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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: April 29, 2009

Date of Order: May 12, 2009

+ OMP 165/2009

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12.05.2009

Triveni Media Ltd.

...Petitioner

Through : Mr.A.M. Singhvi, Sr. Adv. with Mr. Sanjay S. Chhabra,
Advocates

Versus

Zoom Communications Ltd.

...Respondent

Through: Mr. Anil Sapra with Dr. Said Mohmood, Mr. Sumant Dey and
Mr. Naushad Alam, Advocates

AND

+ OMP 196/2009

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Zoom Communications Ltd.

...Petitioner

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Mr. Naushad Alam, Advocates

Versus

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JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. By this order, I shall dispose of the above two petitions made by the parties against each other. In OMP 165 of 2009, petitioner made a prayer that Zoom Communication Ltd (ZCL) should be restrained by this Court from forcibly or by coercive methods removing machines, equipments installed/

commissioned at the business premises of the petitioner bearing No.A-37, Sector-60, Noida being operated by the employees of the petitioner or restrain the removal of machines and equipment by ZCL in any manner without following the due process of law. In OMP 195 of 2009, ZCL made a prayer that this Court should give interim orders/ directions directing respondent Triveni Media Limited (TML) to handover to ZCL possession and custody of equipments detailed in List-A enclosed with the petition which were installed at the TML premises bearing number A-37, Sector 60, Noida by ZCL and restrain TML or its agents and servants in any manner using the said equipments till the time the entire amount due and payable to the petitioner under Facility Agreement was paid. A prayer was made that TML, its agents, employees or servants be restrained from damaging the equipments in any manner. A further prayer was also made that TML should be directed to arrange a security to the tune of Rs.27.84 crore (Rs.9.74 crores towards pending dues and Rs.18.10 crore towards the original costs of the equipments which continues to be installed and utilized) and TML be directed to continue to pay the additional sum of Rs.76,36,719/- per month to ZCL. A request was also made for appointment of a Local Commissioner to visit the TML premises and prepare a list of equipments installed by ZCL.

2. Brief facts relevant for the purpose of deciding these two petitions are that TML wanted to enter into business of running satellite channels. It advertised to outsource supply of entire equipments and to set up necessary infrastructure for running satellite channels. ZCL responded to the advertisement and the parties entered into a Facility Agreement on 12th September 2007. In terms of the said agreement, the installation of equipments was to be done by ZCL within 90 to 120 days from the date of the

agreement and the receipt of advance. The base cost of the equipments to be installed at the premises of TML by ZCL was to be Rs.30 crore. TML was to pay annual rent of Rs.13.50 crores (divided in 12 equal monthly installments) and which was calculated on the basis of 45% of total base costs and the applicable taxes. After five years of the installation of the equipment, TML was to become owner of the equipment on paying 15% of the base costs of the equipments. As per the agreement, the annual rental was to increase or decrease on the basis of additions or subtractions of equipments. The rental was to be calculated on the basis of 45% of the base costs. The agreement expressly provided that there shall be no delay in payment of monthly rentals. In case of delay of more than 30 days from the due date, the rent installment was to attract an interest @ 18% per annum. It was also agreed that delay beyond 20 days of due date, shall be termed as an event of default. It was agreed that after installation of equipments, the equipments was not to be removed from TML's site during the continuation of agreement (5 years period) without prior written authorization of TML except in the event of default. However, in the event of default, ZCL was free to take possession of the equipment and remove the same from the premises of TML to a location of its own choice. The agreement provided that this removal, in the event of default, was unconditional and without any recourse to TML or any other entity.

3. TML was to make advance payment to ZCL of three monthly installments. This advance payment was to be made in two parts, one month advance rent was to be paid at the time of signing of the agreement i.e. on 12th September 2007 and advance for two months rental was to be paid on 1st October 2007. It was provided that these three installments were to be

adjusted against final three installments of the contract i.e. 58th, 59th and 60th installment.

