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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINALCIVIL JURISDICTION

ARBITRATION PETITION NO. 1698 OF 2015
with
NOTICE OF MOTION NO. 17 OF 2016

Zee Sports Limited
(now known as Zee Digital Convergence Ltd.)
having its office at Continental Building,
135, Dr. Annie Besant Road,
Worli, Mumbai – 400 018. … Petitioner.

V/s.

Nimbus Media Pte. Ltd.
having its registered office at
10, Anson Road, #24-16A,
International Plaza,
Singapore – 0769 903. ... Respondent.

Dr. Birendra Saraf a/w. Mr. Rohan Savant, Monisha Bhangale and Warisha Parkar i/b. ALMT Legal for the Applicant - Petitioner.
Mr. Sanjay Jain a/w. A. Singhania, Hemant Prabhulkar, Ms. Smita Bhosale i/b. Jurisperitus Mumbai for the Respondent.

CORAM : N.M. Jamdar, J.

07 February, 2017.

Oral Judgment **:-**

By this Arbitration Petition, the Petitioner has sought to assail the award of the sole Arbitrator dated 3 August 2015. By the impugned award, the learned Arbitrator has directed the Petitioner to pay a sum of US $ 1294372.15/- towards payment of services rendered by the Respondent.

2. The Petitioner is a company incorporated under the provisions of the Companies Act, 1956. The Petitioner belongs to 'Zee Group' which has various companies, including the Petitioner. The Respondent is a company incorporated in Singapore, having its registered office at Singapore. The Respondent belongs to a Nimbus Group of Companies. Nimbus Communications Limited is a parent company of the Nimbus Group. The Respondent is a subsidiary of Nimbus Communications Limited.

3. On 17 April 2004, a Memorandum of Understanding was executed between Zee Entertainment Enterprises Ltd. and Nimbus Communications Limited for incorporating a Joint Venture Company to launch a sports channel, primarily concerning cricket. On 19 May 2004, pursuant to the memorandum dated 17 April 2004, an agreement was executed between Zee Entertainment Enterprises and Nimbus Communications Limited to form a joint venture to launch a television sports channel Zee Sports and to bid for the rights to telecast cricket played in India. Thereafter, various event followed and communications were addressed between the parties. The bid submitted by Zee Entertainment Enterprises was accepted by the Board of Cricket Control in India, which decision

was challenged by another sports channel. This Court set aside the award of the rights by BCCI, which was confirmed by the Supreme Court.

4. On 17 January 2005, an agreement was entered into between the Petitioner and the Respondent in respect of services to be provided. The learned Arbitrator has referred to this agreement as Suit Agreement. It was agreed between the parties that advisory and consultancy services in respect of launching Sports channel are being extended and will be extended by the Respondent. The agreement laid down various clauses in respect of fees and out of pocket expenses to be paid and laid down a schedule of payment thereupon. This agreement is the foundation of the present dispute. On 21 June 2005 and 22 June 2005, the office bearers of the Petitioner sent e-mails to the Respondent confirming that various services were provided by the Respondent. On 22 May 2006, the Respondent addressed an e-mail to the Petitioner raising a query regarding the outstanding payment, which was responded to by the Petitioner on 24 May 2006, stating that the payment schedule will be prepared with an intention of squaring of all dues and that immediately an amount of Rs. One crore will be released. On 9 October 2016, the Respondent sent another e-mail seeking to expedite the payment of the dues. A Suit bearing No. 1410 of 2009 was filed by the Nimbus Communications Ltd. against the Petitioner in respect of certain dues. On 20 May 2009, since the dispute

between the parties regarding the dues was not resolved, the Respondent sent a letter to the Petitioner invoking arbitration clause contained in the agreement dated 17 January 2005. The claim of the Respondent was contested by the Petitioner, which led to the Respondent filing an Arbitration Application No. 42 of 2010 in this Court. On 24 January 2011 the learned Single Judge designate disposed of the arbitration application appointing a learned retired Judge of this Court as a sole Arbitrator.

5. Before the learned Arbitrator, the Respondent filed its statement of claim. In the statement of claim it was asserted that various services were provided by the Respondent pursuant to and as contemplated in the agreement dated 17 January 2005. The Respondent contended that various advisory services were rendered by the Respondent and its parent company Nimbus Communications Ltd. prior to October 2005 and even prior to the suit agreement and were rendered after the suit agreement was executed. It was contended that the Respondent rendered all the services that were stipulated in the agreement as an advisory of Zee Sports Channel. The details of the various services provided and the persons involved in providing these services, were specified. Large number of e-mails were placed on record by the Respondent. It was contended that the Respondent was entitled to receive a sum of USD 1 million plus out of pocket expenses. It was contended that

