Spice Digital Ltd vs Vistaas Digital Media Pvt. Ltd on 12 October, 2012

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

1 ARBPL1164.12.od

hvn

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L) NO. 1164 OF 2012

Spice Digital Ltd.
A Company registered under the Companies Act,
1956 having its registered office at C-5, Sainik

Farms, New Delhi 110 062 and Corporate Office
at S. Global Knowledge Park, 19A and 19B
Sector 125, Noida 201301, U.P. ... Appellant

Versus

Vistaas Digital Media Pvt. Ltd.,

a company registered under the Companies Act,
1956, having its registered office at 415, Palm
Spring Road, Link Road, Malad (West),

Mumbai 400 064 ... Responden

Mr. D.D. Madon, Sr. Advocate alongwith Sanaya Dadachanji alongwith Mr. Amit Chavan along with Tanvi Dudeja and Ujwal Trivedi i/by M/s. Manilal Kher

Ambalal & Co. for the appellant.

Mr. Pradip Sancheti, Sr. Advocate alongwith Mr. Nirmay Dave along with Mr. Mayur Agarwal i/by M/s. Bilawala & Co. for respondent.

CORAM : R.D. DHANUKA,J.
RESERVED ON : 26TH SEPTEMBER, 2012

PRONOUNCED ON : 12TH OCTOBER, 2012

JUDGMENT :

1. By this appeal filed under Section 37(2)(b) of Arbitration & Conciliation Act, 1996 (for short Arbitration Act, 1996) though lodged as petition, the appellant (original claimant/applicant before the arbitral tribunal) seeks to challenge the order dated 16th August, 2012 passed by the learned arbitrator rejecting the application for interim relief sought by the appellant under section 17 of the Arbitration Act, 1996.

2 ARBPL1164.12.odt Some of the relevant facts which emerge from the pleadings and documents filed by both the parties are :

> 2. The company carries on business of telecom value added services. The respondent is carrying on business of telecom content aggregation. It is the case of the appellant that the respondent approached the appellant in the month of September, 2009 with a proposal for providing "Live Aarti" feed from Shree Shirdi Saibaba Shrine, Shree Siddhivinayak Temple, Mumbai and Shree Kashivishwanath Temple, Varanasi and certain other shrines and sought the appellant's support and assistance in developing the market for the said service.

The appellant accordingly entered into an agreement with the respondent for a period of three months.

3. On 11th June, 2010 the parties entered into the Content Licence Agreement effective from 1st January, 2010 initially for a period of 18 months.

Clause 6.2 of the said agreement provides that there shall be a lock-in period of 18 months for licensor from the effective date i.e. 1 st January, 2010. Clause 1.6 provided that Manokamana, a

unique service developed by Licensee, which will enable the End User to record his/her "Manokamna (wish)" (the "Manokamna Feed") on Licensee's platform, which shall be played inside the Temple Premises at "Shree Shirdi Saibaba, at Nashik through licensor respondent.

Scope of agreement was provided in clause 2 of the said agreement. The appellant was granted exclusive licence and right to provide content and its related services specified in Annexure A to the agreement, the rights to use the Content with 3 ARBPL1164.12.odt mobile and/or landline devices of the End User. The respondent also agreed to provide its expert services to the appellant for the Manokamna services as per the instructions of the licensee for the consideration stated therein. Clause 12.1.(a) and (b) provided that :

> "12. TERMINATION :
>
> 12.1 Subject to clause 6.2, this agreement or any part thereof may be terminated;

(a) By either party, upon giving at least thirty (30) days prior written notice to the other without assigning any reason thereof; however both the parties shall continue performing their respective obligations during the notice period.

(b) Immediately, upon written notice by either party, if the other breaches a performance, representation, warranty or material obligation of this Agreement and fails to cure the breach within fourteen (14) days from the receipt of a written request to cure from the non-breaching Party; or ....."

Clause 12(2)(a) to (f) reads as under :

> "12.2 Consequences of termination :
>
> Withstanding any other rights and remedies provided elsewhere in the Agreement, on termination of this Agreement :
>
> (a) Neither party will represent the other Party in any of its dealings.
>
> (b) Neither Party shall intentionally or otherwise commit any act(s)

4 ARBPL1164.12.odt as would keep a third party to believe that the other Party is still associated with the former party in terms of this Agreement.

(c) Each Party shall immediately stop using the other Party's name, trade, mark, intellectual property, etc. in any audio or visual form for any activity whatsoever and return/destroy as directed by the other Party, all intellectual property; information in relation to such intellectual property of the other party in its possession and also the live audio feed.

(d) Neither Party will be entitled to claim any amount of loss or compensation for termination of Agreement.

(e) Each Party must, at the requisition of the other Party, either; (I) return to the other Party the other Party's Confidential Information, or

(ii) destroy or delete the other Party's Confidential Information and certify to the other Party in writing that it has done so.

(f) The expiry or termination of this Agreement for any reason shall not affect any rights and/or obligations :

(i) accrued before the date of termination or expiry; or

(ii) expressed or intended to continue in force after and despite expiry or termination."

