clearly expressed its difficulties in agreeing to the amendments proposed by the petitioner. The respondent has never acquiesced, either expressly or by necessary implication, to any of the amendments, suggested by the petitioner.

24. Mr. Sibal also sought to contend that if there was no concluded contract, the parties would never have explored the possibility of addenda or amendments thereto. This submission, on the face of it, merits rejection. In the present case, the suggested contract, as signed by the petitioner and forwarded to the respondent, was never countersigned by the respondent. Rather, the petitioner proposed three different amendments, at one point of time, after the other, to the respondent, none of which were accepted by the respondent. There has been no consensus *ad idem* on the Agreement dated 18th March, 2020, either as originally signed by the respondent or in any of its amended *avatars*. No concluded contract can, therefore, be said to have come into being between the petitioner and the respondent.

25. This, apparently, was also the understanding of the petitioner, as reflected by its e-mail dated 5th October, 2020[5] addressed to the respondent. Mr. Sibal sought to object to Mr. Mehta reading the said e-mail dated 5th October, 2020[5] in isolation and submitted that if the said e-mail were to be read in conjunction with the e-mails which preceded and succeeded it, it would become apparent that the three options proposed by the petitioner in the said e-mail dated 5th October, 2020[5], were no longer available to the respondent, by the time the respondent chose to exercise the third option, *vide* its e-mail dated 5th

October, 2020[5]. I cannot, *prima facie*, accept this submission. Rather, it appears to me that if the e-mail dated 5th October, 2020[5] was to be read in conjunction with the e-mails which preceded it, the position that emerges is that, having proposed various changes to the original Agreement dated 18th March, 2020 (as forwarded by the respondent to the petitioner), and having found that the respondent was not amenable to agree to the said changes, the petitioner recognized the fact that there was no possibility of travelling the contractual path any further with the respondent. As such the option of walking out of the Agreement and returning the amount deposited by the petitioner, in my view, was consciously proposed by the petitioner, as one of the only viable alternatives remaining. The respondent exercised this option. There is no communication from the petitioner to the respondent withdrawing any of the aforesaid three options, suggested in the e-mail dated 5th October, 2020. Once, therefore, the respondent had exercised the third option suggested by the petitioner, it is no longer open to the petitioner to seek specific performance of the Agreement dated 18th March, 2020, which has run its course.

26. In circumstances such as these, the judgments of the Supreme Court in ***Trimex International***[7] and ***Kollipara Sriramulu***[8] can be of no avail to the petitioner. ***Trimex International***[7] held, unexceptionably, that "*once (a) contract is concluded orally or in writing*, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect *either the acceptance of the contract so entered into* or implementation thereof, even if the formal contract has never been initialled". (Refer para 49 of the report)

Similarly, ***Kollipara Sriramulu***[8] dealt with a situation in which the agreement, *on the basis of which the parties had acted*, contemplated execution of a "future formal contract". The Supreme Court held that, in such circumstances, the existence of a binding contractual relationship between the parties could not be denied merely because the "future formal contract" had not been executed. There is no parallel, whatsoever, between the issue in controversy in that case, and that in controversy in this.

27. The legal position, rather, is against the petitioner, as reflected by the judgment in ***U. P. Rajkiya Nigam Ltd v. Indure Pvt Ltd***[19]. In that case, the U.P. State Electricity Board ("UPSEB") floated tenders for certain construction activities. The tender documents were purchased by the U. P. Rajkiya Nigam Ltd ("UPRNL"). M/s Indure Pvt Ltd ("Indure") approached UPRNL for joint participation in submitting tenders in response to the notice of UPSEB. A draft agreement was prepared by UPRNL and sent, without signature, to Indure, but Indure did not sign it. Rather, Indure sent back a counter-proposal, on 27th June, 1984, incorporating certain changes suggested by it. The tenders were submitted to the UPSEB and, later, withdrawn by the UPRNL before they were finalized. Indure, thereupon, approached the UPSEB undertaking to perform the entire contract by itself. Side by side, Indure also issued a notice, to UPRNL, invoking arbitration under Clause (14) of the draft agreement. Indure contended that it had accepted the draft agreement on 27th June, 1984, while UPRNL disputed the existence of any concluded contract with Indure.