the installments which were due as per the agreement were not paid inspite of the notices sent. The Respondent also claimed out of pocket expenses to the tune of USD 28,292/-. It was stated that the Nimbus Group of Companies had long standing business relationship with the Petitioner, transaction of worth several millions of rupees had already taken place. It was stated that in respect of all the dues that were payable, a query was made regarding payment and Puneet Goenka, in capacity as the Chief Executive Officer of the Petitioner, had confirmed both the factum of providing services as well as dues payable by the e-mails dated 21 June 2005 and 24 May 2006. A specific letter issued on 19 October 2006 was not responded to and neither any dues were paid and therefore, the arbitration clause had to be invoked. A Suit No. 1410 of 2009 in respect of dues payable to Nimbus Communications Ltd. Was filed. Accordingly, before the learned Arbitrator, the Respondent prayed for an award in sum of USD 1294372.15/- with interest on the principal sum of USD 1 million at the rate of 5% per annum. An amount of UDS 36742/- towards out of pocket expenses including interest on the amount of USD 28292/- at the rate of 5%, was claimed.

6. The Petitioner filed a statement of defence. It was contended that the claim was barred by limitation. As per the payment schedule in the suit agreement, the last payment was due in

September 2005 and the arbitration clause was invoked on 29 October 2009. It was also contended that the suit agreement was only a paper arrangement. It was not to be acted upon and it was abandoned. It was contended that the e-mails dated 21 June 2005, 22 June 2005 and 24 June 2006 related to a completely different transaction. Stand was also taken that e-mails were fabricated. The joint venture agreement dated 19 May 2004 had come to an end prior to the suit agreement and therefore, there was no question of any joint venture, which was never incorporated. It was further contended that inspite of the mandate that the Respondent will not assign its rights to any third party under the suit agreement, the Respondent had proceeded to do so. The dues which were payable in respect of some other transaction between the parties were sought to be confused with the e-mails relied upon by the Respondent and based on an agreement which was never acted upon, dues are sought to be claimed by the Petitioner. It was contended that the conduct of the Respondent not sending invoices or not claiming out of pocket expenses would indicate that the agreement was not to be acted upon.

7. The learned Arbitrator permitted the parties to file rejoinder as well as sur-rejoinder. The parties led their oral evidence. On behalf of the Respondent, the Director of the Respondent, Mr. Harish Thawani filed his affidavit of evidence and he was cross-

examined. On behalf of the Petitioner, Mr. Puneet Goenka and Mr. Himanshu Modi filed their affidavit of evidence and they were cross-examined. Parties filed voluminous documentary evidence. The learned Arbitrator, after considering the material on record, concluded that the suit agreement was a legally binding agreement, duly executed by both the parties, which was formally brought in force. The Respondent had proved its claim for amount of USD 1 million alongwith interest at the rate of 5%. In view of the wording of the agreement, it would not make any difference if the services were rendered by the parent company that is Nimbus Communications Ltd. for and on behalf of the Respondent. The audited books of accounts and financial statement duly certified by the auditors would support the case of the Respondent. The oral evidence and the documentary evidence submitted by the Respondent was convincing and had to be accepted. The learned Arbitrator held that the services were in fact provided by the Respondent pursuant to the agreement. It was also held that the evidence led by the Petitioner that the agreement was not to be acted upon and it was not acted upon and the e-mails sent were in respect of some other transaction, was not believable and the contention was rejected. The learned Arbitrator also held that, in view of the acknowledgement of the debt in May 2006 the claim made by the Respondent, was not time barred. Accordingly, the learned Arbitrator proceeded to pass the impugned award directing payment of USD 1294372.15 alongwith interest as stipulated. Thereafter, the present Arbitration Petition has been filed.

8. In the Arbitration Petition, a Chamber Summons bearing No.114 of 2017, was taken out for amendment of the memo and inclusion of an additional ground to challenge the award on the ground it is a nullity, because the Respondent was being foreign entity, the arbitration was an interested arbitration and the delegate of the Chief Justice of the High Court was not empowered to appoint an Arbitrator. This Chamber Summons, by a separate order dated 31 January 2017, was rejected holding that such stand at this stage for the first time cannot be permitted and thereafter, the Arbitration Petition was taken up for hearing.

9. I have heard Dr. Birendra Saraf, learned Counsel for the Petitioner and Mr. Sanjay Jain, learned Counsel for the Respondent.

10. Dr. Saraf, learned Counsel for the Petitioner, in short submitted : The claim of the Respondent was barred by law of limitation. The schedule provided in the suit agreement clearly stipulated the stages when payments could be claimed by the Respondents. The first installment was contemplated by last week of June 2005, second by 15 August 2005 and third by September 2005. The arbitration clause was invoked on 29 October 2009,

