TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 6th December, 2021

Cyber Appeal No.2 of 2021
(With MAs Nos.79, 80 & 174 of 20201)

Indiamart Intermesh Ltd. ……Appellant

Versus

Just Dial Ltd. ….Respondent

BEFORE:
HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. SUBODH KUMAR GUPTA, MEMBER

For Appellant	:	Mr. Gopal Jain Sr. Advocate Mr. Saket Singh, Mr. Sidharth Chopra Ms. Savni D. Endlaw, Ms. Akanksha Mohan, Mr. Sudarshana Mj and Mr.Naman Joshi, Advocates
For Respondent		Mr. Rajshekhar Rao, Sr. Advocate, Mr. Sanjay Jain, Mr. Sharath Sampath, Mr.Manikya Khanna, Mr. Pratyaksh Sharma, Mr. Harsh Behany, Mr. Raghav Kacker and Mr.Aditya Krishna, Advocates

ORDER

By S.K. Singh, Chairperson – This appeal under Section 57 of the Information Technology Act, 2000 (IT Act) is directed against an order dated 05.03.2021 passed by the learned Adjudicating Officer(AO), Principal Secretary (Information Technology), Government of Maharashtra, in Case No.1/2021. It may be relevant to note that this order is interim in nature deciding to hold enquiry against the appellant (respondent before the AO) under Rule 4(g) of the Enquiry Rules by holding that there is sufficient cause to hold such an enquiry. Some interim reliefs on an application by the complainant/respondent were denied but the appellant was directed to submit some unspecified documents in order to enable the complainant to calculate damages in the same matter. It will be useful to extract the four directions issued to the parties at the end of the impugned order. It is as follows:

> "1. Rule 9 of the Enquiry Rules states that, *"When an adjudication into a matter of contravention is pending before an Adjudicating Officer, same matter shall not be pursued before any court or Tribunal or Authority in any proceeding whatsoever and if there is already filed a report in relation to the same matter, the proceedings before such other court, Tribunal or Authority shall be deemed to be withdrawn."*

Pursuant to the above-mentioned Rule, till the instant case is pending before this forum, if the same subject matter is being pursued by the parties before any other forum, the same shall be withdrawn from such other forum.

2. As the interim relief sought by the Complainant cannot be granted without adjudicating upon the instant matter in its entirety, Order on the Interim application shall constitute part of the Final Order;

3. The Respondents are directed to submit the relevant documents in order to enable the Complainant to calculate damages in the current matter and are also directed to submit the acknowledgement of the delivery of the documents before this forum either through the e-mail ID or registered post;

4. Basis the submissions advanced by the parties and documents produced on record, there is sufficient cause to hold enquiry against the Respondents under Rule 4(g) of the Enquiry Rules. In view of the same, a Hearing Notice specifying the date and manner of hearing shall be issued to the parties in due course of time."

2. The relief sought in this appeal is to quash the proceedings of Case No.1/2021 before the learned AO on the ground that the same is without jurisdiction and *non est*; and also to set aside the order dated 05.03.2021 in so far as it directs the appellant to submit documents to enable the complainant/respondent to calculate damages to be claimed against the appellant and also in so far as it directs for initiation of an enquiry against the appellant under Rule 4(g) of the Enquiry Rules and for all consequential reliefs.

3. The appeal was admitted for hearing and an interim order was passed after hearing the parties on 05.04.4021. This Tribunal noticed the stand of both the parties, recorded a *prima facie* finding that direction No.(3) was difficult to be complied because of vagueness and also because interim relief had been denied to the complainant. By the above order, until further orders, direction No.(3) and further proceedings before the AO were stayed. For appreciating the gist of rival stand taken by the parties in this appeal, the interim order dated 05.04.2021 is reproduced hereinbelow:

