

**(1998) 07 DEL CK 0034**

**In the Delhi High Court**

**Case No :** IAs No. 9163/95, 2972/96, 1942/97 and 1943/97 in S.No. 2208/95

Hindustan Times Limited

APPELLANT

Vs

Compagnie Internationale Pour Le Radiotelephone

RESPONDENT

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**Date of Decision :** 17-07-1998

**Acts Referred:**

**Citation :** (1998) 07 DEL CK 0034

**Hon'ble Judges :** K. Ramamoorthy, J

**Bench :** Single Bench

**Advocate :** Mr. Dipankar Gupta, Mr. Gaurab Banerjee, Mr. R.N. Karanjawala and Ms Seema Sapra, for the Appellant; Mr. V.P. Singh Mr. Anil Sharma, Ms.Anju Bhattacharya, Mr. Rajiv Nayayar and Mr. Manmohan Advs., for the Respondent

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## **Judgement**

K. Ramamoorthy, J.—The plaintiff has filed the suit claiming the following reliefs :-

"a) for the following declarations of this Hon"ble Court :

(i) that the Amendment dated 3.6.1995 to the JVA dated 5.5.1995 is illegal, ineffective in law, and void ab-initio;

(ii) that the plaintiffs, not being a party to the JVA dated 5.5.1995, are not bound by the terms thereof, including the arbitral agreement contained in Clause 12 thereof.

(iii) That the 5th defendant had no power or authority in fact or in law to make the plaintiffs a party to the JVA, as illegally, deceitfully and unauthorisedly sought to be done by the 5th Defendant on 3.6.1995 acting in concert with Defendants 1 to 3;

(iv) that Defendant Nos. 1 to 3 are not entitled in law to initiate arbitration proceedings against the plaintiffs or processed with the same before the I or at all.

b) For an order and decree of this Hon''ble Court against the Defendants 1 to 3, ordering and directing Defendants 1 to 3, by themselves, their servants and agents to forthwith deliver up to this Hon''ble Court the amendment agreement dated 3.6.95 (Annex. "T" hereto) so that the same may be cancelled by this Hon''ble Court.

c) for a permanent order and injunction of this Hon''ble Court against Defendant Nos. 1 to 3 restraining these Defendants by themselves, their servants and agents from proceeding with the said Arbitration against the plaintiffs before the I or at all;

d) that pending the hearing and final disposal of this suit:

e) This Hon''ble Court be pleased to pass an order and injunction against Defendant Nos. 1 to 3 restraining these Defendant Nos. 1 to 3 restraining these Defendants by themselves, their servants and agents from proceeding with the said Arbitration against the plaintiffs before the I or at all;

f) for ad-interim reliefs in terms of prayer".

2. The plaintiff has filed I.A. 9163/95 for injunction claiming the following relief :-

"a) that pending the hearing and final disposal of the suit this Hon''ble Court be pleased to pass an order and injunction against Defendant Nos. 1 to 3 restraining Defendants 1 to 3 by themselves, their servants and agents from proceeding with the said arbitration against the plaintiffs before the I or at all;

b) for ex parte ad interim reliefs in terms of prayer (a) above."

3. The defendants 1 to 3 filed C.M. 2972/96 for stay of the suit u/s 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961.

4. plaintiff has filed I.A. 1942/97 under Order 16 Rule 6 of the CPC praying for the following relief :-

"a) issue summons to the ABN Amro Bank having its Delhi Office at DLF Centre, Ground Floor, Sansad Marg, New Delhi and direct them to produce a copy of the letter written by them or by their Head Office dated 2.6.1995 to the Telecom Commission, Ministry of Telecommunication, Sanchar Bhawan at New Delhi;

b) issue summons to the ABN Amro Bank having its Delhi office at DLF Centre, Ground Floor, Sansad Marg, New Delhi and direct them to produce a copy of the letter written by them or by their Head Office dated 9.8.1995 to the Defendant Nos. 1,2 & 3 and Defendant No. 5 mentioned herein above in Para 4 (ii);

c) issue summons to the Telecom Commission, Ministry of Communication, Sanchar Bhawan, New Delhi and direct them to produce a copy of the letter received by them from the ABN Amro Bank dated 2.6.1995 mentioned hereinabove in para 4 (i);

d) issue summons to the Secretariat for Industrial Approvals, Ministry of Industry

and direct them to produce a copy of the Application made by Defendant No. 6 dated 1st June, 1995 for approval for Foreign Investment and Technology of the Joint Venture for providing Cellular Mobile Telephone Service in India;

e) issue summons to the Department of Communications for Cellular Mobile Telephone Service at Sanchar Bhawan, Ashok Road, New Delhi who floated the Tender and direct them to produce the receipt given to Defendant No. 4 for purchase of Tender Documents in respect of Tender No. 11-28/94-MMT(TM) and direct them to state whether Defendant No. 4 had also purchased the Tender Documents in respect of this Tender."

5. The plaintiff has also filed I.A.1943/97 under Order 11 Rule 14 of the CPC praying for the reliefs :-

"to direct the Defendants to produce the aforementioned documents or copies of the same."

6. Before I deal with the Interlocutory Applications, it is necessary to notice events that had happened before the following of the suit. Government of India, Department of Telecommunication issued notice inviting tenders on 16.1.1995 for cellular mobile telephone service in several Telecom territory circle mentioned in the notice. On 22.8.1994 an agreement was entered into between Enpro India Limited (4th defendant) and Mr. Vipin Malik, Chartered Accountant (5th defendant) for the purpose of giving offer to the Government of India for Cellular Phones. In paragraph 3 on the Facilitation of Business Transaction, it is agreed :-

"VMA" shall ; (i) Assist "Enpro" in drafting and vetting of Agreements and Joint Ventures with foreign partners and in securing appropriate governmental approvals with respect to any transaction which "Enpro" may enter into with any corporation, partnership of other entity or entities.

(ii) Upon reasonable notice and at mutually agreeable times, assist and accompany "Enpro" personnel to travel to and fro in U.S.A., of any other countries for business related purpose. It is also understood that "Enpro" will always invite "VMA" for all the meetings.

(iii) Perform such other mutually agreed services and duties as may be reasonably necessary to fulfill the purpose of this Agreement."

7. In paragraph 2 the role to be played by the 5th defendant is mentioned in the following terms:-

"SCOPE OF THE ASSIGNMENT AND ENGAGEMENT OF "VMA" "VMA" SHALL : (i) identity, develop and screen a list of corporations, partnerships and other entries in the United States of America or in any other countries of the world in the above field of business which meet certain criteria to be established by "Enpro" or to any such party or parties selected by "Enpro" as suitable candidates for the negotiation of potential business transactions in Telecommunications; (ii) Upon request of "Enpro", introduce "Enpro" to any such party or parties selected by

"Enpro" for the purpose of negotiating a potential business transaction in Telecommunications; (iii) assist in the negotiation and structuring of any potential business transaction that may result from such introductions."

8. On the same day, there was an agreement between K.K. Birla Group represented by Mr. Shyam S. Bharatia and Mr. Vipin Malik, the fifth defendant. In paragraph 3 under the heading Facilitation of Business Transactions, it is stated :

""VMA" shall : (i) Assist "K K Birla Group" in securing appropriate governmental approvals with respect to any transaction which" K K Birla Group" may enter into with any corporation, partnership or other entity or entities . (ii) Upon reasonable notice and at mutually agreeable times, assist and accompany "K K Birla Group" personnel to travel to and in U.S.A. for business related purpose; (iii) Perform such other mutually agreed services and duties as may be reasonably necessary to fulfill the purposes of this MEMORANDUM OF UNDERTAKING."

9. It could be seen that there was no commitment on the part of Enpro India Limited, 4th defendant, or by K.K. Birla Group. On 23.8.1994 Thomas C. Hunter Jr., President of Thomas C. Hunter JR Management Consultants, who is stated to be a business associates of Mr. Vipin Malik, the 5th defendant, wrote to the third defendant that the Managing Director of the Hindustan Times, Shobhana Bhartia and her husband Shyam Bhartia, the Managing Director of Vam Organic Chemicals will be in the United States in the early September. They wanted to apply for a telephone license for substantial area in India. He had given brief profile of K.K. Birla Group, the 3rd defendant. In September 1994 the various functions of the Bill of Groups of Companies were given to the persons concerned in the U.S. On 8.12.1994 the 5th defendant Vipin Malik gave a message to the third defendant, sent a copy of Memorandum of Understanding between the 5th defendant and Shyam Bhartia. He had promised to give whatever information was required by the third defendant. On 9.12.1994 Navin Sagar on behalf of Shyam Bhartia sent the following Fax message to Vipil Malik :-

"Mr. Shyam Bhartia desires following to be incorporated

1. Name of Company representing KKB

Group will be

The Hindustan Times Ltd.

18-20 Kasturba Gandhi Marg

New Delhi-110 001

2. Mr. P K Basak and Naveen Sagar to be included in Negotiating Committee.

3. We had discussed with Bob McGuire during his visit to Delhi that we may consider participating with other Companies for some telecom circles. Accordingly we need to delete/amend Exclusivity Clause.

Pls feel free if you need any clarification."

10. On the same day, 5th defendant Vipin Malik sent the Fax message to the third defendant:-

"MEMORANDUM OF UNDERSTANDING FOR GSM:

1. Name of Company representing KKB Group will be

The Hindustan Times Ltd.

18-20 Kasturba Gandhi Marg

New Delhi-110 001

2. Mr. P K Basak and Naveen Sagar to be included in Negotiating Committee.

While you were here during your visit we have discussed that KKB may consider participating with other companies for Telecom circles. Accordingly we need to delete/amend Exclusivity Clause.

In any case, if any further clarification is required, please let me know."

