
(2019) 07 BOM CK 0133

In the Bombay High Court

Case No : Commercial Arbitration Petition (L) No. 659 Of 2019

Jatin Keshruwala

APPELLANT

Vs

M/S. Dag Creative Media Pvt. Ltd And Ors

RESPONDENT

Date of Decision : 16-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 17

Citation : (2019) 07 BOM CK 0133

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Gautam Ankhad, Aditya Chopra, Kritika Seth, Sayali Phansikar, Dhvani Shah, Birendra Saraf, Aseem Naphde, Madhu Gadodia, Nitesh Agarwal, Rushabh Mehta

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the petitioner. Respondent no. 1 though served is not appearing. Respondent no. 2 is represented by Dr. Saraf.

2. A short question which arises for consideration in this proceeding is as to whether the petitioner would be entitled to an order which is in the nature

of garnishee order against respondent no. 2? Viacom 18 Media Pvt. Ltd., at the interim stage of the arbitral proceedings.

3. This is a Petition filed under section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act") whereby the petitioner, who has a

privity of contract with respondent no. 1 under an agreement titled as "Co-Production Agreement" dated 25th May, 2017, has principally prayed

for reliefs against Viacom 18 Media Private Limited (for short "Viacom"). Following are the prayers as made in the Petition:

a) Pending the hearing and final disposal of the arbitral proceedings, this

Honâ??ble Court be pleased to direct the Respondents to:

i) deposit a sum of INR 3,41,41,356/Â? along with an interest rate of 36% p.a. as liquidated damages till payment and/or realization in the registry of

this Honâ??ble Court; and

ii) direct deposit of INR 18,000/Â? per episode for showcasing of every new episode;

b) Alternatively, pending the hearing and final disposal of the arbitral proceedings, this Honâ??ble Court be pleased to direct the respondents to

collect all the monies of the said show (including the revenue) and deposit the share payable to the petitioner in the Escrow Agreement;

c) Pending the hearing and final disposal of the arbitral proceedings, this Honâ??ble Court be pleased to restrain the respondent no. 1, their director/s,

representative, servants, agents and all other persons claiming through or under the garb of respondent no. 2 directly or indirectly by order and

injunction to not create any third party rights, without seeking prior approval of the petitioner;

d) Pending the hearing and final disposal of the arbitral proceedings, this Honâ??ble Court be pleased to direct the respondent no. 1 and 2 to disclose

all the financial arrangement between the respondents, with respect to the exploitation of the said show as is presently applicable;

e) Pending the hearing and final disposal of the arbitral proceedings, this Honâ??ble Court be pleased to direct the respondents to disclose the

quantum of profit already accrued to and enjoyed by them with respect to the exploitation of the said Show by submitting a detailed statement of

accounts for the said show since the showcasing of the first episode of the said show;

f) Pending the hearing and final disposal of the arbitral proceedings, this Honâ??ble Court be pleased to direct the respondents to not disburse any

monies in favour of respondent no. 1. Further, to restrain the respondent no. 2, their director/s. Representative. Servants, agents and all other persons

to disburse to any third party the amounts being collected with respect to the said Show, until the respondent no. 1 are able to provide the security as

sought for under prayers hereinabove;

g) Pending the hearing and final disposal of the arbitral proceedings, this Honâ??ble Court be pleased to direct the respondent no. 2 to deposit in the

court all the sums it is liable to pay to respondent no. 1.

h) for ad interim reliefs in terms of prayer clause (a), (b), (c), (d), (e), (f), (g), and (h) above;

i) for costs;

ii) for such other and further reliefs as this Honâ??ble Court may deem fit in the nature and circumstances of this case.â??

4. This Petition was moved for adâ??interim order. This Court passed an order on 25th June, 2016 recording a statement as made on behalf of Viacom

that no amounts are due and payable by Viacom to respondent no. 1 and no amounts shall be paid to respondent no. 1 directly. The order reads thus:

â??1. Heard Mr.Kanade, learned Counsel for the petitioner. It is informed that the respondent no.1 is served and an affidavit of service will be filed

during the course of the day. Dr.Saraf appears for respondent no.2.

