Stoughton Street Tech Labs Private ... vs Jet Skyesports Gaming Private Limited on 6 June, 2022

Author: Gs Patel

Bench: G.S.Patel, M.G. Sewlikar

Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gam
8-IAL-16497-2022-in-appl-16492-

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 16492 OF 2022
WITH
INTERIM APPLICATION (L) NO. 16497 OF 2022
IN
APPEAL (L) NO. 16492 OF 2022

Stoughton Street Tech Labs
Pvt Ltd,
Company incorporated under the
Companies Act 2013, having its registered
office at 11th Floor, Lotus Business Park, Off
Link Road, Andheri West, Mumbai, ...Applic
Maharashtra, India - 400 053 Appellan

~ versus ~

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Jet Skyesports Gaming Pvt Ltd,
Company incorporated under the
Companies Act 2013, having its registered
office at No. 2, 8th Cross Street, (10th Cross
Street as per document), Kurinji Nagar,
Perungudi, Chennai, India 600096 ...Responde

A PPEARANCES
for the applicant /appellants — Mr Ravi Kadam, Senior Advocate, with Ashish Kamat, Nishant Singh, Rajan Raj, Nikhil Bh Tanya Mehta, Narayani Bhattacharyya.

for respondent — Mr Dinyar Madon, Senior Advocate, with Rhia Marshall, Aditi Tiwari, i/b Jerome Merchant & Partners.

CORAM : G.S.Patel &
M.G. Sewlikar, JJ
DATED : 6th June 2022

ORAL JUDGMENT (Per GS Patel J):-

1. The appeal is by the original Petitioner in an arbitration petition under Section 9 of the Arbitration and Conciliation Act 1996. By an order dated 4th May 2022, the learned Single Judge dismissed the Section 9 Petition. He found, essentially, that there was no concluded contract at all, and therefore no possibility of relief under Section 9.

2. We have heard Mr Kadam for the Appellant and Mr Madon for the Respondent at some length. After a careful consideration of the rival submissions and material on record, we are not persuaded that the impugned order calls for interference. In saying this, we are mindful of our responsibilities in appeal, and in particular, those enunciated by the Supreme Court in Wander Limited v Antox India Pvt Ltd.1 In paragraph 14, the three-Judge Bench of the Supreme Court said:

1 1990 (SUPP) SCC 727.

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc "14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of

interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721) :

> "... These principles are well established, but as has been observed by Viscount Simon in Charles Osention & Co. v. Johnston '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case."

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc The appellate judgment does not seem to defer to this principle."

(Emphasis added)

3. It is also well settled that when considering an application for interim relief, a Single Judge is not expected and is in fact not permitted to conduct a mini-trial. It is the prima facie case that is to be assessed.2

4. Further, as the Supreme Court said in Monsanto Technology LLC v Nuziveedu Seeds Ltd,3 the appeals court must not 'usurp the jurisdiction of the Single Judge'; it must confine itself to an adjudication of whether the impugned order was or was not justified in the facts and circumstances of the case. Where there are complicated mixed questions of law and fact, these cannot be dealt with in a summary adjudication, but must be examined on evidence led in the suit.

5. In the very recent decision of 14th March 2022 in Shyam Sel & Power Ltd & Anr v Shyam Steel Industries Ltd,4 the Supreme Court reiterated the law in Wander Ltd and Monsanto.5 The Shyam Sel court went on to hold that the appellate court must assess whether the discretion exercised by the learned single Judge was arbitrary, capricious or perverse.

2 SM Dyechem Ltd v Cadbury India Ltd, (2000) 5 SCC 573; Anand Prasad Agarwalla v Tarkeshwar Prasad & Ors, (2001) 5 SCC 568; Zenit Mataplast Pvt Ltd v State of Maharashtra & Ors, (2009) 10 SCC 388. 3 (2019) 3 SCC 381.

4 2022 SCC OnLine SC 313.

5 Paragraphs 11, 29, 31, 34, 35, 36.

6. It is with this in mind that we approach the Appeal. Once we find that the decision of the learned Single Judge is a plausible one

-- not arbitrary, capricious or perverse -- then we cannot substitute our view for that of the learned single Judge.

7. The two parties are both private limited companies. The nature of the business has to do with organising various e-sports, live-gaming streaming tournaments and other online content and services. The Petitioner, Stoughton Street Tech Labs Pvt Ltd ("Stoughton") is a relative newcomer to the field. The Respondent, Jet Skyesports Gaming Pvt Ltd ("Skyesports") has been in this sector for some time. Stoughton provides an online streaming platform called Loco. Skyesports develops content. The Skyesports content may be streamed on any number of online streaming platforms similar to Loco, including YouTube, Facebook and others. There is material to indicate that some content was subjected to a 'simulcast' -- simultaneous broadcasting -- across multiple platforms.

8. The learned Single Judge found that towards the end of September 2021, Skyesports signed an agreement that had been sent to it by Stoughton. However, Stoughton itself had not signed the Agreement; or, at any rate, there was nothing to indicate until very late in the day, well after disputes arose, to indicate that Stoughton had told Skyesports that it had also signed the agreement in question. It is principally for this reason that the learned Single Judge held, and in our view, and for the reasons that we will shortly set out, correctly, that there was no concluded contract.

