IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5795 OF 2024

M/s. Mobile Arts S.A.L. .. Petitioner

Versus

M/s. Mauj Mobile Private Ltd. .. Respondent

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- Mr. Pankaj Mehta, Advocate for Petitioner.
- Mr. Kunal Mehta a/w. Ms. Riti Gada i./by Dua Associates for Respondent.

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CORAM : MILIND N. JADHAV, J.

DATE : SEPTEMBER 02, 2024.

JUDGMENT:

1. Heard Mr. Pankaj Mehta, learned Advocate for Petitioner and Mr. Kunal Mehta, learned Advocate for Respondent.

2. Present Writ Petition challenges the impugned judgment dated 25.01.2024 passed by the City Civil Court at Mumbai in Summons for Judgment No.152 of 2023 in Commercial Summary Suit No.316 of 2022. By the impugned judgment dated 25.01.2024, Trial Court has dismissed Summons for Judgment filed by Petitioner who is Plaintiff before the Trial Court and granted unconditional leave to defend to Respondent who is Defendant before the Trial Court.

3. Facts necessary for adjudication of the present case are as follows:-

3.1. Petitioner is a Company incorporated and registered in Lebanon and is engaged in the business of providing variants of digital advertising services. Respondent is a private limited company engaged in the business of media in India and involved in computer related activities and is a premium content market place for entertainment and edutainment.

3.2. Admittedly Petitioner and Respondent executed agreement nomenclatured as Media Sales Insertion Order dated 15.01.2019 wherein Respondent agreed to avail digital advertising services from Petitioner in regard to its brands viz; 'Gamesbond' and 'Video Vogue' and parties decided that the terms of service and charges would be determined by parties via e-mail.

3.3. Subsequently, as per agreed terms and charges Petitioner provided digital advertising services to Respondent and raised three invoices for the services provided viz; invoice dated 03.07.2019 for amount of USD $38,560.30; invoice dated 13.08.2019 for amount of USD $59,834.34 and invoice dated 05.09.2019 for amount of USD $22,181.79, which were duly received and acknowledged by Respondent by e-mails dated 30.05.2019, 28.06.2019, 31.07.2019 and 06.08.2019.

3.4. It is an admitted position by both parties that out of the total amount of the first invoice dated 03.07.2019, amount of USD

$10,001.60 was paid by Respondent to Petitioner. Regarding balance payment, Respondent agreed to repay the same alongwith interest as stipulated in the agreement.

3.5. As Respondent failed to clear the balance payment along with interest, Petitioner through their Advocate addressed notice dated 09.05.2020 calling upon Respondent to clear the outstanding dues of USD $110,574.83.

3.6. On 20.05.2020, Respondent addressed e-mail to Petitioner to settle the outstanding dues and on the same day it was agreed between parties that Respondent would clear outstanding dues of Petitioner by paying monthly installments of USD $20,000.00 over a period of six (6) months and in lien thereof interest of 6% on the same was waived of by Petitioner.

3.7. On 21.05.2020, Respondent informed Petitioner by email that it was undergoing financial constraints and crisis and was on the verge of liquidation. On 22.05.2020, Respondent addressed email to Petitioner that in the event Petitioner did not accept Respondent's offer of settlement of one time payment of $ 20,000 against the outstanding liability, then it would take them several years in Court for getting a favourable judgment and hence they should accept their offer. Correspondence has been exchanged between parties thereafter which I have adverted to in detail later in the judgment.

3.8. In view of the above, on 09.10.2020 Petitioner filed Application for pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 (for short "**the said Act**") in the Trial Court. As Respondent failed to appear for mediation, on 09.10.2021, Trial Court issued a non-starter report dated 09.10.2021. Thereafter, Petitioner filed Summary Suit being Commercial Suit No.316 of 2022 in Court seeking recovery of outstanding dues of USD $115,550.69 alongwith interest @ 6% per annum from the date of filing of the Suit till realization of the entire amount.

3.9. On 26.09.2022, Trial Court issued writ of summons to Respondent and the same though initially remained unserved, was admittedly served on Respondent on 24.03.2023, pursuant to which Respondent filed appearance through its representative.

