

M/S Interads Advertising Pvt Ltd vs Ficci Cs No.18466/2016 on 24 April, 2019

M/s Interads Advertising Pvt Ltd vs FICCI

CS No.18466/2016

IN THE COURT OF SH.MANISH YADUVANSHI :
ADDITIONAL DISTRICT JUDGE -11, CENTRAL,
TIS HAZARI COURTS, DELHI

CS No.18466/2016

M/s INTERADS ADVEDRTISING PVT LTD
office at 4/24-A, Asaf Ali Road,
New Delhi 110 002 ...PLAINTIFF

VERSUS

FEDERATION OF INDIAN CHAMBER OF
COMMERCE AND INDUSTRY (FICCI)
through its Secretary/President
Federation House, Tansen Marg,
New Delhi 110 001 ...DEFENDANT

ORDER ON THE APPLICATION UNDER SECTION 8 OF THE
ARBITRATION AND CONCILIATION ACT 1996 READ WITH
SECTION 151 OF THE CODE OF CIVIL PROCEDURE, 1908.

Date of Institution of the suit	: 26.8.1996
Date on which judgment was reserved	: 10.4.2019
Date of decision	: 24.4.2019

ORDER

1. The subject matter of this order is a 21 years old M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 application mentioned above filed by the defendant society in a money recovery suit of the plaintiff instituted on 26.8.1996.
2. Soon after service of summons, the defendant society filed this application dated 06.1.1997 which has been a bone of contention till now.
3. So much so is the enormity of contentions amongst the parties to the lis qua it; that even evidence had to be led just in order to finally settle a dispute which is propelled by a simple plea of the defendant for directions for this lis to be referred for arbitral adjudication as it contends that parties bound themselves to the Memorandum of Understanding dated 16.6.1995 consisting of an arbitration clause No.G-8.
4. Factual matrix and judicial verdicts from the date of institution of the suit till today must be

narrated briefly.

5. In the suit, the plaintiff company, through its Managing Director Sh.Vishwanath Sharma (PW□) lay a claim of M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Rs.10,85,541.95 paise on the defendant□society sued through its Secretary□President. The claim arises out of a joint venture arrangement between the suit parties owing to plaintiff's business business of media publicity and expertise of organizing exhibitions pan India and abroad.

6. An event of first if its kind namely "India□Russia Buyers□Sellers Meet" was scheduled to take place in Moscow (Russia) between 18th September to 23rd September 1995 at the venue by the name of "Krasnaya Presnya International Exhibition Centre". The object was to promote trade relations. An agreement was entered vide letters of the defendant dated 05.6.1995 (Ex.A□2) and 26.6.1995 (Ex.A□3). As per them, the defendant (hereinafter referred to as the FICCI) was co□sponsor responsible for tapping participants and to get 5% revenue for every square meter of space sold by it. The plaintiff was to incur all the expenditure on advertising, organizing and transportation of participants exclusively.

7. Furthermore, FICCI was to keep 5% of the total booking made by it for expenditure they would incur on postage, faxes, M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 telephone, secretarial costs etc and this would have been a very small part of total expenditure incurred including in□house advertisements, generally charged at the rate of 10,000/□per advertisement. However, FICCI agreed to provide all these free of charge in the interest of the cause.

8. The plaint states that the trouble arose when the defendant started collecting amounts from the participants in contradiction of the agreed terms and was reluctant to repatriate the amount of legitimate share of the plaintiff i.e. Rs.5,98,187/□after apportioning 5% commission payable to FICCI.

9. Additionally, the plaint claims a sum of Rs.1,80,000/□as due from FICCI which was payable by "Tea Board" and which was unauthorizedly collected by FICCI. The plaint also claims a sum of Rs.1,29,420/□which is equivalent to 3595 USD at the relevant time as per details in bill No.115 dated 20.11.1995.

10. It is stated that the event was a big success but FICCI created many occasions to the embarrassment of the plaintiff in view M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 of lack of non□participation of its representatives, even though the exhibition was inaugurated by the First Deputy Prime Minister of Russian Federation and closing ceremony was attended by the then India's Union Minister of Commerce Mr.P.Chidambaram. Hence the claim of Rs.9,07,607/□with additional claim of Rs.1,72,434.94 paise towards interest at the rate of 24 per cent per annum and a sum of Rs.5,500/□towards notice charges, thus totalling Rs.10,85,441.94 paise.

11. With the suit, the plaintiff furnished list of documents dated 16.8.1996 thereby placing reliance on 23 documents relevance of which will be referred to later in the order.

12. As pointed earlier, the defendant took the very first opportunity seeking stay of the suit upon ordering referral to arbitration by way of the application at hand. As per it, the defendant was served for 07.1.1997 and immediately thereafter it filed the application stating that the parties entered into an agreement date 16.6.1995 concerning subject matter of this dispute and its adjudication by the arbitrator in terms of clause G□8. With the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 application, copy of the agreement was filed as Annexure R□.

13. For record, its copy bears rubber stamp of the defendant on each page certifying it to be a true copy.

14. In the application, it is stated that the plaintiff had issued notice dated 22.3.1996 (Srl.No.19 in the list of documents dated 16.8.1996), which was replied by the FICCI on 02.5.1996 (Srl.No.20 in the list of documents dated 16.8.1996). On 24.5.1996 (Srl.No.21 in the list of documents dated 16.8.1996), the plaintiff asked for copy of the agreement dated 16.6.1995 (Ex.AW□/1 = Ex.A□) vide its letter dated 24.5.1996.

15. In response, the defendant enclosed copy of the Memorandum of Understanding with the letter dated 06.6.1996 (Annexure R□3 to the application at hand). Hence, the defendant prayed stay on proceedings and directions to the parties to refer their disputes□claims for adjudication by arbitration in accordance with clause G.08 of the agreement dated 16.6.1995 (Ex.AW□/1=Ex.A□). The application is supported with the affidavit of Sh.Amit Mitra, M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Secretary General of the defendant FICCI (AW□2).

16. According to the plaintiff, contents of the application are misconceived and it is not maintainable as (a) no agreement dated 16.6.1995 took place and (b) as the application is not accompanied with the original agreement which is mandatory under Section 8 of the Arbitration and Conciliation Act. 1996 (hereinafter referred to as the Act).