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9. Mr Kadam takes issue with this construct. He submits that once Skyesports signed the contract it was bound by its terms. Stoughton sent the contract to Skyesports for signature, and once Skyesports signed the contract it could not later turn around and say that there was no concluded contract for want of Stoughton's signature. He maintains that the Stoughton did in fact sign the document but overlooked sending Skyesports a counterpart of the agreement bearing the signatures of both sides. He therefore maintains that there was indeed a concluded contract of 30th September 2021/1st October 2021 (the former being the date of Skyesports' email and the latter being the effective date of the contract). According to Mr Kadam, the parties agreed very shortly thereafter to vary the financial terms of this contract -- entirely to the benefit of Skyesports, or so he claims -- and this was accepted by an exchange of email correspondence.

10. The main contract undoubtedly had a dispute resolution clause 14 providing for arbitration.

11. The contract with which Stoughton came to Court was not merely the document that Skyesports signed but that document read with the variation that Stoughton propounds as having been confirmed and agreed in correspondence.

12. This is important for two reasons. What we have before us is not only a question of the existence of a contract within the meaning of Section 4 of the Indian Contract Act, 1872 but also an assessment of whether the contract in question (which contains an Arbitration 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc Clause, and for which reason Section 9 relief was sought) fulfils the requirements of Section 7 of the Arbitration and Conciliation Act.

13. Section 4 of the Contract Act reads thus:

> "4. Communication when complete.--The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> The communication of an acceptance is complete,--
>
> as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;
>
> as against the acceptor, when it comes to the knowledge of the proposer.
>
> The communication of a revocation is complete,--
>
> as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;
>
> as against the person to whom it is made, when it comes to his knowledge."

14. Section 7 of the Arbitration and Conciliation Act says:

> "7. Arbitration agreement. -- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in--

(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or

other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. (5) The reference in a contract to a document

containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

15. Mr Kadam's submission is that the contract in question urged in the Petition is a hybrid that falls within both Section 7(4)(a) and

(b). It is a combination of the signed document and the later email exchange.

16. A proposal for a second variation a little later in February 2022 never materialised. Mr Kadam submits that this is immaterial because no part of his cause of action is based on this second proposal.

17. He claims he is able to show that in fact the first variation was accepted by Skyesports and that Skyesports drew its invoices strictly in accordance with the first variation. He also drew our attention to certain WhatsApp correspondence by which he claims 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc to be able to show that Skyesports had accepted the existence of the principal Agreement.

18. It is therefore, Mr Kadam's submission that the impugned judgement cannot possibly stand. This is, after all, the way the world does business today: by email and WhatsApp, and hardly ever in the older manner with the formality of signed documents. Just because documents are exchanged digitally does not mean that they should be held not to exist. This would be extremely disruptive of modern commercial practices. Whether documents are exchanged in hard copy or not is no longer a consideration. Indeed, the agreement itself contemplates the exchange of counter part documents in PDF format by Clause 16.1. Therefore, Mr Kadam submits, once the contract was shown to exist, the learned Single Judge was bound to proceed to a consideration of whether the Petitioner had a sufficient prima facie case under Section 9. Skyesports having admittedly signed the document could not be allowed to say there was no contract or that it was not bound by the terms of what it signed.

19. He is also quick to point out that the threshold required in regard to the existence of a contract for the purposes of Section 9 is quite distinct from that under Section 11 of the Arbitration and Conciliation Act. This submission really requires no great discussion. It is well tested and completely correct. A Section 9 Court is not making an order under Section 11 though sometimes a combined order is made by a Court, usually for economy. But this does not mean that a Section 9 Court will examine all the contours and parameters that apply to a Section 11 Application.

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20. The question, however, is whether the learned Single Judge could be said to have been entirely mistaken in his view that there was no concluded contract. This is where Mr Madon's answer has a significant bearing. Mr Madon has taken us through some portions of the Petition to show that the contract that Stoughton sent to Skyesports was one that only Skyesports signed but Stoughton never

did. It is in fact his suggestion that Stoughton never signed this document till very late in the date, quite possibly after the Affidavit in Reply was filed to the Petition itself. He submits that a fair reading of the Petition itself shows that there was no concluded contract. It is because there was no concluded contract that Stoughton proposed a few months later a different payment basis. This revised basis did not even mention the formal document and was unlinked to any clause or term of the document. The second proposal was clearly not accepted;

21. To put this into some time context: the document that Skyesports signed was of 30th September/1st October 2021. The so-called first variation Stoughton proposed was of 15th November 2021. This has no reference at all to the signed document, by date, nomenclature or reference to any clause. It is said to have 'substituted' a specific commercial term in the signed document, but it contains no reference to any commercial term in the hard copy printed document. In February 2022, Stoughton proposed another agreement, the one that was never accepted. But this also makes no reference at all to the signed document in any shape, fashion or form.