11. On the same date i.e. 9.12.1984, the third defendant sent a Fax message to the 5th defendant Vipin Malik enclosing a draft Memorandum of Understanding for the signature of Shyam Bhartia. In the message it is stated :-

"Subject: GSM Memorandum of Understanding

Attached is the signed GSM MOU. You can have Shyam sign and fax back. I have put 4 originals that have been signed in Federal Express for you. Please have them signed and keep 2 for yourself and send 2 back to me.

The exclusivity statement in the MOU does not restrict the K.K. Birla Group from working with other companies. We would just like to be notified of your discussions with other entities to avoid potential conflicts of interest with certain companies. We will also do the same for the K.K. Birla Group.

Hope you have a great weekend. I will be working Saturday if you need me."

12. The draft Memorandum of Understanding would speak of Committee Formation in the following terms :-

"Committee formation Each party hereby appoints the following representatives who shall constitute the Joint Negotiation Committee (hereinafter called the "Committee")

HTL USG

Shyam S. Bhartia Robert McGuire Vipin Malik James Roberson P K Basak Rudolf Fischer Naveen Sagar Christian Halbritter William W.Jones, J.

Members of the Committee can be substituted from time to time within the sole and exclusive discretion of the party appointing the member to be replaced."

Clause 2(5) would state :

"The HTL shall serve as the in-country partner and assist with providing project and bridge financing."

13. It is the clause relied on by Mr. V.P. Singh, the learned senior counsel for defendants 1 to 3. About future approvals, paragraph 4 provides:-

"It is intent of the parties that upon successful negotiation of the Joint Venture Agreement, the creation of the Joint Venture will be contingent upon the following :

A) Approval of the Joint Venture by the Boards of Directors of both HTL and US Telecom Holdings;

B) Qualification of USG to serve as "foreign partner" pursuant to guidelines of the Ministry of Communications;

C) The availability of items and components critical to the cost, feasibility of the Joint Venture at prices consistent with the Company business plan;

D) Appropriate approvals from the Indian Government."

On behalf of Hindustan Times, Vipin Malik had signed in the draft. Defendants 1 to 3 or 5th defendant had not referred to approval of the Board of the HTL about these matters. On 13.2.1995 there was a Fax message from the third defendant to the 5th defendant Vipin Malik enclosing a draft of the Joint Venture agreement along with proposed shareholders agreement between third defendant US Global Telecom East, INC and the plaintiff Hindustan Times Ltd. and Protel India Pvt. Ltd., a Company to be formed, which is 6th defendant. He wrote:-

"In Re: US GLOBAL TELECOMMUNICATIONS, INC. ("USG") AND HINDUSTAN TIMES LTD. ("PRO TEL LTD.")

I hope things are going well for you and I would like to take this opportunity to thank you again for the wonderful hospitality that you and your wife bestowed upon our group while we were in India. You were most gracious and I only regret that I was not physically well enough to fully appreciate Indian cuisine at its best. Please thank your wife against for me.

With regard to the Joint Venture Agreement, I have enclosed herewith a draft of the Agreement, along with the proposed Shareholder Agreement.

As you will note, the Joint Venture Agreement speaks in terms of our joint pre-licensing activities and contemplates that upon the grant of license, the remaining documents (including the Shareholders Agreement) will be signed as we proceed with build-out and operations.

Unfortunately, Bob McGuire has not had an opportunity to review this, but (since I am already twenty-four (24) hours late in faxing this to you) I thought I would go ahead and provide you with this draft knowing that we would have the opportunity to discuss the details and make whatever changes everyone feels is appropriate.

As you may be aware, J.B. Dadachanji's office had prepared an initial draft of the Joint Venture for me, but upon my return I decided to reformat it to more specifically address the nature and aiming of our joint activities.

Lastly, Bob has discussed with me your joint concern regarding the qualification issues for US Global Telecommunications, Inc., and the possibility of having US Telecom East, Inc. serve as the foreign operating partner. This is a change in our original plan and is currently being discussed by various shareholder groups. Obviously, we need to do whatever is necessary to qualify and I will be back in contact with you regarding this matter as soon as possible.

Please do not hesitate to give me a telephone call with any comments or questions, and I will look forward to hearing from you as soon as reasonably possible."

In the draft shareholders agreement the parties mentioned are third defendant, plaintiff and the 6th defendant Protel India Ltd. Clause 4 in the preamble portion would read :-

"The parties have, through Pro Tel, made bids for the aforesaid Call for Tenders and the Department of Telecommunications have awarded a license to Pro Tel and the Parties desire to utilise their resources, strength and expertise for their mutual benefit and to successfully implement the joint venture for cellular telecommunication infrastructure and services (the "Project").

Clause 5 would read :-

"The Parties made an application to the Indian Authorities for investment by USG in Pro Tel and for the rendering of management services by USG to Pro Tel and the Authorities have issued an acceptable approval on the....1995."

The relationship of the parties with Pro Tel is mentioned in Article 3 in the following terms:-

"a) USG shall be the operating partner and shall provide the know how relating to the Project through the Management Services Agreement and the license Agreement.

b) HTL shall be the Indian partner responsible for project financing, bridge financing and debt guarantee and for making cash advances, convertible into equity.

To the extent possible, Pro Tel shall be run in accordance with the Business Plan.

On 14.2.1995 the plaintiff wrote to the Department of Telecommunications seeking certain clarification in the light of clause 3 of Part I of Tender document for Cellular Mobile Service :-

"We will be obliged to have the clarification on the following 9 queries on the subject mentioned above:-

1. In para 11.4 of the tender there is a stipulation that the list of GSM subscribers (Directory) be published, since the GSM users also have to pay for incoming calls, such a list might result in heavy billing which would be a disadvantage in achieving cellular service growth. We would request that there should not be any insistence on publishing a GSM Directory.

Individual users, on their own would no doubt inform their numbers to those persons from whom they do not mind receiving calls. We do not have any objection to supplying the list of subscribers to DOT, but the same, we request, should not be published.

2. How does DOT plan to reimburse GSM operates for ..... reimbursing to DOT the revenue for long distance STD, ISD calls from GSM subscribers? We suggest that it could be a lump-sum payment per subscriber or a percentage of the revenue collection.

3. The cellular service operator should also get a share of revenue earned from GSM subscribers on STD/ISD calls made by them which is not provided for in the tender. This should be, we request, on the same basis as the basic service operator could get the share for such calls.

4. At present the GSM tariff indicated in the tender is one minute of GSM equalising to six local calls . ..... following any upward tariff revisions of local calls from Rs.1.40 per call there will be a similar increase in GSM tariff also.

5. DOT, as per their tender, has permitted the operators of the basic telephone service to install their own intra-circle long distance ..... presume that in case DOT's own network is not able to handle long distance traffic from GSM subscribers either due to lack of quality or inadequate network capacity, DOT will permit the GSM operator to use the net works established by the private operators ..... services. We also presume that similar facilities will be available to GSM subscribers for inter-circle and international traffic as and when establishment of such networks is through open to private operators.

6. The tender does not access itself to the tariff applicable in case when GSM subscribers from other territories, under the ..... network of a particular GSM operator. We feel that a suitable structure for a surcharge should be provided for such a usage.

7. We presume that import of equipment by GSM operators will be entitled to same concessions as that of .....

8. We presume that the tender could be responded to by a joint venture company where one constituent has purchased the tender in its own name.

9. Annexure II, Part I, gives the list of offices from where telecom data could be procured. On being ..... has so far been released. Release of all relevant data to prospective tenders needs to be expedited on an immediate basis.

Waiting for the early clarification on the queries raised by us."

This is signed by K.C. Jain and it was submitted on behalf of defendants 1 to 3 and that K.C. Jain is an authorised signatory for Hindustan Times Ltd. On 22.2.1995 the 5th defendant wrote to the third defendant that the matter was being discussed with Hindustan Times Ltd. plaintiff and he would revert to them in 3 or 4 days. On 22.2.1995 the plaintiff wrote to the Canara Bank, New Delhi to make arrangements for furnishing bank guarantee as the plaintiff was intending to participate in the tender in association with American Multi National Company for the B category service areas namely Punjab, Haryana and Kerala. For this purpose, the plaintiff required bank guarantees for Rs. 30 crores as a whole. On 23.2.1995 the 5th defendant wrote to the 3rd defendant in the following terms :-

"I thankfully acknowledge the receipt of your very well drafted Joint Venture Agreement and Shareholders Agreement faxed to me. However, we are attaching some comments and would request you to kindly let us have your views in this regard.

The transfer clauses mentioned are applicable only where restricts are allowed regarding transfer to private companies. In case of public issue, the provisions of transfer as stipulated by the list agreement with the Stock Exchange would apply and, Therefore, restrictions will have to be amended accordingly at the appropriate time.

There are many blanks in the Shareholders Agreement which are quite material and would alter the rights and obligations of the respective parties. It is Therefore imperative that all the blanks are appropriately filled up before final comments can be given in respect of those items.

Clarification required from DOT:

It would be necessary to ascertain whether the tender documents purchased by HTL would be acceptable and would not infringe the conditions of the tender, if the Pro Tel is the tendering authority."

On the 25th of February 1995 the Canara Bank wrote to the plaintiff that it would make all arrangements for giving bank guarantee provided the cash margin for guarantee in lieu of EMD (earnest money deposit) and commission 3% was paid. On 6.3.1995 the 5th defendant sent a draft Fax message to the plaintiff (Mr. S.M. Aggarwal) to be sent to the third defendant. Mr. Aggarwal is stated to be an Adviser to the Board of Directors of the Hindustan Times. Two conditions have to be satisfied according to the message and they are:-

"1. The bidder must have a subscriber base of more than one lac cellular mobile telephone operations as on 1.1.95.