17. Copy of Ex.AW□/1 (Ex.A□) produced with the application is said to be falsification and fabrication as clause F□7 refers to two letters dated 06.6.1995 and 25.6.1995. It is challenged therefore on the ground as to how a document would reflect the date yet to come in the point of time i.e. 26.6.1995 when the document itself stood created 10 days prior in point of time i.e. on 16.6.1995?

18. As explanation to the issue of agreement/Memorandum of Understanding, reply narrates that FICCI desired that some MOU be executed and a fax message was sent to which fax reply was made on 31.7.1995 (Ex.PW□/1=Ex.A□4). On the same day i.e., 31.7.1995 M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 PW□ Vishwanath Sharma wrote a letter to Mr.Mahim Bisht, Deputy Secretary of the FICCI acknowledging receipt of draft Memorandum of Understanding and asserting that there is no need to enter into any Memorandum of Understanding as the plaintiff had already agreed to pay 5% commission to FICCI. Reply however, re□asserts that even on 31.7.1995, no Memorandum of Understanding stood signed or agreed to be signed. It is therefore denied that there was any agreement to refer the disputes to arbitration.

19. Rejoinder to the application was filed. The defendant reasserted its case under Section 8 of the Act adding by way of denial that non filing of the original agreement makes the application itself not maintainable. In regard to clause F.07 in the Memorandum of understanding, it was explained in the rejoinder that the parties agreed for execution of Memorandum of Understanding and draft was prepared after mutual discussion leading to preparation of Memorandum of Understanding itself on 16.6.1995 which was feeded in the computer. However, it could not be signed on that date as the plaintiff desired changes/alterations. In the meantime, communication dated 26.6.1995 (Ex.A³) took place. The plaintiff kept avoiding to M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 sign the agreement and it was only sometime in the first week of September 1995 that he signed the Memorandum of understanding dated 16.6.1995. It is clarified that modifications in the draft memorandum of understanding were carried out but due to oversight and unintentionally the date remained as 16.6.1995 and now the plaintiff is trying to take advantage of this lapse. The rejoinder is supported by sworn affidavit of Amit Mitra (AW²).

20. The case, at that time, was pending in the Hon'ble High Court of Delhi and upon hearing on the application at hand, it was directed that the dispute can be resolved after framing of issues and evidence of the parties

21. Thus on 18.2.1998, the following issues were framed for evidence of the parties for the limited purpose of decision on the application at hand; viz □

1. Whether the parties entered into an agreement (MOU) dated 16.6.1995? If so, when it was executed?

2. Is there an arbitration agreement between the parties?

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3.Relief

22. Subsequently on 03.4.2003, an order was passed calling upon the defendant to produce the original agreement and on the very next date i.e. 24.7.2003, the suit stood transferred to this Court on account of enhancement of pecuniary jurisdiction.

23. Towards compliance of the order dated 03.4.2003, the defendant applicant came up with an application under Section 65 of the Indian Evidence Act reference of which is absolutely necessary. At that time Sh.Vishwanath Sharma had appeared as PW□ and filed his affidavit in evidence dated 15.7.1998 and Mr.Amit Mitra had appeared as DW□ and filed sworn affidavit dated 07.12.1998. The directions are dated 03.4.2003.

24. Reverting back to the application under Section 65 of the Indian Evidence Act, it was filed on 19.2.2004 for the defendant by one Alop K Mittal, Advisor to FICCI. In para 4 of the application, it was submitted that "with the application under Section 8 of the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Act, the defendant also filed an attested true copy of the

agreement/Memorandum of Understanding which was signed in the first week of September 1995". In its para 5, it is submitted that "original contact is not traceable/misplaced or lost in defendant's records". A separate affidavit was filed in support of the application and the deponent is one Harish Sharma (AW□) who claimed to be custodian of the original contract and that the contract was then not traceable/misplaced or lost. It was prayed in this application that the attested copy of the contract be treated as secondary evidence and the application under Section 8 of the Act be disposed of.

25. Reply was filed

26. This application was disposed of vide order of the Court dated 24.9.2005. It was dismissed. On the same date i.e. on 24.9.2005, the Court also pronounced the judgment and decreed the suit.

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27. Both, the order and the judgment were challenged by the defendant in RFA No.27/2006. It was disposed of on 12.10.2006. The Hon'ble High Court of Delhi allowed the appeal and set aside the impugned judgment and decree. It permitted the appellant FICCI to adduce secondary evidence on the question of execution and existence of the memorandum of understanding and remanded the suit back for trial with clarification that this court shall decide issues No.1 and 2 again after permitting the defendant an opportunity to adduce secondary evidence to prove the memorandum of understanding and a further clarification also that the plaintiff shall be entitled to cross examine the witnesses offered by the defendant and to adduce evidence in rebuttal. It was also directed that even if issues No.1 and 2 are decided against the defendant, the suit shall be tried and disposed of on merits by giving opportunity to the defendant to file written statement and after taking evidence.

28. The effect is that the application under Section 65 of the Indian Evidence Act was allowed.

29. After the case was received back for trial, the applicant□M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 defendant examined Sh.Harish Kumar Sharma, the then clerk and Executive Assistant as AW□, its Secretary General Dr.Amit Mitra as AW□2; its then assistant and present Accounts officer Sh.H.K.Chakraborty as AW□3 and made all efforts to call witness from the Chamber of Commerce and Industry of Russian Federation i.e. concerned witness namely A.A.Pankratov who was the then Chief Representative of Russian Federation. I shall refer to his role and role of Russian Federation in subsequent paras of this order.

30. The defendant succeeded eventually in examining one Mr.Nikolay V Kurochkin - the present Chief Representative of Russian Federation, Vasant Vihar New Delhi as AW□4 (wrongly numbered as AW□3).

31. On the other hand, the plaintiff□non applicant company examined Sh.Vishwanath Sharma as PW□. No further witnesses were examined.

32. Sh.Umeh Gupta, Advocate has presented case of the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 plaintiff while Sh.Sushil Sharma, Advocate presented defendant's case. Written submissions were also filed by them on record, which have been perused.