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22. In the meantime, Skyesports did do business and did deliver content. It also raised an invoice (in January 2022) but the invoice makes no mention of the September/October 2021 document. It has no reference to any clause of that Agreement. It is not on the basis of the payment terms set out in that Agreement. The mere fact that Skyesports's invoice accords or may accord with the November 2021 proposal does not, Mr Madon submits, ipso facto establish that the September/October 2021 document constituted a concluded contract signed by both parties. On the contrary, it is his submission that it establishes that the September/October 2021 document was still born and was never signed by Stoughton.

23. This is a broad outline of the rival submissions before us today. One of the grounds for the learned Single Judge refusing reliefs is the fact that even before September/October 2021 Stoughton and Skyesports did have a working relationship. As Mr Madon points out this is not just not denied; it is admitted in paragraph 3 of Petition which reads thus:

> "3. The Petitioner and Respondent have shared a working relationship since 2020. In or around September 2021, certain discussions commenced between the parties in relation to executing an exclusive long-term arraignment by which the Petitioner would engage the services of the Respondent, and the Respondent would exclusively provide his services to the Petitioner as the Tournament organizer and service provider for various e-sports, live-gaming streaming tournaments and other gaming related content and services. Pursuant to discussions and negotiations, a Term Sheet was initially shared by the Petitioner with the Respondent on 21st September 2021. hereto annexed and marked as "Exhibit A" is a copy of the e-mail dated 21st 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc September 2021 addressed by the Petitioner to the Respondent enclosing the communication between the parties and

the said Term Sheet.

24. The case therefore, that Stoughton came to Court with was that Stoughton and Skyesports had a working relationship prior to September/October 2021. Then, in the petition Stoughton claimed that Taral Patel, its Head of Operations, sent to Skyesports's Shiva Nandy on 30th September 2021 a draft for execution. Nandy signed this and emailed a signed copy back to Stoughton. Paragraph 4 of the Petition says that on receipt of the copy signed by Skyesports, Stoughton signed and executed the Agreement. It is for this reason that Stoughton claims that there was an Agreement effective 1st October 2021 captioned "Tournament Organizer cum Service Provider Agreement".6 Paragraph 4 of the original petition says:

> 4. Pursuant to further discussions and negotiations, an agreement was drawn up between the parties. The draft agreement was sent by Taral Patel, Head of Operations of Loco from the Petitioner's company to Shiva Nandy from the Respondent company on 30 September, 2021 for execution. Thereafter, the Respondent signed the agreement and sent it to the Petitioner. Upon receipt of the executed copy of the agreement from the Respondent, the Petitioner signed and executed the agreement. The Petitioner and the Respondent (hereinafter collectively referred to as "Parties") accordingly entered into the "Tournament Organizer-Cum-Service Provider Agreement" (hereinafter referred to as the "Agreement") 6 Stoughton then claims that there was an exclusivity, an aspect we will shortly turn to the extent necessary. But this is pleaded in support of the prayer (4), an injunction against Skyesports from providing online content to other platforms.

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc effective 1st October, 2021. By this Agreement, the Petitioner engaged the Respondent to provide on 'an exclusive basis' services to the Petitioner as the Tournament organizer and service provider for various e-sports, live- game streaming and tournaments and other gaming related content and services the scope of which is defined under the said Agreement. Pertinently, the Agreement records that the contract between the parties was an exclusive agreement and also, specifically barred the Respondent from engaging, inter alia, with any other third party for any work "which is similar or identical to the Tournament or that competes with the Tournament", or any work whatsoever during the subsistence of the Agreement dated 1st October 2021. A copy of the Tournament Organizer-Cum-Service Provider Agreement dated 1st October, 2021 is hereto marked and annexed as "Exhibit B"."

(Emphasis added)

25. In this narrative, as unamended, there is no mention, significantly, of what Stoughton apparently did after it allegedly signed the Agreement that it received with Skyesports's signature. Curiously, Stoughton then amended the Petition and inserted paragraph 4A. This paragraph reads:

> "4A. As stated above, subsequent to the Term Sheet, the parties negotiated and/or agreed upon the long form agreement. The final concluded Long Form Agreement

> was concluded after an exchange of emails. On 30th September 2021, under cover of its email sent at 11:28 AM (Pg. 29 of the Petition), the Petitioner forwarded the Agreement to the Respondent and requested it to share a signed copy with the former. On the same day and by its email sent at 12:31 pm (Pg 29), the Respondent duly forwarded a signed copy of the Agreement to the Petitioner. By signing the 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc agreement and forwarding the same to the Petitioner, the Respondent agreed to the terms of the Agreement (including the arbitration clause) and a valid binding and subsisting contract came into being between the parties. The email correspondence between the parties on 30th September 2021 is already annexed herewith at Exhibit A to the Petition. The Agreement duly signed and sent by the Respondent is already on record at Exhibit B (Pg. 32)."

(Emphasis added)

26. In the Affidavit in Rejoinder, Stoughton says there was an oversight on its part in sending back to Skyesports a copy of the document with Stoughton's signature.