which is beyond the period of limitation. The entire basis of the Respondent to bring the claim within period of limitation are the e-mails dated 22 May 2006 and 24 May 2006, but these e-mails do not refer to the claim sought to be made by the Respondent and since there were various other transactions between the parties, such communication cannot be stated as saving the period of limitation. A Suit bearing No. 1410 of 2009 was filed by Nimbus Communications Ltd. against the Petitioner wherein claim has been made referring to the very e-mails. Therefore the reliance of the learned Arbitrator on these two e-mails to hold that the claim was within period of limitation is contrary to the law laid down by the Apex Court in the case of *J.C. Budhraja v/s. Chairman, Orissa Mining*[1]. A detailed and cogent explanation was given by the Petitioner in the examination-in-chief in respect of the other transactions and the learned Arbitrator was in error to hold that the Petitioner did not give any explanation as to which transaction the e-mail in question related to. The e-mails sent on 21 May 2005 and 22 June 2005 were fabricated and this aspect has not been considered by the learned Arbitrator. Various cogent factors which would indicate that the suit agreement was only paper arrangement has been omitted from consideration by the learned Arbitrator. Most relevant factors being that no invoices were raised, there was no earlier correspondence pleading to the claim, the ledger accounts did not tally. The amounts were asked for in rupees when the payment

1 2008(2) SCC 444

was to be made in USD. In the written submissions the factum of e-mails stated to be sent in June 2006 was dealt with which was not considered. The entries which had bearing even as per auditors certificate was not taken into consideration. Before coming to a conclusion that the suit agreement was not a paper arrangement, these factors had to be taken into consideration by the learned Arbitrator. Omitting to consider most relevant factors while arriving at a finding of fact leads to perversity, which is one of the grounds on which arbitral award can be assailed as laid down by the Apex Court in the decision of *Associate Builders v/s. Delhi Development Authority*[2]. Out of pocket expenses were never claimed, which is not believable as it was a substantial amount and if the agreement being a genuine agreement, the Respondent would have proceeded to claim the out of pocket expenses. Inspite of the express embargo on the Respondent not to carry out the work through anyone else, on their own showing the work was stated to be carried out by other entity. There was no cogent material produced by the Respondent to demonstrate that the work was carried out. The learned Arbitrator, because the witness of the Petitioner on one answer out of many questions did not give clear reply, proceeded to reject the entire evidence. It was contended that the specific questions that were put to the witnesses of the Respondent were disallowed by the learned Arbitrator, which prejudiced the Petitioner from putting forth its case. The award which takes a view that the claim was within

2 2015 (1) SCC 459

limitation is in total contravention of provisions of the Limitation Act and therefore suffers from illegality. The award is perverse for non consideration of various material aspects and perversity is one of the ground available to set aside the award and accordingly, the award should be set aside. Reliance was placed on the decision of the Supreme Court in the case of *Mcdermott International Inc v/s. Burn Standard Co. Ltd.*[3] which decision has been considered and expounded in the case of *Associate Builders* by the Apex Court.

11. Mr. Sanjay Jain, learned Counsel for the Respondent supported the award and in brief submitted : The scope of Section 34 of the Act is not akin to an appeal and all the arguments that are advanced by the Petitioner relate to assessment of evidence. The learned Arbitrator has considered all factors and passed a detailed award. The witness of the Petitioner took varying stand and the learned Arbitrator, who had before him the occasion to observe the demeanor of witness, rightly took into consideration this factor and has taken into consideration totality of the evidence which ought not to be interfered with. The argument that the suit agreement was not to be acted upon, surfaced for the first time in the evidence, and which is also not believable. The suit agreement not only related to services provided after the agreement but also related to the services rendered prior. For claiming fees, no invoices had to be submitted only for out of pocket expenses invoices had to be submitted. Since

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3 2006 (11) SCC 181

no invoices had to be submitted for out of pocket expenses, the learned Arbitrator has refused the said claim. The stand taken by the witness of the Petitioner changed from time to time and they showed ignorance as to the exact nature of the transaction. To arrive at a conclusion that services were in fact rendered, the learned Arbitrator examined each and every e-mail. Nothing was shown as to why and how the e-mails were fabricated. An opportunity was given to the Petitioner to examine the relevant computer. This opportunity was not availed of. Earlier agreement having not come into being of the services that were provided under the suit agreement. The finding of fact has been reached that the services were in fact rendered and the amounts were not paid. The suit agreement itself contemplated a Nimbus Group as an entity and the director was the same person, who had sought confirmation of its dues which was given by the Petitioner. For the dues payable to Nimbus Communications Ltd. a suit was filed and for the claim of the Respondent, the arbitration clause were invoked. Not only there was acknowledgement of the work done but also the acknowledgement of the dues. The Division Bench of the Calcutta High Court has summarizing various facets of the jurisdiction under Section 34 of the Act in the case of *National Highway Authority of India v/s. Gammon India Ltd.*[4.] No case for interference is made out in the award in view of the law laid down. The learned Single Judge of this Court in *Wadhwa Groups Holding*

4 2014 SCC OnLine Cal 17407

Pvt. Ltd. v/s. Vivek Chopra[5] in Commercial Arbitration Petition No. 112 of 2016 has reiterated the settled law that the factual aspects cannot be gone into by the Court under Section 34 of the Act.