Clause 14.6 of the agreement and 14.7 which provides for Exclusivity and waiver respectively are as under :

"14.6 Exclusivity : it is hereby agreed and clarified that with effect

5 ARBPL1164.12.odt from 16th June, 2010, the Agreement shall be on exclusive basis with respect to the Content and its related services provided by the Licensor to the Licensee and the Licensor also agrees not to enter into similar agreement for the purpose as enumerated herein with any third party.

However, Licensee shall be entitled to enter into similar agreement with any third party for the purpose as enumerated herein.

14.7 Waiver : No waiver of any breach of any provision of this agreement constitutes a waiver of any prior, concurrent or subsequent breach of the same or any other provisions, and will not be effective unless made in writing and signed by an authorized representative of the waiving Party."

Clause 14.11 of the agreement provides for arbitration.

4. On 1st June, 2011 both the parties entered into amendment agreement to the principal agreement dated 11th June, 2010. Clause 2.1 of the said amended agreement provides that the term of the principal agreement as defined in clause 6 of the principal agreement was extended for the period of four years from 1.7.2011 to 30th June, 2012 unless terminated earlier in accordance with the provisions of the principal agreement. Clause 6.2 of the principal agreement is amended and reconstituted by clause 2.2.1 of the amended agreement which reads as under :

"2.2 Amendment :

2.2.1 Sub clause 6.2 of the Principal Agreement, be and is hereby amended and substituted by the following new sub clause 6.2, as 6 ARBPL1164.12.odt enumerated below :

"There shall be a lock-in period of 24 months for the Principal Agreement for the Licensor from 1st July, 2011 to 30th June, 2013.

However, if the Principal agreement is terminated before the above lock-in period by Licensor, then the Licensee shall have undisputed right to withhold the payment of the licensee fee (as specified in Annexure "B" of this Principal Agreement), if any due at the time of such termination, along with the right to approach the Court of law for appropriate remedies that the Licensee may be entitled to under the law:. However, this sub clause shall not be applicable in the event there is a material breach committed by the Licensee and in such an event the Licensor shall have the right to terminate the Principal Agreement in accordance with the provisions contained therein."

5. In Annexure A to the said amended agreement, the content listing and delivery mode was provided and names of various religious places for which respondent possess legal right is mentioned. It is agreed by the respondent that during the term of the principal agreement, content from the three temples/shrines namely (I) Shree Shirdi Saibaba, Shirdi, Dist. Nashik, (ii) Shree Kashivishwanath Temple, Varanasi and (iii) Takht Shree Harmandir Sahib Gurudwara, Patna shall be provided at all time without failure. However, for the other temples/shrines as referred in annexure A, the respondent shall ensure to get content replaced by any other new temple/shrine with prior consent from the 7 ARBPL1164.12.odt appellant in case the same are not available due to any reason, thereby, maintaining at all times the count of temples/shrines. Annexure B of the principal agreement which provides for commercial terms, amended by clause 2.2.6 providing for consideration payable by the appellant to the respondent. It was provided that consideration payable by the appellant to the respondent for the period till 31st March, 2011 shall be payable based on MIS report for the content shared by Licensee, which shall be paid by Licensee by 30 th June, 2011 subject to receipt of the invoice and for the period from 1st April, 2011 to 30th June, 2011, shall be payable based on the MIS report for the content shared by licensee by 15 th August, 2011, which shall be paid by 15th September, 2011 subject to receipt of the invoice. It is agreed that during the period from 1st July, 2011 to 30th June, 2012, the appellant shall submit to the respondent reconciled MIS report for the content within 45 days from the end of each quarter and the appellant shall pay the respondent the license fee over and above the minimum guaranteed amount as mentioned in the agreement within 10 days of such reconciliation, subject to receipt of the invoice from the respondents. Similarly it was agreed that during the period from 1st July, 2011 to 30th June, 2012, the appellant shall submit to the respondent reconciled MIS report for the content within 45 days from the end of each quarter and shall pay licence fees over and above minimum guaranteed amount within 10 days of such reconciliation subject to receipt of invoice from the licensor. In so far as Manokamna services are concerned it was agreed that the appellant shall pay the respondent a fixed amount of Rs.3,50,000/- per month or 45% of the gross earning from Manokamna services whichever was higher.

8 ARBPL1164.12.odt Clause L of Annexure B provides that the respondent shall be entitled to verify and examine all past and future MIS reports shared by the appellant in terms of the principal agreement and in case of any discrepancy of more than 5%, the appellant shall pay respondent the amount payable for such discrepancy on demand by the respondent within seven days of raising of such demand. Clause (M) provided that all amounts payable for present and future periods during the term shall be paid as stipulated. It shall be considered as a material breach and licensor shall be entitled to terminate the Principal agreement notwithstanding the lock-in period, in accordance with the provisions of the principal agreement.

Clause (O) provided that no minimum guarantee amount shall be payable by the licensee to the licensor if the said period for which the content is not made available by the lincesor in cases of three temples namely Shree Shirdi Saibaba, Nashik, Shreee Kashivishwanath Temple, Varanasi and Takht Shri Harmindir Sahib Gurudwara, Patna for a period continuously exceeds 15 days during the term. In case of temple Shree Kashivishwanath, it is provided that if the content was not made available to the licensee continuously for any period exceeding 15 days during the term, then only 85% of the minimum guarantee amount shall be payable by the Licensee to the Licensor only for such period for which the content is not made available.

