

Maxx Moblink Pvt. Ltd. Vs. Pickle Advertisement Pvt. Ltd.

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Court : Mumbai

Decided On : Jan-20-2014

Judge : N.M. Jamdar

Appeal No. : Arbitration Petition No. 679 of 2013

Appellant : Maxx Moblink Pvt. Ltd.

Respondent : Pickle Advertisement Pvt. Ltd.

Advocate for Pet/Ap. : Ms. Sadh

Judgement :

Oral Judgment:

1. By this Arbitration Petition under section 34 of the Arbitration and Conciliation Act, 1996 the Petitioner challenges an Award of the sole Arbitrator dated 03 July 2012,
2. The Petitioner is a private limited company in the business of marketing and trading of mobile phones with related accessories, and customer services. The Respondent is also a private limited company engaged in the business of advertising and consulting for promoting and advertising products.
3. On 10 August 2009 an agreement came to be executed between the Petitioner and the Respondent. It was styled as Company / Agency Agreement. The

Petitioner appointed the Respondent as an agency of its advertising consultant for its brand:

œMaxx Moblink Communication Ltd.?. The agreement was to come into effect on 10 August 2009. It was to remain operative unless and until terminated. The Respondent was to provide service as an advertising agency for promotion of Petitioner's brand, more particularly, making recommendations on the positioning and marketing of the Petitioner brands across TV, print, radio, billboard, hoardings/ point of sale and cinema etc. The Respondent was placed under an obligation not to accept fresh advertising account for directly competitive products. The agreement contained a clause for charging of retainer fees which later on became a bone of contention between the parties. This clause will be reproduced subsequently in this order.

4. The agreement provided that Respondent will raise its invoices in respect of retainer fee. Clause 9 dealt with the termination, inter-alia, stating that the agreement will be terminated by either of the parties by giving 60 days written notice. The rights, duties and responsibilities of both the parties were to continue in full force and effect during the period of notice. In the event of dispute, the matter was to be referred to Arbitrator. Jurisdiction was to be vested in the courts in Mumbai. There were certain other clauses which are not germane to the present controversy.

5. Disputes and differences arose between the parties and the Respondent invoked the arbitration clause by its notice dated 5 April, 2011. Thereafter, the Respondent filed a arbitration petition under section 11 of the Act in this court. This court by order dated 20 January 2012 appointed Justice F. I. Rebello, former Chief Justice of the Allahabad High Court as an Arbitrator to decide the dispute between the parties.

6. The Respondent filed its statement of claim before the learned Arbitrator. The case pleaded by the Respondent was that the Petitioners were to pay a sum of Rs. 6,25,000/- per month as retainer to the Respondent. The Respondent completed substantial work for the Petitioner, through several experts and executives. During the discussions about increase in the retainer fee, the

Managing Director of the Petitioner agreed to increase the fee of Rs. 10,00,000/- per month for the month of July 2010 and Rs.16,00,000/- per month for the month of August 2010 onwards. According to the Respondent it had prepared revised draft agreement, however, in the meanwhile the Respondent had already raised invoices and debits for Rs. 6,25,000/-. The Respondent claimed that the Petitioner terminated the agreement on 20 August 2010, as per the terms of the agreement, notice period for termination which commenced on 20 August 2010, came to end on 20 October 2010. Accordingly, the Respondent prayed for an amount of Rs. 47,29,176/- including the principal amount of Rs. 45,81,000/- comprising of retainer fees at the rate of Rs.6,89,375/- per month (inclusive taxes) for the month of April, 2010 to September 2010 and proportionate amount of Rs. 4,44,758/- for the period between 01 October 2010 to 20 October, 2010.