33. Without making prolix reference to the arguments (at this stage of this order), it is the case of the defendant/applicant that it has successfully proven existence as well as execution of Ex.AW□/1 (Ex.A□) by leading secondary evidence. AW□ himself is signatory to this document and AW□ establishes its execution and also establishes the factum of handing over of the original memorandum of understanding in the custody of AW□ who thereafter submitted status of the original as lost/misplaced/untraceable in defendant's records. It was pointed out that AW□ admittedly did not enquire about complete record of document filed of Russian Meet from Moscow office and enquired about only the memorandum of understanding which he had seen for the first time only with the summons issued by this Court. It is submitted that admittedly, the Russian Federation was 50% partner with the plaintiff in organizing Russian Meet and therefore AW□ supports the case of the plaintiff while in the witness box as they themselves are to recover their dues M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 from the plaintiff. Regarding the evidence adduced by the plaintiff, it is contended by the PW□ is deposing falsely on oath and the tenor as well as slip□hod way of his answers to the questions put to him in the cross examination clearly establishes that he is hiding the true facts in as much as he even attempted to hide the documentary evidence to the effect that FICCI was never participating in the meet without profit returns and ended up giving contradictory oral evidence that FICCI participated only for good cause.

34. Conversely, it is contended by the plaintiff that without filing original agreement or its certified copy with the petition under Section 8 of the Act, the defendant can not succeed in its cause as mandatory requirement of Section 8(2) of the Act to the above effect has not been complied with.

35. Reliance is placed from the judgments □(i) Atul Singh & ors v Sushil Kumar Singh & ors AIR 2008 SC 1016; (ii) Vishal Retail Ltd & anr v Achhar Singh Bhumber & ors AIR 2011 Ori 159, and (iii) BLB Ltd v Calcutta Stock Exchange Association Ltd 2008 SCC.online. Cal.699.

M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 On the strength of the above judgments, it is contended that the application per□e is not maintainable.

36. The plaintiff challenged testimony of AW□ sating that it is not understandable as to how in an organization of the level of the defendant all its record, legal documents including contract, memorandum of understanding, agreement etc can be left in the custody of Administrative clerk and as to how an organization such as FICCI would not keep the record of movement of important documents. It is submitted that as per AW□, he was sent in the first week of April 1996 to the defendant's lawyer Sh.Sujoy Kumar by his supervisor Mr.G.D.Avasthi but both of them have not been examined.

37. It is pointed out that the original agreement was returned by the lawyer to AW□ who allegedly kept its duly attested copy bearing rubber stamp of the defendant on each page and after it, lawyer demanded the original again in April 2003 but it could not be found. It is contended that no record

is produced by the witness to show that he took the original document from the office of the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 defendant to the office of the Advocate. Moreover, he had no knowledge about Russian meet.

38. According to the plaintiff, it is Mr.G.D.Avasthi, who was custodian of the documents as per record but he had left the defendant 8 years ago, was never produced as a witness despite his possible availability. It is submitted that surprisingly, no action was taken by the office of the defendant against AW-1 for such gross misconduct/neglect. It is contended that AW-1 has taken contradictory stand. It is contended that the defendant has not examined Mr.S.C.Joshi who had attested photocopy of the memorandum of understanding. It is also contended that the defendant has also not examined Sh.Mahim Bisht. It is also contended that the stand to the effect that the document is lost/misplaced/untraceable are all contradictory stands. It is therefore urged that AW-1 who is an employee can not be believed.

39. AW-2 is similarly attacked on the ground that his testimony is beyond pleadings and stand taken by him and AW-1 are contradictory. It is contended that the alleged memorandum of M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 understanding shows that it was executed between three parties - Chamber of Commerce and Industry of Russian Federation through A.A.Pankratov; FICCI through AW-2 and the plaintiff through its Chairman/Managing Director/PW-1 but the document does not bear signatures of one party i.e. Russian Federation and is not signed by A.A. Pankratov. Signatures of PW-1 are said to be forged. Also argued is the fact that the AW-2 has taken different stands about the date when the agreement was signed. As per the application under Section 8 of the Act, the Memorandum of understanding was signed on 16.6.1995. As per rejoinder it was signed in the first week of September 1995. In the evidence affidavit of AW-1 filed in the Hon'ble High Court of Delhi (mark X), a stand is taken that the agreement was signed in the first week of September 1995. However, in the affidavit filed in this Court, it is averred that the memorandum of understanding was signed in the month of August 1995. Hence it is contended that testimony of AW-2 is also doubtful.

40. Testimony of AW-3 is challenged as he does not say clearly that the memorandum of understanding was signed but the only remembered it vividly. However, attention of the Court is drawn M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 to the fact that the affidavit of this witness is dated 05.3.2007 which was attested a day after i.e. on 06.3.2007 and he had not gone to the Court on 05.3.2007. It is also submitted that the witness claims that the memorandum of understanding was signed in his presence in the office of the Secretary General of the defendant and signed by the Secretary General, plaintiff's official and member of Russian Embassy whereas there are no such signature of any member of Russian Embassy or Russian Federation on the memorandum of understanding.

41. Regarding AW-4, it is pointed out that the witness has himself not supported the case of the defendant at all. On the contrary, the plaintiff has led credible evidence and proved the relevant documents to show that the draft agreement was never signed by him or agreed to be signed by him.

42. This Court has very carefully gone through the record and is not oblivious to the fact that the case is already so old and a decision on this application may relegate the parties to this lis to a position prior to filing of this suit or in the alternative may propel the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 suit to continue from the stage of filing of the written statement. Thus not being oblivious to it and conscientiously, it now proposes to return findings on the issues after culling out all the necessary facts as above and dealing with the matter in sink with the quest to find the truth about which assistance will be taken from the following extract of the judgment from Hon'ble High Court of Delhi dated 29.3.2019 passed in Test Case No.8/1995 titled CS Aggarwal Versus State.

"What is 'Truth' and how to discover it

45. The Indian Evidence Act does not define 'truth'. It defines what facts are relevant and admissible; and how to prove them.

46. Truth in law is synonymous with facts established in accordance with the procedure prescribed by law. The purpose of judicial inquiry is to establish the existence of facts in accordance with law.

47. Section 3, 114 and 165 of the Indian Evidence act lay down the important principles to aid the Court in its quest for duly proved relevant facts.