6. Clause 3.1 provided that the amendment agreement shall form integral part of the principal agreement and shall be read with the principal agreement.

9 ARBPL1164.12.odt

7. It is the case of the appellant that since 1 st December, 2011, the respondent stopped providing live aarti feed from Kashivishwanath, Varanasi and only provided the content from 12 temples/shrines. It is the case of the appellant that respondent in the month of January, 2012 made a request to the appellant to examine records of the appellant and to verify the MIS reports and field inspection of all such documents was given to the respondent on 19 th January, 2012 and 20th January, 2012. Various correspondence was exchanged in this regard between the parties. In the month of March, 2012, respondents offered to the appellant as replacement ig for Kashi Vishwanath, live aarti feed from Gurudwara Banglasahib. It is the case of the appellant that the live aarti from Shri Bangla Saheb Gurudwara had already been borrowed by the appellant from another service provider and as such was not interested in that content from the respondent. It is the case of the appellant that on 10 th April, 2012, the respondent vide email had given ultimatum to the appellant to (i) purchase 50% equity in the Respondent (ii) increase the minimum guaranteed fees or (iii) cancel the contract.

8. On 18th June, 2012 the respondent issued termination notice to the appellant alleging material breaches and gave cure period of 14 days which expired on 1st July, 2012.

9. On 28th June, 2012, the appellant gave reply to the notice of termination denying any breach of the content licence and called upon the respondent to 10 ARBPL1164.12.odt withdraw the notice of termination and to continue to comply with their obligations under the content licence agreement and maintain 13 shrines at all times for live audio streaming by the appellant. By the said letter, the

appellant invoked arbitration agreement and nominated Mr. Justice Bhimrao Naik, a former Judge of this court as an Arbitrator and requested the respondent to concur with his name.

10. The appellant thereafter filed a petition under section 9 of the Arbitration Act, 1996 in this court (Arbitration Petition (L) No. 826 of 2012). On 29 th June, 2012 S.J. Kathawala,J. directed that the matter shall stand over to 16 th July, 2012 and in the meantime, the respondent shall not act on the basis of termination notice dated 18th June, 2012. By an order dated 17 th July, 2012 passed by S.J. Kathawala,J. the Arbitration Petition (L) No. 826 of 2012 as well as Arbitration Application (L) No. 917 of 2012) filed under section 11 of the Act, came to be disposed of by consent of both the parties. The disputes between the parties were referred to sole arbitration of Mr. Justice F.I. Rebello (retired). It was directed that the order passed by this court on 29 th June, 2012 shall continue for the period of four weeks from the date of the said order dated 17 th July, 2012 and that the learned Arbitrator shall decide the application under section 17 of the Act without being influenced by ad interim order dated 29 th June, 2012 which was passed without going into the merits of the case.

11. By an order dated 16th August, 2012 the learned Arbitrator dismissed the 11 ARBPL1164.12.odt application under section 17 of the Arbitration Act, 1996 filed by the appellant herein.

12. Mr. D.D. Madon, the learned senior counsel appearing for the appellant submits as under :

> (i) In the month of December, 2011, the respondent stopped giving feed to the appellant for Kashi Vishwanath temple unilaterally. By letter dated 16 th April, 2012 from the respondent to the appellant, the respondent had given two options to the appellant offering (i) 50% equity participation so as to revive business understanding, demanded revised rates and if those conditions were not agreeable to the appellant, asked to close the relations. It is submitted that this letter shows that there was no dispute and or grievance in respect of any part of obligation on the part of the appellant till the date of the said letter. The appellant could not agree to the demand for royalty made by the respondent by letter dated 13 th March, 2012 for Banglasahib Gurudwara, Delhi as the Appellant had separate agreement with third party in respect thereof and no feed was given by the respondent to the appellant.
>
> (ii) The respondent could terminate the contract under clause 12.1(a) by giving atleast 30 days notice only after lock-in period from 1 st July, 2011 to 20th June, 2012 was over. It is however, fairly stated that the contract could be terminated under clause 12.1.(b) even during the lock-in period if there was any material breach of the contract defined under clause (m) of the amended 12 ARBPL1164.12.odt agreement and if the appellant failed to cure the material breach within fourteen days from the receipt of written notice from the respondent to cure the same.

Clause 12.2 provides for the consequences of termination as produced earlier.