2. The bidder must have 3 years experience of operating cellular mobile telephones net work as on 1.1.95."

On 7.3.1995 S.M. Aggarwal on behalf of Hindustan Times sent a message to the

third defendant :-

"We have ..... certification ..... to US Telecom East.

For Pro Tel to be an acceptable bidder, the following conditions incorporated in Clause 4 (iv) enclosed, of the tender documents have to be satisfied.

a) The bidder must have a Subscriber base of more than 100,000 Cellular Mobile Telephone ..... as on 1.1.95 and

b) the bidder must have minimum 3 years experience of operating Cellular Mobile Telephone network as on 1.1.95.

The experience of only that promoter company which has an equity participation of 10% or more and which is a network operator of Cellular Mobile Telephones will be added to experience of bidder company. .... has nil experience, as India has no Cellular Mobile Telephone service at present.

The documents brought from U.S. indicate that US Telecom East is principally owned by three Companies.

(1) Hargray Communications Group, (2) CT Communications Inc. and (3) Farmers Telephone Co-operative Management ..... these three Companies in US Telecom East is required. Also since when are they operating Cellular Mobile? What percentage of 49% equity shareholding of US Telecom East in Pro Tel could be allocated separately to each of the three Companies?

Of these, CT Communications, it seems, has made a joint operating company with Alltel. Please confirm. The number of Cellular customers indicated for the joint combine of CT Communications and Alltel is 2,12,000. How many of these are being operated by Alltel and how many by CT Communications? It has to be established that on combining CT Communications and Alltel had ..... single corporate entity. Otherwise Alltel too would have to invest 10% for getting its experience counted.

If the combine is not a corporate joint venture and if Alltel does not invest the subscribers of only CT Communications could be reckoned against the experience of 100,000 if CT Communications invests 10% of equity.

As regards Hargray and Farmers, they are both joint venture partners with Palmetto Mobile, who is providing 76,000 mobile phones. What is the shareholding of Hargray and Farmers in Palmetto Mobile? If Palmetto Mobile is not investing, the number of mobile subscribers of Hargray and Farmers for being added for the ..... 100,000 can only be calculated based on their shareholding in Palmetto Mobile. This needs clarification.

Since this is a very important matter in support of the eligibility of the bidder, a clear statement of the position leading logically to the conclusion as required in the bid documents is necessary and may kindly be provided urgently by fax.

It is hoped the bid preparation work is in progress with full speed."

On the same day, S.M. Aggarwal on behalf of Hindustan Times Ltd. wrote to Canara Bank giving the particulars required by the Canara Bank. The plaintiff had sent the balance sheet of the Hindustan Times Ltd. for the years 1992-93, 1993-94 and Memorandum of Articles of Association of Protel India Ltd. and a profile of K.K. Birla Group. Mr. V.P. Singh, the learned senior counsel for defendants 1 to 3, relied upon the first paragraph in this letter wherein it is stated :-

"This was reference to the discussions you had with our Dr. K.C. Jain this morning in connection with issue of Bank Guarantee for our Cellular Mobile Telephone project."

14. According to the learned senior counsel this would give a clear indication that the plaintiff had decided to participate in the tender. On 8.3.1995 the third defendant sent a message to Mr. Aggarwal (Hindustan Times Ltd.):-

"The following pertains to your recent fax concerning our GSM tender efforts. I will attempt to respond to each one of your statements and questions in this memo.

I feel that our structure as a company is confusing to everyone at this point in time. Our structure is however, almost identical to any other telephone operating company in the United States. In addition to the common structure, I do not know of any telephone operating company in North America that does not create new corporate and/or off shore entities to address international projects.

Our corporate structure or the structure of our telephone owners can not be altered in order to satisfy a technical interpretation or to change how the DOT may preconceive our network of companies. The various Telephone Holding Companies can not circumvent their joint venture in US Telecom East and participate directly in Protel. In the same manner, the cellular entities under the Telephone Holding Companies can not go around their own holding company and US Telecom East and participate directly in ProTel.

The structure of US Telecom East and its owners has developed in response to tax issues at the State and federal levels, as well as legal and regulatory considerations between regulated and unregulated business activities in the United States. We feel we have in place the optimum structure for the corporate partners involved in US Telecom East. Attached are organizational charts for US Telecom Holdings and the typical structure of Concord, Farmers and Hargray Holding Companies for your review.

US Telecom East is committed to do what ever it can to maintain the 10% ownership requirement in ProTel, as well as provide the experience, capabilities and dedicated management in order to build and operate an efficient and profitable cellular operating company for our joint venture. it can not however, commit a position that shows a 10% allocation for Concord, Farmers and Hargray each.

I agree with your comments that the qualification issue is extremely important. Since our structure is our structure, we are looking towards you for a definitive statement on our qualification and ultimate acceptance by the DOT in India. There is no way we would even want to take a guess at the finale position of the DOT because:-

- \* We are not at all familiar with the politics and day-to-day working of the Department of Telecommunications in India.

- \* We do not possess any worthwhile knowledge of the legal and regulatory environment in India at this stage of our relationship.

- \* Our level of general law and issues pertaining to the everyday business sector in India is far from our comfort zone.

- \* Our learning curve of just becoming familiar with the basic culture of India is in its infancy.

We are not in a position to present a firm statement that we will be qualified by the Indian Government's Department of Telecommunications. We are half way around the world from the DOT and we are looking to you to evaluate our structure and inform us, if we will be accepted by your Government's DOT.

We are constantly working with interested parties that may want to invest in ProTel through the foreign portion of our joint venture. A number of these prospects have extensive holdings in operating cellular companies. Should we come to an agreement with any of the parties such as Alltel, Fidelity and Alcatel, it will certainly strengthen the story we present to the DOT. However, nothing is certain as of this date.

We are expending a great deal of resources in responding to these GSM tenders and associated joint venture work. There is significant business planning, legal and financial work that still has to be accomplished. Should we have a real problem with our structure, please let us know as soon as possible. Several thousand dollars are being spent everyday in continuing this process. Before we send our General Council and Chief Financial Officer to New Delhi, not to mention all of the other related activities, we need to know if this whole thing makes sense. Essentially, are we throwing good money after bad? Your advise and guidance is appreciated."

15. On 8.3.1995 it is clear that the parties had not come to any definite understanding about the terms. On 9.3.1995 the plaintiff sent the communication to 3rd defendant in the following terms:-

"Thanks for your fax of 8th March 1995. We understand that you have sent some papers relating to your corporate set-up to Mr. J.B. Dadachanji, Senior Solicitor. Mr.Dadachanji is out of India and will be back on Sunday. The earliest we could meet him is Monday, the 13th March.

From the papers you have sent, it seems that Concord, Farmers and Hargray or

the owners of US Telecom Holdings, who are ..... the shareholding of Concord, Farmers and Hargray in US Telecom Holdings has not been indicated in the fax but we presume it would be equal and total to 100%.

We understand that US Telecom East which becomes the promoter company through the Joint Venture here will invest a minimum equity of 10%. This satisfies the condition ..... the tender documents. The only other matter to be established with regard to para (v) is that US Telecom East is a network operator of a Cellular Mobile network. If any of the three constituent companies - Concord, or Hargray or Farmer is a network of a Cellular Mobile network, this condition too would be satisfied, we feel. However, please confirm this and also as to which and..... three companies fulfill this requirement?

The condition in para iv (b) is that the bidder company must have a 3 years experience of operating Cellular telephone network as on 1.1.95. We are sure, this would be so. However, please confirm which one or more of the three Companies - Concord, Hargray and Farmer fulfill this .....

The condition in para iv (a) is important. The subscriber base of the bidder on 1.1.95 has to be 100,000 Cellular phones. This base to reach 100,000 can be pooled for the 3 companies Concord, Hargray and Farmer if each of them is an Operator and invests 10% of the equity which means that US Telecom East invests 30% of the equity since the ..... equal ownership of U Telecom Holdings.

I shall be grateful to have your response about the above points which also we will place before Mr. Dadachanji on Monday next."

16. The third defendant issued a message to the plaintiff. This would mention about the qualification prescribed by the Department of Telecommunication and the third defendant was aware of the conditions imposed by the Department of Telecommunication. The letter reads :-

"Your fax of today was very informative. I am however coming to the conclusion that we (US Telecom East) will not be accepted by the DOT. There were two significant items in your fax that we do not and can not meet and they:

1. US Telecom East, Inc. is not providing Cellular service of any kind as of this date. There is no way that we can imply such a fact.
2. US Telecom East can not commit to a 30% investment in ProTel. This item appeared to be very important to you. You indicated it would be the connection showing that Farmers, Concord and Hargray had a 10% position for each company. This is not possible.

I have just completed an all day meeting with Fidelity Capital. We will be working with Fidelity closely over the next 10 days. At which time, they will make a decision if they will be participating in ProTel through an offshore company that would be established to hold the foreign interest in ProTel. Fidelity is an investment company as well as a day-to-day manager that holds 100%

ownership in Telecommunications operating companies. Fidelity owns a telecom company based in London that has over 100,000 subscribers. They have also built and operate a mobil company that has 42,000 customers in the state of Texas. They also own almost 10% of a very large cellular company with approximately 1 million users. If we can get them committed to participate (I think we can) they will enhance our presentation to the DOT.

We are working with Alltel and should have a decision from them by the end of next week in regards to being a participant in our ProTel joint venture. Alltel is a very large operating company with several hundred thousand cellular customers and over half million basic users. Alltel would also enhance our DOT presentation.

Alcatel will be receiving drafts of business plans from us the end of next week, they will be presented to their corporate people in Paris for a decision. Should Alcatel also make a decision to be part of our efforts they will add to our story to the DOT. In addition to being the second largest supplier of GSM technology in the world, Alcatel is also is the sole operator of 2 small GSM cellular companies.