12. Firstly, the scope of Section 34 of the Act will have to be kept in forefront. The scope, as the scheme of Section 34 itself indicates, is extremely limited. The legislature has consciously used the phrase "only if", as a prefix to the contingency under which an award can be set aside. This phrase has been interpreted by various decisions of this Court and the Apex Court to emphasize upon the limited scope available to the Court under Section 34 of the Act. The Court examining the challenge to the arbitral award cannot assume jurisdiction of a Court of Appeal to re-appreciate the evidence. The Arbitrator is the final Judge to decide the quality and quantity of the evidence. The Court therefore cannot re-appreciate the evidence, neither it can scrutinize the award on merits. Though the factor of perversity as is available to set aside the award, the non consideration of the material should go to the root of the matter. If the non consideration of a piece of evidence would change thetotal complexion of the award, leading to a position that no reasonable person take such a view, a ground of perversity could be urged. Under the garb of invoking the ground of perversity, cannot be used roving factual enquiry and re-appreciate the evidence is not permissible.

5 CARBP 112.16

13. With this prefix, the award rendered by the learned Arbitrator will have to be perused. The learned Arbitrator has given an extremely detailed (157 pages) award. The learned Arbitrator gave liberty to the parties to file their replies, rejoinders, even sur-rejoinders. Parties engaged advocates, oral evidence was led. Voluminous documentary evidence has been placed on record. Detailed reasons have been given.

14. the issue of limitation, revolves around two e-mails of 22 May 2006 and 24 May 2006. On 22 May 2006 an e-mail was sent by Mr. Harish Thawani of the the Respondent to the Petitioner, which read thus :-

> *" I refer to out meeting last week in which you had confirmed that at least 50% of the outstanding payments due to various Nimbus group companies from Zee would be paid by end of last week.*
>
> *We still have not received any payment let alone 50% of the outstandings. I think you will agree that we have been most patient and accommodating.*
>
> *I would appreciate it if the commitments are honoured and our payments released immediately.*
>
> *Please confirm by reply mail the amounts being paid now."*

This e-mail was replied to by the Petitioner through Mr. Himanshu Modi on 24 May 2006, as under :-

> *" I have asked Sudhir in our accounts to make a payment schedule and sent it to Rajinder Agarwal with the idea of squaring off all dues within the next 15 to 20 days.*
>
> *Immediately, I have asked him to release Rs.1 crore for which he should have the check ready by this weekend."*

Mr. Harish Thawani sought confirmation of atleast 50% of the outstanding payment due to various Nimbus Group of Companies from Zee which was replied to by the Petitioner by Himanshu Modi that the Accounts Department will be instructed to prepare a payment of schedule with an item of squaring of all dues and an amount of Rs.1.00 crore will be immediately released. According to Dr. Saraf these e-mails do no constitute any clear and unequivocal admission of any payment neither it refers to any claim in question and therefore, reliance of the learned Arbitrator on these e-mails was patently illegal and contrary to the decision of the Apex Court in the case of *J.C. Budhraja.*

15. This aspect has been considered by the learned Arbitrator. E-mails are produced on record and were therefore before the learned Arbitrator to consider. The learned Arbitrator was

entitled to interpret these documents produced on record and arrive at a particular conclusion. The learned Arbitrator dealt with the issue of limitation *in extantio*. The learned Arbitrator framed two issues. Firstly regarding the issue of limitation as to whether the claim was barred by limitation and secondly whether the e-mail dated 24 May 2006 could be relied upon for extension of limitation under Section 18 of the Limitation Act, 1963. The learned Arbitrator thereafter considered the terms of the agreement and noted that the heads of agreement created rights and obligations and that the agreement was executed between Nimbus Communications Pvt. Ltd. and Zee Sports. Both being part of the same group, the learned Arbitrator found that the acknowledgement of debt was in respect of the liabilities to Nimbus Group of Companies. He held that considering the surrounding circumstances, it included an acknowledgement of claim of the Respondent as well. The learned Arbitrator held that the e-mail dated 24 May 2006 and e-mail dated 22 June 2006 will have to be read together. The learned Arbitrator held that the contention of the Petitioner that the e-mails pertain to some other transaction but in the suit claim could not be believed as no particulars were coming forth. The learned Arbitrator then noted the e-mail dated 9 October 2006 and co-related the same with the earlier e-mail dated 22 May 2006. The learned Arbitrator held that e-mail dated 9 October 2006 was not disputed neither any steps were taken pursuant to this e-mail. Thereafter, the learned

Arbitrator considered the scope of Section 18 of the Act and various decisions that were cited by the learned Counsel for the parties including that of the Apex Court in *Laxmanirattan Cotton Mills Ltd. & Beharilal Ram Charan v/s. The Alluminium Corporation of India Ltd.*[6], *Khan Bahadur Shapoor Freedom Mazda v/s. Durgaprasad*[7], the decision of the Full Bench of Kerala High Court in the case of *P.D. Pillai v/s. Kalyanikutty Amma and Ors.*[8] and the decision of the Apex Court in the case of *J.C. Budhraja*. After considering various decisions, the learned Arbitrator held that all that was required for application of Section 18 of the Act was in existence of jural relationship and the jural relationship could be inferred by implication and based on surrounding circumstances. The learned Arbitrator held that generally a liberal interpretation, construction of a document need to be given, for the purpose of Section 18 of the Limitation Act.

