

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 30<sup>th</sup> January, 2019.**

+ **CS(COMM) 1420/2016**

**WHITE EAGLE ENTERTAINMENT PVT LTD ..... Plaintiff**

Through: Mr. L.M. Asthana, Mr. Siddhant  
Asthana and Mr Peeyush ranjan,  
Advs.

Versus

**OUTLINE S.R.L, ITALY & ANR ..... Defendants**

Through: Mr. Mohit Chadha and Ms. Sukriti  
Mago, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. The plaintiff instituted this suit for (i) permanent injunction restraining the two defendants namely (a) Outline s.r.l., Italy; and, (b) Giorgio Biffi, from indulging in sales directly with any entity based in India or appointing any other entity as distributor for the goods of the defendants in India; (ii) for recovery of damages in the sum of Rs.1,62,28,370/- with interest *pendente lite* and future; and, (iii) for rendition of accounts.

2. The suit came up before this Court first on 19<sup>th</sup> October, 2016, when summons thereof were ordered to be issued. Though the suit was accompanied with an application for *ex-parte* ad-interim relief restraining the defendants from selling goods directly in India but the counsel for the plaintiff on 19<sup>th</sup> October, 2016 did not press the said application and rather withdrew the same.

3. Pleadings have been completed.
4. The plaintiff filed IA No.6293/2018 under Order XIII-A of the Code of Civil Procedure, 1908 (CPC) as applicable to summary suits for a decree forthwith of permanent injunction and for damages as sought. The said application came up before this Court first on 17<sup>th</sup> December, 2018, when the counsel for the plaintiff withdrew the same and the application was dismissed with costs.
5. Not only so, the counsel for the plaintiff on 17<sup>th</sup> December, 2018 also withdrew the suit insofar as for the relief of permanent injunction and on the counsel making such statement, the suit insofar as for the relief of permanent injunction was dismissed as withdrawn.
6. Having gone through the file on 17<sup>th</sup> December, 2018, it appeared that the claims of the plaintiff for damages and for rendition of accounts which were the only surviving reliefs, were also not maintainable and had no basis in law. Certain observations in this regard were made in the order dated 17<sup>th</sup> December, 2018 and on the request of the counsel for the plaintiff, hearing was adjourned.
7. Today, the counsel for the plaintiff has been further heard and the counsel for the defendants has also been heard in response.
8. The basis of the surviving claims of the plaintiff for recovery of damages to the tune of Rs. 1,62,28,370/- and for rendition of accounts is, (I) that the defendants, to facilitate sale of their products in India, appointed the plaintiff as exclusive distributor in the territory of India and an Exclusive Distributorship Agreement dated 2<sup>nd</sup> July, 2012 for a period of three years

was entered into between the parties; (II) that the Agreement of exclusive distributorship was renewed on 15<sup>th</sup> October, 2015 for a further period of one year; (III) that the agreement is “subsisting till date by the conduct of the parties as per the initial agreed terms contained in the Agreement dated 2<sup>nd</sup> July, 2012”; (IV) that the Agreement could have only been terminated by a three months notice assigning reasons for termination; (V) that the defendants, during the term of the Agreement were not entitled to sell their products directly to any customer in India; (VI) that the plaintiff, under the Exclusive Distributorship Agreement, was entitled to 25% of the sales generated by the plaintiff at the price list sent by the defendants; (VII) that the plaintiff kept on placing orders on the defendants and the defendants kept on supplying the goods and therefore the plaintiff continued to be the exclusive distributor of the defendants in India; (VIII) that though the period of one year for which the Agreement was extended vide extension letter dated 15<sup>th</sup> October, 2015 came to an end on 2<sup>nd</sup> July, 2016, the defendants thereafter also continued selling to the plaintiff and even as on 3<sup>rd</sup> October, 2016, the website of the defendants showed the plaintiff as the distributor in India, thereby meaning that the contract and the terms thereof were subsisting and continuing; (IX) that the plaintiff, from the date of appointment as the exclusive distributor, has generated sales worth Rs.3.31 crores of the products of the defendants and as on the date of institution of the suit, the offers in the pipeline were of the value of Rs.2 crores; (X) that the defendants, over telephonic conversations assured to the plaintiff that the plaintiff would continue to be the exclusive distributor; (XI) that the defendants, in the year 2014 breached the Agreement but offered to pay 15% fee/commission instead of 25% under the Agreement to the plaintiff therefor

