

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

FAO(OS) (COMM) 123/2017

Date of decision: 30th May, 2017

M/S MAXPOSURE MEDIA GROUP (INDIA) PVT. LTD.

..... Appellant

Through Mr. Tushar A. John, Advocate.

versus

M/S. GO AIRLINES (INDIA) LTD. AND ANR Respondent

Through Mr. Mukul Gupta, Sr. Advocate with
Mr. Abdhesh Chaudhary and Mr. Meenesh Dubey,
Advocates for R-1.

Mr. Rishab Raj Jain, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

PRATHIBA M. SINGH J. (ORAL):

The brief facts leading to the present appeal are that the Appellant had entered into an arrangement to publish the in-flight magazine for Go-Air. The arrangement commenced with a Letter of Intent dated 22nd December, 2015. Thereafter, two bank guarantees for Rs. 41,48,034/- dated 18th January, 2016 and the second for Rs. 5,51,996/- dated 28th March, 2016 were submitted at the behest of the appellant to the first respondent. The long-form final agreement did not get executed between the parties. The appellant commenced publication of the magazine from January 2016 which continued till December 2016. During the interregnum, disputes had arisen

between the parties and several emails had been exchanged. The arrangement was terminated by the first respondent on 22nd December, 2016. The respondent No.1 threatened to invoke the bank guarantees which led to the filing of CS(Comm) No. 8/2017. On 3rd January, 2017, the learned Single Judge granted an ex-parte order of injunction restraining the second respondent-bank from making any payment under the bank guarantees. However, vide order dated 26th May, 2017, the said order was vacated by the learned single Judge. The present appeal came to be filed challenging the said order dated 26th May, 2017.

2. Initially, the appeal was filed without a copy of the impugned order which had not yet been made available. The same was listed on 29th May, 2017, upon urgent mentioning and listing. The matter was taken up and the interim order was continued till today.

3. Copy of the impugned order has been placed on record during the course of hearing.

4. We have heard the counsel for the appellant and the first respondent. Counsel for the appellant states that there is urgency in the matter and the appeal may be heard.

5. The appellant has drawn our attention to the draft agreement and it is

submitted that the bank guarantees were not required to be given by the appellant till a formal written contract was executed. It is argued that the written contract was never executed between the parties. Our attention is also drawn to the e-mails exchanged between parties and the contention raised is that the first respondent had committed breach of the understanding between the parties as the said respondent had outsourced the publishing of the magazine 'Gladrags' to another contractor, namely, Mans World, who are competitors of the appellant. The effect thereof was that Mans World was able to secure and sell advertisements at a cheaper rate than the appellant. The business of the appellant thus became unviable. Our attention is also drawn to the fact that the first respondent had agreed to reduce the royalty rate to 50% of the originally agreed amount. The submission is that this is a case of fraud in the underlying contract and, therefore, the respondent should be restrained from encashing the bank guarantee of Rs.41,48,034/- dated 18th January, 2016 and bank guarantee of Rs.5,51,996/- dated 28th March, 2016, totalling to Rs.47, 00,030/-.

6. Counsel for the respondent on the other hand disputes the said contentions and submits that it was clearly agreed between the parties that the first respondent would be entitled to display 'Gladrags', which is a

magazine of the respondent/Wadia Group, in the seat pockets in the aircrafts. The appellant had agreed to pay Rs.23,50,000/- per month as royalty. This was purely a commercial transaction and the loss and gain was that of the appellant. It is denied that the first respondent had ever agreed to reduce the royalty to 50%. It is also submitted that the appellant on its own after the Letter of Intent, had furnished the two bank guarantees and hence their contention that the formal agreement was never signed is inconsequential and irrelevant. In fact, the appellant cannot rely upon the non-signing of formal agreement once the arrangement was accepted and parties had acted upon the same. Allegation of underlying fraud is contested and denied.

7. Having heard counsel for the parties, we are not inclined to interfere with the impugned order. The appellant had accepted and agreed that the respondent was entitled to display and place in the seat pockets the 'Gladrags' magazine, which belongs to the respondent/Wadia Group. Thus the appellant, as per the first respondent, was aware and conscious that there would be advertisers, who would be advertising in the said magazine. How and in what manner the first respondent published the said magazine is a dispute which has to be examined at trial and thereafter decided. We do not

think that a case of fraud as alleged is prima facie made out merely because the first respondent had engaged MW.com for selling and procuring advertisements for the 'Gladrags' magazine.

