TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 03.06.2011

Petition No. 220 (C) of 2009

M/s Hathway Space Vision ..... Petitioner

v.

Vivekanand Rao ..... Respondent

221 (C) of 2009

M/s Hathway Space Vision ..... Petitioner

v.

Suresh Kambli ..... Respondent

222 (C) of 2009

M/s Hathway Space Vision ..... Petitioner

v.

Ranjit Mathur ..... Respondent

BEFORE:

HON'BLE MR.JUSTICE (RETD.) S.B. SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner	:	Mr. Arun Kathpalia, Advocate Mr. Nasir Husain, Advocate
For Respondent No.1	:	Mr.Maninder Singh Sr. Advocate Mr.NavinChawla,Advocate Mr. Sharath Sampath, Advocate
For Respondent No. 2 (Impleaded Party) Hathway Cable	:	Mr. Jayant K. Mehta, Advocate

J U D G E M E N T

These petitions, involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgement.

The factual matrix involved in the matter lies in a narrow compass.

We may notice the basic fact of the matter from Petition No. 220 (C) of 2009.

The petitioner is a firm (the said firm) constituted and registered under the Indian Partnership Act, 1932.

The terms and conditions are contained in the deed of Partnership dated 27.01.2005.

The partners of the petitioner firm are

(i) Hathway Internet Satellite Pvt. Ltd. (hereafter to be referred to as HISPL);

(ii) Binary Technology Transfers (Pvt.) Ltd. (hereafter to be referred to as BBTPL) and

(iii) Space Vision Cablenet (Pvt.) Ltd(Space Vision)

which are subsidiaries of Hathway Datacom Ltd.

The said Hathway Group of companies have 56% share and the Space Vision had 44% share in the said partnership.

According to the petitioner, the operations of the said firm were under the control and management of the partners of Space Vision. The respondents herein admittedly are partners of the said space vision.

The relevant clauses of the said agreement are:

"6. The net profits of the Partnership shall be divided between the parties in the following proportions:

1. Hathway Internet Satellite Pvt Ltd	*28%*
2. Binary Technology Transfers Pvt Ltd	*28%*
3. Space Vision Cabletel Pvt Ltd	*44%*

	100%

Losses including loss of capital, if any, shall be borne by HISPL and BTTPL only in such proportion as HISPL and BTTPL may mutually decide between them, however if no consensus is reached in this behalf, the losses shall be shared equally between HISPL and BTTPL.

....

8. The partnership shall use the name "Hathway" pursuant to a Name Licence Agreement to be entered into [Between Hathway Cable and Datacom Pvt Ltd and the Partnership] only, until such time as a party of the First Part shall remain a partner.

...

12. Proper books of account and all other books and accounts shall be maintained by the Partnership which shall always be kept at the place of business of the Partnership and each partner shall, at all times, have free access to and right to inspect the same in the business premises."

Indisputably, the First Respondent entered into a Consultancy Services Agreement wherein Hathway Cable and Datacom Pvt. Ltd. and Hathway Space Vision are the main parties. The Respondent No.1 in each case is a third party as

Hathway Cable and Datacom Pvt. Ltd. and Hathway Space Vision have been described as the parties thereto, whereasRespondent No.1 has been described as a consultant.

In lieu of Respondent No.1's services as a consultant, it was to be granted some commission.

We may notice some of the relevant clauses of the said Consultancy Agreement:

> *"1.14 "Space Operators" shall mean the Cable operators taking input feed from the M/s. Hathway Space Vision Control Room situate at 347/A United Chamber M.S. Ali Road, Next to Shalimar Theatre Grant Road, Mumbai 400007 for re-per transmission by the Cable Operators to the Space Subscribers as per List Annexed hereto.*
>
> *1.15 "Space Subscribers" shall mean the subscribers who subscribe to the Cable TV Services from Space Operators and pay the subscription charges to Space Operators and who avail Internet Services from Hathway and pay access revenue to Hathway.*
>
> *....*
>
> *3.1 Hathway shall pay to the consultant a consultancy fee of Rs. 31,250/- (Rupee Thirty One Thousand Two Hundred Fifty Only) per month (less Tax Deducted at Source). Provided now that Hathway shall appropriate and adjust the consultancy fee of Rs. 31,250/- (Rupee Thirty One Thousand Two Hundred Fifty Only) per month payable by Hathway towards the amount repayable by the Consultant to Hathway under the Loan Agreement dated 27.01.2001. The consultancy shall be subject to an increase of 25% per annum progressively.*

3.2 In addition to the Consultancy fees under Clause 3.1 Hathway shall pay to the consultant 1.25% of the Internet Access Revenue and 2.50% of the Digital set-top box service fee actually received by Hathway from Space Subscribers in respect of Internet Service and Digital set-top box service provided by Hathway to the Space Subscribers."

Another agreement was entered into by the parties hereto known as ISP Agreement, wherein the aforementioned Space Vision and Hathway Cable and Datacom Pvt. Ltd. are the main parties; whereas Hathway Space Vision has been described as a confirming party; Clauses 5.1 and 5.2 whereof read as under:

"5.1 Hathway shall during the subsistence of the agreement pay to the Cable Network Owner 20% of the Access Revenue received by Hathway from the customers in the territory or a sum of Rs. 100 (Rupees One Hundred Only) per paying Internet subscriber per month, whichever is more as an by way of license fee for the grant of exclusive licence in favour of Hathway under this presents after deducting TDS and the download charges under Clause 2.3, if any. Hathway will be liable to pay all the taxes, levies, duties, fees, or other charges levied, imposed or to be levied or imposed by any Government, Statutory Body or any Regulatory Authority on Hathway.

5.2 The above fees shall be paid / payable monthly in arrears, within ten (10) days after the end of each month. Hathway shall within ten (10) days after the end of each such month, deliver to the Cable Network Owner a statement of Access Revenue in respect of the month just ended."

The Petitioner contends thatRespondent No.1 in each of these matters was also acting as a local cable operator and in that capacity had been taking supply of signals from its networkbutdid not pay any charges therefor.

In the petition it is stated:

"C. The Respondent has had a long-standing relationship with the Petitioner in so far as the respondent is a director of a company known as the Space Vision Cabletel Pvt Ltd which company is a partner of the Petitioner Firm. The other two partners of the Petitioner firm namely Intre and Binary are also companies which are wholly owned subsidiary companies of Hathway Cable & Datacom Ltd. Since the year 2006, disputes and differences arose between the partners of the Petitioner Firm in relation to accounts of the Firm as well as other managerial disputes and all such disputes were referred to arbitration before the Sole Arbitrator Mr Justice S.P. Bharucha (Retd.) The arbitration is still pending.

D. In view of this very close and long-standing relationship between the Petitioner Firm and the Respondent there never was any written agreement executed between the Petitioner and the Respondent. The business relationship was treated more like a family relationship. In view thereof the agreement, understanding and arrangements between the Petitioners and the Respondents were oral and were not disputed at any point in time.