and admitted liability in the sum of Rs.19,88,370/- for the said breach but out of which only Rs.7.6 lakhs were paid, leaving a balance of Rs.12,28,370/-; (XII) that the defendants, even in September, 2016 forwarded to the plaintiff the query of another customer/client; (XIII) that the defendants however thereafter started making direct sales in India; and, (XIV) that the plaintiff is seeking Rs.50 lakhs on account of loss of business, Rs.12,28,370/- on account of balance due with respect to the breach of the Agreement by the defendants of the year 2014 and a sum of Rs.1 crore on account of loss of market reputation and loss of annual profits; thus, damages in the sum of Rs.1,62,28,370/- are due from the defendants to the plaintiff.

9. The counsel for the plaintiff, on enquiry, states that the relief of rendition of accounts is claimed, since according to the plaintiff, the plaintiff even today continues to be the exclusive distributor of the defendants.

10. The counsel for the plaintiff now states that the plaintiff was the exclusive distributor till the date of institution of the suit on 7<sup>th</sup> October, 2016. On further enquiry, it is stated that rendition of accounts is sought for a period of three years from 2<sup>nd</sup> July, 2016.

11. The counsel for the plaintiff has drawn attention to Sections 8 & 9 of the Indian Contract Act, 1872 and relied on ***Haji Mohammed Ishaq Wd. S.K. Mohammed Vs. Mohamad Iqbal*** (1978) 2 SCC 493 and ***Kalyanji Vithaldas Vs. State of M.P.*** (1996) 10 SCC 762.

12. Per contra, the counsel for the defendants has drawn attention (A) to the email dated 2<sup>nd</sup> October, 2016 of the plaintiff at page 49 of the plaintiff's documents and the response dated 3<sup>rd</sup> October, 2016 and 10<sup>th</sup> October, 2016 thereto at page 51 & 54 of the plaintiff's documents; and, (B) to the

communication dated 26<sup>th</sup> September, 2016 of the defendants at page 71 of the defendants documents.

13. The document (B) supra to which the counsel for the defendants has drawn attention to, pertains to the alleged admission of the plaintiff of dues owed to the defendants, is not relevant inasmuch as the defendants are not making any counter-claim in the suit. As far as the documents at pages 49, 51 & 54 of the plaintiff's documents are concerned, the same are only the claim of the plaintiff of exclusive distributorship and the denial of the defendants thereof.

14. Incongruously, though the plaintiff on 17<sup>th</sup> December, 2018 withdrew the suit insofar as for permanent injunction restraining the defendants from acting in breach of the contract of Exclusive Distributorship Agreement, the plaintiff today is pressing for rendition of accounts till 1<sup>st</sup> July, 2019 presumably treating the Exclusive Distributorship Agreement to be continued till then.

15. Though the plaintiff instituted the suit in this Court by valuing it for the purposes of court fees and jurisdiction at Rs.1,62,28,770/-, but it is found that the claim of the plaintiff which has basis in law is only for recovery of Rs.12,28,370/- and the plaintiff is not found to have any basis for the claim for recovery of balance of Rs.1,50,00,000/-. My reasons for holding so are as under:

(A) The Exclusive Distributorship Agreement, in breach whereof damages in the sum of Rs.1,50,00,000/- and the relief of rendition of accounts is claimed was in writing. It is deemed appropriate to set out the entire contract hereinbelow as under:

### ***“EXCLUSIVE DISTRIBUTORSHIP AGREEMENT***

*Following up verbal agreements, **OUTLINE s.r.l.** based in FLERO – ITALY, via Leonardo da Vinci, 56 (hereinafter referred to as the **COMPANY**) appoints **White eagle Entertainment Pvt. Ltd.** F301, Lado Sai, Near Port Side Studio Chodhary Prem Singh Building, New Delhi 30. (hereinafter referred to as the **DISTRIBUTOR**) as exclusive distributor of **OUTLINE** products at the following conditions:*

- 1) **TERRITORY** : The full extent of territory of Republic of INDIA.*
- 2) The Distributor agrees that, during the term of this agreement, he will not stock, sell, supply or advertise any products whatsoever which are similar to **OUTLINE** products in the same price range or same technical specification range.*

*The Company shall be under the obligation to refrain from selling any of the products it manufactures and which bear the trade name of **OUTLINE** to any other Company, having its Registered Office in INDIA – The Manufacturer is aware and agrees that the Distributor is yet distributing the audio brand **MASTER AUDIO** for the Territory in object. The Distributor is committed not to apply for registration of the Tradename as a Trademark but will give to the Company at Company's expenses any assistance it may require in connection with the registration of the Trademark in INDIA –*

