

(2007) 03 DEL CK 0277

In the Delhi High Court

Case No : Other Miscellaneous Petition No. 477 of 2006 and is 13512 of 2006

Modi Rubber Ltd.

APPELLANT

Vs

Guardian International Corp.

RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:

Arbitration Act, 1940 — Section 18, 20, 41
Arbitration and Conciliation Act, 1996 — Section 11, 17, 18, 19, 20
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, 148A
Companies Act, 1956 — Section 82
Constitution of India, 1950 — Article 16, 226
Contract Act, 1872 — Section 27, 32, 39, 56
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 18
Specific Relief Act, 1963 — Section 10, 14, 14(1), 16, 21

Citation : (2007) 2 ARBLR 133 : (2007) 141 DLT 822

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Arun Jaitley, D.S. Narula, Anis Sharma and Manmeet Arora, for the Appellant; A.S. Chandhiok and Rajiv Nayar, Mann, Sweta Kakkad and Amit Jain, for the Respondent

Judgement

Gita Mittal, J.—This petition raises two very interesting questions which are required to be answered. The first question raised is whether a party can seek interim relief on the ground that the other side has raised a dispute before the Arbitral Tribunal. The second question which has been raised by the respondent is to the effect that on account of sickness of its partner in a joint venture under the Sick Industrial Companies (Special Provisions) Act, the underlying shareholders agreement between the parties is rendered frustrated and incapable of implementation. Consequently, the petitioner cannot base a petition for prohibitory relief based on a clause in this agreement which prohibited the parties thereto from undertaking any business similar to that of the joint venture during its currency.

2. So far as the basic facts are concerned, there is no material dispute and to the

extent necessary, they are noticed hereinafter. The petitioner M/s Modi Rubber Ltd., (hereinafter referred to as "MRL" for brevity) entered into a Memorandum of Understanding ("MOU") dated 1st July, 1988 with M/s Guardian International Corporation arrayed as respondent before this Court, (hereinafter referred to as "Guardian").

3. Guardian is stated to be a leader in manufacturing float glass and the agreement between the parties states that it has acquired unique and valuable engineering skills and expertise for designing, constructing and operating plants for the manufacture of float glass by the float process. The agreement between the parties also notices that the MRL is a renowned industrial establishment of India with extensive expertise in the manufacturing and marketing of high quality industrial products in India and other countries.

4. Besides the parties to the present petition, the agreement between the parties also involved M/s Gujarat Alkalies Chemicals Ltd., a Gujarat Government Corporation which had obtained a letter of intent No. LI: 779 (1989) Regn. No. 79 (89)-comp./SCS dated 13th October, 1989 issued by the Government of India for establishing and operating a float glass plant in the State of Gujarat.

5. There is Therefore no dispute that MRL and Guardian were both financially strong and stable and had entered into a relationship of trust and faith. These parties entered into a Memorandum of Understanding dated 1st July, 1988 whereby they agreed in principle to collaborate and promote a joint venture company in India in the assisted sector with the State of Gujarat through one of its nominee companies, subject to grant of requisite Indian Government approvals and obtaining all requisite finances to undertake, amongst others, the production and marketing of flat glass using the most advanced and up to date float process based on the expertise acquired by Guardian or any of its subsidiaries. As per this MOU, the initial issued equity share capital of the company was agreed to be subscribed in the following percentages:

(i) Guardian or one of its subsidiaries 40.00%

(ii) The MRL and its associates including Gujarat State Government 40.00%

(iii) Public issue 20.00%

6. The parties had agreed to restrict their commercial activities under this MOU in clause 7 in the following manner:

7. This MOU assures both parties that they will not engage in other collaborations for the purpose of making float, tapered coated or laminated automotive and architectural glass products in India or any other industry which uses float glass as a raw material.

7. The parties had also agreed that the management of the joint venture company shall be in such manner as is "mutually agreed between the parties from time to time".

8. Pursuant to this Memorandum of Understanding, the parties entered into a Share Holders Agreement dated 23rd January, 1990 (referred to as "SHA" hereinafter for brevity). By this agreement, the parties agreed to collaborate and promote a joint venture company called the Gujarat Guardian Ltd., (hereinafter referred to as "GGL") for the production and marketing of float glass. For the purposes of facilitating its development and operation and for ensuring a satisfactory relationship between the principal share holders of this company, the parties agreed that the equity subscription in GGL would be held between the parties to this SHA as follows:

(i) By Guardian International Corporation 40.00% (ii) By MRL 20.00% (iii) By Gujarat Alkalies and Chemicals Ltd. and its nominees 11.00% (iv) By the public 20.00%

The amount of issued and the subscribed capital was agreed to be valued by mutual agreement between Guardian and MRL and it was agreed that if any additional shares were issued, GGL was first to offer such shares at the price at which the shares are to be offered to new share holders, to Guardian, MRL or the other share holders in proportion to the equity shares owned by each of them on the date of such offer.

9. So far as the agreement of the parties which was set out as Clause 7 in the MOU is concerned, the parties reiterated the prohibition therein contained and co opted the same as Clause 14 of the SHA whereby the parties covenanted as follows:

Clause 14 - Additional Projects/Exclusivity During the term of this Shareholders Agreement, neither MRL nor Guardian International, nor any Affiliates or Associates of either one of them shall, without the consent of MRL and Guardian International, participate, negotiate or engage, or be financially interested, directly or indirectly, in any other project for the manufacture of float glass, or for the fabrication of products made from float glass, or for the sale of float glass or products made from float glass, in India.

10. The present petition has raised a contentious issue with regard to the rights of one the parties to the SHA to set up an additional project without association or participation of the other.

11. There is no dispute that this agreement between the parties was given full effect to. After all requisite government approvals were obtained, the parties formed a joint venture company known as the Gujarat Guardian Ltd. (hereafter referred to as "GGL") incorporated on 21st February, 1990 under the provisions of the Companies Act, 1956. This company set up a manufacturing facility for production of float glass at Ankleshwar in the State of Gujarat.

12. So far as the present shareholding of the parties in GGL is concerned, the admitted position is that M/s Guardian is holding 50% shareholding while MRL along with other Indian promoters is holding 50% shareholding therein. MRL's

individual shareholding is 21.24% in this joint venture.

13. So far as the representation on the Board of Directors is concerned, the same was stipulated in clause 2.1 of the SHA. It was agreed that both parties would be entitled to equal representation on the Board. As a nominee of MRL, Mr. Vinay Kumar Modi is stated to be a Director on the Board of the joint venture while Mr. Alok Modi is a nominee of the petitioner-company. My attention has been drawn to the annual report of the joint venture for the year 2004-2005 which provides that the Finance Director as well as the Purchase Manager of GGL were also nominees of MRL. In terms of clause 2.7 of the SHA, Mr. V.K. Modi was nominated as the Director cum Chairman who continues to so function.

14. Dispute resolution is provided in clause 26 of the SHA which reads thus:

26. Arbitration Any dispute or difference arising under or in connection with this Shareholders Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the rules of the London Court of International Arbitration by three (3) arbitrators designated in conformity with those Rules. MRL and GACL shall select one (1) arbitrator, Guardian International shall select one (1) arbitrator, and the two arbitrators so selected shall select the third arbitrator. Judgment upon the award rendered may be entered in any court of competent jurisdiction.

15. It now becomes necessary to examine certain other aspects of the functioning of the joint venture placed before this Court by both sides. The admitted position is that no dividend was distributed to the share holders of shares in the joint venture GGL for 16 years since its incorporation. MRL has complained that dividend was declared for the first time in the last financial year which was also only to the extent of Rs. 2 per share. As a result of this policy, the position of the reserves and surplus considerably enhanced. The petitioner has placed reliance on a letter dated 19th November, 2003 written by Guardian to Mr. Vinay Kumar Modi as Chairman of the joint venture GGL adverting to restructuring alternatives. This communication refers to several alternatives and proposals which were discussed between the parties and refers to growth of the company in India to be financed by internal accruals and leveraging.

16. It has been contended on behalf of the petitioner that, thus, as back as in the year 2003, both the parties could foresee the growing demand of float glass and the requirement of expansion of facilities at the joint venture.

17. It is pointed out that in terms of the agreement between the parties, Guardian has received amounts from the joint venture on account of license fee, royalty etc. for the technology transfers while this technical expertise has enabled the GGL to establish itself as a highly profitable enterprise.

18. Mr. Arun Jaitley, learned senior counsel for the petitioner has asserted that MRL had been promoting distribution or declaration of dividend to the share

holders which was being unreasonably obstructed by Guardian for one reason or another.

19. Before this Court, the reason which has been put forth by Guardian has been that an amount of US \$ 45 million was required towards the essential repairs which were to be effected on the cold tank for the manufacturing unit. In this behalf, Guardian had addressed a fax dated 5th August, 2005 to MRL wherein it had written thus-

This is to request some detailed information on dividend capacity for Gujarat Guardian Limited.

If GGL were to pay dividends as of 31 December, 2005, what would be the maximum dividend that could be paid and what would be the basis for the calculation"

For purposes of answering this question, you would assume that the cold tank repair reserve has been reversed in the local books.

For purposes of this question you should also assume that the AGM has been held and approved the financial statements for the year ended 31st March, 2005.

Don't worry about financing. Whatever the amount is above the cash on hand assuming GGL can finalise it.

More specifically:

- 1) Are we limited to some percentage of retained earnings as of 31 March, 2005"
- 2) If there is a legal reserve requirement, what is it"
- 3) Can we pay additional dividends as part of a 31 December, 2005 dividend payout by looking based on interim earnings for months after 31 March 2005" If so, what is required if anything by way of auditor review or certification" How long would this take" Realistically, how many months could we consider after 31 March 2005"
- 4) If we wanted to pay dividends beyond the maximum distributable earnings, (taking into account the questions and assumptions above), can we do a return on capital" If so, what percentage or amount of the paid in capital would be returned" Would there be a withholding tax on this.

This fax is evidence of the fact that so far as the reservation of amounts in the books of accounts of the joint venture GGL was concerned, the entries to this effect in the accounts had been reversed. Undoubtedly this communication also confirms availability of substantial reserves.

20. A further communication dated 12th August, 2005 was addressed by Guardian to Mr. V.K. Modi as Chairman of GGL pointing out that so far as its considerations with regard to the distribution of the dividends was concerned, they were based on the tax impact on its earnings of the dividends. In this

communication, Guardian wrote thus:

As you requested, I also wanted to let you know that due to the mechanics of U.S. Tax Law, Guardian has the ability until December of this year to receive its share of a GGL dividend in the range of \$17 - \$45 million and only be taxed \$5 million on the first \$17 million .Therefore, anything above \$17 million is tax free. We understand from Mr. Surana that the legal limit for a total GGL dividend would be \$45 million and Guardian's 50% share, on \$22.5 million would allow us to bring \$5.5 million out tax-free for a net tax on the total of 22%. For this reason, we are very interested in exploring this possibility especially since it does not look as if GGL will be investing in any additional manufacturing in the near future. Because of the need for a special General Assembly meeting, it seems likely to me that we should be deciding how to proceed by early to mid October.

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21. Even these discussions did not culminate in any fruitful outcome. In a communication dated 2nd February, 2006 so far as the release of dividends was concerned, Guardian put forth yet another alternative for utilization of the reserves and surplus. It now advocated utilization of the available amounts for repurchase of shares from the Government companies which were holding equity in the joint venture. It also imposed a condition for dividend payment upon Guardian being satisfied that there was no dispute between Mr. V.K. Modi and his brother. In this behalf, Guardian made the following stipulations in its letter dated 2nd February, 2006:

...With respect to your description of the dividend discussion, I did state that Guardian could support a dividend payout of up to 40% later this year. However, as we discussed, our strong preference remains to first use available cash to repurchase shares from the Gujarat Government. We can think of no better use for GGL assets than obtaining those shares from the public domain, which would resolve your legal disputes as well as eliminate acrimony at GGL Board meetings. We also made a dividend payment contingent upon a demonstration to our Board meetings. We also made a dividend payment contingent upon a demonstration to our satisfaction that you and your brother are no longer at odds over the ultimate disposition of the GGL shares. Additionally, you would have undisputed sole control of the voting of these shares, and we would have a clear understanding, also to our satisfaction, as to how Modi Rubber will take the final steps in its complete restructuring.

However, our discussion was of a one-time dividend to be declared and paid during 2006. Any future payouts are subject to mutual agreement. Hopefully, we would ensure that GGL is not subjected to any degradation of its financial position and that it makes sense including from a tax perspective, for both of us to receive dividends.

22. In this communication of 2nd February, 2006, a suggestion was made on behalf of the Guardian with regard to purchase of shares held by MRL in the joint

venture as well. In this behalf, Guardian had written thus:

...Summarizing Guardian's perspective on various GGL restructuring issues, it has become increasingly clear that if and when shares change hands, they will do so at a premium price. As you know, during your visit, we were discussing the possibility of a GGL share price in the range of Rs. 60 to Rs. 65 per share. Our view is that this price is at, or even beyond the upper end of any reasonable discounted cash flow analysis, EBITDA multiple, or similar "investment banker" formula beyond taking a multiple from the current overheated Mumbai stock exchange.

If our restructuring conversation had continued into Tuesday, I would have proposed a Guardian/Modi relationship with some modifications to the elements that have been discussed over the last couple of years. If Guardian were to purchase shares at a price that reflects this premium level, we would prefer to own over 75% of the company. However, at whatever percentage that might be agreed upon, we would propose a new seven member Board, with Guardian appointing four members and Modi appointing three. We would continue to agree to the annual fee structure of 1.75% of net sales and agree to pay an annual dividend of 40% of net income with the exception of cold repairs or new plant construction occur. We would also provide some form of dilution protection where you would have protection except if new equity were required for investments in flat glass and you decided not to participate. You could also retain a veto on new investments outside of flat glass.

Furthermore, Guardian would have the right to buy your remaining shares in ten years, subject to your right to retain up to 10% of the shares should you desire, at a price determined using a similar valuation methodology as that employed by ICICI Securities. At that time, you would remain Chairman, but other special governance provisions would end. If you chose, you would have the right to put any remaining shares to Guardian at any time." From the foregoing, it is pointed out that two facts are evident. Firstly, that GGL had adequate reserves and was still adding to them. Secondly, the reluctance the part of Guardian to distribute dividends on the part of Guardian did not emanate from the reason that the reserves and surplus of the joint venture stood assigned and reserved for utilization towards effecting any major plant repairs or the repairs to the cold tank and further that this aspect had been considered by the Guardian itself.

23. In this factual background, the petitioner MRL has urged that the communication dated 21st July, 2006 addressed by Guardian to MRL stating that its agreement with the petitioner stands frustrated and is terminated with immediate effect came as a bolt out of the blue. In this communication which deserves to be considered in extenso, the respondent wrote to the petitioner thus:

...As you know, Guardian International Corp. (Guardian) and Modi Rubber Ltd. (Modi Rubber) are parties to a Shareholder's Agreement dated January 23, 1990

(Agreement) with respect to the joint venture between them, namely Gujarat Guardian Ltd. (GGL). Modi Rubber Ltd. has been in BIFR since February, 2004 and was declared sick by the BIFR on May 17, 2006. To date:

(a) Modi Rubber is no longer a financially viable partner and its future is uncertain.

(b) Modi Rubber's management and affairs are under the effective control and mandate of the BIFR, and the appointed Operating Agency, IDBI.

(c) There are inter-se disputes between the promoters, which further exacerbates Modi Rubber's distressed condition.

The Agreement was founded on the premise of two financially stable and reliable partners. This understanding stands completely eroded as a consequence of Modi Rubber being declared a sick company by the BIFR, thus striking at the very substratum of the Agreement. Therefore, the Agreement stands frustrated and is terminated effective immediately.

Further, pursuant to the terms of the Articles of Association of GGL, we assume you will not transfer your shareholding in GGL without our prior consent. We will continue to comply fully with the Articles of Association and expect that you will do the same.

24. On the same date, Guardian addressed another letter dated 21st July, 2006 to MRL requesting MRL to provide written consent to Guardian for building and operating a wholly owned float glass manufacturing unit and fabrication plant in India. It is imperative to also consider the tenor of this communication and the proposed language of the consent which was sought by Guardian which reads thus:

...As you know, Guardian International Corp. ("Guardian"), together with Gujarat Mineral Development Corp. ("GMDC") and Gujarat Alkalies and Chemicals Ltd. ("GACL") are partners with Modi Rubber Limited ("Modi Rubber") in Gujarat Guardian Limited ("GGL"). As you also know, Guardian has been deeply concerned about the status of Modi Rubber, which has been in BIFR since February, 2004 and which was officially declared sick by the BIFR in May, 2006. The Modi Rubber situation shows no sign of being resolved as the various parties continue their different legal maneuvers and continue to talk about the likelihood of litigation.

Guardian needs to expand in India. Modi Rubber is obviously not in a position to join in any new projects and is not likely to be restructured for a long time. Therefore, Guardian intends to establish a wholly-owned subsidiary to build and operate a float glass manufacturing plant and, in a second phase, a glass coating operation with advance technology. We intend to seek FIPB approval for this expansion.

Therefore, given Modi Rubber's obvious constraint, we are writing to respectfully

request that Modi Rubber provide written consent to Guardian to build and operate a wholly owned float glass manufacturing and fabrication plant in India. It would be helpful if the consent is in the form attached to this letter.

Of course, Guardian will remain the single largest shareholder in GGL and will Therefore continue to maintain, operate and support GGL in a manner consistent with Guardian's operations worldwide. We remain fully committed to GGL's continued success.

We trust that you appreciate the importance of this matter and the difficult situation Guardian is in. Thank you for your careful consideration and prompt assistance in this matter. We look forward to favorable response as soon as possible.

25. The proposed language for the consent of MRL which was enclosed reads thus:

...Modi Rubber Limited ("Modi Rubber") has been advised by Guardian International Corp. ("Guardian") that Guardian desires to establish a wholly-owned subsidiary in India to build and operate a float glass manufacturing plant and a glass coating facility outside of Gujarat. Modi Rubber understands that this business would be separate from the existing joint venture, Gujarat Guardian Ltd. ("GGL"). Finally, Modi Rubber also understands that Guardian is seeking FIPB approval under Press Note 18 and Press Note 1 for this planned expansion.

As such, Modi Rubber has no objection to Guardian proceeding, through one or more wholly owned subsidiaries in India, to build and operate float glass manufacturing and fabrication facilities such as those described above, and Modi Rubber gives its consent to Guardian to undertake such activities independently of Modi Rubber and GGL.

26. The petitioner points out that such consent was imperative under the SHA and that the very fact that Guardian has sought the consent under the SHA negates its contention that the SHA stood terminated.

27. Immediately thereafter on the 22nd of July, 2006, the respondent made an application to the Foreign Investment Promotion Board (FIPB for brevity) for approval to set up a wholly owned subsidiary in the glass manufacturing and glass coating sector.

28. In the meantime, the Board of Directors of MRL passed a resolution dated 12th August, 2006 deciding to oppose the attempts of the respondent to terminate the SHA as well as its intent to set up a wholly owned subsidiary. MRL addressed a letter dated 21st August, 2006 asserting that the purported termination was wrongful and illegal and had no basis, either on any contractual ground or on any statutory provision. MRL strongly urged that the statement of facts stated by Guardian in its letter dated 21st July, 2006 were incorrect and illusory and that the alleged termination was illegal and made for collateral reasons. Apart from reiterating that the SHA did not permit any of the said

grounds for termination, MRL pointed out the following facts:

...(a) you will have noted from the order passed by the BIFR on May 17, 2006, it has been effectively mandated that the Board of Directors of MRL shall continue; as such MRL remains, in accordance with the Guidelines specified by the BIFR, a Board managed company;

(b) the declaration of MRL as a "sick company" is not the equivalent of a winding up or insolvency of MRL; indeed, per applicable Indian law, this is only the first step in the revival of the activities of a company. Hence, MRL remains, to date, a functioning entity, and is not defunct or wound up. As you may note from the order passed by the BIFR on May 17, 2006, the Operating Agency has been appointed with a view to facilitate the revival. The likelihood of such revival is clearly manifest in the fact that the Financial Institutions, being MRL shareholders, have imputed a value of Rs. 91 per MRL share, which would hardly have been the case, if either MRL was wound up, defunct or if there was doubt as to the revival being undertaken or indeed as to its financial viability on account of its asset base.

(c) As stated above, there has been no contractual breach, nor any failure to discharge contractual obligations in the Shareholders Agreement by MRL. Nor have the alleged non congruent points of view between the promoters been to the detriment of GGL and/or that of Guardian, in terms of the Shareholders Agreement. In fact MRL through its designated directors (in particular Mr. V.K. Modi) on the Board of GGL has rendered vital support for the needs and operations of the Joint Venture company leading to its continuing successes and its highly prosperous present state. As such the question of the Shareholders Agreement being frustrated does not arise. Guardian's action purporting to terminate the agreement, entirely ignores Indian law on the subject of "frustration of contract" which governs the Shareholders Agreement.

29. In this communication, MRL also pointed out that despite continuous profitability of the joint venture during the last many years, no dividend had been declared by GGL to its shareholders since inception. Consequently, at the next meeting of the Board of Directors of GGL, it was stated that an interim/final dividend of at least 80% of the permissible distributable dividend be declared.

30. Guardian replied to this communication by a letter dated 25th September, 2006 baldly disagreeing to MRL's submissions and again stated thus:

...We have received your letter of August 21, 2006 on behalf of Modi Rubber Limited (MRL) in response to our letter of July 21, 2006 with regard to the termination of the Shareholders Agreement dated January 23, 1990 (the Agreement) between us. We respectfully disagree with your assertions in the letter that there is no valid basis for the termination of the Agreement. Given, inter alia, the uncertain future of MRL arising from its "sickness" and the continuing public disputes between the promoters thereof, which have a major bearing on the future of Gujarat Guardian Limited (GGL) and the inter-se

relationship between Guardian and MRL, the purpose of the Agreement is frustrated and the Agreement Therefore stands terminated as of July 21, 2006.

31. The petitioner has pointed out that despite the above and active steps having been taken by the MRL and its directors to overcome the sickness including the encouraging steps taken to buy out the shares of the financial institutions and payments having been made on or before 26th July, 2006, Guardian, behind the back of the petitioner, was creating instability in the market circles for MRL. Even prior to issuance of the letter dated 21st July, 2006 to MRL purportedly terminating the SHA with it, Guardian addressed a letter dated 17th July, 2006 to Gujarat Alkalies and Chemicals Ltd (GACL), a company of the Gujarat Government which was also holding equity in the joint venture, seeking its written consent to build and operate a wholly owned float glass manufacturing and fabrication plant.

32. The petitioner has submitted that GACL has not granted consent as sought by Guardian and in fact has opposed setting up of the wholly owned subsidiary by it.

The reasons advocated by Guardian for such consent in its letter of 17th July, 2006 make interesting reading and reads thus:

...Guardian Industries Corp. ("Guardian") has been deeply concerned about the status of its partner, Modi Rubber Limited ("Modi Rubber"), which is in BIFR. The Modi Rubber situation shows no sign of being resolved as the various parties continue their different legal maneuvers and continue to talk about the likelihood of litigation.

Modi Rubber is obviously not in a position to join in any new projects and is not likely to be restructured for quite some time. Additionally, Guardian, as a matter of strategy, locates its float glass plants geographically to optimize proximity to markets and logistics costs. Therefore, Guardian's next float glass plant in India will be built outside of Gujarat, at some distance from GGL's facility. Guardian has received advice that it should undertake any expansion plans that it may have in India on its own. We intend to establish a wholly-owned subsidiary to build and operate a float glass manufacturing plant and, in a second phase, a glass coating operation.

We are writing to respectfully request that GACL provide written consent for Guardian to build and operate a wholly owned float glass manufacturing and fabrication plant in India. It would be helpful to us if you written consent were to contain the language shown on the enclosed sheet.

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33. Despite the stand taken by Guardian in its letter dated 21st July, 2006 purportedly terminating its SHA with MRL, on the 24th July, 2006, it also filed O.M.P. No. 337/2006 titled Guardian International Corporation v. Modi Rubber Ltd. before this Court seeking the following prayers:

(a) to restrain the respondent from transferring its shareholding in Gujarat Guardian Limited without the prior consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner.

(b) pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstance of the case.