[19] **(1996) 2 SCC 667**

28. UPRNL approached the High Court under Section 33 of the 1996 Act. The High Court held that a concluded contract had emerged, between UPRNL and Indure, on the ground that (i) UPRNL had sent the drafted contract to Indure, (ii) Indure had signed the contract and sent it back with modifications to UPRNL, (iii) at no time did UPRNL reject the modifications, and (iv) UPRNL, rather, acted on the basis of the contract thus returned by Indure by submitting the tender. As such, the High Court held that UPRNL could not deny the existence of the contract, or of the arbitration agreement therein.

29. Reversing the decision, the Supreme Court held, in paras 17 and 19 of the report, thus:

> **"17.** In ***Ramji Dayawala & Sons (P) Ltd. v. Invest Import [(1981) 1 SCC 80 : AIR 1981 SC 2085]*** , a two-Judge Bench of this Court considered the existence of the contract and arbitration clause thereunder. This Court had held that in the facts of a given case acceptance of a suggestion may be *sub silentio* reinforced by the subsequent conduct. *Where there is a mistake as to terms of a document, amendment to the draft was suggested and a counter-offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document. Where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem.* In that case a sub-contract was signed and executed by the Managing Director of the appellant-Company but part of the contract was altered subsequently since counter-proposal was given by the respondent. This Court had held that one such case is where a part of the offer was disputed at the

negotiation stage and the original offeree communicated that fact to the offeror saying that he understood the offer in a particular sense; this communication probably amounts to a counter-offer in which case it may be that mere silence of the original offeror will constitute his acceptance. *Where there is a mistake as to the terms of the documents as in that case, amendment to the draft was suggested and a counter-offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document*; to wit, the letter and the cable. *It can, therefore, be stated that where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. It was held that there was no consensus ad idem to the original contract.* It was open to the party contending *novatio* to prove that he had not accepted a part of the original agreement though it had signed the agreement containing that part.

19. In view of the fact that Section 2(*a*) of the Act envisages a written agreement for arbitration and that written agreement to submit the existing or future differences to arbitration is a precondition and further *in view of the fact that the original contract itself was not a concluded contract*, there existed no arbitration agreement for reference to the arbitrators. *The High Court, therefore, committed a gross error of law in concluding that an agreement had emerged between the parties, from the correspondence and from submission of the tenders to the Board.* Accordingly it is declared that there existed no arbitration agreement and that the reference to the arbitration, therefore, is clearly illegal. Consequently arbitrators cannot proceed further to arbiter the dispute, if any. The conclusion of the High Court is set aside."

(Emphasis supplied)

30. Consensus *ad idem*, the foremost, and most indispensable, prerequisite for any concluded contract, is totally absent in the present case. No contract, which the Court could, in exercise of its jurisdiction under Section 9 of the 1996 Act, specifically enforce, or

the specific performance of which the Court could protect, even pending arbitration, can be said to exist.

31. In view of the aforesaid, no occasion arises for this Court to enter into any other aspect of the controversy, including the aspects of balance of convenience and irreparable loss, as there is no *prima facie* case made by the petitioner, justifying grant of any of the interim reliefs sought in the present petition. In my view, the petitioner is, for reasons unknown, seeking to breathe life into a dead body. Mr. Mehta has submitted that his client has requested the petitioner, on more than one occasion, to take back the amount of US $ 3,10,000, paid by the petitioner to the respondent. Needless to say, that option would always be open to the petitioner and it is not necessary for this Court, in the present proceedings, to express any view thereon. Suffice it to say that, as no concluded or enforceable contract with the petitioner has ever come into being, none of the reliefs in this petition, under Section 9 of the 1996 Act, can be granted to the petitioner. It is obviously open to the respondent to contract with any other party, for broadcasting of its programs.

32. The present judgment adjudicates only the prayer of the petitioner for interim protection under Section 9 of the 1996 Act, and the views expressed herein are *prima facie*, towards such adjudication. Section 9 requires the Court to examine, *inter alia*, whether the petitioner has made out a *prima facie* case, as one of the considerations for grant of interim protection. For the reasons aforementioned, the answer, in my opinion, has to be in the negative.

Needless to say, the parties would be at liberty to seek resolution of their disputes by arbitration and, in such event, the Arbitral Tribunal would not be bound by the findings, on merits, contained in this judgment.

Conclusion

33. In view thereof, there is, in my view, no substance, whatsoever, in this petition, which is accordingly dismissed with no orders as to costs.

C. HARI SHANKAR, J.

APRIL 5, 2021/*dsn/kr/r.bararia*