

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1079 of 2011

[M/s. Makran Communication & others v. M/s. China Mobile Pak Ltd. and another]

Dates of hearing : 08.05.2019.
Date of Decision : 08.05.2019.
Plaintiffs : M/s. Makran Communication and 2 others,
through Mirza Safaraz Ahmed, Advocate.
Defendants 1 and 2 : China Mobile Pak Ltd., through Mr. Qazi
Ali Athar, Advocate.

Decisions relied upon by Plaintiff's Counsel

1. 2012 C L D page-6
[*Abdul Majeed Khan v. Tawseen Abdul Haleem and others*] – Abdul Majeed Case.

Case law relied upon by Defendant's Counsel

Other precedents

1. P L D 1996 Supreme Court page-737
[*Sufi Muhammad Ishaque v. The Metropolitan Corporation, Lahore through Mayor*] – Ishaque Case.

Law under discussion:

1. Civil Procedure Code, 1908 (“CPC”)
2. Qanun-e-Shahadat Order, 1984
(Evidence Act, 1872); Evidence Law.
3. Arbitration Act, 1940

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The present action at law against the Defendants contains the following prayer(s)_

- i. That this Hon'ble Court may graciously be pleased to pass judgment and decree in favor 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 ranted by this Hon'ble Court.

ii. Any other relief, which under the circumstances of the case, this Hon'ble Court may deem fit and proper.

iii. Cost of the Suit be also awarded to the Plaintiff.

2. Upon service of summons, the Defendant entered appearance through their Counsel Qazi Athar Ali, who filed application under Section 34 of the Arbitration Act, 1940, for stay of the proceeding and referring the matter to the Arbitrator, which was opposed by the Plaintiff by filing objections and finally on 27.10.2016, the said Application was dismissed as not pressed.

3. On 16.10.2012, the matter was ordered to be proceeded *ex parte* against the Defendant. Only Plaintiff led the evidence.

4. In brief, the controversy as mentioned in the plaint is, *inter alia*, about selling the Subscriber Identity Modules (“SIMs”) of Defendant Company by the Plaintiffs to their customers. Per Mirza Sarfaraz Ahmed, learned counsel representing the Plaintiffs, the territory assigned to the Plaintiffs was Orangi Township, Banaras, Metroville, Qasba Colony, Katti Pahari and allied areas. It is the case of the Plaintiffs that the Defendant abruptly terminated the franchise, which caused colossal losses to the Plaintiffs. The said Defendant has been impleaded through its Regional Director (Sindh and Baluchistan) and Chief Executive Officer (CEO).

5. On the other hand, Mr. Qazi Ali Athar, learned counsel for Defendant, has argued that the claim of the Plaintiffs in the present suit is baseless.

6. Arguments heard and record perused.

7. Even though, the proceeding has remained ex-parte and the evidence of Plaintiff has gone unchallenged / unrebutted, but still the settled judicial principle requires that the Court should apply its independent mind while granting such type of relief, particularly that of damages; thus, the Points for consideration in this matter are as under:

- i) Is / was there any relationship existed between Plaintiffs and Defendant?*
- ii) Whether due to acts of Defendant, Plaintiffs suffered any losses?*
- iii) What should the decree be?*

Point No.1:

8. The Plaintiff No.2 has examined himself and two other witnesses. It has been argued by the learned counsel for the Plaintiffs that even after termination of franchise, the amount of Rupees Three Million (approximately) paid to the Defendants towards Security Deposit has not been returned and the Defendant is utilizing the same in its business and to its advantage. He has referred to the correspondence of 20.10.2008 of the Plaintiff as Exhibit “E”, (available at page-63 of the Evidence File) and the counterfoils of three pay orders, which are exhibited as “F”, “F/1” and “F/2” (available at pages-65 and 67 of the Evidence File). The above Letter of 20.10.2008 is in fact the covering letter for the three Pay Orders in respect of Orangi Town Franchise. All these pay orders have been drawn in favour of the Defendant and the total amount of these pay orders comes to Rs.30,00,110/- (Rupees Thirty Lacs One Hundred Ten only).