(iii) Clause 12.2.(d) of the contract provide that neither party will be entitled to claim any amount of loss or compensation for termination of agreement. The learned arbitrator gave a finding that by

notice dated 18 th June, 2012 the respondent had called upon the appellant to pay outstanding minimum guaranteed amount for the month of May and June, 2012 which was paid by the appellant by forwarding two cheques along with advocate's notice dated 28 th June, 2012 i.e. within 14 days, which cheques were encashed by the respondents, thus cured the breach within the time prescribed. The finding is given that there can be no material breach in so far as these amounts was concerned, considering the definition of material breach. In respect of Manokamna services, though they were discontinued from 1st December, 2012, no demand has been made by the respondent for payment of any amount on account of discontinuance of such services. In view of the finding of the learned arbitrator that there was no material breach committed by the appellant during the lock in period, termination of agreement by notice dated 18 th June, 2012 was illegal and contrary to clause 12.2 of the agreement which warranted interference by the learned arbitrator under section 17 of the Arbitration Act, 1996. It is submitted that on the one hand, the leaned arbitrator has held hat the agreement by its very nature is determinable, considering section 49(1)(c) of the Specific Relief Act and specific performance 13 ARBPL1164.12.odt thus cannot be granted and on the other hand relying upon clause 12(2)(d) had observed that neither party will be entitled to claim any amount of loss or compensation for termination of contract. It is submitted that the party can not be deprived of either of these reliefs..

(iv) The learned arbitrator could not have considered letter sent by e-mail on 11th June, 2012 by Mr. Shehzad Azad, Head of Business Development and Alliances to the respondent asking the respondent to let the appellant know if they were not interested in working with the appellant any more which reads as under :

> "What is this all rubbish going on?? and on top it I have come to know of various representation by your people at operators, maligning Spice name which is totally unacceptable and not in the spirit of the partnership.
>
> Let me know you if you are not interested in working with Spice anymore, I am pretty sure both of us can survive independently."

13. It is submitted that the said letter could not read in isolation. In any event, it was personal opinion of said Mr. Shaizad Azad who was Head of the Business Development and Alliances and not on the instruction of the appellant to put an end to the contract. The finding of the learned arbitrator that the applicant would not suffer any irreparable loss or injury if the injunction is not granted, is based only on isolated e-mail dated 11 th June, 2012 and not on the basis of any records produced by the respondent before the learned arbitrator. The appellant had already entered into agreements with various customers and in the 14 ARBPL1164.12.odt event of such illegal termination during the lock-in period, serious prejudice would be caused to the appellant.

(v) It is submitted that since ad interim order came to be passed by this court before the expiry of 14 days notice issued by the respondent for curing the alleged defects, termination did not come into effect and thus the finding given by the learned arbitrator that the contract having been terminated, no injunction can be granted in view of section 41 (e) of the Specific Relief Act read with section 41(1)(c) and section 9 of the Arbitration Act, 1996 is contrary to law and facts.

The learned counsel submitted that though the appellant has pleaded before the arbitral tribunal that the contract was terminated, however, it is apparent from the order passed by this court on 29 th June, 2012 that termination did not come into effect and thus in the interest of justice, both the parties be directed to perform their respective obligations under the agreement.

(vi) It is submitted that the provisions under the agreement provides that the respondent shall not enter into any agreement with anybody-else during the lock-

in period and thus shows that the contract was of special value and thus grant of specific performance is the only proper remedy available to the appellant and compensation in terms of money is not adequate.

(vii) The learned counsel placed reliance on the judgment of Delhi High Court in the case of Satyanarayan Sharma1, the judgment of Madhya Pradesh High Court in Jabalpur Cable Network Pvt. Ltd. Vs. E.S.P.N. Software India Pvt.

1 CS (OS) No. 1339 of 2008 delivered on 6th April, 2009 15 ARBPL1164.12.odt Ltd. and Ors.2 . Reliance is placed on the judgment in the case of Satya Narain Sharma (supra) in support of the proposition that if the contract prohibits termination within the lock-in period, contract could not be terminated before expiry of the lock-in period. Reliance placed on the judgment in the case of Jabalpur Cable (supra) is in support of the plea that the obligation to provide content and its related services was in the nature of contract for supplying goods which is not easily obtainable in the market and thus specific performance of this contract is enforceable under section 10 of the Specific Relief Act.

14. On the other hand, Mr. Sancheti, the learned senior counsel on behalf of the respondent submits as under :

> (i) the learned Arbitrator has considered in detail the provisions of the agreement and has interpreted such provisions and has come to the conclusion that the contract was determinable and considering section 14(1)(c) of the Specific Relief Act, specific performance of such contract could not be granted. It is submitted that if specific performance could not be granted in terms of section 41(e) of the Specific Relief Act, no injunction could be granted. It is submitted that the clause 14.6(a) of the amended agreement read with clause 14.6 A of the principal agreement provided that in case of breach of the exclusivity provisions by the licensor, then the licensee shall have undisputed right to withhold the payment of licence fee (as specified in annexure B of the Principal agreement), if any due at the time of such breach along with right to approach the court of law for appropriate remedies that the licensee may be entitled to in law. It is submitted 2 AIR 1999 Madhya Pradesh 271 16 ARBPL1164.12.odt that there is no finding given by the learned arbitrator that in no circumstances, the appellant would be entitled to claim damages even if ultimately the termination is found contrary to the provisions of the agreement. The apprehension of the appellant therefore, that it would be without any remedy is not proper. The appellant having

pleaded in its application under section 17 before the learned arbitrator that the agreement was terminated by the respondent, can not be permitted to argue across the bar contrary to such pleadings. It is submitted that even if there is no termination of the contract, once it is found that the contract is determinable, then considering section 14(1)(c) of the Specific Relief Act no specific performance can be granted and thus no interim injunction can be granted in such situation. If the appellant succeeds, he would be entitled to claim damages in accordance with provisions in the contract and law.

