* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Order delivered on: March 07, 2014*

\+ **I.A. No.324/2014 in CS(OS) No.60/2014**

BRAINSMART MEDIA AND ADVERTISING PVT LTD
..... Plaintiff

Through Mr.J.P.Sengh, Sr.Adv. with
Ms.Deepali Gupta, Adv.

versus

INDIAN NEWSPAPER SOCIETY ..... Defendant

Through Mr.Sandeep Sethi, Sr.Adv. with
Mr.Yogendra Misra & Mr. Nakul
Sachdeva, Advs.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present suit has been filed by the plaintiff for declaration and permanent injunction against the defendant. Along with the suit, the plaintiff also filed an application under Order XXXIX Rule 1 and 2 read with Section 151 CPC, being I.A. No.324/2014. By this order, I propose to decide the said application.

2. The plaintiff is an advertising agency having its registered office in Tamil Nadu and was earlier known by the name of 'Calai Campaigns Pvt. Ltd'. The defendant is a society having as its members the newspapers and periodicals of the country. One of the major activities of the defendant is the interface between member publications and accredited advertising agencies.

Case of the plaintiff

3. It is the case of the plaintiff that different advertising agencies including the plaintiff carry out business transactions on commission basis with the defendant. The advertisement agencies book space for their clients for publishing the advertisement in different member newspapers and periodicals. The member newspapers and periodicals of the defendant grant certain benefit in their business transactions to those advertisement agencies which have been granted accreditation by the defendant. Government organizations engage only those advertising agencies for the purpose of publication of their advertisement which are accredited by the defendant. As per the arrangement, accreditation is granted to advertising agencies on certain terms and conditions by the defendant after verifying the credit worthiness of a firm/company.

4. The plaintiff is a well known and reputed company having a well established clientele in the business of advertising and accordingly enjoys goodwill in the print media and advertising market in India. The plaintiff has eight branches i.e. at Chennai, Bangalore, Hyderabad, Trivandrum, Cochin, Goa, Mumbai and Delhi with over 250 people as its employees across India and has a turnover of ₹52.68 Crores for the period 2012-2013.

5. The plaintiff had given a bank guarantee for ₹45 lacs besides a personal guarantee of all directors to the defendant at the time of accreditation as per the rules and regulations of the defendant and that the plaintiff had complied with all the terms and conditions of the defendant.

6. It is the case of the plaintiff that due to the market situation of some of the advertisers, being the clients of the plaintiff, did not make payments for which they had been given credit. Despite best efforts of the plaintiff and

due to this, the payment to be made to the member publications of the defendant was delayed. Some of the member publications complained to the defendant, who according to the plaintiff, acting on ill advice of the said publications and without enquiring from the plaintiff as required under the Rules, issued a notice dated 25th July, 2013 for dis-accreditation stating that there has been unsatisfactory payment position as reported by the member publications. A copy of the said notice was also sent to the member publications and as a consequence, the reputation and goodwill of the plaintiff were affected severely. Major corporate clients of the plaintiff cancelled their existing orders of advertisements and restricted and restrained from giving fresh work orders as also did not entertain tenders of the plaintiff in this respect.

7. As per the applicable Rules as laid down in the defendant's Press Handbook, where an advertiser fails to pay and as a consequence the advertising agency is unable to pay publications, the member Publications shall not refuse to publish the advertisements scheduled by the concerned Advertisement agency on behalf of the advertisers whose previous advertisements have been paid for. As per the rules, such protection is available to an advertising agency if the advertiser has not paid its bills. The protection is not available only if the bills are pending payment with the member publications for above a period of six months.