E. As per understanding and oral agreement/arrangement between the Petitioner and the Respondent, the Petitioner has been providing signals to the Respondent, for supplying the same to Respondents' subscribers. The Respondents' operational area being a CAS notified area, the Respondents are liable to collect the subscription charges from the end subscribers based on the maximum retail price for each channel/bouquet of channels of the respective Pay Broadcasters. The structure for the collection and payment of subscription charges in the CAS area is as follows..."

Admittedly, disputes and differences having arisen between the parties, (there is a controversy with regard to the period for which they arose) the same were referred to Mr. Justice (Retd.)SP Bharucha as aSole Arbitrator.

By an award dated 14.09.2009, the learned arbitrator dismissed both the Claim and the Counterclaim opining that the remedy of the parties, if any,was to file a suit for dissolution of the partnership and to have the accounts taken on the basis thereof.

It is not in dispute that the matter is pending adjudication before the Bombay High Court.

According to the petitioner invoices were raised and served on Respondent.Service of the invoices, however, is in dispute. It however stands admitted that there exists no proof of service thereof on the Respondent with the Petitioner.

The petitioner raised a demand for a sum of Rs. 38,26,963/-, by a notice dated 12.01.2009. In one of these matters namely, Petition No. 220 (C) of 2009, the said notice of the petitioner was replied to on or about 16.02.2009.

We would notice the said demand and reply thereto at an appropriate stage.

Inter alia on the premise that the respondents were supplied with Set Top Boxes (STBs)and signals were being transmitted which were being retransmitted to their subscribers not only for providing cable services but also internet services, this Petition has been filed claiming, interalia for the following reliefs:

> *"A. Direct the Respondent to pay to the Petitioners is a sum of Rs. 38,26,963.00 (Rs. Thirty Eight Lakh Twenty Six Thousand Nine Hundred Sixty Three Only) towards the Cable TV feed signal charges.*
>
> *B. Restrain the Respondent from migrating to any other competing MSO without clearing the outstanding dues and complying with the regulations and/or..."*

The Petitioner in Petition No. 221 (C) similarly has claimed a sum of Rs. 12,07,391/- and in Petition No. 222 (C) of 2009, a sum of Rs. 59,16,546/- against the respective respondents therein.

The Respondents, in their reply contended:

1. They being the shareholders of one of the partners of the petitioner firm, and, thus, being its integral part, an oral arrangement was entered into by the parties, in terms whereof signals were to be supplied free of cost to them, and, thus, these petitions are not maintainable.

2. No invoice has ever been served upon the Respondent nor at any point of time prior to the aforementioned legal notice any demand was raised.

3. The Respondents, on the other hand, are entitled to accounts from the Petitioner as a huge amount is owing and due from it towards commission in terms of the aforementioned agreements dated 27.01.2001 and 29.08.2002.

4. The Hathway Group of Companies, which constitute the majority share, in fact, are the alter ego of their holding company namely Hathway Cable and Datacom Pvt. Ltd.

5. Like the Respondent No.1, the said Hathway Cable and Datacom Pvt. Ltd. also had been receiving free signals for their own network and in that view of the matter, it cannot be said that Respondent No.1 has made itself liable to pay any subscription fees.

The Respondent No.1, filed an application for rejection of the plaint purported to be under Order VIIRule 11 (d) of the Code of Civil Procedure, 1908 (the Code) which was rejected by an Order dated 11.02.2010, stating:

"It may be that ultimately the petition will fail, but as it makes out a cause of action, no case has been made out to reject the petition at this stage.

Merit of the matter, except in a very exceptional case can be gone into while determining an application under order 7 Rule 11 of the code of Civil Procedure.

At this stage the Tribunal will have to proceed on the basis that the allegations made in the petition are correct. The matter might have been different, had the petition even if given face value and taken to be correct in

its entirety would have disclosed no cause of action. It is now also well known that inter se dispute between the parties would by itself be not a bar for initiating a proceeding against a third party.

We, therefore, are of the opinion that no case has been made out for exercising our jurisdiction under Order VII Rule 11(d) of the Code of Civil Procedure."

The respondent, as noticed heretobefore not only filed a reply but also filed a counterclaim. A reply to the said counterclaim has also been filed.

A large number of issues were framed by an Order dated 30.06.2010. Keeping in view the fact that the counterclaim has also been made against the Hathway Cable and Datacom Pvt. Ltd., it was also directed to be impleaded as a party (Respondent No.2) by an Order dated 10.08.2010.

It has also filed its reply to the counterclaim.

The Petitioner in support of its case examined Shri Kanishk Singh, its DGM (Accounts).

The Respondent No.1, in each of these cases examined themselves.

The Respondent No.2 however has not examined any witness.

Mr. Kathpalia,learned counsel appearing on behalf of the Petitioner, urged:

1. The respondent No.1, being merely a shareholder in 'Space Vision', was not entitled to free supply of signals as from a perusal of the

partnership deed, it would appear that no such term is contained therein.

2. The Hathway Group of partners, having not been carrying on any cable operation business being neither a MSO nor a Cable Operator, it is wholly unlikely that the directors of the third partner would be given benefits which were not available to the other partners.

3. The Petitioner admittedly had been paying the requisite charges to the broadcasters even for the consumers of the Respondent No.1 and supplied STBs and in that view of the matter it would not be correct to contend that the Petitioner had entered into any special arrangement with the broadcasters in that behalf particularly when no such document has been brought on record.

4. The supply of signals being in a CAS area and,thus,being governed by the Regulations, it is preposterous to contend that the broadcasters would not know which subscribers had been receiving signals from which of the LCOs and would not know even the address of the owners of the STBs.

5. As the rights of the parties flowed from the deed of partnership, any contention raised contrary to or inconsistent with the terms thereof shall be hit bySections 91 and 92 of the Indian Evidence Act.

6. The contentions of the Respondent that their names do not appear in the Application for Grant of Permission filed by the petitioner before

the Ministry of Communications,Information and Technology, (Department of Telecommunication) cannot be accepted as:

(i) the same would be contrary to the deed of partnership,

(ii) rights and liabilities arise only out of the said instrument,

(iii) *admittedly they are supplying signals and charging fees therefor from their customers*

7. In a case of this nature it is wholly irrelevant as to whether an agreement in writing had been entered into by and between Petitioner and Respondent No.1, as the latter had been receiving the subscription fees from their subscribers, and, thus, it cannot deprive the MSOs of its rightful share under the Regulations.

8. From the materials brought on record it would appear that the accountant examined on behalf of the Respondent,Shri. Glen Jacinto is their Manager-Accounts.

9. In law, the Respondent cannot claim any share of profit of more than 44% and if the contention of Respondent No.1 is accepted, they will be having more share in the partnership business.

10. From the evidence of Mr. Kanishk Singh it would appear that so far as the Hathway group of partners are concerned, their income was nil as it would appear from the profit and loss statement in asmuch as they are merely investment companies.