16. Therefore, it is not that the learned Arbitrator has not applied his mind to the argument that the claim was beyond period of limitation and that the e-mail did not constitute any acknowledgement of the debt. The only question therefore is whether the approach can be termed as illegal or perverse as contended by the learned Counsel for the Petitioner. It is trite in the limited jurisdiction under Section 34 of the Act, if two views are

6 1971 (21) SCC 67
7 1961 SC 1236
8 AIR 1995 Ker 78

possible on the construction of a document, then merely because another view is possible cannot be a ground to interfere or set aside the award. This position of law is settled that acknowledgement contemplated under Section 18 of the Limitation Act need not be clinching and it is permissible to look at the surrounding facts and circumstances. The decision of the Apex Court relied upon by the Dr. Saraf in the case of *J.C. Budhraja* does not exclude from consideration the surrounding circumstances before construing a document to hold whether the period of limitation stands extended. In the case of *J.C. Budhraja* the matter arose for consideration of the Apex Court in respect of work contract issued from which a dispute arose and was referred to an arbitrator for adjudication. One of the contentions raised in the appeal before the Apex Court was on the aspect of the limitation. The Apex Court considered the provisions of Section 18 of the Limitation Act and in that context held that for a writing to the acknowledgement it must involve a substance of a jural relationship and confirmation of an intention to continue such relationship as regards an existing liability. The Apex Court also held that the admission need not be of a precise amount or need not be by express words. The learned Counsel however sought to draw support from the observation that if the acknowledgment in respect of amount is in writing, the acknowledgement should necessarily be in respect of subject matter. This position of law and the judgment in case of *J.C. Budhraja* was considered by the learned Arbitrator.

Once it is held that by way of inference or surrounding circumstances and construing a document, Section 18 of the Limitation Act can be made applicable and a view is taken by the Arbitrator that a document indeed expresses such intention, then due deference will have to be given to the Arbitrator's construction of the document placed before him. Though the Apex Court has observed in a written document should relate to a suit agreement, the Apex Court has also emphasized that there was no need to specify a specific amount or to give absolute detailed particulars. In the present case claim was made by Mr. Thawani, a Director of the group of companies in respect of dues belonging to the group, including that of the Respondent which in the same spirit was responded to the reference was also to the debt of the Respondent. The e-mails clearly show that the parties knew that what was sought was confirmation of the dues of the Respondent as well. Therefore, the acknowledgement also included the acknowledgement of the debt of the Respondent. Therefore, it cannot be said that the learned Arbitrator committed any illegality as contemplated, as a ground available under Section 34 of the Act.

17. The next head of arguments of the Petitioner is regarding the suit agreement being a paper arrangement not to be acted upon. It was contended by Dr. Saraf that various factors would indicate that the agreement was never acted upon and was not contemplated to be

acted upon and was created only for booking revenues.

18. Firstly it has to be kept in mind that the agreement exists, is entered into between the parties, and is signed by both responsible officers of both the parties. The witness of the Petitioner has admitted about the existence of the agreement and has also accepted all the contents. This being the position, burden lay on the Petitioner to demonstrate that such agreement was only a paper arrangement. Therefore, the Petitioner had to come with a clear and cogent stand before the Arbitrator regarding the nature of the document.

19. The Petitioner by letter dated 26 June 2009 firstly took a stand that the agreement was a mere recording of the understanding to provide certain services. Second that no services having been rendered pursuant to the agreement. Thirdly, the agreement was never taken forward and the joint venture was not incorporated. This pleas is taken in the sur-rejoinder. Fourthly, in the evidence it was sought to be contended that the agreement was entered into because the Petitioner wanted to book some revenue. Therefore, the stand of the Petitioner as regard the real nature of the suit agreement varied from time to time. To reinstate, once a written agreement duly existed and it contemplated providing of certain services then heavy burden lay on the party to demonstrate that such agreement

was only a paper arrangement. The learned Arbitrator therefore had to consider whether the stand taken by the Petitioner regarding the nature of the agreement can be believed and was honest.