48. Section 3 of the Indian Evidence Act defines the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 expression 'proved', 'disproved' and 'not proved'. A fact is said to be proved when, after considering the matters before it, the Cour either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. "Evidence" of a fact and "proof"

of a fact are not synonymous terms.

"Proof", in the strict sense, means the effect of evidence.

49. If on consideration of all the matters before it, the Court believes a fact to exist or considers its existence probable, the fact is said to be 'proved'. On the other hand, if the Court does not believe a fact either to exist or probable, such fact is said to be 'disproved'. A fact is said to be 'not proved' if it is neither proved nor disproved.

50. The test whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is of a prudent man. The Judge like a prudent man has to use its own judgment and experience and is not bound by any rule except his own judicial discretion, human experience, and judicial sense.

51. Nothing can be said to be "proved", however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is 'disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance. Reference be made to Garib Singh Vs State of Punjab, 1972 (3) SCC 418, M. Narsinga Rao Vs State of Andhra Pradesh (2001) 1 SCC 691, R. Puthunainar Alhithan Vs P.H. Pandian, (1996) 3 SCC 624, Vijayee Singh Vs State of U.P., (1990) 3 SCC 190, State of U.P. Vs M.K. Anthony (1985) 1 SCC 505, Bundhoo Lall Vs Joy Coomar, MANU/WB/0198/1882, Bipin Kumar Mandal Vs State of West Bengal, (2010) 12 SCC 91, Johnson Scaria Vs State of Kerala, MANU/KE/0367/2006 and Ved Prakash Kharbanda Vs Vimal Bindal, 198 (2013) DLT 555 with respect to the scope of Section 3 of Indian Evidence Act.

52. Section 114 of the Indian Evidence Act is a useful device to aid the Court in its quest for truth by using common sense as a judicial tool. Section 114 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts.

53. Whether or not a presumption can be drawn under the Section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 can be laid down. Human behaviour is so complex and room must be left for play in the joints. It is not possible to formulate a series of exact propositions and confine human behaviour within straitjackets.

54. No rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject - whether and how far he ought to believe what the witnesses say? The rules of evidence do not guide what inference the Judge ought to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions - Is this true, and, if it is true what then? - ought to be constantly present in the mind of the Judge, and the rules of evidence do not throw the smallest portion of light upon them. Reference be made to Izhar Ahmad Khan Vs Union of India, AIR 1962 SC 1052, Kali Ram Vs State of Himachal Pradesh (1973) 2 SCC 808, Tukaram Ganpat Pandare Vs State of Maharashtra, (1974) 4 SCC 544, Syad Akbar Vs State of Karnataka, (1980) 1 SCC 30, Sodhi Transport Co. Vs State of U.P. (1986) 2 SCC 486, State of W.B Vs Mir Mohammad Omar, (2000) 8 SCC 382, M. Narsinga Rao Vs State of Andhra Pradesh, (2001) 1 SCC 691, Limbaji Vs State of Maharashtra, (2001) 10 SCC 340 and Ved Prakash Kharbanda Vs

Vimal Bindal, 198 (2013) M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 DLT 555 with respect to the scope of Section 114 of Indian Evidence Act."

ISSUE No.1

1. Whether the parties entered into an agreement (MOU) dated 16.6.1995? If so, when it was executed?

43. Onus to prove this issue is not upon any of the parties and after so much of water has flown since the date of issues, the question on onus is reduced to academic purpose only. Nevertheless, the assertion that the memorandum of understanding exists is by the applicant and that it does not is by the plaintiff. The applicant has led evidence prior to non-appearance of applicant/plaintiff. The facts not pleaded can not be permitted to be proved. In this case, while pleading facts relatable to the application having limited plea of referring the dispute to arbitration. Only so much could have been pleaded which was written in it. But the pleadings multiplied as detailed reply was filed followed by detailed rejoinder. They amplified as both the sides filed documents. They further amplified in the form of pleadings contained in the application under Section 65 of the Indian Evidence Act and affidavit in support of it is sworn and filed by none other than AW-2.

44. The cumulative effect is that plea of the plaintiff that the evidence adduced by AW-2 hinge at places at the verge of being qualified as inadmissible in evidence has also lost its significance and sheen, that is why this court had made it a point to incorporate pleadings and contents of relevant documents in the preceding part of this order. The following part of the order will be dealing with the said pleadings as well as contents of the documents while appreciating evidence adduced by them and take it for appreciation in its totality.

45. I will begin with suit of the plaintiff in which the plaintiff has narrated its entire case through PW-1 and towards end of the plaint, the plaintiff has made a point to mention about the communications it made including legal notice dated 22.3.1996. The plaint refers that an evasive reply dated 02.5.1996 was sent in which the defendant has raised totally baseless claims which are not tenable on the facts and in law (para 16 is referred to). The detail as to what is M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 "baseless claim of the plaintiff" has not been provided in para 16 or anywhere else in the plaint except for para 15. The plaint is silent that the defendant made out false claim in the reply notice to the effect that the parties executed an agreement dated 16.6.1995. Without having set out the above facts in the pleadings, the plaintiff state in para 15 that it does not admit any other alleged agreement dated 16.6.1995 referred to in the reply dated 02.5.1995 given by the defendant through its Advocate stating that there was no such agreement in between the parties and completed paragraph with the line "any such agreement dated 16.6.1995 is specifically and expressly denied".

46. What I highlight is that the plaintiff is aware of the defendant's claim regarding memorandum of understanding dated 16.6.1995, when he filed this suit. It is another matter that the plaintiff has failed to set out facts which warranted explanation to para 15.

47. Nevertheless, both the documents i.e. legal notice dated 22.3.1996 and its reply dated 02.5.1996 were filed by none other than M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 the plaintiff with its list of documents i.e.16.8.1996 and the same are at Srl.No.19 and 20 of the list. Surprisingly, the plaintiff is silent about the document at Srl.No.21 which is a letter dated 24.5.1996. I will refer to them now.