3.10. On 30.06.2023, Petitioner filed Application for Summons for Judgment No. 152 of 2023 in the Trial Court. On 10.07.2023, Respondent sought time to file reply to Summons for Judgment on the ground of taking inspection of documents from Petitioner. Trial Court permitted inspection of documents on the same date and matter was adjourned for judgment to 20.07.2023.

3.11. Respondent did not file reply within the prescribed time to the Summons for Judgment. Respondent filed Notice of Motion No.2605 of 2023 for condonation of delay in filing reply to Summons

for Judgment and the same was allowed by Trial Court subject to payment of costs of Rs.5,000/- by order dated 29.08.2023. Thereafter, Respondent filed reply to Summons for judgment and Trial Court after hearing both sides passed the impugned judgment dated 25.01.2024, thereby dismissing Summons of Judgment filed by Petitioner while granting unconditional leave to defend to Respondent.

3.12. Hence, the present Petition.

4. Mr. Pankaj Mehta, learned Advocate for Petitioner would submit that the Trial Court committed a grave error in questioning the validity of the admitted agreement between parties as the same was neither disputed nor challenged by Respondent. He would submit that there is another erroneous finding recorded by Trial Court regarding non-filing of certificate under Section 65B of the Indian Evidence Act, 1872 for authenticating the e-mail communications exchanged between parties, despite the emails having been annexed to the Suit plaint, that they were referred to and relied upon and even admitted by Respondent also at the time of arguments.

4.1. He would submit that Trial Court ought not to have granted unconditional leave to defend to Respondent in the facts of this case, considering delay on the part of Respondent in filing reply to Summons for Judgment within the stipulated 10 day period and in view of Petitioner having *prima facie* established the suit claim. He

would submit that impugned order is passed with complete disregard to the provisions of Sub-Rule 5 of Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 (for short "**CPC**") as Respondent did not raise any probable defence which could be deemed sufficient for grant of unconditional leave to defend the suit considering the admitted facts in the present case. According to him, the Summons for Judgment ought to have been made absolute in the facts of the present case.

4.2. For immediate reference, Sub-Rule 5 of Order XXXVII, R. 3 of CPC is reproduced herein below for reference and convenience:-

> *"(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:*
>
> *Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that has has a substantial defence to raise or that the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:*
>
> *Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."*

4.3. In support of his above submissions, he has relied on the following decisions of this Court as well as various other High Courts:-

(i) ***Jatin Koticha Vs. VFC Industries Pvt. Ltd.***[1];

(ii) ***Flick Studios Pvt. Ltd. Vs. Gravity Entertainment Pvt.***

1 2008 (2) Bom CR 155

Ltd.[2];

(iii) *Jyotsna K. Valia Vs. T. S. Parekh and Co.*[3];

(iv) *Pradeep Sadashiv Pavgi and Ors. Vs. R.S. Luth Education Trust and Ors.*[4] and

(v) *State of Gujarat Vs. Union of India*[5].

4.4. In view of the above, he would urge that the judgment dated 25.01.2024 passed by the Trial Court be quashed and set aside.

5. ***PER CONTRA,*** Mr. Kunal Mehta, learned Advocate for Respondent in support of the impugned judgment dated 25.01.2024 would submit that claim of Plaintiff is false and liable to be dismissed. At the outset, he would submit that the suit itself is not maintainable as a Summary Suit since the copy of board resolution filed by Plaintiff does not bear the office rubber stamp. He would submit that Respondent has filed affidavit in reply for seeking leave to defend and to oppose Summons for Judgment before the Trial Court. He would submit that services of Plaintiff Company were engaged by Defendant for advertising purposes for customer acquisition of its products and services under the Media Sales Insertion Order dated 15.01.2019 and it was to cover countries like UAE, Oman, Egypt etc. He would fairly submit that Defendant made part-payment of USD $ 10,001.60 to Plaintiff Company but has denied the contents of the suit plaint and

2 CM(M) No. 1185 of 2021 decided on _____
3 2007 (3) Bom CR 772
4 2008 (1) Mh.L.J. 919
5 R/Special Civil Application No.737 of 2018 decided on 07.05.2018

sought unconditional leave to defend due to subsequent agreement between parties exchanged by emails. He would submit that the original agreement between parties did not refer to any contents to ascertain the exact nature of transaction between parties and / or the rates agreed between them for providing advertising services to Defendant and thus the said agreement is not legally enforceable. According to him, Trial Court has correctly held that Respondent is entitled to unconditional leave to defend.