20. The learned Arbitrator therefore had to first consider whether there was any factual basis for the claim of the Respondent that services were rendered as it was disputed by the Petitioner. For this purpose the parties led their documentary and oral evidence. Mr. Jain has drawn my attention to the award wherein the learned Arbitrator has considered each and every e-mail. E-mails dated 7 October 2004, 6 December 2004, 24 December 2004, 23 January 2005, 24 January 2005, 25 January 2005, 31 January 2005, 2 February 2005, 15 February 2005, 18 February 2005, 20 February 2005, 24 February 2005, 18 March 2005, 19 March 2005, 22 March 2005, 23 March 2005, 27 March 2005, 29 March 2005, 30 Marcy 2005, 31 March 2005, 4 April 2005, 11 April 2005, 14 April 2005, 19 April 2005, 21 April 2005, 12 May 2005, 2 June 2005, 6 June 2005, 8 June 2005 and 12 June 2005 were placed on record by the Respondent. A summary of these e-mails have been extracted by the learned Arbitrator in the award. The perusal of the summary shows that there are atleast fifty e-mails which are placed on record which relate to various services that have been provided. Therefore, when e-mails dated 21 June 2005 and 22 June 2005 were issued by the Petitioner, they were not stand alone e-mails, but were issues in

context of atleast fifty e-mails issued from time to time by the Respondent wherein it was placed on record that the services were provided. In view of such overwhelming material on record, the learned Arbitrator could not have held that no services were provided at all by the Respondent. Least it could be said that the view taken by the learned Arbitrator based on these e-mails that the services were provided, cannot be stated to be an impossible view.

21. The second aspect is that the agreement itself contemplated that the Nimbus and its related companies have been doing the work of advice consultancy in services to the Petitioner for the last few months with a view of managing these Zee Sports Channel. The scope of services were also defined under the heads of agreement as under :-

> *" Nimbus <u>has been</u> and shall continue to provide, where required, to Zee the following services :-*
>
> *(i) Assist in preparation and refinement of business strategy and channel concept.*
>
> (ii) *Formulation and refinement of financials and operating budges.*
>
> *(iii) Formulation of as organization human resource list and budge.*
>
> *(iv) Identification of relevant headhunters across the world and India.*
>
> (v) *Where asked for by Zee, conduct interview*

of key personnel anywhere in the world.

(vi) Identify and negotiate fees with a sports law specialized firm in UK or Singapore to engage them for Zee.

(vii) Select and negotiate with channel ID design firm from firms across the world.

(viii) Identify sports events and programmes for potential acquisition by Zee and guide Zee managers on acquisition on the same.

(ix) Contact and lead negotiations with leading sports rights management agencies and sports federations across the world, with the exception of the ICC wherein Zee acknowledges the world, with the exception of the ICC wherein Zee acknowledges that Nimbus cannot offer its services due to a previously subsisting engagement.

(x) *Impart knowledge to Zee managers in the area of acquisition negotiations.*

(xi) Assist in the development of a programming strategy and Fixed Point Chart.

(xii) Assist in the development of programme concepts.

(xiii) Assist in the preparation of studio design and set design.

(xiv) Advise on selection of studio and post production equipment.

(xv) Conduct tests and interviews to select sports presenters.

(xvi) Assist in preparation of channel positioning and marketing strategy.

(xvii) Assist in identifying brand ambassadors for the channel, and where asked by Zee, negotiate with the brand ambassadors to sign them on for the channel.

(xviii) Prepare a template for sports show production budgeting and conduct a training workshop for Zee production staff in relation to the same.

(xix) Prepare best practice process note for new show greenlighting and conduct a workshop for Zee creative staff in relation to the same.

(xx) Make available in Zee NOIDA office and studios Nimbus senior production executive and Nimbus senior creative executive for interaction with and guidance of Zee personnel, for at least 2 days a week for 3-4 weeks during March/April 05 leading up to the commencement of test transmission of the channel.

(xxi) Make available in Zee NOIDA office and studios Nimbus senior production executive and Nimbus senior creative executive for interaction with and guidance of Zee personnel, on a full time basis 15 days in May 05 leading up to commercial launch of the channel.

(xxii) Make available in Zee NOIDA office and

> *studios Nimbus senior creative executive for interaction with and guidance of Zee personnel, on a full time basis for 15 days in June 05 and if July 05 with a view to inducting the full time Head of the channel."*

The period of engagement was from 1 October 2004 to 30 June 2005. The preamble to the clauses regarding scope of services emphasized that Nimbus *has been* providing and shall continue to provide the services. It was agreed between the parties that the services would not only be provided by the Respondent but by the related companies. They were proceeded not only after the execution of the agreement but that were being rendered prior to the agreement. Since the Petitioner had disputed the veracity of the e-mails dated 21 June 2005 and 22 June 2005 relied upon by the Respondent as acknowledgment of the work done, the learned Arbitrator considered this aspect as well. Firstly, as held earlier the e-mails dated 21 June 2005 and 22 June 2005 were not stand alone e-mails but they were preceded by series of e-mails issued by the Respondent.