27. If what Stoughton says in paragraph 4 is true, viz., that it had signed the document Skyesports had, then paragraph 4A was wholly unnecessary. The two narratives are materially divergent. Paragraph 4A takes the stand that Skyesports is bound by the Agreement because it had signed it and put it into transmission -- clearly an argument under Section 4 of the Contract Act. But that is not the case pleaded in paragraph 4. The question is whether Stoughton can establish that it had in fact also signed the very same document that it sent to Skyesports. The learned Single Judge found that it had not. It is not until the Rejoinder that Stoughton sought to clarify this position inter alia in paragraph 12 at page 225 by saying that it was mere oversight that Stoughton did not send a copy of the countersigned document (i.e. the one that Stoughton signed) back to Skyesports.

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28. From paragraphs 15 to 19B of the petition (including several paragraphs added by amendments), we find Stoughton's assertions about its so-called variation or modification of the 30th September/1st October 2021 Agreement.

15. Inspite of contractual requirements, the Respondent was unable to meet the minimum commitments set out in Clause 3.3 of the Agreement for the first one month after the Agreement was executed and was therefore not eligible to receive any payments from the Petitioner for that months. For this reason, after the execution of the said Agreement, discussions ensued between the parties to revise the payment structure that was agreed upon in the said Agreement.

16. Pursuant to these discussions, the Petitioner offered revised payment terms to the Respondent at INR 6 (Indian Rupees Six only) per Live Watch Hour ("LWH") by their email dated 16th November

2021. This revised payment structure was duly accepted by the Respondents by their email of even date. Hereto annexed and marked as "Exhibit C" is a copy of the Petitioner's email dated 16th November 2021 and the response of the same date from the Respondent. Except for this all the terms and conditions of the said Agreement dated 01 October, 2021 remain unchanged and continued to govern the contract between the Petitioner and the Respondent.

17. Notwithstanding these discussions regarding the payment terms, the parties were always aware and accepted that the said Agreement was a legal, valid and binding agreement between the parties and constituted a concluded and binding contract. The Respondent, in the month of December 2021, rendered services to the Petitioner in accordance with the terms of the Agreement and organized 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc a Tournament known as "Skyesports Grandslam 2022 Season 1" during this period. Pertinently, this Tournament was a huge success. The Respondent accordingly raised an invoice for payment as per the revised payments terms that were duly agreed by the parties on 10th January 2022. Hereto annexed and marked as "Exhibit D" is a copy of the email dated 10th January 2022. It is pertinent to note that the invoice raised by this email was in accordance with the renegotiated payment terms which were discussed and agreed by the parties. The Petitioner craves leave to refer to and rely upon contemporaneous material to demonstrate this. 17A. The Respondent's Invoice of 10th January 2022 was on the basis of it having achieved an LWH of 504.301 live watch hours. It was thus liable to be paid a sum (pre-GST) of Rs. 30,25,806/- (INR 6 x 504301 LWH) for which it raised an Invoice of Rs. 35,70,451/- (Rs. 30,25,806 + GST of Rs. 544,645 at 18%).

18. It is not in dispute that payments under this invoice were duly and promptly made and cleared on 21st January 2022 via NEFT/RTGS/internet banking vide reference number FCM-2201210IRQX0. The copy of the payment receipt evidencing this payment is annexed hereto and marked as "Exhibit E".

18A. In or around mid-January 2022, the Parties once again re-negotiated the consideration payable under the Agreement. This re-negotiation interalia took placed through an exchange of WhatsApp messages between Mr. Taral Patel of the Petitioner and Mr. Shiva Nandy, the CEO of the Respondent. On or around 18th January, 2022, the parties agreed upon the following further revised payment terms viz Consideration - Rs. 50,000/- per streaming 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc day + Live Watch Hour (LWH) Tiered Payment LWH Tiered Payment Formula No. of Live Watch Hours Rate (in INR)/Per Live Watch Hour (LWH) 0-100k INR 4/LWH 100k-500k INR 5/LWH 500K+ INR 6/LWH Other than these changes, the Agreement remained valid, subsisting binding upon both parties. The WhatsApp transcripts of 18th January 2021 of the discussions pertaining to these further revised rates are annexed herewith at "Exhibit E-1".

18B. The fact that the further rates were not only agreed but acted upon is borne out by communications between the aforesaid Petitioner and Respondent's representatives on WhatsApp between 4th - 5th March 2022. On 4th March 2022, the Respondent sought an update in relation to

the billing for February 2022. in response, the Petitioner's representative stated that an LWH of 1165466 had been achieved and that the streaming days was known to the Petitioner. On 5th March 2022, the Respondent sought and received a confirmation by the Petitioner of the following figures for work done in February 2022:

LWH 0-100K (Rs. 4)	Rs. 400,000/-
LWH 100-500K (Rs. 5)	Rs. 20,00,000/-
LWH 500K - 1165K (Rs. 6)	Rs. 39,90,000/-
Loco Stream of 27 days (Rs. 50,000/ day)	Rs. 13,50,000/-
Total Amount	Rs. 77,40,000/-

6th June 2022

Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc 18C. The Petitioner confirmed the correctness of these figures, and the Respondent thereafter raised its Invoice of 5th March 2022 for Rs. 91,33,200 (Rs. 77,40,000+GST of 13,93,000 at 18%) thereafter. The WhatsApp transcripts of 4th - 5th March 2022 are annexed at "Exhibit E-2".