34. It has been pointed out on behalf of MRL that by way of this petition, Guardian was again seeking enforcement of its rights under the SHA. In answer to this submission Mr. Mukul Rohatagi, Senior Advocate has argued at great length on behalf of the respondent that it was merely ensuring compliance by MRL with the Memorandum and Articles of Association of the joint venture.

35. Perusal of the application filed by Guardian shows that it has been captioned as an application u/s 9 of the Arbitration and Conciliation Act, 1996. The arbitration clause which has been referred and reproduced in para 9 of the petition is clause 26 of the SHA dated 23rd January, 1990 which has been reproduced hereinabove.

36. In para 21 of the petition, Guardian relies on clause 6 of the SHA and has stated that:

21. Petitioner is deeply concerned about the future of Respondent and the status of Respondent's shareholding in GGL. A scheme of rehabilitation has still not been formulated. The petitioner apprehends that the Respondent's shareholding in GGL may be sold under a scheme of rehabilitation to third parties without the express consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner. The Shareholders Agreement and the very purpose and spirit behind it also contemplated that the identity of the joint venture (GGL) to be maintained and third parties not be introduced. The very purpose of the joint venture was to ensure that business may be carried on by like minded people and that should any one shareholder seek to exit from the joint venture, they would make the shares available to the other continuing members. This clear intention was expressly stated in Clause 6 of the Shareholders Agreement and such intention came to be reflected in the Articles of Association of GGL and in particular Article 3 which contemplated maintenance of the shareholding pattern. While the said Article mandates such maintenance of the shareholding pattern which would disentitle the respondent in transferring shares in GGL, it is submitted, the clause in the Shareholders Agreement offering pre-emptive rights reflects a clear intention of the shareholders, which would continue even after the Shareholders Agreement has come to an end. Further this clause is not restricted to the period of the Shareholders Agreement but forms an independent and severable agreement amongst the shareholders. However, it appears that the Respondent cannot be depended upon to be bound by the restrictions on the transfer of shares, which is compounded by the factum of the Respondent being a "sick" company within the purview of BIFR. It further transpires that the inter se disputes between the promoters of the Respondent

company are also fuelled by their interest and intention to participate in GGL. It is in fact the stand of the petitioner that given the circumstances under which the Shareholders Agreement stood frustrated, the very *raison d'être* for the participation of the Respondent in GGL no longer stands. The petitioner is willing to buy the respondents shareholding in GGL and willing to pay a fair price for the same, and the petitioner believes that the respondent ought to transfer its shareholding in GGL in favor of the petitioner. These are, however, all disputed issues which perforce would need to be resolved as per the arbitration clause (Clause 26) in the Shareholders Agreement. It is, however, imperative that pending such imminent arbitration proceedings, urgent interim orders are passed by this Hon'ble Court. Hence this petition.

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23. Therefore, in the interest of justice and in aid of the Arbitration Agreement in the Shareholders Agreement, the petitioner is seeking to restrain the respondent from taking any steps from transferring its shares in GGL without the consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner.

24. The petitioner Therefore submits that it is absolutely just, necessary and convenient that the respondent its officers and directors are restrained in any manner from transferring any of its shareholdings in GGL without the consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner. The petitioner also craves leave that in the event of change in the ultimate and beneficial ownership of the respondent they be permitted to seek other reliefs. xxx xxxx xxxx

26. The petitioner states that the Memorandum of Understanding with the respondent was negotiated in Delhi, the Shareholders Agreement was negotiated in Delhi, the respondent is carrying on the business at Delhi, their Delhi office is the designated address, *inter alia*, for service of the respondent even as per the Shareholders Agreement and Therefore the Respondent carries on business within the jurisdiction of this Hon'ble Court. The petitioner has always corresponded with the respondent at Delhi. This Hon'ble Court Therefore has the jurisdiction to entertain and try the present petition.

37. O.M.P. No. 337/2006 rested on the assertion that by an order dated 12th March, 2005 passed by the learned Company Judge at Allahabad, MRL had been directed to be wound up in Company Petition No. 1/2002 passed by the High Court of Judicature at Allahabad.

It has been pointed out that it was only on account of the order dated 20th May, 2004 passed by the Division Bench of the High Court of Judicature at Allahabad in Special Appeal No. 420/2004 that the winding up was not effectuated.

On these facts, Guardian has contended in its Section 9 petition that the very continuance of MRL as a strong and viable partner in the joint venture is in

jeopardy; there are interse disputes between the promoters of MRL; MRL has been declared sick and its management and affairs are subject to control and mandate of the BIFR and the operating agency IDBI and consequently, the entire substratum of the SHA stands eroded by the frustration thereof.

38. The petitioner has urged that the letter dated 6th July, 2006 and the letter dated 21st July, 2006 support the submission that the respondent Guardian was treating the SHA dated 23rd January, 1990 as subsisting and the averments of Guardian in O.M.P. No. 337/2006 and as well as the relief sought therein bears out the fact that the SHA stood neither frustrated nor terminated and that Guardian was itself treating the same subsisting.

39. On the 22nd July, 2006, Guardian also filed a caveat petition u/s 148A of the Code of Civil Procedure, 1908 before this Court.

40. In O.M.P. No. 337/2006, the following order was recorded on 28th July, 2006:

O.M.P. No. 337/2006 Notice. Mr. Arjun Pant, Advocate accepts notice for the respondent and prays for time to file reply. Let the reply be filed within six weeks. Rejoinder thereto, if any, be filed before the next date.

The petitioner, inter alia, places reliance on the Article of Association of the petitioner company to point out that as per the Memorandum and Article of Association of the company, Clause 3 (b) governing the share capital clearly provided the pattern and shareholding of the company. This position is not disputed on behalf of the respondent. The petitioner has expressed apprehension that respondent would transfer its shareholding in violation of clause 3 (b) of the Memorandum and Articles of Association. Such transfer would be clearly permissible.

In view of the above, it is directed that the parties shall maintain the shareholding in terms of Clause 3 (b) of the Memorandum and Articles of Association of the petitioner.

41. In this factual background, the petitioner has filed the present petition u/s 9 of the Arbitration and Conciliation Act, 1996 urging that the action of the respondent in proposing to set up a wholly owned subsidiary is in absolute breach of the SHA, and that the same would negatively impact the interest of the joint venture and jeopardise its business and profitability thereby causing irreparable loss and damage to it. It has urged that the termination of the agreement by the letter dated 21st July, 2006 was illegal and contractually impermissible.

42. The petitioner also points out that despite the order dated 28th July, 2006, Guardian took no steps to initiate the arbitration as per the arbitration clause 26 of the SHA and that the whole effort of Guardian was to compel the MRL to sell its shareholding to it and to dump the existing joint venture partner.

43. Apprehensive that the respondent could effectuate setting up its wholly

owned subsidiary causing irreparable loss to GGL and asserting breach of the afore-noticed Clause 14 of the SHA, the petitioner has sought the following reliefs by way of the present petition:

(a) restrain the respondent or its affiliates or associates from participating, negotiating or engaging or be financially interested, directly or indirectly in any other project for the manufacturing of float glass, or for the fabrication of products made from float glass, or for the sale, import/export of float glass or related products made from float glass in India;

(b) restrain the respondent from taking any step in setting up a wholly owned subsidiary in India for manufacturing in the same filed as GGL;

(c) restrain the respondent from pursuing the application made to the Government of India (now pending before the Foreign Investment Promotion Board) for approval to set up a wholly owned subsidiary in the glass manufacturing and glass coating sector;

(d) restrain the respondent from acting in furtherance of the application No. 141/2006-F.C.I. filed before the FIPB;

(e) grant ex-parte ad-interim reliefs in terms of clause (a) to (d) above; and xxxx xxxx".

44. Inasmuch as no interim relief was granted in this matter, the petition was put to final hearing. Long arguments have been addressed by both sides and voluminous submissions laid before this Court. During the course of the hearing, it appears that Guardian has on 16th October, 2006 filed a reference for arbitration before the London Court of International Arbitration.

45. MRL has submitted that, in its reply, it has opposed the reliefs prayed for by the respondent and has also made counter claims against the respondent company to the effect that the SHA including clause 14 continues to be valid and binding between the parties.

46. Mr. Arun Jaitley, learned senior counsel for the petitioner has contended that the purported termination of the agreement by the letter dated 21st July, 2006 by the respondent is ex facie illegal as well as unlawful and being contrary to the specific stipulations between the parties as contained in clause 16 of the SHA. The term of the SHA has been set out in the agreement and termination can be only in accordance with the specific stipulations therein. It is submitted that the respondent in its request for Arbitration to the LCIA has itself raised a question about the validity of the termination and has sought arbitration on its legality. The agreement Therefore is subsisting and the respondent is bound by the prohibition and the negative covenant contained in clause 14 of the SHA and consequently liable to be enjoined.

47. In support of these submissions, the pronouncement of the Apex Court reported in M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and

others, has been placed before this Court. Strong reliance is also placed on the pronouncement of the Division Bench of this Court dated 23rd October, 1998 in FAO (OS) No. 251/1998 titled Goyal MG Gases Ltd. v. Griesheim GmbH.

48. My attention has further been drawn to the pronouncements of learned Single Judges of this Court wherein this Court has directed enforcement of the negative covenant in different agreements between the parties. In this regard, learned senior counsel placed reliance on the judgment dated 19th December, 2002 passed in CS (OS) No. 915/2002 The Chancellor, Masters and Scholars of the University of Oxford v. Orient Longmans Pvt. Ltd.; AIR 1993 Delhi 93 Velmer Hindustan v. LCR Corporation and 73 (1998) DLT 374 Old World Hospitality v. ILC.

49. On these submissions, it has been contended that balance of convenience and interest of justice are wholly in favor of the petitioner. It is submitted that it is MRL shall suffer an irreparable loss and damage if the respondent proceeds to implement its proposal to set up a wholly owned subsidiary in violation of the non compete clause which shall irreversibly and irreparably impact the business of GGL, the joint venture. According to Mr. Jaitley, learned senior counsel, as a result the respondent would move new technology into the parallel business. It would impact the expansion potential of GGL, the joint venture company, very deeply inasmuch as the clients of the joint venture would go into the parallel business. The value of the equity of the joint venture would be also impacted and would go down sharply.

50. It has further been pointed out that merely because one of the partners of the joint venture was before the BIFR, does not give any immunity to the respondent against its contractual obligations. So far as the contract between the partner which is before the BIFR and the respondent is concerned, the same remains valid and binding. The respondent cannot terminate the agreement for any reason other than the stipulations contained in the agreement itself. Consequently, the unilateral termination by the respondent for reasons which are not stipulated in the agreement between the parties, is illegal and so long as the parties continue to maintain the shareholding in terms of the SHA, the agreement subsists. The respondent is consequently bound by the non compete clause.

51. It has further been contended that before this Court, the respondents have tried to place reliance on the tentative proposals placed by one of the directors of the petitioner before the BIFR giving different alternatives whereby MRL could liquidate its liabilities. Such proposal, it is explained, was not by or on behalf of the petitioner company.

According to Mr. Jaitley, learned senior counsel, so far as the transfer of shareholding held by the parties to the SHA is concerned, clause 6 permits transfers to affiliates and associates provided that they are not competitors in the business. One of the alternative suggested by the Director related to a proposal to transfer shareholding in the joint venture. This proposal nowhere

stipulated that the transfer would be in violation of clause 6 of the SHA. Such a tentative proposal which is one of the several alternatives placed before the BIFR, and low down in the priorities of the suggestions would not permit the respondent to breach its contractual obligations under the SHA.

52. The main plank of the respondents' submissions has been that the petitioner has not challenged the termination by the communication dated 21st July, 2006 in any proceedings and that no challenge has been laid to the same even in the present petition. It is contended that the reliefs sought in the present petition are based only on the non compete clause in the SHA. Such a clause could be pressed only if the agreement was in force or continued to operate between the parties. The agreement having been terminated, all bindings of the parties thereby ceased to exist or bind the parties.

Consequently, the negative covenant in the contract or the non-compete clause cannot be enforced against the respondent inasmuch as the contract between the parties stands determined and ceases to exist.

53. Mr. Mukul Rohtagi, learned senior counsel has also urged at great length that in terms of the proposal which was laid before the FIPB, in order to set up a wholly owned subsidiary, the respondent has to invest more than US\$ 200 million in the proposed new plant. This involves an amount of US \$ 66 million in equity while an amount of US \$ 134 million is to be raised from the market. Such an investment by Guardian strongly adds to India's economic growth. Learned senior counsel has urged at length that the new plant is not in any manner going to compete with the market or the business of the joint venture and that unless new technology and products are brought into India, the business of the joint venture itself would suffer. The two competitors of the joint venture i.e M/s Saint Gobain and M/s Asahi Glass have brought out the new products and new ranges in the product in a big way, strongly jeopardising the joint venture.

54. It is pointed out that in the light of the Guardian's huge stake in the joint venture, in case the business of the joint venture suffers, Guardian suffers the most. The submission is that it is in Guardian's commercial interest as well not to do anything which would jeopardise the business interest of the joint venture.

55. Mr. Mukul Rohtagi, learned senior counsel for the respondent has pointed out that even the FIPB has required a guarantee that the health of the joint venture is not impacted in any manner by the proposed new subsidiary. Consequently, it is urged that instead of Guardian being like the "big fish trying to eat a small fish", it is in fact, acting as the big brother protecting the smaller brother.

56. On the afore-noticed facts, it is vehemently submitted that the new project to be set up by Guardian is its wholly owned subsidiary. It is not a collaboration with any other Indian or foreign partner. Consequently there is no question of there being any competition with the joint venture or any outsider becoming privy to the business secrets of the joint venture. On these facts, Mr. Mukul Rohtagi, learned senior counsel has urged at great length that despite repeated

promises that MRL would get out of its industrial sickness promptly and ensure finalization of the proceedings before the BIFR, it has been unable to do so. On the contrary, it has put forth a proposal of sale of its shareholding in the joint venture resulting in extreme insecurity and uncertainty.

For all these reason, Guardian is satisfied and is not willing to participate in the expansion activities of the joint venture which would involve precious financial and technological implications. On these facts, it is urged that MRL is not entitled to any injunction to prevent Guardian from expanding.

57. In the facts of the case, it has been pointed out that MRL is guilty of concealment of material facts in the petition inasmuch as it has not informed this Court about the proposal which was laid before the BIFR with regard to the sale of its shareholding in the joint venture and that in the light of their being no challenge to the validity of the termination on behalf of the petitioner, no stay of the same can be granted to MRL in the present proceedings.

In any case, it is urged by Mr. Mukul Rohtagi, learned senior counsel for the respondent that the relief which a petitioner may be entitled to u/s 9 of the Arbitration and Conciliation Act, 1996 cannot amount to the relief which the arbitrators may award ultimately. It has been contended that Section 9 is perseveratory and is not adjudicatory and for this reason as well no relief is admissible to the petitioner in the present petition. On these submissions, the respondent has urged that the petition fails to disclose a prima facie case, that balance of convenience and interests of justice are in favor of the respondent and that the petitioner has failed to make out a case of irreparable injury, disentitling it to any relief.

58. The submissions on behalf of the respondents can be briefly summed up thus:

(I) The petition at the instance of MRL is not maintainable since it has not invoked the arbitration agreement and that the petitioner has not challenged the termination of the SHA in any proceedings including the present petition.

(II) The arbitration proceedings have already commenced. MRL has objected to the very initiation of the arbitration proceedings as being pre-mature and consequently cannot invoke the jurisdiction of this Court u/s 9 of the Arbitration and Conciliation Act, 1996.

(III) Clause 14 of the SHA is not binding on the parties for the reason that it has not been incorporated in the Articles of Association of GGL, the joint venture.

(IV) The SHA cannot be enforced for the reason that it stands terminated on the grounds of frustration and the petitioner has failed to make out a prima facie case for grant of injunction in the following circumstances:

(i). MRL had been declared sick by the BIFR. Its total dues as on 31st March, 2003 were in excess of Rs. 250-300 crores and its net worth had been completely eroded. MRL's industrial operations and products stood shut down

since 2001.

(ii). Shares of the joint venture GGL as held by MRL have been treated by it as investments. Under the provisions of Sick Industrial Companies (Special Provisions) Act, the operating agency has the power to sell the assets of MRL in order to revive the company. Shares of GGL as held by MRL are the most valuable assets of MRL. Consequently, there is continuing uncertainty with regard to the sale of GGL's shares held by MRL to a third party. This would lend uncertainty to the partner with whom Guardian would be compelled to work in the joint venture.

(iii). By the order dated 20th May, 2004 passed by the High Court of Judicature at Allahabad, MRL had been ordered to be wound up. This matter was even on date pending before the Supreme Court.

(iv). It has been submitted that MRL has filed an application dated 22nd August, 2006 wherein it has been repeatedly contended in paras 5.3, 5.4, 6.2 and 7.4 that the revival could be funded by sale of shares of MRL in GGL. There is continuous contentious fighting between the two brothers Mr. V.K. Modi and Dr. B.K. Modi with regard to the control of MRL, lending further uncertainty to the future of one major partner in the joint venture.

(v). MRL has thus put forth a revival plan before the BIFR in which it has envisaged sale of its shareholding in the joint venture GGL. The revival plan put forth by MRL banks in a long way on the sale of its shareholding in GGL.

(vi). Guardian owns 50% equity in the joint venture GGL. It has five nominee directors on the Board of Directors of GGL, out of a total of ten directors. It has a substantial stake of more than Rs. 450 crores in GGL. It is pointed out that on the other hand, MRL is holding only 21.24% shares in the joint venture and shares the directorships with the nominees of the Gujarat Government companies. In this behalf, reliance has been placed on Article 112 of the Articles of Association to urge that a downfall in the business of GGL impacts the profits of respondent more than those of the petitioner.

(vii). Guardian finds itself unable to undertake any expansion in existing business of GGL in partnership with MRL because of the uncertainty and insecurity within MRL.

(viii). Any proposal to undertake expansion activities in the joint venture requires an approval of both Guardian and MRL's directors and not that of his nominated directors of Guardian alone. In this behalf, Article 148 (xiv) of the Articles of Association so stipulates.

(ix). The cold tank of the plant requires repairs and such a requirement is a certainty. The cash which would be required for this purpose would be to the tune of US \$ 45 million. Such repairs are required to be undertaken in the coming two years beginning from 2007 though actual repairs may start in the year 2008. Merely shifting the reserve for such repairs from one heading to

another for accounting purposes is distinct from having the actual cash to pay for the same. Such an amount has to be maintained in order to have the reserve to effectuate the repairs.

(x) Guardian cannot be compelled to share its cutting edge technology and new technologies for new products under any agreement with the MRL or with the existing joint venture.

(xi). M/s Saint Gobain and M/s Asahi Glass, the competitors to the joint venture GGL in India, have already set up second plants in India which has aggravated the need for a new project to be set up which would complement the joint venture GGL's production facility.

(xii). The Foreign Investment Promotion Board FIPB has granted permission to Guardian, USA to start a new project on terms and conditions stipulated in the permission granted to it. The FIPB stands satisfied that the joint venture would not be harmed or prejudiced if the Guardian is permitted to set up a new wholly owned subsidiary. The findings of the FIPB are those returned by the expert body set up by the Government of India which is prima facie evidence of the fact that the new venture shall not compete with the joint venture but rather complement it.

It has been submitted that FIPB gave a personal hearing to both sides; that FIPB is an expert body of the Government of India and it has passed its orders after giving a detailed hearing to the objections raised by MRL.

(xiii). Guardian has repeatedly offered to buy out the MRL's shareholding in the joint venture at a valuation arrived at by ICICI Securities Ltd. and an application to this effect was also filed in the pending proceedings before the BIFR. Guardian has had discussions with Mr. V.K. Modi in this behalf continuously and has clearly expressed its intention to Mr. V.K. Modi to acquire the shareholding of MRL as well as that of the Gujarat Government Companies in the joint venture which would then be sold to Guardian.

(xiv). MRL has never proposed to purchase Guardian's shareholding in the joint venture GGL. The proposal to this effect itself is preposterous inasmuch as the MRL's net worth stood eroded and it had been declared sick by BIFR.

(xv). Termination of the SHA by Guardian does not impact the continuance and profitability of the joint venture GGL as a company. It shall continue to be run in accordance with its Articles of Association and because of its extensive stake holding in this joint venture, the respondent shall continue with its active and healthy participation in the business and affairs of GGL.

(xvi) It is vehemently urged that the joint venture would not be harmed in any manner if the new company is permitted to be set up by Guardian. No loss would result to MRL nor would the value of its shares go down inasmuch as Guardian would continue to support GGL.

59. Having heard learned senior counsels for both sides at great length, I have given my thoughtful consideration to the record laid before this Court and the submissions made. The nature of the issues raised which includes a challenge to the very maintainability of the petition at the instance of the petitioner have necessitated a close factual analysis. I have endeavored to crystallise the propositions for clarity which I propose to deal with hereafter. Clause 14 of the Share Holder Agreement is illegal and not binding as the same is not contained in the Articles of Association of the Joint Venture of GGL.

60. An objection has been taken by the respondents in their arguments to the effect that Clause 14 of the SHA dated 23rd January, 1990, was not incorporated in the Article of Association of the joint venture GGL and consequently would not bind the parties. (Ground III in para 58 above) Placing reliance on the pronouncement of the Supreme Court in V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, and the pronouncement of the Bombay High Court reported at 2004 (121) Comp Cas 335 IL and FS Trust Company Limited and Arn. v. Birla Perucchini Limited and Ors. it is contended that it is only the Article of Association which binds the shareholders.

61. On the other hand, Mr. Arun Jaitley, learned senior counsel for the petitioner, has urged that Clause 14 of the SHA did not relate to a matter effecting the affairs of the joint venture. Learned senior counsel has placed reliance on another pronouncement of the Apex Court reported at M.S. Madhusoodhanan and Another Vs. Kerala Kaumudi Pvt. Ltd. and Others, to urge that such a covenant as contained in clause 14 would bind the parties thereto irrespective of whether it was contained in the Article of Association or not.

62. It is well settled that a judgment would be relied on the facts in which it has been rendered. A judgment cannot be applied in an abstract without consideration of the facts in which the principles were laid down. In Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, the Supreme Court state that:

19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussion but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton 1951 AC 737, Lord Mac Dermot observed:

The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the

rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

In *Home Office v. Doreset Yacht Co.* 1970 (2) All ER 294 Lord Reid said, "Lord Atkin's speech...is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed : "One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in *Herrington v. British Railways Board* (1972) 2 WLR 537 Lord Morris said:

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case." Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

63. This principle was reiterated by the Supreme Court in 2004 (VIII) AD (SC) 468 *Kesar Devi v. Union of India* and 2004 (VII) AD (SC) 109 *U.P. Co-operative Cane Unions Federations v. West U.P. Sugar Mills Association and Ors.* etc. It has also been dealt with in (109) 2004 DLT 763 *M.C. Khullar v. Union of India and Ors.*

64. In a recent decision reported at *State of Haryana and Others Vs. M.P. Mohla*, , also the Apex Court has observed thus:

19. A judgment as is well known must be read in its entirety. The judgment of a court must also be implemented. But what would be the effect of a judgment must be considered from the reliefs claimed in the writ petition as also the implications thereof which has to be deciphered from reading the entire judgment. A judgment may also have to be read on the touchstone of pleadings of the parties.

65. It Therefore becomes necessary to consider the facts which were before the Supreme Court in *V.B. Rangaraj Vs. V.B. Gopalakrishnan and others*, . In this case, the plaintiffs had placed reliance on an oral agreement to the effect that two branches of the family who were the shareholders in the company, would continue to hold equal number of shares therein and that if any member in either of the branches wished to sell its share/shares, he would give the first option to purchase the members of that branch. Only if the offer so made was not accepted that the shares would be sold to others. The defendant No. 1, who was the son of one brother sold shares to the sons of the other brother without giving the first option to the member of his father's family. In these circumstances, the sale of shares and their transfer was challenged by his brothers.

It was held by the court that the restriction which was urged on behalf of the plaintiff, was a blanket restriction on all the shares, present or future, and that

such a restriction was not provided in the Articles of Association of the company. It was pointed out that that Section 82 of the Companies Act defines the nature of shares and states that the shares or other interest of any member in the company shall be the moveable property transferable in the manner provided in the Article of Association of the company. It was in these circumstances held that so far as the restrictions on the transfer of shares was concerned, the same would be regulated by the Articles of Association of the company and any agreement which does not form part of the Article of Association, cannot be urged to deny registration of the shares purchased by a vendee on any ground other than those contained in the Articles.

