IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial

High Court Appeal No. 274 of 2019

M/s China Mobile Pak Ltd.
Versus
M/s Makran Communication & others

Date of Hearing:	10.01.2024
Appellant:	Through Mr. Muhammad Mansoor Mir Advocate.
Respondents:	None present.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Respondents filed suit against the appellant only for damages in the sum of Rs.206.25 Million with interest at bank rate, from the date of termination of franchise license, till the realization of decretal amount. The suit was decreed only to the extent of security deposit amount of Rs.30,00,110/- plus unpaid commission amount and general damages to the tune of Rs.15,00,000/- and in case of failure to pay, mark up of 10% was also awarded on these amounts, against which this High Court Appeal is preferred by the principal.

2. Appellant claimed that respondent No.1 is an unregistered partnership firm whereas respondents No.2 and 3 are the two partners of the said unregistered firm. In pursuance of an advertisement of September 2007, it appears that the respondents were appointed as franchisee/licensee of the appellant i.e. China Pakistan Limited (C.M. Pak Limited Zong). The plaint disclosed that there was no written agreement signed between the parties. It is claimed that respondents invested huge amount in establishing the infrastructure described as building cost, adornment and beautification as per international

standards, appointment of staff, security measures, sales promotion measures, launching two floats on their own resources for sale promotion, expenses to meet inept sale policies etc.

3. However, it is alleged (correspondence relied upon by plaintiff) that respondents were unable to perform up to the mark, which respondents claimed to have been caused on account of PTA Regulations, the terms of which were to be complied with by the appellant and consequently its licensee, which it failed, as claimed. Consequently, despite above, the agreement was terminated, which led to filing of suit by the respondents, which was decreed, as referred above.

4. The appellant is aggrieved of the judgment and decree on the following consideration:

- That they (appellants) have been precluded from contesting the matter and bringing its evidence in support of their defence;
- That the respondent No.1 is not a registered partnership firm and hence cannot sue and be sued accordingly;
- That no sum as security was provided which was ordered to be returned along with a claim of damages of approximately 1.5 Million.

5. We have heard learned counsel for the appellant and perused the record whereas no one attended on behalf of the respondents.

6. From record it appears that appellant after service of notice and summons opted not to file the written statement and thus was declared exparte on 16.10.2012. The memo of appeal does mention filing of an application under section 34 of Arbitration Act, but even copy of the same has not been annexed nor was that argued or relied upon. Thus, in the suit proceeding, appellant has chosen not to bring its pleadings and/or stand before the Court. It is for the first time through this appeal that the appellant is pleading its case while relying all the material

placed by the respondents along with plaint/evidence and without any supporting documents by the appellant itself.

7. Learned Judge on the original side, thus had no option but to proceed with the matter relying on the pleadings and documents exhibited/relied upon. Respondents in order to prove their case examined plaintiff No.2 (respondent No.2) as well as two other witnesses who were employees of respondent No.1 (Firm). Plaintiff No.2 (partner) in paragraph 10 of his affidavit-in-evidence has stated that M/s Makran Communication is a partnership firm engaged in business as being franchisee of appellant. He has not stated if the partnership was unregistered or otherwise; neither has produced any documents in respect thereto nor cross examined with denial of such facts. In order to oust respondent No.1 from contest as being unregistered firm, we only have to presume (in view of oral submission of advocate), since evidence is not available. There was/is no material on such point.

8. Plaintiff No.2 along with his affidavit-in-evidence also exhibited following documents:

i) Special Power of Attorney (Ex. A/1)
ii) Copy of dawn news clipping dated 9.12.2015 (Ex. B)
iii) Copy of picture showing trophy from president of Federation of Pakistan Chamber of Commerce & Industry (FPCCI) (Ex. C)
iv) Copy of winner certificate from Zong (Ex. D)
v) Franchise application/covering letter dated 20.10.2008 (Ex. E)
vi) Copies of three pay orders deposited as security deposit/stock (Ex. F, F/1 and F/2)
vii) Copies of bills, receipts of payments etc. (Ex. G-G/7 to H)
viii) Copies of press releases etc. (Ex. J, Ex. J/1, Ex. K, Ex. L)
ix) Copies of emails (Ex. M, N and N/1)
x) Copy of warning letter dated 28.06.2010 (Ex. O)
xi) Copy of termination letter dated 25.11.2010 (Ex. P)
xii) Copies of statements (Ex. Q to Q/2)
xiii) Copy of legal notice dated 23.3.2011 (Ex. R)
xiv) Copies of medical reports of one of the plaintiff/ respondent No.2 (Ex. S/1 to S/9)

9. Although suit was not defended as no written statement was filed nor cross-examination took place, yet learned Single Judge on the basis of material before it framed following "points for determination".

i) Is/was there any relationship existed between plaintiffs and defendant?
ii) Whether due to acts of defendants, plaintiffs suffered any losses?
iii) What should the decree be?