(ii) It is submitted that the agreement entered into between the parties as well as correspondence exchanged clearly indicate that the agreement was for providing services by the respondent to the appellant and the same was not for supplying the goods. No plea that contract was for supply of goods was raised by the appellant before the learned arbitrator or in this court in the earlier proceedings. The appellant's own case is that in respect of one of the Gurudwara, the appellant had entered into separate contract with third party. The learned counsel distinguished the judgment in the case of Jabalpur (supra) relied upon by the appellants on this issue.

17 ARBPL1164.12.odt

(iii) It is submitted that reliance placed by the appellant on the judgment in the case of Satyanarayan (supra) is also totally misplaced. The learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Indian Oil Corporation Limited Vs.Amritsar Gas Service3, , in the case of Her Highness Maharani Shantidevi P. Gaikawad 4, Cox and Kings India Limited Vs. Indian Railways Catering Tourism Corporation Limited and another5 and in the case of Rajsthan Breweries Limited Vs. Stroh Brewery Company6 .

(iv) It is submitted that considering the nature of the contract entered into between the parties, it is clear that it is determinable. The learned arbitrator has given a prima facie finding holding that the contract is in the nature of determinable. It is submitted that the contract cannot be specifically enforced if the performance of which involves continuous duty and supervision of the court.

It is submitted that in addition to the minimum guarantee amount, the appellants were also liable to pay to the respondent on the basis of the amount to be calculated based on MIS reports. It is submitted that the court cannot supervise as to whether the appellant has submitted all MIS report from time to time and if so about the accuracy thereof. The court also cannot supervise whether the payment on the basis of such MIS reports are made by the appellant to the 3(1991) 1 SCC 533 4 (2001) 5 SCC 101 5 (2012) 7 SCC 587 6 AIR 2000 Delhi 450 18 ARBPL1164.12.odt respondent or not. At the same time the Court also cannot supervise whether the respondent has complied with its part of obligation under the contract. It is submitted that the learned arbitrator has given prima facie finding of fact and this court shall not re-appreciate the finding of fact under section 37 of the Arbitration Act, 1996.

(v) The learned counsel placed reliance upon various breaches alleged by the respondent against the appellant as summarized by the learned arbitrator in Para 30 of the order and thereafter prima facie

finding thereon recorded in para 32 and 36 of the order which are extracted as under :

> "30. We may now consider the notice served by the Respondent on the Applicant dated 18.06.2012. By that notice, the Respondent has pleaded various breaches as on the date of the notice. We may summarize briefly the said breaches as raised by the Respondent :
>
> (a) That the Applicant was under a specific contractual obligation to inform them through e-mail, written communication prior to any Content been made available like any telecom operator as per clause 12.6 of the Principal Agreement. The Respondent has contended that the Applicant failed to inform seemingly with the intention to conceal relevant information from them to make wrongful gains and to cause loss to the Respondent.

(b) The Applicant, it is set out by e-mail dated 5.12.2011, was called upon to provide the status of 'live aartis" on operators, including MTS, 19 ARBPL1164.12.odt Aircel, Uninor and Loop". The Respondent in their reply, admitted being "live" with the operators in question and undertook to share reports with the Respondent upon billing the operators. That the Applicant had failed to inform as of the date of the notice about the Content;

(c) It is then contended that as "late as 8.12.2011 till date, the Applicant had not shared the MIS reports of the Content provided to the operators and as a result had dishonestly appropriated the revenue and denied the due share to the Applicant.

(d) That the Applicant had illegally exploited the content in the manner not warranted by the terms of the Agreement and had committed material breach of the said Agreement. The Applicant was called upon the send written authentication from the respective telecom operators stating the dates on which the Content was made live by them on their platforms within 14 days from the receipt of the letter. Further, the Applicant was called upon to send the complete MIS reports for the Respondent's Content for these additional telecom operators.

(e) That the Applicant had failed to pay the monthly minimum guaranteed amount for the months of May 2012 and June 2012 and also failed to make the payment of the minimum guaranteed amount within the time frame stipulated in the Agreement. Also, the Applicant without prior intimation and for no conceivable reason, ceased to continue the "Manokamana Service" from December, 2011 onwards, 20 ARBPL1164.12.odt even though the same was provided in the Principal Agreement.

(f) The Applicant had failed to provide the reconciled MIS reports of revenue for the Contents within 45 days from the end of each quarter and disburse the amount as determined after perusal of the reconciled MIS report over and above the minimum guarantee amount within 10 days of such reconciliation. The applicant, it was set out had failed to provide the aforesaid reconciled MIS report.

(g) That the Applicant had received the feed of "Shri Bangla Saheb

Gurudwara, New Delhi".
ig The Applicant had admitted and

acknowledged offering the feed of the Respondent on their platform and that took 60 days to reply to Content that they were not using the feed for Bangla Saheb. The Applicant was also called upon to disclose the name of the third party, who was providing the feed to the Applicant which they were contending they were using.

(h) That the Applicant had failed to grant inspection and necessary access to the details of the MIS reports for cross verification in respect of the Content of Manokamana Services. The Applicant had also failed to furnish the said information.