19. In fact, the Respondent raised an additional invoice on 5th March 2022, again under the revised payment terms. Hereto annexed and marked as Exhibit G is a copy of the Respondent's email addressed to the Petitioner on 5th March 2022 in this regard.

19A. Subsequently, the Petitioner was desirous that the lock in period agreed upon be deleted and a Right of First Refusal introduced. The Petitioner via an email dated 22nd February 2022 forwarded a draft agreement which interalia proposed a deletion of the Lock-in period of 12 months subsisting under the existing Agreement and introduction of a Right of First Refusal to the Petitioner. The Respondent did not agree to do so and this proposal thus proved to be a non-starter. A copy of the Petitioner's email of 22nd February 2022 with the Draft is annexed collectively at "Exhibit G-1".

19B. Consequently, the only agreement between the parties is the Agreement dated 30th September 2021 with the agreed further revised payment terms as set out in paragraph 18B above. The existing Agreement continued to govern the parties legal relationship and remained valid, subsisting and binding".

(Emphasis added)

29. Stoughton's case, therefore, is that the change it proposed on 16th November 2021 was a modification of the commercial terms of the 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc 30th September / 1st

October 2021 'contract'. Necessarily, this would require the 'modification' to reference the September/October 2021 in some manner. It does not. Mr Kadam's submission is that Skyesports's January 2022 invoice was drawn in terms of the November 2021 'modification', and this therefore 'establishes' that there existed a contract. How else, he asks, could that invoice have been drawn except under the contract? This is where, as Mr Madon points out, Mr Kadam's construct falters. For, even on Stoughton's own showing, particularly paragraph 3 of the petition, the parties already had a pre-existing commercial relationship. Skyesports was indeed doing work for Stoughton, and this was evidently unrelated to any contract but on some ad hoc basis. Therefore, neither the invoice nor the proposal for its terms (of November 2021) unequivocally or unambiguously establishes the existence of a concluded contract.

30. We must now look to certain provisions of the 30th September/1st October 2021 Agreement which we find at Exhibit "B" from page 92. Clause (2) is relevant. This sets out the purpose and more importantly defines what is meant by a 'tournament', something that is essential to this one year contract. Clauses 3.1, 3.2 and 3.3 have also been relied on by both sides. They read thus:

> 3. TERMS OF ENGAGEMENT, DELIVERABLES, TIER-STRUCTURE AND PAYMENTS 3.1 Subject to the fulfillment of obligations under this Agreement, Stoughton shall pay the Organizer the consideration pursuant to the terms set out in Annexure I of this Agreement which may be updated from time to time and annexed with additional annexures by mutual 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc agreement of the Parties ("Consideration"). The Parties acknowledge and agree that this engagement shall be a long-

term engagement for various Tournaments, each with commercials that shall be decided prior to the Tournament. Such updated Consideration for Tournaments shall be recorded by way of additional annexures that shall be signed by both Parties which shall be annexed herewith. Any and all such annexures shall be considered to be a part and parcel of this same Agreement. All other terms of this Agreement shall remain the same for any and all Tournaments.

3.2 The Organizer shall be solely and exclusively responsible for:

> (a) organizing, producing, marketing, promoting, managing and monetizing any and all such Tournaments as required by Stoughton;
>
> (b) ensuring the participation of steamers and teams for the Tournaments and the streamers shall be as required by Stoughton;
>
> (c) coordinating with any and all teams and ensuring the teams and streamers participate in the Tournaments and adhere to the Tournament guidelines and Loco and Stoughton policies;

(d) be responsible for educating the streamers and teams of the Tournament eligibility, requirements, guidelines, policies of Stoughton and Loco, Terms of Use of Loco and all other necessary information to ensure compliance with guidelines;

(e) All the casing / commentating talent engaged by the Organizer shall be exclusive to Loco during the Term and shall not be entitled to provide their services to any competing medium/platform except for YouTube;

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc (f) ensure that the streamers create individual profiles and channels on Loco;

(g) ensure and be solely and exclusively responsible for payment of any and all prize money to the teams and/ or streamers;

(h) maintain and submit to Stoughton, timely and regular records of any and all payments made towards the services/Deliverables under this Agreement;

(i) maintain and submit to Stoughton, timely and regular records of any and all payments made to the teams/streamers in relation to the Tournaments and this Agreement;

(j) any additional services required by Stoughton and mutually agreed between the Parties from time to time;

(k) diligently provide services as may be mutually agreed between the Parties; and

(l) shall ensure compliance with the terms of this Agreement.

3.3 The Organizer shall be solely and exclusively responsible for:

a. Exclusive Scrims - Once a week, fixed days every week b. Streamer Battle- Once a week, fixed days every week c. Skyesports YT Scrims - Simulcast on Loco d. Exclusive Tournament Events with pro teams e. Skyesports Content - Exclusive Interviews, Coffee chats etc. f. 1,50,000 Live Watch Hours cumulatively every month from all streams.

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc g. Maintain active concurrent users of 3000 on each stream and have at least 40,000 unique users on each stream."

