
(2011) 12 DEL CK 0116

In the Delhi High Court

Case No : I.A. No. 12360 of 2011 in CS (OS) No. 1900 of 2011

Ozone Spa Private Limited

APPELLANT

Vs

Delhi Lawns Tennis Association (DLTA) and Others

RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2012) 194 DLT 116

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Maninder Singh with Ms. Prathiba M. Singh, for the Appellant;
Dinesh Agnani, with Ms. Leena Tuteja, for the Respondent

Judgement

Manmohan Singh, J.—The plaintiff has filed the above-mentioned suit for permanent/mandatory injunction and other consequential reliefs against the defendants. Along with the plaint, the plaintiff has filed an application under Order XXXIX, Rules 1 & 2 read with Section 151 CPC, bearing I.A. No. 12360/2011. The suit as well as the interim application was listed before the Court on 08.08.2011 and after hearing the plaintiff, the ex parte ad-interim order was passed against the defendants restraining them, their servants, agents and employees, from alienating, parting or allotting the fitness centre premises in the South Wing and East Wing of R.K. Khanna Tennis Stadium, Africa Avenue, New Delhi-110019 to any third party which is the subject matter of the agreement dated 07.02.2005 and Supplementary Agreement dated 09.03.2009.

2. The brief facts of the case are that the plaintiff and the defendant No. 1, Delhi Lawns Tennis Association (hereinafter referred to "DLTA") had entered into a Management Agreement dated 07.02.2005 for establishing, running and conducting a Fitness Centre in the R.K. Khanna Tennis Stadium, Africa Avenue, New Delhi.

3. The salient features of the Agreement may be enumerated as under:-

(a) As per recital (a) of the Agreement, DLTA is the owner of only the South Block/wing of the Stadium, vide a Sale Deed dated 02.11.1993.

(b) The rest of the Stadium, including the East Wing, is owned by the All India Tennis Association and the same stood recorded in recital (c) of the Agreement.

(c) The reputation of the plaintiff as a leading expert in the fitness industry is duly acknowledged by the defendants in recital (d) of the agreement.

(d) Pursuant to the agreement between the parties regarding the location of the fitness centre, the plaintiff has run the fitness centre in the South Wing of the Stadium from October 2005 to March 2010.

(e) The swimming pool in the Stadium is also on the same side of the South Wing where the fitness centre was located. The users of the fitness centre were also using the swimming pool, which was also one of the relevant factors towards the fee from the users and also the revenue share between the parties.

(f) The fitness centre in the South Wing was open to not only the users of DLTA; AITA and the India Tennis Centre but also to general public at a certain tariff charge as per Clause 1.2.

(g) Under Clause 18.2 the plaintiff has the exclusive right to enter the fitness centre and manage the business of the fitness centre. This Clause not only bars the running of the fitness centre by a third party, but also bars the defendants from starting their own fitness centre.

(h) It has been further agreed between the parties in Clause 13.2 that the plaintiff is in full charge of the management, operation, conduct, day to day running and supervision of the fitness centre.

(i) The minimum tariff of the fitness centre was fixed at Rs.50,000/- per person per annum as per Clause 1.3. The said tariff was for the use of the fitness centre and included access to the swimming pool. Out of this total amount, Rs. 35,000/- (70%) was towards the usage of the fitness centre and 15,000/-towards the annual membership of the India Tennis Centre. This annual membership of India Tennis Centre included the usage of a swimming pool. According to Clause 15.1.1 out of the usage fee of Rs. 35,000/-, 72.50% was to be given to the plaintiff and rest of the amount was retained with the defendant i.e. DLTA and as per Clause 15.1.2 an additional amount of 20% of the share of tariff payable as the annual membership of the India Tennis Centre was to be paid to the plaintiff.

(j) It was agreed between the parties and recorded in Clause 19.10 & Clause 19.18 of the Agreement that all the staff for running of the fitness centre was to be provided by the plaintiff. It was further agreed that the plaintiff was wholly responsible for all the staff employed, including any claim, action or compensation in relation thereto.

(k) The agreement nowhere contemplates any role of the defendants in selecting or approving the staff, trainers etc employed by the plaintiff. Their credentials,

expertise etc were to be verified and checked by the plaintiff only.