2. As argued by Mr.Kanade, learned Counsel for the petitioner, there is already an order dated 4 February 2019 passed by the learned Arbitrator on

the application filed by the petitioner under Section 17 of the Arbitration and Conciliation Act,1996 (for short 'the Act'), wherein respondent no.1 who

is the only party to the arbitral proceedings, is directed to deposit within two weeks of the said order, an amount of Rs.1,30,00,000/â?? in an escrow

account with a bank or to furnish a bank guarantee of the said amount. An option of offering a security of movable/immovable property is also granted

to respondent no.1 as directed in clause (b) of the operative order.

3. The case of the petitioner is that the said order is not being complied by respondent No.1; although now proceedings are initiated for execution of

the said order passed by the learned Arbitrator. Mr.Kanade, learned Counsel for the petitioner would contend that the purpose of this petition filed

under Section 9 of the Act is that there are amounts due and payable by respondent no.2 to respondent no.1 and those amounts ought not to be

distributed to respondent no.1 inasmuch as the petitioner has become entitled to receive the amount invested by the petitioner in the T.V.serial in

question, which is being produced by respondent no.2 by engaging respondent no.1. It is his submission that as there are dues payable by respondent

no.2 to respondent no.1 which ought to be directed to be deposited in this Court.

4. Dr.Saraf, learned Counsel for respondent no.2 at the outset would contend that the contract awarded by his clients in favour of respondent no.1 in

regard to the said serial was terminated on 4 April 2019. He however submits that as the production of the serial is undertaken by respondent no.2, respondent no.2 cannot be left in a situation that the artists technicians and other similar persons necessary for the production of the serial, and engaged for the serial are not paid. It is submitted that to keep the serial going, in fact payment was required to be made by respondent no.2 which are also not payments of very large amounts. It is stated that the T.V. serial is an ongoing serial and about 500 episodes are completed. Dr. Saraf states that respondent no.2 however shall not make any direct payment to respondent no.1 and no payment has been disbursed to respondent no.1.

5. Mr.Kanade, learned Counsel for the petitioner however contends that respondent no.2 ought to disclose how much amount is due and payable by respondent no.2 to respondent no.1, as the petitioner has invested amounts by making payment to respondent No.1 for the very serial in question and thus respondent no.1 is under an obligation to make payment to the petitioner of the said amounts, which in fact would be derived from the serial in question.

6. The statement as made by Dr.Saraf that no amounts are due and payable by respondent no.2 to respondent no.1 and that no amounts shall be paid to respondent no.1 directly, stands accepted.

7. Respondent no.2, however, shall place on record on affidavit the amounts, if any, which are payable to respondent no.1. Let the affidavit be filed within one week from today.

8. Stand over to 9 July 2019.â??

5. The above order passed by this Court was challenged by the petitioner in Commercial Appeal (L) No. 322 of 2019. The Appeal Court by an order dated 3rd July, 2019 dismissed the said Appeal. The Division Bench observed thus:

â??11. The learned Single Judge has recorded the said stand of respondent no. 2 that no amount shall be paid to respondent no. 1 directly has been accepted by the Court. The learned Single Judge has not terminated the proceedings. While directing the 2nd respondent to file an affidavit disclosing the amount payable by it to respondent no. 1. Hearing has been deferred to 9th July, 2019.

12. As per the appellant, the 2nd respondent is making payment to 3rd parties

which are to the credit of the 1st Respondent and thus, learned counsel urges that a security available with the appellant is being diminished.

14. Now, it needs to be highlighted that there is no privity between the appellant and the 2nd respondent. The proceedings initiated by the appellant before the learned Single Judge is to seek a garnishee order. A garnishee order would not be passed if injury is caused to the person holding money on behalf of another party. On this principle alone, the 2nd respondent would be entitled to clear the dues of the technicians, artists and vendors for their input concerning the Serial which was the subject matter of the agreement between the 1st Respondent and the 2nd Respondent.