(Emphasis added)

31. Clause (3.1) makes a specific reference to Annexure 1 at page

> 104. This deals with consideration and it says:
>
> "CONSIDERATION Subject to the complete, timely and satisfactory performance of this Agreement and compliance with all its terms and conditions and the Organizer not being in breach, in relation to the Deliverables and the Terms of Engagement the Organizer shall be paid on all inclusive sum of INR 10,00,000/- (Indian National Rupees 10 Lakhs Only) on a monthly basis and upon the Organizer raising a due and valid invoice.

The Parties have mutually decided that a bonus of:

> INR 0.5/- shall be payable per unique viewers after 1 Million unique viewers on the platform via the Organizer."
>
> (Emphasis added)
>
> 32. Clearly this clause provided for a flat fee of Rs.10 lakhs per months against an invoice. In addition, there was an Agreement for bonus with a rate specified and computed per unique viewer after one million unique viewers were on the Loco platform via the organizer. The organizer is, by definition, Skyesports (under its earlier name).
>
> 33. As we have seen from the portions emphasized above, any updates to the consideration Annexure 1 had to be recorded by way 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc of additional measures to be signed by both parties, and this could, presumably, be in soft copy. It had to be annexed to the Agreement.

We do not think it is necessary to hold that this necessarily means that these annexures had to be in hard copy, but they certainly needed the consent of both sides. This portion of Clause (3.1) will have to be read with Clause 16.7, set out below.

16.7 Entire Agreement and Amendments. The Agreement, any documents that expressly incorporate by reference constitute the sole and entire agreement between the Parties with respect to the Engagement and supersede all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to the Engagement. None of the terms of this Agreement shall be amended except by way of execution of any addendum/amendment agreement which must be signed by both Parties.

(Emphasis added)

34. This is in the usual form but whatever the medium, hard copy or soft copy, the clause clearly requires a consensus ad idem of both sides. Indeed this is the essence of arbitration law as a whole.

35. The non-compete clause is also relevant because of the interim relief sought. It reads thus:

> "8. NON-COMPETE OBLIGATIONS 8.1 The Organizer acknowledges it has various other skill sets which, if deployed by it after it ceases to be associated with Stoughton would be sufficient to be gainfully employed without having to engage with any Competing Platforms and / or compete with the Company 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc or its Affiliates with respect to the Tournaments and subject matter of the Agreement.
>
> 8.2 The Organizer undertakes that it shall not, during the Term, anywhere in the world, whether by itself or with any third party engage, directly or indirectly and whether as a n individual, through a partnership or as a shareholder, joint venture partner, collaborator, consultant, advisor, director, committee member, agent or in any other manner whatsoever, whether for profit or otherwise, commence, engage or be concerned with, in any tournament, contest or any other entertainment / infotainment programme, whether online or otherwise, which is similar or identical tot he Tournament or that competes with the Tournament. 8.3 No separate non-compete fees are payable to the Organizer and it confirms the same."

36. Mr Madon may be right in saying that there was never any absolute bar on Skyesports transacting with other parties. As the emphasized portions above show, content that Skyesports developed exclusively for Stoughton under this contract could not, without Stoughton's express consent, be streamed on any other platform. But content that was not prepared bespoke by Skyesports for Stoughton could be simulcast without Stoughton's consent. The reason this is of some relevance is that the reliefs sought both before the learned Single Judge and in the Interim Application before us are far broader than this clause could possibly justify.

37. This, then, is broadly the Agreement itself. On 16th November 2021, Stoughton's Taral Patel sent an email to Skyesports's Nandy proposing a payment of Rs. 6/- per Live Watching Hour (for the whole duration of the Championship). Mr 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc Kadam says that this was the variation proposed of Annexure 1 and Clause 3.1 of the contract. The document at Exhibit "C" at page 105 has no reference to the contract, Clause 3.1 or Annexure 1 at all. Annexure 1 stipulated, as we have seen, a monthly fee of Rs. 10 lakhs and a bonus which was also not on a LWH basis but on the basis of unique viewers, possibly an entirely distinct metric. As we have noted, the reason Mr Kadam says that the November 2021 proposal was accepted is because on 10th January 2022 Skyesports drew an invoice on Stoughton (Exhibit "D"). This was for a December 2021 service for " Skyesports". A copy of the invoice is available at page 108. It refers to the Skyesports Mobile Open. It is not computed on the Annexure 1 basis at all; it could not be because that was a monthly payment. The invoice also makes no reference to the 30th September/1st October 2021 document either by date or by nomenclature. At this stage we note that there is not even an attempt to show that there is compliance with the provisions of Clauses 3.1 and 16.7 by a mutually signed document of modification.

38. It is therefore entirely plausible -- perhaps even likely -- that the 16th November 2021 payment suggestion was not in fact a variation of any September/October 2021 'Agreement' but was simply an arrangement being made on an ad-hoc basis. This is further established by the fact that the invoice is not drawn in terms of the September/October 2021 Agreement at all. That required the invoice to have a clause stipulating payment in 45 days as per Clause 3.5 (b) at page 95. The invoice, one that was paid by Stoughton, provides for a 30 day payment period. There is no explanation whatsoever for this discrepancy. We will not trouble with the subsequent invoice that remained unpaid.