There is certainly no such issue in the present case.

66. So far as the pronouncement of the Bombay High Court in 2004 (121) Comp Cas 335 IL and FS Trust Co. Ltd. and Anr. v. Birla Perucchini Ltd. and Ors. is concerned, it appears that a Subscription cum Share Holders Agreement was entered into on March 25, 2000 between the petitioners, the respondent company and the second respondent. The Articles of Association of the company were duly amended for implementation of the provisions of this share holders agreement. On disputes arising, the petitioners sought a reference to arbitration under the arbitration agreement contained in Article 16 of the Subscription cum Share Holders Agreement dated 25th March, 2000. In a petition filed u/s 11 of the Arbitration and Conciliation Act, 1996, a reference to arbitration was made by the court on 13th September, 2002. The petitioners also filed a petition u/s 9 of the Arbitration and Conciliation Act, 1996 seeking certain injunctions.

In this background, the court noticed that the provisions contained in the subscription cum share holders agreement were translated into an amendment of the Articles of Association. However, the provisions contained in Article 3.10 of the subscription agreement which provided that the promoters undertook that the second respondent shall not resign from the Board "till the validity of the agreement" was not translated into an amendment of the Articles of Association of the company. The effect of Article 3.10 was that the respondent No. 2 was rendered a permanent director of the company.

Placing reliance on the Division Bench pronouncement reported at 2000 (100) Company Cases 19, Rolta India Ltd. v. Venire Industries Ltd. and Anr., the court held that subject to the provisions of the Companies Act, the company and its members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the company and define the powers of its officers. It was also observed that the Articles would be a contract between the company and its members and between the members interest and that the contract governs the ordinary rights and obligations incidental to the membership in the company. It was in this background that the court held that the provisions in the Subscription cum Share Holders Agreement as contained in clause 3.10 cannot be given effect to so far as the management of the affairs of the company is concerned unless those provisions have been incorporated into

its Articles of Association.

67. The issue raised before the Bombay High Court in IL and FS Trust Co. Ltd. was also Therefore not the issue which is being considered by this Court.

68. The instant case is certainly not concerned with any restriction or stipulation relating to management of the affairs of GGL, the joint venture. The agreement between the parties relates to an agreement not to enter into such business which is the same as or similar to the business of GGL, the company that is the joint venture. There is a fundamental difference between such an agreement as against an agreement relating to restriction on transfer of share holding or functioning as directors of a company which would be governed by the Companies Act and the Articles of Association of the company.

69. It is also necessary to notice that in the instant case, so far as the restriction on transfer of share holding is concerned, the parties had covenanted and also provided for a pre-emptory right to purchase the shares of the company as was contained in clause 6 of the share holders agreement dated 23rd January, 1990.

70. So far as the transfer of share holding is concerned, there is no dispute that the same has to take effect in accordance with the provisions of the Companies Act and Section 82 shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of association of a company which are in the nature of a contract between its various members. It is well settled that the articles of a private limited company may regulate the transfer of shares and place restriction on it but there can be no absolute bar to the transfer of shares.

71. In AIR 1928 PC 291 Ontario Jockey Club v. Samuel Mc. bride, it was held that a restriction which precludes a share holder altogether from transferring a share may be invalid but a restriction which does no more than give a right of pre-emption is valid. The Bombay High Court in a judgment reported at 2000 (100) Comp Cas 19 Rolta India Ltd. v. Venire Industries Ltd. and Anr. was called upon to consider a restriction contained in a pooling agreement with regard to restriction of number of directors of the Board. The court held that a pooling agreement cannot be used to supersede the statutory rights given to the board of directors to manage the company, the underlying reason being that the share holders cannot achieve by a pooling agreement that which is prohibited to them, if they are voting individually. Therefore, the power of share holders to unite is not extended to a contract whereby restrictions are placed on the powers of directors to manage the business of the corporation. The only restriction which would be recognised as binding on the company would be under the statute or in the Articles of Association.

It was such an agreement between the shareholders which was held by the court as being capable of such construction as to constitute a contract not binding on the company even if the company had taken note of the same or acted thereupon. The court had held that an interim injunction restraining the right of the company to be a director in the interest of a company would amount to

stultifying the management of the company. The principles laid down herein certainly do not apply to the instant case.

72. At this stage, it would be topical and instructive to refer to the judicial pronouncement reported at M.S. Madhusoodhanan and Another Vs. Kerala Kaumudi Pvt. Ltd. and Others, .

The court was called upon to consider the validity of an agreement dated 16th January, 1986 referred to as "karar" which sought to get the partition of assets by mutual consent and was executed between Madhavi, Mani, Madhusoodhanan, Srinivasan and Ravi. It also provided that Madhavi would be the Chairman of the company known as Kerala Kaumudi Pvt. Ltd. during her lifetime; that there would be no change in the existing share structure during the lifetime of Madhavi; that after the death of Madhavi, the shares of Kerala Kaumudi should be so given that Madhusoodhanan gets 50% of the total shares of the company including the shares owned by Ravi and Srinivasan; Srinivasan and Ravi gets 25% each. The court held that the karar was in the nature of family settlement seeking to settle the disputes between the brothers and that the three brothers having taken full benefit of the karar were bound to comply with all of its terms. It was not open to them to accept that portion of the karar which was in their favor and jettison the rest.

73. In the submission before the Supreme Court, the respondents placed reliance on the earlier decision of the court rendered in V.B. Rangaraj Vs. V.B. Gopalakrishnan and others, to urge that the transfer of shares of Sukumar and Madhavi was contrary to the Articles of Association of the company and could not be enforced.

After a consideration of the law on the subject, it was noticed that shares were moveable properties and transferable. Private companies like the respondent restricted the share holders' right to transfer shares and prohibit invitations to the public to subscribe for shares or debentures in the company by the Articles of Association.

However, subject to this restriction, a shareholder in a private company may agree to sell his shares to a person of his choice. In para 141 of the judgment, the court held that such agreement is specifically enforceable u/s 10 of the Specific Relief Act, 1963 inasmuch as the shares in a private limited company would come within the phrase "not obtainable in the market" as specified in the Explanation to Section 10.

It was further held in para 142 that, while it is imperative that the company should be a party to any agreement relating to the allotment of new shares, before such an agreement can be enforced it is not necessary for the company to be a party in any agreement relating to the transfer of issued shares. For such agreement to be specifically enforced between the parties for transfer, the court considered the decision rendered in Rangaraj case and observed thus:

144. The decision does not in any way hold that the transfer of shares agreed to between shareholders inter se does not bind them or cannot be enforced like any other agreement.

145. In Rangaraj case relied upon by the respondents, an agreement was entered into between the members of the family who were the only shareholders of a private company. The agreement was that for all times to come each of the branches of the family would always continue to hold equal number of shares and that if any member in either of the branches wished to sell his share/shares, he would give the first option of purchase to the members of that branch and only if the offer so made was not accepted, the shares would be sold to others. This was a blanket restriction on all the shareholders, present and future. Contrary to the agreement, one of the shareholders of one branch sold his shares to members of the second branch. Such sale was challenged in a suit as being void and not binding on the other shareholders. This Court rejected the challenge holding that the agreement imposed a restriction on shareholders' rights to transfer shares which was contrary to the Articles of Association of the Company. It was, Therefore, held that such a restriction was not binding on the Company or its shareholders. The decision is entirely distinguishable on facts. There is no such restriction on the transferability of shares in the karar. It was an agreement between particular shareholders relating to the transfer of specified shares, namely, those inherited from the late Sukumaran and Madhavi, inter se. It was unnecessary for the Company or the other shareholders to be a party to the agreement. As provided in clause 10 of the karar, Exhibits R-59 and R-60 did not obviate compliance with the karar. Both Exts. R-59 and R-60 were executed on 15-7-1985, several months prior to the karar. The parties who had consciously entered into the agreement regarding the transfer of their parents' shares are, Therefore, obliged to act in terms of the karar. The defense of Ravi and Srinivasan based on Exts. R-59 and R-60 should not, in the circumstances, have been accepted by the Division Bench. Having regard to the nature of the shareholding, on the basis of the law as enunciated by the Federal Court and the Privy Council in the decisions noted above, it must be held that the karar was specifically performable.

74. In order to appreciate the submissions made in this case, Clause 6 of the SHA deserves to be considered in extenso and reads thus:

6. Transfer of Shares

6.1 If Guardian International (and/or its Affiliate or Associate) wishes to sell or otherwise dispose of some or all of the shares of the company owned by it, Guardian International (on behalf of such proposed disposing party) shall first offer in writing such shares to MRL (or MRL's nominee) at the price and other terms specified by it in such offer. MRL shall, within a period of sixty (60) days after the receipt of such offer, notify Guardian International if MRL (or such nominee) will accept such offer (subject to obtaining any requisite approvals of the Reserve Bank of India, the Department of Company Affairs, or any other

institution or department of the Government of India or any political subdivision thereof). If MRL fails to notify Guardian International of its acceptance of the offer as aforesaid, Guardian International (or its Affiliates or Associates) shall be entitled to sell or otherwise dispose of the shares to third parties at the aforesaid price. Should Guardian International (or its Affiliates or Associates) fail to sell or otherwise dispose of such shares at the said price, any of them shall be entitled to sell or otherwise dispose of the shares to third parties at a lower price; provided, however, that Guardian International (on behalf of such proposed disposing party) shall first have offered the shares at such lower price to MRL in accordance with the aforesaid procedure. Guardian International (or its Affiliates or Associates) shall be entitled at any time, without liability to any person, to decline to sell or otherwise dispose of its shares if the price approved by the Controller of Capital Issues, the Reserve Bank of India or any other institution or department of the Government of India or any political subdivision thereof is below its offer price. In addition, Guardian International (or its Affiliates or Associates) shall be entitled, without liability to any person, to decline to sell or otherwise dispose of its shares if it is not satisfied that the proceeds of such sale or disposition of the shares can be repatriated to the United States of America or to a country of Western Europe selected by it.

6.2 If MRL (and/or its Affiliates or Associates) wishes to sell or otherwise dispose of some or all of the shares of the company owned by it or allotted to it (or owned by such Affiliates or Associates), MRL (on behalf of such proposed seller) shall first offer the shares to Guardian International. The procedure to be followed with respect to such offer and the subsequent sale or other disposition shall be the same, mutates mutans, as the procedure described in Section 61 of this Shareholder Agreement; provided, however, that if Guardian International (or its Affiliates or Associates) is prohibited from acquiring such shares for any reason attributable to the laws or policy of the Government of India or any political subdivision thereof, then Guardian International (or such person) shall be entitled to renounce its rights to acquire the shares as aforesaid in favor of persons selected by it who are residents of India and MRL (or such other disposing party) shall sell the shares to such persons in accordance with the procedures set forth in this Section 6 of this Shareholders Agreement.

75. However, despite the foregoing restriction, it was specifically agreed between the parties that the transfer of shares interest between Guardian and on any of its affiliates or associates or between MRL and any of its affiliates or associates was permissible if the transferee was not engaged in a competing business with the joint venture company. There was also no restriction on a transfer of shares by the Gujarat Alkalies and Chemicals Ltd. to a company owned by it or to MRL. In this behalf, clause 6.5 provides thus:

Clause 6.5

6.5 Nothing contained in this Section 6 shall restrict:

(i) the transfer of shares inter se between Guardian International and any of its Affiliates or Associates, or between MRL and any of its Affiliates or Associates; provided, however, that with respect to a transferee of MRL (or any of its Affiliates or Associates) the transferee is not engaged in a competing business with the company; and

(ii) the right of GACL to transfer all or a part of the equity shares of the company owned by it to MRL.

The SHA dated 23rd January, 1990 contained a restriction on the parties to indulge in other business for manufacture of float glass or fabrication of products made from float glass in Clause 14 which has been reproduced earlier in this judgment.

76. Inasmuch as the SHA permits transfer of equity to an "affiliate" or an "associate", it would be useful to also set out the definition of these expressions as agreed upon between the parties which was provided in clause 15.1 and reads thus:

15. "Affiliates" and "Associates"

15.1 For purposes of this Shareholders Agreement, the term "Affiliates" shall mean any legal person (other than the company) who, directly or indirectly, is controlled by controls, or is under common control with, a party to this Shareholders Agreement; and the term "Associate" shall mean a business partner, agent or adviser of either party to this Shareholders Agreement or of any other company or person proposed as an investor by that party and accepted in writing by the other party.

77. The respondent has itself asserted rights based on the pre-emptive right to purchase the shares in GGL by virtue of clause 6 of the share holders agreement dated 23rd January, 1990. In this behalf, the respondent filed O.M.P. No. 337/2006 entitled Guardian International Corporation v. Modi Rubber Ltd., wherein para 21 it was inter alias stated thus:

21. Petitioner is deeply concerned about the future of respondent and the status of respondent's shareholding in GGL. A scheme of rehabilitation has still not been formulated. The petitioner apprehends that the respondent's shareholding in GGL may be sold under a scheme of rehabilitation to third parties without the express consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner. The shareholders agreement and the very purpose and spirit behind it also contemplated that the identity of the joint venture (GGL) to be maintained and third parties not be introduced. The very purpose of the joint venture was to ensure that business may be carried on by like minded people and that should any one shareholder seek to exit from the joint venture, they would make the shares available to the other continuing members. This clear intention was expressly stated in clause 6 of the Shareholders Agreement and such intention came to be reflected in the Articles

of Association of GGL and in particular Article 3 which contemplated maintenance of the shareholding pattern. While the said Article mandates such maintenance of the shareholding pattern which would disentitle the respondent in transferring shares in GGL, it is submitted, the clause in the Shareholders Agreement offering pre-emptive rights reflects a clear intention of the shareholders, which would continue even after the Shareholders Agreement has come to an end. Further this clause is not restricted to the period of the Shareholders Agreement but forms an independent and severable agreement amongst the shareholders. However, it appears that the respondent cannot be depended upon to be bound by the restrictions on the transfer of shares, which is compounded by the factum of the respondent being a "sick" company within the purview of BIFR.

Again in paras 23 and 24 of this petition, the respondent stated thus:

23. Therefore, in the interest of justice and in aid of the Arbitration Agreement in the Shareholders' Agreement, the petitioner is seeking to restrain the respondent from taking any steps from transferring its shares in GGL without the consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner.

24. The petitioner Therefore submits that it is absolutely just, necessary and convenient that the respondent its officers and directors are restrained in any manner from transferring any of its shareholdings in GGL without the consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner. The petitioner also craves leave that in the event of change in the ultimate and beneficial ownership of the respondent they be permitted to seek other reliefs.

Finally, the following prayers have been asserted by the respondent:

(a) to restrain the respondent from transferring its shareholding in Gujarat Guardian Limited without the prior consent of the petitioner and without giving a pre-emptive right to purchase the said shares to the petitioner. (b) pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstance of the case.

78. There is no dispute that clause 6 of the SHA did not translate into a clause in the Articles of Association. Yet, the respondent is itself asserting binding ness of the pre-emptive rights to purchase of shares as contained in the SHA. The respondent has not challenged Clause 14 of the SHA on any ground under the Contract Act also.

79. The shareholders agreement between the parties in the instant case does not cast an absolute restriction on the transfer of shares. The pre-emptive right conferred on the parties has been relied upon by the respondent itself in OMP No. 337/2006. Even such agreement relates only to the transfer of shares between the petitioner and respondent and does not involve the other shareholders. So far as Clause 14 is concerned, it binds only the parties to the

SHA, is unconcerned with and independent of the affairs of the joint venture. Certainly, the prohibition contained in clause 14 of the agreement is not rendered illegal or unenforceable by any provision of the Companies Act or any clause of the Articles of Association or by virtue of the principles laid down in any of the judicial pronouncements noticed hereinabove. It is also not rendered void or not binding for the reason that it is not incorporated in the Articles of Association of the joint venture. Such a covenant between MRL and Guardian, the contracting parties is not prohibited under any other statutory provisions as well and was entered for the benefit of the joint venture. The issue raised in the present case was not the issue raised before the Apex Court in the Rangaraj case (supra). In my view, Therefore clause 14 would bind the parties to the agreement even if the clause was not contained in the Articles of Association of the joint venture. The same Therefore binds MRL and Guardian during the subsistence of the SHA. Objections as to the maintainability of the petition

80. It becomes necessary to deal with the two grounds raised on behalf of the respondent with regard to the maintainability of the present petition. These have been noticed as ground I and II in para 58 above. It has been urged at great length that there is no challenge by the petitioner to the termination of the SHA by the letter dated 21st July, 2006 before any forum and consequently, the present proceedings are misconceived and wholly without jurisdiction and not maintainable.

81. In the present case, I find that the respondent has made a request for arbitration dated 16th October, 2006. In its letter of request, the respondent has urged that its termination of SHA is valid and has sought, a declaration to be made to the effect that the termination is justified and legal. The respondent has further sought a specific declaration that the petitioner is not bound by the non-compete clause as contained in clause 14 of the SHA. It is apparent that the respondent has itself raised an issue with regard to the validity and legality of the termination effected by it by the letter dated 21st July, 2006.

82. I find that the petitioner has filed the present petition based on the averments that the purported termination of the SHA effected by the letter dated 21st July, 2006 is contrary to the terms of the contract and is illegal and wrongful. Thus, it is the petitioner's case that the termination was in violation of clause 16 of the SHA and was not permissible.

The material averments in this behalf are contained in paras 3.9, 4, 6, 8-10, 14, 17 and 18 of the petition. Inter alias the petitioner has averred thus:

3.9 Further, the petitioner has, vide letter dated 21st August, 2006, responded to respondent's letter dated 21st July, 2006. In the said letter the petitioner has expressed surprise and extreme disappointment in receiving the said termination letter from the respondent. The petitioner drew the attention of the respondent to the clause 14 of the SHA and stated that there has been no contractual breach of any of the provisions of the SHA by the petitioner and that there was no

provision in the SHA for termination thereof by either party. Therefore, there was no valid basis for termination of the SHA and as such its terms remain in full force and effect and continue to bind the parties thereto.

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8. It is submitted that the purported termination of the SHA by the Respondent is completely invalid. It is submitted that declaring the Petitioner as a sick unit does not make it financially unsound. The Petitioner has substantial assets and has continuously kept the Respondent informed that the Petitioner is in the process of revival and should revive in the very near future.

9. It is submitted that the Petition filed by the Respondent before this Hon'ble Court for enforcement of its rights under the SHA is self-contradictory to the purported termination of the SHA and supports the contention of the Petitioner that the SHA is still valid and continues to operate.

10. It is submitted, Therefore, that the issues as to whether the SHA "stands frustrated" as alleged or whether Respondent and its affiliates/associates are bound by the Clause 14 of the SHA and Therefore is prohibited from making any Application before the Government for permission to set up a wholly-owned subsidiary would, as admitted by respondent ultimately have to be decided in the arbitration as per the SHA.

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17. However, Respondent and Guardian has, in violation of the provisions of the SHA, applied before the Government and the Government is presently processing the said application for approval to permit setting up of a wholly-owned subsidiary. Any such approval, apart from being contrary to Government policy would amount to aiding a breach of the SHA. The Petitioner reserves its right to take separate legal action seeking appropriate direction/order/writ against the Government by invoking the extra ordinary jurisdiction vested in this Hon'ble Court under Article 226 of the Constitution of India."

Therefore, it cannot be held that the petitioner has accepted the factum and validity of the termination.

83. The objection based on the plea that the petitioner has not challenged the termination can be tested from yet another angle. There are several instances when a party is compelled to seek relief of injunction on the averment that an action taken by a person or authority is contrary to law or the agreement between them. The adjudication on the entitlement to the relief necessarily requires an inquiry into the legality of the action of the defendant. In such a case, a declaration that the action of the defendant is illegal is inherent in the adjudication. It is well settled that such a declaration does not require to be specifically prayed for. The courts have held that the correct test is as to whether there is a legal necessity for the plaintiff to get a declaration of his right before he can get an injunction. (Ref: Harchand Singh Gujjar Singh Vs. Dalip Singh

Pritam Singh, ; Sri Rajah Nayani Venkata Ranga Rao Bahadur Zamindar Garu Vs. Sri Rajah Tadakamalla Sita Ramachandra Rao Bahadur Zamindar Garu, In Purshottam Dass and Others Vs. Har Narain and Another, , while considering a question as to the court fee payable on the plaint, the court held that a prayer for declaration would be a surplusage if the plaintiff can get the relief for injunction without praying for declaration, but declaration has to be prayed where an obstacle has to be removed before the plaintiff can claim the relief of injunction simplicitor.

84. In this behalf, it would also be useful to advert to the pronouncement of this Court reported in 1985 RLR 398, Time Properties v. DDA. It was held in this case that even if a plaintiff had filed a suit simply for injunction, however, there was a legal necessity for a declaration before grant of the relief for injunction. Such suit would not be treated as a suit for injunction. It is only if grant of the declaration is not necessary, the suit would be purely a suit for injunction.

Undoubtedly, these judgments were rendered on issues relating to court fee payable on the plaint as different court fee is payable on the two reliefs. However, the principles laid down would guide this Court on adjudication of the issue raised herein.

85. Before this Court, the petitioner has sought a prohibitory relief against the respondent praying that it ought be prohibited from taking action and proceedings in the matter as if the agreement between the parties subsists. The petitioner has prayed for this relief based on averment that the action of the respondent was impermissible, incorrect and legally untenable.

86. The respondent has admittedly sought a declaration to the effect that the termination of the agreement by it was legal and valid before the arbitrators who shall Therefore decide the same.

87. The petitioner has placed before this Court its response to the request for arbitration made by the petitioner. In this reply, the petitioner has again challenged the termination of the SHA as being wrongful and has made a counter claim to this effect. In the present proceedings, the petitioner has sought preservation of the status quo on the plea that the petitioner would suffer irreparable loss and damage if the respondent is not prohibited from committing breach of clause 14 of the agreement.

88. It is trite that in the present proceedings, it is not open to the court to adjudicate upon an issue which is the subject matter of the arbitration. The present proceedings are concerned only with preservation of the property and to prevent violation of claimed rights of parties so that no irreparable loss and damage enures to the parties till the arbitration results in a dispute redressal.

89. In this background, Therefore, it cannot be held that the petitioner has not challenged the termination or be non-suited for the reason that it has not made a prayer for declaration before this Court to the effect that the action of the

respondent was illegal.

90. The second limb of the objection as to the maintainability of this is based on the plea that the petitioner has not invoked the dispute redressal mechanism by way of arbitration and for this reason as well, the present petition at its instance, is misconceived.

91. In order to appreciate the submission on behalf of the petitioner, it becomes necessary to consider the concerned statutory provisions at this stage. Section 9 of the Arbitration and Conciliation Act, 1996 empowers a court to pass interim orders at the instance of a party. This statutory provision reads thus:

9. Interim measures, etc. by court " A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court:

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

92. An examination of the scheme of the Arbitration and Conciliation Act, 1996 shows that the legislature has drawn a distinction between a claimant and a respondent. It is to be found that furthermore ,wheresoever the legislature intended the statutory provision to be available or applicable to either of them the expression "party" is used. In this behalf, it would be useful to advert to the provisions of Section 17 which confers powers on the Arbitral Tribunal to make orders as interim measures and Section 18 of the statute which provides that the "parties" shall be treated with equality and each "party" shall be given a full opportunity to present his case. Similarly, Section 19 to 24 which deal with the

procedural aspect of the conduct and arbitration proceedings also refers to agreement by the "parties". Section 25 of the Arbitration and Conciliation Act, 1996 refers to default of a "party" and Sub-section (a) and (b) of this provision provide for the consequences of the default either by the "claimant" which is dealt with in Sub-section (a) while Sub-section (b) refers to the consequence of a default by the "respondent". Sub-section (c) refers to the failure of either party to appear at an oral hearing or to produce documentary evidence.

Section 9 of the Arbitration and Conciliation Act, 1996 permits a "party" applying to a court seeking interim measures for protection. It is thus apparent from the spirit, intendment and purpose of the statute that the legislature intended such statutory right to approach a court for interim relief to be available to either party to the arbitration.