16. We find no infirmity in the proÂ?tem adÂ?interim order dated 25th June, 2019.â??

6. It is on the above backdrop I have heard this Petition today. Mr. Ankhad, learned counsel for the petitioner has submitted that it is necessary for

this Court to grant the reliefs as prayed in the present Petition in as much as respondent no. 2 at all material times was aware that respondent no. 1

had an agreement with the petitioner under which finance was made available to respondent no. 1 for the production of a Bengali serial in question,

namely, Mahaprabhu Sree Chaitanya. Mr. Ankhad referred to the letter dated 20th June, 2017 addressed by respondent no. 1 to Viacom whereby

respondent no. 1 informed Viacom about opening of an Escrow Account so that the amounts which are payable to respondent no. 1 by Viacom are

deposited and the amounts can come to the benefit of the petitioner as also of respondent no. 1 in regard to the said TV serial in question.

7. Mr. Ankhad has drawn my attention to the order dated 6th September, 2018 passed by this Court (Coram : S.J. Kathawalla, J.) on an earlier

Section 9 Petition filed by the petitioner wherein this Court in paragraph 1(v) has recorded that respondent no. 1 shall not raise any bill on Viacom for

a period of four weeks from the date of said order and that the said order continues to operate till today. By the said order, the Court also appointed a

sole arbitrator to adjudicate the disputes between the petitioner and respondent no. 1 and the parties admittedly are before the arbitral tribunal. It is

Mr. Ankhadâ??s contention that considering this position, the amounts should now be paid by Viacom to the petitioner. Mr. Ankhad would next

contend that perusal of the termination letter dated 4th April, 2019 issued by

Viacom to respondent no. 1 will also indicate that there are amounts which are due and payable by Viacom to respondent no. 1 and thus, even considering the contractual agreement between respondent no. 1 and Viacom, the rights of the petitioner need to be recognized.

8. Mr. Angad would submit that the conduct of Viacom is not bonafide in as much as the payments were made by Viacom to the artist and especially

as set out in paragraph 5(i) of Viacom's affidavit of disclosure dated 4th July, 2019. Mr. Ankhad would submit that disclosure in regard to the

Agreement dated 15th March, 2016 entered between Viacom and respondent no. 1 in regard to assignment of the rights of a film titled

'Dhumketu' is set out for the first time in the reply and no such case can be seen from the correspondences between the parties as placed on

record. It is submitted that a bogus case as pleaded by Viacom. Mr. Ankhad would submit that it appears to be collusive plea between respondent no.

1 and Viacom to defeat the rights of the petitioner.

9. On the other hand, Dr. Saraf, learned counsel for respondent no. 2, at the outset, would submit that there is no privity whatsoever between Viacom

and the petitioner. It is submitted that Viacom has independent rights under a contract entered by Viacom with respondent no. 1. It is submitted that

respondent no. 1 has admittedly defaulted to perform its obligations under the said contract causing losses to Viacom and ultimately resulting in

termination of the said contract by Viacom by termination notice dated 4th April, 2019. It is submitted that as set out in the affidavit of disclosure,

Viacom has substantive claims inter alia not only for damages under the agreement relating to production of serial 'Mahaprabhu Sree Chaitanya'

under the Production Agreement dated 4th May, 2017 but also another Production Agreement dated 2nd January, 2019 in respect of a program titled

'Khonar Bachan' as set out in the termination notice. It is submitted that this apart, even in regard to another agreement in respect of film

'Dhumketu', Viacom has a claim against respondent no. 1 and accordingly Viacom is entitled to retain the said amounts of Rs.1,14,14,280/- to

be set off in respect of the said claims which Viacom may have against respondent no. 1.