> "The appeal is admitted for hearing. No notice need be issued as Just Dial Ltd. has appeared on advance notice through Mr. Dayan Krishnan, Senior Advocate with Mr. Rajshekhar Rao, Senior Advocate and Mr. Sharath Sampath, Advocate.
>
> Clearly the appeal is against an interim order in which there are four directions on the last page of the order. The petitioner is aggrieved by the direction nos. 3 and 4.
>
> According to learned senior counsel for the petitioner, the findings given in direction no. 4 that there is a sufficient cause to hold inquiry against the respondent (petitioner herein) under Rule 4 (g) of the Inquiry Rules is without any basis and discussion. Further stand of the petitioner is that in any case when direction no. 2 states that the interim relief sought by the complainant cannot be granted without adjudicating upon the instant matter in its entirety, the direction no. 3

requiring the petitioner to submit the so called "relevant documents" in order to enable complainant to calculate the damages in the current matter is not only vague but unjustified. Learned senior counsel has referred to prayers made by the respondent before the Bombay High Court to show that calculated damages have been claimed before the Bombay High Court.

According to learned senior counsel for the respondent (complainant), the identification of relevant documents can be done by the parties on the basis of the various prayers made in the complaint and such a direction is not by way of any interim relief but is in the nature of an order on an application for discovery of documents. He further submits that the case of the parties has been noted and on that basis a decision has been taken to hold inquiry under the Inquiry Rules.

At this stage, there is indeed an apparent difficulty in showing compliance with direction no. 3 because of vagueness and more so when interim relief has already been denied to the complainant. Hence, until further orders, direction no. 3 and further proceedings before the A.O. shall remain stayed.

The respondent is granted four weeks' time to file reply. Rejoinder, if required, may be filed within two weeks thereafter.

Post the matter under the head "for Directions" and if possible for final disposal on 18.5.2021."

4. The records and the order sheet disclose that respondent filed its reply on 28.05.2021. Rejoinder was filed by the appellant on 24.06.2021. On 03.06.2021, an oral prayer on behalf of the respondent for some interim orders in its favour was not entertained. While the matter was pending for hearing, on behalf of respondent MA No.174/2021 was filed on 16.08.2021 to seek interim reliefs in its favour. This Tribunal did not grant any interim relief but on 20.09.2021, by agreement of both the parties the appeal was ordered to be listed for hearing on 04.10.2021 at the top of the list. Hearing concluded on 11.10.2021 and order was reserved.

5. The stand of learned Senior Counsel for the appellant during the hearing was that the proceedings before the AO be quashed and in particular direction Nos.(3) and (4) be set aside. Further contention on behalf of the appellant is that although the complaint alleges contravention of Section 43(a), (b), (d), (i), (j) and Sections 72, 79 and 85 of the IT Act but the complainant has failed to establish a *prima facie* case under the aforesaid provisions of the IT Act. According to learned counsel, the Apex Court has laid down that every judicial or quasi judicial order passed by any court/tribunal/authority, which decides a lis between parties must be supported with reasons in support of its conclusion. Reliance has been placed on judgment of the Supreme Court in the case of **State of Orissa & Ors. Vs. Chandra Nandi; (2019) 4 SCC 357**. The impugned order has been criticized on

the ground that it is unreasoned and erroneous. According to learned counsel for the appellant there is no evidence of unauthorized access through any technical intervention or breach of cyber security by the appellant to substantiate the claim of the respondent in the complaint; respondent has failed to establish ownership of "proprietory data", and such claim is contrary to stand of the respondent in litigations pending before other forum where it has claimed that it is an intermediary under the IT Act which would imply that the data such as contents, images etc. are provided by third parties. Pleadings in the suit pending before the Delhi High Court have been relied upon for this purpose.

6. It has also been argued that the direction No.(3) is vague and also erroneous when interim relief has been denied. Documents are not required at the present stage to enable the respondent to calculate damages. It has also been submitted that plea of calculation of damages is untenable, more so when the respondent has claimed calculated damages in the suit filed by it before the Bombay High Court.

7. In order to support the case against direction No.(4), it has been submitted on behalf of the appellant that in absence of the exact time or place of commission of offence, the essential elements to initiate proceedings under Rule 4 are absent and it has been wrongly held that there is sufficient cause for further investigation.