11. Invoices were raised as Respondent No.1 was not entitled to free supply of signals and particularly in view of the fact that it does not say as to what was wrong with the same.

12. The Respondents having prevaricated their stand from time to time is not entitled to any relief, so far as their counterclaim is concerned.

13. From the cross-examination of the witness for the Respondent No.1 Mr Vivekananda Rao, it would appear that he has accepted that Respondent No.1 has 200 subscribers in respect of Cable TV and 500 to 550 customers of internet services but despite the same,no subscriber details having been placed on record, an adverse inference should be drawn.

14. From the other materials bought on record, it would appear that the management of the Petitioner Firm as also the control over the employees were entirely in the hands of the Respondent.

Mr. Maninder Singh and Mr. Naveen Chawla, learned counsel appearing on behalf of the Respondent No.1, on the other hand, submitted:

1. From a perusal of the petition itself it would appear that according to the Petitioner, the causes of action for the petition was:

   (a) threat of migration

   (b) it has never maintained any accounts

   (c) *no invoice at the relevant point of time was raised*

2. The understanding between the parties cannot be kept confined to the partnership agreement as it did not provide for grant of signals free of cost or otherwise.

3. Admittedly no agreement for grant of signal having been signed, it is wholly unlikely that the Petitioner would continue to supply signals to the Respondent although from the materials bought on record, it would appear that the disputes and differences between the parties arose at least in 2003 or 2004 and not from 2006.

4. The petitioner admittedly, having not maintained any books of accounts so far as Respondent No.1 is concerned, it must be inferred that the supply of signals were free of charge.

5. Although in a CAS regime, the invoices must be based on the Customer's Request Form and other records electronically maintained and in view of the fact that no such Customer Request Form has been produced, it is absurd to suggest that any invoice had been raised.

6. From the bare perusal of the invoices filed by the Petitioner, it would appear that they are forged and fabricated documents.

7. The legal notice of the Petitioner dated 12.01.2009 having been replied by the Respondent No.1 in Petition No. 220(C) of 2009 contending that the supply of signals were made free of cost, no explanation has been offered as to why the Petition has been filed only in November, 2009.

8. Despite the fact that in its rejoinder to the reply,Petitioner denied the receipt of the said letter dated 16.02.2009, its witness has accepted that the same has been served.

9. In its rejoinder to the reply,Petitioner having not controverted the contents of the said letter dated 16.02.2009, the same should be held to be admitted.

10. In a post advent CAS Scheme, free supply of signal is not prohibited and in fact Petitioner had entered into arrangements with the broadcasters by entering into packages for supply of signals to the customers in bouquets,one of which contained 62 channels and the other 25 channels.

11. From the materials brought on record, it would appear that Hathway Cable and Datacom Ltd. started having direct connectivity although it originally did not have any.

12. The Respondent being entitled to commission in terms of the Consultancy Agreement as also the Internet Agreement from the Respondent No.2 through the petitioner, it is bound to render accounts.

13. So far as the contention of the Petitioner that Respondent No.1 had 200 cable TV subscribers and 500 to 550 of Internet subscribers are concerned, in view of the aforementioned agreement they had the direct connectivity through the local cable operators to the extent of 200 connections for which Respondent No.1 is entitled to 20%

commission and so far as the internet connection is concerned it was entitled to get a Commission of 1.25% and from a perusal of the cross-examination of the witness of Respondent No.1 it would appear that two different questions had been put in relation to two different types of services as the number of customers for both different types of services could not have been mixed up.

14. From a perusal of the invoices, the receipts whereof are denied and disputed, it would appear that even opening balance is Nil and there are calculation mistakes with regard to 25% of the revenue share in the invoice of February 2007.

15. From the requisition slip raised in October 2008, it would appear that some adjustments are being made only against theSTBs.

16. From the balance sheet of the Hathway group of companies, it would appear that auditors have noticed in the balance sheet dated 01.4.2003 that issues have been raised by the minority shareholders and no issue having been raised by the majority shareholders, it is evident that Respondent No.1had the requisite knowledge thatPetitioner had been receiving supply of signals free of cost.

In support of the aforementioned contentions, Mr Manidar Singh has relied upon,*Ramji Dayawala & Sons (P) Ltd. v. Invest Import*, reported in (1981) 1 SCC 80.

17. In a case of this nature this tribunal would be entitled to lift the corporate veil as in effect and substance,the Respondent No.2 controls the Hathway group of companies which are nothing but its alter ego and in that view of the matter in a proceeding of this nature, a counterclaim would be maintainable against theCo-Respondent as also the Petitioner.

Mr Jayant Mehta, the learned counsel appearing on behalf of the Respondent No.2, however, submitted:

1. The counterclaim filed by the Respondent No.1 as against a Co-Respondent being contrary to or inconsistent with the statements made in the Petition, the same is not maintainable.

2. The Respondent No.1 itself has not pressed two out of three items of Counterclaim, namely arrears towards consultation fees and rent for the premises on the ground that in relation thereto this Tribunal has no jurisdiction, the same must be dismissed.

3. So far as the ISP Agreement is concerned, from a perusal of the Petition it would appear that the claim has been made against only the Petitioner and not against Respondent No.2, and, thus, it must be held that the Respondent No.2 has unnecessarily impleaded as a party in thesePetitions.

4. In any event, Respondent No.2 being not a service provider, this Tribunal cannot adjudicate any dispute for enforcement of the ISP agreement also.

5. In any view of the matter, keeping in view the settled law that a counter claim is not maintainable against a Co-defendant, the same is liable to be dismissed.

6. In any view of the matter the claim having been made from 2002, the impugned demand ex-facie is barred by limitation.

7. It is incorrect to contend that in a case of this nature, the doctrine of 'piercing the corporate veil' should be invoked as agreements have been entered into by and between the parties hereto in separate capacities.

The principal questions which arise for consideration in these petitions are:

1. Whether the Respondent was entitled to receive free signals purported to be under the deed a partnership dated 27.01.2001 or otherwise?

2. Whether the claim of the Petitioner is barred by limitation?

3. Whether the claim and counterclaim of Respondent No.1 against Petitioner and/or Respondent No.2is maintainable?

4. Whether the claim as thecounterclaim are barred by limitation?

5. Whether Respondent No.1 has made out any case for accounts from Petitioner?

6. Whether for all intent and purport,Petitioner is an alter ego of Respondent No.2 and for the said purpose the corporate veil of the majority partners of Petitioner should be pierced?

Execution of the deed a partnership dated 27.01.2001 is not in dispute.

It is also not in dispute that in terms of the said deed of partnership, *stricto sensu* any of the partner is not entitled to supply of signal either for consideration or without consideration.

Although Respondent No.1 in each case of these cases claim supply of signals of the channels of Petitioner free of cost as its partners, we are of the view that legally the same is not tenable.

In the aforementioned factual backdrop, whether entering into a separate agreement/arrangement with the directors of Space Vision without reference to the partnership deed is permissible in law is the question.

