IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 226 OF 2015

Ketchum Sampark Private Limited ...**Petitioner**

Versus

Swipe Telecom LLP ...**Respondent**

Ms. Roshni Naik, i/b Khare Legal Chambers, for the Petitioner.

Mr. Madhav J. Jamdar, for the Respondent.

CORAM : A.K. MENON, J.
DATE : 19th September 2016

P.C. :

1. This is a Petition for winding up filed by a communication and corporate public relations consultant. The Company had engaged the Petitioner to carry out a public relations campaign in relation to the Respondent's business. A Public Relations Service Agreement dated 13th June 2012 was entered into between the Respondent Company and the Petitioner, a copy of which appears at **Exh.A**. A Public Relations Plan was agreed upon. In consideration of consultancy services, a monthly retainer fee of Rs. 1,50,000/- was

payable by the Respondent to the Petitioner. It is the case of the Petitioner that in respect of three months i.e. for the period January 2013 and March 2013, the retainer fee has not been paid. Further, sums towards translation charges and tax component had not been paid. The particulars of claim in the Petition discloses that a total sum of Rs. 5,10,375/- was payable. The Company has filed an Affidavit in Reply disputing the contents of the Petitioner.

2. Mr. Jamdar, the learned Counsel appearing on behalf of the Respondent Company points out that the Petitioner has failed to carry out its obligations as agreed upon and that the agreement has since been terminated with effect from April 2013. A specific dispute has been raised in relation to the review of the Company's product on a television programme known as 'Tech Guru' on the CNBC Awaaz Channel. The Respondent Company by the fact that instead of sending a tablet PC called Halo Value, the Petitioner had sent a product known as Swipe 3D Life Plus tab which was not comparable to the other gadget on the programme. This comparison of incomparables caused grave injury to the Respondent. Mr. Jamdar is however unable to show me any specific provision in the agreement or any correspondence or communication addressed to the

Respondent Company which required them to send a particular product for review. Mr. Jamdar relied upon an e-mail dated 7th March 2013, copy of which appears at **Exh.F** of the Petition in support of his contention that in breach of instructions in the e-mail, the Petitioner had submitted a gadget known as Swipe 3D Life Plus instead of Halo Value resulting it suffering negative publicity.

3. Although Mr. Jamdar may be right in his contention that the Respondent Company had requested the Petitioner to send their representative to one of the dealers of the Respondent Company to collect the device known as Halo Value, the Petitioner had in its possession both the products Halo Value and Swipe 3D Life Plus. They sent the product known as Swipe 3D Life Plus instead of Halo Value which was apparently not comparable to the other products of the programme. However, even assuming Mr. Jamdar is right in his contention that incomparable gadget are sent, this does not appear to be the reason for withholding three months retainer fee. It is seen that on 22nd April 2013 the Respondent's Head Marketing Communication, Mr. Kartik Gaur in its e-mail addressed to the Petitioner makes, reference to the payments due, but requests the Petitioner to go ahead with the next day's release. A copy of this e-

mail is annexed at **Exh.J**. There is no explanation as to why the Respondent continued to instruct release of further publicity material through the Petitioner, if in fact, the Respondent was unhappy with the submission of Swipe 3D Life Plus instead of Halo Value. Moreover, the fact that there is no reply to the statutory notice, furthermore, leads me to believe that the dispute relating to the submission of different gadgets cannot be the basis for non payment of retainer fees. There is no connection between items to be submitted by review or the publicity to be carried out in respect of the retainer fee which is payable to cover the scope of work set out in clauses (a) to (f).

4. In the circumstances and facts of the case, there is nothing to show that the Petitioner has not performed in accordance with the Public Relations Plan forming subject matter of the Petition. The Affidavit in Reply does not contain reference to any specific direction to the Petitioner Company not to submit the Swipe 3D Life Plus for review. On the other hand, e-mail correspondence appearing at **Exh.G** indicates that the Respondent was aware that the Petitioner had with it both Halo Value and Swipe 3D Life Plus. The only controversy appears to be relating to the fact that the Petitioner

submitted Swipe 3D Life Plus instead of Halo Value. If both gadgets were in possession of the Petitioner and in the absence of any specific direction about which gadget has to be sent for review of the programme, the Petitioner opted to send the Swipe 3D Life Plus unit.

5. Mr. Jamdar submitted that the Petitioner ought to have sent a comparable product for review and in view of the Petitioner's failure to do so, the Respondent was entitled to hold back the retainer fee for three months. This submission is baseless. Firstly the Respondent has not been able to satisfy me that the Petitioner was under an obligation to send the Halo Value Tablet. The agreement does not detail the manner in which comparative review have to be approached. Moreover, even if, Halo Value was sent as a comparable product there is no certainty that it would have been the better product on the review. It may be a better alternative, but there is no justification in the Respondent's contention that any damage was caused to the Respondent's image or business on account of the review. On the other hand, the reviewer would have dealt with the salient features of both, unless the Respondent is able to show that the Respondent had separately asked the Petitioner to send Halo Value for review on 'Tech Guru'. The Respondent's stand is not

supported by the correspondence or pleadings. The Respondent has refused to pay the amounts that are otherwise due and payable. There is no dispute on the quantum, but the Respondent's case is that because the Petitioner had erred in sending the Swipe 3D Life Plus Tab for review, the Petitioner must be penalized by being denied their rightful dues.

6. In the circumstances, a debt in the sum of Rs. 5,10,375/- is admittedly due, but the Respondent seeks to adjust it towards unspecified damages it may claim from the Petitioner. In the facts of the case, I am of the opinion that the Respondent is not entitled to decline payment of three months retainer fee and the other sums all of which are due. The Respondent has admittedly no quantified claim against the Petitioner. The Petitioner has made out a *prima facie* case. However, as an opportunity to test the Respondent's bonafide; I pass the following order;

(i) The Respondent-Company shall deposit the sum of Rs. 5,10,375/- (Rupees Five Lakhs Ten Thousand Three Hundred Seventy Five only) with the Prothonotary & Senior Master of this Court within a period of four weeks from today i.e. on or before

17th October 2016.

(ii) In the event deposit is made and if a suit is filed by the Petitioner, the amounts so deposited will be transferred to the suit account and thereafter, the Company Petition will stand dismissed. The amount deposited to be invested in a nationalised bank initially for a period of one year and to be renewed for similar period and subject to further orders in the Suit.

(iii) If after the deposit is made, the parties are desirous of referring the dispute to mediator or arbitrator, they are liberty to make a joint application.

(iv) If the Company fails to deposit the amount on or before 17th October 2016, the Petition shall stand admitted, returnable within four weeks from the date of default and be advertised in two local newspapers i.e. Free Press Journal (in English) and Navshakti (in Marathi) and in the Maharashtra Government Gazette.

(v) The Petitioner shall meanwhile deposit an amount of Rs. 10,000/- (Rupees Ten Thousand only) with the Prothonotary & Senior Master of this Court towards publication charges, within two weeks from the date of default, with intimation to the Company Registrar failing which the Petition shall stand dismissed for non prosecution.

7. The Company Petition is disposed of in the aforesaid terms.

[A.K. MENON, J.]