- 3) **Duration**: this agreement shall continue for a period of **three years** from the signing date and in combination with Par. n° 8. This Agreement shall terminate, in the event that one of the Contracting Parties should notify the other Contracting Party by registered letter, that it wishes to*

*discontinue collaboration for weighty reasons to be specified, which make it impossible or extremely difficult for the Terminating Party to continue collaboration and in regard to which it's itself not responsible, by giving 3 month's notice.*

*4) The Distributorship shall be discontinued, in the same manner, by dispatch of a registered letter, and discontinuation will concern the period of time following receipt thereof, in the event of culpable breach, or omission of fulfilment of obligations, in regard to even a single paragraph of this document, by the other Contracting Party. The culpable breach or omission of fulfilment of obligations must be set out and specified in the registered letter. In the event that the competent Court should determine that no culpable breach or omission of obligation fulfilment exists, arising from this document, on the side of the Contracting Party against which termination is exercised, the terminating Contracting Party shall be under the obligation of compensating for any and all direct loss, of the Contracting Party against which termination is exercised.*

*5) The Company shall sell its products to the Distributor at the export price in force at the date of order placement. In case the payment or the L.C. comes 30 days over the order, the Company shall have the right to refuse the order and to apply new prices if in the meanwhile a new price list will enter in force.*

*6) The Distributor shall not solicit business for the Company products from outside of the limits of the jurisdiction territory, and will refer to the Company all inquiries or orders received from outside the territory.*

*The Distributor shall have the right to ask to the Company to supply and ship directly to dealers/clients in the area by giving to the Company the prices to be invoiced. The Company shall have to pay to the Distributor the commissions arising from these sales based on the balance from the export price in force, to the net prices offered to the client. The Distributor shall have to issue an appropriate invoice to the Company stating the amount due for technical support and commissioning.*

*7) Payments : payment terms shall be by Cash in Account or by Letter of Credit at sight, irrevocable and confirmed by primary Italian Bank.*

*8) The Distributor undertakes to purchase a minimum quantity of products equivalent to EURO 100,000,00 for the first year; a minimum equivalent to EURO 150,000,00 for the second year and a minimum equivalent to EURO 200,000,00 for the third year. Following the end of the third year, the Company and the Distributor shall renegotiate the level of the rate of yearly increase of the minimum estimated turnover, the maximum rate being 15%.*

*The annual turnover shall be divided into two (2) six-month's periods and the Distributor shall be under the obligation to purchase during each six-month's period goods for an amount equal to the respective minimum quantity of the annual turnover.*

*In the event that the purchase volume of every six-month's period should not meet the estimated goal, as set above, the Company and the Distributor will discuss about the reasons of the missing goal.*

*Whether no acceptable reasons shall be given, the Company shall have the right to discontinue the relationship by giving 3 months notice to the Distributor.*

*The Company shall not be entitled to one-side discontinuation of collaboration, in the event that if not-attainment of the above estimated goal is due to force major (fire or destruction by other means of the Distributor's facilities, transportation strikes, earthquake, etc.) or to fault of the Company (delay in order's delivery, etc.).*

*9) The Distributor during the currency of this agreement shall do his best to provide for the organisation of all service requirements concerning the products sold by himself in the Territory.*

*Two year warranty will cover all the electronic products, 3 years warranty will cover all the loudspeaker products against defects in materials or assembly workmanship.*

*The damaged parts, will be supplied to the Distributor Ex Works at factory in Flero, at no cost, if defective.*

*In case of industrial defective products, the freight costs shall be split by the Distributor and the Company.*

*If the damage is caused by the customer, the spare parts will be invoiced and the Distributor will have to pay for them.*

*Schematic diagrams and drawings will be supplied by the Company to the Distributor to facilitate necessary repairs.*

*The Company shall be under the obligation to have available, for the Distributor, spare parts of all its products, throughout the term of Agreement.*

**10) Delivery:** *all deliveries of the products shall be Ex works at factory in Flero – Brescia – Italy.*

*The Distributor shall cover all insurance and freight charges.*

*The Company shall not be held liable for losses or damages caused during transportation.*

**11)** *This agreement shall be governed by the laws of Italy.*

**12)** *This agreement shall enter into force only when the Company shall receive a signed copy of this agreement and the initial purchase order for a minimum amount equivalent or superior to 1/3 (one third) of the minimum purchase's amount agreed for the first year.*

**Date:** *July the 2th, 2012- ”*

(B) As would be evident from above, the duration of the Agreement was specifically provided to be of three years and it was further agreed that following the end of the third year, the parties shall renegotiate.