10. Dr. Saraf would contend that the petitioner's case of being a mere financier for respondent no. 1, is not a correct picture as painted by the

petitioner. It is submitted that the petitioner's agreement with respondent no. 1 is a co-production agreement clearly defining the rights and obligations between the parties. My attention is drawn to various clauses of the said agreement and more particularly, to clause 3 whereby respondent no. 1 has agreed to make payment to the petitioner including the profits per episode. Dr. Saraf has also referred to the Schedule of repayment as agreed between the parties which commences from August, 2017. Dr. Saraf has also submitted that the said agreement is peculiar, in so contending he refers to clause no. 24 which according to Dr. Saraf is a very unusual and an abnormal clause set out in the Agreement. Dr. Saraf would submit that the Co-Production Agreement as entered between the petitioner and respondent no. 1 is in the nature of partnership defining rights and liabilities and considering the definition of partnership with the Partnership's Act, it is purely a partnership dispute. It is thus submitted that considering the nature of the said agreement, by no stretch of imagination, the petitioner cannot asserted any rights against Viacom. It is thus contended that in any case it is too late in time for the petitioner to now assert any rights against Viacom. Dr. Saraf would also contend that the present proceedings are not proceedings in execution of any arbitral award or a decree of a civil court where such an order against a garnishee can be passed.

11. Having heard learned counsel for the parties and having perused the record, it appears to be quite clear that the petitioner entered into Co-

Production Agreement dated 25th May, 2017 with respondent no. 1. Various clauses as set out in the agreement would clearly indicate the nature of financial arrangement between the petitioner and respondent no. 1. Some of the relevant clauses read thus:

3. That Co-Producer shall be responsible only for providing finances as agreed hereinabove; for the production of the said program for an agreed

return of the principal amount of Rs.1,30,00,000/ (Rupees One crore thirty lakhs only) as per the agreed schedule as well as a fixed amount of

Rs.18,000/ (Rupees Eighteen thousand only) towards profit per episode for a total of the 312 episodes. In case of extension of the show, only

financial terms will comply as per Annexure III which construes part and parcel of this agreement and if the channel enhances per episode cost of the

show due to change in production cost, the investment amount 1 crore and profit margin of Second part will be Rs.18000/ per episode on pro data

basis by approval from Viacom 18. The producer is agreed, If show is terminated by Viacom 18 before 312 episodes, the co-Producer profit will be

counted till 312 episodes whatsoever reason. If the channel enhances per episode cost of the show due to change in production cost, the co-Producer per episode profit Rs.18,000/- will not be changed.

5. Notwithstanding anything contained in the respective channel Agreements, Producer agrees and undertakes to accord the following credits in each

and all episodes separate state in the opening credit titles of the respective programs. If the respective channel or the Channel Agreements permit the

same, alternatively, the credits will be shared on the state (with DAG Creative) which shall be of equal size and prominence as that of the credit

accorded to the representative of producer in the respective programs.

The Credits shall be given Program so produced in the following manner:

“Produced by Janvi Productions/Jatin Keshruwala”

6. Producer has requested for a maximum investment of Rs.1,30,00,000/- (Rupees One Crore Thirty lacs only) to be disbursed by Co-Producer as per the schedule of Annexure-II.

7. That the Producer has informed the Co-Producer that VIACOM 18 shall pay to Producer for the development. Production and delivery of the

completed program @ Rs.1,90,000/- per episode which shall be paid 60 days after the telecast of each such episode of the said show.

8. That the Producer agrees that the amount of Rs.1,30,00,000/- (Rupees one crore thirty lakhs only) paid to him as advance/investment shall be returned as per Annexure-II.

It is hereby agreed that the Parties shall jointly open and operate an escrow account for receiving any and all revenues in respect of said program.

The parties agree that the program Escrow Account shall be opened before the release of the First franchise of the Investment Amount by producer to

co-Producer. Producer, it agreed that until the operation of the Program Escrow Account, co-Producer shall not be obligated to release any amount

towards the Investment Amount, and such delay in the payment of Investment Amount by co-Producer shall not constitute a breach of the terms of

this Agreement. It is agreed between the Parties that the Program Escrow Account shall continue to subsist until co-Producer instructs otherwise.