(i) That the Applicant had failed to provide the reconciled MIS reports within 45 days from the end of each quarter and had not received the MIS reports from April, 2011 from some of the telecom operators and for the all telecom operators for the months of January, 2012, February, 2012 and March, 2012 thereby committing material breaches.

21 ARBPL1164.12.odt

32. The question for consideration is whether the breaches as alleged subsist having not been cured, can only be answered (on the evidence being led) at this stage on the material based on pleadings, affidavits and documents. There is some material from the replies and the correspondence exchanged between the parties that some breaches subsist. Some of these it has been contended by the Applicant were dependent on the operators furnishing the information. The question is whether in an agreement of the nature entered into between the parties, can there be specific performance? A prima facie finding has been recorded that the contract by its very nature is determinable. Waiver of breaches committed can only be in terms of clause 14.7 and not otherwise. Considering clause 12.1(b), the Applicant could have cured the breaches within 14 days of receipt of the notice. The issue would still remain whether the breaches as set out in the notice had been cured within the period of 14 days. In my opinion, even prima facie, it is not possible to hold that there are no subsisting breaches. Further, considering the Agreement is prima facie determinable, specific performance cannot be granted and as such, the question of granting temporary injunction would not arise.

36. For all the aforesaid reasons, viz. That the contract by its very nature is determinable, that prima facie there are breaches, which are not cured, interim relief by way of injunction cannot be granted. Even in the alternative, if it can be said that the specific performance can be 22 ARBPL1164.12.odt granted, nonetheless this is not a case where the Applicant have been able to establish that irreparable injury and loss will be caused to them if the injunction is not granted and/or balance of convenience is in their favour. Accordingly, the application u/s. 17 of the Act is dismissed."

(vi) It is submitted that in view of such prima facie findings of facts on breaches, the learned arbitrator was justified in refusing to grant any interim relief to the appellants and thus this court shall not interfere ig with such findings of fact given by the learned arbitrator. The validity of termination of the contract and consequences thereof will be finally decided by the learned arbitrator. If any interim injunction of termination is granted, it would amount to re-writing the contract between the parties by the Court, which is not permissible in law.

15. It is not in dispute that even during the lock in period, the respondent can terminate the contract if there was material breach of contract. Whether the contract was rightly terminated or not is the issue which is pending before the arbitral tribunal and would be decided at the time hearing of the claims made by the Appellant before the arbitral tribunal. The question that arises for consideration of this court is that whether inteirm mesures can be grnted in a contract which is determinable. Section 14(1)(a) to (d) of the Specific Relief Act, 1963 are extracted as under :

> "Section 14 - Contracts not specifically enforceable 23 ARBPL1164.12.odt (1) The following contracts cannot be specifically enforced, namely:--
>
> (a) a contract for the non-performance of which compensation is an adequate relief;
>
> (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise."

16. The arbitral tribunal in the impugned order after referring to clause 6.2 as amended and clause 12.1 of the agreement has recorded prima facie finding that the agreement by its very nature is determinable even during the lock in period. It is held that in case other than for material breach, the licensor if it invokes clause 12 and terminated the agreement, the the licensee is entitled to certain rights which include withholding any license fees that may be due and payable and also moving the competent court for whatever reliefs the Licensee would be entitled. In Para 36 of the impugned order the arbitral tribunal has recorded a finding that the contract by its nature is determinable and interim relief by way of injunction cannot be granted. In Para 29 of the impugned order, it is held that if the agreement by its very nature is determinable within the meaning of section 14(1)(c) of the Specific Relief Act, specific performance cannot be granted. If specific relief cannot be granted, then in terms of section 41(e) of the Specific Relief Act no injunction can be granted. It is held that if the licencee is not entitled to final relief of permanent injunction, then in that event no interim relief by way of injunction can be granted.

24 ARBPL1164.12.odt

17. In the case of Indian Oil Limited (supra), the Supreme Court was considering the fact that if the contract by its nature is determinable, granting relief of restoration of distributorship even on finding that the breach was committed by Indian Oil Limited was contrary to the mandate in section 14(1) of the Specific Relief Act and thus there was error of law apparent on the face of the award which cannot be sustained. The relevant portion of the judgment of the Supreme Court in the case of Indian Oil Limited (supra) reads thus :

> "12. The arbitrator recorded finding on Issue No.1 that termination of distributorship by the appellant-Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff- respondent no. 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under :
>
> "This award will, however, not fetter the right of the defendant corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises."

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in 25 ARBPL1164.12.odt accordance wit the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement it is in this sense that the award describes th Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically ig enforced, one of which is in its nature determinable. In the present case, it is not necessary to refer to the other clauses of sub section (1) of section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained."

18. In the case of Rajasthan Breweries Limited (supra), the Delhi High Court after following the judgment of the Supreme Court in the case of Indian Oil Limited (supra), held that if ultimately it is found that the termination was bad in law or contrary to the terms of the agreement between the

parties, the remedy of the party would be to seek compensation for wrongful termination but not a claim 26 ARBPL1164.12.odt for specific performance of the agreements. Para 20 of the said judgment reads thus :

> "20. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature.
>
> The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same."