(C) The parties understood the contract to be for fixed term is also evident from the communication dated 2<sup>nd</sup> July, 2015 of the defendants to the plaintiff extending the duration of the contract for the next twelve months i.e. till 2<sup>nd</sup> July, 2016. The same is indicative of the parties not intending the contract to continue till terminated.

(D) Admittedly, there is no document of renewal of contract thereafter.

(E) The argument of the counsel for the plaintiff is of renewal by conduct.

(F) The counsel for the plaintiff in this regard refers to the invoices raised by the defendants on the plaintiff for the period after 2<sup>nd</sup> July, 2016.

(G) However, the aforesaid invoices neither show the plaintiff to be the exclusive distributor nor would continue the Agreement of Exclusive Distributorship whereunder the defendants had precluded themselves from supplying their goods to anyone else. The said invoices would only show commercial transactions between the parties to be continuing and which the parties in any case were free to undertake. The sales effected by the defendants to the plaintiff by no means constitute, even by conduct, an agreement by the defendants to continue with the plaintiff as exclusive distributor for a further period of three years.

(H) For this reason, the reliance by the counsel for the plaintiff on *Haji Mohammed Ishaq Wd. S.K. Mohammed* and *Kalyanji Vithaldas* supra is misconceived. All that *Haji Mohammed Ishaq Wd. S.K. Mohammed* supra held was that placing of orders and making of supplies and raising invoices therefor proved concluded transaction between the parties and for liabilities arising wherefrom the parties were liable. Similarly, in *Kalyanji Vithaldas* supra, the agreement itself provided that unless terminated it would continue from year to year and which is admittedly not the position in the contract between the parties in the present case. Neither of the said judgments show continuation of an agreement of exclusivity by conduct.

(I) The same is the position with respect to Sections 8 & 9 of the Contract Act. Section 8 of the Contract Act only provides for creation of a contract by making of a proposal and acceptance thereof. Section 9 of the Contract Act provides for express and implied promises, with proposal and acceptance made otherwise than in words being said to be implied. Once the parties had by a contract in writing agreed to the arrangement of exclusivity for the period of three years and after the expiry of three years extended it for a period of one year only, the question of the parties having impliedly extended the agreement for a further period of three years, after the expiry of the said one year, would not arise. The transaction of sales by the defendants to the plaintiff, of after the expiry of said one year, would only accrue liabilities with respect to the said sales and would not create a relationship of exclusivity for future.

(J) In *Oil and Natural Gas Commission Vs. Association of Natural Gas Consuming Industries of Gujarat* 1990 (Supp) SCC 397, in the context of ordinary commercial contracts entered into by private treaty, for sale and purchase of goods, it was held that ONGC was perfectly at liberty to stop the supply on the expiry of the relevant contract and to refuse to supply further unless a fresh contract could be entered into agreeing upon a price for such supply. It was further held that even on account of ONGC being a State instrumentality and the price demanded by it being susceptible to judicial review, the Court could not direct ONGC to continue the supply indefinitely, without a contract. Similarly, in *Aggarwal & Modi Enterprises (P) Ltd. Vs.*

*New Delhi Municipal Council* 2007 (8) SSC 75, it was observed that since the terms had not been mutually arrived at, in essence the parties had not agreed to renewal and the earlier renewals were therefore of no consequence. It was noticed that specific periods were indicated in the terms of license itself and contractually there was no entitlement to seek a renewal. It was further held that the injunction sought amounted to seeking specific performance. In *State of Karnataka Vs. State of Tamilnadu* (2018) 4 SCC 1 also, noticing that the clauses in the contract did not indicate permanency but on the contrary fixed term, it was observed that the contract had to be construed so. It was further held that the continuance of the contract was a subjective consideration and merely agreed upon and therefore to hold that it continued solely because of the experience gathered would not be appropriate and it would be contrary to the concept of understanding the clauses of contract to give effect to its continuance. It was held that the term of the contract being for 50 years, on expiry of the said term, the contract expired and the correspondence exchanged between the parties was held to be not amounting to extension of the contract.