48. In the legal notice dated 22.3.1996, the plaintiff's lawyer notifies the FICCI to make payment (as in the suit) failing which legal proceedings for recovery will be initiated. Here, the plaintiff is referring to two letters dated 05.6.1995 and 26.6.1995 which are Ex.A□2 and Ex.A□3 respectively. Both these letters are correspondence between the suit parties originating from Sh.Mahim Bisht to the plaintiff. Ex.A□2 is an offer by FICCI about the terms of collaboration while Ex.A□3 is a letter asking confirmation of arrangement with FICCI that parties had agreed to.

49. What is interesting is that clause 2 of the legal notice and also para 4 of the suit plaint are referring to "agreement" which was entered into vide FICCI's letters dated 05.6.1995 and 26.6.1995. The term "an agreement" can not be read in plurality as it refers to M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 singularity only. However, two letters are to be referred in plurality. The net effect is that "an agreement" is seen separable from "vide your letters dated 05.6.1995 and 26.6.1995" Full extract is hereunder :

"2. That my clients entered into an Agreement with you to organized Ist India□Russia Buyers□Sellers Meet, at Moscow held in September, 1995, and Agreement was entered into in between you and my clients vide your letters dated 5.6.1995 and 26.6.1995. The salient terms agreed in between you and my clients were as under."

50. When the question is of interpretation of a document, the nomenclature is not important and it is the intent of the executants which eventually defines as to what was the consensus□ad□dem. Seen so, again in para 3 of the legal notice reference is made to "terms and conditions of the aforesaid agreement". Here again, referral made to the agreement is in singularity only. Thus the effect of the letter is of the existence of an agreement entered into between the parties vide two letters dated 05.6.1995 and 26.6.1995. An agreement is a contract.

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51. On the other hand, these two letters are single sided communication made on both the occasions by FICCI with the plaintiff. I have already pointed out that Ex.A□1 is an offer whereas Ex.A□2 is request for confirmation. Nevertheless, in Ex.A□2 the defendant is referring it as "this contract". But for presence of another letter dated 26.6.1995, I cannot conclude that the contract/agreement dated 05.6.1995 finally concluded with the date itself, if I cannot conclude that even on 26.6.1995 the defendant was seeking confirmation from the plaintiff. Response, if any, by the plaintiff to these two letters is not before this Court in documentary form but of course, the plaintiff has proceeded in the light of these two documents only.

52. The above discussion will now bring me to very peculiar aspect of this case which is sufficient in itself to clinch the issue. In Ex.A⁶ (letter dated 16.10.1995) written by PW¹ to Mr.Bisht of FICCI with cc to Mr.A.A. Pankratov, the plaintiff is referring to letter dated 06.6.1996 but providing contents of the letter dated 05.6.1995. This could be a typographical error. However, what is important to M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 note is that here the plaintiff is not referring to one of these two letters as an agreement but in the entire body of this three page letter, he is repeatedly referring to a contract. It would be interesting to note that the plaintiff also provided itemized details of what it is required to pay to FICCI as per terms of the agreement. Towards the end of the letter, he quotes "we have fulfilled our commitment within the frame work of the contract entered into between FICCI and Interads which was duly confirmed and proved by the Chamber of Commerce and Industry of Russian Federation who are 50% partners in this show. They are insisting for the final settlement of account of Moscow exhibition....."

53. I pause for a moment and say now that this is the first document which throw light upon the role of third party in this dispute as "Chamber of Commerce and Industry of Russian Federation", on behalf of which, AW⁴ appeared in this court. It is not in pleadings but is intricate part thereof as exists repeatedly in the document after document and so on.

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54. Resuming back, in the penultimate lines of Ex.A⁶, the plaintiff states of signing of the agreement between the parties on 06.6.1995.

55. As to where this date i.e. 06.6.1995 is introduced again in this letter after its earlier introduction in para 2 at first page of this letter is a question that leaves no possibility of a typographical error in writing of the date as 06.6.1995 in clause 2 on page 1 of this letter, of which I had earlier commented so.

56. Thus, there is an agreement between the plaintiff and the defendant which was signed on 06.6.1995. The question arises as to where is this agreement dated 06.6.1995? Leverage is also to be given to the plaintiff as to could there be a probability that at both the places in Ex.A⁶, he wrongly referred the date as 06.6.1995 instead of referring the date of letter dated 05.6.1995 which indeed exists as Ex.A². However, the fact also remains that not only Ex.A² but also Ex.A³ are by necessary implication as above, are distinct of "an agreement".

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57. Answer to this lies in the cross examination of PW¹ himself with the following words :

"It is correct that letter Ex.A⁶ was sent by us. It is incorrect to suggest that we had taken any approval of Russian Federation for seeking co^operation of FICCI. No approval of Russian Federation was required for entering into an agreement with FICCI. I have seen letter Ex.A⁶ which has been written by the plaintiff Co. and signed by me. The contents of the said letter are correct. The agreement dated

06.6.1995 referred in the letter Ex.A[6] is not on record. I can not produce agreement dated 06.6.1995 mentioned in the letter Ex.A[6]. It is incorrect to suggest that the document Ex.AW[1]/1 is copy of the same agreement dated 06.6.1995 mentioned in letter Ex.A[6]."

58. The witness had an opportunity to explain that in Ex.A[6] repeated mentioning of the letter/agreement dated 06.6.1995 was typographical error and he was perhaps referring to actual letter dated 05.6.1995 (Ex.A[2]) wherever he was mentioning it wrongly as that of 06.6.1995. He offered no explanation. He did not offer any M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 explanation that the agreement dated 06.6.1995 is not the Memorandum of Understanding (Ex.A[6]) dated 16.6.1995. The possibility therefore that the witness actually intended to refer to the memorandum of understanding dated 16.6.1996 in Ex.A[6] but ended up mentioning it as 06.6.1995 is therefore a very strong probability. I cannot loose sight of the fact that the letter dated 05.6.1995 has single signatory i.e. Sh.Mahim Bisht whereas Ex.A[6] clearly refers that the agreement between Interads and FICCI was signed on 06.6.1995 (which makes two parties). The matter does not end here.

59. Reverting further back to the aspect that legal notice dated 22.3.1996 is also referring to an agreement which seems in all probabilities to be independent of Ex.A[2] and Ex.A[3], I would focus now on the fact that the plaintiff did produce response reply dated 02.5.1996. It is not pleaded in the plaint but it is there in this reply notice that there existed memorandum of understanding dated 16.6.1995 which the plaintiff had not referred to in his any legal notice.