22. It is the contention of Dr. Saraf that the aspect of fabrication of these e-mails has not been looked into by the learned Arbitrator. This contention cannot be accepted. The learned Arbitrator noted the allegation made on behalf of the Petitioner by Mr. Goenka and Mr. Modi that the e-mails were false and fabricated

and proceeded to take a view that the emails were genuine. The learned Arbitrator, in addition, directed the parties to produce the concerned Computer and thereafter passed an order enabling the Petitioner to depute a representative in the office of the Respondent with a due intimation to take examination of the Computer. The learned Arbitrator noted that this opportunity was availed of by the Petitioner. The learned Arbitrator was entitled to take note of the factum of giving opportunity to the Petitioner to take inspection of the Computer in furtherance of their allegation regarding fabrication of their e-mails and their failure to avail of this opportunity. The learned Arbitrator therefore was not in error in relying on these e-mails issued in June 2005 by the Petitioner to hold that the services were in fact provided by the Respondent.

23. As regard the contention of Dr. Saraf that the services, on own showing of the Respondent, were rendered by some other entity which was prohibited under the terms of the Suit Agreement, Mr. Jain has rightly pointed out that the Suit Agreement itself contemplates rendering all services by Nimbus and related companies and a finding of fact has been recorded that part of the services has been rendered not by any outsider but within the Nimbus Group of Companies.

24. The next stand taken by the Petitioner was that the agreement was not to be acted upon. It was contended that the fact

that no invoices were raised by the Respondents, no out of pocket expenses were claimed, which any prudent businessman would do coupled with the entries in the audited accounts and filing of the suit for recovery of the claim, would substantiate this position. It was contended that these factors have not been considered at all by the Arbitrator. Out of pocket expenses and fees are separately dealt with in the Suit Agreement. As far as fees are concerned, the liability of the Petitioner is fixed under the Suit Agreement, irrespective of raising any invoices. For out of pocket expenses the Respondent was entitled to reimbursement on invoices duly supported. Mr. Jain drew my attention to this distinction and submitted that it was no where contemplated that the fees should be supported by invoices which stipulation was only in respect of out of pocket expenses. It was sought to be contended by Dr. Saraf that it is not consistent stand taken by the Respondent and in respect of the other claims, the Respondent has raised invoices. Again it is not possible to scrutinize the evidence in such depth as urged by Dr. Saraf. Bare perusal of the Suit Agreement shows that for fees, there is no stipulation for raising any invoice and therefore, merely because invoices are not raised for the fees, it cannot be said that the Respondents were precluded from raising a claim or it created a doubt regarding the genuineness of the contract. As far as the out of pocket expenses are concerned, the learned Arbitrator held that the agreement stipulated raising of invoices and even if the out of pocket expenses have been in fact incurred, since no invoices were raised, same cannot be granted. The view taken by the learned Arbitrator is inconsonance with the agreement. Therefore, only on the basis of not claiming the out of pocket expenses by raising invoices or not raising the invoices in the matter of fees, it cannot straight away lead to an conclusion that the agreement was a paper arrangement. As far as the payment of fees is concerned, the stipulation in the agreement is clear. Merely because the Respondent did not keep on making a claim regarding the fees which are payable under the agreement itself, the agreement cannot be styled as a paper arrangement. The learned Arbitrator was therefore entitled to take a view that on these two facets urged by the Petitioner, that the agreement cannot be stated to be a paper arrangement.

25. As far as the aspect of filing of a suit is concerned, the same is raised, both in connection of the aspect of limitation and regarding the genuineness of the suit agreement. It is contended that in the Suit bearing No.1410 of 2009 there is an admission by the Respondent that the dues referred to in the disputed e-mails are in respect of the dues of Nimbus Communication Ltd. It was contended that in view of this admission, the learned Arbitrator could not have held that the burden of showing that the correspondence was in respect of some other transaction and the agreement being only a paper arrangement, was not discharged by the Petitioner. The learned Arbitrator has dealt with this aspect of

filing of the suit. The correspondence between the parties could be construed narrowly as sought to be urged by the Petitioner or construed broadly as sought to be urged by the Respondents. It is the case of the Respondents that the correspondence related to all the debts of Nimbus Group payable by the Petitioner and to the work done under the suit agreement as well. This broad view of the correspondence has been accepted by the learned Arbitrator. The parties did have various other transactions. The dues of Nimbus Group were under discussion in the correspondence. It could therefore legitimately held that the suit was filed for recovery of dues of Nimbus Communication Ltd. and the arbitration proceedings were invoked in respect of dues of Nimbus Pte. Ltd. The learned Arbitrator did not accept narrow interpretation put by the Petitioner and proceeded to hold that the acknowledgement related to the dues of the entire Nimbus Group and distinct claims were made in the suit and the arbitration under Section 34 of the Act. It is not possible to interfere and take a different view merely because it is possible to take a different view.