8. It is averred by the plaintiff that it had communicated to the defendant that the present situation had arisen due to advertisers delaying and defaulting in payment and hence in view of the bonafide situation no coercive action be taken as the plaintiff was in the process of clearing its liability and stated that the plaintiff shall clear the same within six months

and sought extension of time till 31st January, 2014. In the meanwhile the plaintiff recovered certain dues and duly paid to the member publications. However, vide letter dated 14th December, 2013, the defendant allowed extension till 31st December, 2013. The said notice stated that the said notice would be considered for withdrawal only if the plaintiff provided upto date clearance certificates of all outstanding from reported member publications. Further it was required that the latest audited balance sheet as on 31st March, 2013 be provided. In view of the delayed payments, the plaintiff was asked to furnish a further Bank Guarantee of ₹5 lacs.

9. The plaintiff pursuant to the said notice immediately took action to comply with the same and along with forwarding the a copy of the Audited Balance Sheet as on 31st December, 2013, Bank Guarantee and no due certificates from various publications, it was intimated to the defendant that some outstanding dues were in process of being recovered to be paid and in view thereof, further time was sought till 31st January, 2014.

10. However, vide notice dated 3rd January, 2014 received by email, the plaintiff came to know that the defendant had cancelled the accreditation of the plaintiff with immediate effect stating that the Bank Guarantee of ₹5 lacs had not been submitted by the plaintiff. It is the case of the plaintiff that the said notice had not been sent as per the applicable Rules.

11. It has been stated that due to the consistent unsympathetic stand taken by the defendant towards the plaintiff and due to non appreciation of the difficult position faced in view of the market situation and consequently issuance of dis-accreditation intimation, the customers of the plaintiff are reluctant to pay their outstanding dues to the plaintiff. The payments to be

made to the member publications in time shall be adversely affected due to the said notice. Aggrieved thereof the plaintiff filed the present suit.

12. In the application bearing I.A. No.324/2014 under Order 39 Rules 1 and 2 CPC filed by the plaintiff along with the suit for grant of ex-parte ad-interim injunction, notice of the said application was issued to the defendant. Interim order was passed, subject to the condition. The operative part of the interim order reads as under:-

> "……Upon instructions, learned counsel for the plaintiff states that as of today the liability of the plaintiff towards publication is about ₹3.41 crores and plaintiff undertakes to pay the said amount by 31st March, 2014. He further submits that in view of letters dated 25th July, 2013 and 3rd January, 2014, the defendant has fixed a meeting today in order to take steps against the plaintiff.
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> In view of the statement made by the learned counsel for the plaintiff, let summons in the suit and notice in the application be issued to the defendant on filing of process fee and Regd. A.D. Covers within three days, returnable on 22nd January, 2014.
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> Till the next date of hearing, the defendant shall not take further steps with regard to letters issued on 25th July, 2013 and 3rd January, 2014."

13. **Case of the Defendant**

(a) The defendant – Indian Newspaper Society is a Society registered under the provisions of Section 25 of the Indian Companies Act. Many major newspapers and periodicals are the member publications of the defendant-Society. The defendant-society recognizes advertising agencies and grants accreditation to them as per the rules and regulations framed in this respect. The advertising agencies that are granted accreditation by the

defendant are entitled to a 60 days unlimited credit facility from the member publications whereas a non-accredited advertising agency does not have any credit facility and would have to furnish advance deposits to multiple publications so as to ensure publication of their advertisements.

(b) The plaintiff was granted full accreditation w.e.f. 1st October, 2009. The plaintiff thereafter changed its name from 'Calai Campaigns Pvt. Ltd.' to 'Brainsmart Media & Advertising Pvt. Ltd.' and forwarded the fresh Memorandum and Articles of Association along with the Certificate of Incorporation and requested the defendant to regularize the full accreditation granted on 1st October, 2009 in the abovementioned name. The accreditation was duly regularized in the name of Brainsmart Media & Advertising Pvt. Ltd., i.e. the plaintiff vide letter and Agreement dated 1st February, 2013. Being agency of the defendant, the plaintiff agreed to be bound by the terms and conditions of the Agreement of Accreditation dated 1st February, 2013, the plaintiff was entitled to 60 days unlimited credit facility from the member publications of the defendant.