4. The agreement contained an arbitration clause according to which the disputes between the parties was to be resolved through arbitration at Delhi.

5. It is contended by ZCL that the first part of advance payment payable on 12th September 2007 was not paid on that day and it was paid on 16th October 2007. The second part of advance payable on 1st October 2007 was not paid and instead this was spilt up in two parts and TML paid one month advance rent on 7th March 2008 and the second on 19th March 2008. However, ZCL, in spite of non-payment of the advance in time, purchased and supplied the equipments worth Rs.24 crores and installed it at TML premises. Additional equipments worth Rs.12 crore as required by TML was hired by ZCL and installed at the premises. The entire equipment as per the specifications and agreement was installed at the premises of TML by the end of February 2009. TML obtained permissions from Government of India for launching the channels on 14th March 2008 and the test signal was started on 16th March 2008 i.e. just two days after the permission. In order to procure the equipments, ZCL had made loan arrangements with ICICI Bank. ZCL already had credit limit of Rs.8.85 crore with ICICI Bank. It obtained additional limit of Rs.24 crore from ICICI Bank which was sanctioned by the bank vide its letter dated 31st December 2007. The bank while granting additional facility also considered the credentials of TML and sought corporate guarantee, which was furnished by TML through its sister concern viz Triveni Infrastructure Limited and an equitable mortgage of immovable properties falling in Khasra No.777/2 and 7776/1 of Village Jait, Tehsil and District Mathura, U.P belonging

to Triveni Infrastructure Developer Limited a sister concern of TML was also furnished to secure ICICI bank loan. Since the equipment at TML premises was installed in February, 2008, TML became liable to make monthly rentals from February 2008. However, there were repeated defaults on the part of TML in making payment of monthly rentals and the post dated cheques issued by TML started getting dishonoured. The cheque for Rs.74,72,221/- of TML dated 16th August got dishonoured for insufficiency of funds. ZCL had been corresponding with TML for payment of monthly rentals in time. TML vide letter dated 27th August 2008 admitted default on their part for not making payment in time and assured that pending dues shall be cleared by 15th November 2008 and subsequent payment of monthly rentals from December 2008 would be regularized as per the contract between the parties. However, this did not happen and TML again defaulted in making payment of monthly rentals. Again TML vide letter dated 13th January 2009 admitted default on their part in making payments and again assured of regularizing the payment. TML also admitted its liability of Rs.6.99 crore. On 8th April 2009 six post dated cheques of TML each for a sum of Rs.1,12,50,000/-(monthly rentals) as per assurance of TML were presented to bank but got dishonoured because of insufficiency of funds. Thereafter, there was again an exchange of letters and e-mails between the parties. In March 2009, TML offered to take over the loan liability of ZCL with ICICI Bank by loan transfer arrangement and in addition to make a payment of Rs.5 crore to ZCL by 31st March 2009 towards due payment. However, despite giving this assurance, TML did not adhere to this agreement even and neither took over the loan liability of ICICI Bank nor paid the amount of Rs.5 crore to ZCL. Rather TML mischievously sold equipments worth Rs.60 lac hired by it from ZCL to M/s Behive System Limited on 25th March 2009 and on 26th March

2009, TML in a mischievous manner, also fraudulently created charge over the said equipments (which was already under charge of ICICI Bank) with Punjab National Bank against a term loan of Rs.17 crore obtained by it.