(l) As per Clause 5 of the Agreement, it was agreed between the plaintiff and DLTA that the operations of the fitness centre would begin on or before 15.05.2005. The parties entered into various Amendment Agreements wherein the specified date was amended. The last of such Amendment Agreement was executed on 14.09.05 whereby the date of start of operations of the fitness centre was amended to 04.10.2005. The fitness centre commenced its operation in the South Wing in October, 2005.

(m) As per Clause 18.15, it was the DLTA's responsibility to provide air conditioning to the fitness centre at all times. The cost of electricity was to be borne by the plaintiff as per the reading in the electricity meter (Clause 18.14).

(n) The Agreement is for a total period of 18 years i.e. till 2023, consisting of 3 terms of 6 years and has been recorded in Clause 12 of the Agreement.

(o) As per Clause 13 of the agreement, there is no power to terminate the agreement before the expiry of entire term of the agreement. In fact, Clause 13.1 specifically provides unless there is a breach of the Clauses of the agreement, the Agreement cannot be terminated within the stipulated period.

4. Due to the selection of the R.K. Khanna stadium as the venue for the conduct of Common Wealth Games in October, 2010, the DLTA represented to the plaintiff that the South Wing was required to be renovated to meet the requirements of the Games. Hence, a Supplementary Agreement dated 09.03.2009 was entered into between the parties for temporary shifting of the fitness centre to the East Wing and the temporary shutting down during the conduct of the Common Wealth Games in October 2010.

5. The plaintiff agreed to the temporary reallocation to the East Wing on the express undertaking by the Defendant that the fitness centre was to be shifted back to the South Wing as soon as the stadium was handed back by the Common Wealth Games Committee.

6. The relevant features of the said Agreement are as follows:

(a) In Clause II of Supplementary Agreement it was recorded that the Government of India had chosen R.K. Khanna Tennis Stadium for hosting the Common Wealth Games 2010 for which certain alteration and modernization of the South Wing was required to be carried out. As a result the parties in Clause III agreed to the temporary shifting of fitness centre from existing site of South Wing to the East Wing of the complex. As agreed between the parties, the said shift was a temporary shift only for the purposes of the conduct of the Commonwealth Games.

(b) That despite the temporary shifting of the fitness centre due to the conduct of the Common Wealth Games, the parties agreed and specifically recorded in Clause 1 of the Supplementary Agreement that they would continue to be

governed by the original management agreement dated 07.02.2005.

(c) In accordance with Clause V, the fitness centre in the South Block was closed down on 15th February, 2009 for the purpose of re-location. The fitness centre started its operation from the East Wing w.e.f. 15th March, 2009 upto 30th March, 2010. Thereafter, the fitness centre was shut down because the entire R.K. Khanna Stadium complex had to be handed over to the Committee of the organizing team for conduct of the Common Wealth Games.

(d) From 30.03.2010 till date, the plaintiff has not been permitted to run the fitness centre, even when the stadium including the South Wing was handed back to the defendant in February, 2011.

7. The understanding between parties in the Supplementary Agreement was that the shifting of the fitness centre from the South Wing to the East Wing was temporary and necessitated only for the conduct of the Common Wealth Games. In Clause 13 it was further agreed by the Defendant DLTA that, within 120 days of taking over of the South Wing of R.K. Khanna Stadium, DLTA would carry out such renovations as is necessary for restart of the fitness centre in the South Wing. In fact, the defendants have also admitted the same in their reply filed before this Court. The defendants during the course of hearing of interim application have also admitted that they are also the owners of East Wing. Photocopies of title deed were produced.

8. As per Clause 9 the period of closing down of the fitness centre on account of Common Wealth Games was to be excluded from the initial period of the agreement as stipulated in the Management Agreement dated 07.02.2005.

9. The defendant No. 1 had specifically agreed in the Supplementary Agreement that on the handing back of the stadium from the Games Committee, the plaintiff would restart the operation of the fitness centre from the South Wing. As per the Defendant's own letter dated 01.02.2011, the R.K. Khanna Stadium was handed back to the defendants in February, 2011. As per Clause 13 of the Supplementary Agreement, the defendant had undertaken to carry out the necessary renovations/modifications for restart of the fitness centre, the plaintiff addressed a letter dated 7th February, 2011 requesting the defendants to complete the interior work so that the fitness centre would be restarted.