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39. Another variation of February and March 2022 was also to payment terms as shown in Exhibit "E-1" at pages 111 and 112. The entire exchange is on WhatsApp. In any event this was never agreed and that is common ground.

40. Stoughton proposed yet another agreement on 22nd February 2022 with completely different terms as to consideration. This can be seen from the document at pages 184 to 201. This has never been acted upon. But this also does not establish the existence of a previous concluded contract of September/October 2021. To the contrary: it is prima facie evidence that there was no previous concluded contract. The reason is plain. Even in the draft Stoughton sent Skyesports on 22nd February 2022 there is no reference to the previous so-called agreement of September/October 2021 being superseded when the new agreement took effect. It is of little use to Mr Kadam to rely on a generic clause saying that the new agreement superseded 'all previous agreements'. Had there been a concluded contract of an earlier date, its supersession would have been mentioned; and, further, in the recitals themselves of the revised proposal, there would have had to be some reference to a previous concluded contract. There is none.

41. Mr Kadam's next submission is based on a set of WhatsApp messages that are annexed to the Affidavit in Rejoinder. Here Stoughton says, having found that Skyesports was now dealing with other platforms, that Skyesports was in breach of its Agreement. The answer from Skyesports's Nandy was to ask where Skyesports was in violation and, when a clause was pointed out, to respond that there were no payments made to Skyesports until December 2021.

6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc We do not believe that a Section 9 Petition can be founded on an exchange of WhatsApp correspondence between litigants like this. What is perhaps more significant is to see how parties understood the case in the legal notices that came to be exchanged between them.

42. In the legal correspondence, Stoughton's lawyers invoked the September/October 2021 Agreement and gave Skyesports three days to refund Rs.33 lakhs apart from demanding that Skyesports should remedy its breaches within one day failing which it would stand terminated under Clause 10.2. From Mr Kadam's perspective, this was perhaps unfortunate because this was

not Stoughton protesting against a termination of the agreement by Skyesports. It was the other way around. If Stoughton had terminated the agreement it propounds, it is difficult to see how it could then come to Court seeking relief under Section 9. Perhaps realising this, a few days later, Stoughton purported to withdraw its termination. Mr Kadam says this cannot count against Stoughton. Apart from anything else the parties continued to work together and in any case this is not proof of a total absence of a contract. But what is more important in this correspondence is what Skyesports said on 21st March 2022 at Exhibit "M" -- it totally and completely denied the existence of any contract specifically stating in paragraph 2 thus:

> "2. Firstly, we would like to state that there is no valid or existing contract executed between your Client and us any time whatsoever. As for the document dated 1st October 2021 titled 'Tournament Organizer-Cum-Service Provider Agreement') "Unexecuted Agreement"), we did not receive any executed copy of the said document from your Client at any time, either by facsimile or electronic mail.
>
> 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc Accordingly, your client had no intention to execute and bind itself to the Unexecuted Agreement. This was further substantiated by the fact that, your Client contacted us in December 2021 to revise the terms of the said Unexecuted Agreement, further to which your Client has shared another draft document with us in February 2021. it is also pertinent to note that neither have we raised any invoice as per Clause 3.1 (read with Annexure 1) of the Unexecuted Agreement and neither has your Client made any payment thereunder. It is therefore clear that there exists no binding agreement between the parties and the parties have neither by execution, conduct or otherwise bind themselves to the Unexecuted Agreement."

43. Mr Madon has also drawn our attention to a tabulation at page 209, Exhibit "D" to the Affidavit in Reply, which shows the various programs broadcast and content produced by Skyesports and the platforms on which this content was periodically broadcast. Two things emerge from this. It shows that Skyesports and Stoughton had a relationship that goes back at least to May 2020, possibly earlier. Item 1 of this list is the Skyesports Grand Slam 2020. That was broadcast on the YouTube and Stoughton's Loco platform in that year. Therefore, what is said in paragraph 3 of the Petition is correct, viz., that there was a pre-existing relationship; and this is a plausible answer to Mr Kadam's case on the January 2022 invoice based on the November 2021 pricing. In this list we are concerned with Items 37 and 40, the Skyesports Mobile Open (the subject matter of the first invoice of January 2022) and the unpaid subsequent invoice of the Skyesports Pro-League. The first of these was on three platforms, You Tube, Stoughton's Loco and highlights on Facebook. The second was on YouTube and Stoughton's Loco 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc platform. The relevance of these is that this simulcast was clearly not of content developed exclusively by Skyesports for Stoughton, i.e., content under the so-called agreement of September/October 2021. Had it been so, it would have required Stoughton's express consent for broadcasting on any other channel. This consent is supposedly to be inferred from some WhatsApp transactions where we are asked to believe that

because Stoughton asked that the YouTube broadcast for item 37 be delayed by 10 minutes or be after a 10 minute delay, this must necessarily mean (a) that there is a valid consent by Stoughton and (b) that the content was exclusive; (c) that exclusive content could have come only under the September/October 2021 agreement; and (d) therefore there was a concluded contract. There is a such a thing as stretching things too far. Mr Madon submits that there is no evidence in this entire matter of any exclusive content developed by Skyesports for Stoughton. This, he submits, lends considerable heft and credence to his submission that there was no agreement because even today Stoughton is unable to show how it was acted upon in any manner, at any time. We agree. There is no pleading or any other documentation whatsoever that we can find to show that there was exclusive content and that in writing or with some degree of formality Stoughton consented to a broadcast on other platforms.