93. In the instant case, the admitted position is that the respondent approached this Court by way of O.M.P. No. 337/2006 which was filed on 24th July, 2006 by the respondent u/s 9 of the Arbitration and Conciliation Act, 1996 seeking interim relief in respect of the share holding in GGL.

94. Subsequently thereafter, the respondent herein has made a request for arbitration dated 16th October, 2006 before the London Court of International Arbitration (LCIA). This request for arbitration was made by the respondent invoking clause 26 of the SHA which provided that any dispute or difference arising under or in connection with the SHA or breach thereof shall be settled by arbitration conducted in accordance with the rules of the LCIA by three arbitrators in conformity with the rules. The petitioner has intimated the name of its arbitrator in the communication dated 18th October, 2006 to the LCIA. The respondent's request for arbitration contains elaborate submissions by the respondent in relation to the contract containing the arbitration agreement which reads as follows:

II. THE CONTRACT CONTAINING THE ARBITRATION AGREEMENT

7. This dispute arises in connection with a Shareholders Agreement dated 23 January, 1990 between Guardian International and MRL (the "Shareholders Agreement"), a copy of which appears as Exhibit 1 to this Request for Arbitration.

8. Clause 26 of the Shareholders Agreement contained an arbitration agreement which provides as follows:

Any dispute or difference arising under or in connection with this Shareholders Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of the London Court of International Arbitration by three (3) arbitrators designated in conformity with those Rules. MRL and GACL shall select one (1) arbitrator, Guardian International shall select one (1) arbitrator, and the two arbitrators so selected shall select the third arbitrator. Judgment upon the award rendered may be entered in any court

of competent jurisdiction.

9. The dispute detailed below arises in connection with the Shareholders Agreement, and is Therefore within the scope of the arbitration agreement set out above, establishing the jurisdiction of the LCIA.

III. THE NATURE AND CIRCUMSTANCES OF THE DISPUTE

35. Notwithstanding the foregoing, MRL recently commenced injunction proceedings in the Indian courts to prevent Guardian International from acting upon any FIPB permission and from developing further float glass plants in India. A copy of MRL's application for an injunction appears as Exhibit 11 to this Request for Arbitration.

36. Guardian International has commenced this arbitration seeking declaratory relief that it is entitled to construct and operate other float glass plants in

India, together with an award of monetary damages. Guardian International is entitled to such relief on one or more of the following grounds:

a. the Shareholders Agreement has been frustrated and as a result the non-competition provision of Clause 14 of the Shareholders Agreement no longer applies; and/or

b. alternatively, MRL has anticipatorily breached Clause 6 of the Shareholders Agreement (and Article 3(b) of GGL's Articles of Association), by declaring its intention to sell its GGL shares to a third party and by taking steps to effect such sale, discharging the Shareholders Agreement; and/or

c. alternatively, the non-competition provisions of Clause 14 of the Shareholders Agreement are null and void and/or unenforceable against Guardian International and/or have been frustrated or otherwise discharged; and/or

d. alternatively, MRL has unreasonably and/or wrongfully withheld its consent to Guardian International's construction of further flat glass plants in India.

IV. THE GOVERNING LAW, PLACE, AND LANGUAGE OF THE ARBITRATION

37. Clause 25 of the Shareholders Agreement provides that the law applicable to the Shareholders Agreement is the laws of the Union of India.

38. The Shareholders Agreement does not specify the place of the arbitration. Accordingly, pursuant to Article 16.1 of the LCIA Rules, the place of the arbitration shall be London.

39. The Shareholders Agreement does not specify the language of the arbitration. Accordingly, pursuant to Article 17.1 of the LCIA Rules, the language of the arbitration shall be English.

VI. RELIEF REQUESTED

42. As a consequence of the foregoing, Guardian International respectfully

requests the following relief:

- a. a declaration that the Shareholders Agreement has been frustrated or has been validly terminated or otherwise discharged; and /or
- b. alternatively, a declaration that Clause 14 of the Shareholders Agreement is null and void and/or unenforceable against Guardian International and/or has been frustrated or otherwise discharged and/or may not be invoked by MRL to prevent Guardian International from constructing and operating further float glass plants in India; and/or
- c. an award of monetary damages in an amount to be quantified in the course of these proceedings;
- d. its costs incurred in this arbitration; and
- e. such additional or other relief as may be just. Guardian International reserves the right to amend or supplement or to make additional claims or revisions to its claims.

95. By way of the present petition, the petitioner has invoked the jurisdiction of this Court u/s 9 of the Arbitration and Conciliation Act, 1996 and, inter alia, sought a prohibition against the respondent its directors or assigns from participating, encashing or engaging or being interested in any other project for the manufacture of float glass or products or for the sale by the import/export of the glass and its products from India. These prayers have been made enforcing clause 14 of the SHA whereby the parties had contracted to not engage in business which was similar to the business of the joint venture. Such prayers have been made during the pendency of the arbitration proceedings, albeit initiated at the instance of the respondent wherein the issue as to the validity and legality of the termination of the agreement dated 21st July, 2006 is yet to be decided.

96. The present petitioner is a respondent in the arbitration proceedings commenced by the present respondent. Therefore, it cannot be disputed that the petitioner is a party to the arbitration proceedings. In the light of the above discussion, it has to be held that the petitioner is entitled to maintain the present petition u/s 9 of the Arbitration and Conciliation Act, 1996. The SHA stands frustrated and terminated and Therefore the respondent stands discharged from obligation there under (Ground IV)

97. The entire grave man of the respondents' case rests on its purported termination of the SHA by the letter dated 21st July, 2006. Perusal of the letter dated 21st July, 2006 shows that the termination of the agreement is for the reason that there was fighting within the promoters of MRL; the petitioner was before the BIFR, had been declared sick; there was a winding up order against it, all of which lent insecurity to its partnership with the respondent and consequently jeopardizing the future of GGL. Consequently, it was stated that the SHA stood frustrated and did not bind the parties.

98. Frustration of contract is not an abstract or nebulous concept. In India, it is statutorily recognised in Section 56 of the Indian Contract Act which relates to performance of a contract. Undoubtedly, frustration of contract is a class of circumstances under which performance of a contract is excused or dispensed with. Section 56 of the Indian Contract Act reads thus:

56. An agreement to do an act impossible in itself is void. A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

In the agreement between the parties, admittedly they have agreed that adjudication would be governed by laws in India.

99. The doctrine of frustration was considered by the Apex Court in *Satyabrata Ghose v. Mugneeram Bangur and Co.* 1954 SCR 310. The court had cited with approval the principles laid down in an earlier judgment rendered in *Ganga Saran v. Ram Charan*, wherein the Apex Court had clearly held that so far as frustration of contract was concerned, the Indian Contract Act deals with a particular subject and it is not permissible to import the principles of English Law on this aspect dehors these statutory provisions. In this behalf, the court held thus:

It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act, 1872.

We hold, Therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law dehors these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before our courts."

100. It would also be useful to consider the principles laid down by the Apex Court in *Satyabrata Ghose v. Mugneeram Bangur and Co.* (Supra) wherein the court had observed thus:

9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expression. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The parties shall be excused, as Lord Loreburn says

If substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible." In *Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Ltd.*, Viscount Maugham observed that the "doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made. Lord Porter agreed with this view and rested the doctrine on the same basis. The question was considered and discussed by a Division Bench of the Nagpur High Court in *Kesari Chand v. Governor-General-in-Council* and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and as such comes u/s 56 of the Indian Contract Act.'

101. In *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, , the Apex Court had further clarified that the courts have no power to absolve a party from the liability to perform a contract merely because the performance becomes onerous and that the expressed covenants in a contract cannot be ignored only on account of un contemplated turn of events after the contract. Also, in *Chairman, Ramappa Gundappa Sahakari Samyakta Besava Sangha Ltd. Vs. State of Mysore and Others*, , the court had held that the doctrine of frustration can only apply to executory contracts and not the transactions which have created a demise in praesenti.

The principles noticed hereinabove were reiterated by the Apex Court in the recent pronouncement reported at *Ganga Retreat and Towers Ltd. and Another Vs. State of Rajasthan and Others*, .

102. Even in United Kingdom, it is well settled that the doctrine of frustration of a contract cannot be lightly invoked to relieve the contracting parties of the normal consequences of imprudent commercial bargains. (Ref: 1982 AC 724 between *Pioneer Shipping Ltd. and Ors. and B.T.P. Trioxide Ltd.*) The essence of frustration is that it should not be due to an act or election of the party seeking to rely on it and it must be some outside event or extraneous change of situation. (Chitty on contracts, 29th Edition, Vol.I, Page 23 Para 007).

103. Furthermore, it is an admitted position that the petitioner continues to be under its Board of Directors.

104. It has not even been argued by the respondent that any of the terms of the contract have become incapable of performance for any reason. It is also not the respondent's case before this Court that the petitioner has committed breach of any term of the SHA which could impact its binding ness or the validity of the SHA between the parties. On the contrary, the petitioner has discharged all its obligations there under.

105. On this aspect it would also be useful to advert to the pronouncement reported at *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, wherein the court has held that it is not hardship or inconvenience or material loss which brings the principle of frustration of contract as envisaged u/s 56 of the Indian Contract Act into play. There must be a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that which was contracted for. The court cited with approval the principles laid down by the Apex Court in *Satyabrata Ghose v. Mugneeram Bangur and Co.* 1954 SCR 310.

In the facts of the case before the Apex Court, it was held that performance of the contract had not become impossible by reason of any force majeure, nor by reason of any change in government policy which could not be foreseen by the parties. No question also could arise of importing an implied term into the contract. A contract is not frustrated merely because the circumstances in which it was made are altered and the courts have no general powers to absolve a party from the performance of his part of contract merely because its performance had become onerous on account of an unforeseen turn of events.

In para 10 of the judgment, the Apex Court specifically held that in such a case, the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term, the court cannot find on construction of the contract an implied term inconsistent with such express term.

It was Therefore held that the contract between the parties was not discharged under the doctrine of frustration and was still in existence. The facts in the instant case would require an examination on these legal principles.

106. So far as the tenure of the SHA was concerned, the parties had agreed to remain bound to each other under this agreement till such period that each of them continues to hold not less than 15% of the total issued equity shares of the company. The stipulation in this behalf was contained in clause 16 of the SHA which provides as follows:

16. Term

This Shareholders Agreement shall continue in force and effect for so long as MRL (either with or without GACL and its nominees) and Guardian International (or Affiliates or Associates of Guardian International) each shall hold not less than fifteen per cent (15%) of the total issued equity shares of the company.

It is noteworthy that there is was no other provision governing termination of the agreement and certainly the grounds set out in the letter dated 21st July, 2006 were not envisaged or provided under the agreement.

107. The admitted position is that both parties continued to hold more than 15% of the total issued shares in GGL when the letter dated 21st July, 2006 was issued and continued to do so when hearing in the present matter commenced and concluded.

108. So far as the performance of the joint venture GGL is concerned, it appears that the demand of float glass has constantly expanded over the period. The balance sheet and the profit and loss account for the year ending 31st March, 2006 has been placed before this Court which would reflect the financial status of the company on the relevant dates.

This balance sheet of the joint venture company as on 31st March, 2006 reflects that it had reserves and surplus of Rs. 1,810,265,716/- as on 31st March, 2005. These reserves showed a sharp increase on the 31st March, 2006 and the position of the reserves and surplus had reached the figure of Rs. 2,544,825,934/-. These figures reflect an increase of over Rs. 70 crores within one year.

It is pointed out that this increase was for the reason that GGL recorded average internal accruals of US \$ 2 million which was equivalent to approximately Rs. 90 crore per month net of taxes and that, for the last month, the joint venture recorded internal accruals of over US \$ 3 million which was equivalent to approximately Rs. 135 crores.

109. The principal ground for urging that the SHA stood frustrated is based on the orders of winding up dated 12th March, 2004 passed by the learned single Judge of the High Court of Judicature at Allahabad in Company Petition No. 1/2002, copy whereof has been placed by the respondent on record, whereby the

petitioner was found unable to pay its debts and that it was found just and equitable that the petitioner/MRL be wound up. The court had appointed an official liquidator of the company with directions to take over the assets of the company and submission of a report with the inventory of the assets of the company.

110. The respondent has further pointed out that MRL assailed this order of the court before the Division Bench of the High Court of Judicature at Allahabad by way of Special Appeal No. 420/2004. This appeal was allowed by the Division Bench by its judgment dated 20th May, 2004 whereby the order dated 12th March, 2004 was quashed and it was directed that the winding up proceedings before the learned Company Judge shall remain in abeyance till disposal of the proceedings/appeal before the authorities under the Sick Industrial Companies (Special Provisions) Act, 1985.

111. This judgment of the Division Bench was assailed by the creditor company by way of a SLP (C) No. 19024/2004 before the Supreme Court. The court granted leave to appeal by its order dated 24th February, 2006. There is no dispute that this matter is pending before the Supreme Court as on date.

112. It is also an undisputed position that on the 4th February, 2004, MRL filed a reference under the Sick Industrial Companies (Special Provisions) Act hereinafter (SICA) before the Board of Industrial and Financial Reconstruction hereinafter (BIFR) seeking a declaration that its own net worth stood eroded. MRL has urged that this was a "technical sickness" faced by the MRL which in no way has impacted the stability or growth of the joint venture GGL. The submission is that it has also had no effect on its management and performance.

113. So far as this reference to the BIFR was concerned, it remained pending on account of a vacancy of the Presiding Officer and was listed for the first time on the 17th May, 2006. Upon consideration of the matter, the BIFR declared that the petitioner as "sick" u/s 16 of the Sick Industrial Companies (Special Provisions) Act (SICA). An operating agency was appointed to examine the affairs. The operating agency as well as the petitioner were required to submit a scheme for revival for MRL, if feasible, bearing in mind the provisions of Section 18 of SICA and the enclosed guidelines while carrying out the directed exercise.

114. So far as various proposals which were being considered before the BIFR with regard to the management of MRL are concerned, the same are required to be considered by this Court only to the extent that they concern the joint venture company or the involvement of Guardian, the present respondent therein.

115. It has been pointed out by MRL that the financial institutions hold 44.25% equity in MRL. Before any scheme of revival could be submitted to BIFR, these financial institutions put up a precondition of purchase of their shareholding by the promoters. Consequently, an open bid sale for the 44.25% stake of the financial institutions was held.

M/s ICICI Securities Ltd. addressed a letter dated 19th July, 2006 to Shri V.K. Modi informing the acceptance of his offer to purchase the shareholding of the financial institutions in MRL and required Mr. V.K. Modi to deposit into an Escrow account of the Financial Institutions, a non-refundable amount of 20% of the purchase consideration on 1,10,79,061 Equity Shares on or before July 26, 2006. It was also stipulated that the transaction documents need to be executed on or before August 18, 2006, failing which the Financial Institutions shall be free to explore other possibilities in relation to the said equity shares and debentures.

116. MRL has informed that Mr. V.K. Modi has duly complied with the requirement of deposit of this amount which was equivalent to 20% of the purchase consideration on or before the 26th July, 2006. By acquisition of the 44.25% stake of financial institutions, the stake of Mr. V.K. Modi in MRL increased to more than 64%.

117. This purchase of 44.25% stake of the shareholding of the financial institutions was approved by the BIFR on 9th October, 2006. The order of the BIFR was sustained by the Appellate Authority Industrial and Financial Reconstruction by its order dated 22nd November, 2006. It has been stated that the financial institutions are selling their shares in MRL for Rs. 91 per share against the face value of Rs. 10 per share. According to the petitioner, this circumstance by itself displays positive prospects of the revival of "MRL".

118. The petitioner contends that the present respondent Guardian is fully aware of all these developments so far as the status of MRL is concerned.

119. In this behalf, a letter dated 9th June, 2006 which was written by Guardian to Unit Trust of India has been placed before this Court wherein Guardian wrote that Guardian hoped that its agreement with Mr. Modi will be approved by BIFR, to the extent BIFR approval is necessary, and consummated in a timely manner. However, the BIFR may take several months or longer to approve a scheme of rehabilitation for MRL and, further, any proposed scheme could be opposed by the various constituent interests in MRL. If the complete restructuring of MRL and its emergence from BIFR could be completed promptly and that Guardian was prepared to act to protect GGL and was Therefore writing to remind UTI of Guardian's willingness to purchase all of MRL's GGL shares at their recently appraised fair market value if a transaction with Mr. Modi is not concluded promptly. Guardian is prepared to provide meaningful liquidity to MRL by making payment in cash within days of reaching an agreement with the financial institutions. Guardian also requested UTI that its agreement with Mr. Modi would not preclude it from supporting a sale of MRL's GGL shares to Guardian in the event that Mr. Modis proposed transaction cannot be consummated within 90 days. Guardian also sought a confirmation that the members of the MRL board of directors nominated by the financial institutions will be at liberty to consider an offer from Guardian if the proposed agreement with Mr. Modi is not signed by the end of the month or if the BIFR restructuring process is riot completed by September 30, 2006.

120. From the above, it is apparent that even till 9th June, 2006, Guardian had no real evidence of malfunctioning in MRL. In any case, there was no evidence whatsoever of the industrial sickness which was complained of before the BIFR impacting in any manner the stability or the growth of the joint venture company GGL.

121. However, the admitted position is that in the meantime, the Board of Industrial and Financial Reconstruction (BIFR) has appointed an operating agency and was considering a scheme for revival of the petitioner company. Certain interim measures with regard to the purchase of the shareholding of the financial institutions by the directors of the company stood approved. The petitioner has contended that in these circumstances, no liquidator has been appointed and that the petitioner's company is being managed by its own directors which is functioning even on date.

122. The material fact is that no breach of the agreement by the petitioner of any nature has been urged by the respondent or placed by the respondent before this Court. On the contrary, it is an admitted position that GGL is a healthy company. It is also not disputed by the respondent that MRL has discharged all its contractual liabilities. In this factual and legal background, prima facie it certainly cannot be contended that the fact that the petitioner has faced winding up or its scheme of revival is pending before the BIFR is by itself sufficient ground for holding that the sub stratum of the SHA stood frustrated.

123. Thus, it would appear that the present case is a case where the petitioner has proposed technical sickness within the meaning of expression under the Sick Industrial Companies (Special Provisions) Act, 1985 as opposed to insolvency. Based on the performance of GGL despite such sickness of the petitioner, the petitioner has urged that there is no ground, contractual or statutory available to the respondent to terminate its agreement with the petitioner.

124. It has been pointed out by the parties that in the 1990s itself that is the early years after the incorporation of the joint venture, GGL was also referred to the BIFR. The respondent has contended that when equity infusions were required, the petitioner remained a spectator and did not participate in the infusions.

However, the fact remains that the respondent at that stage did not contend that the SHA stood frustrated.

125. The petitioner on the other hand, has submitted that the Board of Directors of GGL is headed by Mr. V.K. Modi as Chairman and that it was Mr. Modi who had approached the financial institutions for financial restructuring of GGL's debt which included pre-payment of debts and waiver of interest amongst other measures. It has been contended by the petitioner that it was the effort of Mr. V.K. Modi as Chairman which resulted in GGL's net worth improving and helped it to come out of the BIFR. The petitioner has also claimed that it was Mr. V.K. Modi who had furnished his personal guarantee to the financial institutions for securing

the repayment of the dues while the respondent did not undertake any such measure.

126. It has also been pointed out that the respondent has been adequately compensated for its contribution to GGL and according to the petitioner, its interest therein now is minimal.

127. It is not the respondent's case also that the petitioner has committed breach of any term and condition of the SHA which could impact its binding ness or the validity of the agreement between the parties. Furthermore, the petitioner has discharged all its obligations under the contract with the respondents and continues to be functioning.

128. It is noteworthy that in every document relating to the affairs of the joint venture GGL, the respondent has acknowledged the continued success of the joint venture as also reiterated its stability and profitability in every communication addressed by it.

129. It is trite that in a private contract, a party is free to choose the person as also the subject matter of the transaction according to its own free will. No restriction or fetter could be imposed on either of the parties as to the manner, mode and the nature of the agreement that they choose to enter into. Such freedom is available in the realm of private law.

130. In exercise of such right which is available to a private party, a party may give to itself a right to terminate the agreement without cause. This has been held in common law to be a valid power which the party may give to themselves.

131. The issue before this Court gets further narrowed inasmuch as the contract between the parties contained a provision whereby the contract could be ended. The petitioner has urged that the contract could be terminated only strictly in compliance with this provision as contained in Clause 16 of the agreement between the parties. According to the petitioner, the same could not be terminated for any other reason.

In other words, the issue is as to whether, despite the parties having agreed and restricted themselves to a certain set of contingencies which would enable the other side to terminate the contract, is it legally permissible for the other side to terminate the contract for any reason other than those stipulated therein. (Re. Classic Motors Ltd. Vs. Maruti Udyog Ltd.,)

132. Section 39 of the Indian Contract Act provides that if a person indulges in any fundamental breach of the contract and the other party does not acquiesce to the breach, then the party not breaching is not bound under the liabilities of the contract. This would, Therefore, enable a party to terminate a contract on the ground of substantial failure by the other party which goes to the root of the contract.

133. The respondent has asserted that the petitioner was no longer a financially

viable partner and that its future was uncertain. It has been contended that the petitioner being before the BIFR has amounted to frustration of the SHA and the respondent has resorted to termination the same. Even assuming that such a submission was to be accepted, it is noteworthy that despite this position, GGL is admittedly a prosperous undertaking with substantial reserves.

134. Examination of the course of the proceedings which are pending before BIFR so far as the MRL's industrial and technical sickness is concerned. The accepted position is that one of the factions Constituting MRL had put forth a proposal to purchase the share holding of the financial institutions in MRL which proposal has been accepted by the BIFR and this faction has also discharged the financial liability towards such purchase so far. As a result the stake of the financial institutions is stated to have come down from over 50% in 1998 to around 44 % before the BIFR. Such a factor would only lend towards stability of the organisation rather than infusing instability or insecurity.

135. In the factual matrix laid before this Court, considered in the light of the legal principles noticed hereinabove. Prima facie , there is Therefore force in the submissions on behalf of the petitioner that merely because one of the partners of the joint venture is before the BIFR, would not give immunity to the respondent against its contractual obligations under the SHA.

136. The respondent has also not set up a case that it required the petitioner to contribute any finances in GGL which it failed to do so. There is also no allegation of administrative mismanagement on the part of any nominee director of MRL.

137. Before this Court Mr. Mukul Rohtagi, learned senior counsel for the respondent has placed strong reliance on a proposal dated 22nd August, 2006 submitted in the proceedings before BIFR alleging on behalf of the petitioner for revival of MRL.

138. This has been termed as the evidence of ``anticipatory breach by MRL of the Shareholders Agreement`` and has been pleaded as a strong ground for contending frustration of this agreement.

139. The petitioner on affidavit in its rejoinder has stated that such proposal was not made by the petitioner company and that it has not received the assent of the Board of Directors of MRL. It has further been submitted that the petitioner shall act strictly in accordance with the terms of the SHA and the Articles of Association of GGL even if it is compelled to transfer its share holding therein.

140. It has been pointed out that in para 5.4 of this proposal that it had been clearly stated that the shares of the petitioner in GGL were only listed in the assets of the petitioner and that the prioritization of sale of the properties listed in clause 5.3 shall be at the discretion of MRL/Asset Sale Committee of the MRL through appropriate board resolution may seek the same to any person/persons as it may deem fit.

141. The petitioner has categorically stated on affidavit that at no point of time it

has been its intention to dilute its shareholding in GGL by sale of its shares to any third party including Guardian and that in fact, ``in the unlikely event of the sale being necessitated it is the intention of the petitioner that its shareholding would be acquired by its own affiliates or its associates in terms of the share holders agreement and thus there is no intent of the petitioner to dispose of its shareholding in GGL to any third party as allotted by the respondent''.

142. Even assuming for the sake of argument that such a proposal was advanced and was binding on the petitioner, a reading thereof would show that it had set out two alternative proposals. The first postulated raising of a loan from a bank whereby all assets of the company could be protected. The second proposal put forth disposal of the assets of the company. The shareholding in GGL has undoubtedly been set down as one of the assets. It has been urged that this proposal also shows that the value of the assets of GGL were far more than its liabilities and it was not necessary that the shareholding of the GGL would require to be sold even in order effectuate such a proposal.

143. The petitioner has pointed out that even this proposal closely examined in its entirety does not evidence of any intention to violate the petitioner's commitment under the SHA and that there was nothing in the face of the proposal to show that the petitioner intended to dispose of its shares in GGL to a third party. My attention has been drawn to Clause 6.5 of the SHA which itself permits transfer of the shareholding of the parties to certain persons including the affiliates of the parties.