Unless we have some significant changes (such as the involvement of companies above) in our proposed ProTel joint venture, I feel the picture is not good for us to go forward. In the meantime we have people in the United States, Paris and Vienna working on the tender responses."

17. On 11.3.1995 the plaintiff sent a message to the third defendant stating :-

"Your Fax of March 9th. I appreciate the position regarding US Telecom East, Fidelity Capital and Alltel as indicated in the Fax.

What we are concerned with is only that our bid meets the qualifying requirements as laid down by DOT in the bid documents, relevant extracts from which have been faxed to you.

Our suggestions in the Faxes have been directed only to meet those requirements based on information we have obtained from you about your inter-Corporate structures.

As detailed information about such structuring is known to you, we await your advice and confirmation of the qualifying requirements. You may please Therefore make the possible suggestions about this incorporating various alternatives namely (1) US East on its own (2) with Fidelity Capital and (3) with Alltel and/or combination of the above to reach the objective.

Please also send us a copy of the Business Plans prepared by you which you would be sending to Alcatel."

18. In or about 9th of March 1995, the Company Pro Tel was incorporated and Mr. S.M. Aggarwal became the Head of the Company. Mr. S.M. Aggarwal on behalf of Pro Tel India Pvt. Ltd. wrote on 14.3.1995 enclosing the comments by the solicitors of the plaintiff on the joint venture agreement. According to Mr. V.P. Singh, learned senior counsel for defendants 1 to 3 that Mr. S.M. Aggarwal had

become the Head of Pro Tel but he would write purporting to be on behalf of the plaintiff. According to Mr. V.P. Singh, learned senior counsel, this would show that Pro Tel was only the alter ego of the plaintiff. On 19.3.1995 the third defendant sent a fax message to Hindustan Times (Dr. K.C. Jain). Here also the third defendant wanted to have a few details for satisfying the Department of Telecommunications. The message reads as under :-

"The financial business plans (2 Copies) have been sent to your attention at the Hindustan Times. We continue to work extremely hard in getting commitments from strong financial institutions and other significant cellular operators. I am getting to feel fairly confident that we will have a team on the foreign side that will more than qualify operationally and financially. I just wish I had some additional time to structure the business relationships with a little more thought.

Couple of quick comments.

- Has the questions ever been answered that were submitted to the DOT? A number of the questions will have a direct impact on our business plans and tender responses. I guess we have run out of time in regards to the DOT information.

I will send you another Federal Express package Monday with a copy of the Motorola information for your review and file. I could not fit the Motorola binder in Saturdays Federal Express to you."

19. On behalf of Enpro he wanted clarification from the third defendant as Mr. Bhatia had commented that the partners in the venture would be U.U.S.. Company and the Hindustan Times and now in change in the partners would require the consent of Enpro. On 20.3.1995 the third defendant had sent the message to Mr. Naveen Sagar, Enpro (4th defendant) stating :-

"I am sending you this message in an attempt to clarify a statement in your fax and explain our mission. We have always made it known that our company was going to have other foreign participants in the 49% ownership portion of our joint venture. The "Memorandum of Understanding", that we agreed to in December of last year clearly presents our proposed structure as having 51% owned by The Hindustan Times and other Indian interests and 49% by our company and other foreign investors. Some additional comments are :

\* It has always been discussed that Alcatel, after reviewing business plans, could be a major player on the foreign trade.

\* Fidelity has always shown an interest in participating on the foreign side of the joint venture. Vipin Malik introduced Fidelity to us.

\* Alltel is a potential participant that will enhance our credentials as a Cellular Operator.

\* Another potential operating company (SFR) could more than qualify our operating acceptance by the DOT.

\* GE Capital is another company that we are talking with concerning a role on the foreign side.

Since time is of the essence, we do not have the luxury of being selective for capital or added operating credentials. We are burning the midnight oil in hopes of just filling in the financial and operating holes of the foreign ownership. Naturally, our company is the sponsor of the foreign side and as such, will control the business activities of the foreign participants as a group.

I hope this answers your concerns that were presented in your recent fax."

20. On 22nd of March 1995 the third defendant sent a message to Dr. K.C. Jain (Hindustan Times) and the message reads as under :-

"We are at the stage where we are having definitive commitment meetings with other perspective teaming companies to participate under our control within the 49% foreign ownership position. The extension of the tender to April 21 gives us a little more time to mutually analyze our proposed business. I have planned a series of meetings with potential investors and companies that will significantly strengthen our operating credentials (should make Mr. Agarwal happy). I do not feel Alltel can commit because of their corporate decision making requirements before the new April 21st date. However, I do have other strong relationships with cellular/GSM operators that can fulfill Mr. Agarwal's concerns.

The following is a breakdown of meetings I have scheduled with various potential partners for the foreign side and my respective agenda. Please let me know as soon as possible if you support my strategy:

1) March 27th - meetings in New York with GE Capital and Fidelity Capital. Objective is to obtain a commitment of \$2 to \$8 million in equity for Protel through an off shore company. It is my intent to have one of the above companies commit and have a letter of financial support in our tender response.

2) March 28th and 29 - Meetings in Hilton Head with Alcatel CIT in order to obtain a financial commitment of up to \$15 million in equity for ProTel via a Mauritius Company. I will be looking for at least a strong financial "letter of intent" from Alcatel for our tender.

3) March 29th and 30 - Meeting with SFR. SFR is a large international operating company of AMPS and GSM cellular services. I am looking for a firm financial commitment of \$ 15 million and/or a guaranteed 10% position or what ever is greater in order to assure that their respective operating credentials will qualify according to the DOT's tender requirements. SFR is a large operator with over 200,000 cellular customers that I at least know of. This company is very eager to cooperate with us, if I can promise them that they will extended an opportunity to participate in some of the projects we are addressing in Central Europe.

It is my hope to obtain the above financial commitments that will be presented in our tender responses with the SFR operating capabilities included. The SFR

operating history coupled with our own operating presentation should create a very strong story for the DOT. US Telecom will be controlling the proposed foreign group through a Mauritius company.

I have been asked by all of the mentioned companies, since we have a few more weeks and they are willing to support financially, is The Hindustan Times interested in bidding a 4th GSM Circle? What are your thoughts on this?

Please let me know if you concur with the above strategy."

21. The third defendant had expressed a doubt whether the plaintiff was interest in bidding a 4th G.M. Circle. On 25.3.1995 Mr. S.M. Aggarwal on behalf of Hindustan Times plaintiff wrote to the third defendant :-

"Thanks for your fax dated 22nd March `95.

Could you please let us know the name of the fourth Telecom Circle for Cellular for which you have shown interest?

We have received a GSM offer from Ericsson. If ..... to you.

Yesterday we received the Federal Express Courier packet regarding financial feasibility. We are studying it."

The Department of Telecommunications in the meantime had extended the last date for submitting tenders to 21.4.1995.

22. On 29.3.1995 the third defendant sent a message to Dr. K.C. Jain (Hindustan Times) requesting a letter to be sent by the Hindustan Times and the third defendant had sent a draft of the letter which reads as under :-

"We have just finished three days of meetings with potential partners for the foreign ownership portion of our ProTel joint venture. Tomorrow we will be meeting once again with Fidelity Capital. As of this date we have tentatively agreed to the following structure for the 49% foreign ownership portion:

COMPANY ROLE ownerSHIP % \* US Telecom General Manager of Partners 13% 1. SFR Operating Credentials 12% 2. Alcatel CIT Investor (equity/debt) systems supplier 12% 3. Mannesmann Operating Credentials Eurokom 12% \_\_\_\_\_ TOTAL 49% \* Fidelity will be participating in our portion of the ProTel Mauritius Company.

1. In addition to investment capital, SFR will provide operating credentials and direct evidence for our tenders of being an operator for 220,000 cellular customers.

2. In addition to funding, Mannesman will also provide operating credentials as an operating company that has 800,000 cellular subscribers.

We Jones will amend our "Memorandum of Understanding" that reflects the above for your approval. In the mean time, it appears that I need some type of

comfort letter from the Hindustan Times that reflects your acknowledgment and support of my efforts. Each of the above companies have asked me if I have been keeping you informed of the discussions and want to know if you agree with my attempt to strengthen Protel's financial and operating capabilities with the addition of their companies.

As you requested earlier today, I have drafted a brief letter (see attached) that you can retype on your letter head and fax back to me.

All of the above companies have requested a senior level management meeting in Paris for Thursday and Friday of next week to discuss the overall commitments and involvement of all parties. It was asked by everyone, if it would be possible to have senior management representation from the Hindustan Times in Paris for the above. In addition to a representative from the Hindustan Times, I feel it would be helpful if Vipin Malik could attend. After Paris, everyone's scheduled to travel onto to New Delhi and work with our Hindustan Times partner (you) to the end."

"This memo will confirm our acknowledgment and support of your activities associated with the 49% foreign ownership portion of our ProTel joint venture. It is our view that companies such as : Alcatel, SFR, Fidelity and Mannesmann will strengthen our joint venture and tender responses to the DOT.

You have kept us informed of your discussions with other potential participants and look forward to meeting and working with our new group. It is understood, that our joint venture is between the Hindustan Times and your company and as such, we look to US Telecom as the General Manager of the foreign group."

23. On 30.3.1995 the plaintiff wrote to the third defendant (Mr. S.M. Aggarwal) stating :-

"In accordance with the progress of our discussions so far and the information as above, we are confident that the joint venture between the Hindustan Times and US Telecom, strengthened as above would successfully embark on the Indian Cellular business."