(c) As per practice, the defendant monitors payments to member publications from accredited advertising agencies through the system of Monthly Review Verification (hereinafter referred to as "MRV"). Member publications of the defendant are expected to file their MRV returns every month so as to enable the defendant to ascertain the quantum and period of outstanding of the accreditation advertising agencies. Depending upon the status of payment by the agencies, actions as enumerated under the terms and conditions of accreditation are taken to enforce payments to member publications.

(d) Admittedly the plaintiff-Company defaulted in making timely payments as agreed to between the plaintiff and the defendant vide Agreement of Accreditation dated 1st February, 2013 and accordingly, a pre-clearance letter was issued to the plaintiff on 24th May, 2013. The said letter was issued on the basis of the MRV for the month of February, 2013. The outstanding liability of the plaintiff for the month of February, 2013 as reflected in the MRV for the said month was ₹1,05,05,000/-.

The plaintiff took no steps in furtherance of the pre-clearance letter dated 24th May, 2013. The defendant was thereafter constrained to issue a show-cause notice dated 28th June, 2013. In the said notice, the plaintiff was asked to submit proof of payment of dues as per the MRV for March, 2013, however, the plaintiff abstained from replying to the said show-cause notice.

(e) Due to lack of any kind of response to the aforementioned letters, the defendant sent a fax dated 28th June, 2013 to the plaintiff after analyzing the MRV of March, 2013 and requested the plaintiff to furnish complete proof of MRV dues of March, 2013 and April, 2013 bills in the shape of acknowledgement slips/postal certificates/courier receipts to match with the claim sheet for the said month. The explanation of the plaintiff for the default in payment was that publications are either wrong reporting/ disputed/rate difference/bills not received, etc., whereas on the contrary, the stand taken by the plaintiff in the suit is that the payment could not be made to the member publications due to late payments by the ultimate clients.

(f) In view of the abovementioned, the defendant issued a notice of dis-accreditation on 25th July, 2013 whereby the defendant informed the plaintiff that the conduct of the plaintiff had been unsatisfactory due to its default in payment and there was also an instance of dishonouring of cheque

issued by the plaintiff to member publication. The plaintiff informed that such misconduct cannot be condoned and that the said Notice of Dis-accreditation would be considered for withdrawal by the defendant only upon receipt of payment of the outstanding and till date clearance of dues. However, the plaintiff did not bother to the said notice and chose not to respond to the same.

(g) Thereafter, the defendant wrote several other letters asking the plaintiff to submit complete details of payment made by it. The plaintiff vide letter dated 26th November, 2013 admitted to an accumulated MRV outstanding amounting to Rs.3,45,70,558/- as on 20th November, 2013. The plaintiff conveniently attributed the inordinate delay in payment to various member publications to non-receipt of payments from the plaintiff's clients. The plaintiff, however, admitting to the inordinate delay on its part and outstanding to the tune of ₹3,45,70,558/-, requested the defendant for time up to the end of December, 2013 and undertook to clear the entire dues/ outstanding by then.

14. It is stated by Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the defendant that the plaintiff had suppressed the fact that the plaintiff had issued a cheque for ₹36 lacs to Times of India, one of the member publications of the defendant and the said cheque was dishonored. Plaintiff did not disclose the letter dated 26th November, 2013 written by the plaintiff wherein the plaintiff categorically undertook to clear all the dues of member publications by end December, 2013. It is stated that it was on the basis of this undertaking that the defendant issued the letter dated 14th December, 2013 extending the notice of dis-accreditation upto 31st December, 2013. Learned counsel admits that certain agencies were granted

time to clear their dues but the plaintiff in the present case is taking the undue advantage of leniency shown by the defendant. He further states that the plaintiff was given maximum period of time but no steps were taken by the plaintiff. The defendant who is a well-known Indian newspaper society has to maintain the discipline. In the absence of that other agencies would also take the advantage. Thus the notice issued by the defendant is as per rules and regulations.