5.1. Next he would submit that Plaintiff Company did not file the mandatory certificate under Section 65-B of the Indian Evidence Act, 1872 in support of the electronic mails allegedly referred to in the suit plaint and relied upon by Plaintiff and therefore in view of denial of Plaintiff's case, Defendant is entitled to unconditional leave and a trial. Hence he would submit that the impugned judgment granting unconditional leave to defend the suit has been correctly passed. In support of his submissions, he would refer to the decisions in the case of **Black Diamond Trackparts Pvt Ltd & Ors. Vs. Black Diamond Motors Pvt. Ltd**[6] and **Pradeep Sadashiv Pavgi & Ors. Vs. R.S. Luth Education Trust & Ors**[7] to contend that the Media Sales Insertion Order, the contentious contract in the present case which is basis of the suit claim does not provide for the contents and details of contract, *inter alia*, pertaining to rights and obligations of parties and therefore this Court

6 2021 SCC OnLine Del 3946
7 2008(1) Mh.L.J. 919

cannot take into consideration the said Agreement as a contract resultantly leading to any outstanding payment due and payable by Defendant.

5.2. On the merits of the matter, he would draw my attention to page Nos. 65 to 67 which is the correspondence of emails exchanged between the parties. He would submit that on 20.05.2020, Defendant addressed an email to Plaintiff, *inter alia*, stating that both parties agreed that Defendant will pay USD $ 20,000/- against the outstanding amount to settle Plaintiff's account and after that payment, there shall not be any liability on Defendant. In that email, Defendant called upon Plaintiff to confirm back so that the issue can be discussed with its management for approval and sharing of payment plan. Next he would draw my attention to email dated 21.05.2020 addressed by Plaintiff to Defendant wherein it is stated that parties have misunderstood each other and that Defendant would pay $ 20,000 per month for six months to the Plaintiff. He would therefore submit that the impugned judgment be upheld and Writ Petition be dismissed as a triable issue has been raised.

6. I have heard Mr. Pankaj Mehta, learned Advocate for Petitioner - Plaintiff and Mr. Kunal Mehta, learned Advocate for Respondent - Defendant and perused the pleadings and record with their able assistance. Pleadings and submissions shown and made by

both the learned Advocates have received due consideration of the Courts.

7. At the outset, it needs to be reiterated and stated that Defendant has not denied the agreement between the parties i.e. the Media Sales Insertion Order dated 15.01.2019. By virtue of this agreement, Plaintiff's services were engaged by Defendant for digital advertising with respect to its various products, brands and branches on digital media platforms. In respect of services that were engaged by Defendant, it is seen that after providing the said services, Plaintiff raised three invoices viz. invoice dated 03.07.2019 for an amount of USD $38,560.30; invoice dated 13.08.2019 for an amount of USD $59,834.34 and invoice dated 05.09.2019 for an amount of USD $22,181.79. It is seen that thereafter Defendant has admittedly paid to Plaintiff USD $ 5,000 on 14.01.2020 and another tranche of USD $ 5000 on 05.02.2020 against the first outstanding invoice No. 1805. Thus, it is seen that after this partial remittance, there has been cecession of payment by Plaintiff resulting in substantial outstanding balance amount of USD $ 110,574.83 due and payable by Defendant to Plaintiff under the 3 invoices. By virtue of the terms and conditions agreed between parties, admittedly on delayed payment interest @ 6% per annum is required to be paid by Defendant. Thus together with interest on the date of filing of Summary Suit in the Trial Court,

Defendant was required to pay the sum of USD $ 115,550.69, including interest due and payable by Defendant.