It is conceded at the bar that the same is not prohibited by any statutory provision. If that be so, it is idle to contend that so far as the admitted arrangements for supply of signals to the Respondent No.1 from the network of the Petitioner is concerned, the same has anything to do with the partnership

agreement. It is one thing to say that a partner claims the right under a partnership deed but it is another thing to say that the directors of a partnership company enters into distinct arrangement(s) with the partnership firm which per se has nothing to do with the terms of the deed of partnership.

Illegality of such a contract has not been pleaded. Effect of such an arrangement also has not been pleaded.

Indisputably there is no written agreement. Admittedly again the Respondent No.1in each case has been taking supply of signal for its own direct subscribers since 2001.

The area of operation of the Petitioner being extensive, it must have been maintaining its books of accounts. It must have a large number of LCOs.

Those LCOs, again presumably would be having a large number of subscribers. Keeping in view the fact that supply of signals was to be effected in the CAS area, the invoices were required to be raised by the LCOs on the basis of the Customer Request Forms. The broadcasters are also required to be paid the stipulated charges on the basis thereof.

There are certain disturbing features in these matterswhich must be noticed at the outset.

1. Admittedly the Petitioner has not been maintaining any books of accounts, nay, any accounts whatsoever so far as Respondent No.1 is concerned.

2. Even in its Application for Permission applied to the Ministry of Information and Broadcasting in terms of Rule 11 of the Cable Services Network Rules, 1994 in the prescribed form namely 'Form 6', the name of Respondent No.1 has not been shown as a LCO.

3. Although concedingly, disputes and differences between the parties arose if not in the year 2003 but at least in the year 2004, there was absolutely no reason as to why invoices were not raised, books of accounts were not maintained and notices of demand were not served upon Respondent No.1.

4. No explanation has been offered as to why despite non-payment of any subscription fee, no action was initiated for termination of the arrangement in terms of Clauses 4.1 and 4.3 of 2004 Regulations.

5. No explanation has also been offered as to why despite amendment in the 2004 Regulations in the year 2009 whereby and whereunder Clause 4A was inserted, Petitioner did not insist on entering into an agreement in writing with Respondent No.1.

6. No explanation has also been offered as to why in various documents the outstandings as against 1st Respondent have been shown to be nil.

7. The Petitioner is said to have been making payments to the broadcasters also in relation to supply of signals to Respondent No.1, although according to the latter,it had entered into separate arrangements with the broadcasters in respect of those connections.

On the aforementioned backdrop of events, we may notice the documentary evidences brought on record by the parties.

Before however adverting thereto, we may consider a preliminary objection with regard to adduction of oral evidence which is raised by Mr Kathpalia, namely that the same is barred under Sections 91 and 92 of the Indian Evidence Act.

Section 91 of the Evidence Act forbids adduction of evidence in proof of the terms of a contract except the document itself or secondary evidence of its contents.

The said provision provides for certain exceptions and explanations.

Explanation 3 appended to Section 91 reads as under:

"Explanation 3. - The statement, in any document whatever of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact."

We would refer to Clause 7 of the partnership deed in this regard, while considering the counterclaim of the Respondent No.1.

Section 92 provides for exclusion of any such document in a case where the terms of any contract is required by law to be reduced to the form of a document and the same has been proved.

What is prohibited is the evidence of any oral agreement or statement as between the parties to such instrument by the representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms.

Provisos (ii) and (iv) appended thereto read as under:

"Proviso (2) - The existence of any separate oral agreements to matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not his proviso applies, the Court shall have regard to the degree of formality of the document.

....

Proviso (4) - The existence of any separate oral agreement, constituting, a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property, is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents."

It bears repetition to state that Respondent No.1 claims the right as a partner of the Petitioner but there is no gain saying that an arrangement between

the Petitioner and Respondent No.1 whether as a partner or in the individual capacity is not the subject matter of the deed of partnership.

We, therefore, fail to see any reason as to how Sections 91 and 92 of the Indian Evidence Act are relevant for our purpose.

Mr. Kathpalia relies upon a decision in *Dinkerrai Lalit Kumar v. Sukhdayal Rambilas* reported in AIR 1947 Bom 293, wherein it has been held as under:

> *"3. .... Once the parties reduce the terms of their contract into writing, the Court can only look at the writing alone in order to construe what the terms of the contract were. It is hardly necessary to say that what the terms of the contract between the parties were cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did -subsequent to the contract."*

In *Motilal Singh and Ors. v. Mt. Fulia and Ors.* reported in AIR 1958 Pat 68, whereupon again Mr Kathpalia places reliance it is stated:

> *"It is clear that under proviso (1) evidence may be adduced to prove want or failure of consideration. This is, however, totally distinct from the amount of consideration. If in fact the amount of consideration also could be proved by oral evidence to be otherwise than what was stated in the document, there was no reason why the legislature omitted this from proviso (1). A statement in a document that a consideration has been paid is really a recital in a deed and does not constitute one of the terms of the contract, But the amount of consideration is obviously a term of the sale deed and, therefore, it is not open to a party to prove a variation in, the amount of consideration."*

The said decisions referred to a decision of the Privy Council in*Maung Kyin v. Ma Shwe Law*reported in AIR 1917 PC 207, wherein also a similar law has been laid down.

We have, however, no doubt in our minds that the oral arrangement is in regard to the supply of signals to Respondent No.1 from the network of the Petitioner being not covered by the Partnership Agreement, the question of applicability of the provisions of Section 91 and 92 of the Indian Evidence Act does not arise.

Sub rules(1) and (2) of Rule 11 of the Cable TelevisionNetworks Rules, 1994 read as under:

> *"**11. Grant of permission to multi-system operators to provide cable services with addressable systems in the notified areas.-***
>
> *(1) No multi-system operator shall provide cable television network services with addressable systems in any one or more notified areas without a valid permission from the Central Government under sub-rule 3 of rule 11.*
>
> *(2) Every multi-system operator who desires to provide cable television network services with addressable systems in any of the notified areas, shall, within thirty days of the issue of the notifications under section 4 A of the Act by the Central Government, apply for permission to the Ministry of Information & Broadcasting in Form 6 annexed to these Rules, along with processing fee of rupees ten thousand."*

Clause 15 of the 'prescribed form' reads thus:

> *"15. Total no. of each of local cable operators and subscribers covered (attach list of local cable operators with their telephone nos./fax nos./E-mail*

IDs and the number of subscribers each of the cable operators has with him.)"

The consequence for violation of the said provision is laid down in Rule 11 (7) of the Rules in the following terms:

"(7) In the event of a violation by a multi-system operator of one or more of the terms and conditions of the permission granted under sub-rule (3), the Central Government may suspend or revoke such permission for such period and for such notified areas as deems fit: Provided that no such order of suspension or revocation shall be made without giving a reasonable opportunity to the multi-system operator to explain its position."