144. I find that this submission on behalf of the respondent really deserves to be noticed for the sake of rejection. Certainly, such a proposal could not have founded the basis of the letter of termination dated 21st July, 2006 primarily for the reason that the proposal had not emerged by then. There is nothing contained in the proposal which would support that the submission that it was on behalf of the petitioner company. Para 12 of this proposal states that it was subject to the approval of the Board of MRL. There is no dispute that the proposal was advanced by Mr. V.K. Modi who was a promoter- director of MRL. There is nothing to evidence a resolution of the Board of Directors of MRL to support that such proposal was made by the company.

145. Therefore, in the light of the above discussion, certainly, the proposal dated 22nd August, 2006 submitted to the Operating Agency and not even the BIFR, cannot be either cause or justification for issuance of a prior letter of termination dated 21st July, 2006. In my view, this proposal does not prima facie evidence breach of any term of the SHA.

146. Looked at from any angle an anticipatory breach as asserted by the petitioner certainly cannot support termination of the agreement on the ground of frustration. The agreement being determinable, hence cannot be specifically enforced and consequently no injunction can issue

147. The respondent has also opposed grant of an injunction on the objection

has been taken on behalf of the respondent that the agreement, at the face of it, is determinable. Therefore, in the light of Section 14(1)(c) of the Specific Relief Act, 1963, such a contract would not be enforceable and consequently, in view of Section 41(e) of the Act a declaration or injunction to prevent its breach cannot be legally granted.

148. However, Section 42 of the Specific Relief Act, 1963 carves out an exception to the above provision. This statutory provision provides that notwithstanding the prohibition contained in Section 14(e), where a contract comprises of an affirmative agreement to do certain acts, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel the specific performance of an affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

149. So far as contracts which are determinable are concerned, it has been repeatedly held by the court that compensation would be the adequate remedy for breach of the contract and that the court cannot direct enforcement of the specific performance of its material terms.

150. This is so because if the party against whom specific performance is sought, is entitled to terminate the contract, an order of specific performance will be refused as the defendant could render it nugatory by exercising its power to terminate the contract (Ref: Law of Contract by G.S. Treitel, 15th Edition at page 762 and Chitty on Contract 27 Edition Vol. I and Pollock and Mulla's Contract and Specific Relief Act 11th Edition Vol.II page 1271). This principle would apply whether the contract is determinable under its express terms or on account of the conduct of the parties seeking specific performance.

151. It now becomes necessary to examine the effect of a negative covenant in an agreement and a prayer for injunction made before the court seeking enforcement of such negative covenant.

152. Inasmuch as the agreement between the parties in the instant case contained a clause whereby term of the agreement was specified and also a negative stipulation contained in Clause 14 of the agreement dated 23rd January, 1990, Mr. Arun Jaitley, learned senior counsel for the petitioner has relied on the exception provided in Section 42 of the Specific Relief Act to contend that even if it was to be held that the contract is in express terms determinable, still the petitioner would be entitled to an injunction directing enforcement of the negative covenant against the respondent.

153. In this behalf, it would be appropriate to advert to the principles laid down by the Apex Court in M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, . In this case, Coca Cola had granted franchise to the Gujarat Bottling Company to manufacture, bottle, sell and distribute various beverages for which trade marks were acquired by Coca Cola. Under this commercial agreement, both parties undertook obligations for promoting the trade in such beverages for their mutual benefits. The agreement contained a

negative stipulation restraining the Gujarat Bottling Company in dealing with beverages of any other brand or trade mark/trade name during the subsistence of the agreement. The shares of the Gujarat Bottling Company were transferred by it to another company namely Pepsi, which was a trade rival of the Coca Cola company without obtaining its consent in terms of the agreement. At the same time, the Gujarat Bottling Company issued notice for terminating its agreement with Coca Cola. On these facts, M/s Coca Cola company filed a suit and sought an interim injunction against the Gujarat Bottling Company prohibiting it from transferring shares of the Gujarat Bottling Company or using of the plants of Gujarat Bottling Company for manufacturing, bottling, selling etc. of beverages of any other person. The Gujarat Bottling Company had challenged the negative stipulation which was contained in para 14 of its agreement with M/s Coca Cola company on the ground that the same was in restraint of trade and void in view of the provisions of Section 27 of the Indian Contract Act.

154. It was observed by the Apex Court that what has to be examined by the court is whether the negative stipulation restricting the right of the other side did amount to a restraint of trade. So far as the negative stipulation in the agreement between the Gujarat Bottling Company and M/s Coca Cola Company was concerned, it was noticed by the Apex Court that such a condition restricting the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchiser, it could not be regarded as being in restraint of trade. It was further held that since the negative stipulation was confined in its application to the period of subsistence of the agreement and the restriction imposed therein was operative only during the period 1993 when the agreement is subsisting, such stipulation could not be held to be in restraint of trade so as to attract the bar of Section 27 of the Contract Act. The court thereafter proceeded to consider as to whether the plaintiff in the case in hand was entitled to the injunction prayed for to compel enforcement of the negative agreement not to do certain acts. It was held by the Apex Court that the court was empowered to so direct in the light of Section 42 of the Specific Relief Act, 1963. Such power however, would be exercised only if the plaintiff had failed to perform the contract so far as is binding on it. It was further noticed that, the court, however, was not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.

155. Placing reliance on 1898 (1) CH 671 : (1895) All ER 1680 *Ehrman v. Bartholomew* and its earlier pronouncement reported in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, , the Apex Court emphasized that relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty relating to the alleged violation could be resolved.

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of its right for which it could not be adequately compensated by

damages recoverable in the action if the uncertainty was resolved in its favor at the trial. The court cautioned that the requirement of such protection has, however, to be weighed against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated. To do this, the court weighs one need against other and arrived at a finding as to where the "balance of convenience" lies.

156. In so assessing, the Apex Court noticed that Pepsi in taking over the Gujarat Bottling Company took a calculated commercial risk knowing fully well the effect of the negative covenant contained in its agreement. It was observed that if Gujarat Bottling Company is not restrained from manufacturing and selling Pepsi products for the stipulated period of one year, the goodwill and market share which Coca Cola Co. had for its own products, would be destroyed by a rival company which had captured the Gujarat Bottling Company and that such damages would not be an adequate compensation for the injury which would be irreparable.

157. It was urged on behalf of Gujarat Bottling Company that its plants would remain idle and the workmen would be unemployed. The court was of the view that this submission was being made actually by Pepsi through the mouth of Gujarat Bottling Company in order to require Coca Cola Company to part with its trade secrets to its business rival by supplying its essence/syrup etc. for which the Coca Cola owns trademark to the Gujarat Bottling Company which was by then under the effective control of Pepsi.

158. The court observed that Pepsi took a deliberate decision to take over the Gujarat Bottling Company with the full knowledge of terms of its agreement with Coca Cola and it did so with the intention of paralysing the operations of the Coca Cola in the region and promoting its goods. Subsequently, it must suffer the consequences of the failure of its effort and cannot possibly oppose the interim protection to Coca Cola Company.

So far as the loss that may be caused to Gujarat Bottling Company as a result of the grant of the interim injunction, the court was of the view that such loss can be assessed and the Gujarat Bottling Company can be compensated by award of damages which can be recovered from Coca Cola in view of the undertaking which was required to be given under the concerned rules.

159. The Apex Court re-emphasised the principle that the relief of injunction was wholly equitable in nature and the party invoking the jurisdiction of the court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. The plaintiff's conduct should Therefore be fair and honest.

160. Observing that the Gujarat Bottling Company had not acted in conformity with the terms of the agreement, it was held that this company was prima facie

responsible for the breach of the agreement and that no consent was also taken by Coca Cola before the shares were transferred. Consequently, it was held that though Coca Cola had a right to terminate the agreement but it did not do so. On the contrary, it was done by Gujarat Bottling Company. Therefore, the Gujarat Bottling Company, having itself acted in violation of the terms of the agreement and having breached the contract, could not claim vacation of the interim injunction. Hence, it was primarily responsible for having brought about the state of things complained of.

161. It would be useful to refer to the pronouncement of this Court reported at *Wellman Hindustan Limited Vs. N.C.R. Corporation*, . In this case, the court was required to consider a letter of termination issued by a foreign partner in a joint venture company wherein a contention has been raised by the defendants that the agreement was not complete because further agreements had been required to be executed. The court was of the view that on prima facie ground, the plaintiff had a good case inasmuch as they were able to show that the parties have acted upon the terms of the letter of intent dated 10th June, 1986 for a long period of time and that the plaintiff had expended considerable sums of money relying on such terms as stated in the letter. In this view of the matter, it was held that balance of convenience was also in favor of the plaintiff and against the defendant; that in case it inducted a third party as their joint venture partner or associate for manufacturing, marketing and servicing of their products, the plaintiff was bound to suffer irreparable loss and injury. The plaintiff in this case had expended huge sums of money in acquiring land based on the mutual agreement between the parties for the joint venture; recruited new staff for the joint venture and given training at huge expenses. The government approval had also been sought for the joint venture.

In this background, this Court upheld the order of the lower courts restraining the defendants from urging any agreement with any other party in India for joint venture disturbing till the disposal of the suit.

162. My attention has been drawn to the Division Bench pronouncement of this Court rendered on 23rd October, 1998 in *FAOS 251/1998 Goyal MG Gases Limited and Anr. v. Messer Griestrein Gmbh and Anr.* In this case the appellant (referred to as GMG for short) had entered into a share purchase and cooperation agreement dated 12th May, 1995 with Messer Griestrein Gmbh (referred to as Messer for short). This agreement had resulted in a joint venture of the parties. A dispute had arisen between these parties in connection with acquiring the control and shares of another industrial gas company in India namely the Bombay Oxygen Corporation Limited (referred as BOCL for short) as to whether the control of BOCL should be with Messer or with GMG or otherwise. The appellant had sought an injunction against such acquisition by Messer on the ground that the same was contrary to the share purchase agreement dated 12th May, 1995 and two subsequent agreements dated 8th November, 1997 and 3rd May, 1998 whereby it was agreed that the management and control of the BOCL

shall rest with Goyals or GMG. The contention was that if Messer acquired control of BOCL, it would become a competitor of GMG and that as a consequence Goyals would have no other option but to ultimately sell their interests in GMG to Messer. Thus the plea of balance of convenience was set up on the ground that the very existence of GMG/Goyals was at stake and the proposed acquisition of BOCL was contrary to the agreement between the parties. Reliance was placed on clause 9 in the agreement dated 12th May, 1995 to urge that this was a non-compete clause which prohibited Messer from entering into any activity of competition with regard to gas business and conferred a right of first refusal on the business option to GGL.

163. The respondent Messer had opposed the grant of injunction on the ground that the promoters of BOCL had refused to sell its shares to M/s Goyal and as a result the contract between the parties had been rendered impossible to perform. It was urged that clause 9 was not in the nature of a negative covenant. Furthermore a plea of balance of convenience in its favor and irreparable injury resulting to it was pleaded on the ground that a number of steps had already been taken including obtaining permission from the Foreign Investment Promotion Board for acquisition of the shares and if the restraint order was issued, the effect would be that the entire agreement between BOCL and Messer would fall through and this would amount to interference with the rights of Messer to carry on trade. It was also urged that as a consequence of the agreement between BOCL and Messer falling through the shares could be acquired by third party which would jeopardise business interest of both parties whereas if the agreement was permitted to go through, there was possibility of even the petitioner benefitting between the same.

164. The matter was considered by the Division Bench which was of the view that it was not permissible to Messer to go ahead to acquire shares of BOCL when admittedly it would result in breach of the agreement with Goyals whereby the controlling interest of BOCL had to be transferred to the joint venture GMG. The court noticed that Messer could not take advantage of its own action which may be contrary to the agreement with GMG and then oppose the injunction on the ground that balance of convenience lay in its favor as it would expose Messer to breach of the agreement which it had entered into with the third party. It was held that there was substance in the apprehension of GMG that if Messer took over BOCL, it would become a competitor of GMG and that as GMG has on its board of directors, nominee directors of Messer; thereby the secret information of GMG would be passed of through these directors to BOCL. The court also noticed that Messer was a multinational corporation and customers of GMG may prefer to contract with the company where Messer has a controlling interest and not with GMG which only carries the name and technology of Messer in view of the agreement dated 12th May, 1995 and 30th November, 1995. As a consequence thereof, it was held by the court, Goyals would have no option but to have to sell its shareholding in MGM to Messer resulting in its ruination. In this behalf, the court observed thus:

In substance the argument is that in this manner a big fish will altogether eat a small fish in the corporate world despite the agreement referred to above. It deserves to be emphasized that the Messer had repeatedly agreed for acquisition of BOCL and jointly and in concert with GMG and not in the manner sought to be done when BOCL cannot be taken up as agreed between the parties".

The court further observed that if despite the several agreements between the parties, "Messer will go ahead to acquire the shareholding of BOCL not jointly and in concert with GMG but to its derogation and take some steps for the acquisition thereof, it cannot turn around and say that balance of convenience and equities are in its favor. While considering the balance of convenience and equities, the conduct of a party to litigation is of paramount importance. The conduct of Messer was not above board. They did not conduct themselves in a business like manner. They are attempting to give a go by to their agreements with GMG.

The court held that a negative covenant was implied in clause 9 and that it, in any case, contained a right of first refusal. Consequently finding that the appellant had established a prima facie case and that balance of convenience were also in its favor, it was also held that the appellant would suffer irreparable loss and injury if the injunction prayed for was not granted. The appeals were consequently allowed and Messer was restrained from taking any steps to acquire the shares of BOCL pursuant to its agreement till decision of the arbitration and proceedings.

165. The principles laid down by the Division Bench would bind this Court. The judgment has been rendered in facts which are similar to the facts which have arisen for consideration before this Court.

166. The petitioner has placed reliance on a pronouncement of a learned Single Judge of this Court dated 19th December, 2002 rendered in is Nos. 4425 and 5527/2002 in Suit No. 915/2002 entitled The Chancellor Masters and Scholars of the University of Oxford, Trading as Oxford University Press v. Orient Longman Pvt. Ltd. and Ors. in support of the contention that the petitioners would be entitled to an injunction in the light of the agreement contain between the parties. This judgment was confirmed by the Division Bench in its judgment dated 5th February, 2003 rendered in FA(OS) No. 53/2002 Orient Longman Pvt. Ltd. and Ors. v. The Chancellor of University of Oxford and Ors. which was upheld by the Supreme Court of India by its order dated 6th May, 2003 rendered in SLP (Civil) No. 7775/2003 entitled Orient Longman Pvt. Ltd. and Chancellor, M and S, University of Oxford whereby the SLP assailing the judgment of this Court was dismissed as withdrawn.

167. Based on the pronouncement of this Court rendered in Old World Hospitality Pvt. Ltd. Vs. India Habitat Centre, it has been urged that the courts should prefer such construction of a contract as could favor performance of the contract and not encourage avoidance contractual obligations. On such construction, it is

urged that injunctions would be granted in favor of a party seeking enforcement of contractual obligations. My attention was drawn observations in this judgment which reads thus:

116. In *Chave v. Brearer* 1976 Q.B. 76, Rosekill Learned Judges said "In principle contracts are made to be performed and not to be avoided according to whims of the market fluctuations where there is a free choice between the two possible constructions of a contract, I think the Court should tend to prefer the construction which will infer performance and not encourage avoidance of contractual obligations.

168. On the other hand, Mr. Mukul Rohtagi, learned senior counsel for the respondent has placed reliance on several judicial pronouncements in support of his contention that the petitioner herein was not entitled to the relief sought. Reliance was placed on the pronouncement of the Supreme Court in *Percept D'Mark (India) Pvt. Ltd. Vs. Zaheer Khan and Another*, . In this case, the Supreme Court was concerned with post contractual covenants which were held to be restrictive of trade and vocative of Section 27 of the Contract Act. As noticed in para 54, the contract between the parties had come to an end by efflux of time. However I find that in this case also the Supreme Court re-affirmed the legal position that there are instances where the negative covenant in the contract is valid and can be enforced. In this behalf, the court had observed thus:

61. Clause 31(b) was also to operate only during the term i.e. from the conclusion of the first negotiation period under clause 31(a) on 29-7- 2003 till 29-10-2003. This Respondent 1 has scrupulously complied with. So long as clause 31(b) is read as being operative during the term of the agreement i.e. during the period from 29-7-2003 till 29-10-2003, it may be valid and enforceable. However, the moment it is sought to be enforced beyond the term and expiry of the agreement, it becomes prima facie void, as rightly held by the Division Bench.

169. In the present case, the respondent has not laid a challenge to any of the terms of the SHA. Clause 14 has also not been assailed on grounds of its being barred by virtue of Section 27 of the Contract Act. For this reason, this pronouncement has no bearing on the present matter.

170. It has been strenuously urged that the contract in the instant case was terminable and consequently the award of damages was adequate remedy. It was urged that in this view of the matter injunction would not lie in support of this submission. Mr. Rohtagi, learned senior counsel for the respondent placed strong reliance on the judicial pronouncements reported at *Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*, ; *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, ; *D.R. Sondhi and Others Vs. Hella KG Hueck and Co. and Others* ; *East India Film Studios Vs. P.K. Mukherjee and Others*, ; *Star India Private Limited Vs. Laxmiraj Seetharam Nayak and Another*, ; *Usha Drager*

Private Ltd. Vs. Draegerwerk Aktiengesellschaft, ; AIR 1984 Delhi 119 Modern Food Industries v. Sri Krishna Bottlings; Turnaround Limited v. Jet Airways India Limited and Ors.

171. I have carefully perused the judgments relied upon by the respondents. I find that in Rajasthan Breweries Limited (supra) it was specifically noticed by the court that there was no negative covenant in the contract and that termination of the agreement was in fact effected in terms of clause 8 of the contract between the parties. However in paras 14 and 15 of the report, the court specifically noticed that the principles of compensation of damages would have no relevance when a negative covenant is sought to be enforced in the light of Section 42 of the Specific Relief Act. It would be useful to consider the observations of this Court in extenso which reads thus:

14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to Sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law. This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

15. Learned Single Judge considered various covenants of the agreement and referred to clause 8 of the Technical Assistance Agreement regarding termination saying that similar provision is incorporated in the Technical Know how agreement and both agreements provide that the same could be terminated even by the appellant at its option at the occurrence of any of the events, which are specifically mentioned in the agreement. Learned Single Judge extracted clauses relating to Technical Assistance Agreement under which the respondent could terminate the contract and as the termination had to take place at the instance of the respondent Therefore, events under which the appellant could terminate are not extracted. We were taken through various clauses and it is not disputed and has also rightly been pointed out by learned Single Judge that there is no negative covenant in the agreements in question. As there was no negative covenant, it was observed by learned Single Judge that agreements could be terminated by the respondent on the happening of any of the events mentioned

in Clause 8 of the Technical Assistance Agreement and under similar corresponding clause in Technical Know how Agreement. Accordingly, learned Single Judge held that since agreement was determinable at the behest of respondent Therefore, the same was determinable in nature and is revocable at the option of both the parties at the happening of any of the events mentioned therein.

172. It would also be appropriate to consider the observations of the Division Bench in para 16 of this pronouncement wherein the court interpreted the meaning of the expression determinable used in clause ``c`` to Sub-section 2 to Sub-section 14. In this behalf, the court had observed thus:

16. Learned Counsel for the appellant contended that the word "determinable" used in Clause (c) to sub-Section (1) of Section 14 means that which can be put an end to. Determination is putting of a thing to an end. The clause enacts that a contract cannot be specifically enforced if it is, in its nature, determinable not by the parties but only by the defendant. Although clause does not add the word "by the parties or by the defendant" yet that is the sense in which it ought to be understood. Therefore, all revocable deeds and voidable contracts may fall within "determinable" contracts and the principle on which specific performance of such an agreement would not be granted is that the Court will not go through the idle ceremony of ordering the execution of a deed or instrument, which is revocable at the will of the executant. Specific performance cannot be granted of a terminable contract.

173. The court had also negated the submissions on behalf of the appellant that when a contract was determinable by the party, the court could not treat it as an enforceable contract in the light of clause (c) of Sub-section 1 of Section 14.

174. So far as the pronouncement of this Court in D.R. Sondhi and Ors. v. Hella K.G. Hueck and Co. is concerned, the court held that u/s 9 of the Arbitration and Conciliation Act, an interim order could be passed in accordance with the statutory provisions which would include the provisions of the Specific Relief Act for the purposes of preservation, interim custody or sale of goods. In this case it was held that the parties were acting pursuant to a share holders agreement dated 18th June, 1999 whereby the respondents had been permitted to acquire 51% stake in the company and the petitioners had already entered into a non-competing agreement with the respondent No. 1. The petitioners were not paid any consideration for allowing the respondents to take over the majority stakes and control and the management of the company. The court had arrived at a conclusion that the respondents had failed to honour their commitment and also had fabricated charges and issued a letter dated 3rd September, 2001 seeking to cancel/terminate the shareholders agreement between them.

175. In this case, it had been urged on behalf of the petitioner that only those agreements could be treated as terminable which are voidable. This submission was rejected and the law on this aspect was succinctly laid down. The court held

that it is not only voidable contracts but even where the contracts provide that it is terminable on a particular event, the provisions of Section 14(1)(c) read with Section 41(e) of the Specific Relief Act would apply and as such injunction will not be granted.

The court noticed the statutory provisions of the Specific Relief Act and held that a contract which is in its nature determinable cannot be specifically enforced and consequently, that injunctions are not to be granted on the breach of the contract, non-performance of which could not be specifically enforced. Clause 13.4 of the agreement between the parties in this case stipulated that if the one party itself is in material breach of any of its obligations which it fails to remedy within 60 days of the receipt of the written notice or in two other contingencies, the agreement can be terminated. It was observed that such a notice had been issued to the plaintiff and the shareholders agreement terminated thereafter. In these facts injunction was refused. However, having closely considered this judgment, I find that in this pronouncement the court was not called upon to consider the impact of the negative covenant and grant of an injunction to ensure its compliance.

176. In *Pravudayal Agarwala Vs. Ramkumar Agarwala*, , the court was concerned with a suit for specific performance of a contract whereby the parties had agreed that only Pravu Dayal as a benamidar would submit tenders for the settlement of the plot in question and such offer would be deemed to have been made on behalf of all three. The parties as partners were all to contribute their share of the capital within one month from the execution of the patta to be obtained from the Government. It was stated that despite intimation to the other parties they failed to pay their shares which consequently led to Pravu Dayal to intimating them that the partnership stood abandoned. This was denied by the other parties who filed the suit against Pravu Dayal seeking the relief of specific performance of the agreement. The court held that in view of the terms of the agreement, the partnership if entered into, would be a partnership at will and even if such a contract were to be specifically enforced, it could be terminated immediately thereafter. Consequently under clause (d) of Section 21 of the Specific Relief Act, such a contract which is in its nature revocable, cannot be specifically enforced and that damages in specific performance or injunction would be an adequate remedy. I find that in this case also the court was not concerned with enforcement of any negative covenant which is being considered in the present case.

177. Again the judicial pronouncement of the High Court of Bombay rendered in *Star India Private Limited Vs. Laxmiraj Seetharam Nayak and Another*, does not further the case of the respondent before this Court in any further inasmuch as this case related to a contract of service and the court held that the plaintiff had failed to establish irreparable injury if the injunction prohibiting the employee from joining any other business was not granted. It was held that by granting injunction in favor of the plaintiff to enforce the negative covenant as contained

in clause 12 of the agreement between the parties, the court would be forcing a contract in respect of personal service after the employee had tendered his resignation from service. The court was of the view that grant of injunction would cause greater harm and injury to the defendant than the benefit which would accrue to the plaintiff and for this reason the injunction was refused.

178. The respondents have also relied on the pronouncement of this Court in *Sumer Arora Vs. Domino's Pizza India Ltd.*, . I find that in this case the court had arrived at a conclusion that the termination notice was based on grounds contemplated under clause 17 of the agreement and the only issue which was raised before the court was with regard to the sufficiency of the notice period. The court returned a finding that the termination was in terms of the contract and in these circumstances the injunction had been refused.