8. Correspondence between the parties in this case after the agreement is crucial. There is no denial by Defendant of the Media Sales Insertion Order i.e. Agreement which is appended at Exh. C to the Petition between the parties. It is accepted and admitted. One of the crucial condition of payment as stated in the agreement is that the Advertiser (Defendant herein) must settle the invoices, free of any tax, within 30 days of receiving them, by transfer into the account of the Plaintiff detailed therein. It also clearly envisages payment of interest @ 6% per annum by Defendant. One of the term and condition is that the Advertiser must provide final figures, either via an accessible platform or via email, for each month's activity, no later than 7 days after its end and if there is an error in the figures sent by the Advertiser, the Defendant in this case would send its detailed logs with its invoice and the advertiser would have 7 working days for review. Thereafter any difference with the advertiser's logs was to be reconciled in 7 working days and it categorically records that any dispute by Advertiser to the figures of Defendant must be presented by documentary evidence, otherwise the invoice shall stand. Once this Media Sales Insertion Order is executed, Defendant is bound by its terms and conditions. What is seen is that there is adequate

correspondence between parties thereafter which is appended from page No. 46 onwards once the Defendant was unable to clear the invoices. The dispute in the present case pertains to non payment of amounts raised by the invoices for the services provided to Defendant. Substantial and adequate correspondence in the form of emails is placed before the Court by Plaintiff, *inter alia*, which shows due acknowledgment of having provided services to Defendant. It is seen that email dated 20.05.2020 sent by Defendant to Plaintiff states that Defendant was committed to settle the account of Plaintiff and that Defendant will pay USD $ 20,000 against the outstanding to settle the account and after that payment there shall be no liability on Defendant. At this stage it needs to be noted that the outstanding amount was USD $ 115,550.69. Defendant in this email called upon Plaintiff to confirm back so that he can discuss with its management for approval and share the payment plan. Immediately on the next day i.e. on 21.05.2020, there is email addressed by Defendant to Plaintiff at 8:06 AM which states that Defendant Company is on the verge of closure and there are no funds. This email specifically states that Defendant can only pay $ 20,000 in 6 installments of $ 3.33K each month and that is what was agreed upon yesterday i.e. on 20.05.2020. To the aforesaid two emails addressed by Defendant, Plaintiff has replied on 21.05.2020 at 11:30 hrs by stating that parties have misunderstood each other and what was understood by Plaintiff

was that Defendant will pay $ 20,000 per month for six months. It is categorically stated by Plaintiff that they will go to Court as they would have no any other option in that case. The reason why these three emails which are appended at page Nos. 66-67 are crucial and critical is because of the precursor emails exchanged between the parties which are appended at page No. 68 onwards. These emails categorically prove that the total outstanding amount discussed between parties on the basis of invoices was 110,574.83 $ USD. Though at one point of time, Plaintiff has also agreed that if the aforesaid amount was paid within a period of six months, Plaintiff would not claim 6% interest but if was not paid, then Plaintiff will have right to claim interest if the period exceeds 6 months. It is also seen from the emails exchanged between parties that Defendant Company had major revenue loss which has led to the closure of the Company. There is one particular email which is appended at Exh. O, page No. 70 of the Petition addressed by Defendant to Plaintiff. This email is addressed on 22.05.2020 at 09:00 AM by Defendant which reads as under:-

> *"Please understand the Mauj situation. They don't have money to pay you and I am not sure whether they will exist after 3 months or so.*
>
> *Going to Court may not lead you to anything...court processing and verdict will take years...I am afraid if court verdict in your favour and the company doe s not exist then who will you recover the money from.*
>
> *Knowing all these facts, I think you should at least accept that Mauj could pay at the moment."*

8.1. Reference to "Mauj" in the above email is to Defendant in the present case. From the above correspondence which is referred to, it is clear that there is a clear acknowledgment of the debt due and payable by Defendant but it is only on account of financial constraints that Defendant is not able to pay. Thus there can be no denial of the transaction between the parties as also the Media Sales Insertion Order i.e. contract between the parties.

9. In the present case, it is clearly seen that Defendant has failed to file its say within the prescribed time frame pursuant to service of suit summons on 24.03.2023. In such facts and circumstances all that the learned Trial Court ought to have seen was the aforementioned correspondence which was placed by Plaintiff. This correspondence clearly proves that the contents of the agreement and the services provided by Plaintiff to Defendant. Defendant has neither the invoices nor the services received. The invoices have thus become payable under the contract. Once that is the case, finding returned by the learned Trial Court in paragraph No. 10 that the exact nature of transaction between the parties cannot be ascertained from the contents of the agreement is clearly an incorrect finding. The Media Sales Insertion Order clearly refers to publisher information in detail. Thereafter it refers to campaign information, payment terms and rate / budget as also the start / end date to be determined by the