60. I have pointed out that the plaint, particularly para 15 of M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 it, ended on a note that "plaintiff is denying such agreement". What is not noticeable here is akin to a concealment about what followed thereafter. However, I will ignore it as the plaintiff also filed letter dated 24.5.1995 and the missing link was completed by the defendant as it also filed letter dated 06.6.1995 (Anneure R[3]) to the application in hand. By letter dated 24.5.1995, the plaintiff's Advocate requested for furnishing copy of the memorandum of understanding dated 16.6.1995 while denying knowledge of its existence.

61. On 26.6.1996, i.e. prior to filing of this suit, defendant's counsel Sh.Sujoy Kumar responded with a copy of the said memorandum of understanding. Copy of dispatch proof by registered post is already part of Annexure R[3]. There is no denial to it in the reply filed by the plaintiff to the application under Section 8 of the Act. It is for this reason only that I had opened discussion on the issue while stressing upon the fact that the plaintiff could have, at the first available opportunity, protected its interest by making clear pleadings to the effect that the story of execution of the memorandum of understanding was a sham or for that matter twisted.

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62. On the contrary, in the reply to the application under Section 8 of the Act, the plaintiff firstly claimed non existence of any such memorandum of understanding while admitting secondly that there was demand from the defendant for execution of Memorandum of understanding regarding

which fax was sent and reply (Ex.A□4) followed by letter Ex.PW□/2 indicating that there was no need to enter into any memorandum of understanding. What is therefore established apart from the fact that there existed agreement apart from letters Ex.A□2 and Ex.A□3 as additional fact is that there was indeed a discussion about finalization of the memorandum of understanding and the reply shows that plaintiff was in receipt of draft memorandum of understanding. The question now is, was it signed?

63. Much part of the question above has been answered is evident by way of implication and preponderance. Legal notice dated 22.3.1996 and reply Ex.A□6 speaks volume about existence of the agreement. In the cross examination, PW□ offered no explanation that by making reference to the agreement dated 06.6.1995 he was M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 making reference of Ex.AW□/1. Therefore, this Court has also approached the issue with another angle which is the agreement (MOU) itself. What is the agreement and what does it imply.

64. Before that I will touch on the aspect as to whether non filing of original or its certified copy has rendered the application not maintainable.

65. It is in the order of the Hon'ble High Court of Delhi dated 12.10.2006, that occasion for production of the original agreement arose only upon the directions of this court and the moment such directions were given, the defendant filed an application under Section 65 of the Indian Evidence Act. It was observed that the net effect of assertion that the memorandum of understanding had been lost/misplaced, in those circumstances, was that the original can not be produced nor was it available for perusal by the Court. This did not prevent the parties from proving execution of the agreement and existence of arbitration clause by producing secondary evidence. It was also observed that the present case, indeed, is one such case where the document in possession of the defendant was according to M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 his version lost thereby making secondary evidence necessary. The Court also observed that the defendant gained nothing to its advantage by pleading its loss.

66. The judgments cited by the plaintiff on Section 8(2) of the Act are the law of land as applicable. Indeed, without filing original arbitration agreement or duly certified copy thereof, the application itself shall not be entertained. There is no issue before me that the defendant has given to the jurisdiction of this Court as the application was filed not later than submitting first statement of substance of dispute.

67. What is also equally clear from the facts is that while filing the application, the defendant categorically averred that it is placing "copy of the said agreement". The plaintiff took objections and in the rejoinder the defendant denied objections. The Court called for the original agreement for the first time on 03.4.2003. This fact is noted in the order dated 12.10.2006 in RFA No.27/2006 also. Pursuant to it, application under Section 65 of the Indian Evidence Act was filed.

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68. In para 4 of the application supported with the affidavit of AW□, it was taken as a stand that with the application under Section 8 of the Act, the defendant had filed "attested true copy" of the agreement dated 16.6.1995. The persons who actually dealt with this copy are Sh.Sujoy Kumar, Advocate for the defendant and Sh.Harish Sharma - its custodian. The first occasion for this Sh. Harish Sharma to state anything about copy of the memorandum of understanding filed with the petition came only with filing of subsequent application under Section 65 of the Indian Evidence Act. What is deposed in his own affidavit sworn on 19.2.2004 in para 3 is that "the certified true copy of the said agreement dated 16.6.1995 was enclosed with the application filed by the defendant under Section 8 of the Arbitration and Conciliation Act, 1996".

69. These pleadings are now merged in the order of the Hon'ble High Court of Delhi in RFA No.27/2006. Thus there is pleading on record before any judicial order of rejection of the application for want of compliance of Section 8(2) of the Act that M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 copy of the memorandum of understanding filed with the application is "certified true copy". It being so, reliance placed by the plaintiff as noted in para 36 hereinabove are rendered inapplicable.

70. The result would be that the application is indeed accompanied by certified true copy of the agreement. Thus there is no non□compliance of Section 8(2) of the Act and therefore the application is maintainable.

71. Having said so, I once again revert to the question posed para 62.

72. A bare look at the Memorandum of Understanding will reveal that it is entered amongst three parties but factually it remains an agreement between two parties only i.e. M/s Inderads (Plaintiff) and FICCI (defendant). The memorandum of understanding has given an impression that it is entered into between Chamber of Commerce & Industry of Russian Federation, Moscow, FICCI (defendant) and M/s Inderads (plaintiff). However, there are only two effective parties that entered into this agreement by taking consent of M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Russian Federation. The memorandum of understanding makes it clear that FICCI is the "first party" which is referred to as "co□organizer" while M/s Inderads is the "second party" which is referred to as "Nodal Agency" and rest of the memorandum of understanding is only between "co□organizer" and "Nodal Agency".