There is absolutely no reason as to why the Petitioner would intentionally omit to disclose the names of Respondent No.1, in the said form. The reason therefor is not far to seek. It, if we may say so, was with a view to supress some facts deliberately from the statutory authorities.

We may notice the following from the cross-examination of the Petitioner's witness, Mr. Kanishk Singh:

"Invoices is generated by Magnaquest (MQ) for Hathway Cable and Datacom Ltd. and its subsidiaries and joint ventures for CAS area.

Q. Are payments made to the petitioner by Hathway Cable and Datacom Ltd. and its subsidiaries and joint ventures on receipt of the invoices?

A. Invoices are generated for each and every subsidiary of the joint-venture in their respective capacities and the payments, which are collected from the customers, are deposited in the account of the joint ventures.

No payments are made to the petitioner firm by Hathway Cable & Datacom Ltd and its subsidiaries & joint ventures."

If the contention of Petitioner is correct,then it is difficult to understand as to on what account, an invoice would be generated for each and every subsidiary of the joint-venture in their respective capacities and the payments would be collected from the customers and deposited in the account of the joint-venture. It is also difficult to comprehend as to how any payment can be made by Hathway Cable and Datacom Private limited and its subsidiaries and joint ventures.

Admittedly Shri Glenn Jacinto was an employee of Petitioner. He has deposed on behalf of the Respondent.

He, in his evidence in regard to his job responsibility stated as under:

"Q: What were your job responsibilities?

A: While working with the petitioner, my job responsibilities were to look after the accounts along with Mr Rajesh Choudhary. We used to distribute the invoices to the LCOs which were sent by Hathway Cable and Datacom office at Kamla Mills by hand delivery or by Registered AD and then collecting the feed charges from the LCOs except the primary subscribers of the partner companies, the Directors and the parent company Hathway Cable."

It is true that the Respondent No.1 in its reply raised a contention that Hathway had 12,000 direct connectivity which has not been proved but then the fact remains that the signals used to be supplied by Hathway, the essential

components of a CAS system are maintained by Hathway. It would therefore be Hathway which should claim payments from Petitioner and others and not the other way round.

Coming now to the purported invoices said to have been issued by petitioner, the first invoice is of January 2009.

The registered office of the Petitioner is at 347A, United Chambers, MS Ali Road, next to Shalimar Theatre, Mumbai-7. It is situateon the ground floor of the said building, the first floor whereof is occupied by Respondent No.1.

Indisputably, the Respondent No.1 is owner of the building. The first invoice, however, was allegedly sent from Raheja's, Fourth Floor, Corner of Main Avenue, VP Road, Santa Cruz (West), Mumbai. It is not the registered office of Petitioner.

The invoice was raised not in the name of Respondent No.1 but in the name of one 'Vishu' of Space Vision. The invoice is said to have been raised on the basis of the details furnished at Pages 14 to 25 of the petition namely only the accounts number and software charges. The details do not contain any CRF, any hardware form, any description of the account holders or what are the names and addresses of the customers.

No details, thus, have been set out for claiming a sum of Rupees 32,88,877.87. Even the number of the STBsor who had activated the STBs have not been mentioned.

The second invoice is for the month of February. It only contained the details of computer generated sheets containing only the account numbers and service charges at Pages 27 to 38. The third invoice is at page 52. It contains the names of more than 800 persons. It was for the month of April 2009.

According to Mr Kathpalia, Respondent No.1 had 900 subscribers whereasaccording to the Respondent No.1, it merely stated that it had a subscriber base of about 200. It is, however not disputed that the Internet and cable TV subscribers were to be serviced on the same cable. The Respondent No.1 in its letter dated 6th February, 2009 stated that out of the said list, 274 were not its customers.

The Respondent No.1 contends that the said invoices were received only along with a copy of the petition and not any time prior thereto. Our attention has been drawn to the cross examination of Mr. Vivekananda Rao by Mr Kathpalia to contend that the said witness admitted that he had about 500 subscribers for his internet connection and about 200 subscribers for cable TV network.

The said questions were put a little differently to the said the witness, which as rightly pointed out by Mr. Manindar Singh might have created confusion.

In answer to one of the questions namely the internet connection, he replied that he had 500 to 550 of Internet customers, and 200 customers in his network so far as cable TV is concerned.

However, we have noticed heretobefore that the parties had entered into a consultancy agreement. In terms of Clauses1.14, 1.15, 3.1 and 3.2 thereof,Respondent No.1was to receive commission from Hathway to the extent of 1.25% of Internet Access Revenue for rendition of his service as a consultant. It is, therefore, possible that the Internet subscribers referred to by him in his cross examination relate to the said Consultancy Services Agreement dated 27th January 2001.

We, however, must also place on record that apart from him, Respondent No.1of the other petitions, i.ePetition No. 221 and 222 did not refer thereto.

We also noticedheretobefore that the parties have entered into another agreement being agreement dated 29th August 2002 in terms whereof also the Respondent No.1 was to get 20% commission from Hathway.

The Petitioner, in its rejoinder has also enclosed a few more invoices purported to be for the month of February 2007.

In those invoices the registered office of the Petitioner has not been shown. The sum total of the amounts mentioned therein was mentioned to be Rs. 27,322.82 but the amount mentioned therein is 24,343.00 towards 25% revenue

share. The opening balance being the total dues for the month has been shown to be nil,and, thus, evidently no amount was payable till that date.

So far as the requisition slip is concerned, the Petitioner in its rejoinder made the following statements:

> *"It is hereby submitted that as recorded in the consultancy Agreement the consultancy amount was disbursed to the Respondent on month-on-month basis. However due to the breach of non-compete clause as mentioned in the said Agreement the Petitioner as well as Hathway Cable and Datacom Ltd were left with no choice but to terminate the Agreement .....*
>
> *Even the Respondent had failed to clear the outstanding towards the Set Top Box charges. After persistent follow-up, a small amount against the Set Top Box outstanding was adjusted/deducted against the Internet commission payable to the Respondent by Hathway Cable & Datacom Limited as* ***Exhibit-"D""***

In support of the said statement, a requisition slip was annexed to the rejoinder by reason whereof an adjustment was sought to be made from the STB charges payable by Respondent No.1.

Therein, commission payable to Respondent No.1 for a sum of rupees 1,59,179 and DIST Commission for a sum of Rs. 4,30,446 are said to have been adjusted in the month of October, 2008.

Even therein, the outstanding sum of the operator in CATV books as on date has been shown to be nil.

We may also notice that Mr Kanishk Singh in his cross-examination, categorically stated that there is no written proof of service of invoices upon Respondent No.1. In his deposition, he stated:

"Q. Is there any mandatory requirement to give 25% of the revenue share by way of profit of the cable operators?

A. The mandate is that the 25% is the minimum; there being no upper limit. It is incorrect to suggest that the invoices filed by the petitioner are false and fabricated.

Q. Have you taken acknowledgement from the respondent so far as the service of the invoice is concerned?

A. In these cases, we have not taken any acknowledgement from the respondent in view of the long-standing relationship between the parties.