There was no firm commitment and there was no agreement to which the plaintiff was ever a party. On 31.3.1995 the Solicitors of the third defendant sent a draft Memorandum of Understanding between the third defendant, plaintiff, Alcatel and Mannesmann. On 31.3.1995 the Solicitors of the third defendant sent also a draft of Confidentiality Agreement.

24. On 1.4.1995 the 5th defendant (Vipin Malik) in response to the Fax message sent a message stating :-

"Thanks for your fax dated 03.31.1995. I am really happy to know the hard work you and Bob are doing to strengthen this Joint Venture and I hope it will fruitfully result into success.

The proposed amendment as suggested by you to the MOU of 9th Dec.94 signed

by HTL and USG is o.k. subject to a review of the business plan and understanding the full import of the phrase "operating partner". These may require discussions with the Negotiation team.

I talked to Mr. Sham Bharatia today. We have been approached by Mannesmann Eurokom GMBH with whom we have an existing business relationship. They have suggested taking PUNWIRE, a very well run company (partly owned by the Govt.) as a partner in our portion of the equity.

Mannesmann & Punwire are coming for final discussions on Monday.

We will be participating in the name of ENPRO & / or HTL. We think it will be a very healthy combination.

In my fax dated 30.03.1995 I have already requested a change in dates (suggested dates after 9th April) for the meeting at Paris. Please advise dates to enable us to make reservations.

You can call me at any time even at my residence Tel. No. (011-91-11641-4587).

Press report on tender conditions attached. advise Bob."

25. Even on the 1st of April 1995 Mr. Vipin Malik was not sure whether Hindustan Times plaintiff would be participating. On 4th of April 1995 the third defendant wrote to Dr. K.C. Jain, Hindustan Times Ltd. asking for the information whether the foreign partners would be associated with the plaintiff. The letter reads as under :-

"Received a telephone call today from Vipin Malik. He informed me that he and Shyam Bhartia will represent our partners from Indian in Paris and to cancel the Friday meeting and reschedule for the following Monday. I have done that, but I am not sure how many of the original group can change their agendas. However, I have rescheduled Jim Roberson and Wes Jones to be in Paris by Sunday night and be ready for a Monday meeting.

Vipin also informed me that ENPRO & Punwire are now our Indian partners. How does that affect ProTel that was formed? Are we associated with the Hindustan Times at all."

26. On the 6th of April 1995 the Solicitors of the third defendant wrote to the 5th defendant Vipin Malik enclosing a draft Memorandum of Understanding for discussion. The parties to the said draft MOU are Enpro India Ltd. (defendant No. 4), Punwire System, Protel India Pvt. Ltd. (defendant No. 6), US Telecom Holdings, Inc (defendant No. 3) and defendant No. 1 Compagnie Internationale Pour Le Radiotelephone and Mannesmann. Alcatel wrote to defendant No. 1 Dr. K.C. Jain, Vipin Malik and others stating that all parties are to meet in Paris on 4th or 5th of May. It is indicated therein that certain number of issues have to be finally settled. On the same date, the first defendant wrote to all the parties concerned:-

"We plan to have steering committee to sign the JV agreement to discuss business plan, assumptions, minutes and other matters if any by Thursday and Friday, 4,5 May.

I suggest that all members come with a power duly signed by their management allowing them to take decision and to sign."

27. Mr. Dipanker Gupta, learned senior counsel for the plaintiff had relied upon the last portion of the letter to show that the parties were aware of their obligations to have a binding arrangement and that is why they wanted power duly signed by the respective managements.

28. On 2.5.1995 the first defendant (Rene Dreesen) wrote to Dr. K.C. Jain, Rob Ketterson, Fidelity Communications International Inc. (defendant No. 2), Vipin Malik, Jim Roberson (defendant No. 3), Gurpal Singh (Punwire), Alcatel, Khindria & Co. and ABN Amro confirming the meeting to be held on 4th and 5th of May in Paris. In the agenda one of the items is "presentation of signature powers."

29. On 2.5.1995 Enpro (4th defendant) passed a resolution authorising Vipin Malik to negotiate and to sign the joint venture agreement. The Protel India pvt. Ltd. had also passed a similar resolution empowering Vipin Malik to negotiate and sign and that resolution is also of 2.5.95. The Fidelity Communications also had passed a resolution authorising Mr. David C. Weinstein. On 3.5.1995 the first defendant had given power to Rene Dreesen. The third defendant had given authority to Robert W. McGuire. On 5.5.1995 joint venture agreement was executed in Paris between Enpro India Limited (defendant No. 4), Fidelity Communications International, Inc. (defendant No. 2), U.S. Telecom East, INC. (defendant No. 3) and Compagnie Internationale Pour Le Radiotelephone SA (defendant No. 1). On behalf of Enpro (defendant No. 4) Vipin Malik had signed, on behalf of Protel (defendant No.6) Vipin Malik had signed as a conforming party having noticed of the joint venture agreement and agreeing to be bound by the terms of the agreement.

30. To this joint venture agreement, the plaintiff is not a party. The parties had agreed that Protel was to submit the bids and it was agreed "the parties wish to seek all relevant Government approvals in connection with the investment of the Foreign Investors in Protel." Mr. V.P. Singh, learned senior counsel for defendants 1 to 3, relied upon the following in clause 1.2 :-

"..... The Foreign Investors shall provide technical support and its experience to PRO TEL for the Bids.

The Indian Investors shall provide the local support and information necessary for the submission of the Bids.

The Bids shall be submitted by PRO TEL, acting on behalf of all Parties before the closing date for the Bids or any extension thereof. Provided that if such extended date goes beyond the 31st December 1995 the written approval of the Parties shall be required before the submission of such Bids.

....."

31. The learned senior counsel also relied upon clause "c" in Article 2:-

"c) PRO TEL shall issue new equity shares to the Parties in the following proportions :

Indian Investors,

ENPRO: 51% Foreign Investors:

USTE 9% FIDELITY 15% CIR 25% Subject to the other provisions hereof, the Parties shall always be allowed to own shares in the proportions specified above.

Article 3 which speaks of the scope of the joint venture reads :-

"The Parties acting as shareholders through PRO TEL's general assembly and Board, shall bring their capital and collective expertise to enable PRO TEL to provide the cellular, telecommunications infrastructure and services related to the Project."

Article 11 reads :-

"This Agreement shall be governed by and construed in accordance with Indian law."

Article 12 is an arbitration clause.

32. Dr. K.C. Jain on 13.5.1995 wrote to the first defendant that the Department of Telecommunications may issue the clarifications on Monday, the 15th May 1995 and the last date for the submission of the bids have been fixed as 7th June 1995.

33. On 16.5.1995 S.M. Aggarwal (Protel India) wrote to the first defendant informing him that the Department of Telecommunications had given replies to the questions raised by the prospective bidders and the final date have been fixed as the 7th of June 1995. He had requested that the arrival of the members of the group may be communicated as early as possible. There was a steering committee meeting held in Paris. In the minutes under the heading Miscellaneous it is stated :-

"1. Political risk insurance will be available to the foreign side only at a cost of 0.6% to 0.7% per year on total capital and guaranteed debt.

2. The consortium has a question to be answered regarding parcel company net worth being considered for qualification. Reading of the clarifications indicated, we do not qualify.

3. There is an open question regarding the necessity or not for U.S. partners to create their Mauritius vehicles prior to bid submission."

This shows that on the 20th of May 1995 in Paris the parties were aware that

they did not satisfy the net worth qualification prescribed by the Department of Telecommunication. Dr. K.C. Jain from Paris on 22.5.1995 sent a message to S.M. Aggarwal about the net worth problem :-

"For bidding Karnataka, Kerala, Punjab & Haryana we require to have 100 crore cumulative net worth of all the promoters company.

As on today the Protel India Pvt. Ltd. promoter Companies are

\* Enpro India Ltd. (India) \* Fidelity Comm. INC (USA) vehicle company of Fidelity. \* USTE (USA) \* CIR (France); vehicle company of CGE very large group. Note - Total Net worth of all the above Companies is falling short than required. Exact Nos I will send by late evening tomorrow.

\*As far as Cellular experience is concerned it is coming through the subsidiary and the parent Company of CIR. (This has been made clear .....

CGE (very large Co.) 99% owned by 59% owned by CGE (Rest 41% with others) CIR COFIRA 90% many more SFR TDR Cellular Paging \*Fidelity Comm. & USTE may like to come through Morisis route & this will always remain a problem as far as net worth is concerned.

\* My suggestion to them is that CGE should come in this venture through COFIRA & not through CIR. They are not agreeing on this & giving reasoning that being COFIRA is 59% owned by CGE & hence they have to approach 41% share holders for this etc. etc.

Please call Sh. Vipin Malik & discuss this problem. I will call you again late in the evening."

34. On 23.5.1995 Vipin Malik wrote to the first defendant Rene Dreesen. He had stated in that letter:-

"I also hope that detailed working and analysis on the net worth requirement based on the tender conditions for eligibility has been made and the group is satisfied about meeting this condition. As you know, we had already given our balance sheet along with the certificate of net worth."

35. On 24.5.1995 Rene Dreesen (defendant No. 1) write to Vipin Malik inter-alia stating :-

"Sorry not to share your point of view regarding you last paragraph as we explained in the steering committee and as we asked KC (K.C. Jain) and other people to tell Sham Bhartia. We, as foreign partners, meet the eligibility conditions from experience point of view and we are preparing the bid. We think that the network requirement has to be primarily met by Indian partners. We have been invited to join an Indian partner (Industan Time, VAM electronics, Sham Bhartia) with a strong reputation.

You have requested to have the Chairman seat and one of the two Managing Director seat. We think that the net worth requirement has to be met by Indian

partners. I understood from KC Jain and that is now on the way. You have to be convinced that none among the foreign partners is ready to look for compromise. Sorry but we would like to know your answer before Friday 12.00 (French time) in order to give correct instructions to the team."