The Program Escrow Account shall be the only account used and operated by produced in respect of said Program including for the purpose of

receiving all sums payable to or receivable by Producer under the respective Channel Agreements without limitation Episode Cost including for any

Maha episode total consideration. TVR based incentives and/or any other additional amounts receivable by or payable to Producer under the

respective Channel Agreements and/or from/by the respective Channels. Producer hereby agrees and undertakes that it shall intimate the Channels in

writing under copy to co-Producer that all amounts payable to or receivable by Producer under the respective Channel Agreements and/or from the

respective Channels in relation to said Program shall be transferred/deposited by the respective Channels only in the said Program Escrow Account.

Producer agrees and undertakes that it shall not intimate the Channels and/or any third party of any change to such details of the Program Escrow

Account for the purpose of receiving Revenues in relation to Program without a specific prior written consent of co-Producer. Any breach of the

aforesaid shall be deemed to be a material breach by Producer of this Agreement. That it is further agreed between the parties hereto that the stamp

duty, Escrow account and any other legal charges on this agreement will be shared by both the parties in equal proportion.

The Producer will furnish monthly statement of account to Co-Producer.

12. That it is agreed and understood between the parties hereto that the co-Producer from out of per episode consideration received/receivable from

VIACOM 18 as stated above and deposited in the account, shall have the first charge i.e., the Co-Producer shall be paid his entire dues till date first

and then only any further payment shall be made out of the remaining amount and/or any payment shall be received by the Producer. Similarly, after

return of the entire principal amount Rs.1,30,00,000/- and the amount towards agreed profit per episode shall first be received by the Producer. That

however the Producer hereby extends a personal undertaking that the payment due to the Co-Producer shall be paid as per the schedule mentioned

hereinabove even if there is any deficit of money in the account, due to happening of whatsoever circumstances time being the essence.

24. That the First Part is not authorized to interfere in the financial involvement of the said show by the second part as the co-Producer of the show.

The financial investment and source of money will be the privacy right & exclusively borne by the Second Part. The Second Part will ensure the legality of the money financed and the First Part hereby makes itself indemnified against any dispute/enquiry/investigation done subsequently by any competent authority on the Second Part with regard to money invested by the Second Part.â??

12. Perusal of Annexures II and III would reveal that the petitioner was to receive payment from August 2017. Further, there was an amendment to the said Agreement dated 7th November, 2017 whereby settlement was arrived between the parties in regard to the revision of payment schedule as contained in AnnexureÂ?III of the original agreement. In Clause (iv) of this amendment agreement, petitioner and respondent no. 1 agreed as under:

â??(iv) Party of Second part will not communicate with Viacom 18 Media Pvt. Ltd. or any one concerned in respect of the agreement with

â??Viacom 18â? or any one concerned with the production of the serial â?? Mahaprabhu Sree Chaitanyaâ? in any means for any matter of the Party of First Part.

The rest terms and conditions of the original agreement will remain same.â??

13. It is not in dispute that respondent no.1 has defaulted in its obligation under CoÂ?Production Agreement between the petitioner and respondent no.

1 and the disputes are now pending adjudication before the arbitral tribunal appointed under Order dated 6th September, 2018 (Coram : S.J.

Kathawalla, J.). Respondent no. 1 is not appearing in the present proceedings.

14. By an order dated 4th February, 2019 passed by the learned sole arbitrator on an application filed by the petitioner under section 17 of the Act,

respondent no. 1 has been directed to deposit an amount of Rs.1,30,00,000/Â in an Escrow account with the bank. Though the said order was passed

on 4th February, 2019, respondent no. 1 has not deposited the said amounts. The petitioner, however, apprehends that amounts are due and payable by

Viacom to respondent no. 1 and as respondent no. 1 has defaulted has filed the present proceedings principally against Viacom in the nature of

garnishee proceedings and at the interim stage of the arbitral proceedings. It is informed that now steps are being taken by the petitioner to execute

the order dated 4th February, 2019 passed by the sole arbitrator under section 17 of the Arbitration and Conciliation Act.