Q. According you, the dispute between the parties arose in 2006; when CAS was introduced in 2007, the disputes were still pending. Did you send the invoices under registered post the respondent?

A. All the invoices were served hand delivery. Invoices being too bulky, it was not possible to be sent by registered post.

Q. How many pages would be there in a month's invoice?

A. 15-20 pages.

Attention of the witness is drawn to page 827.

Q. Is in the format of Internet commission?

A. Yes.

Q. Is it correct that even as per you there is no due of the respondent in CATV books as on October, 2008?

A. Outstanding was there but the same was not mentioned as statement of account was not maintained for the period.

Q. Had you asked for outstanding payment from the respondent prior to October, 2008 by any letter or separate requisition form?

A. Yes. However, the same is not placed on record.

It is incorrect to state that no outstanding has been mentioned in the requisition form as there was no outstanding."

An invoice can be raised only if an account is maintained.

Mr Kathpalia conceded that if the Petitioner had been following the mercantile system of accounting, each invoice has to be accounted for the purpose of the payment of Income Tax. The witness, however, is categorical in his admission that no books of account so far as Respondent No.1 in each of these caseswere being maintained till then.

It is difficult to comprehend that even aninvoice could be raised without CRF in a CAS system. It will bear repetition to state that no CRF has been filed.

Shri Kanishk Singh in his affidavit has annexed a schedule forming part of the accounts in the audit report; paragraph 5 of "Notes on Accounts" whereof reads as under:-

"5. The Company and one of his fellow subsidiaries the majority partners and Messrs Hathway Space Vision. There are disputes and claims with reference to management of the firm between the Company, the fellow subsidiary and their holding company on one side and the minority partner, on the other

side. The accounts of the said firm have not been finalised from 01st April, 2003. The minority partner has raised certain issues with regards to accounts of the firm for the earlier years also. The matter has been referred to arbitration. The Company based on legal advice has not made any provision towards claims raised by the minority partner of the firm and are considered as claims against the Company not acknowledged as debt."

Yet again in the next year's audited account it is stated:

"4. The Company and one of its fellow subsidiaries viz. Hathway Internet Satellite Pvt. Ltd. are majority partners in a partnership firm namely M/s. Hathway Space Vision. The aforesaid majority partners of the firm have initiated legal action against the minority partners viz. Space Vision Cabletel Pvt. Ltd. with reference to some management and operational issues. The majority partners and the Company have lodged certain claims against the minority partners. Pursuant to Order passed by High Court dated 22nd March 2005, the matter was referred for the arbitration before Justice S. P. Bharucha (Retd.) An award has been passed by Justice S. P. Bharucha (Retd.), on 14th September, 2009 dismissing all claims as well as counter claims. Pursuant to dismissal of claim under arbitration, on 7th October,2009 the majority partners have filed a petition before Bombay High Court under section 9 of Arbitration and Conciliation Act seeking extension of restraining Interim Orders dated 12th May 2004 and 22nd March 2005 passed by the Hon'ble High Court against the minority partners. High Court has been pleased to extend the said restraining Interim Order. On 5th November 2009 the majority partners have filed an Appeal before the Bombay High Court under section 34 of Arbitration and Conciliation Act, challenging the award dated 14th September 2009. The same is pending for hearing. Pending the Arbitration, On 2nd March 2009, the majority partners have also filed an Petition before the Bombay High Court seeking the Interim relief for appointment of court receiver in order to carry out the activity of collection

of subscription from the customers / operators. The same is also pending for hearing. The Company based on legal advice has not made any provision towards claims raised by the minority partner of the firm and such claims are frivolous in nature and are considered as claims against the Company not acknowledged as debt."

Whereas in the first audited account, the issues are said to have been raised by the minorities, in the latter the claims raised by the minorities are stated to have been frivolous. However,neither any claim norany issue has been raised by the Petitioner against theSpace Vision.

We need not seriously consider the submissions of Mr. Manindar Singh that the petitioner entered into separate arrangement with the broadcasters and for the said purpose, the parties had entered into special packages known as 'Dhoom Package' and 'Double Dhamaka Package'. But ex facie, it is evident that the invoices do not reflect the correct state of affairs.

It may incidentally also be noticed that after September 2009 no invoice has been raised. Mr. Manidar Singh may be correct in his submissions that although a legal notice was served on 12.01.2009, why this petition has been filed in September 2009 has not been explained, particularly when limitation was running.

In any event, the period of limitation governing this case will be three years from the date of filing of this petition, and, thus a major part of it would be barred by limitation.

Mr. Kathpalia would urge that it is for that reason, the claims have been confined to 3 years, that is from 2006, when the CAS regime started.

It is, therefore, established that despite the fact that disputes and differences arose between the parties, no claim was raised from 2001 to 2006. If it is correct that Respondent No.1 had not been asked to pay any amount whatsoever despite the fact that Petitioner had been paying the charges to the broadcasters even in respect of their subscribers, it probably was necessary to show the change in circumstance after CAS regime came into force.

The CAS regime came into force in 2007. Even at that point of time keeping in view the regulatory regime, it was obligatory on the part of the Petitioner to insist on entering into an agreement in writing. Books of Accounts were also required to be maintained. Why despite change in the regime the oral arrangement was allowed to continue is beyond our comprehension.

The contract between the parties, must, in a situation of this nature be deciphered by their conduct. It is now a well settled principle of law that the terms of the contract can be found out from the trade practice as also the conduct of the parties.

It may be true that even for the purposes of the arriving at a conclusion as to whether a contract has been entered into by and between the parties or not,

the exchange of letters between them, their subsequent conduct would play some role.

The decisions of the Supreme Court of India as also other decisions which had been relied upon by Mr. Nasir Hussain also point out to the said fact. We may notice some of the said decisions.

In ***Clear Media (India) Pvt. Ltd. v. Union of India & Anr***., Petition No.248 (C) of 2009 decided on 9th July, 2010 upon noticing some decisions of the English courts and other authorities on the law of contract, it was held that:

> *"It is in the aforementioned situation, the subsequent conduct of the respondent attracting the doctrine of 'Estoppel by Convention' is required to be considered.*

In ***Hathway Cable and Datacom Ltd v. Neo Sports Broadcast Pvt. Ltd***., M.A No. 91 of 2009 in Petition No. 209 (C) of 2008 decided on 14.12.2010, this Tribunal has held as follows:

> *"It may be true that even for the purpose of arriving at a conclusion as to whether a contract had been entered into by and between the parties or not, the exchange of letters between them, their subsequent conduct would play a great role."*

We have noticed heretobefore that there exists a regulatory regime.

If that be so, it was expected of the parties not only to raise invoices at regular intervals, particularly in view of Clause 3.3 of the Regulations, but also to

maintain books of accounts. It is difficult to conceive a situation that the Petitioner which is the part of a big MSO having a Pan India presence would not maintain books of accounts even for the purpose of payment of taxes.