36. First time after the joint venture agreement the foreign partners had thought of Hindustan Times and VAM Electronics and Sham Bhartia.

37. On 25.5.1995 the Management Consultant, who is stated to be an associate of Vipin Malik, as noticed above, wrote to Vipin Malik that Protel should have a net worth over 45 million dollars to fulfill the tender requirements. On 27.5.1995 Fidelity Communications International, Inc. (defendant No. 2) wrote to S.M. Aggarwal stating that Fidelity Communications Internationals would give necessary comfort regarding the financial wherewithal behind FCI and would support Protel India Pvt. Ltd. He had also given the balance sheet of Fidelity Communications International, Inc.

38. On 28.5.1995 Thomas C. Hunter, the Management Consultant wrote to Arthur Anderson & Co., Bombay in the following terms :-

"Mr. Rob Ketterson of Fidelity Capital has asked me to obtain your opinion on the following question.

By a careful reading of the attached documents, a part of the Cellular Tender, we have concluded that if a small percentage of Protel, an Indian bidder company, were owned by a much larger Indian company such as the Hindustan Times or VAM Organic Chemicals, the net worth of either or both of the larger companies could be included in the calculation of Protels net worth for purposes of the Tender.

Is this conclusion correct? If it is incorrect, please explain. Please answer this fax at the earliest to me and Mr. Jim Roberson at FAX # 33-1-45-55-30-04, and by voice mail to Mr. Ketterson. He will not be in his office tomorrow as it is a holiday, but he will check his voice mail."

Arthur Anderson sent a reply:-

"Thus, if Hindustan Times or Vam Organic Chemicals were to hold a small equity stake in Protel, we believe that the net worth of either or both of the companies can be included in the calculation of Protel's net worth. However, both their names would have to form part of the promoter's agreement, which is required to be submitted with the bid.

We have received only one page of your fax and thus, did not have the benefit of your research."

39. On 31.5.1995 second defendant Fidelity Capital wrote to Shyam Bhartia. The relevant portion of the letter reads :-

"With the initial commitment you made to US Telecom to use Hindustan Times as

the vehicle, we would meet the Net Worth criteria easily. Alternatively you could use Vam Organic Chemicals. Either one of these companies could take a small position in the ProTel consortium without violating the Indian Companies Act because each of these companies is already pursuing businesses in related fields:

- \* VAM Organic has joint ventures including one with GPT to build telecom equipment.

- \* Hindustan Times has HTV to build cable TV systems with Pearson and Falcon.

Please carefully consider this quite reasonable request. I will await your response in my office. I will be at 617-563-4159 from 9.0a to 11.00a EST today 5/31."

40. On 1.6.1995 Vipin Malik is stated to have given a Fax message in the letter head of Management Consultant mentioning it had emanated from France Protel to Mr. Ashok Wadhwa or Mr. Carlion Pereira. This document was filed by the plaintiff. It is stated that the letter was to Arthour Anderson. The letter reads as under :-

"On behalf of Robert Ketterson of Fidelity Capital, we would like to have the following questions resolved as a follow up to Mr. Thomas C. Hunter Jr."s recent fax.

1. Whether a Company whose main object clause is the business of Publication of Newspaper and related business can enter into the business of Telecommunications without getting the approval in Shareholders meeting. Department of Company Affairs and other related approvals?

2. Whether a Company whose main object clause is the business of Publication and Newspaper can make investments in Telecommunications business? Please answer this question in the light of Section 370 and Section 372 of Indian Companies Act, 1956.

Please, if you need any clarification, don't hesitate to call Mr. Vipin Malik at No. 33.1.46.12.32.13 - Fax No. 33.1.46.55.30.04.

If you need to have the object clause, please call Mr. Shyam Bhartia"s Delhi Office at No. 6220201.

Please answer this fax at the earliest tome and Mr. Thomas Hunter at fax No. 33.1.46.55.30.04 and to Mr. Ketterson."

41. It was submitted by Mr. Dipanker Gupta, learned senior counsel for the plaintiff that the letter was not sent by Vipin Malik because the signature found there is not that of Vipin Malik. There is one name written Salmon Greenville and according to Mr. Dipanker Gupta that is not in the handwriting of Vipin Malik. The learned senior counsel sought to compare the signatures of Vipin Malik in this document with the signatures found in the joint venture agreement and they differ. According to the learned senior counsel, the 5th defendant had contrived to fabricate it just for his own purposes. On 2.6.1995 Arthur Andersen would

appear to have sent a reply to the Fax, alleged to have been sent by Vipin Malik. The letter reads as under :-

"We refer to your fax of June 1, 1995 and to our telecom with you. In this connection, we wish to advise you as under.

#### BACKGROUND

From our discussions with you, we understand that Hindustan Times (HT) will invest in the business of telecommunications by acquiring 51 percent of the equity share capital of Protel and granting loans to Protel. Further, you have confirmed that the Objects clause to the Memorandum of Association (MoA) of HT does not permit it to invest in the business of telecommunications or inquire shares of any company engaged in a business other than publication of newspaper.

#### COMMENTS

1. In the above scenario, HT would have to attend its Objects clause in the MoA to enable it to acquire shares of Protel and to grant loans to Protel. In order to amend its MoA, the following steps should be taken:

- \* Pass a Board of Director resolution.
- \* Pass a special resolution in a general meeting.
- \* Make a petition to the Company Law Board (copy of the petition should be filed with the Registrar of Companies),
- \* On receipt of the order of the Company Law Board accepting amendment of the Objects clause, the same should be registered with the Registrar of Companies.

2. Section 370 of the Act provides that a public or deemed public company can make a loan to a corporate body if it is authorised by a special resolution in a general meeting of the lending company and obtains prior approval of the Central Government.

However, such a resolution or Government approval will not be required if the amount of the loan (including all prior loans) does not exceed 30 percent of the aggregate of the subscribed capital of the lending company and its free reserves. Thus, if HT makes a loan to Protel and the amount of the loan (alongwith prior loans) exceeds 30 percent of the subscribed capital and free reserves of HT, it would have to pass a special resolution and obtain a Government approval.

Section 372 of the Act provides that a public or deemed public company can acquire shares of another body corporate if it is authorised by an ordinary resolution in a general meeting of the investing company and obtains a prior approval of the Central Government.

However, such a resolution or Government approval will not be required if both

the following conditions are satisfied:

- \* The level of investment by the investing company does not exceed 30 percent of the subscribed equity share capital, or the aggregate of the paid up equity and preference share capital of the investee company, whichever is less.
- \* The total amount of investment (including all prior investments) does not exceed 30 percent of the aggregate of the subscribed capital and free reserves of the investing company.

Accordingly, as HT proposes to acquire 51 percent of the equity share capital of Protel, the first condition mentioned above is not satisfied. Hence, an ordinary resolution and a Government approval prior to acquisition of the shares would be required.

Please note that there could be planning opportunities to avoid the applicability of Section 370 and 372 by proper structuring of the loan and investment transaction.

The overriding condition for engaging in any of these transactions is that it should be permissible by the Objects clause of the company. If not, permissions as described in (1) above will have to be obtained.

If you require any other clarifications, please do not hesitate to contact us."

42. Under what circumstances, and on whose instructions Arthur Andersen wrote this has not been explained by defendants 1 to 3 and it is only at the time of evidence the facts could be ascertained with certain amount of definiteness.

43. On 3.6.1995 according to defendants 1 to 3 an agreement was entered into seeking to amend the joint venture agreement dated 5.5.1995 between Enpro India Ltd. (defendant No. 4), Fidelity Communications International, INC (defendant No. 2), Us Telecom East, INC (defendant No. 3) and Compagnie Internationale DU Radiotelephone SA (defendant No. 1) and the plaintiff. It has to be noticed that this was executed in Paris and the bid was to be made in Delhi on or before 7.6.1995. The document reads as under :-

"WHEREAS :

The Parties referred herein above have signed a Joint Venture Agreement on 5th day of May 1995, to bid for a project relating to Tender No. 11-28/94-MMT(TM) of the Department of Telecommunications, Government of India, for Cellular Telecommunications Infrastructures and Services in India ("the Call for Tenders") and the investment in a Joint Venture Company to carry out the provision of such infrastructure and services in one or more of the states of the Punjab, Haryana, Kerala and Karnataka (the "Project") if awarded a license or licenses (a "License") to do the same.

AND WHEREAS:

ENPRO has informed the foreign Investors that they have decided to include THE

HINDUSTAN TIMES LTD., 18-20, Kasturba Gandhi Marg, New Delhi.

NOW IT IS HEREBY AGREED AS FOLLOWS :

#### ARTICLE 1 -SHAREHOLDING IN PROTEL

ENPRO has agreed to offer equity not exceeding 1000 (one thousand) equity shares in PROTEL INDIA PRIVATE LTD. to THE HINDUSTAN TIMES LTD. out of ENPRO's share of 51% in the issue of PROTEL new equity shares to the parties.

Foreign Investors have agreed to admit THE HINDUSTAN TIMES LTD. abnominal equity shareholder of PROTEL INDIA PRIVATE LTD. subject to condition that THE HINDUSTAN TIMES LTD. agrees to all the terms and conditions of Joint Venture Agreement dated 5th May, 1995 as an Initial Investor. A copy of the Joint Venture Agreement dated 5th May, 1995 is enclosed as Annexure I to this agreement.

THE HINDUSTAN TIMES LTD. have agreed to participate in the equity of PROTEL INDIA PRIVATE LTD. to the extent of 1000 (one thousand equity shares) out of the 51K% equity of Indian Investors (ENPRO) and have agreed to all the terms and conditions of Joint Venture Agreement dated 5th May, 1995.