44. Mr Kadam relies heavily on the Judgment of the Supreme Court in Trimex International FZE Limited Dubai v Vedanta Aluminium Limited India.7 There is no quarrel with the legal propositions that are set out in that Judgment. Indeed there cannot be. Paragraphs 59 and 60 summarise the position in law:

> 7 (2010) 3 SCC 1.

59. In Shakti Bhog Foods Ltd v Kola Shipping Ltd, this Court held that from the provisions made under Section 7 of the Arbitration and Conciliation Act, 1996 that "the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement"

60. It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication.

45. But apart from the fact this is a decision in a Section 11 matter, this position in law does not take Mr Kadam the required distance.

46. To put it into an appropriate context:

> (a) Stoughton cannot show unequivocally that it signed the September/October 2021 document;
>
> (b) it admits that it never sent a copy of this document signed by Stoughton to Skyesports;
>
> (c) there is no material to indicate that the 16th November 2021 proposal was linked to the September/October 2021 document;

> (d) there is no document that is in compliance with the requirements of Clause 3.1 or Clause 16.7 for any 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc variation of this alleged agreement of September/October 2021;
>
> (e) the invoice that was drawn by Skyesports in January 2022 was in accordance with the unlinked proposal of 16th November 2021 but was materially in variance with the September/October 2021 document and for which there is no explanation at all;

(f) there is nothing to show exclusivity of content developed by Skyesports for Stoughton under the September/October 2021 so-called agreement or express consent for sharing on other platforms in writing.

47. We agree that a party must be bound by the bargain it struck. But it must be shown that a bargain was in fact struck, and that is the whole of Mr Madon's case: there was no concluded contract. It is possible, he submits, that since there was a working relationship, parties proceeded on an ad-hoc basis from one contract or tournament to the next. But that is a very different thing from saying that there was a binding agreement with an arbitration clause and which granted to Stoughton exclusivity over all Skyesports- developed content. That is beyond Stoughton's reach in the Petition as it currently stands.

48. The upshot of all of this is that we are today, as was the learned Single Judge, asked to conjecture on almost every single aspect of the matter. The one thing that is known is that Skyesports signed a document. But this has some how become a springboard for 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc Stoughton to have us imagine almost everything else. We must now assume that Stoughton signed the Agreement. We must assume that Stoughton's November variation was of the September/October 2021 so-called agreement. We must further assume that the invoice that Skyesports drew was in accordance with the variation of the September/October 2021 agreement. We must continue to assume that all content was developed by Skyesports only for Stoughton. Finally, we must assume that the February 2022 proposal was in replacement of the September/October 2021 so-called agreement. This is asking us to assume rather too much. Pegged only to Skyesports's signature on one document, the entire case is based on conjecture and surmise that there must have existed a concluded contract.

49. In addition there is Mr Madon's submission on Section 42 of the Specific Relief Act. Section 42 reads thus:

> "42. Injunction to perform negative agreement.-- Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

> Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

50. This is cited because Mr Kadam before us today argued that the Section 9 Petition was really to enforce a negative covenant (i.e. the non-compete clause). The answer by Mr Madon to this is simple 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc and is based on the proviso that in order to succeed on this argument, Mr Kadam would have to show that Stoughton was not itself in default of performance of its obligations under the contract. This is not a matter that is reflected in the decision of the learned Single Judge and we need not say anything further.

51. One last point is to be noted. We heard the matter fully in the morning session. Since there were other matters listed, we indicated we would deliver judgment in the afternoon session. When the matter was called, and before we began dictating the judgment in open court, we asked the advocates for Stoughton to take instructions if they wanted to unconditionally withdraw the appeal. The impugned order would stand, but we indicated that subject to that, we would make an order keeping open any civil remedies Stoughton might have wished to pursue. On taking instructions while the court waited, the advocates for Stoughton reported that their instructions were to invite a judgment. We therefore proceeded to deliver this judgment.

52. Returning to the Wander v Antox principle, we find that view the learned single Judge was not merely plausible. It was the only possible view in the circumstances of the case, and one with which we are entirely in agreement. There were other reasons set out by the learned single Judge, but those need not detain us. Equally, it is true that our order today considers additional factors and is for further reasons, but we have arrived at precisely the same conclusion as the learned single Judge. The brevity of the learned single Judge's order is not a reason to disturb it -- indeed, with 6th June 2022 Stoughton Street Tech Labs Pvt Ltd v Jet Skyesports Gaming Pvt Ltd 8-IAL-16497-2022-in-appl-16492-2022-J.doc profound respect, it may instead speak to the learned single Judge's greater acuity and incisiveness.

53. We see no substance in the Appeal. It is dismissed.

54. In view of this, the Interim Application does not survive and it is disposed of.

(M.G. Sewlikar, J) (G. S. Patel, J)

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