7. The Petitioners filed their Say before the Arbitrator and contested the claim made by the Respondent. It was the case of the Petitioner that no amount or claim is due post 31 March 2010 and the Respondent failed to produce any evidence for the work done till August 2010, as alleged. It was the case of the Petitioner that the agreement was terminated as the work of the Respondent was not satisfactory. Before the Arbitrator both the parties submitted their documents. Mr. Kevic D'Souza, the Manager Director of the Respondent was examined by the Respondent who was cross-examined by the Petitioner. Ms. Megha Gupta, the Company Secretary of the Petitioner was examined by the Petitioner, who was cross- examined by the Respondent.

8. The learned Arbitrator considered the material on record and case pleaded by both the parties and the arguments made by the counsels of the parties. The learned Arbitrator framed issues based on the pleadings by the parties. The learned Arbitrator framed issue as to whether the Petitioner proved that no amount is payable to the Respondent after 1 April 2010 as the agreement expired on 31 March 2010; and, whether the Petitioner proved that the claim for the amount after 1 April 2010 is not arbitrable.

9. The learned Arbitrator considered the material on record and particularly the email correspondence. The learned Arbitrator held that the notice of termination

was given on 20 August 2010 and the Respondent carried out substantial work for the Petitioner after 1 April, 2010. The learned Arbitrator came to the conclusion that there was no notice of termination prior to August 2010 and the contract continued till August 2010. The Arbitrator held that since the contract continued till August 2010 and thereafter till notice period and that as the Respondent had carried out work, Respondent must be paid. The learned Arbitrator came to the conclusion that the retainer fee of Rs.6,25,000/- was not agreed to be reduced and proceeded to award the retainer fee of Rs. 6,25,000/- per month till subsistence of the contract. The learned Arbitrator accordingly allowed the claim of the Respondent and directed the Petitioner to pay an amount of Rs. 45, 81, 008/-.

10. The Petitioner thereafter has filed the present petition challenging the Award of the learned Arbitrator. In Chamber Summons (Ldg.) No. 734 of 2013 taken out by the Petitioner in respect of the execution proceedings taken out by the Respondent, the Petitioner made a statement that an amount of Rs. 55,00,000/- will be kept aside until further orders. This order is in effect till date.

11. Ms. Sadh the learned counsel for the Petitioner submitted that the finding of the learned Arbitrator that the agreement continued till August 2010 is an incorrect finding as there is no such material on record. Ms. Sadh submitted that there was absolutely no evidence placed on record by the Respondent that the Respondent had carried out any work beyond 1 April 2010. She submitted that except for certain vouchers and emails no substantial work was carried out by the Respondent. She submitted that under clause 4 of the agreement, the retainer fee was fixed at Rs. 6,25,000/- only till 31 March 2010 and it was to be renegotiated based on the work of next 12 months. She submitted that the exercise of renegotiation cannot be done by the Arbitrator. Ms. Sadh submitted that the learned Arbitrator has invoked the provisions of section 70 of the Contract Act which will pre-supposes that there absence of contract. She submitted that assuming that there was work done by the Respondent, it was outside the scope of the agreement and the learned Arbitrator erred in holding that he had jurisdiction. She submitted that the Award of the Arbitrator proceeds upon invocation of Section 70 of the Contract Act and since Section 70 of the Contract Act can be invoked only in absence of an agreement, the fact of non existence of

the agreement is established and therefore the Arbitrator will not have jurisdiction.