73. The question arises as to what is the role of Russian Federation? The answer is also present in the memorandum of understanding itself. As per the first opening recital clause, the "Chamber of Commerce and Industry of Russian Federation" is the organizer of the event i.e. "India '95 First official India□Russia Buyer Seller" meet. None of the arrangement described from clause A to clause G.11 makes any reference to the role of the organizer. The entire memorandum of understanding defines the role and liabilities of (a) the co□organizer and (b) Nodal Agency. The agreement establishes that it is the Nodal agency which approached the organizer to accept the proposal to act as co□organizer for the event. It establishes that after a series of discussion, they decided to enter into a working arrangement with the Nodal Agency to become co□organizer of the event. The arrangement which is then described in M/s Interads Advertising Pvt Ltd vs FICCI CS

No.18466/2016 the memorandum of understanding is in sync with the contents of letter Ex.A□2 and Ex.A□3. Thus, nexus between an agreement (here the memorandum of understanding) and two letters dated 05.6.1995 (Ex.A□2) and dated 26.6.1995 (Ex.A□3) is further established.

74. The agreement has been signed on each page purportedly by the representatives of the first party and second party being Dr.Amit Mitra (AW□2) and Sh.Vishwanath Sharma (PW□). The last page of the memorandum of understanding is purportedly signed at two places by AW□2 and at three places by PW□. A provision is made for signatures of Mr.A.A.Pankratov, the then Chief Representative of Russian Federation. However, it is admittedly not signed by Mr.A.A.Pankratov. An impression is given to this Court that the agreement was signed for the Russian Federation by the plaintiff himself. The plaintiff denies that this document bears his signatures. None of the parties has led any expert evidence by seeking comparison of signatures at points A, A□ and A□2 which are stated to be of the plaintiff on the last page of the memorandum of understanding.

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75. A careful perusal of the signatures of the plaintiff as appearing on this document along with his signatures appearing on 23 documents which he has filed by certifying them as "True copy"

makes it clear that there is no variation amongst these signatures and signatures appearing at point "A□2" on the memorandum of understanding. Rest of the signatures of the person signing as plaintiff appears to be only the initials and hence complete signatures of the plaintiff/PW□ are those signatures which are on the 23 documents which he certified to be True Copies and which are found to be similar to the signatures appearing at point A□2.

76. Now, in order to prove that this document was indeed in existence, secondary evidence has been led and the defendant has completed all the requirements of Section 65(c) of the Indian Evidence Act. I will also say that not only the above, the testimony of AW□2 that he is one of the signatory of the memorandum of understanding also qualifies the test under Section 65 (b) of the Indian Evidence Act.

77. Testimony of AW□2 proves that writing at point B on the M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 memorandum of understanding i.e. signatures on it are that of AW□2. Testimony of AW□2 qualifies the original of this document as that of a lost document and AW□ also clarified that after returning from the office of his Advocate, the Company lawyer demanded the original memorandum of understanding in April 2003 for producing it in the Court. His testimony clarifies that despite having done extensive search in his records, he could not lay his hands on the original memorandum of understanding. He deposed that it is possible that while taking the original memorandum of understanding to the company's lawyer in April 1996, it got lost/misplaced during transit while returning from the lawyers office OR it is misplaced/lost/non traceable in FICCI's office. Thus the witness has taken both these stands. He is not using the above three terms i.e. lost, misplaced and untraceable interchangeably to give rise to all the three possibilities which are independent of each other.

78. The net result being that the document could not be produced in original. His testimony establishes that he was indeed the record keeper in the administration department of FICCI. Merely because he was a clerk, it can not be said that he could not have been M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 assigned the duties of being custodian of a document. I have already pointed out that the plaintiff has specifically target the credibility of this witness in his cross examination.

79. However, it appears that the plaintiff is ignoring that his testimony is in all eventualities, a correct version of his as the dates meticulously correspond with the record. This suit was filed on 20.7.1996. Prior to it, several communications were made between the plaintiff and the defendant which includes legal notice dated 22.3.1996 and its reply dated 02.5.1996. In the reply dated 02.5.1996, the defendant's lawyer has made reference to the memorandum of understanding without referring that he is quoting from its copy. AW□ was sent by his superior Mr.G.D.Avasthi (who could not be examined being retired) to hand over the original memorandum of understanding along with its attested copy to the company's lawyer Sh.Sujoy Kumar. Reply notice is admittedly issued by none other than Sh.Sujoy Kumar Advocate. Thus, Sh.Sujoy Kumar would have actually made reference of the memorandum of understanding in this reply dated 02.5.1996 after it was produced before him by AW□ sometime in the previous month i.e. April 1996.

M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Thus, testimony of AW□ coincides with time.

80. The next question is about demand of the original memorandum of understanding for producing it in the court which, as per AW□, was made in April 2003.

81. I have already pointed out that it is the Court which had directed the defendant to produce the original agreement by passing the order dated 03.4.2003. The company lawyer demanded the original memorandum of understanding in April 2003 only and therefore the testimony of AW□ that it could not be located despite search again coincides with the time aspect.

82. The last aspect regarding the original memorandum of understanding is whether the defendant has actually complied with Section 63 of the Indian Evidence Act or not?

83. Section 63 of the Indian Evidence Act provides as to what qualifies for secondary evidence. AW□ 1 categorically stated that he got copy of the memorandum of understanding prepared and M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 A□ (Ex.AW□/1) is deposed to be the correct copy of the original memorandum of understanding. What follows is that in April 1996, AW□ 1 got prepared copy from the original and the said copy was produced along with the application at hand. The said copy qualifies as Secondary evidence under Section 63 of the Indian Evidence Act. Ex.AW□/1 is, indeed, copy made from the original.

84. The last leg of findings on the above aspect is as to what/when was the document signed. According to AW□, the memorandum of understanding was prepared and fed in the computer on 16.6.1995 and it was made subject to approved by the Russian Federation. As the plaintiff desired

that Ex.A² and Ex.A³ be also referred to in the memorandum understanding, it was not signed on the date when it was prepared i.e. on 16.6.1995 but signed subsequently in the first week of August 1995 in the presence of AW² before he left for Moscow and AW² also signed on the memorandum of understanding at the same time for FICCI. Hence AW² also claimed that PW¹ signed it on behalf of the plaintiff as well as Russian Federation.

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85. The above testimony has two aspects - first is that PW¹ also signed on it on behalf of Russian Federation and second is that it was signed in August 1995 before PW¹ left for Moscow.

86. Of course, PW¹ denies the above. It is also true that pleading and documents show that the claim of AW² that memorandum of understanding was signed in the first week of September 1995. However, the first occasion for AW² to state so arose only after he was called to adduce evidence.