If the books of accounts were to be maintained, the accounts of Respondent No. 1 in each of these cases were also required to be maintained in ordinary course of business.

The Petitioner, it will bear repetition to state, has admitted in the petition itself that no books of accounts in ordinary course of business were being maintained so far as Respondent No. 1 is concerned. The reason was stated to be was good family relations.However admittedly, the alleged good relation between the parties came to an end. Disputes and differences between them began surfacing, if not for earlier at least from 2003. Allegations and counter allegations were made. The disputes were referred to a learned arbitrator. The matter is still pending before the Bombay High Court.

It is, therefore, wholly unlikely that some sort of arrangements had not been entered into by and between the parties hereto.

It is also difficult to accept that the entire onus was on the Respondent No.1 to prove the same.

It may be true, that having regard to the provisions of Section 70 of Indian Contract Act, a party to a quasi contract must restore the benefit received from

the other party. It is, however, not a case where supply of any goods or services were made by way of a mistake and/or in respect of the goods which were *stricto sensu* not the subject matter of the contract.

If the contention of the Petitioner is correct, that an agreement had been entered into in terms whereof the Respondent No. 1 was to be treated as a Local Cable Operator and the consideration for supply of signals to its network was fixed, the question of invoking the principles of quasi contract as envisaged under Section 70 of the Indian Contract Act would not arise.

It is true, that the Respondent No. 1has not been able to establish that the Respondents and/or its subsidiary companies had connectivity to the extent of 12,000. But then, from the materials bought on record by the parties, the Respondent No. 2 having independent connectivity cannot also be brushed aside.

In a situation of this nature, whether Respondent No. 2 or any of its subsidiary companies had direct connectivity and/or the number of its subscriber could have been ascertained,had Petitioner produced its books of accounts?

One of the prime circumstances which negates the contention of Petitioner that a separate agreement had been entered into is non mentioning the name of Respondent No. 1 in its application for permission in terms of 1995 Act.

Why such a deliberate omission had been made is not known.

Even in cross-examination, the witness of the Petitioner stated:

> *"Q. Does the 3rd partner, Space Vision sign on the balance sheet of the petitioner or the agreement with the broadcaster?*
>
> *A. No, the other partners being in majority, they sign.*
>
> *It is incorrect to suggest that the balance sheet has not deliberately been filed as the names of the respondent do not appear therein.*
>
> *Vol. in the balance sheet, the names of the debtors does not appear.*
>
> *It is correct that the petitioner has not mentioned the name of the respondent in the list of LCOs filed by it in the MSO application under the Cable TV Act. The same was not mentioned by mistake and there are number of other LCOs, whose names also did not appear but they were receiving signals."*

Mr Kathpalia has drawn our attention to the cross-examination of the Respondent No. 1 in each of these cases which are to the following effect :

> <u>Petition No. 220 (C) of 2009</u>
>
> *"... We do not make any payment to the Broadcasters for signals availed for my personal points.*
>
> *Vol. They are free of cost.*
>
> *There is understanding of the petitioner with the broadcaster that they will not make payments for the signals availed by me and Hathway's direct points. The broadcasters were paid for the subscription amounts collected from the operators.*
>
> *There is no understanding as stated above in writing with the broadcasters."*
>
> *....*

Q. Can you show from the document if there is any term for providing free signals from the petitioner to you as a cable operator.

A. There is no such term

Vol. I am not a cable operator. I am an MSO. I am the partner of the petitioner. I had requested Hathway at the time of entering into partnership deed to incorporate the terms for free signals, however, Hathway refused saying that there is an understanding between the partners for free signals no clause/term is required to avoid tax liability.

Q. Whether you have stated the aforesaid fact in your affidavit or in your reply.

A. I can not read and understand English properly. I can read English a little bit. But I have told my advocate about the aforesaid facts."

Petition No. 221 (C) of 2009

"I had entered into an agreement in the year 2001 with the petitioner.

It is correct that there is no term or clause in the agreement entered with the petitioner that signals be provided free of cost.

Volunteers: We had asked them whether we partners need to pay for the signals but the petitioner said that the signals to be free for all the partners.

....

I cannot show from any documents that the signals will be provided free of cost by the petitioner."

Petition No. 222 (C) of 2009

"Q. Could you tell us whether your partnership deed anywhere stipulates that the partners of the petitioner would get signals from the petitioner free of cost?

A: I do not remember what is written in the partnership deed.

Volunteers: there was however an oral commitment.

Before the agreement was executed there was a meeting in the office of Hathway at SantaCruz where amongst others Mr Jayaraman, Mr Rajan Raheja and Mr Milan Karnik and Mr. Praveen Shikende along with myself and Mr Vivekananda on behalf of Space were present. At the meeting a commitment was made that the partners of the petitioner would receive signals free of cost. I requested the representatives of Hathway that since other agreements are to be executed this should also be reduced into the agreement. However, I was told that since the connectivity of the partners varied and as there was tax implications this commitment would not be put in writing in the agreement. (Objected to)"

The aforementioned evidence brought on record do not lead to an inference that Respondent No. 1 either expressly or impliedly made himself bound itself to make payments towards the feed charges. In fact the conduct of the parties clearly go to show that no such charges were payable.

The counterclaim has been made by the Respondent No. 1originally against the Petitioner but later, the Respondent No. 2 has been impleaded as a party.

A counterclaim ordinarily against a Co-Defendant is not maintainable. There are ample authorities for the proposition.

See *Udhavdas Tyagi v. Srimurti Radhakrishna Mandir* reported in (2001) 4 CCC 443, *Kulwant Singh v. Gurcharan Singh and Ors.* reported in AIR 2003 Punjab and Haryana 1, *Sahebrao Vithoba Pawar v. Bapurao Ravji Pawar* reported in AIR 1985 Bombay page 426, *Barthels and Luders GmbH v. M.V. `Dominique`* reported in AIR 1988 Bombay 380.

In *Ramesh Chand Ardawatiya v. Anil Panjwani*reported in (2003) 7 SCC 350, the Supreme Court of India held as under:

> ***"28.*** *..... A refusal on the part of the court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.*
>
> ***29.*** *The purpose of the defendant which was sought to be achieved by moving the application dated 2-5-1995 under Order 8 Rule 6-A CPC was clearly mala fide and an attempt to reopen the proceedings, including that part too as had stood concluded against him consequent upon rejection of his application under Order 9 Rule 7 CPC. Fortunately, the trial court did not fall into the defendant's trap. If only the trial court would have fallen into the error of entertaining the counter-claim the defendant would have succeeded in indirectly achieving the reopening of the trial in which effort, when made directly, he had already failed. There being no written statement of the defendant available on record and the right of the defendant to file the written statement having been closed, finally and conclusively, he could not have filed a counter-claim."*

Mr Manindar Singh and Mr Naveen Chawla however would urge that keeping in view the requisition slip, there cannot be any doubt or dispute that it was the Petitioner through whom the commissions in terms of the

aforementioned two agreements namely consultancy agreement and IPS agreement were payable. Only because for certain reasons in one of the requisition forms, some adjustments are purported to have made by the Petitioner from the STB charges, the principal liability of the Respondent No. 2 cannot be wiped off.