12. Ms. Sadh further submitted that the learned Arbitrator has accepted the position that the retainer fee will have to be renegotiated and the renegotiation will be dependent on the work of next 12 months. She submitted that then there will be no contract between the parties in this regard and the learned Arbitrator would have no jurisdiction. In this regard, she placed heavy reliance on the decision of the Apex Court in **case of Alopi Parshad and Sons, Ltd., vs. Union of India**, reported in AIR 1960 SC 588. Based on this decision, Ms. Sadh submitted that the learned Arbitrator had no authority to Award an amount in excess of the amount expressly stipulated under the contract. She submitted that the Apex Court laid down that the Indian Contract Act does not enable a party to a contract to ignore express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on very some vague plea of equity. She submitted that for an Arbitrator to come to the conclusion that Award is just, equitable and reasonable by invoking the principle of quantum meruit then Arbitrator will have to proceed on the basis that there is absence of contract. Ms. Sadh relied upon the decision of the Apex court in the case of **Oil and Natural Gas Corporation Ltd., vs. Saw Pipes Ltd.**, reported in (2003) 5 SCC 705, where the Apex Court considered the decision in the case of Alopi Parshad (supra). She further relied upon the decisions of the Apex Court in the case of **Delhi Development Authority vs. R.S. Sharma and Co.**, reported in (2008) 13 SCC-80, wherein the Apex Court noted its earlier decisions in the case of **Grid Corporation of Orissa Ltd., vs. Balasore Technical School**, reported in (2000) 9 SCC 522. Relying upon these decisions Ms. Sadh submitted that an Arbitrator will have no jurisdiction to decide the question not referred to him by the parties. She submitted that there is a clear error on the face of the Award. Reliance was also placed on the decision of the Apex court in the case of **State of Orissa vs. Sudhakar Das**, reported in 2000 (3) Bom. C.R. 499 and the decision of the Division Bench of Patna High Court in the case of **M/s. Patel Engineering Co. Ltd., vs. Indian Oil Corporation Ltd.**, reported in AIR 1975 PATNA-212, to contend that grant of claim under section 70 of the Contract Act was de-hors of contract and do not invest the Arbitrator with power to invoke this section. She submitted that since the Arbitrator has proceeded on a wrong legal principle, the

Award needs to be interfered with.

13. On the other hand, Mr. Vishal Kanade, the learned counsel for the Respondent submitted that the decisions relied upon by the Petitioner are not applicable to in the present case as the Arbitrator has come to the clear findings that the contract in question continued and there is no question of any work been done outside the contract. He submitted that what was granted was a fixed monthly fee, which since contract continued had to be paid to the Respondent. Mr. Kanade submitted the fact that the work was done is based on evidence and these findings ought not to be interfered with under section 34 of the Act. The learned counsel for the submitted that though the learned Arbitrator has referred to section 70 of the Contract Act, the learned Arbitrator has not passed the Award under section 70 of the Contract Act. He submitted that the learned Arbitrator had reached with the findings that the agreement continued and therefore, the claim was within the contract. He submitted that the Arbitrator has taken note that there was no decision of the parties to reduce the retainer fee and has continued to grant the same. He submitted that the learned Arbitrator has not granted any claim other than the one agreed between the parties. He submitted that it will be unjust and unfair that after the Arbitrator came to the conclusion that the agreement continued till August 2010 and subsequently till October 2010 for recovery of retainer fee, the Respondent is driven to file a civil suit. The learned counsel submitted that the arbitration clause is very widely worded and includes all the disputes between the parties. The learned counsel for the Respondent placed reliance on the decisions of the learned single Judge of this Court in the case of **Oil and Natural Gas Commission Ltd. vs. GarwareShipping Corporation Ltd.**, reported in 2005 (1) Mh.L.J. 838. Relying on these decisions, he submitted that if two views are possible then this Court ought not to interfere in interpretation of the clause of the contract as it is in exclusive domain of the Arbitrator.

14. Before I proceed to examine the rival contentions, the relevant clauses of the agreement need to be noticed and reproduced as under:

œ4. Charge/Fees:

The Agency shall bill the Company at the following rates :

a) The Company will pay to the Agency a sum of Rs. 6,25,000/- (Rupees Six lakh twenty five thousand only) per month including supervision of advertisements, produced on TV and Radia and Artworks done as a Retainer fees for the period from 10th August 2009 till 31st March 2010. The fee for the period April 2010 will be renegotiated accordingly based on the work for the next 12 months. It is clarified that the Company will make the payment of Retainer fee for the month of August 2009 for 21 days only i.e. from the date of this agreement till 31st of August.

b) The Company will pay the actual expenses incurred by the Agency as traveling, packing postage and will directly pay third party suppliers for cost for film production, photography, radio production and audio visuals expenses.