15. It is also argued by Mr.Sethi that the plaintiff has incorrectly informed the Court to the effect that straightaway a notice of dis-accreditation was issued to the plaintiff without sending any communication prior thereto, the same being incorrect as the first letter was sent to the plaintiff in May, 2013 which had been continuously followed up later. In fact, the plaintiff had been given time to improve the payment schedule to the member publications from February, 2013 till December, 2013, however, the plaintiff had failed to improve on the payment schedule. It is submitted that pursuant to the repeated assurances given by the plaintiff last of which was embodied in the letter dated 26th November, 2013, the plaintiff chose not to submit the clearance certificates of all the outstanding from reported member publications as required.

16. It is alleged by the defendant that the plaintiff had obtained an interim injunction against the defendant on the first date of hearing by misrepresenting that the defendant is supposed to have a meeting on that date itself i.e. 8th January, 2014 to take further steps in view of the letters dated 25th July, 2013 and 3rd January, 2014. It has been stated that neither any meeting was supposed to be convened on the said date nor any such meeting was, in fact, convened. Pursuant to the cancellation of accreditation

on 3rd January, 2014, the defendant on the same date had written a letter invoking the bank guarantee for a sum of ₹45 lacs issued by the plaintiff.

17. After hearing both parties and having considered the material placed on record, I am of the considered view that the *ex parte* order passed by this Court on 8th January, 2014 is liable to be vacated on the following reasons:-

(i) The action of the defendant is in accordance with the terms and conditions of the Agreement of Accreditation dated 1st February, 2013 and also in conformity with the Rules and Regulations governing Accreditation of Advertising Agencies and Media Services Agencies as the plaintiff had specifically agreed vide the Agreement dated 1st February, 2013 that the plaintiff shall be liable to pay all the bills of member publications irrespective of whether or not the plaintiff has received payment from its advertisers. Clauses (o), (p), (s) and sub-rule (9) of the said Agreement read as under:-

> "(o) The advertising agency shall pay all member publication's bills including bills relating to advertisements placed with member publications prior to its accreditation according to the rules and regulations and within the credit period fixed by the society in this regard and will be liable to any action that may be deemed necessary by the society for such breach, in accordance with the such rules and regulations.
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> (p) The society will have the right to suspend or cancel or terminate the advertising agency's accreditation and remove its name from the list of accredited agency after giving one month's notice in writing for the reasons mentioned therein, and subject to, the rules and regulations.
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> (s) In the event of any substantial or material changes or major alternations in the particulars furnished in the Application or any breach mentioned in the rules and regulations, the society may forthwith suspend the accreditation of the advertising agency pending inquiry.

> (9) Notwithstanding anything contained herein, the Advertising Agency shall be liable to pay all bills irrespective of whether or not the Advertising Agency has received payment from the advertisers."

The justification given by the plaintiff hence cannot be accepted that it could not make payments to the member publications of the defendant on ground that the payments had not been received from its clients.

(ii) The action of the defendant is in conformity with the Rules and Regulations governing Accreditation of Advertising Agencies and Media Services Agencies. Clause 9 of the said Rules & Regulations deals with 'Suspension & Cancellation/Termination of Accreditation'. Clause 9 (II)(b) under which the instant Cancellation/Termination of Accreditation has been effected is as follows:-

> "(b) Any Advertising Agency has failed to settle its bills in respect of accounts within 60 days counted from the end of the month during which the advertisement in respect of which the bills are raised/appeared, the society may in its sole discretion suspend or cancel the Accreditation of the accredited Advertising Agency at any time or take such action as it may deem fit, after investigation and giving one month's notice in writing to the concerned accredited Advertising Agency and if required to the Member Publication."

Hence, the defendant was empowered to cancel the Accreditation granted in favour of the plaintiff as per rules and regulations.

(iii) It is the admitted position that the plaintiff had specifically agreed vide the Agreement dated 1st February, 2013 that the plaintiff shall be liable to pay all the bills of member publications irrespective of whether or not the plaintiff has received payment from its advertisers.

