

(1988) 05 DEL CK 0008

In the Delhi High Court

Case No : Interim Appeal No. 184 of 1988 and Suit Appeal No. 70 of 1988

Frank Simoes Advertising (P) Ltd.

APPELLANT

Vs

Hada Leasing and Industries Ltd. and Another

RESPONDENT

Date of Decision : 20-05-1988

Acts Referred:

Citation : AIR 1988 Delhi 362 : (1988) 2 ARBLR 161 : (1988) 35 DLT 283

Hon'ble Judges : C.L. Choudhary, J

Bench : Single Bench

Advocate : S.B. Ghosh, T.K. Ganju, M.L. Lahoti, Satish Luthra, P.S. Jha, V.B. Mishra and Jyoti Sinha, for the Appellant;

Judgement

C.L. Chaudhry, J.

(1) The plaintiff has filed this suit against defendant No. I for grant of an injunction for performance of the negative covenant. The facts on which the relief is claimed are briefly stated as under :

(2) The plaintiff is engaged in the business of advertising agency. The defendant No. I is carrying on the business of Hada Foods. On 20.6.1987 the parties entered into an advertising agency agreement. The said agreement inter alias contains the following terms :-

"3.Agency Commission : Agency is generally allowed 15% commission on all media and material on the gross amount of the bill. Wherever this agency commission is not applicable to the agency by the publishers, radio or television stations, outdoor suppliers, or other sources, there will be included in the charge to the advertiser(c) 15 % on net amount as agency commission".

"4(viii) Billing and Payment on Due Dates :- Invoices are rendered by the agency weekly following publication of advertising work completed, and are payable within 45 days from date of presentation. Non-payment of invoices within the said period of 45 days will render the advertiser liable to interest at 18% per

annum or at such higher rate as prevailing in the market at the time on all such invoices."

"6.Termination: Termination of this Agreement shall not become effective until 90 days after the receipt of the written notice of termination from either party from the other. The advertiser agrees to pay for all authorised work in process at cost, plus regular agency commission where applicable on the due date of the payment, Or advertiser must settle the entire outstanding before the new agency takes over, whichever is earlier. The advertiser must assume the agency's liabilities under all outstanding contracts made on the advertiser's behalf and with his prior sanction".

The plaintiff has been performing its obligations under the said agency agreement and has been doing the advertising job for defendant No. 1. Various bills for the work done were raised on defendant No. 1 for payments. The defendant No. 1 by their letter dated 16.11.1987 admitted and acknowledged the outstanding dues of Rs. 16.68 lacs and agreed to pay the amount in Installments i.e. before 30.11.1987 Rs. 5.89 lacs, before 30.12.1987 Rs. 6.85 lacs and by mid January 1988 Rs. 3.94 lacs. The case of the plaintiff as disclosed in the plaint is that the defendants failed and neglected to fulfill their commitments. various cheques given by the defendants were dishonoured. After giving credit to all the adjustments the defendant No. 1 again on 14.12.1987 admitted and acknowledged an amount of Rs. 10,98,204.84 being the outstanding dues from them. The defendants did not pay the amount despite various demands. By letter dated 5.1.1988 the plaintiff informed the defendant No. 1 that an amount of Rs. 10,98,204.84 would be due to the plaintiff if the defendant No. 1 had paid a sum of Rs 5 lacs to M/s. Century Tubes Ltd. which the defendant No. 1 had agreed to pay directly to that company. In case the amount of Rs. 5 lacs had not been paid to M/s. Century Tubes Ltd. then the claim of the plaintiff would be Rs. 15,38,923.66. It is asserted that the defendant No. 1 in complete breach and negation of its obligations under the agency agreement dated 20.6.1987. appointed and/or engaged another advertising agency i.e. defendant No. 2. Relying upon clause 6 of the agency agreement the plaintiff alleges that the defendant No. 1 had specifically undertaken and agreed that the defendant No. 1 would pay to the plaintiff their entire outstanding on their due dates of payment or would settle the entire outstanding before any new agency takes over whichever is earlier. It is further claimed that that defendant No. 1, cannot in breach of their obligations, under clause 6 of the agreement appoint any other agent till such time the outstanding dues of the plaintiff are paid or duly settled. In these premises the plaintiff claims to be entitled under the provisions of the Specific Relief Act to enforce the negative covenant provided in the agency agreement to as to restrain the defendant No. 1 from appointing or engaging any other agent till such time the defendant No. 1 clears the outstanding dues of the plaintiff. The relief of injunction is also claimed against defendant No. 2. It is also stated that the suit filed by the plaintiff is bonafide and the plaintiff will suffer irreparable loss and injury in case the reliefs as prayed for are not granted to the

plaintiff.

(3) Along with the suit the plaintiff has filed an application under Order 39 Rule 1 & 2 of the CPC for the grant of interim relief (being 1.A. 184/1988) which is under disposal. Besides repeating the allegations made in the plaint it is stated that the plaintiff will suffer irreparable loss and injury in case the reliefs prayed for by way of temporary injunction till the disposal of the suit are not granted to the plaintiff.