(K) The Division Bench of the High Court of Bombay in *Airwide Express Cargo Vs. Union of India* 2010 SCC Online Bom 1849 (SLP(C) 35367/2010 preferred whereagainst was dismissed on 23<sup>rd</sup> August, 2013) held that there is no vested right to extension or renewal of the contract. This Court also recently in *Parsoli Motors Works Pvt. Ltd. Vs. BMW India Pvt. Ltd.* 2018 SSC Online Del 6556, on a conspectus of case law held that in the current day and age, making of

contracts is a matter of high technical expertise, with legal brains from all sides involved in the process of drafting a contract; it is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into; thus, normally a contract should be read as it reads, as per its express terms. It was further held that implied terms could be read into a contract only in exceptional cases, where it is reasonable and equitable to do so and where it is necessary to give business efficacy to the contract, so that no term would be implied if the contract is effective without it and so that it does not contradict any express term of the contract. It was further held that if the power of renewal is not exercised, it is not possible for the court to hold that the contract stood renewed.

(L) There is thus no real prospect of the plaintiff succeeding in the claim for recovery of damages in the sum of Rs.1,50,00,000/- and/or for its claim for rendition of accounts and there is no other compelling reason why the said claims of the plaintiff should not be disposed of before recording of oral evidence;

(M) Order XIII-A of the CPC as applicable to commercial suits permits the Court to, in such circumstances, render a summary judgment dismissing such claims.

(N) Though Order XIII-A of the CPC required an application to be moved for a summary judgment and which the defendants have not done in this case but Rule 1 of Chapter X-A of the Delhi High Court (Original Side) Rules, 2018 introduced with effect from 1<sup>st</sup> November,

2018 permits the Court to, on its own, render a summary judgment, even without waiting for the defendants to make an application.

16. Thus, in exercise of powers under Rule 1 of Chapter X-A, I dismiss the claims of the plaintiff for recovery of damages in the sum of Rs.1,50,00,000/- and for rendition of accounts. Once it is found that the Agreement of exclusivity, on the basis whereof the said reliefs are claimed had not been further renewed, the question of the plaintiff being entitled to the said reliefs, does not arise.

17. That leaves the claim of the plaintiff for Rs.12,28,370/-.

18. The counsel for the defendants has not made any arguments with respect to the said claim and has rather said that the same be put to trial.

19. The next question which arises is, whether the surviving claim of the plaintiff of recovery of Rs.12,28,370/- should be put to trial in this Court.

20. In my opinion, the same is not permissible, inasmuch as the same is below the minimum pecuniary jurisdiction of this Court. Merely because in of the inflated claims of the plaintiff, which have now been summarily dismissed, a claim for an amount less than minimum pecuniary jurisdiction of this Court, is also included, would not entitle the plaintiff to invoke the pecuniary jurisdiction of this Court, when the claim which has legs to stand on, is below the minimum pecuniary jurisdiction of this Court. The plaintiff, merely by inflating a claim, cannot avail of the pecuniary jurisdiction of this Court.

21. Though an attempt was made in the last two hearings to encourage a settlement between the plaintiff and the defendants and to which the counsel

for the plaintiff, though without taking instructions from the plaintiff, seems agreeable, but the counsel for the defendants has stated that he does not need to take instructions from the defendants and wants to contest the claim.

22. Accordingly, the claim of the plaintiff for recovery of damages in the sum of Rs.1,50,00,000/- and for rendition of accounts is summarily dismissed.

23. No costs, since the dismissal is not at the instance of the defendants.

Decree sheet be drawn up.

24. As far as the claim of the plaintiff for Rs.12,28,370/- is concerned, the plaint with respect thereto is ordered to be returned to the plaintiff for the plaintiff to file the said claim in the Court of appropriate pecuniary jurisdiction.

25. Subject to the plaintiff filing certified copies in this Court, the original plaint and the original document/s, if any filed by the plaintiff be returned forthwith to the plaintiff.

26. Since the suit has been pending in this Court since 7<sup>th</sup> October, 2016, it is further provided that if the plaintiff so presents the returned plaint for the claim of Rs.12,28,370/- in the Court of appropriate pecuniary jurisdiction on or before 8<sup>th</sup> March, 2019, the same shall be entertained irrespective of the question of limitation.

**RAJIV SAHAI ENDLAW, J.**

**JANUARY 30, 2019**

‘bs/ak’

*(corrected & released on 12<sup>th</sup> February, 2019)*

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