This part of the order has been criticized also on the ground that no materials or reasons to support the conclusion that sufficient cause has been made out, has been mentioned in the impugned order. Direction No.(3), indicated above, has been criticized for vagueness as well as for non-application of mind. According to learned counsel for the appellant, the apparent vagueness in direction No.(3) cannot be removed by the respondent who has claimed that the vagueness has been removed by him through an Email dated 24.03.2021.

8. Lastly, it has been submitted on behalf of the appellant that litigations initiated by the parties before Delhi High Court and Bombay High Court and the orders passed therein have not been properly appreciated by the learned AO and that AO should have declined to proceed with the complaint. The impugned order has been criticized further on the ground that such submissions advanced on behalf of the appellant have been rejected *sub silentio* without providing any reason for such rejection.

9. On behalf of appellant reliance has been placed upon a judgment of this Tribunal in the case of **M/s Total Telefilms Pvt. Ltd. Vs. M/s Prasar Bharti and other connected matters** reported in **(2008) SCC OnLine TDSAT 669** and particularly on Para 54 of the said judgment which relies upon a Supreme Court

judgment in support of its strong disapproval of attempt of the petitioner in that case to seek relief simultaneously in two fora.

10. The aforesaid contentions have been strongly refuted on behalf of the respondent. The stand of the respondent is that this proceeding through a complaint before the AO Filed on 14.01.2021 is not a counterblast to the suit of the appellant before Delhi High Court filed on 09.11.2020 which is only to restrain infringement of copyright look and feel of appellant's website. The respondent has also justified its filing a police complaint on 15.12.2020 and later a civil suit before the Bombay High Court on 18.01.2021 alleging violation of various provisions of the Copyright Act, 1957 and Trade Marks Act, 1999 by the appellant.

11. Learned Senior Counsel for the respondent has countered the issues relating to proprietory data on the platform of the respondent by drawing inferences from pleadings of the appellant. According to respondent the appellant has admitted that the data on the platform of the respondent is proprietory. But as noted earlier, the stand of the appellant is that since the respondent is an intermediary, the data on its platform belongs to third parties. An alternative submission has been made that even if respondent is accepted to be only an intermediary, the appellant could not have used respondent's Patent, Source Code, Meta Tags, Keywords, watermarks,

trade name etc. Respondent has placed reliance upon sample screenshots from Pgs.1219 to 1233 of the paperback to support its allegation that it is the appellant who has indulged in data theft and it has also claimed that such data was its proprietory data. Respondent has alleged that appellant has been deleting respondent's proprietory content/images from its platform in a pre-planned manner and there is no substance in the stand of the appellant that deletion of data at regular intervals is in accordance with policy of the applicant.

12. It is also the stand of the respondent that there is no merit in the allegation of forum shopping leveled against the respondent and that it is entitled to exercise all its rights to seek remedies available under various statutes and there is no bar on such a course of action by the respondent.

13. On behalf of respondent it has been pointed out that in Cyber Appeal No.2/2014 decided by this Tribunal, disputes between the parties had led to multiple litigations and that Delhi High Court in the case **Abhinav Gupta Vs. JCB India Ltd. & Ors., 2010 (119) DRJ 397** has held that a suit for copyright violation and a complaint under the IT Act can both be maintainable on the basis of independent reliefs and causes of action. It has also been contended on behalf of the respondent that in obedience to the direction of the Adjudicating Officer in the

impugned order made on the basis of Rule 9 of the Enquiry Rules, both the parties had to withdraw any case filed in relation to the same matter pending before any other forum. It has been submitted on behalf of the respondent that in the pleadings, 26000 instances of respondent's proprietory data on the platform of the appellant has been alleged and some instances have also been provided. By his Email dated 24.03.2021, the respondent provided to the appellant the details of such instances for compliance with the direction No.(3) in the impugned order. Lastly, it has been submitted that the appellant is pre-judging the issue and trying to curb the powers of the Adjudicating Officer under the IT Act when the AO is yet to pass a final order on the basis of evidence to be produced by the parties and after final hearing on the complaint. Large number of case laws have been referred to in support of the aforesaid stand of the respondent.