26. A grievance was made by Dr. Saraf that various aspects such as the auditors account, evidence of the witnesses have not been considered by the learned Arbitrator. Perusal of the award would indicate that it is not justified. As far as the audited accounts are concerned, the learned Arbitrator has looked into the audited

financial statement of the Respondents, the ledger account and the general entries. The learned Arbitrator took note of the anomalies pointed out by the Petitioner that the date of the agreement is incorrect or the bills have been raised from the different point of time and had found them to be a minor technical corrections and the entire audited accounts cannot be disbelieved. The learned Arbitrator was entitled to hold a view regarding the evidentiary value of a piece of evidence and was entitled to hold that this piece of evidence will not over weigh the evidence led by the Respondents in support of its claim. The arguments that the claim was made in rupees when the payment was agreed upon in US Dollars cannot be elevated to a status whereby the entire claim of the Respondent is disbelieved. This is a minor aspect of the matter and rightly not given much importance by the learned Arbitrator.

27. As far as the oral evidence of the witnesses of the Petitioner is concerned, according to Dr. Saraf, it was most germane. The evidence will have to be seen in toto including the cross-examination and the demeanor of these witnesses. The Petitioner examined Mr. Himanshu Modi, who is the Director and Head of Group of Companies and Mr. Puneet Goenka, Chief Officer and the Director. The learned Arbitrator therefore rightly noted that these officers were high ranking and were expected to be conversant of facts and circumstances, atleast at the time of deposing before the Arbitrator. The Arbitrator found that whenever these witnesses were

confronted, they took a stand that they did not remember the facts or took contrary pleas, as contra-distinguished by cogent evidence led by Mr. Harish Thawani of the Respondent. Though these witnesses made certain assertions in the affidavit of evidence, the learned Arbitrator had to take note of the statements made by them in their cross-examination. The learned Arbitrator took note of each and every statement made by the witnesses in their cross-examination. As regard their stand that the suit agreement was entered into only to book revenue, the witnesses firstly stated that the agreement never came into existence, which was noted as in contrary to the plea that subsequently the agreement was abandoned. The learned Arbitrator considering the answer to question nos. 79 and 80 found that the answers of the witness Mr. Modi were not consistent. As regard the evidence of Mr. Goenka, the learned Arbitrator took note of various answers given by this witness when he was confronted with the correspondence between the parties. The learned Arbitrator took note of the answers to question nos. 13, 14, 30, 32 and 52 wherein the questions were asked to this witness regarding the nature of the agreement. Considering these answers, the learned Arbitrator held that the evidence of Mr. Goenka could not be accepted as it was not consistent.

28. Therefore, before the learned Arbitrator what was placed was oral evidence led by the Director of the Respondent coupled with various e-mails exchanged between the parties. The learned

Arbitrator after going through these e-mails found that the case made out by the Respondent was cogent and substantiated by the evidence on record. The Arbitrator noticed the terms of the agreement. Found that the e-mails by which liability was confirmed were germane. He found that the dues payable under the agreement were not paid. The stand taken by the Petitioner that the agreement was not to be acted upon and that the correspondence was in respect of some other transaction, was not found trustworthy. The learned Arbitrator carried out this exercise in detail by assessing each piece of evidence.

29. The argument which is advanced by the learned Counsel for the Petitioner are merely picking holes in the assessment of evidence by the Arbitrator. Considering the material that is produced on record, the evidence of the parties and perusal of the award would indicate that the learned Arbitrator applied his judicial mind and considered and evaluated the case of both the parties and held in favour of the Respondents, which the learned Arbitrator was entitled to do being a Judge appointed by the parties by consent. As held by the learned Single Judge of this Court in *Wadhwa Group Holding Pvt. Ltd. V/s. Vivek Chopra* a finding of fact based on the evidence appreciated by the learned Arbitrator cannot be interfered with under Section 34 of the Act. In the decision of *Wadhwa Group Holding Pvt. Ltd.*, the arbitrator had considered and evaluated the evidence which had been placed on record by the parties. In the case

of *National High Way Authority of India v/s. Gammon India Ltd.,* the Division Bench of Calcutta High Court has culled out various principles in respect of ambit of jurisdiction of Section 34 of the Act. It has been emphasized that the Court will not sit in appeal nor re-appreciate the evidence. Though the ground of perversity in award is available as ground of challenge as held by the Apex Court in *Associate Builders,* non-consideration by the Arbitrator of each and every piece of evidence will not *ipso facto* lead to perversity. The evidence not taken into consideration should be of such a nature that it will overwhelm the evidence placed on record by the other party and will fundamentally alter the outcome. The ground of perversity cannot be used as a tool to convert the proceedings under Section 34 of the Act, to an appellate proceedings.

29. No interference is possible in the impugned Award. The Arbitration Petition is dismissed.

30. Dr. Saraf seeks continuation of protection which was the operating during the pendency of the Petition by virtue of understanding between the parties. The learned Counsel for the Respondent opposes. In any case, the Respondents will not proceed to execute the Award unless they get copy of this judgment, which will take some time. Thereafter, the Respondents will give one months' advance notice to the Advocate for the Petitioner, if they are proceeding to execute the award.

31. In view of the disposal of the Arbitration Petition, the Notice of Motion does not survive and is disposed of.

(N.M. Jamdar, J.)