179. In the judgment reported at *Usha Drager Private Ltd. Vs. Draegerwerk Aktiengesellschaft*, , the petitioner has sought an interim injunction basing its claim on a non-compete clause contained in clause 6 of the joint venture agreement.

In this case, the court held that the relief by way of interlocutory injunction was granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty of the respective claims is resolved. Such injunction is to be granted only in cases where damages would not be adequate compensation for the injury which would result. Injunction was refused for the reason that the court for several reasons which have been noticed in the judgment held that the plaintiff can be compensated in terms of money and that plaintiff No. 1 would be held entitled to commission on the sales effected by the defendant. In this case, the plaintiff had even quantified its claim at 20% commission on sales made by the defendant or by its group/subsidiary directly or indirectly in India. It was in these circumstances held by the court that instead of an interim injunction, an interim protection in respect of securing 10% of the commission on the sales of the products which were covered by the joint venture agreement between the parties should be passed. The present case is distinguishable on facts which are before the court in *Usha Drager P. Ltd.* This Court is not concerned with mere distribution of products but the very existence of the joint venture for its entire manufacturing business is at stake.

Furthermore, the respondent in the present case has itself sought adjudication of its action in terminating the agreement. The question is whether damage which may result to the joint venture and the petitioner is quantifiable in monetary terms so as to disentitle the petitioner to the interim protection.

180. In *AIR 1984 Delhi 119 Modern Food Industries India Ltd. v. Shri Krishna Bottlers (P) Ltd.*, the petitioner had filed a petition u/s 20 of the Arbitration Act, 1940 seeking reference of the dispute between the parties to arbitration. The petitioner also filed an interim application praying for injunction against the respondent seeking enforcement of the negative covenants contained in a

franchise agreement with the respondent. Under the agreement between the parties, the plaintiff was to sell concentrate to defendant to manufacture and bottle the aerated water drink and distribute it in Hyderabad. The defendant was prohibited from manufacturing or selling any product akin to that of the plaintiff in Hyderabad without its written permission. Alleging that the defendant had failed to perform his contract and had entered into an agreement with another company to bottle and market their aerated drink, the plaintiff filed an application seeking a restraint of the defendant from manufacturing or marketing or in any other manner dealing with the aerated drink of the third party. In this case, the court considered the facts of the case and arrived at a conclusion that the petitioner had made alternative arrangements with some other party to bottle and market their products in the State of Andhra Pradesh and as a result, the product of the petitioner was available in the cities in respect of which it had covenanted with the respondent. Furthermore, the defendant had already started manufacturing and marketing the product of the third party after stopping production of its own product as a result of which the court arrived at a conclusion that it was the defendant who would suffer irreparable loss and damage if the injunction was granted. It was in these facts that injunction was refused. The court had rejected the prayer for injunction holding that injunction could be granted only in exceptional cases.

181. The respondent has also placed reliance on the judgment reported at Turnaround Logistics (P) Ltd. Vs. Jet Airways (India) Ltd. and Others . This case is also distinguishable on facts inasmuch as the court held that from the averments made in the plaint, the contract whereby the plaintiff was appointed an agent could not be inferred. Furthermore, this case did not postulate any negative covenants, and the plaintiff had only challenged the termination by the defendant on several grounds. Consequently, the court held that the contract being determinable, provisions of Section 14(1)(c) and Section 41(e) of the Specific Relief Act would preclude the grant of an injunction. For these reasons, this pronouncement has no application to the instant case. 182. I, Therefore, find that there is no legal impediment to grant of an injunction so as to enforce a negative covenant contained in an agreement which may be determinable. Of course, such relief cannot be granted merely on the asking of a petitioner who is required to show more as is discussed hereinafter. Impact of approval by the Foreign Investment Promotion Board (FIPB) to the proposal of the respondent

183. An approval of the FIBP is required by virtue of press note 1 (2005 series) which was issued by the Government of India requiring approval of the proposal by a multinational corporation to set up a wholly owned subsidiary in India if it was a party in existing joint venture holding more than three per cent equity.

184. Mr. Mukul Rohtagi, learned senior counsel for the respondent has pointed out that the prayers made in the present petition are all based on implementation of only the non-compete clause contained in Clause 14 of the SHA without any challenge to the termination of the agreement effected by the

respondent. It has been pointed out that the respondent bearing in view the market position, had no option but to proceed with its proposal of setting up a wholly owned subsidiary without the partnership of the petitioner. Towards this end, the respondent after requesting the petitioner for its consent, submitted an application dated 22nd July, 2006 to the FIPB. This proposal has been urged by the petitioner to be in blatant violation of Clause 14 of the shareholders' agreement.

185. There is no dispute that the petitioner did contest this petition before the FIPB and FIPB gave hearing to the petition in the course of its consideration.

186. It has been vehemently urged that Guardian proposes to infuse approximately US \$ 60 millions in the subsidiary over the next two years which equity infusion shall be augmented by expected export earning. It has also been urged that the proposed subsidiary would create more than 575 skilled and unskilled jobs. Indirect jobs were expected to be created for approximately 2,000 persons and consequently, if the proposal was implemented, Guardian would significantly contribute to the generation of employment in India. On these submissions, it has been urged that the proposal of the Guardian is not only in the interest of the respondent but in the larger public interest having regard to the infusion of foreign exchange as well as increase in availability of employment opportunities.

The respondent submits that its proposal would result in its bringing in the most advanced technology which was available with the respondent into this country and consequently setting up the subsidiary was in public interest.

187. The respondent had also contended that the onus to provide requisite justification as also proof to the satisfaction of the Government that the new proposal would or would not in any way jeopardise the interest of the existing joint venture or technology/trade mark approval or other stock holders would lie equally on the Foreign investor/technology supplier and the Indian partner.

Press Note 1 (2005 series) states that a new proposal would be allowed where the existing venture/Corporation is defunct or sick and according to the respondent this should be interpreted to include a situation where the Indian partner is sick or defunct.

188. The respondent was required to give details of the previous/existing joint venture in the same/allied fields, if any, and if so, the justification for the proposed venture. The respondent in para 9 (a) A has clearly stated that "the existing joint venture, GGL, is in the same field as the new proposed wholly owned subsidiary".

Justification has been given as to why the proposed venture shall not impact the existing joint venture and four reasons have been advanced by the respondent for the same which read thus:

(I) The MRL is in a state of internal disarray.

(II) Proposal to bring in latest and improved technology.

(III) Increasing demand for glass

(IV) Proposal not to prejudice the interest of existing joint venture.

189. The petitioner, on the other hand, has strongly contested the respondent's claim. It has been pointed out that in the application which was submitted by the respondent to the FIPB, it had indicated that its solution to resolve MRL's internal problems was its offer to purchase GGL's shares held by MRL at a price established in an independent valuation and that it was on account of refusal by the petitioner to do so, that the respondent had terminated the shareholders agreement. It was also urged that the respondent has misrepresented the position that the petitioner had been declared sick in its petition.

190. Before this Court, it has been urged on behalf of the petitioner that Article 2(iii) of Press Note 1 (2005 series) stipulates the enforcement of a non-compete clause between the joint venture partners and that the respondent had not disclosed the factum of the non-compete/non-conflicting clause included in the shareholders agreement.

191. Perusal of the minutes of the meeting dated 5th October, 2006 which have been placed before this Court by the respondent show that the board also noticed that its approval was merely an enabling decision for induction of FDI without prejudice to the legal/adjudicatory rights of the parties concerned, under any existing contractual agreement.

192. Pursuant to the recommendation of the FIPB, the Government of India granted approval to the respondent by its letter dated 26th October, 2006 which has been assailed by the petitioner in the High Court of Judicature at Ahmedabad.

193. The proposal dated 22nd July, 2006 to the FIPB submitted by the respondent set out its intention to set up a wholly owned subsidiary and build a new float glass plant in India in two phases. In para 9(a)(A) of its application, the respondent has unequivocally stated that ``the existing joint venture GGL is in the same field as the new proposed wholly owned subsidiary''. In phase I, it was proposing to build a float glass manufacturing plant with capacity of at least 600 metric tonnes per day while in phase II it was building on the same site a glass coating facility.

194. Undoubtedly, in the instant case, GGL was not defunct or sick. However, a committee of the FIPB was of the opinion that the setting up of the proposed division was not likely to jeopardise the interest of existing joint venture and consequently recommended the proposal of the respondent for consideration and approval of the competent authority. The petitioner is stated to have assailed the recommendations of the FIPB in proceedings before the Gujarat High Court. The scope of those proceedings is concerned with the legality and validity of the approval under press note 1 (2005 series) and not of the contractual stipulations between the parties and the commitments by the respondent under clause 14 of

the SHA.

195. It is noteworthy that the other share holders in the joint venture have also opposed setting up of the wholly owned subsidiary by the respondent.

196. The petitioner has placed the stand of the Union of India, Ministry of Finance in the writ petition filed by it assailing the recommendation under press note 1 (2005 series) granted vide letter dated 26th October, 2006. In the affidavit dated 10th November, 2006 filed by the officer (OSD), Capital Marketing and Investment of the Department of Economic Affairs in the Ministry of Finance in Special Civil Application 2206/2006 in the High Court of Gujarat at Ahmedabad, it was stated that the ``SHA under question is binding on the signatories of JV partners. Any breach of the said agreement has to be agitated before the court of law"`. .

197. On the own showing of the respondent its submission that it is bringing exchange to the tune of US\$ 150 to US\$ 200 million for the purpose of setting the wholly owned subsidiary may be misleading. The petitioner has pointed out that as per the application of the respondent to the FIPB, the respondent proposes to raise US \$ 200 million/equity debt ratio of 1:2 and intended to invest only US \$ 66.67 by way of equity, that too, in two or three years.

The respondent itself has pointed out that GGL itself admittedly has reserves to the tune of US \$ 60 million with profits secured in US \$ 2 million per month. It is a debt free company. Consequently it is more than eligible for procuring working capital finances from banks. On these projections, the petitioner has urged that GGL, with its existing reserves, is fully capable in itself for undertaking expansion.

198. The respondent has placed strong reliance on the recommendation given by FIPB to its proposal on 5th of October, 2006. On the other hand, the petitioner has urged that this recommendation cannot impact adjudication in the present case inasmuch as the board was not concerned with the commitment of the respondent that it would not undertake similar business during the subsistence of SHA as per clause 14 of the agreement.

199. In several pronouncements, the courts have held that the irreparable injury which may result to a petitioner has to be weighed against the injury which may result to the respondent if the injunction as prayed for is granted. In the instant case, approaching the FIPB for approval is only one of the steps towards setting up its wholly owned subsidiary. There is no dispute that the respondent has yet to take steps for setting up of the plant. Arbitration is expected to be an efficacious and speedy remedy and in my view, certainly the balance of convenience lies in favor of the petitioner and against the respondents.

200. Clause 14 of the SHA prohibits the parties to set up any other similar business as the joint venture unrelated to whether it competes or not. The issue of breach of contract was certainly not a consideration before the FIPB.

No material has been pointed out by the respondent as having been placed

before the FIPB other than its own self-serving bald statements and assurances.

201. I also find that there is no manner of enforcing the assurance and guarantee given by the respondent before the FIPB that the business of the subsidiary proposed to be set up by it would not impact the business of the joint venture inasmuch as it is relatable to third parties with whom it would be conducting business and who would not be bound by the assurance given by the respondent. The FIPB on 5th October, 2006 has also observed that its approval is merely an enabling decision which is without prejudice to any existing contractual agreement. In view of the stand of the government also it Therefore, cannot be held that grant of approval by FIPB would bind adjudication by this Court. Suppression of material facts and delay

202. According to the respondents, the petitioner is also disentitled to any relief in this petition on grounds of suppression of material facts. According to the respondent the petition does not adequately disclose the proceedings before the FIPB. It has been pointed out that FIPB had given a hearing to the petitioner which fact has not been disclosed in the petition. The petitioner is also alleged to have not disclosed the revival plan dated 22nd August, 2006 submitted to the IDBI which has been appointed as the operating agency. According to the respondent this fact coupled with the clamour for dividends by the petitioner is indicative of its dishonourable motives. The respondent has also urged that it has repeatedly offered assistance to Mr. Vinay Modi representing the MRL in resolving its existing problems and since 2003, it had been indicating that expansion of GGL was desirable but only if MRL could resolve its internal problems.

203. The respondent has also opposed the grant of relief in the application on grounds of delay. It has been urged that the termination of the SHA was effected on 21st July, 2006 and the respondent had approached the FIPB on the 22nd July, 2006. The petitioner filed its objections before the FIPB on the 14th August, 2006. The present petition has been filed only on the 9th of October, 2006 after the petitioner has appeared before the FIPB on the 5th of October, 2006 after the proposals of the respondent had been cleared by the FIPB Core Group.

204. The respondent has terminated the SHA by its letter dated 21st July, 2006. The Board of the petitioner considered the matter on 12th August, 2006. On 21st August, 2006, the petitioner requested the respondent to re-consider its action. It was only on 25th September, 2006, that the respondent informed the petitioner that there would be no re-consideration. The petitioner has contended that the first hearing before the FIPB took place on 5th October, 2006 when the intentions of the respondent were further crystalised necessitating the filing of the present petition on 9th October, 2006.

205. I find that even though the respondent had filed a petition u/s 9 of the Arbitration and Conciliation Act, 1996 in July, 2006 being O.M.P. No. 337/2006, it has approached the Arbitral Tribunal only on 16th October, 2006.

206. There is also no dispute that the respondent has urged that it would take

more than one year to set up its wholly owned subsidiary. In these circumstances, the time taken by the petitioner does not amount to such a delay as would disentitle the petitioner to grant of an injunction. Nature of relief which can be granted u/s 9

207. Section 9 of the Arbitration Act enables a court to exercise jurisdiction and pass such orders as are required to maintain the sub-stratum of the subject matter of the arbitration.

208. The next issue which deserve to be considered is the nature of relief to which a party may be entitled. Section 9 confers a discretionary power on the court which has to be exercised sparingly and cautiously, the object of the statutory provision is to be found in the words of the Section itself which confers jurisdiction on a court to pass orders of interim measures of protection for the preservation, interim custody or sale of goods which are the subject matter of the arbitration agreement; securing the amount in dispute in the arbitration proceedings; detention, preservation or inspection of a property which is the subject matter of the dispute in arbitration; authorise any person to enter upon a land or building; taking of samples or making of observation or experiment to be tried as may be necessary or expedient for the purposes of obtaining full information or evidence. The court is empowered to even appoint a receiver in respect of the property which is the subject matter of the arbitration and take such interim measures of protection as may be just and convenient. The powers granted on the court are far reaching. The statute has specifically mandated that the court would have the same power for making such orders as it has for the purposes and in relation to any proceedings before it.

209. It is also necessary to examine the parameters within which the court shall exercise such power. The manner and limits of exercise of such discretion have fallen for consideration in several judicial pronouncements and the principles laid down can be usefully called out thus:

(i) Even though Section 9 does not embody the ingredients of Order 38 Rule 5 of the Code of Civil Procedure, 1908 nor the conditions of the Order 38 Rule 5 can be read into it, however for the exercise of discretion there under, the court can take guidance from the provisions of Order 39 as well as Order 38 of the Code of Civil Procedure, Rite Approach Group Ltd. Vs. Rosoboronexport,).

(ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in pari material with the provisions of Order 39 of the Code of Civil Procedure, 1908. The power vested in the court by virtue of Section 9 must be exercised in consonance with equity which tempers the grant of discretionary relief as the relief of interim injunction is wholly equitable in nature. (Ref: M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, ; (115) 2004 DLT 219 : 2004 (VIII) AD (Delhi) 361 Reliance Infocomm Ltd. v. Bharat Sanchar Nigam Ltd.)

(iii) The intention of the defendant is a sine qua non for invoking Section 9 where

the claim is to secure the amount in dispute in arbitration. The court can take guidance from Order 38 Rule 5 of the CPC and Sections 18 and 41 of the Arbitration Act, 1940 for considering whether such a relief as has been prayed for in the petition u/s 9 deserves to be granted. (Ref: Global Company Vs. National Fertilizers Ltd., ; Mala Kumar Engineers Pvt. Ltd. (MKE) Vs. B. Seenaiiah and Co. (Projects) Ltd. (BSCPL),)

(iv) Protection u/s 9 can be granted only when a prima facie case is made out and balance of convenience and possibility of irreparable loss and injury to the petitioner is made out. Section 23 of the Specific Relief Act, 1963 provides that the provision of liquidated damages is not a bar to the specific performance of the contract. The general rule of equity is also that if a thing is agreed to be done, though there is a penalty attached thereto to secure its performance, yet the court in its discretion enforces specific performance thereof. The jurisdiction of the court is discretionary and must be exercised on such judicial principles when balance of convenience and possibility of irreparable loss and injury is shown to the plaintiff (Ref: Geep Batteries (India) Pvt. Ltd. Vs. Gillette India Ltd., ; Techno Construction and Another Vs. Kunj Vihar Co-operative Group Housing Society Ltd.,)

(v) The discretionary power of the court u/s 9 has to be exercised by the court sparingly and cautiously, bearing in mind that the objective of the court is to create an alternative dispute redressal mechanism and consequently, the interference by the court is not required at every stage. (Ref: 2006 (128) DLT 694 DB Sanrachna (India) Inc. v. AB Hotels Ltd.) Whenever the powers of the courts are invoked u/s 9 with the objective of supporting the arbitration, the court must act with alacrity. However, this would not justify grant of interim orders and relief on the mere asking. (Ref: (87) 2000 DLT 449 : 2000 (vi) AD (Delhi) 509 : 2000 (55) DRJ 750 CREF Finance Ltd. v. Puri Construction Ltd.; Sea Transport Contractors Ltd. Vs. Indian Farmers Fertiliser Cooperative Ltd.,)

(vi) The scope and object of Section 9 of the statute is to grant such relief by way of interlocutory injunction so as to mitigate the risk or injustice to the petitioner during the period before that uncertainty can be resolved. Its object is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages which would be recoverable in the action if the uncertainty were resolved in his favor at the trial. (Ref: M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, ; 2006 (iv) AD (Delhi) 38 Country Development and Management Services Pvt. Ltd. v. Brooke side Resorts Pvt. Ltd.) In Shaw Wallace Breweries Ltd. Vs. Him Neel Breweries Ltd., , Learned Single Judge of this Court held that the interim orders are calculated to ensure that the assets of the party are not dissipated or frittered away and that such orders do not fall within the moratorium of Section 22.

(vii) The application seeking interim measures of protection u/s 9 of the Arbitration and Conciliation Act, 1996 pertaining to the preservation, interim custody or sale of equipment which is the subject matter of the agreement would

be covered u/s 9(ii)(a) as also u/s 9(ii)(c), (d) and (e) of the Act. (Ref: National Highways Authority of India (NHAI) Vs. China Coal Construction Group Corpn.,)

(viii) The court has the power to pass an order u/s 9 during the pendency of the arbitration or even after the arbitral award but before the award is enforced in accordance with Section 36. Such order can be passed for preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement or securing the amount in the dispute and the like. (Ref: (128) 2006 DLT 694 Sanrachna (India) Inc. v. AB Hotels Ltd.; (87) 2000 DLT 449 CREF Finance Ltd. v. Puri Construction and Ors.)

(ix) The power u/s 9 to grant interim relief is available to the court while u/s 17, such powers to make interim measures are made available to the Arbitral Tribunal. Even though there may be some degree of overlap between the two provisions, however, the powers u/s 9 are much wider inasmuch as they extend to the pre and post award period as well as with regard to the subject matter and the nature of the orders which the court is empowered to pass. Therefore, pendency of an application u/s 17 before the Arbitral Tribunal does not denude the court of its power to make an order for interim measures u/s 9 of the statute. (Ref: National Highways Authority of India (NHAI) Vs. China Coal Construction Group Corpn.,)

(x) It has been held that though Section 9 enables a party, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced u/s 36 of the Act, may apply to the court for an interim order u/s 9, however, without a substantive move for reference or declaration on the petitioner's stand on the substantive relief by an appropriate forum, Section 9 cannot be invoked for grant of interim relief. (Ref: Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., ; M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., ; National Building Construction Corpn. Ltd. (NBCC) Vs. IRCON International Ltd.,

(xi) So far as the questions which can be considered in a petition u/s 9 of the Arbitration and Conciliation Act, 1996 are concerned, certainly issues which are to be decided in the substantive arbitration proceedings cannot be gone into in a petition u/s 9 of the statute. Thus, a question as to whether the agreement between the parties was validly entered into or whether it was validly terminated has to be determined only in the arbitration proceedings and cannot be determined in a petition u/s 9 of the statute. (Ref : 2002 (8) AD (Delhi) 617 : 2003 (66) DRJ 239 S. Raminder Singh v. NCT of Delhi).

A similar question had arisen before this Court in D.R. Sondhi and Others Vs. Hella KG Hueck and Co. and Others . In para 14 of the judgment, it was held by this Court that the question as to whether the material breach has been committed or not or if there is any breach at all was agitated but it was not gone into for the reason that it is not the question for determination at present.

210. This Court while considering the petition u/s 9 of the Arbitration and

Conciliation Act, 1996, does not have the jurisdiction to return a finding on the merits of a claim made or a dispute raised by the parties before the arbitrator. However, there can be no dispute that this Court is required to examine the existence of a prima facie case on the assertions of the petitioner with regard to the termination of the agreement in the facts and law applicable and as to strength in the petitioner's case as to the binding ness and subsistence of the SHA. Irreparable Injury and the Balance of convenience consideration

211. In a judgment reported at M/s. Sociedade de Fomento Industrial Ltd. and others Vs. Ravindranath Subraya Kamat and others, , the expression used in clause 4 of the contract which was being considered prohibited the respondent No. 1 from undertaking any business activity competing with the business of the plaintiff-company.

The court noticed the case of the plaintiff that the activities of the defendant's business were of a similar nature to that of the plaintiff and that it was in competition with the business of the plaintiff. However, no other material was placed on record to show that there was any act of competition in the business with the plaintiff-company by the defendant.

The plaintiffs had urged that the business of the defendant-company was in competition with the plaintiffs, and that they were not required to produce any further proof of such competition. This contention was rejected by the court holding thus:

14. While appreciating the above referred contentions of the appellants, one cannot forget that this is a matter pertaining to equitable relief being sought by the appellants. No amount of weakness on the part of defense case can ensure to benefit of the plaintiffs to obtain the equitable reliefs. It is the duty of the plaintiffs seeking the assistance of the Court for equitable relief, to disclose all the facts which can entitle the plaintiffs to justify the grant of the relief asked for. Once it is not disputed that Clause 4 clearly provides that what is sought to be restrained is the competition by the defendant No. 1 with the business of the plaintiff's company and the grievance of the plaintiff is that there is a violation or breach of the defendant No. 1 of Clause 4 in that regard it is primarily for the appellant company to plead and prima facie establish that there is violation by the defendant No. 1 in respect of Clause 4 inasmuch as there has been a business by the defendant No. 1 in competition with the business of the plaintiffs companies. It cannot be said that similar business will always amount to competing with each other. Whether one party is competing with another in similar business is a matter of fact and is to be established by producing sufficient material to establish such fact.

In order to establish such fact, there must be pleadings on record. Competition will certainly involve doing something with the intention or purpose of gaining upper hand on someone else. Such an act can be done in different ways and methods. Each of such methods can constitute a bundle of facts giving rise to a

cause of action to somebody who is aggrieved by the act of competition. But in order to succeed in such suit, it is necessary to plead and prove all such facts which constituted the act of competition. Mere allegation that similar business started by the defendants amounts to competition with the business of the plaintiff's company cannot amount to a statement of fact pertaining to the competition. It would be rather a submission on the part of the plaintiff. For example, in the case of claim of adverse possession it is not just sufficient to state that the plaintiff is in peaceful possession of the land for over 12 years. It is necessary to state when it became adverse, nature of possession, the fact of the possession being to the knowledge of the owner, etc. Similarly, it is not sufficient to merely allege that the defendants have entered into competition with the plaintiffs by starting similar business. It is necessary to disclose the facts which constitute the competition with the business of the plaintiffs by the defendants. This will include not only the nature of the business started by the defendants but also the different methods those may be adopted by the defendants for the purpose of competition with the plaintiffs in the similar business.