10. Dispute

In the event of any dispute or difference between the parties hereto, regarding the interpretation or meaning of any provision of this agreement or regarding any claim of one party against the other or regarding any other matter arising out of this agreement, the same will be referred to arbitration of a common arbitrator if agreed upon or to two arbitrator, one to be appointed by each party and the arbitration will be governed by the Arbitration Act, 1940.

11. Jurisdiction

The jurisdiction for any matter relating to this Agreement shall always be at Mumbai and all disputes and the difference arising out of this Agreement with regard to construction, meaning and effect of any of the terms and conditions hereof shall be resolved and decided by a court of competent jurisdiction in Mumbai.?

Clause 10 of the agreement is very widely worded. It states that any dispute or difference regarding interpretation or meaning of any provision of the agreement or regarding any claim of one party against the other or regarding any other matter arising out of the agreement, the same shall be referred to an Arbitrator. Thus the parties had agreed that almost all disputes amongst them arising out of the

agreement shall be referred to an Arbitrator. This is a conscious decision of the parties to invest the Arbitrator with widest possible jurisdiction that any dispute between the parties would be resolved.

15. Firstly, the learned Arbitration has come to the conclusion that the agreement continued till August 2010. For that purpose he interpreted clause (1) of the agreement. This clause states that the agreement will come into effect that 10 August 2009 and shall continue till it is terminated. The agreement was to be terminated by a written notice by giving 60 days period. Admittedly, no such written notice was given till 20 August 2010. The Company Secretary, who was examined, accepted the position that the Petitioner did not give any notice for termination prior to the 31 March 2010. She admitted that the notice of termination was given on 20 August 2010. There can hardly be any debate on this finding of the learned Arbitration. Once the parties had agreed that the contract will continue till it is terminated by a written notice, the only way which could have been terminated was by written notice. No such written notice is given on 31 March 2010 so as to freeze the claim of the Respondent to 31 March 2010. Notice was admittedly given on 20 August 2010. Thus contract continued till 20 August 2010 plus notice period. Once this position was established the Arbitrator had to proceed to consider the effect thereof. The first effect is obviously that till termination as per the terms contract, all rights and liabilities of the parties would continue. The learned Arbitrator then next examined the factual dispute as to whether the Respondent carried any work after 01 April 2010 till 20 August 2010.

16. Clause 4 of the Agreement lays down retainer fee for the period from 10 August 2009 till 31 March 2010. There is no dispute that upto 31 March 2010, the retainer fee has been paid. To prove the work carried out by the Respondent, the Respondent examined their Managing Director. The Managing Director stated that he was involved in conceptualizing and execution of the advertising campaign. He deposited that substantial work was carried by the Respondent after 01 April 2010 and he produced correspondence and emails. An email in July 2010 the event of presentation of Hotel Taj Lands End, Bandra was recorded. In April 2010 an employee of the Respondent Company made a presentation to the Officer of the Petitioner, which has reflected in email dated 9 April, 2010. On 2 April 2010 an

email was sent by the Petitioner regarding the details of the team proposal. The Petitioner examined the Company Secretary, who joined the company on 5 April 2010. An email from Ms. Nidhi Verma to one of the employees of the Respondent dated 9 April 2010 was noted by the Arbitrator. The Arbitrator also noticed the Maxx campaign and key minutes of the meeting held on 30 April 2010. An email dated 30 July 2010 in respect of a meeting and an e-mail of 03 August 2010 enclosing a job sheet.

17. The witness of the Petitioner i.e. Company Secretary had admitted the position that the email was sent for the first time on 20 August 2010. Thus there was material before the learned Arbitrator to come to the conclusion that not only the contract continued till August 2010 when it was terminated by the Petitioner by giving a notice but that the Respondent carried on the work during this period. The learned Arbitrator considered the emails exchanged between the parties and came to this conclusion. It cannot be said that this finding of the learned Arbitrator is without any material on record. Ms. Sadh did not seriously dispute this factual finding. In any case she cannot.