10. The plaintiff states that instead of complying with its obligations, the defendant started making unsustainable and vague submissions in complete contravention of the agreement dated 07.02.2005 and 09.03.2009. DLTA in its letter dated 8th February, 2011 stated that the fitness centre could not be shifted back to the South Wing on account of an alleged legacy agreement entered into with the Ministry of Youth Affairs and Sports under which the South Wing was designated as a dope centre and could not be used for running a fitness centre.

It is submitted by the plaintiff that the agreements between the plaintiff and defendant No. 1 cannot be defeated by way of a subsequent agreement with a

third party.

11. It is alleged by the plaintiff that in order to maintain cordial relationship between the parties and enable to restart the fitness centre, which was lying shut since March 2009, the plaintiff only as a matter of compromise had agreed to restart of fitness centre in the East Wing.

12. The defendants filed the reply to the interim application raising various objections for the grant of relief sought by the plaintiff. It is contended by the defendants that the suit filed by the plaintiff is not maintainable, as no relief of permanent or mandatory injunction can be granted with other consequential reliefs, to the plaintiff. It is further contended that the entire matter was referred to the Sports Committee before whom the plaintiff was supposed to give its presentation pertaining to the profile of equipment and the staff, and the Committee was to give its finding for an appropriate decision. However, the plaintiff refused to discuss the matter in peaceful and cordial atmosphere to resolve the issue between the parties.

13. According to the plaintiff the defendants had misrepresented to the plaintiff that a Dope Centre is to be located in the South Wing of the stadium and therefore, the location for the fitness centre in the South Wing would not be available, it is stated that the plaintiff had indicated for the location in the East Wing with revision of the tariff fee - giving a higher revenue share to the plaintiff from a lower annual fee to be received from the users. The annual fee was required to be lowered on account of the far distance of the location of the fitness centre in the East wing from the swimming pool. The defendants who had entirely misrepresented that the South Wing location will be used for Dope Centre, had agreed for the higher revenue share for the plaintiff and had sent a Supplementary Agreement along with their email dated 19th February, 2011, stipulating therein that the monthly tariff of the fitness centre would be reduced to Rs. 40,000/- per person per annum and the share of the plaintiff would stand enhanced. It is on account of such a misrepresentation that South Wing will be used for Dope Centre that the plaintiff had shown its readiness and willingness to shift to East Wing with the clear pre-condition of the revised fee structure. The entitlement of the plaintiff in terms of the agreement dated 07.02.2005 and the 09.03.2009, is for the same location at the South Wing in terms of agreement dated 09.03.2009.

14. After passing of the interim order dated 08.08.2011 passed by this Court, it appears from the record that a meeting of the Executive Committee was called on 01.10.2011 for consideration of the issues raised by the plaintiff. In the said meeting, the Executive Committee resolved that the terms and conditions of the Agreement dated 07.02.2005 entered into between the plaintiff and defendant No. 1 would remain unchanged and there would be no change in the said Agreement as well as the terms thereof. The minutes of the said meeting of the Executive Committee are filed, extract whereof reads as under:

...Further resolved that terms and conditions of the management agreement dated 7th February, 2005 will remain unchanged and the manager to operate DLTA fitness centre will be allowed to discharge his services to DLTA in accordance with the said terms and agreement dated 7th February, 2005, subject to the report of the Sports Committee and its consideration by the Executive Committee...

15. It is submitted by the plaintiff that it was unaware of the falsehood of the defendants that there would exist a Dope Centre in the South Wing, and the plaintiff on repeated occasions vide letters dated 19.04.2011, 20.06.2011, 12.07.2011, 28.07.2011 and 22.09.2011, asked the defendants to execute the Supplementary Agreement dated 19.0.2011. But, the defendants had no intention of permitting the plaintiff to run the fitness centre and avoided to execute the Supplementary Agreement dated 19.0.2011.