(4) The suit is being contested on behalf of the defendants. The pleas taken by the defendant No. 1 are that the suit is not maintainable in the present form and is barred under the provisions of Sections 10, 14 & 41 of the Specific Relief Act. The defendant alleges that no irreparable loss or injury will be caused to the plaintiff. The agreement dated 20.6.1987 is admitted. It has been denied that the plaintiff from time to time carried out its obligations under the agency agreement dated 20.6.1987 by doing the advertising work for defendant No. 1. The case of defendant No. 1 is that the plaintiff has not carried out its obligation properly from time to time and has caused to defendant No. 1 huge financial loss and wastage of time, because of production of a defective advertising film. Letter dated 16.11.1987 acknowledging the amount of Rs. 16.68 lacs due from defendant No. 1 is admitted. The defendant No. 1 admits that by their letter dated 14.12.1987, the amount of Rs. 10,98,204.84 was confirmed to be due to the plaintiff. It is stated that the figure of Rs. 10,98,204.84 was arrived at after making certain payments and adjustments. It has been further stated that even out of the amount of Rs. 10,98,204.84 the payment made by the defendant No. 1 of Rs. 75,000.00 on 15.12.1987 and also the loan of Rs. 5 lacs paid to the plaintiff by M/s. Century Tubes Limited with interest accrued thereon has to be deducted. In a way, the defendant No. 1 admits that a sum of Rs. 5,23,204.85 is due to the plaintiff. The defendant No. 1 states that they have not appointed or engaged defendant No. 2 for doing their advertising jobs and as such no cause of action has arisen for filing the present suit. No irreparable loss or injury as alleged would be caused to the plaintiff. Rather the defendant No. 1 has suffered hardship and irreparable injury. The suit is claimed to have been filed by the plaintiff in order to put pressure on the defendant No. 1 to submit to the false and inflated claim of the plaintiff. On the same lines the defendant No. 1 is contesting the application for interim injunction.

(5) The defendant No. 2 has also filed the written statement wherein it is stated that the plaint discloses no cause of action against defendant No. 2. There is no privity of contract between the plaintiff and defendant No. 2. The defendant No. 2 has not accepted any business from defendant No. 1 and no transaction had taken place between them. However, the defendant No. 2 is well within its right to accept or do the business of any person including defendant No. 1. No irreparable loss or injury will be caused to the plaintiff.

(6) I have heard the learned counsel for the parties and have gone through the record.

(7) The ad interim injunction was granted on 8.1.1988 wherein the defendant No. 1 was restrained from procuring the services of defendant No. 2 or any other agency, which is still operating. It was strenuously argued by the learned counsel for defendant No. 1 that the suit is barred under the provisions of Sections 10, 14 and 41 of the Specific Relief Act. The contention is that the Specific Relief Act provides that the contract is the standard for ascertaining actual damage caused by the alleged nonperformance; and also where compensation in money is adequate relief specific performance cannot be directed. I see no force in this argument. The plaintiff is claiming relief u/s 42 of the Specific Relief Act, which provides as under :-

"42. Injunction to Perform Negative Agreement : Notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; Provided that the plaintiff has not failed to perform the contract so far as it is binding on him".

The case of the plaintiff is that the contract in question is comprised of affirmative agreement as well as negative agreement. So far as the affirmative agreement is concerned it cannot be enforced. However, the plaintiff can enforce the negative agreement. An affirmative agreement is that the plaintiff will do the advertising job and the defendant No. 1 would pay the amount for the said job. The plaintiff is not enforcing the affirmative agreement, and in my opinion rightly, because it cannot be specifically enforced. However, the plaintiff is not precluded from enforcing the negative agreement. I do not agree with the contention of the counsel for defendant No. 1 that the negative agreement cannot be enforced.

(8) In support of his contention the learned counsel for defendant No. 1 has relied upon a number of judgments. The first in the line is M/s. Modern Food Industries India Ltd v Shri Krishna Battlers Ltd. AIR 1984 Delhi 119. In that case the plaintiff entered into a franchise with the defendants, a private company, under which the plaintiff were to sell concentrate to the defendant to manufacture and bottle the aerated water drink "77" distribute it in Hyderabad. Under that agreement the defendant was prohibited from manufacturing or selling any other similar product. But the defendant entered into an agreement with another company to bottle and market their product "thrill". Injunction was refused on the ground that balance of convenience was not in favor of the plaintiff.

(9) In my opinion this authority does not help the defendants. The facts in that case and in this case are not similar. In that case the plaintiff had pleaded breach of agreement, as a result of which the plaintiff claimed that they were likely to suffer damages to the tune of Rs 60 lacs in that season. The case of the

defendant was that due to the injunction they were likely to suffer a loss of Rs. 30,630.00 each day. In those circumstances it was found that remedy by way of damages was more efficacious and the facts and circumstances did not warrant grant of injunction.

(10) The next authority is Ramchandra Tanwar Vs. Ram Rakhmal Amichand and Another, . Even from this authority the defendant No. 1 cannot derive any help It was not a case where injunction in respect of negative covenant was involved. That was a case where injunction was sought to restrain the defendant from terminating the contract. The court was right in holding that the said contract could not be specifically performed.