6. ZCL submitted that the parent company of TML namely Triveni Infrastructure Private Limited was having several criminal and civil cases pending against it and its sister concerns. It was also involved in a pre-launch fraud of cheating various people of crores of rupees by selling the plots and shops and those matters were under investigation by Serious Fraud Investigation Unit of Government of India. Many cases of dishonor of cheques under Section 138 of Negotiable Instruments Act and cases of cheating and fraud were being faced by the sister concern/ parent company of TML. It is contended that TML was in gross default of the agreement between the parties. While approaching this Court by way of OMP No.165 of 2009, TML did not come to the Court with clean hands and the effort was to deprive ZCL of its entire equipments. ZCL under the directions of the Court had taken photographs of the equipments and found that the equipments were in very bad shape. They were lying dumped on the ground and they were not even properly placed and some of the equipments have been deliberately damaged and broken while most of them were in perfect working condition. It is also submitted that the effort of TML had been to deprive the ZCL of its properties. TML also lodged a false complaint with NOIDA police on 21st January 2009 alleging that equipments worth Rs.12 lac was stolen while being transported by car. The complaint was obviously false and frivolous complaint to deprive ZCL of its property.

7. On the other hand case of TML is that ZCL did not install the

equipments within the time period as agreed between the parties. The equipments were to be installed from 90 to 120 days of the agreement. The agreement was entered into between the parties on 12th September 2007 and 90 days expired on 12th December 2007 and 120 days expired on 12th January 2008. The installation of equipment was done by ZCL only by the end of February 2008. Therefore, the agreement was breached by ZCL at the very inception. It was submitted that advance sum of Rs.25 lac was paid by TML to ZCL on 18th October 2007 and advance as mentioned in agreement did not mean entire advance. It is further submitted by TML that in fact ZCL got the finances from ICICI bank only because the sister concerns of TML furnished equitable mortgage of its properties worth Rs.60 crore and also furnished corporate guarantee to ICICI Bank. Thus, the amount invested by ZCL was in fact secured by the sister concern of TML as a guarantor and security worth Rs.60 crore was lying with the bank. There was no breach on the part of TML in payment of rentals in accordance with the bills raised by ZCL. As per letter dated 5th January 2009, the outstanding payment as on December 2008 was Rs.6.99 crore. Rs.5 crore were paid by TML to ZCL on 5th February 2009 by way of demand draft of Punjab National Bank and Rs.1.5 crore were paid on 16th February 2009 totaling Rs.6.50 crore. Further TDS amount of Rs.42.97 lac and Rs.19.10 lac was also deductible if this amount was included, the total payment made to ZCL would be more than Rs.699 lac. Thus, there was no default in payment of monthly installments by TML. The payment of Rs.3.5 crore by ZCL to Triveni Infrastructure Limited had nothing to do with the agreement between the parties and this amount was returned by ZCL to Triveni Infrastructure at the instance of TML. TML and M/s Triveni Infrastructure Limited were two different entities. ZCL had thus received Rs.6.5 crore. The allegations regarding TML being involved in litigations had

nothing to do with the present agreement. The sister concern of TML were independent entities and pendency of litigations against them cannot be a ground of doubting TML. Its sister concern i.e. Triveni Infrastructure Limited in usual course of business had voluntarily disclosed all litigations and the proceedings as per SEBI guidelines and it is from this document only ZCL gathered information about the litigation.

8. It is submitted that the equipments furnished by ZCL was found to be either defective or not as per the specifications or compatible and beyond repairs and some part of the equipments were returned against challans. The cost of returned equipments was Rs.6 crore. ZCL had not provided specific services in terms of the agreement. The site engineers of ZCL were either not available and if available were not competent to rectify the problems. TML had to outsource the repairs and maintenance of equipment on the request of ZCL to Behive. Behive was introduced by ZCL and that is how ZCL could get hold of documents showing transportation of equipments to Behive. TML had been insisting upon ZCL for release of corporate guarantee and equitable mortgage land security. ZCL has rather received an excess amount of Rs.4,02,00,000/- since the monthly rental was linked with the costs of equipments. After returning of equipments worth Rs.6 crore, the monthly rental had to be reduced proportionately, which shows that ZCL had received an excess amount and there was no default on the part of TML. It is also submitted that ZCL had taken no steps for invoking arbitration clause. It was TML who made an application under Section 11(6) for appointment of an Arbitrator and that petition was being opposed by ZCL. That shows that the intention of ZCL was not bonafide and ZCL invoked Section 9 of the Arbitration & Conciliation Act 1996 with no intention to submit the disputes to

the arbitration. Counsel for TML submitted that this Court had already directed status quo and the Court should immediately appoint an arbitrator with consent of parties who should go into the disputes in a time-bound manner as that will save lot of energy and time of the parties and the entire dispute would be resolved.