87. His first affidavit in evidence is mark A which is sworn on 07.12.1998 wherein he states in para 7 that the agreement was signed in the first week of September 1995. This is in sync with the contents of rejoinder which is supported by affidavit of AW². However, PW¹ has claimed that he was not in Delhi in the first week of September 1995 and therefore, sworn testimony of AW² that he makes in his second affidavit in evidence sworn on 18.1.2007, appears to be a correct version. This is also established as it is this version which has been passed on touchstone of cross examination. In M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 this, the witness states that three meetings took place prior to execution of the memorandum of understanding in early August 1995.

88. So far as AW² is concerned, he never stated in his examination in chief that he was present at the time when memorandum of understanding was signed. He initially stated that he vividly remembered that the memorandum of understanding was signed between M/s Interads and FICCI. He does not say that it was also signed by or on behalf of the Russian Federation. He handed over the original memorandum of understanding to AW². In his cross examination, however, the witness has been asked questions regarding his presence at the time of actual execution of the memorandum of understanding. I am mindful of the fact that the cross examination took place on 24.8.2007 while the memorandum of understanding was executed in August 1995. There is a difference of 12 years and hence I would accept testimony of AW² of vividly remembering execution of memorandum of understanding between the plaintiff and the defendant which is actually a fact which this Court has also observed from a perusal of the memorandum of M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 understanding.

89. For the reason that AW² did not check with Moscow office about the complete file/documents pertaining to Russian Meet 1995, and also for the fact that the witness appeared from the New Delhi office of the Russian Federation and not its Moscow office, I would say that his denial of execution of the memorandum of understanding is inconsequential. The record clearly indicates innumerable efforts which the defendants made to call A.A.Pankratov in person which cannot fructify. As his replacement, AW² came to the Court with half baked and unconvincing facts. He himself admits that he had not enquired about the document/file regarding 1995 meet. It is completely

inconsequential as to when he first saw photocopy of the memorandum of understanding. He never remained Chief Representative of the Russian Federation at the relevant time when A.A.Pankratov was.

90. Furthermore, I find myself in agreement with the defendant that the AW□2 will have a motive to support PW□1 as the Memorandum of Understanding show that the Russian Federation M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 was the actual organizer and despite all his efforts to deny so, PW□1 would still be held accountable for the contents of the document which would show that Russian Federation was 50% partner with the plaintiff for the event. This document is indisputably filed by none other than the plaintiff and is Ex.A□6.

91. PW□1 has admitted that this document was issued by him. Its copy was also sent to A.A.Pankratov. As a matter of fact, visit of PW□1 to Moscow in August 1995 (as deposed by AW□2) is also confirmed from the contents of another admitted document of the plaintiff which is Ex.A□1/2 wherein the witness himself writes that A.A.Pankratov. already discussed with AW□2 each and every point and that he was leaving for Moscow on 12.8.1995 along with A.A.Pankratov. This admission in the documents is final nail in the plaintiff's coffin.

92. The above discussion, therefore clearly proves that issue No.1 is to be answered in favour of the defendant. Resultantly, it is found that the parties had actually entered into an agreement M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Ex.AW□1/1 dated 16.6.1995 and signed on it in the first week of August 1995. The issue is decided accordingly.

ISSUE No.2

2. Is there an arbitration agreement between the parties?

93. AW□2 has categorically deposed in his affidavit in evidence that after addition of clause F.07 in the memorandum of understanding, it was signed subsequently in the first week of August 1995. He also deposed categorically that the parties had specifically agreed to arbitration clause in the memorandum of understanding which he has also set out in his affidavit of evidence. This clause is clause G.08 which reads as under :

"All matters, question or differences whatever arising between the parties touching the construction, meaning, operation or effect of the contract or out of or relating to the contract or breach thereof, shall be settled by arbitration in accordance with the rules of the Indian Arbitration Act as in force at that time, through the Indian Council of Arbitration, New Delhi."

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94. There is no cross examination offered to the witness on this aspect. As a result, testimony to that effect as contained in para 19 of his affidavit is unchallenged and unrebutted.

95. The question arises whether dispute which is sought to be adjudicated by the plaintiff in this suit is arising out of the subject matter of arbitration clause or not. It is settled law that if third party is involved or if the subject matter of dispute is also concerning some other subject matter besides the actual subject matter of arbitration, the Court will generally refuse reference under Section 8 of the Act. However, it is not in this case and undoubtedly, the dispute arose out of the contract which is the memorandum of understanding Ex.AW□1/1 whereby the parties have resolved for settlement of such disputes by way of commencement of arbitration in accordance with the rules of Indian Arbitration Act as in force at that time, through the Indian Council of Arbitration, New Delhi.

96. Accordingly, issue No.2 is to be answered in favour of M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 the defendant. It is held that clause G□08 exists as Arbitration agreement in the memorandum of understanding Ex.AW□1/1.

ISSUE No.3 RELIEF

97. In view of the findings on issues No.1 and 2 herein above, the application of the defendant under Section 8 of the Arbitration and Conciliation Act, 1996, stands allowed. The dispute is directed to be referred for Arbitration in terms of clause G□08 and the plaintiff as well as the defendants will be at liberty to invoke arbitration clause as agreed on the basis of duly proved copy of the memorandum of understanding Ex.AW□1/1. In the result, the suit is to be disposed of in accordance of the settled principles in (i) Kalpana Kothari v Sudha Yadav, (2002) 1 SCC 203 and (ii) P Anand Gajapati Raju v P.V.G.Raju (2000) 4 SCC 539.

98. In the application under Section 8 of the Act, the defendant has made prayer for stay of further proceedings in the suit. However, in the light of the ratio in the judgment in the case of P M/s Interads Advertising Pvt Ltd vs FICCI CS No.18466/2016 Anand Gajapati Raju □supra, as soon as the matter before any judicial authority is referred to arbitration, the suit /legal proceedings before it, stands disposed of.

99. Ordered accordingly.

100. File be consigned to the record room.

Announced in the open Court
on 24.4.2019

(MANISH YADUVANSHI)
Additional District Judge-11
Central District
Tis Hazari Courts, Delhi.

MANISH YADUVANSHI
YADUVANSHI Date:
2019.04.25
17:12:43 +0530