18. The next and main dispute then arise is whether the Respondent was entitled to retainer fee and whether the Arbitrator could grant it. Firstly the concept of retainer fee needs to be emphasized. Retainer fee would be a fixed monthly fee payable by the party which is different than money for the work done. Claim for grant of Retainer fee continues till the existence of the agreement. The retainer fee is a fixed amount which is to be paid. Ms. Sadh laid a great emphasis on the fact that the retainer fee had to be renegotiated as per the clause 4 of the contract after 31 March 2010. But what is being missed in the vehemently put submission is that what was to be negotiated was the quantum of retainer fee and not the liability to pay the retainer fee. When the contract continued the liability to pay retainer fee continued. There was no agreement between the parties that there will be no retainer fee at all after 1 April 2010. This fact is unique to the present case, which is distinct and different from all the judgments which are relied upon by Ms. Sadh.

19. The learned Arbitrator referred to section 70 of the Contract Act only by way of an illustration. He did not follow it up neither made section 70 of the Contract Act

as basis of the Award. The learned Arbitrator came to a definite conclusion that the agreement continued so also the obligations for payment of the retainer fee and only posed himself a question that if the agreement continued and the obligations of payment of retainer fee also continued, will it mean that no retainer fee be paid at all. The learned Arbitrator referred to section 70 and posed this question by way of an illustration. It was an illustration only to emphasis that even if in a worst case scenario the Petitioner case is accepted, still under section 70 of the Contract Act, the Respondent will be entitled to payment from Petitioner. But that scenario did not arise at all since the Arbitrator came to a definitive finding that the contract continued. Once this finding was reached and that retainer fee had to be paid, there was no question of any equitable consideration or invoking principles of quantum of meruit. What was only cited by way of a mere illustration is made edifice of a challenge going to the extent that the Arbitrator has laid down a wrong proposition of law which needs to be corrected.

20. Further the jurisdiction clause is widely worded. Once the Arbitrator came to the conclusion that the contract continued and with it the obligation to pay the retainer fee, what the retainer fee should be paid was well within the jurisdiction of the Arbitrator under the said clause. In fact that was the very dispute to be decided. The learned Arbitrator took note that the parties were negotiating the retainer fee but they could not arrive at an agreement for retainer fee. The learned Arbitrator came to the conclusion that there was no discussion for decreasing the amount of Rs. 6,25,000/-. The learned Arbitrator also took note of the fact that there was no agreement to increase the retainer fee as well. Accordingly he continued the retainer fee. Since the obligation to pay retainer fee continued under the contract and that the dispute to decide all aspects arising out of the contract were referred to the Arbitrator, the learned Arbitrator had the jurisdiction to decide this issue as well. Since there was no decision to reduce the retainer fee, the learned Arbitrator rightly continued the same amount.

21. The learned counsel for the Petitioner has cited the decisions of the Patna High Court and the Apex Court to challenge the Award. There cannot not be any dispute regarding legal proposition laid down in those judgments. However, completely different fact factual position cannot be ignored. In the decision of the

Patna High Court in the case of **M/s. Patel Engineering** (supra), work was entrusted by Indian Oil Corporation in favour of Patel Engineering which involved certain civil engineering work and construction. The case of the Patel Engineering was that it had done certain excess shuttering work. The Arbitrator had granted compensation for the additional shuttering work as the ground that it was fair and equitable. The Apex Court came to the conclusion that the shuttering work was included in the work and accordingly on some vague plea of quality, no compensation could have been granted for the additional work. The argument that compensation quantum meruit was within the scope of the arbitration clause was negated. The application of section 70 of the Indian Contract Act was also disapproved. The facts in the present case are different. There is no additional work carried out by the Respondents. The work was within the contract as held by the learned Arbitrator and in the present case, it is payment of retainer fee.