212. So far as loss likely to occur which has been pleaded by the petitioner in the present case is concerned, a scrutiny of the pleadings of the petitioner shows that in its petition, it has pleaded that the action of the respondent in setting up of wholly owned subsidiary would be prejudicial to the interest of the existing joint venture and violative of the contractual provisions which are binding on the respondent such as:

- (1). Respondent would be induced to concentrate only on their 100% subsidiary and will ignore GGL operations where they have only a stake of 50%
- (2). Future growth of GGL will be stopped as all further expansion will be taken up by the Respondent only in the subsidiary company
- (3). In float glass industry the margins are much higher in value added products viz. mirrors, coated glass, tempered and laminated glass and automotive glass. Respondent will pursue manufacturing of these products only in its subsidiary rather than GGL leading to reduced profitability at GGL.
- (4). Respondent would force GGL to undertake more exports being near to the sea and use the subsidiary largely to meet the requirements of the Indian market. Respondent is planning to put up its subsidiary in North India. The margins in glass industry are much higher in the domestic market as compared to the export market. This would lead to reduce profitability at GGL.
- (5). If GGL sets up the second plant instead of the Respondent setting up the new subsidiary, it would be much more cost effective. It would provide economy of scale to GGL, which would improve its competitive position in the market and hence improved profitability. This would not be the case if the Respondent is allowed to have its own subsidiary.

213. Elsewhere in the petition, the petitioner has stated that the guarantee which

the respondent has put forth that the interest of the joint venture would not be prejudiced has no validity and cannot be enforced.

214. My attention has been drawn to the note by the respondent in support of its application dated 22nd July, 2006. In para 5 of this note at page 306 of the paper book, I find that the respondent has categorically stated "(b) that the growth of glass consumption in the Indian construction industry increasing (roughly 15% per year since last year) and GGL has been unable to satisfy the increased demand as it has been running at its maximum capacity for a few years and has Therefore been unable to ``capitalize on this increased demand. GGL has also not been able to capitalize on the large unfulfilled export market. c) As the competition grows and GGL is stifled, GGL will not be able to offer as diversified a product line as its competitors resulting in reduced profitability. If Guardian is allowed to build a second line, it will help stabilize GGL."

215. In the same note, the respondent has asserted that in the proposed subsidiary, it anticipates that 50% of the total production would be tinted glass, 20% would be dedicated to the coater and 30% of its production would be devoted to the float glass. It has been unequivocally stated that there would neither be any development of technology, nature of product or the capacity of the joint venture GGL. The respondent has thereby clearly and unequivocally stated that it has no intention of either improving the available technology or the existing plant of the joint venture GGL nor it proposes to extend its facilities. Undoubtedly, the intent is to stultify the development of a joint venture.

216. The respondent has interestingly pointed out that soon after the GGL was set up in March, 1997, its losses exceeded its paid up capital. Consequently, in January, 1998, GGL the joint venture filed a reference before the Board of Industrial and Financial Reconstruction. GGL at this stage, submitted a rehabilitation plan that was addressed by the BIFR in June, 1999. There is no dispute that the respondent never sought to terminate the SHA when the future of GGL was itself in jeopardy.

217. So far as the impact of the subsidiary on the profitability and revenues of the joint venture company GGL is concerned, the petitioner has clearly stated that the impact of such a subsidiary and its on going production would result in diminishing the value of the share holding of the petitioner- company in GGL and that thereby the petitioner and its minority share holders would be unjustly deprived of valuable rights with the act of breach by respondent.

The petitioner has clearly stated that setting up of the wholly owned subsidiary shall result in irreversible damage to the rights of the petitioner.

218. The respondent has urged that the wholly owned subsidiary is proposed to undertake manufacturing of glass and glass products and coating of glass using advanced coating technology. In phase-I, the respondent proposes to build only a float glass manufacturing plant with the capacity of at least 600 metric tonnes per day. It is only in phase-II that the respondent would build on the same site,

a glass floating facility. Before the FIPB, the respondent has stated that 20% of the new plant would be dedicated to the coating technology. However, initially, the major production would be float glass which is the product manufactured by GGL. It is only in the phase-II of the proposed subsidiary that the respondent proposes to add new products which are not made by GGL. In this background, it cannot be said that the apprehension of the petitioner to the effect that the production activities of the wholly owned subsidiary would impact the business of GGL are without any basis.

219. The respondent has urged that its wholly owned subsidiary would be at another location in a different State and geographically removed from GGL. However, there is no restriction or confinement of its business, distribution or sales to the location where it is proposed to be located lending force to the petitioner's apprehension that its sales and business would be impacted.

220. Mr. Mukul Rohtagi, learned senior counsel for the respondent has however urged at great length that despite the state in which MRL finds itself, GGL has reached the maximum level of its production capacity and further that there are really no reserves or surpluses in the GGL which could be diverted towards expansion and that an amount of US \$ 45 million is actually needed for cold tank repairs. It has been contended that the fact that in an audit conducted by the officials of Guardian as regards the condition of the furnace, it was discovered that the cold tank repairs could be undertaken in the coming two years, does not vary the position that such repairs are required and the amount in question has also to be set aside for this purpose. In this behalf, reliance has been placed on the annual report of GGL for the year 2005 purportedly signed by Mr. V.K. Modi himself.

221. However, from the documents on record it would appear that in the year 2006, these reserves earmarked for the cold tank repair, were returned back since the amount was not required immediately. The submission is that this was a pure financial matter, would not impact the availability of the amount. My attention has been drawn to the director's report to the shareholders for the year 2005-2006 wherein an Explanation has been given as to why there was no requirement of reserves for the cold tank repairs immediately. In the Directors report of GGL for the year ending 31st March, 2006, it has been noticed that based on the current expected life of the furnace, the present financial and liquidity position and the expected future cash flows, it was estimated that substantial funds would be available to finance the major repairs in future.

This was the reason which was given in the director's report for transferring back the amount of Rs. 13,500/- lakhs which was appropriated to reserves for cold tank repair to the profit and loss account in the current year.

222. It has been strenuously contended on behalf of the petitioner that the respondent has prevented expansion of GGL not because the same is not possible. It has been pointed out that the respondent has exercised its power to

Veto such expansion which has been provided to it under Article 148 of Article of Association which reads thus:

148. Subject always to any directions of the company in General Meeting by Special Resolution, so long as Modi and GACL together and Guardian shall be members of the company, (each holding not less than fifteen per cent 15% of the total issued equity capital of the company) the following powers shall be exercised by the Board or a Committee of the Board if such powers are delegated under the provisions of these Articles by an alternative vote of a majority of directors which majority shall include at least one (1) director nominated or appointed by Guardian and at least one (1) director nominated or appointed by MRL.

xxx xxx xxx (xiv) undertaking any new business or substantial expansion of the business including the establishment of plants for the manufacture of other types of glass or for the fabrication of products made from float glass.

223. In the exercise of such power, the respondent has not allowed even discussion of a proposal to expand GGL at any of its board meetings. On the other hand, the respondent has clearly refused that there is any plans for expansion of GGL. My attention has been drawn to the minutes of the meeting of the board of directors of GGL held on 30th August, 2006 which has been filed by the respondent before this Court wherein on a query raised by Mr.C.J. Jose, IAS about expansion of GGL's capacity, Mr. Peter Walters, Vice Chairman of GGL (a nominee of the respondent) replied that "there is no immediate plans for expansion".

The respondent had addressed a letter dated 6th July, 2006 to the IDBI wherein also it had admitted that it was not proposing to undertake any expansion at GGL if it is permitted to set up a wholly owned subsidiary. The respondent has also clearly stated now that it was unwilling to provide any further technology to GGL for the very reasons that it has given in support of it, terminating the shareholder's agreement.

224. Perusal of the letter dated 6th July, 2006 sent by the respondent shows that the respondent had clearly informed the petitioner to either sell its shares to it or to permit it to expand separately in India. There is no dispute that there was no consideration of the option of expanding GGL's business. It is also an admitted position that the market share of GGL had reduced not because it was not running its affairs profitably but because of other producers in the field.

225. The respondents have stated that the minutes of the Board meeting dated 30th August, 2006 relied upon by the petitioner are only draft minutes and are yet to be finalised. It is in any case, submitted that it is not as if the cold tank does not need the repairs. Such repairs have only been postponed. According to the respondent Mr. Peter Walters had stated that the GGL has no immediate plans of expansion in view of the state in which the MRL found itself.

226. Looked at from whatever angle, even if the amount which has been considered necessary for cold tank repairs, is so immediately utilized, I find that there is no dispute even by the respondents that the GGL was still a vibrant profitable business enterprise which was capable of sustaining its business, and that, despite the disputes in which MRL or its promoters were involved, GGL had faced no difficulty even during the period when the MRL was before the BIFR or when it was facing a winding up proceedings in the High Court of Judicature at Allahabad.

227. Be that as it may be, there is no dispute that the GGL has the financial capacity and that there is no dispute that it is functioning with technical and administrative capability and has reserve surplus in its cash flow as noticed hereinabove.

228. In its note to the FIPB on 5th October, 2006 in para 9(c), the respondent admitted that cold tank repair is not to be undertaken for the next two years, i.e. by the end of 2008. The admitted position is that the Board of GGL had not considered any proposal for undertaking the repairs of the cold tank which was not absolutely eminent.

229. The respondent has also considered alternative utilization of the fund which would be available on account of reversal of the entry for the funds which was earmarked for the cold tank repairs and towards this end, it had addressed a communication dated 2nd February, 2006 wherein it had considered supporting a dividend payment of up to 40% and reiterated its preference to use the available cash to repurchase shares from the Gujarat Government.

230. It may be noticed that the respondent has attempted to explain this communication only in its written submissions stating that by this letter, the respondent was emphasising its concern with regard to the instability and chaos at MRL and its emphasis and its concern about acquisition of 75% or, in any case, majority shareholding in the GGL. It was also contended that the reversal of the amount allocated towards the cold tank repairs was only as a financial measure and for no other reason.

231. The petitioner has taken great pains to point out that as per the figures of the accounting of GGL, its estimated profit for the year 2005-2006 was to the tune of Rs. 14,828 million which was expected to go up to Rs. 22,000 million. It was submitted that so far as the current cash availability was concerned, a sum of Rs. 300 crores (US \$ 65 millions) was available and based on figures for the current year, upon calculation of the additions and adjustments of the amount of Rs. 202.50 (equivalent to US \$ 45 millions) towards the cold tank repairs, there was still a net surplus of Rs. 216.44 crores.

232. In my view, for the purposes of the present case, these elaborate submissions would be immaterial and except that the submissions laid by both sides indicate that GGL is a profitable enterprise having adequate and growing reserves, whether they be for dividend disbursement or to be used for repairs or

are otherwise utilised.

233. Therefore, to obtain an interim injunction, the plaintiff must demonstrate both not only the prima facie case that is the likelihood of success on the merits of the claim but also a substantial risk of irreparable harm in the absence of an injunction. If such factors are established, the court is required to balance against the harm that the injunction may inflict on the opposing party, including the impact on public interest.

234. The principal submission on behalf of the petitioner has been that the respondent cannot be permitted to avoid its contractual liability with the petitioner as the SHA dated 23rd January, 1990 remains valid and binding and consequently, the respondent cannot proceed with its proposal to set up a wholly owned subsidiary which would be in violation of the agreement between the parties.

235. In an answer to the respondent's submission that the proposed project of the respondent would bring in huge amounts of foreign exchange, it has been pointed out that the respondent proposed to bring in foreign exchange in two phases. In the first phase, the project cost was to the tune of US \$ 150 million while in the second phase, its cost was US \$ 50 million. The respondent has proposed induction of foreign exchange in the nature of equity to the tune of US \$ 66.67 million only and the respondent was proposing to infuse approximately US \$ 60 million in the new subsidiary over the next two-three years.

236. From the documentation which has been placed on record, it has been pointed out that the existing joint venture GGL currently has over US \$ 66 million in liquid assets including a bank balance which was growing at the rate over US \$ 2 million per month. Consequently, it is pointed out that the existing joint venture already had adequate resources to meet the entire equity financing for the proposed project and that the expansion of the existing joint venture was definitely a feasible and available option. The joint venture was profit-making and debt-free without any borrowing for its working capital. Such position has been stated to be subsisting for the last few years. The petitioner points out that substantial advantages have been created by the GGL in terms of marketing, distribution and establishment of the brand for which benefit would be diverted by the respondent to its proposed wholly owned subsidiary.

237. The petitioner has also criticised the plea taken by the respondent with regard to generation of additional employment placing reliance on the figures relating to GGL. It has been pointed out that GGL has established itself as a company of standing and has been providing trained personnel to the respondent's international operations in several countries and thereby it is a major resource for provision of skilled men and trained manpower needed for the business of the respondent. According to the petitioner, the wholly owned subsidiary of the respondent would result in diversion of skilled manpower which has been trained by GGL to its detriment.

It is further pointed out that even the fact that the wholly owned subsidiary is to be geographically separated from the location of the GGL and is proposed to be set up at a distance from Ankleshwar, Gujarat where GGL is located. However, it was pointed out that as per the proposal, the respondent was required to export 40% of the production from the new plant and Guardian was intending to manage and control both its wholly owned project as well as GGL. The petitioner apprehended that the respondent would use GGL for meeting its export requirements while using the new project to service the larger and more profitable percentage in the Indian market which was more profitable than the export. The petitioner has buttressed this submission pointing out that the respondent would be more interested in the profitability of its wholly owned subsidiary inasmuch as it would own 100% of the new project and only fifty percent of the existing GGL. On this basis, it is submitted that apart from violation of the contractual commitment to the petitioner, the setting up of the subsidiary was wholly detrimental and was opposed to the interest of the joint venture. It has been submitted that the profitability of the wholly owned subsidiary would also guide the respondent's policies in the technology sharing with the GGL and impact on the payments which the respondent expected GGL to make to it.

238. According to the petitioner, GGL, a highly successful company had adequate resources to meet the entire project cost for the proposed new project and there was no need at all for setting up a wholly owned subsidiary by the respondent. It has been vehemently urged that the respondent has deliberately not permitted GGL to proceed with such project which had been proposed to be implemented in GGL by using its affirmative vote which allowed it to veto the setting up of such a plant and it is for this reason, GGL which was a market leader holding market shares which were more than 33%, found its leadership position eroded and taken over by other competitors. It is also the petitioner's case that the respondent has earned huge amounts from the joint venture on account of the payments towards the technology which was shared and advanced to it.

239. Another argument which has also been advanced in support of the imperative necessity to proceed with the establishment of the plant by the respondent is based on the status of the float glass industry in India and the growing threat to the business on account of competitors' acquiring a large chunk of the market. Mr. Mukul Rohtagi, learned senior counsel has urged that the production of float glass in India has doubled from 589 thousand metric tons per year in 2003 to 1048 thousand metric tons per year in the year 2007. GGL's production is stated to have gone up from 195 thousand metric ton to 2007 thousand metric tons per year in the same period which is beyond its maximum capacity. However, despite this position, GGL's share in the float glass production in India has gone down from 33% to 20%. According to the respondent this is because the GGL's plant located in Ankleshwar, Gujarat was the first float glass plant in India which commenced commercial production in the market on 1st March, 1993 with the installed capacity of 550 thousand metric tons per day.

Thereafter, its competitors M/s Asahi India Safety (earlier known as Float Glass India) first commenced commercial production in Taloja in Maharashtra in 1995 with a capacity of 500 metric tons per day. However, its second plant is currently under construction in Uttranchal which is expected to go on stream in early 2007 with a production capacity of 700 metric tons per day. St. Gobain located in Perumudur near Chennai also launched its first plant in July, 2000 with a capacity of 650 metric tons per day. A third establishment known as the Triveni Glass (Allahabad) commenced production of float glass using Chinese technology in 1996, also having a production capacity of approximately 230 metric tons per day.

240. These submissions would have bearing in respect of balance of convenience if there had been any consideration of the capacity of GGL to expand or face competition. The same does not appear to ever have been an issue. There is also no dispute that the GGL's financial health was in a good position and it was flush with funds. The same is apparent from the various proposals which were mooted at the instance of the respondent for utilising some of the funds which were available towards cold tank repairs. The proposal made on 2nd February, 2006 to utilise these funds for buying back the shareholdings of the Gujarat Government establishment as also the refusal to utilize the ``available funds`` for releasing dividends to shareholders goes to show that funds were available. The respondent has not placed or relied on any proposal to expand the capacity of GGL. I also find that the respondent's termination of the agreement with the petitioner does not emanate from growing competition in trade inasmuch as there is no dispute that GGL remains a vibrant and profitable enterprise.

241. The petitioner has pointed out that even in 2003, the joint venture partners foresaw the growth of the demand for its production and had agreed that it was desirable to expand existing facilities of the GGL by setting up an additional float glass plant. MRL is stated to have proposed conservation of internal accruals towards furtherance of expansion which fact the respondent has acknowledged in its letter dated 19th November, 2003. But such proposal did not culminate in any active consideration.

242. The petitioner has challenged the claim of the respondent that it is intending to bring in latest and improved technology through the wholly owned subsidiary into the country. It has been asserted that this claim itself demolished the intent put forth of the respondent that it had any interest in the development of the business of the joint venture.

243. It is an admitted position that the demand for the product of the joint venture and those manufactured by the respondent is increasing in India and that GGL has ability and resources to address this demand. According to the petitioner, the project which is proposed by the respondent to be implemented by it through its wholly owned subsidiary was first recommended to be implemented by the joint venture which still has the financial, technical and managerial capacity to undertake the same. It has also been submitted that the very basis of

the joint venture agreement postulated expansion of the business and that the basic spirit, intendment and purpose of bringing in the latest and improved technology into India had resulted in the parties entering into the agreement and creation of a joint venture company.

244. The petitioner has also argued that improved technology increases scale of operations on a cost-effective basis and that there is no reason why the respondent could not be interested in diverting value added products which are more profitable to its wholly owned subsidiary depriving GGL of potential revenue and profit stream. For the same reason, the petitioner has apprehended prejudice to the imports of products.

245. I find that interestingly, it is not the joint venture GGL's industrial or financial health which is purportedly guiding the respondent's decision but the status of the petitioner. Even though the petitioner has emphasised the impact of the proposed wholly owned subsidiary on the value of its shareholding in GGL, however, the respondent had been at great pains to urge that the value of the MRL's shareholding in GGL would not go down even if GGL's market shares go down since the respondent would be supporting it. In evidence of such an intention, the respondent has stated that it is willing to keep its offer for purchase of MRL's shareholding in GGL open for a reasonable period of time to allay the petitioner's apprehensions in this behalf. It has been repeatedly urged by the respondent that not only is the respondent unable to expand within GGL but it finds itself unable to do so on account of the circumstances that the petitioner finds itself in. Such a stand has been taken despite the strong emphasis laid by the respondent on the fact that it is holding 50% of shares in GGL while the petitioner is holding only 21.24% of shares.

246. The respondent has the power of veto on all material decision-making as per the Articles of Association and is not only influencing but is controlling the decision-making so far as GGL is concerned. In this background Therefore, while the concerns of the respondent even though may be legitimate, however, it has to be borne in mind that the same are prima facie not supported by any facts and figures inasmuch as MRL has been in such a position since 2000 while GGL has continuously grown in status and strength over this period. In this background, the submission made by the respondent that its new venture would not compete with GGL or that the petitioner's sole interest in the matter is restricted to the value of its shareholding and any reduction to the same can be compensated adequately, is wholly misconceived. Such a submission certainly does not consider the reasonable apprehension of the petitioner with regard to the impact on the goodwill and business of the GGL.

247. Prima facie, there is strength in the submission of the petitioner that the intent of the respondent to not expand the existing joint venture is guided not by any of the concerns which have been set forth but by the change in the respondent's intention of benefitting itself at the expense of the GGL.

248. So far as the asserted contention of the respondent that the products which are being manufactured by GGL and those manufactured by the newly proposed wholly owned subsidiary would complement each other, I find that the petitioner has pointed out that the products manufactured under GGL are sold under the trade name "Modi Guard" which is marked recognition. There is no dispute that the products which are proposed to be sold by the newly set up wholly owned subsidiary would not be sold under the same trade name. The petitioner has pointed out that the consumers in the market will not relate the product of the Modi Guard with that which is manufactured at the proposed subsidiary which would strongly impact the sales of the petitioner as also its goodwill. The petitioner has submitted that GGL would thus suffer loss of market shares, goodwill and profits which are incapable of quantification and consequently, the loss which would be suffered would be irreparable.

249. Therefore, the proposal of the respondent is clearly to freeze the business of the joint venture at its existing point. By setting up the wholly owned subsidiary it proposes to develop not only the second line but also the same product as the petitioner. The respondent is thereby effectuating its refusal to share new technology with GGL and is completely scuttling any attempt for its expansion. It is not either party's contention that the agreement between them when the joint venture was conceptualised, did not envisage any expansion of the facilities or the project or that it was limited to the existing capacity alone. It has stated that it would divert new technology only to this subsidiary and does not propose to share any of its technology with the joint venture. It proposes that the joint venture would exist but says that its business would not be developed.

250. In this background and bearing in view the detailed submission made by the respondent with regard to the growing competition, there is certainly strength in the apprehension of the petitioner that the interest of the respondent lies in promoting the wholly owned subsidiary which would certainly be a competitor for the business of the petitioner; would take the market share of the joint venture in the product which it is manufacturing and that its business would certainly be negatively impacted.

251. The contract between the parties was a commercial contract and the prohibition which was contained in Clause 14 is to operate only during the subsistence of the agreement and was provided in the interest of the joint venture. The respondent has refused to share technology or permit expansion of the joint venture not because the joint venture could not have coped with the same or that the petitioner could not have participated or contributed to the expansion but on its apprehension that the petitioner's involvement in the proceedings before the BIFR would render the petitioner as incapable of participating in the venture in a healthy manner.

252. It cannot be lost sight of that if the wholly owned subsidiary is set up and goes into business, undoubtedly, the market share of the joint venture shall

further go down. There is also reasonable apprehension that hitherto customers of the GGL may divert their business and attention to the new wholly owned subsidiary which the respondent has proposed to set up and which would directly impact the business interest of the joint venture. There can be no dispute that the formation of a new business would impact the goodwill of the on-going business and would, Therefore, impact the petitioner's "legitimate interest" in the profits of the joint venture.

253. So far as the irreparable harm from breach of clause 14 in the instant case is concerned, the determination thereof would not rest solely on the existence and subsequent breaches of this covenant between the parties. Several factors which would support the irreparable harm determination would include an inability to calculate damages, harm to goodwill, diminishment of competitive positions in the market places, loss of employees' unique services and loss of opportunities to manufacture and distribute unique products. There can be no manner of doubt that the respondent's decision to propose the wholly owned subsidiary is based on its intention of capturing the huge customers base available in the market in the country.

254. Goodwill is considered as a legitimate business interest and is the company's positive reputation in the community, particularly in the eyes of its customers and potential customers. The respondent has categorically stated that its actions should not impact the current customers' base of the petitioner. But, it is an admitted fact that the petitioner's customers would be targeted by the respondent through its wholly owned subsidiary. Loss of goodwill is recognised as being hard to quantify in terms of compassable damages and certainly gives rise to the need for an equitable injunctive relief. The respondent being closely associated and holding 51% equity share holding in the joint venture undoubtedly has access to every aspect and detail of the working of the joint venture. It would certainly be guided and would utilize such information for the purposes of furthering the business of its wholly owned subsidiary wherefrom it shall derive 100% profits.

255. So far as the consideration of the aspect of the maintenance of the joint venture's existing market shares is concerned, as noticed hereinabove, the wholly owned subsidiary to be set up by the respondent would be producing the same product as being produced by the petitioner and would not be selling the same under the trademark and trade name of the joint venture. The respondent has categorically stated that it has no intention of bringing in any new technology into the joint venture or participate in its expansion. Undoubtedly, these actions would result a smaller market share of the joint venture in the future. It is well established that loss of current or future market share may constitute irreparable harm. (Ref: Freedom Holdings v. Spitzer 408 F.3d at 114-15; Novartis Consumers Health Inc. v. Johnson and Johnson Merc. Consumers Pharms .Co. 290 F.3d 578, 526 : 3d CIR.2002.

It is equally well settled that in a competitive industry, consumers would be

influenced by the branding and the loss of market shares is a potential harm which cannot be retraced by a legal or an equitable remedy following a trial.