9. From the Application under Section 34 of Arbitration Act, 1940, as mentioned in preceding paragraphs, it can be seen that the Franchise Agreement dated 25.11.2008 did exist between the parties hereto, but a copy whereof was not filed by the Defendant with the above Application,

on the basis whereof, the Defendant sought directions of this Court that matter be referred to the Arbitration; however, as already stated above, the said Application was not pressed. Secondly, the deposition of Plaintiffs' witnesses that Franchise Agreement was not given to them and therefore, the same could not be produced, has gone unchallenged and, therefore, to this extent it is an undisputed position that a contractual relationship between Plaintiffs and Defendant was there, which is further proved by the Pay Orders, which were issued in favour of the Defendant towards Security Deposit. Consequently, Point No.1 is answered in Affirmative that the relationship between the Plaintiffs and Defendant as Franchiser and Franchisee, existed.

Point No.2:

10. The Plaintiff in support of his case that the Agency / Franchise was terminated by the Defendant in an illegal manner, which has caused losses to the Plaintiffs, referred to the evidence of P.W.-1 (Mirza Tehmasp Baig), that is, one of the Partners of Plaintiff No.1 – Firm and other two witnesses, who were employees of the Plaintiffs' Firm and have basically supported the evidence of P.W.-1. The main argument of the Plaintiffs' side is that since Plaintiffs were insisting that the newly promulgated directions of Pakistan Telecommunication Authority (“P.T.A.”) with regard to sale and activation of SIMs should be strictly adhered to, this stance of the Plaintiffs had annoyed the Defendant, which finally led to termination of franchise. The Plaintiff in support of his plea, produced the circular of P.T.A. as Exhibit “I” and “I/1”, respectively, in which the entire procedure for activation of SIMs was mentioned. The email dated 10.11.2010 addressed by the Plaintiffs to the Defendant has been produced as Exhibit “N” (available at page-107 of the Evidence File), in which the stance of Plaintiffs has been highlighted.

11. It is argued that the termination of the Franchise Agreement, vide Notice dated 25.11.2010, produced in evidence as **Exhibit “P”**, *primarily* has made the earlier Warning Letter as one of the basis for termination of the franchise. The earlier Warning Letter of 28.06.2010, Exhibit “O” has been referred to, in which the Plaintiff was called upon, *inter alia*, to improve its performance, which, according to the Defendant, was not satisfactory (both these correspondence are available at pages-113 and 115 of the Evidence File). It is the case of Plaintiffs that there is a period of five months between the said Warning Letter and the Termination Letter and basically the termination of franchise was not done on the basis of performance but on the principle stance of the Plaintiff with regard to adherence to P.T.A. regulations (as mentioned above), because, Defendants were reluctant to strictly comply the Regulations and were insistent that Franchisees including Plaintiff should focus on increasing sales figures, rather than getting involved in procedures.

12. The next segment of arguments of the Plaintiffs’ side is with regard to suffering of huge losses at the hands of Defendant, because its running business abruptly came to an end. To substantiate their losses, the Plaintiffs’ witnesses have produced a monthly performance graph as Exhibit “Q” and has attempted to quantify the losses in paragraph-53 and 54 of the plaint and reiterated in the Affidavit-in-Evidence. Since Plaintiff is claiming special damages, I am afraid that the same cannot be granted in absence of any tangible evidence. Even though the Plaintiffs have mentioned details of expenditure they incurred in setting up the franchise business, but it is not supported by the documentary evidence, for instance, that how much amount was expended in setting up of office premises for subject franchise, details about hiring of staff and at what salaries; how much commission per month the Plaintiffs were receiving from the

Defendant for selling of SIMs as claimed by the Plaintiffs, so on and so forth.

13. It is a settled principle that broadly damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her through positive evidence. In the present case, the Plaintiffs' side has failed to adduce evidence with regard to their claim of Rs.206.25 Million towards damages, which in fact are special damages. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, *Abdul Majeed Khan v. Tawseen Abdul Haleem* [2012 C L D page-6], being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal right exists. From the above discussion, Plaintiffs have proven the relationship between the latter (Plaintiffs) and Defendant and the fact that Defendant despite termination of Franchise, did not return / refund the above amount towards Security Deposit. Thus, legal right does exist for the Plaintiffs in the present proceeding.