parties by email. Said instructions in the contract / order relate to cancellation period. Bank details have been furnished in the contract along with authorization. Terms and conditions of the contract clearly envisage liability of the advertiser and the provider. There is no denial of the fact that thereafter services of Plaintiff were not received by Defendant. On the contrary, there is enough correspondence between the parties appended to the Petition itself and admittedly in the plaint that services of Plaintiff were availed by Defendant and Defendant has made part payment and Defendant has also acknowledged the delay. Some of the correspondence between the parties has been referred to herein above while referring to emails exchanged between the parties. In that view of the matter, there is no doubt or ambiguity with respect to requirement of any further details to ascertain any legally enforceable agreement between the parties.

10. Though, Mr. Kunal Mehta would argue that if the Court is not willing to sustain the impugned order, then necessary corollary would be to permit Defendant to defend the suit proceedings by directing Defendant to deposit the entire outstanding amount before the Trial Court. In a given case, if there would had been any ambiguity or discrepancy with respect to the rights and obligations between Plaintiff and Defendant, Mr. Kunal Mehta would have been right. However in the present case accepting Mr. Kunal Mehta'

submission would not be fair and in the interest of justice. Facts in the present case are so strong that learned Trial Court ought to have had taken cognizance of the same. Once there is no denial on the part of Defendant with respect to the contract and the outstanding amount due and payable for the services which have been availed and received by Defendant, there is no reason as to why Defendant should be given any opportunity to defend the suit proceedings. Defendant's case for non payment of outstanding amount is clearly based on its own financial constraints and the fact that Defendant Company has faced a closure. This is evident in the correspondence and emails exchanged by the Defendant with Plaintiff and which is on record and is not denied. Once that is the case, there is no reason for allowing Defendant to defend the suit proceedings at all.

11. With respect to the reasons regarding non-filing of certificate under Section 65-B of the Indian Evidence Act, 1872 in respect of the various correspondence of electronic emails exchanged between the parties is concerned, Mr. Pankaj Mehta would draw my attention to the fact that the said certificate has been produced and he would also place a copy of the said certificate before this Court. This ground may not be relevant since both the learned Advocates have extensively referred to and relied upon the emails which have been exchanged between the parties while arguing the present Writ Petition before me,

rather Mr. Kunal Mehta has heavily relied upon the emails exchanged between the parties to show that it was agreed by Defendant that it would pay USD $ 20,000 against the entire outstanding amount to settle its account with the Plaintiff. What is seen is that to this stand adopted by Defendant the Plaintiff has not consented. It was Defendant's own unilateral stand. Rather the Plaintiff has clarified its stand on the next day itself. Therefore Defendant's case that it was agreed between parties that Defendant will pay USD $ 20,000 against the entire outstanding amount cannot be accepted at all. Once the desired certificate under Section 65-B of the Indian Evidence Act is produced on record, there can be no reason to discard the emails exchanged between the parties which have been placed on record. In that view of the matter, it cannot be held that there is no *prima facie* proof by Plaintiff in support of its claim. On the contrary, Plaintiff has given more than adequate *prima facie* proof in support of its claim for the Summons for Judgment to be made absolute. Learned Trial Court in paragraph No. 11 of the impugned judgment has clearly held that defence of the Defendant is not specific and this is in fact a correct finding. The fact that Defendant has not denied receiving of advertising services from Plaintiff is evidently clear from the correspondence exchanged between the parties. In this view of the matter and the observations made with respect to the findings given herein above, Summons for Judgment deserves to be made absolute.

12. In view of the above observations and findings with respect to the twin findings given by the learned Trial Court, Defendant is not entitled to any leave to defend the present Suit proceedings. Though learned Trial Court states that Defendant is entitled to unconditional leave, in view of my rejection of both the twin findings by recording the aforementioned reasons, Defendant is not entitled to any conditional leave in the facts of the present case.

13. In view of the above, impugned judgment dated 25.04.2024 is quashed and set aside. Summons for Judgment No. 152 of 2003 is made absolute.

14. Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

RAVINDRA MOHAN AMBERKAR

Digitally signed by RAVINDRA MOHAN AMBERKAR
Date: 2024.09.16 17:47:34 +0530