15. The question thus is whether the petitioner would be entitled to any relief against Viacom in the present proceedings which is in the nature of a garnishee order.

16. I am not persuaded to accept the contentions as urged on behalf of the petitioner for such orders to be passed against Viacom for the reason that such an order is sought by the petitioner at the interim stage of arbitral proceedings and that too by invoking section 9 of the Act against Viacom.

Admittedly so far no concrete steps are taken to recover any amounts from respondent no. 1.

17. The principles as applicable are well settled. Even when a decreeholder is seeking an order against the garnishee, the principal consideration for

the Court to pass any garnishing order would be to ascertain whether the debt is actually due and payable by the garnishee to the judgment debtor.

When the garnishee has not admitted the debt, the Court certainly cannot compel the garnishee to deposit any amount on account of judgment debtor.

This can lead to an absurdity as it would amount to making an order before the debt is payable. In such a situation, it is the discretion of the Court to

direct the parties to adopt appropriate proceedings even for determination of said debt. Such an order hence is always a discretionary order. The

Court needs to consider the facts and circumstances of the case and as to whether it would be inequitable to pass such an order and as to whether it

would cause any injury or effect substantive rights of the garnishee. Further it would be imperative for the Court to consider whether the judgment

debtor has a present right to recover any debt from the garnishee and what is the nature of such a right. If it is a contingent right then certainly the

decreeholder would also stand in the same position as the judgment debtor qua garnishee.

18. Applying all these principles to the facts of the present case, it can certainly be concluded that the petitioner is not entitled for any relief against

Viacom. This also taking into consideration the nature of the agreement entered between the petitioner and respondent no. 1, it is clearly seen that the

petitioner was entitled to payment in August 2017 and is now making a claim against Viacom.

19. Further although the petitioner has sought to draw a connection of the petitioner's contractual relation with respondent no. 1 with that of

Viacom, it can be clearly seen that it is not so. There is no privity of contract of any nature between the petitioner and Viacom. Viacom has placed on record the agreement entered between Viacom and respondent no. 1. Disclosure affidavit has also set out that respondent no. 1 has contractual relations with Viacom even in respect of other programs and a feature film under which Viacom has substantial claims against respondent no. 1. Thus, there is much substance in the submission of Viacom that Viacom cannot be put into position to disregard the specific terms and conditions of the agreement between Viacom and respondent no. 1, and the position Viacom is confronted in view of the termination of agreement as entered between respondent no. 1 and viewers qua the ongoing TV serial. There is much substance in the contention as urged on behalf of Viacom that the relation between the petitioner and respondent no. 1 is in the nature of partnership and that certainly there are disputes inter se between the petitioner and respondent no. 1.

20. On behalf of Viacom a statement is already made and recorded in the order dated 25th June, 2019 passed by this Court that Viacom has stated that no amounts shall be due and payable by Viacom to respondent no. 1 and no payments shall be paid to respondent no. 1 directly, which statement as made to the Court was accepted. This Court has further observed that in the facts and circumstances of the case, Viacom will be entitled to make payment to technicians and artists who are actually working for the serial after the termination of the contract as also approved by the Appeal Court.

21. In the aforesaid circumstances, this Petition cannot be entertained for any reliefs against respondent no. 2. Viacom. The petitioner is free to adopt appropriate proceedings against respondent no.1.

22. However, the statement made on behalf of respondent no. 2. Viacom and recorded by this Court in the order dated 25th June, 2019 shall continue to operate till the disposal of arbitral proceedings.

23. All the contentions of the petitioner and respondent no. 1 before the arbitral tribunal are expressly kept open.

24. Petition is accordingly dismissed, however, subject to the above observations.

25. At this stage, Dr. Saraf would submit that the amounts which are disclosed in the affidavit of disclosure are not accurate amount as there is likely to be deduction of taxes etc. and therefore, the amounts may differ.