16. It is further submitted by him that in order to deprive the plaintiff from running and managing the fitness centre, the defendants are only making one or the other excuse. It is also stated that the defendants in letters dated 16.07.2011, 20.07.2011 and 28.07.2011 have made new submission that approval of the Executive Committee was required for which the plaintiff was required to give its proposal for running of the fitness centre but, same is baseless, as under the Agreements dated 07.02.2005 and 09.03.2009, the plaintiff has an exclusive right to run and manage a fitness centre without having to obtain the approval or consent of any alleged Executive Committee. It has been done by the defendants about plea of the Executive Committee with malafide intention in order to run its own fitness centre to the exclusion of the plaintiff.

17. It is submitted by the plaintiff that it is evident that the defendants do not have any intention, to comply with and honour their commitments as per the terms and conditions of the agreements dated 07.02.2005 and 09.03.2009.

18. Mr. Dinesh Agnani, learned Senior counsel appearing on behalf of the defendants, after arguments, has made his following submissions:

(a) As far as South Wing is concerned, the same cannot be allowed to be used by the plaintiff as a fitness centre as the same is now not available.

(b) However, the defendants are agreeable to comply the terms and conditions mentioned in two agreements dated 07.02.2005 and 09.03.2009 in case the plaintiff is agreeable to run the fitness centre using the recent modern equipment and using the qualified and trained staff and list of the same is provided by the plaintiff to the defendants. The reasons assigned by Mr. Agnani is that how the Government has spent a huge amount on this complex and therefore, Government is entitled to examine these aspects and if any untoward incident has happened due to lackness of the plaintiff, then why should the defendants suffer. Therefore, the defendants have now become more wiser.

19. On the other hand, Mr. Maninder Singh, learned Senior counsel has refuted the submissions of the defendants by saying that these are totally irrelevant submissions and the defendants are aware that the plaintiff is a renowned expert in the field of fitness who is conscious of its reputation and is interested in running the fitness centre strictly in accordance with its international standards. In any event, it is in the business interest of the plaintiff to run the fitness centre using the most competent & trained staff and modern equipment.

20. It is submitted by the counsel that the plaintiff is not prepared to give the list of trained staff and their qualifications as earlier the defendants had employed its employee in their fitness centre. As far as details of equipments are concerned, the same have been filed on record. Mr. Maninder Singh, learned Senior counsel appearing on behalf of the plaintiff has agreed to provide the details of their employees and their qualifications in sealed cover to this Court. He further submits that why would the plaintiff use old equipment instead of modern equipment when it is also a question of goodwill and reputation of the plaintiff. He further submits that in case the defendants have objection to any equipment installed, then the plaintiff is ready to cooperate the same. The question of poor performance and lackness does not arise.

21. It is evident that the plaintiff had submitted a list of the equipment proposed to be installed by the plaintiff and a further list of trainers and staff has been employed or to be employed in the fitness centre in sealed cover.

22. There is no dispute left between the parties at this stage in the application to be determined.

23. Otherwise, as mentioned above, it would be obviously considered that the defendants do not intend to honor their obligations under the agreements dated 07.02.2005 and 09.03.2009 and are running the fitness centre at their own in breach of the said agreements.

24. Hence, the prima facie case and balance of convenience lies in the favour of the plaintiff and against the defendants as the plaintiff has the right to run the fitness centre from the South Wing. It is further submitted that irreparable loss is being caused to the plaintiff who has been unable to run the fitness centre since March 2009, because of which the plaintiff has suffered tremendous financial loss and loss of reputation.

25. Thus, plaintiff's application under Order 39 Rule 1& 2 CPC be allowed and the plaintiff be permitted to run the fitness centre in the East Wing of the R.K. Khanna Stadium as per the terms and conditions of the Agreement dated 7.2.2005 and 09.03.2009 by the defendants who shall hand over the possession within two weeks from today to the plaintiff. In case, the defendants are not agreeable to allow the plaintiff to run the fitness centre in the East Wing as per mutual understanding and agreement dated 09.03.2009, during the said period, the plaintiff would be entitled to move an application for modification of order to run the fitness centre in South Wing in terms of agreement dated 7.2.2005. The

plaintiff is also granted two weeks time to file fresh complete list of equipment to be brought to the fitness centre and also file the list of the staff member, their name, address and qualification and their experience within the same time in sealed cover.

26. In the above terms, the application is disposed of.