18. This Court while deciding the case of ***Crompton Greaves Limited vs. Hyundai Electronics Industries Co. Limited***, reported in 76 (1998) DLT 733, held as under:-

> "10. I have also carefully analysed the conditions of the Joint Venture Agreement and on careful perusal of the same I am prima facie satisfied that the said agreement is determinable in nature. When clauses 2.2 and 3.2.3 are read together the intention of the parties is clear and apparent that the contract could be determined at the option of the parties. The defendants No.1 to 3 have taken a stand in their letter dated 31.1.1998 that they are terminating the agreement for not obtaining the approval within the time frame as stipulated in the agreement. The agreement provided for a time limit to obtain the approval and it is admitted that within the aforesaid time frame the approval could not be obtained as the Government is yet to formulate and announce the policy in respect of the project. If a contract is determinable no suit for specific performance of the said contract would lie which is settled law by now. It is provided by Section 38 of the Specific Relief Act that in granting an injunction to prevent the breach of a contract the Court is to be guided by the rules contained in Chapter II relating to specific performance. Section 41(e) states that an injunction cannot be granted to prevent the breach of a contract, the performance of which could not be specifically enforced. There is however, an exception provided under Section 42 that if a particular contract contains both positive and negative covenants then in such a case the court can grant an injunction to perform the negative covenant. It is also settled law that even in such a case a party has to satisfy the three primary factors for grant of injunction. Counsel for the plaintiffs initially did not submit that the plaintiffs are seeking to enforce any negative covenant in the present case. However, at the time of his rejoinder submissions, he referred to Clause 14 which is non-competing clause and submitted that this being in the nature of negative covenant injunction could be sought for performance of the same. The plaintiffs however, have not pleaded in the plaint that there

> is a negative covenant in the contract. It is nowhere pleaded that the suit has been instituted to give effect to the said negative covenant and that injunction is sought for to perform the negative covenant. The plaint also does not contain any prayer for a relief of enforcement of a negative covenant. Even assuming that there is a negative covenant in the agreement and the plaintiffs could enforce the same as provided for under Section 42 of the Specific Relief Act, the same could be enforced and injunction could be obtained only in respect of a contract which is valid and subsisting. Since the defendant No. 2 and the plaintiffs had no privity of contract, the defendant No. 2 had no obligation qua the plaintiffs under the Joint Venture Agreement or otherwise and thus no injunction could be granted against the defendant No. 2 compelling performance of any negative covenant in the contract. The said negative covenant, if any, at best binds the plaintiffs and the defendants No.1 & 3 and not the defendant No. 2."

19. In another case titled as ***MSM Discovery Private Limited vs. Union of India (UOI) and Ors.***, decided on 22.12.2010 in W.P.(C) No.8585/2010 and CM No.21898/2010 and Caveat No.293 & 294 of 2010 this Court held as under:-

> "8. The above submissions have been considered. At the ad-interim stage, the Court has to proceed on the basis of the documents presented before it. The Court does not have the benefit of evidence which would help it in determining if the actions of the parties were justified in terms of the agreement. The letter dated 13th December 2010 issued by NDTV terminating the `Term Sheet' inter alia points to the breakdown of trust and faith in the relationship. Where one of the parties to an agreement is categorical that it does not wish to continue the agreement for whatever reason, it is not possible for a court at an ad-interim stage to direct revival of such agreement. [see Percept D'mark India (Pvt.) Ltd. v. Zaheer Khan AIR 2006 SC 3426 (3438-39)]. Prima facie, it appears that Section 14(1)(c) SRA is attracted. The agreement in question was in its very nature a determinable one. Further, in terms of Section 14(1)(a) SRA, it cannot possibly be contended that the