IN WITNESS HEREOF, the duly authorized representatives of the parties have signed this Agreement in ten original copies with effect from the day first before written."

On behalf of Hindustan Times Ltd. Vipin Malik has signed. On behalf of ENPRO also Vipin Malik had signed. On the same day, Navin had sent a letter to Mrs. Shobhna Bhartia/Shyam Bhartia stating :-

"Mr. Vipin Malik called from Paris and confirms that as authorised by you, he has given consent of the Hindustan Times participation to the extent of 1000 shares in the cellular Mobile Telephones bidding Company - PRO TEL INDIA PVT. LTD.

To meet the tender condition requirements, we have to furnish a copy of the Income Tax Clearance Certificate of the Hindustan Times Ltd. Mr. Vipin Malik has assured that this is merely a paper formality.

I understand that if an application to obtain the Income Tax Clearance Certificate is made to the Authorities on Monday, the 5th June 95. It can be obtained latest by 6th June morning.

I request you to kindly instruct Mr. V.K. Charoria, Company Secretary, Hindustan Times, to help us in obtaining the necessary Income Tax certificate from the concerned authorities, at the earliest."

According to this document Vipin Malik had called Mrs. Shobhna Bhartia over the phone from Paris for obtaining consent for the participation of Hindustan Times in the tender.

44. On 7.6.1995 which was the last date for submitting the tender Protel did not

submit. On 7.6.1995 the first defendant send a message to Bhartia stating :-

"I understand that Protel was not able to submit our offer due to the fact of Enpro bid bend.

Consequences are very grave for the foreign partners of Protel. We ask you to give us an Explanation. We, as foreign partners, intend to be compensated of the large amount of money spent as well as of the consequences of the Protel's failure."

45. On 12.6.1995 Vipin Malik, the 5th defendant wrote to Shobhna Bhartia and the letter reads as under:

"I hope that everything is well at your end.

You will recall that I talked to you from Paris on Saturday, the 3rd June, 1995 and emphasised the urgency of adding the Amendment to the Joint Venture Agreement of 5th May, 1995 between ENPRO INDIA LIMITED, FIDELITY COMMUNICATIONS INTERNATIONAL, INC. OF USA, US TELECOM EAST, INC. OF USA AND COMPAGNIE INTERNATIONALE DU RADIOTELEPHONE SA of FRANCE.

I explained that unless we admit The Hindustan Times Limited in the Joint Venture Agreement, we will not be able to go ahead with the tender as the eligibility condition of the tender requires a minimum net worth of Rs. 100 crores for quoting Circle A like Karnataka etc. and as our foreign partners are insisting, there should be no problem in having a minor equity share in the Joint Venture Agreement to which you kindly agreed to buy the equity up to the extent of 1000 equity shares and to become a part of Joint Venture Agreement. As authorised, I am enclosing the Joint Venture Agreement signed on behalf of The Hindustan Times Limited for your information and record.

It is very unfortunate that inspire of 3 years hard work and labour in which we won the world's finest and the largest partners like Fidelity of USA with a net worth of US \$ 30 billion and CIA of France with a net worth of US \$ 10 billion in their respective countries, we could not submit the tender on time due to lack of certain understanding.

The reason which, I understood, was the non receipt of the bank guarantee. However, on reaching here today, I found that the bank guarantee was sanctioned and was intimated on telephone but I do not know what happened and where.

I will also like to add that on 6th June, 1995, I was calling the whole night to the Chairman and General Manager of the Canara Bank who telephonically confirmed to me that they will make sure to grant the sanction tomorrow morning and will convey the same by 10.30 AM on 7th June itself. This guarantee was to be sanctioned by the Board of Directors in their meeting on 7th June and they actually kept their words and conveyed the sanction to us at Delhi.

I am enclosing sanction received from Canara Bank on 7th June 1995 conveying

the telephonic sanction promptly at 11.10 AM and at 14.47 hours on 7th June, 1995 itself by FAX MESSAGE.

I personally feel that you must also inquire into the reasons for not tendering so that this type of unfortunate incidents should not occur as I feel that such lapses will damage not only financially but also the reputation of all of us internationally.

It will not be out of place to mention that due to this blunder the group have lost one of the biggest tenders of the country as on a very conservative estimate the profitability of 10 years was estimated as under :

State Profitability Karnataka 202 crores Kerala 873 crores Punjab 1514 crores  
May I also request you to spare some time to enable me to come and meet you

I hope we will have good association and will be able to assist with good professional experience and expertise to the K.K. Birla Group and Bhartia Group.

My personal regards and wishing you a good healthy long life too."

45. On 14.6.1995 the first defendant wrote to K.K. Birla and others stating that it was disappointed. On 19.6.1995 Mrs. Shyam Bhartia wrote to the first defendant that she would write to it about the matter. Defendants 1 to 3 on 8.7.1995 wrote to K.K. Birla, Hindustan Times stating :-

"As you know we had a meeting today in Paris with Messrs Shyam Bhartia and Vipin Malik regarding contract default in connection with the Pro Tel Indian Cellular Tender.

We came to the meeting with the understanding that Mr. Bhartia was prepared to discuss a fair resolution to this problem. The American Partners in our consortium came from overseas because of the importance of this meeting.

Given this understanding, we had previously stopped all other actions designed to gain compensation from our Indian partners. These actions would have included, as you know, contacting the Principal Secretary to the Prime Minister of India and Chairman of the FIPB, as well as any other actions which could have done damage to the image of any Birla or Bhartia family company. We look this decision to show our respect as a group for your family and your good name.

We regret to inform you that the outcome of today's meeting was completely unsatisfactory. Mr. Bhartia, while acknowledging that he alone was at fault in failing to provide the required bank guarantees, has refused to offer any compensation whatsoever to the foreign partners who have been damaged greatly by his failure.

We are writing this letter to request your assistance as a member of our bidding consortium (through The Hindustan Times) in resolving this dispute in a fair and just manner. This is our final attempt to resolve this issue in a friendly business-like way before turning to more drastic measures.

We request your response as to your proposal regarding our compensation in this

matter no later than Tuesday July 11, 1995 at 6.00 PM Pans time. Your correspondence to the consortium foreign partners may be addressed to Mr. Rene Dreesen as our representative. His facsimile number is 331-49-24-69-40 and his telephone number is 331-49-24-35. We are now requesting only reimbursement for our costs incurred in preparing the bids and, for the moment, no compensatory damages.

We have historically had the utmost confidence in the Birla family name. We likewise have every confidence that you will help resolve this matter in appropriate fashion."

46. On 12.6.1995 the plaintiff wrote to the first defendant explaining the position :-

"This has reference to your faxes dated June 14, 1995 and July 8, 1995 addressed to The Hindustan Times Ltd. I have been asked to reply to them after ascertaining the facts and am accordingly doing so.

I have now been able to ascertain that on the 3rd June, 1995 Mr. Vipin Malik on behalf of Protel India Pvt. Ltd., requested The Hindustan Times to purchase equity shares in Protel. Accordingly, Hindustan Times agreed to purchase up to the extent of a maximum of 1000 shares of Protel subject to all approvals required in Law. No further commitment of any kind whatsoever was made and at no stage was it held out as you have now sought to contend that Hindustan Times was willing to participate in any consortium of which Protel or any other companies were participants.

Mr. Vipin Malik is not an employee or in any way an agent of Hindustan Times and has never been given any authority either in writing or verbally to execute any document on behalf of the Hindustan Times or to make any commitment on its part. The only commitment made by Hindustan Times was the one made to Mr. Vipin Malik, namely the purchase of maximum 1000 shares of Protel and no more. Mr. Vipin Malik when contacted telephonically has also confirmed that what is stated here is correct.

Your contention in your fax dated 14.6.95 that there was a failure on the part of Hindustan Times to deliver a Bank Guarantee is Therefore, totally untenable and contrary to the facts. We once again wish to reiterate that the Hindustan Times is not liable for any consequences which may or may not arise in respect of the tendering process for the Cellular Mobile Telephone Services and we view with some concern the yielded threat issued by you in your letter of the 8.7.95 in the following terms in which you state "These actions would have included, as you know, contacting the Principal Secretary to the Prime Minister of India and Chairman of the FIPB as well as any other actions which could have done damage to the image of any Birla or Bhartia family company."

Kindly note that any attempt made by you or any other members of your consortium to defame the name of the Hindustan Times will be resisted at your

own cost and consequence."

47. On 13.7.1995 the Enpro had sent a letter to the first defendant denying any fault on the part of Enpro. On 28.7.1995 defendants 1 to 3 had made a request for reference for arbitration against Enpro India Ltd. and the plaintiff. In that it is stated:-

"ENPRO and HINDUSTAN are closely related companies with intricate interlocking family relationships. Both companies were represented in their relationships with Claimant by a single person: M. Vipin Malik."

48. The Secretariat of the International Court of Arbitration sent communication on 2.8.1995. On 30.8.1995 4th defendant had filed a reply. Enpro had also claimed a counter claim against defendants 1 to 3.

49. On 23.9.1995 the plaintiff had presented the plaint in this suit. The main ground taken by the plaintiff is that it was never a party to any agreement and Vipin Malik was never authorised by the Board of Directors of the plaintiff Company to sign any joint venture agreement and the amendment dated 3.6.1995 alleged to have been executed by Vipin Malik on behalf of the plaintiff is not true and it would not bind the plaintiff and, Therefore, the plaintiff cannot be subject to any arbitration at the instance of defendants 1 to 3. The plaintiff has asked for injunction, as I had noticed above.