14. In view of nature of the order proposed to be passed, it is not deemed necessary to go into detailed facts referred to and relied upon by the parties or on the case laws. This Tribunal has already noted that the impugned order is interlocutory in nature and rights of the parties have not been decided as yet. In such circumstances it will be not be in the interest of either of the parties to pass a detailed order on the merits of the case set-up by the parties. In respect of orders passed by AO this Tribunal is an appellate Tribunal and hence, it would not be

proper to pass an order on merits in a matter which has not been decided by the AO finally. A detailed order on merits would be akin to an original order and not an appellate order. Hence such a course has to be avoided at the present stage of proceedings.

15. Keeping the aforesaid aspect in mind, in the light of submissions of both the parties and after going through the impugned order carefully, it is found that direction No.(3) forcing the petitioner to produce documents without specifying such documents on the basis of very certain identification or detailed in any list furnished by the complainant, renders the direction No.(3) vague and incapable of compliance. Such defect in a quasi-judicial or judicial order cannot be cured by a party to the lis by giving details of documents later through an Email or any other means. On the basis of this finding direction No.(3) in the impugned order is set aside. Since this Tribunal has not gone into the merits of issues involved in direction No.(3) but has gone only on an apparent *lacunae* of vagueness, the issues on merits relating to direction No.(3) are remitted to the learned AO who shall hear the parties in detail if pressed by the parties, and shall re-determine this aspect of the controversy as per law.

16. It is useful to indicate that when some related issues are pending before Constitutional Courts such as a High Court, the orders passed by such courts, more so between the parties deserve highest respect despite the provisions in Rule 9. This should also be kept in mind while passing order in accordance with law.

17. So far as direction No.(4) is concerned, the finding recorded therein as to sufficiency of cause to hold enquiry against the respondent under Rule 4(g) of the Enquiry Rules has been assailed mainly on the ground that the contentions advanced on behalf of the appellant for dropping the proceedings for lack of sufficient allegation and materials and on account of pendency of similar subject matter before the High Court has not been discussed and no finding has been arrived at with respect to such submissions. In other words, the criticism of the appellant is that the impugned finding *sub silentio* rejects the contention of the appellant relating to this issue without indicating reasons. On the other hand, the stand of the respondent is that large number of materials as well as sufficient allegations/pleadings are available for initiating an enquiry as ordered by direction No.(4).

18. On a careful appraisal of the impugned order it is found that submissions of the learned counsel for the parties have been noted but no findings, even *prima*

facie, have been given in the impugned order for rejecting the objections to further enquiry, raised on behalf of the appellant nor reasons for taking a view contrary to the stand of the appellant can be deciphered from the impugned order. Ordinarily, this Tribunal would not have interfered with direction No.(4) but there are substantial aspects including pendency of cases filed by both the parties before High Courts and orders passed therein as well as issues relating to proprietory data, the manner or mode of theft of data allegedly committed by the appellant or its absence etc., which require the learned AO to go into some more details before deciding whether to hold further enquiry under Rule 4(g) of the Enquiry Rules or not. At the interim stage some findings may not be final and may be only *prima facie* but reasons should be apparent for taking one view or the other.

19. The aforesaid discussion has been made with a view to find out whether the issues relating to direction No.(4) also deserve to be remitted to the learned AO or not. On a careful consideration of larger aspects and issues involved even at the interim stage in this particular case, the discussion of reasons for the finding in the direction No.(4) is found to be insufficient to meet the requirements of a judicial/quasi judicial order which is appealable. Hence, direction No.(4) is also set aside and issues related thereto are also remitted back to the learned AO for passing a fresh order in accordance with law. It is clarified that in respect of

direction No.(3) the defence of the respondent, *inter alia*, is that although interim relief has been refused, this direction is in the nature of an order on discovery and production of documents. In view of such defence, this aspect should also be kept in mind and if required, the complainant/respondent herein may be given an0020opportunity to file an appropriate application for seeking direction No.(3) in a different manner. But in that event also, the other side must be given an opportunity to contest such an application; any order should be passed only after hearing the parties and in accordance with law.

20. The appeal is allowed to the aforesaid extent. There shall be no order as to costs.

……..J
(Shiva Kirti Singh)
Chairperson

…….
(Subodh Kumar Gupta)
Member

sks