It is also a matter of record that Plaintiffs are pursuing their genuine remedy after termination of Franchise Agreement by the Defendant since 2010.

14. Now adverting to the claim of general damages. Both witnesses have produced their respective appointment letters and corroborated the testimony of P.W.-1 with regard to the running of the affairs of the Plaintiffs Firm and contribution by Plaintiffs towards the revenues of the Defendant. It is also an undeniable fact that there is a gap of five months in between the aforementioned Warning Letter [Exhibit "O"] and the Termination Letter (Exhibit "P") and in between these two correspondences, the crucial email from the Plaintiffs' side and its

reminders being Exhibits “N” and “N/1”, were sent to the Defendant, *inter alia*, highlighting the significance of new SIM activation SOP (Standard Operating Procedure) introduced by the Regulator, viz. P.T.A. *Secondly*, the Plaintiffs’ witnesses have testified about suffering harassment, mental torment and inconvenience at the hands of government agencies, including F.I.A. (Federal Investigation Agency) and CIA and the indifferent attitude of Defendant in the entire episode. Plaintiffs’ witness has specifically deposed the fact of raiding by government functionaries and detention at CIA Centre.

The above version has also gone unrebutted and thus to this extent the evidence of Plaintiffs has to be accepted, at least for considering the award of general damages.

15. In my considered view, the rule laid down in the two well-known Judgments of the Honourable Supreme Court, that is, Abdul Majeed Case (*ibid*) and Ishaque Case [P L D 1996 Supreme Court page-737], applies to the present case. In the first one (as already stated), the principle, *inter alia*, with regard to general damages has been discussed in detail; *whereas*, in second reported decision, the rule with regard to grant of damages on account of mental anguish has been explained, because the Plaintiffs have also claimed a sum of Rs.15 Million towards mental torture in paragraphs-50 and 54 of the Plaint and paragraphs-61 and 63 of the Affidavit-in-Evidence / Examination-in-Chief, which, remained uncontroverted. It is relevant to reproduce herein under the paragraph-8 from the second decision (Ishaque Case)_

“8. Once it is determined that a person who suffers mental shock and injury is entitled to compensation on the principles stated above, the difficult question arises what should be the amount of damages for such loss caused by wrongful act of a party. There can be no yardstick or definite principle for assessing damages in such cases. The damages are meant to

compensate a party who suffers an injury. It may be bodily injury loss of reputation, business and also mental shock and suffering. So far nervous shock is concerned, it depends upon the evidence produced to prove the nature, extent and magnitude of such suffering, but even on that basis usually it becomes difficult to assess a fair compensation and in those circumstance it is the discretion of the Judge who may, on facts of the case and considering how far the society would deem it to be a fair sum, determines the amount to be awarded to a person who has suffered such a damage. The conscience of the Court should be satisfied that the damages awarded would, if not completely, satisfactorily compensate the aggrieved party.”

16. In view of the above, in my considered view, the Plaintiffs are entitled for damages but only to the extent of Rs.15,00,000/- (Rupees Fifteen Hundred Thousand only), which is payable by the Defendant. The Plaintiffs have specifically deposed that an amount of Rs.1.5 Million is unpaid towards commission. It is also a proven fact that even after termination of franchise, the Security Deposit has not been returned to the Plaintiff. Point No.2 is answered accordingly.

Point No.3:

17. The upshot of the above discussion is that the present suit is decreed in the following terms_

1. That the Defendant will forthwith return the entire amount of Rs.30,00,110/- (Rupees Thirty Lacs One Hundred Ten only) towards Security Deposit to Plaintiffs.
2. General damages are awarded to the tune of Rs.15,00,000/- (Rupees Fifteen Hundred Thousand only).
3. With regard to the unpaid commission amount as claimed by the Plaintiffs, it is hereby ordered that Defendant shall calculate the commission of the Plaintiffs within two weeks from today and pay the amount to the Plaintiffs not later than four weeks.

4. If above amounts remain unpaid even after six weeks from the date of this Decision, then mark up of 10% per annum, will also be paid by the Defendant to Plaintiffs from the date of decree till realization of the amount.

19. In the above terms, suit stands decreed. Parties to bear their own costs.

Judge

Karachi,
Dated: 08.05.2019.

Riaz / P.S.0