(11) The next authority is Sitaram Jaipuria and Others Vs. Banwarilal Jaipuria, . This authority also does not relate to the grant of injunction in respect of a negative covenant. In this case the plaintiff sought an injunction against the defendant from holding any meeting which was rightly refused. Prima facie I am of the view that the suit is maintainable and is not barred under the provisions of Sections , 1014 and 41 of the Specific Relief Act.

(12) Clause 6 of the agreement on which the plaintiff has placed reliance for the purposes of this suit has been reproduced above. It specifically provides that the advertiser i.e. defendant No. 1 is to pay regularly agency commission on the due date of the payment, or the advertiser must settle the entire outstanding before the new agency takes over, whichever is earlier. This clause seems to have been inserted in order to curb dishonesty on the part of defendant No. 1. This clause is reasonable. It provides that the advertiser cannot engage a new agency till he settles the entire outstanding of the plaintiff I am prima facie of the opinion that the plaintiff can enforce this clause. Otherwise the advertiser can terminate the agreement and engage another agency without paying any amount to the plaintiff. The plaintiff claims that a sum of Rs. 15 38,923.66 is due from defendant No. 1 in case the defendant No. 1 has not paid a sum of Rs. 5 lacs to M/s. Century Tubes Ltd. The letter dated 5.3.1988 of M/s. Century Tubes Ltd. has been placed on the record to show that the defendant No, 1 had paid a sum of Rs. 5 lacs, with interest to M/s. Century Tubes Ltd. in the loan account of the plaintiff and no amount stands due from the plaintiff. After adjusting this amount of Rs. 5 lacs the amount claimed by the plaintiff remains to be Rs. 10 lacs and odd. The defendant No. 1 admits that an amount of Rs. 5 lacs and odd is due from them. There seems to be a dispute for Rs. 5 lacs. The case of defendant No. 1 is that they have adjusted a sum of Rs. 5 lacs from the account of the plaintiff on account of the loss suffered for defective film produced by the plaintiff. However, the plaintiff repudiates this claim of defendant No. 1. Without expressing any opinion as to what is the actual amount due to the plaintiff, the admitted case of the defendant No. 1 is that Rs. 5 lacs and odd is due from them. The defendant No. 1 is not paying this amount. No reason has been assigned as to why the defendant No. 1 is withholding this amount. The defendant No. 1 is not acting like a fair businessman. His conduct is not clean

and honest. During the course of arguments I suggested to the defendant No. 1 that the ex parte injunction could be vacated if the defendant No. 1 paid the admitted amount of Rs. 5 lacs and odd to the plaintiff and furnish security for the remaining disputed amount. This suggestion was not acceptable to defendant No. 1. The case of defendant No. 1 is that though the amount is admittedly due from it yet it would not pay to the plaintiff. In these premises I do not think that the defendant No. 1 deserves any protection from the Court. Law and equity are both against defendant No. 1. This is an act of high-handedness on the part of defendant No. 1 I do not agree with the contention of defendant No. 1 that since the defendant No. 1 has not engaged defendant No. 2 as its advertising agent there is no cause of action for filing the suit. The plaintiff can enforce the negative covenant restraining the defendant No. 1 from engaging any other advertising agency. The plaintiff has been able to make out a prima facie case for enforcement of negative agreement. In case the plaintiff is not granted the injunction it is likely to suffer irreparable injury and loss. The plaintiff is not being paid even the admitted amount. The plaintiff has to fulfill its commitments. The plaintiff has been using television media for doing advertising work for defendant No. I and an amount of Rs. 3.2 lacs is due on that account to the television department. Doordarshan has demanded by letter dated 15.1.1988 the sum of Rs. 3.2 lacs from the plaintiff. This letter reads as under:-

"THIS refers to your letter No. FSAD/87-88 dated 5th January" 88 addressed to the Director General, Doordarshan, on the subject mentioned above. This office is basically concerned with the payments in respect of ads telecast from Doordarshan. The client and the agency are jointly and severally responsible for the payments. As such you are requested to collect the payments in respect of Doordarshan bills from the client and remit the same at the earliest. As per our records a sum of Rs. 3.2 lakhs is out standing from you in respect of the billing of this client for the month of September" 87. The payment in respect of bills for September" 87 was due to be paid before 15th November 87. Two months have already elapsed. In case the payment Along with interest is not received by us by 31st January" 88, this office would have no other alternative but to take necessary action against the agency and the client. A copy of this letter is also being endorsed to the clients."

In case the amount demanded in the above letter is not paid the plaintiff's accreditation will be cancelled and the plaintiff will go out of business. An accredited agent gets certain benefits. He will be deprived of those benefits. The damage caused to the plaintiff will not be mere monetary but will amount to stoppage and closure of its business. Its reputation will also be affected. The plaintiff will suffer irreparable loss and injury.

(13) The balance of convenience is also in favor of the plaintiff. The defendant No. I cannot be allowed to take advantage of its own wrong. Before engaging another agency he must pay and clear off the dues of the plaintiff.

(14) The view of the discussion above the application succeeds and the ex parte

ad interim injunction granted on 8.1.1988 is confirmed till the decision of the suit.