19. In the case of Cox and Kings India Limited (supra), the Supreme Court was considering the case of restoration of the leased agreement which was terminated by the party by applying for interim measures under section 9 of the Arbitration Act, 1996. The Appellant in the said case had also pleaded that he had invested large sum of money in the project and thus was entitled to mandatory order of injunction once the lease agreement had been terminated. The Supreme Court has dealt with these arguments in Para 25 and 26 of the said judgment which read thus :

> 27 ARBPL1164.12.odt "25. It is evident from the submissions made on behalf of the respective parties that the arrangement between the Respondent No.1, IRCTC, was with the Appellant Company and, although, it was the intention of the parties by virtue of the Joint Venture Agreement that the luxury train, belonging to the Respondent No.1, was to be operated by the Joint Venture Company, at least for a minimum period of 15 years, what ultimately transpired was the termination of the Agreement by the Respondent No.1 in favour of the Joint Venture Company. As pointed out by the Division Bench of the High Court, the Appellant was not entitled to question such termination as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings. In fact, what the Appellant has attempted to do in these proceedings is to either restore the Lease Agreement, which had been terminated, or to create a fresh Agreement to enable the Appellant to operate the luxury train indefinitely, till a decision was arrived at in Section 9 Application.

> 26. It is no doubt true that the Appellant has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/arrangement had been terminated. We are also unable to accept Mr. Rohatgi's submission that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Appellant's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding."

20. In my view, the arbitral tribunal was right in its prima facie view that clause 6.2 read with clause 12. 1 shows that the contract is determinable during the lock in period. Section 14(1)(c) provides that the contract which in its nature 28 ARBPL1164.12.odt is determinable, cannot be specifically enforced. The Judgments of the Supreme Court in the case of Indian Oil Limited (supra), Delhi High Court and also the judgment of the Supreme Court in the case of Cox and Kings are clearly applicable to the facts of this case. In my view, the arbitral tribunal has interpreted the terms of the contract and has recored prima facie finding that the contract is determinable and thus no specific performance of such contract can be enforced in view of section 14(1)(c). This interpretation of the arbitral tribunal is a possible interpretation and thus no interference is warranted at this stage.

21. In my view, the injunction sought by the Appellant under section 17 of the Arbitration Act, 1996 for the contract which is determinable or is terminated even according to the appellant, such injunction is statutorily prohibited. In my view, at the interim stage, the arbitral tribunal while deciding application under section 17 and the court deciding application under section 9 of the Arbitration Act, 1996 cannot continue operation of such determinable contract or the same having been terminated otherwise it would amount to re-writing the contract. In my view the arbitral tribunal was thus right in refusing to grant injunction under section 17 of the Arbitration Act, 1996. Even otherwise, the arbitral tribunal has given a finding of fact after considering the facts, provisions of the agreement and the provisions of Specific Relief Act and thus no interference is warranted by this court with such finding of fact recorded by the arbitral tribunal at this stage.

22. I am not inclined to accept the argument of the learned senior counsel appearing for the appellant that the contract was not terminated by the respondent as ad interim stay was granted by this court before expiry of fourteen days notice 29 ARBPL1164.12.odt period. The learned counsel appearing for the respondent is right in his submission that the Appellant itself had pleaded while making an application for interim measures under section 17 before the arbitral tribunal that the contract was terminated by the respondent and thus cannot be permitted to change its stand across the bar in the present proceedings. The entire order passed by the arbitral tribunal was on the premise that the agreement was terminated by the respondent.

I am, therefore, not inclined to permit the appellant to contend that the contract was not terminated.

23. The learned counsel for the respondent submitted that the court or the arbitral tribunal cannot grant relief of specific performance of the contract, performance of which involves performance of the continuous duty which the court cannot supervise in view of section 14(1)(d) of the Specific Relief Act, 1963. The learned counsel submits that the respondent had agreed to provide feed to the appellant. One of the obligation of the appellant to make payment to the respondent was based on the MIS report required to be submitted by the appellant from time to time to the respondent. The arbtiral tribunal has recorded a finding that the appellant had not submitted MIS reports on time. The arbtiral tribunal has also recorded a finding that the payment was made by the appellant in the case of one of the site after fourteen days. It is submitted that the arbitral tribunal cannot supervise compliance of the obligation on the part of either party and more particularly whether MIS reports were submitted by the appellant on time or not and vice versa the payments were released by the appellant to the respondent 30 ARBPL1164.12.odt based on such MIS reports. The learned counsel submits that in this situation, the arbtiral tribunal cannot grant specific performance to the appellant in such type of agreements which involves performance of continuous duty which the tribunal cannot supervise. The learned counsel appearing for the appellant on the other hand submits that even if there was delay at any point of time in submission of MIS reports or any payment followed by submission of such reports to the respondent, or if there was any delay in supplying the feed by the respondent to the appellant, the parties can always approach the arbitral tribunal for appropriate relief for seeking compliance thereof. It is submitted that thus in this agreement, no continuous duty or supervision was required by the arbitral tribunal and thus the agreement can be specifically enforced and thus interim relief was warranted in this case.