9. It is also argued that no case is made out by ZCL for grant of any of the reliefs as claimed in the application under Section 9. There was no prima facie case in favour of ZCL neither the balance of convenience was in favour of ZCL rather the balance of convenience lay on the side of TML since TML's entire business would come to standstill in case ZCL is allowed to remove the equipments. TML was running a satellite channel and had invested crore of rupees for running the satellite channel which was having hundreds of employees who all be rendered jobless in case ZCL is allowed to remove the equipment. Reference was made Gujarat Bottling Co. to *AIR 1995 SC 2372* and Sundram Finance Ltd. 1999 (2) SCC 479 to press the point that ZCL has no intention to take recourse to arbitral proceedings and no case was made out in favour of ZCL. It was submitted that this Court must decide the issue in favour of the party in whose favour balance of convenience lies.

10. Looking at the pleadings of both sides, it is apparent that TML had been in default of the agreement. TML was to pay advance of three months' rent by 1st October 2007 and the period of 90-120 days was to start from the date of advance payment. Admittedly, TML did not pay even a part of the advance on 1st October 2007 and the advance was paid in three installments instead of two installments. The first installment was paid on 16th October 2007, 2nd on 7th March 2008 and the third on 9th March 2008. The period of 90-120 days

thus cannot be counted from 12th September 2007 and has to be counted from the date of payment of advance. In any case, it is not in dispute that entire equipment worth Rs.36 crore was installed by February 2008. The installation of equipment by ZCL was therefore within time as per the terms of the agreement and prima facie there was no breach of contract on the part of ZCL as far as installation of equipments was concerned.

11. TML was to pay monthly rental of Rs.1,12,50,000/- to ZCL and admittedly this monthly rental was not paid in time by TML. There was delay beyond 30 days in payment of rental. The agreement specifically provided that any delay beyond 30 days amounted to an event of default warranting termination of contract and also attracted interest @ 18% per annum. The Admission on the part of TML that it paid a cheque of Rs.5 crore on 5th February 2009 and another draft of Rs.1.5 crore on 16th February 2009 to clear the arrears up to December 2008 itself shows that TML was in arrears of monthly rentals and had committed default of the agreement. There is no denial that a part of the equipment, worth Rs.60 lac was given to Behive Systems Limited on non-returning basis. That itself shows that the equipments worth Rs.60 lac was sold to Behive Systems Limited. ZCL has placed on record the challans showing that these equipments were given to Behive Systems Limited on non-returnable basis. There is no denial that the post-dated cheques issued by TML against monthly installments i.e. from January onwards got dishonoured. It is submitted by counsel for TML that these cheques were presented deliberately after grant of status quo by the Court but the fact remains that status quo was not granted in respect of payment of installments. This Court had granted status quo on a prayer of TML that the equipments be not removed from the premises of TML, TML was

obliged to continue to pay monthly rentals. Non payments of monthly rental gave right to ZCL to remove the equipments as per the agreement.

12. The correspondence and exchange of e-mails between the parties shows that TML had agreed to take over the loan liability of ZCL with ICICI Bank by making payment of Rs.15 crore to the bank and had also agreed to pay Rs.5 crore to ZCL by 31st March, but this payment was also not made by TML. No reasons have been given by TML's counsel as to why the agreement was not adhered to by TML.

13. There is no doubt that TML is running a satellite channel but this channel cannot be run by TML at the costs and expenses of someone else. TML might have employed number of employees but the equipments being used by TML was supplied by ZCL and ZCL had incurred liabilities worth crore of rupees by taking loans from ICICI bank. It is also not denied that the equipments which was under first charge of ICICI bank was put under the second charge of PNB by TML without even disclosing this to ZCL. No doubt, TML's sister concern had given corporate security to ICICI Bank of its properties but these securities are in the form of additional securities. ICICI bank had made arrangement for additional finances to ZCL on the basis of mortgage of the equipments and securities. The sister concern of TML had given securities in the interests of TML.