10. Relationship is not disputed however there is no franchise/license agreement on record to understand its terms. It was neither presented by the respondents along with the plaint and/or with the evidence, nor the appellant has attempted to file it with the memo of appeal. The terms of such agreement hence are not known. What is admitted by learned counsel for the appellant is that through a covering letter (attached with plaint) of respondent No.1 dated 20.10.2008 (Ex.E), a sum of Rs.3 Million was extended to the principal appellant via pay orders covering security deposit and stocks for Orangi Town Franchise. The amount was forwarded through pay orders (Ex. F, F/1 and F/2) available at pages 235 and 237 of the file.

11. In was not the case of respondents that agreement was terminated illegally and/or in violation of terms of agreement; nor prayed for in the plaint. Only prayer is of damages as under:-

> "*That this Hon'ble Court may graciously be pleased to pass judgment and decree in favour of plaintiff directing the defendant to pay damages Rs.206.25 Million with interest on bank rate from the date of terminating franchise license till the final payment decreed amount granted by this Hon'ble Court.*"

12. A challenge to the termination of license is/was not before this Court, hence its legality or illegality cannot be adjudged. Only prayer in the plaint is that the damages be awarded with interest from the date of terminating franchise/license agreement. Respondents have not even

prayed that the subject license was cancelled/terminated without any lawful cause or reason, though in such relations, it is always prerogative of the principal to terminate it, as they deem fit and proper with consequences to follow. Since it is not respondents' case therefore no compulsion upon learned Single Judge to ascertain whether it was terminated lawfully or unlawfully. In such a situation, claim of damages could not be matured except claim of security which is not dependent upon unlawful termination. In our understanding in the instant case the claim of damages is dependent upon unlawful termination of license, which is not proved.

13. Suit however was not contested as neither any written statement was filed nor respondent No.2 who deposed evidence, was cross examined; the assertions of the respondents have gone un-rebutted and unchallenged but that alone would not prove the unlawful termination nor the damages claimed since the suit itself does not seek such declaration.

14. The warning letter issued on 28.06.2010 (Ex. O) is also not disputed. Prior to this there were some email correspondence also however the fact of the matter is that the warning letter was followed by termination letter dated 25.11.2010 (Ex. P). The text of the warning letter, which was issued to respondents, disclosed that licensee was unable to perform the obligations of franchise business awarded under agreement to them and to achieve monthly assigned sale targets and to maintain better performance and to use better endeavors to promote and increase the franchise business relying on clause 19 of the agreement (which is not available on record); with these grievances being communicated, principal reserved right to terminate the agreement. However, a final notice in shape of warning letter was issued on 28.06.2010, which was then followed by termination letter, referred

above. Since there is a relationship of licensor and licensee wherein termination was not objected and rightly so as the only relief available was to claim damages, if at all it was terminated contrary to promised terms, which is not established.

15. There is nothing on record to suggest that it was an unlawful termination hence damages to be followed. The only amount that they (respondents) were entitled to is the security amount in shape of Rs.30,00,110/- which amount in shape of three pay orders cannot and has not been disputed.

16. Respondents may have produced/exhibited the medical reports of Dr. Ziauddin Hospital and Professor Mahmud Jilani but those pertain to a period from April 2012 onwards whereas the agreement was terminated on 25.11.2010 and the suit was filed on 27.08.2011. This health status of one of the partners of firm could not be attributed to the termination of agreement/license agreement and more importantly, if it is not established to be an "unlawful termination of license", then the principal cannot be saddled with the responsibility of paying the damages of whatsoever nature. A lawful termination may have effected someone's health, but the lawful actions taken cannot be subjected to claim of damages. Only unlawful termination may give rise to a claim of damages. Since it is not established to be an unlawful termination, therefore question of awarding damages does not arise.

17. Contention was made on account of raids of FIA that respondents No.2 and 3 suffered mentally and physically but such actions on the part of FIA cannot be attributed to the appellant nor the respondents have established their case that it was in collusion and connivance. It seems to be a statutory duty performed, which was not objected in the suit either. Thus, this is also not helpful for the plaintiffs/respondents as far as claim of damages is concerned.

18. We therefore are of the view that the respondents are only entitled to the extent of amount of security amount extended to the principal in shape of security along with interest. The decree as such is modified to the extent of Rs.30,00,110/-. As far as condition of payment of interest on the said security amount is concerned that would continue in term of paragraph 4 of the decree and be counted from the date of decree of the learned Single Judge.

19. Appeal stands disposed of in the above terms.

Dated: **J U D G E**

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