> Petitioner cannot be compensated for the breach of agreement resulting in its non-performance. Whether such compensation would be an adequate relief cannot possibly be determined at an ad-interim stage. However this Court is of the view that in the circumstances, given the nature of the agreement between the parties, the damages or losses, if any, suffered by the Petitioner on account of the alleged breach of its agreement by NDTV can certainly be quantified. Section 41(e) places a further fetter on the Court in granting injunction to prevent a breach of contract the performance of which would not be specifically enforced.
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> 9. The judgment of the Supreme Court in Indian Oil Corporation Ltd. v. Amritsar Gas Service is clear that even where the termination of a contract is illegal, the only relief that can be granted is by way of damages and not continuation of the contract by an interim mandatory injunction."

20. It is also pertinent to mention here that after hearing submissions on behalf of both parties, the matter was adjourned for orders on 14th February, 2014 due to the reason that the learned counsel appearing on behalf of the plaintiff assured that the plaintiff would make substantial payments due by his client and would also try to make to clear all the dues. However, when the matter was listed before Court on 14th February, 2014, it was informed by the plaintiff's counsel that no payment was made as loan has not been sanctioned and the same is likely to be sanctioned very shortly and the plaintiff would clear all the outstanding dues to the parties by 28th February, 2014. At that time, Mr.Sethi, learned Senior counsel did insist that the order be passed on merits, as it is unlikely on behalf of the plaintiff to clear the dues in view of past experience.

21. On 4th March, 2014, learned counsel for the plaintiff has orally informed the Court when enquired that the plaintiff has not cleared the outstanding amount due to non-sanctioning of loan.

22. Even, it appears to the Court that the plaintiff has not approached the Court with clean hands as it has suppressed and abstained from filing the pre-clearance letter dated 24th May, 2013 and show-cause Notice dated 28th June, 2013. It is stated that the defendant monitors payments to member publications from accredited agencies through the system of Monthly Review Verification (MRV) and on the basis of MRV for the month of February 2013, the pre-clearance letter was issued to the plaintiff as the MRV reflected an outstanding liability for the said month for ₹1,05,05,000/-. Since no steps were taken in furtherance of the pre-clearance notice and thereafter the Show Cause notice, the defendant was constrained to issue the Notice of Dis-accreditation on 25th July, 2013.

23. The plaintiff has also suppressed the e-mail written by the plaintiff to the defendant on 31st December, 2013 seeking an extension of time till 31st January, 2014 for settling all the dues. In the documents which have been annexed with the plaint, the plaintiff has only placed a letter of 31st December, 2013 seeking an extension of time for payment of dues till 31st March, 2014, whereas, in the e-mail dated 31st December, 2013 a note was appended at the end stating that the additional Bank Guarantee is being sent separately and when the Bank Guarantee was sent separately under the cover of another letter of the same date, i.e. 31st December, 2013, the plaintiff had changed the date for extension of time till 31st March, 2014 instead of 31st January, 2014. An *ex parte* injunction order was passed on the basis of letter dated 31st March, 2013. Copy of e-mail is filed by the

defendant only. In case, it would have been filed by the plaintiff, an ex-parte order ought not to have been passed as in the letter, time was sought by the plaintiff upto 31st March, 2014, therefore, the statement of the plaintiff's counsel was recorded when ex-parte order was passed. It is also a matter of fact that despite of assurance given to clear all dues, the same was not paid. Thus, there is no bonafide on the part of the plaintiff. Therefore, the interim order even otherwise is liable to be vacated.

24. In view of the above said reasons, the application under Order XXXIX Rules 1 & 2 CPC being I.A. No.324/2014 is dismissed with cost of ₹20,000/- which shall be deposited by the plaintiff with the Prime Minister's Relief Fund within two weeks from today. The interim order passed on 8th January, 2014 stands vacated.

CS(OS) No.60/2014

List before the Joint Registrar on 25th April, 2014. In the meantime, the defendant is granted four weeks' time to file the written statement.

(MANMOHAN SINGH)
JUDGE

MARCH 07, 2014