Mr Manindar Singh himself has relied upon a decision of the Supreme Court of India in ***Rohit Singh v. State of Bihar***, reported in (2006) 12 SCC 734 wherein it has been held as under:

> ***"21.*** *Normally, a counterclaim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But, it appears to us that a counterclaim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the suit. But a counterclaim directed solely against the co-defendants cannot be maintained. By filing a counterclaim the litigation cannot be converted into some sort of an interpleader suit. Here, Defendants 3 to 17 had no claim as against the plaintiff except that they were denying the right put forward by the plaintiff and the validity of the document relied on by the plaintiff and were asserting a right in themselves. They had no case even that the plaintiff was trying to interfere with their claimed possession. Their whole case was directed against Defendants 1 and 2 in the suit and they were trying to put forward a claim as against the State and were challenging the claim of the State that the land involved was a notified forest in the possession of the State. Such a counterclaim, in our view, should not have been entertained by the trial court."*

The said decision is therefore an authority for the proposition that principally a counterclaim should be against a plaintiff and not against a co-defendant.

In this case in terms of the agreement, the Respondent No. 2 was liable to pay the commission and not petitioner.

Mr Manindar Singh, however, has relied on a decision of the Kerala High Court in *Sarojini Amma v. Dakshayini Amma* which prima facie appears to be contrary to a decision of the Supreme Court of India.

A claim against a partner in terms of the provisions of the partnership agreement and/Or against a third party stand on different footings. Disputes and differences may arise between the partners during the continuance of the partnership. Stipulations made therein may be enforced. Duties and obligations, whether express or implied in case of every partnership may also be enforced.

There can be a suit for partial account. A suit for accounts shall lie,also when one of the partners desires to get the partnership firm dissolved. The matter relating to taking of the accounts would, however, arise only in one of the above circumstances. A person without asking for adjustment of general accounts cannot sue for only the amount payable to it. If, the commission was payable under a different agreement, the same cannot be enforced against a third party and/or the other partners in the same suit. For the purpose of a general

account, special circumstances must exist. A clear case of departure from a general rule must be made out. It is also not a case where Respondent No. 1 has only been excluded or expelled from the partnership by its other partner(s) and the partnership being for a fixed term has not expired. We may notice that whereas according to Petitioner, the partnership was for a period of 10 years and thus has expired, according to Respondent No. 1 the same is still in force.

In any event, the matter is pending consideration before the Bombay High Court. Whether the arbitrator can go into the question of accounts without the dissolution of the partnership firm is pending consideration before the it.

We do not think that in a situation of this nature, where the counter claim itself is not maintainable, any discussion is necessary on the doctrine of lifting the corporate veil. Moreover, the question as to whether a third party is a necessary party or not should be determined having regard to the fact situation involved therein.

Mr Manindar Singh has, however relied upon a decision of this Tribunal in *Wire & Wireless India Ltd. v. MSM discovery Pvt. Ltd.*, Petition No. 29(C) of 2010 disposed of on 16th December 2010. In that case, some decisions of the Supreme Court of India were noticed, but they were found to be not applicable to the facts of the case.

Reliance has also been placed on *Jai Narain Parasrampuria v. Pushpa Devi Saraf*reported in (2006) 7 SCC 756 wherein it was held:

> ***"50.*** *In Kapila Hingorani v. State of Bihar this Court opined: (SCC p. 19, para 25)*
>
> > *"25. It is now well settled that the corporate veil can in certain situations be pierced or lifted. The principle behind the doctrine is a changing concept and it is expanding its horizon as was held in State of U.P. v. Renusagar Power Co15. The ratio of the said decision clearly suggests that whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefor."*
>
> *[See also Union of India v. Playworld Electronics (P) Ltd., State of U.P. v. Renusagar Power Co. and Yukong Line Ltd. of Korea v. Rendsburg Investments Corpn. of Liberia (No. 2).]"*
>
> ***51.*** *The application of the said doctrine becomes relevant in view of the fact that in the memorandum of association of the Company Sarafs alone were shown to be the subscriber members of the Company. In the article of association they were naturally inducted as the first Directors. Subsequently, they included their son as a Director; and it was all the three of the Directors who executed the agreement for sale. There had, thus, been no shareholder except Sarafs. Since they had been attempting to use the personality of the Company for furthering their own personal object, the doctrine of lifting the veil is applicable. They did so in furtherance of their dishonest and fraudulent design. They in fact were the alter ego of the Company. It was, therefore, impossible for them to take a different stand vis-à-vis the interest of the Company."*

The said decision also, in our opinion is not applicable to the facts of the present case as here Respondent No. 2 is not to be treated as an alter ego of the Petitioner or vice versa.

Reliance has been placed by Mr Jayant Mehta on *P.C. Agarwala v. Payment of Wages Inspector, M.P.* reported in (2005) 8 SCC 104 and *Karnataka State Financial Corpn. v. N. Narasimahaiah*reported in (2008) 5 SCC 176 (2008) 5 SCC 176.

In Karnataka State financial Corporation (supra) the Supreme Court opined:

> ***"41.*** *A surety may be a Director of the company. He also may not be. Even if he is a close relative of the Director or the Managing Director of the company, the same is not relevant. A Director of the company is not an industrial concern. He in his capacity as a surety would certainly not be. A juristic person is a separate legal entity. Its veil can be lifted or pierced only in certain situations. (See Salomon v. Salomon and Co. Ltd., Dal Chand and Sons v. CIT, Juggilal Kamlapat v. CIT and Kapila Hingorani v. State of Bihar)"*

None of the exceptions noticed in the decisions referred to therein exist in the instant case.

In *P.C. Agarwala*(Supra) it has been held:

> ***"22.*** *The doctrine of lifting of the veil has been applied, in the words of Palmer, in five categories of cases: where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to*

certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duty and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control, and in the law relating to trading with the enemy where the test of control is adopted (Palmer's Company Law, 20thEdn., p. 136, now p.215, 24th Edn. 1987). In some of these cases judicial decisions have no doubt lifted the veil and considered the substance of the matter."

It has been further observed:

***"23. .....** Broadly, where fraud is intended to be prevented, or trading with the enemy is sought to be defeated, the veil of the corporation is lifted by judicial decision and the shareholders are held to be "persons who actually work for the corporation"*

For the reasons aforementioned, it must be held that no case has been made out for invoking the doctrine of lifting the corporate veil.

For the reasons aforementioned, we are of the opinion that subject to the decision rendered by the Bombay High Court, no case has been made out for either allowing the claim petition or the counterclaim. They are dismissed accordingly.

In view of the divided success, the parties shall pay and bear their own costs. **....**

S.B. Sinha, J
(Chairperson)

.....

G.D. Gaiha

(Member)

.....

P.K. Rastogi

(Member)