24. The learned senior counsel also placed reliance on the judgment of Madhya Pradesh High Court in the case of Jabalpur Cable Network Pvt. Ltd. in support of his plea that the agreement between the parties was for supply of goods. It is submitted that the feed agreed to be provided by the respondent to the appellant was of the special value of interest of the appellant and was not easily obtainable in the market and thus specific performance of the agreement was enforceable under section 10 of the Specific Relief Act. The learned senior counsel appearing for the respondent distinguished the judgment of the Madhya Pradesh High Court in the case of Jabalpur Cable Network on the ground that no such plea that the feed agreed to be provided by the respondent was of special value or was not easily obtainable in the market has been raised in the pleadings 31 ARBPL1164.12.odt before the arbitral tribunal. The learned counsel invited my attention to Page 17, 19, 20, 21 to 25 of the application filed under section 17 of the Arbitration Act by the appellant to show that it was all through out pleaded by the appellant that under the agreement respondent had agreed to provide services to the appellant.

In para 19 of the impugned order, the arbitral tribunal has negatived this contention of the appellant that they were governed by section 10 of the Specific Relief Act on the ground that there was no pleadings by the appellant in their application in that regard.

25. In my view, the arbitral tribunal has rightly rejected the contention of the appellant that the feed agreed to be provided by the respondent to the appellant was of special nature and was not easily obtainable in the market on the ground that no such plea was raised by the appellant in an application under section 17.

In my view, the learned counsel appearing for the respondent was right in his submission that it was the appellant's own case that in case of Bangalasaheb Gurudwara, New Delhi site, the appellant had already entered into a contract with third party to provide services.

26. The next submission of the learned senior counsel appearing for the appellant is that the arbitral tribunal has rejected the application for interim measure based on isolated letter sent by an officer of the appellant which was his personal opinion and who was not instructed to write any such letter on behalf of the appellant. The learned counsel appearing on behalf of the 32 ARBPL1164.12.odt respondent on the other hand submitted that there were series of such letters addressed by same person on behalf of the appellant which were not disputed by the appellant. There is no such plea raised by the appellant that the said e-mail letter considered by arbitral tribunal was without any authority. In my opinion the letters addressed by the parties at pages 246, 254, 258, 266 and 276 of the compilation indicates prima-facie that there were series of letters in the same direction and thus I am not inclined to accept the submission of the appellant that interim relief was refused based on an isolated letter or that the officer of the appellant was not authorized to address such letter. It is not in dispute that the appellant has not disputed the other letters addressed and signed by the same person on behalf of the appellant.

27. The next submission of the appellant through its senior counsel is that a party cannot be be without a remedy of claiming specific performance and/or damage. It is submitted that the prima-facie findings of the arbitral tribunal is that in view of the contract being determinable, the appellant would not be able to get relief of specific performance and at the same time has also held that in case of termination on the ground of material breach of contract, the appellant was also not entitled to claim any damages. The learned senior counsel appearing on behalf of the respondent on the other hand pointed out that the apprehension of the appellant that it would not be 33 ARBPL1164.12.odt entitled to get any relief of compensation even if contract is found illegally terminated is incorrect. The learned senior counsel placed reliance on Clause 6.2 as amended read with clause 12.1 of the agreement which provides that licencee is entitle to certain rights which includes withholding any licence if that may be due and payable and also moving the competent court for what the relief the licencee would be entitled to. The arbitral tribunal has considered this issue and has rejected the submission of the appellant that the contract does not provide for compensation on interpretation of clause 6.2 read with clause 12.1 in paragraphs 14 and 17 of the impugned order. In my view, this interpretation of the arbitral tribunal is a possible interpretation and no interference is warranted by this court in this appeal against such possible interpretation of the arbitral tribunal.

28. The next submission of the appellant through the learned senior counsel is that the prima-facie finding of the arbitral tribunal that the appellant had committed breach and that there would be no irreparable loss if reliefs as prayed for were not granted and that the balance of convenience was not in favour of the appellant are contrary to the facts on record and such finding are mutually inconsistent and contradictory. The learned senior counsel appearing for the respondent on the other hand submitted that after considering the pleadings and documents filed by both the parties, the arbitral tribunal after summarizing the breach alleged by the respondent in 34 ARBPL1164.12.odt para 30 of the impugned order has recorded the findings on breaches, on the

part of the appellant, that no irreparable loss would be caused to the appellant and that balance of convenience was not in favour of the appellant in paragraphs 32 and 36 of the impugned order. It is submitted that this court shall not interfere with such findings of fact recorded by the arbitral tribunal in this appeal. In my view, the learned senior counsel appearing for the respondent is right in his submission that this court shall not interfere with these prima facie findings of fact recorded by the arbitral tribunal.

29. In my view, there is no merit in the appeal filed by the appellant. It is, however, made clear that the findings recorded by the arbitral tribunal are prima facie and are recorded while deciding the interim application filed by the appellant. It is made clear that the arbitral tribunal shall decide the matter on merits without being influenced by the findings recorded by the arbitral tribunal as well as the observations made by this court and shall decide the matter in accordance with law.

30. Resultantly, the appeal is rejected.

There shall be no order as to costs.

(R.D. DHANUKA,J.)