256. I find that the issues raised in the present case have arisen in several cases decided by the courts in the United States of America and adjudication in these matters gives a valuable insight into the matter. The Supreme Court of the State of New York had an occasion to consider a matter raising a claim by the plaintiff based on the non-compete clause in its joint venture with the defendant. In the judgment reported at *Ned Steinfields v. General Visions Services Inc.* (INDEX No. 600942/99-001 Cal# 9-3/8/99 Supreme Court of New York, the plaintiff had moved for a preliminary injunction to enforce the terms of a contract forming a joint venture between himself and the defendant. The court noticed that the defendants did not deny most of the actions which had been complained of by the plaintiff as a breach of the agreement. It was even admitted, as in the present case, that it had entered into an agreement whereby it has expanded its business activities without including the plaintiff and to this the plaintiff had not consented. The defendants claimed that the joint venture agreement was void for the reason that it was obtained in breach of the fiduciary duty which the plaintiff owed to the defendant. Consequently, they had unilaterally terminated the joint venture agreement and urged that such a termination had freed it of any further duty to abide by any of the joint venture agreement's provision.

The court held that the defendant had not established any right to unilaterally void the agreement between the parties nor had they offered probative evidence to show that the amendment to the agreement was obtained through any breach of the plaintiff's fiduciary obligations to the defendant. It was also held that the defendant was competing with the joint venture by starting a business relationship with a new store without the plaintiff's consent which was in flagrant breach of the parties covenant not to compete which establishes the element of irreparable harm under the New York Law. On these facts, the court reiterated the principle that irreparable injury to the goodwill invested in the on-going business is established without the need to show the actual loss of customers.

It was also noticed that there would be flow of patients and income away from the joint venture which would certainly erode its business and cause loss to the plaintiff which would not be compassable in money damages inasmuch as the patients who moved away would be unlikely to return to the joint venture locations and that patients would not be in a position to comprehend the distinction between the joint venture and the other business undertaken by the defendant without the participation of the plaintiff. It was held that issuance of an injunction was appropriate to protect the plaintiff's "legitimate interests" in the profits of the joint venture. Consequently, holding that equity was tipped in the plaintiff's favor, the court had passed an order of status quo with regard to the joint venture business.

257. The United States Courts of Appeals for the Tenth Circuit, in a case reported at 356 F.3d 1256 : 2004 US App LEXIS 1382 *Dominion Video Satellite Inc. v.*

Echostar Satellite Corp. and Ors., the court had an occasion to consider a prayer for injunction based on a breach of the exclusivity clause. In this case, the court had negated the injunction which was prayed for on the ground that the plaintiff has failed to show anything which could persuade the court to hold that the loss of exclusivity rights itself constitute irreparable harm without evidence of any further damage.

Several judicial pronouncements were relied upon the court including Tom Doherty Assocs., Inc. v. Saban Entm't, Inc. 60 F.3d 27, 37-39 : 2d Cir. 1995 (loss of prospective goodwill through inability to market unique product constituted irreparable harm); JAK Prods., Inc. v. Wiza 986 F.2d 1080 : 1084 7th Cir. 1993 (under Indiana law, when employee uses experience gained from employer in violation of covenant not-to-compete, irreparable injury occurs); Basicomputer Corp. v. Scott 973 F.2d 507 : 511-12 6th Cir. 1992 (violation of covenant not-to-compete constituted irreparable harm where damages were difficult to calculate, customer goodwill was damaged, and plaintiff suffered loss of competitive position); Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc. 944 F.2d 597 : 603 9th Cir. 1991 (irreparable harm established from violation of covenant not-to-compete where intangibles like advertising efforts and goodwill were injured); Equifax Servs., Inc. v. Hitz 905 F.2d 1355, 1361 : 10th Cir. 1990 (irreparable harm exists where damages from breach of covenant not-to-compete difficult to calculate); Ferry-Morse Seed Co. v. Food Corn, Inc. 729 F.2d 589, 592 (8th Cir. 1984) (breach of exclusive distribution agreement constituted irreparable harm where company was disadvantaged in competitive market by inability to market unique seed corn); Shred-It USA, Inc., 202 F. Supp. 2d at 233-34 (loss of employee's unique services to competitor in violation of do-not-compete agreement constituted irreparable harm); Green Stripe, Inc. v. Berny's Internacionale, S.A. 159 F. Supp. 2d 51, 56-57 (E.D. Pa. 2001) (violation of exclusivity clause in sales contract constituted irreparable harm where plaintiff was denied ability to sell unique, perishable grape and lacked market substitute to maintain its presence in Mexican grape market); J.C. Penney Co., Inc., 813 F. Supp. at 369 (inherent nature of exclusive provision in lease coupled with damage to goodwill, difficulty of calculating damages, and unique nature of interest in real estate constituted irreparable harm); Walgreen Co. v. Sara Creek Prop. Co. 775 F. Supp. 1192, 1197 (E.D. Wisc. 1991) (where exclusivity clause in lease was breached, loss of goodwill, erosion of customer base, and diminution of corporate image provided grounds for finding irreparable harm), affirmed, 966 F.2d 273 (7th Cir. 1992); see also Auto skill Inc. v. Nat'l Educ. Support Sys., Inc. 994 F.2d 1476, 1498 (10th Cir. 1993) (loss of uniqueness in marketplace satisfied irreparable harm factor where plaintiff established harm to goodwill and difficulty in calculating damages); Reuters Ltd., 903 F.2d at 907-09 (loss of unique product and goodwill supports finding of irreparable harm when customers indicate a strong preference for the product and threaten discontinuation of business relationship).

It was also noticed that certainly there are cases in which courts have made

findings of irreparable harm based on the loss of unique rights protected by contract. But those cases were distinguished from the controversy before the court because they focussed on harm to a unique market position based on evidence of loss of a unique product or goodwill, or difficulty in calculating damages. See, e.g., *Tom Doherty Assocs., Inc.*, 60 F.3d at 38 (irreparable harm arises where loss of ability to market unique product damages company's prospective goodwill); *Reuters Ltd.*, 903 F.2d at 907-08 (damages to goodwill as a result of loss of unique product supports finding of irreparable harm); *Ferry-Morse Seed Co.*, 729 F.2d at 592 (company irreparably harmed where it would suffer disadvantage in competitive market by inability to sell unique product); *Green Stripe, Inc.*, 159 F. Supp. 2d at 56-57 (irreparable harm arises from denial of ability to sell unique product and inability to obtain market substitute); *J.C. Penney Co., Inc.*, 813 F. Supp. at 369 (irreparable harm found, in part, from acknowledgment that damage to interest in real estate is generally viewed as unique); see also *Auto skill, Inc.*, 994 F.2d at 1498 (loss of unique position in marketplace evidenced by harm to goodwill and difficulty in calculating damages).

258. Perusal of the letter dated 6th July, 2006 sent by the respondent shows that the respondent had clearly informed the petitioner to either sell its shares to it or to permit it to expand separately in India. There is no dispute that there was no consideration of the option of expanding GGL's business. It is also an admitted position that the market share of GGL had reduced not because it was not running its affairs profitably but because of other producers in the field.

259. There can be no manner of doubt that so far as the respondent's contribution to GGL is concerned, it has received the contracted consideration for the technical and any other contribution made by it. The products manufactured by GGL are sold under the trade name "Modi Guard" which is a mark enjoying goodwill and recognition. The respondent has not claimed that it would be selling products manufactured by its proposed wholly owned subsidiary under the same trade name. The petitioner points out that the respondent shall be selling its products under its own worldwide brand ``Guardian``. The petitioner points out that the wholly owned subsidiary in the market will not relate to the products of Modi Guard. It has apprehended that, as a result, the consumers may be persuaded to shift their purchase to the goods manufactured by the proposed wholly owned subsidiary directly impacting the business and goodwill of the petitioner.

260. In these foregoing circumstances and the legal principles judicially recognised as Constituting irreparable injury, the petitioner has adequately demonstrated a reasonable apprehension of loss of goodwill and market share and strong likelihood of irreparable harm in the market in which it operates. It is also to be held that balance of convenience is in favor of the petitioner.

261. I find that there is an important distinction in the prohibitory clauses in the cases which have fallen for consideration before various courts as noticed above and clause 14 in the instant case. Clause 14 of the SHA prohibits MRL and

Guardian from participating, negotiating or engaging, or being financially interested, directly or indirectly, in any other project for the manufacture of float glass or other products. The prohibition to involve in or undertaken similar business is clear, unequivocal and absolute without even requiring an element of competition between the joint venture or the other project.

Interestingly, clause 6.5 dealing with the transfer of the shareholding prohibits sale of shares to a transferee which is engaged in ``competing`` business with the company.

In the instant case, there is no dispute that the proposed wholly owned subsidiary is to manufacture float glass as well as other products made by the joint venture in India. Prima facie, this by itself would entitle the petitioner to assert that the respondent is threatening to breach the SHA between the parties entitling it to interim protection. However, in the facts noticed above, it has been held that the petitioner has been able to make out a prime facie case in its favor and that there is reasonable apprehension of irreparable damage in case the interim protection is not granted.

262. It is well settled that the intent of the respondent is a relevant factor while consideration of the grant of interim relief u/s 9 of the Arbitration and Conciliation Act, 1996. The petitioner contends that the entire conduct of the respondent in unreasonably withholding declaration of dividends, persuading UTI and other financial institutions with whom the petitioner's shares are pledged/mortgaged to compel the petitioner who is a minority share holder to sell the shareholding at a distress value. The petitioner has urged that the conduct of the respondent is really in the nature of effecting a corporate take over in exercise of its power under clause 2.11 of the shareholders agreement to the prejudice of the petitioner.

263. In this behalf, the petitioner has drawn my attention to the letter dated 6th July, 2006 written by the respondent to the IDBI whereby the respondent communicated a formal offer of a proposal for preparing a scheme of rehabilitation of MRL pointing out that MRL owned 33,335,000 shares in the joint venture, GGL amounting to 21.2% of its share capital and the share holders agreement dated 23rd January, 1990. The respondent submitted that in order to assist the IDBI to put forth a scheme of rehabilitation, Guardian was prepared to provide meaningful liquidity to MRL by entering into only either of the two following arrangements:

Guardian hereby offers to buy Modi Rubber's shares in GGL. We understand that ICICI Securities acting on behalf of the Financial Institutions, has recently valued these shares at Rs. 55 per share. In order to facilitate a transaction and eliminate the uncertainty of negotiations with us while you work on other elements of the scheme of rehabilitation, Guardian is prepared to pay Rs. 55 per share (approximately US\$40M) and can close and make payment in cash within 10 days of acceptance of this offer.

If you do not wish to sell the GGL shares, Modi Rubber should provide Guardian with permission to expand in India separately from GGL and Modi Rubber. Modi Rubber would provide (1) a release from paragraph 14 of the shareholders agreement between Modi Rubber and Guardian International (though we do not accept the enforceability to this provision); and (2) a letter of no objection to the FIPB. If Modi Rubber does so prepared to agree with Modi Rubber to cause GGL to pay a significant dividend. For example, if GGL were to pay a significant dividend, 22.4% of the dividend would go Modi Rubber and could be used in your scheme of rehabilitation. We can arrange for dividend to be declared as promptly as the required meetings of Modi Rubber can be called." The same proposal was placed before the Unit Trust of India (UTI) by the respondent by a letter dated 6th July, 2006 urging that thereby MRL would have the liquidity to make a reasonable payment to its secured creditors. The respondent even informed the UTI that it was willing to invest separately from MRL in case it so preferred.

264. This proposal was also placed by the respondent before the Board of Industrial and Financial Reconstruction (BIFR) by an application for impleadment filed in July, 2006 wherein the respondent stated thus:

7. Specifically, the Applicant is willing to buy MRL's shareholding in GGL at Rs. 55 per share, aggregating to Rs. 184.25 Crores (approx. USD 40M). This valuation is based on an independent valuation performed by ICICI Securities at the direction of the Financial Institutions who have a 44% shareholding in MRL. This offer has already been made to the Operating Agency, IDBI vide letter dated 6.7.06. The applicant has also written to the Financial Institutions who have a 44% shareholding in MRL offering to buy GGL shares from MRL, vide letters dated 14.6.06 and 6.7.06 copies whereof are annexed hereto as Annexure-A(colly). The applicant is seriously concerned that MRL's shareholding in GGL may be sold under a scheme of rehabilitation to third parties without the required express consent of the applicant under GGL's Articles of Association and without giving Applicant a pre-emptive right to purchase said shares. In the above circumstances, the Applicant is an interested and a necessary party in the above proceedings and needs to be heard with regard to its proposal. xxxx xxxx
xxxx PRAYER

i) implead the Applicant Guardian International Corp. as a necessary and interested Party in the above proceedings especially in view of its offer as stated in paragraph 7 of the instant application;

ii) pass such other or further order as deem fit and proper in the facts and circumstances of this case.

265. This offer to purchase the shares held by the petitioner in GGL was also urged as a ground in support of its application before the Foreign Investment Promotion Board (FIPB). In the submissions filed by the respondent in July, 2006 before the FIPB, it expressed the apprehension that the petitioner would sell its shareholding to a third party without effectuating the pre-emptive right of the

respondent to purchase the shares of the petitioner in GGL.

266. In this behalf the respondent stated that in para 21 of O.M.P. No. 337/2006 of the respondent at page 155 wherein it was stated thus:

...It further transpires that the inter se disputes between the promoters of the respondent company are also fuelled by their interest and intention to participate in GGL. It is in fact the stand of the petitioner that given the circumstances under which the shareholders agreement stood frustrated, the very *raison d'être* for the participation of the respondent in GGL no longer stands. The petitioner is willing to buy the respondents shareholding in GGL and willing to pay a fair price for the same, and the petitioner believes that the respondent ought to transfer its shareholding in GGL in favor of the petitioner. These are however, all disputed issues which perforce would need to be resolved as per the arbitration clause (Clause 26) in the Shareholders Agreement. It is, however, imperative that pending such imminent arbitration proceedings, urgent interim orders are passed by this Hon'ble Court. Hence this petition.

267. Before this Court, the respondent has filed a reply on 13th October, 2006 wherein it has again stated that it is willing to buy the petitioner's shares in GGL at a fair market value and that it had filed an application for impleadment at the BIFR towards this end.

268. During the course of hearing, the respondent repeatedly stated that it was only willing to purchase the shares held by the petitioner in terms of the offers contained in the above communications. An oral offer made during the course of hearing on 21st November, 2006 by the petitioner to purchase the share holding of Guardian in GGL was answered by the respondent in their written submissions filed on 24th November, 2006 in the following terms:

n.) That Guardian has offered to buy MRL's shareholding in GGL at a valuation arrived at by ICICI Securities Ltd. and an application to this effect was also filed before the BIFR (see page 439), apart from request being made to the Financial Institutions which hold 44% of the shareholding in MRL (see page 527- 531). Throughout Guardian's discussions with MRL's Mr. V.K. Modi, the intention has always been for Mr. V.K. Modi to acquire GACL, GMDC and MRL's shareholding in GGL which would then be sold to Guardian (see page 522-525 especially the beginning paragraphs where meeting with Mr. V.K. Modi is discussed and then Mr. Modi's offer of sale at Rs. 60-65 is discussed). Never has there been any hint of MRL offering to purchase Guardian's shareholding in GGL " the very thought was preposterous given that MRL's net worth stood eroded and it was declared sick by the BIFR " nor was such an offer (to buy Guardian shares in GGL at Rs. 72.50 per share) ever made until the final day when arguments were addressed before this Hon'ble Court. Even then, no time limit was provided as to the payment to be made to Guardian in the unlikely even that the offer was acceptable to Guardian. It is submitted that Guardian is fully committed to its investments in GGL and is not a seller. This has been made clear even before the FIPB.

269. In a later portion of the submissions, the respondent has further submitted in para VI that "for the first time during the course of arguments before this Hon"ble Court that MRL has made an offer to buy Guardian's shareholding in GGL. Guardian will respond to this offer shortly. Guardian has serious doubts about the financial capability of MRL to make the payment, given that its net worth is eroded." The respondent had also stated that they harboured serious doubts about the financial capability of MRL to make the payment stating that its net worth is eroded.

270. After judgment was reserved in the matter on 12th November, 2006, the respondent filed I.A. No. 13512/2006 submitting that it had communicated acceptance of the offer made in court to the petitioner's counsel verbally on 28th November, 2006 and subsequently in writing on 30th November, 2006. It was stated that with the purchase of respondent's share holding in GGL by the petitioner, it was likely that all the disputes between the parties shall stand settled. On these submissions, the respondent made a prayer that these additional facts and events be taken on record and the matter be posted for an appropriate direction.

Notice was issued to the petitioner on this application who has filed a reply pointing out that the offer of the petitioner was rejected outright by the respondent in court which opposition was reiterated in the written submissions filed on 24th November, 2006. The petitioner has contested the claim of the submission made by the respondent submitting that its communication dated 30th November, 2006 is a conditional acceptance which has been replied by the petitioner by communication dated 8th December, 2006.

In its rejoinder, the respondent has referred to this course of events as "talks of settlement". The parties were heard on this application on the 15th of December, 2006 till which date no firm settlement was placed before this Court.

Therefore, so far as adjudication in the present matter is concerned, this Court is not required to go into this aspect any further as the fact remains that the parties had agreed that the term SHA would be so long as the parties held 15% shareholding (Clause 16) which they did on all material dates.

271. The present case is concerned with a joint venture by two legal entities to undertake a business for mutual profit. The expression "joint venture" came up for consideration before the Supreme Court in the judgment reported at New Horizons Limited and Another Vs. Union of India (UOI) and Others, . The Apex Court noticed that the expression "joint venture" is more frequently used in United States, and that it connotes a legal entity in the nature of a partnership, engaged in the joint undertaking of a particular transaction for mutual profit, or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by

agreement, to share both in profit and losses.

272. Undoubtedly, such an enterprise can best work in a situation of trust, confidence and comfort. Parties to joint ventures couch their bindings in stringent contractual convenience and complexities. The present case is an outcome of purportedly diminishing of confidence levels between two strong business partners; an example of one of the partners declaring complete loss of confidence even though admittedly the joint venture which they have undertaken is going stronger and there is not a single complaint against the other partner of mismanaging the affairs or disturbing the affairs is evident. So far as its contribution to the joint venture is concerned, both parties have placed strong reliance on the milestones achieved by GGL and its profitability and in fact, both parties are justifying their respective positions based on the financial health of the joint venture.

273. An important issue which has been drawn up in the present case relates to the manner in which the parties can effect termination of a joint venture. The complexities of the transactions appear to leave either party at the risk of opportunism by the other party. For this reason, it appears that the parties endeavored to protect against such uncertainty by providing stringent conditions and parameters within which the parties are to act. Contractual safeguards to ensure transparency in conduct and protection against arbitrary terminations are provided in the agreement which the parties entered into.

274. Joint ventures are intended to be strong alliances which allow the firms to tap resources of each other and thereby increase their own capabilities. Therefore, joint ventures fill a strong need for organisations as they enable organisations, to extend resources, acquire tacit resources and engage in forms of organisational and scientific learning. It is natural that as the firms' capabilities grow, it may no longer need the co-operation of its joint venture partner.

275. In the instant case, GGL and MRL entered into a joint venture for the obvious reason that the same was in their mutual interest. The parties agreed on the proportion of their contributions. Guardian was admittedly compensated for its technical contributions by the joint venture. From the facts noticed above, not only has GGL discharged all its financial liabilities towards the respondent but also is placed in a healthy situation so far as the financial reserves are concerned. It has been vehemently urged by both sides that GGL is a debt free company.

276. Undoubtedly, GGL has displayed technical, financial and managerial discipline. Guardian has been able to take the benefit of the experience of MRL's long standing and experience on the Indian industrial scene. Guardian has thus been successful in maintaining a joint venture in a culture which is totally dissimilar to its own experience in the USA. It has certainly gained from the experience, knowledge and contribution of MRL in India and derived profits from

the technical contribution made by it. In all the complaints made by Guardian in order to justify its action of termination, there is not even whisper of an allegation that either MRL or any of its constitutes or contractors have not fulfilled or have jeopardised GGL's business and functioning in any manner. Therefore, even while, MRL is facing problems within its organisation, however, the disputing factions have been able to put up a combined effort so far as business transactions involving GGL are concerned. Perhaps, having maximised production and profits, it could be stated that this case is an instance of opportunism at its best inasmuch as there is no dispute as to manner of conduct of the business of the joint venture and the joint venture partner is being abandoned after deriving commercial profits from the project while relying on the very agreement which the petitioner claims to rely upon.

277. At this stage, it becomes necessary to notice the several factors which indicate that even after 21st July, 2006, the respondent has treated the SHA to be subsisting and that its intent to set up the wholly owned subsidiary did not commence from its action in terminating the SHA.

The intention of the respondent to set up a wholly owned subsidiary without the participation of the petitioner, did not commence from issuance of a letter of termination dated 21st July, 2006 but is evident from the letter dated 17th July, 2006 whereby it attempted to obtain the consent of Gujarat Alkalis and Chemicals Limited to so set up a wholly owned subsidiary. The respondent has sought written consent of the petitioner to allow it to establish the wholly owned subsidiary by the letter of 21st July, 2006 in the first phase and in the second phase, a manufacturing plant with the glass coating facility with advanced technology. The very fact that the respondent has sought the consent of the petitioner by its letters dated 6th July, 2006 and 21st July, 2006 shows that such consent was being sought in terms of the SHA. The respondent in fact communicated the format in which it needed the no objection from the petitioner. In the petition filed by the respondent being OMP No. 337/2006, u/s 9 of the Arbitration and Conciliation Act, 1996, on 24th July, 2006, the respondent sought preservation of the shareholding pattern set out in Article 3(b) on Article of Association of GGL and also sought to enforce its pre-emptory rights of purchase of shareholding. Such pre-emptory right is not available under the Articles of Association but is available to the parties only under Clause 6 of SHA.

The respondent has sought a restraint order against the petitioner from transferring its shareholding in GGL without the petitioner's consent and without giving effect to Guardian's pre-emptory rights to purchase shares. Undoubtedly, such a right could be enforced only if the agreement is subsisting and binding upon the parties.

There is also no arbitration clause in the Articles of Association of GGL. The same is available only in the shareholder's agreement. The respondent pursuant to the arbitration agreement contained therein, has made a request for arbitration before the London Court of International Arbitration (LCIA) wherein it has sought

a declaration with respect to the validity of the termination of the agreement effected by it on 21st July, 2006 and release of its obligation under Clause 14 of the shareholders agreement.

Therefore, prima facie, the respondent remains bound by the terms of SHA and cannot avoid the same.

278. In the instant case, there is no dispute that the wholly owned subsidiary which is being complained of has not yet come into existence. The petitioner has set up a case of apprehended loss of business and goodwill which could not be quantifiable. It is also an undisputed fact that the validity of the very basis on which the entire case of the respondent rests, that is, its action of unilaterally terminating the agreement, has yet to be decided before the arbitrator.

In these facts, it cannot certainly be contended that the petitioner does not have a triable case or that interest of justice and equity are not in its favor. The petitioner is likely to be suffered irreparable loss and damage. The relief to which the petitioner would be entitled is preservative so as to preserve the subject matter of the dispute. The respondent has relied upon several covenants of the very agreement which it claims to have terminated and has sought adjudication upon the validity of the termination before the arbitrators. Pending such determination, the respondent cannot be permitted to proceed to conduct business which would amount to a breach of Clause 14 of the SHA whereby it is prohibited from conducting any business similar to that of the joint venture.

The submissions made by the respondent in is No. 13512/2006 have been taken on record and considered. The prayer made therein, Therefore, stands satisfied.

I, accordingly, allow OMP No. 477/2006 to the extent of prayers (a) and (b) and restrain the respondents, its affiliates or associates from participating, negotiating, engaging in or being financially interested, directly or indirectly in any other project for the manufacturing of Float Glass, or for the fabrication of products made from Float Glass, or for the sale, import/export of Float Glass or related products made from Float Glass in India. The respondent shall also stand restrained from taking any steps in setting up a wholly owned subsidiary in India for manufacturing in the same field as GGL.

So far as prayer (c) and (d) are concerned, the same shall abide adjudication in the writ proceedings which are stated to have been initiated by the petitioner.

This order shall operate till making of the Award by the Arbitral Tribunal.

It is made clear that this Court has only taken a prima facie view in the matter and nothing herein contained shall be considered as an expression of opinion or a finding on the merits of the dispute pending before the Arbitral Tribunal.