50. In the application I.A. 2972/96 u/s 3 of The Foreign Awards (Recognition and Enforcement) Act, 1961 filed by the defendants 1 to 3, it is stated:-

"plaintiff-Non Applicant and Defendant No. 4 are closely related companies with intricate inter-locking family relationship. plaintiff-Non Applicant is a part of K.K. Birla Group of Companies. Mrs. Shobna Bhartia, who is the daughter of Mr. K.K. Birla and wife of Mr. Shyam Bhartia, owns majority shares in the plaintiff-Non Applicant. Mrs. Shobna Bhartia also owns an investment company which controls Defendant No. 4. Both these companies were represented in their relationship with the applicants by a single person Mr. Vipin Malik, defendant no. 5 in the suit."

It is further stated that the tender documents were purchased by the plaintiff. It is stated:-

"As more elaborately detailed hereinafter, plaintiff/ non-applicant, which was a part of the K.K. Birla group, was interested in participating in the privatization of cellular mobile telephone service in India and for this purpose they were looking for global partners. They appointed Mr. Vipin Malik, Defendant No. 5 as their authorized person to identify the global partners, assist them in negotiations and in concluding the agreement with the selected global partners. Defendant No. 5 identified the Applicant No. 3 and US global Telecommunication Inc, both 100% subsidiaries of M/s US Telecom Holdings Inc. as potential business partners of the plaintiff/Non-applicant."

It is asserted that Vipin Malik represented the plaintiff. It may be recalled that when the first defendant had asked the parties to bring the requisite authorisations from the Boards of Companies, the plaintiff had not sent any and Vipin Malik did not have any authority from the Board of Directors of the plaintiff Co. negotiate and sign any joint venture agreement. But it is asserted in paragraph 13:-

"Between the period August 1994-March 1995, several discussions, correspondences by exchange of faxes and letters took place between Mr. Shyam Bhartia, Mrs. Shobna Bhartia, Mr. S.M. Agarwal and Dr. K.C. Jain all representatives/employees of plaintiff/ non-applicant, representatives of Applicant No. 3 and US Global Telecommunications Inc. and Vipin Malik, defendant No. 5 in order to conclude a joint venture agreement for the purpose of carrying on cellular mobile telephone service in India. At all material times, Mr. Vipin Malik was representing the plaintiff Non-Applicant. In the 1st week of April, 1995, it was further confirmed by the defendant No. 5, acting on behalf of the plaintiff / non-applicant that it would be the plaintiff non-applicant and/ or the defendant No. 4 (a company closely linked to the plaintiff/ non-applicant) that would participate in the joint venture."

It is stated in paragraph 15 :-

"plaintiff/ Non-applicant and defendant No. 4 amongst themselves decided to put defendant No. 4 as a member of joint venture as the Indian Partner. In so far the applicants were concerned they treated both plaintiff/non-applicant as a single entity in their relationship with applicants. Accordingly, on 4th & 5th May 1995 parties met in Paris to conclude the joint venture agreement."

It is asserted in paragraph 21:-

"On or about 15th May 1995, the Department of telecommunication clarified that any parent company's networth will not be considered for meeting the networth criteria, which was also one of the eligibility conditions. The applicants and defendant No. 4 as a Consortium could not meet the net worth eligibility requirement of Rs. 100 crores. The Applicants state that they never assumed the responsibility to meet the net worth eligibility requirement of the tender and they had made it clear that net worth criteria was the sole responsibility of the Indian partners, the plaintiff/non-applicant and defendant No. 4 if the bid was to be placed. As already stated in so far as applicants were concerned, both plaintiff/ non-applicant and defendant No. 4 were a single entity in their relationship with the Applicants."

52. As already stated, in so far as defendants 1 & 3 are concerned both plaintiff/ non-applicant and defendant No. 4 were a single entity in their relationship with the applicant, this is not factually correct because the Board of the plaintiff had never authorised anybody to sign in agreement and the above averment has to be established by the defendants 1 to 3 by producing necessary material. It is stated in paragraph 22 :-

"In that view of the matter, Applicants state that the Indian Partners including the plaintiff decided that it was necessary for plaintiff-Non Applicant (a company being closely interlinked with the defendant No. 4) to participate directly in the Joint Venture Agreement so that the net worth eligibility criteria could be met. Accordingly, on 3rd June 1995 an amendment was made to the Joint Venture Agreement dated 5.5.1995. By virtue of the said amendment to the Agreement it was agreed that Defendant No. 4 would offer equity not exceeding 1000 equity shares in Defendant No. 6 to the plaintiff out of Defendant No. 4's share of 51%. The Applicants agreed to admit plaintiff-Non Applicant as a nominal equity shareholder of Defendant No. 6 subject to the condition that plaintiff Non Applicant agrees to the terms and conditions of the Joint Venture Agreement dated 5.5.1995 as an initial investor. The plaintiff-Non applicant agreed to participate in the equity of Defendant No. 6 to the extent of 1000 shares out of 51% equity shares of Defendant No. 4 and also agreed to all terms and conditions of the Joint Venture Agreement dated 5.5.1995. The said agreement on behalf of plaintiff/ non-applicant was signed by Mr. Vipin Malik, defendant No. 5 at the direction of the plaintiff. The said amendment dated 3.6.1995 was signed at Paris in the presence of one Dr. K.C. Jain, a senior level employee of the plaintiff/non-applicant. A copy of the said amendment dated 3.6.1996 is annexed hereto and marked B."

This also has to be established by defendants 1 to 3. Defendants 1 to 3 would rely upon clause 12 in the joint venture agreement dated 5.5.1995 to which the plaintiff was admittedly not a party and they have to prove the amendment dated 3.6.1995 to the joint venture agreement. Defendants 1 to 3 cannot rely upon the arbitration clause by making allegations that they had understood that 4th defendant and the plaintiff were one and the same. It is further stated in paragraph 32(k) :-

"The Applicants state that it is clear from above that it was always contemplated that it would be the plaintiff/non-applicant who would be one of the Indian partners of the foreign partners in the Joint venture Agreement."

The applicants cannot rely upon this for the purpose of the relief which they have prayed for. In paragraph 32(r) it is stated :-

"The Applicants thus submit that having regard to the back ground of the transaction there is no manner of doubt that Defendant No. 5 at all times since August 1994 represented and acted on behalf the plaintiff/non-applicant as their agent in their relationship with the Applicants and thus had actual and apparent and ostensible authority to act on their behalf."

The applicants should have taken necessary steps to get authorisation from the Board of the plaintiff and their assertion that 5th defendant represented the plaintiff also cannot be accepted. The plaintiff has filed the reply and it is necessary to relate the averments because the main thrust of the plaintiff's case is that it was never a party to the joint venture agreement and the 5th defendant

had absolutely no authority to execute an agreement amending the joint venture agreement which was done on 3.6.1995 on the basis of some alleged telephonic conversation between the 5th defendant Mrs. Shobhana Bhartia. Mr. Dipanker Gupta, the learned senior counsel for the plaintiff submitted that defendants 1 to 3 had not explained as to what was the need for signing an agreement amounting to JVA on 3.6.1995 at Paris when the tender had to be submitted on 7.6.1995 at New Delhi. The 5th defendant instead of signing without any authority could have brought the papers to Delhi and obtain the signatures of Ms Shobhana Bhartia at New Delhi before the submission of the tender. The learned senior counsel further submitted that defendants 1 to 3 could have asked for Fax message signed by Ms Shobhana Bhartia. There is considerable force in the submissions made by the learned senior counsel.

53. Section 3 of The Foreign Awards (Recognition and Enforcement) Act, 1961 reads as under:-

"Stay of proceedings in respect of matters to be referred to arbitration.- Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

This has been subject matter of the decision by the Supreme Court in Renusagar Power Co. Ltd. Vs. General Electric Company and Another, . The conditions require to be fulfilled for invoking the provisions are :-

"(i) there must be an agreement to which Article II of the Convention set forth in the Schedule applies. (It is not disputed that this is so in the instant case);

(ii) a party to that agreement must commence legal proceedings against another party thereto. (It is again not disputed that Renusagar and G.E.C. are the two parties to the arbitration agreement and that Renusagar has commenced legal proceedings against G.E.C. by filing suit No. 832 of 1982);

(iii) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement. (The question whether this condition is fulfilled here needs to be decided);

(iv) the application for stay must be made before filing the written statement or taking any other steps in the legal proceedings. (Admittedly this condition is

fulfilled);

(v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the "existence and validity" of the arbitration agreement. (In the instant case these questions do not arise);

(vi) the Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; this relates to effect (scope) of the arbitration agreement touching the issue of arbitrability of the claims. (It will have to be dealt with while considering the satisfaction of condition (iii) above."

54. The conditions are not at all satisfied on the facts and circumstances of this case. Therefore, I do not find any merit in the application filed by defendants 1 to 3 and accordingly I.A. 2972/96 stands dismissed.

55. The applicant has made out a, prima facie, strong case for injunction. The principles are well settled with reference to the grant of injunction and I have considered the facts in great detail and I am of the view that great injustice would be caused to the plaintiff if injunction is refused. A person who has not been a party to the arbitration agreement cannot be subject to arbitration on the basis of some undisclosed understanding formed by defendants 1 to 3 without any written authority on behalf of the plaintiff. Therefore, defendants 1 to 3 are restrained from proceeding with the arbitration which they had commenced against the plaintiff before the International Council till the disposal of the suit.

I.A. 9163/95 is allowed. I.A. 2972/96 filed by defendants 1 to 3 for stay of suit stands dismissed.

I.As. 1942/97 & IA.1943/97

I.A.1942/97 is an application filed by the plaintiff under O.16 R.6 CPC for issuance of summons to produce documents and I.A. 1943/97 is also filed by the plaintiff under O.11 R.14 CPC for production of documents. It is not necessary to deal with these applications.

Post for appropriate directions along with suit No. 2208/95 on the 17th of September 1998.