14. There seems to be some transactions between ZCL and sister concern, that is why ZCL must have paid a sum of Rs.3.5 crore to sister concern of TML. TML had taken a plea that its sister concern are different identities and their affairs should not be considered by the Court while considering the case.

TML has simultaneously taken a plea that the corporate guarantee given by the sister concern to ICICI bank should be taken into consideration by the Court while considering the case of TML. I consider the affairs of the sister concern are not be taken into account while considering the case of ZCL, therefore, issue of furnishing security by sister concern of TML is not relevant.

15. I consider that while considering an application under Section 9 of the Act in respect of the parties who have entered into commercial relationship by virtue of a written agreement, the Court must concentrate on the agreement between the parties and must see as to which party prima facie is a defaulting party. In the present case, prima facie the defaulting party is TML. TML had been defaulting in payment of monthly rentals. TML had also sold away part of the equipments and had also filed a complaint that while transporting the equipments, the equipments worth Rs.12 lac was stolen. No reason as to why equipment was being transported from TML is given and how the equipments got stolen while transporting is not stated. ZCL has also placed on record the photographs showing that the equipment was not even placed properly and some part of the equipment was lying damaged. I, therefore, consider that prima facie it was TML who was in breach of the contract and had put the interests of ZCL in serious jeopardy by continuing to use the equipments for running satellite channel and not paying the monthly rentals and not honouring the agreement on the basis of which these equipments worth Rs.36 crore were installed at its premises. I also consider that the balance of convenience does not lie on the side of TML. TML does not seem to have dearth of funds but seem to be deliberately trying to take advantage of the fact that it had equipments at its premises and once the equipment was installed, it would keep on using the equipment and not pay

for the equipments and also not allow removal of the same. The running of a satellite channel gets huge revenue from advertisement. Satellite channels are not run for the sake of fun or for the sake of providing services to the people of this nation. They all are being run on commercial basis to earn profits. A channel cannot be run to earn profits on the basis of getting equipments installed on assurance of paying rentals and then by not paying the rentals to the lawful owner.

16. Counsel for ZCL submitted that ZCL had opposed the application under Section 11(6) of the Act only on the ground that no prior notice of invocation of arbitration clause and appointment of an arbitrator was sent to ZCL which was a pre-requirement under the Act. ZCL itself was interested for arbitration and wanted that the disputes between the parties should be resolved. I consider that since the application under Section 11(6) is pending before the Bench of Hon'ble the Chief Justice, the parties can take up the matter of appointment of arbitrator before that Bench and the bench would consider the application on its own merits.

17. In the above facts and circumstances, the OMP 165 of 2009 filed by TML has no force and is hereby dismissed and OMP 196 of 2009 filed by ZCL is allowed to the following extent:

- (i). In case TML clears the entire arrears on account of rentals within ten days of passing of this order, ZCL shall not remove the equipments from the premises of TML bearing No.A-37, Sector-60, Noida. However, in case the arrears on account of rentals are not cleared within ten days from today, ZCL shall be free to

remove these equipments from the premises of TML and if any hindrance /obstruction is put by TML, ZCL would be at liberty to take help of local police of concerned Police Station of Noida for the removal of the equipments.

- (ii) Alternatively, if TML deposits a sum of Rs.15 crore with ICICI Bank, as already agreed by TML and takes over the loan liability of ZCL and pays Rs.5 crores to ZCL within ten days from today, ZCL shall not remove the equipments, and if it is not done, ZCL would be free to remove the equipments as ordered above.

18. With above order, both the petitions stand disposed of.

May 12, 2009
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SHIV NARAYAN DHINGRA J.