8. We have also examined the two bank guarantees. Clause (D) of the bank guarantee dated 18th January, 2016 for Rs.41,48,034/- states as under:-

“D) We, E-13/29, 2nd Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 hereby provide a guarantee to Go Airlines (India) Ltd. that in case of MMGIPL is not able to render its services as per the aforesaid agreements or is not able to fulfill its obligations as stated in the agreement. The bank hereby undertakes that it shall pay to Go Airlines (India) Ltd. within seven days of receipt of demand from Go Airlines (India) Ltd. without demur, reservation reference or protest in such manner as Go Airlines (India) Ltd. directs, the amounts guaranteed or each-portion thereof no exceeding the guaranteed amount of Rs.41,48,034/- (Rupees Forty one Lakhs forty eight thousand thirty four only) which they may from time to time require.”

9. The second bank guarantee dated 28th March, 2016 in clause (D) has provided as under:-

“D) We, hereby provide a guarantee to Go Airlines (India) Ltd. that in case of MMGIPL is not able to render its services as per the aforesaid agreement or is not able to fulfill its obligations as stated in the agreement. The bank hereby undertakes that it shall pay to Go Airlines (India) Ltd. within seven days of receipt of demand from Go Airlines (India) Ltd. without demur, reservation, recourse or protest in such manner as Go Airlines (India) Ltd. directs, the amounts guaranteed or each-portion thereof no

exceeding the guaranteed amount of Rs.5,51,996/- (Rupees Five Lakhs Fifty One Thousand Nine Hundred Ninety Six Only) which they may from time to time require.”

It is the case of the first respondent that the second bank guarantee was to cover the shortfall and balance amount which was not covered by the first bank guarantee. The bank guarantee was equal to two months’ royalty, which was payable @ 23,50,000/- per month. The aforesaid clause contained in both guarantees stipulates that the bank undertakes to pay the guaranteed amount to the respondent within 7 days of receipt of demand from the said respondent without any demur, reservation or protest. Both the bank guarantees could be invoked by the first respondent in case the appellant was not able to render services as per the agreement or was not able to fulfil its obligations as stated in the agreement. Obviously and as per the first respondent, reference to the agreement would be the oral understanding or arrangement between the parties. As per the appellant, agreement referred to, is the Letter of Intent dated 22nd December, 2015. This Letter of Intent states that the agreement between the appellant and the respondent would be valid with effect from 1st November, 2016 for a period of three years from the date of publication of ‘Go Getter’ magazine’s first issue on 1st February, 2017. It states that the appellant and the respondent would enter into a

formal agreement on or before 1st February, 2016 and in case parties failed to enter into a formal agreement, the same would stand terminated with immediate effect. As noticed above, the second bank guarantee of Rs.5,51,996/- was issued on 28th March, 2016, which is after the date 1st February, 2016, specified in the Letter of Intent dated 22nd December, 2015.

10. Thus, the parties had clearly acted in furtherance of the agreed arrangement notwithstanding non-execution of the formal agreement. The appellant commenced publication of the magazine and had paid royalty at the agreed rate even without the formal agreement being executed. It is the case of both the parties that they had continued their relationship without any formal contract executed till December, 2016.

11. Even if we accept the contention of the appellant that the first respondent had agreed to reduction of royalty to 50%, it is accepted that the amount due and payable @ 50% of the agreed royalty would be more than Rs.47,00,000/- i.e., the amount of the bank guarantees furnished. As per the first respondent, a sum of Rs.2 crores is due and payable by the appellant and they have filed a counter claim.

12. We are of the opinion that the appellant has not been able to make out a prima facie case of special equities or fraud of egregious nature or

irretrievable injury, to be entitled to interim relief. There are disputes and differences between the parties but these disputes cannot be a ground or foundation to stay encashment of the bank guarantees.

13. In view of the aforesaid, and as mandated by the law relating to encashment of bank guarantees, we do not find good and cogent reasons to restrain the second respondent bank from encashing the guarantees. Accordingly, we do not find any merit in the present appeal and the same is dismissed.

14. We clarify that the view expressed above is for decision of the present appeal, and would not be construed and treated as conclusive and binding findings on merits in respect of the *inter se* dispute between the appellant and the first respondent.

Dasti to the counsel for the parties.

PRATHIBA M. SINGH, J.

SANJIV KHANNA, J.

MAY 30, 2017
NA/VKR