22. The next case upon which heavy reliance is placed by the learned counsel for the Petitioner is of the Apex Court in the case of **AlopiParshad** (supra). In this case before the Apex Court of India, the Government of India had entered into a contract under which M/s. Alopi Parshad were to supply ghee. Around September 1939, the Word War II broke out and there was enormous increase in the demand for ghee. A claim was made by the Alopi Parshad and Sons that in view of certain assurances for increase in prices of ghee were made by the Government and they supplied ghee, incurring heavy extra expenditure. This claim was resisted by the government, stating that the Alopi Parsad continued to supply ghee as they found it profitable to do so. The Arbitrator granted additional amount on the basis of quantum meruit. The Arbitrator took into consideration that other persons were also paying ghee considerably in excess of stipulated rates and Alopi Parshad was entitled to be reimbursed. The Apex Court disapproved the grant of such an additional compensation. The Apex Court held that the Indian Contract Act does not entail the parties to ignore express covenants thereof and proceed on the basis of the quantum meruit. Again this case where Arbitrators have proceeded to grant compensation for something which was additional. In the present case the retainer fee has been granted since the contract continued. Similar is the decision of the Apex Court in the case of **SudhakarDas** (supra) . Ms. Sadh relied upon the decision in the case of **Delhi Development Authority** (supra) to contend that if

the Arbitrator commits a jurisdictional error by stepping up outside the contract then the Award must be set aside. This position is settled. However, in the present case, the question is whether the learned Arbitrator has stepped outside the contract.

23. It is settled law that if Arbitrator commits an error in construction of the contract, that is an error within his jurisdiction. Even if two interpretations are possible this court will not interfere. Ultimately, all that the learned Arbitrator had done is that he has held that the contract continued and therefore, the obligation to pay retainer fee is continued. Since the arbitration clause was very widely worded, he considered the quantum of retainer fee. The clause regarding retainer fee has been construed by the learned Arbitrator as right to receive the retainer fee continued. Thus the Arbitrator had come to a point where the contract stood continued, the right of retainer fee stood established and then at that stage all that the Arbitrator had to do was to decide the quantum. The widely worded arbitration clause permitted the learned Arbitrator to do so.

24. For fixing the retainer fee, neither the learned Arbitrator stepped outside the contract nor did he employed the principles of section 70 of the Contract Act. The learned Arbitrator gave the effect to the term of contract itself. He took note of the fact that there was no decision to reduce the retainer fee and therefore, proceeded to grant it. None of the decisions cited by the learned counsel for the Petitioner are similar to the facts of the case at hand. The retainer fee is not the same as compensation for the work done. If the argument of the learned counsel for the Petitioner is to be accepted, that having come to the conclusion that the contract continued and the right to receive retainer fee continued, the Arbitrator ought to have sent the parties to the Civil Court, would make mockery of the arbitration proceedings. The policy of the Act is to promote arbitration and not to defeat it by raising hyper technical objections. The Award is being challenged by invoking abstract propositions of law with no regard to the factual situation. The entire attempt of the Petitioner is to somehow deprive the Respondents of their legitimate dues.

25. Simplistically put this is a case where the Arbitrator has found that the contract continued and Respondent is entitled to the retainer fee. There is no error much less any jurisdictional error in the approach of the learned Arbitrator. No case for interference under section 34 of the Act is made out.

26. The Petition is accordingly rejected.

27. At this stage, the learned counsel for the Petitioner prays that this order be stayed for a period of four weeks. The Petitioner has already made a statement in the execution proceedings that the Petitioner (Respondent in the execution proceeding) will keep aside an amount of Rs. 55, 00,000/- in the Bank Account, which statement has been accepted. In view of this statement it is directed that the Respondent will not proceed to execute the Award for a period of five weeks.

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