

(2000) 02 DEL CK 0097

In the Delhi High Court

Case No : IAs. 7529/96 and 10922/97 in S. 1979/96

Palwell Exports Pvt. Ltd.

APPELLANT

Vs

M/s. Royal Safe Co. (South) and Others

RESPONDENT

Date of Decision : 03-02-2000

Acts Referred:

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

Citation : (2000) 2 AD 619 : AIR 2000 Delhi 249 : (2000) 84 DLT 442 : (2000) 53 DRJ 235 : (2000) 3 RCR(Civil) 333

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Mr. P.N. Bhardwaj, for the Appellant; Mr. S.P. Aggarwal and Ms. Pooja Parmar, Mr. A.K. Mukherjee and Mr. Vikram Dhokalia, for the Respondent

Judgement

Manmohan Sarin, J.—By this order. I would be disposing of two interim applications, viz. IA. 7529/96 under Order XXXIX, Rules 1 & 2 of the CPC and 10922/97 under Order XXXIX, Rule 2A of the Code of Civil Procedure.

2. plaintiff, claiming to be the owner of property No. G-26, South Extension Part - I, New Delhi, by virtue of Sale Deed dated 16.3.1990, has instituted the present suit. plaintiff has sought an injunction to restrain the defendant from sub-letting, assigning, creating any third party interest in any manner in the premises or parting with possession thereof to M/s. Joy Line Exports or any other person. plaintiff claims that the defendant, after the purchase of the property by the plaintiff, had attorney to the plaintiff as tenant and started paying the rent in respect of the entire premises on the ground floor. It is alleged that in August 1996, the defendant under-took substantial additions, alterations and renovations in portions of the suit premises, without the consent of the plaintiff. The said additions/alterations are said to be without municipal sanction and vocative of its bye-laws. The present suit is filed on plaintiff's allegation that despite an assurance given to stop, the defendant has continued with the changes with the sole object of sub-letting, assigning or parting with the

possession of the tenanted premises to M/s. Joy Line Exports. The plaintiff claimed that by virtue of Clause IV of the lease deed dated 22.11.1963, between the plaintiff's predecessor-in-title, the defendants were prohibited from sub-letting, assigning or parting with the possession of the property.

3. Vide an ex-parte order dated 19.8.1996 the defendant was restrained from sub-letting, assigning or creating any third party interest in any manner or parting with possession of any portion of the suit premises and from raising an further construction and/or renovation. This order was modified vide order dated 12.9.1996 and defendant was permitted to undertake renovations, without any additional masonry construction or demolition of any existing masonry constructions. The pleadings in the case have been completed.

4. Defendant, in the written statement, apart from raising certain preliminary objections has urged that the suit is an interference in the enjoyment and carrying out of its legitimate and peaceful business activity. There was no violation of any Municipal bye-laws and the alterations carried out did not require any notice or permission under the Municipal bye-laws. In brief, the case of the defendant is that the plaintiff's allegation of premises being sub-let to M/s. Joy Line Exports or for the showroom of M/s. Alternative Fashions Pvt. Ltd.. were false. The defendant had entered into an agency agreement with M/s. Alternative Fashions Pvt. Ltd. The defendant was to act as their agent and use his outlet for the sale of goods to be supplied by the said M/s. Alternative Fashions Pvt. Ltd. It may be noted that the agreement entered into with M/s. Alternative Fashions Pvt. Ltd. was also terminated by the defendant with effect from 31.10.1977. The defendant, thereafter, entered into a franchise agreement with M/s. Adidas India Trading Pvt. Ltd.

5. Learned counsel for the plaintiff, Mr. P.N. Bhardwaj, urges that the second agreement also constitutes sub-letting or creating a third party interest in the premises. Learned counsel submitted that the lease deed dated 22.11.1963, contained a complete prohibition on sub-letting, assigning or parting with possession and the action of the defendant was in total violation of it, for which the plaintiff has also instituted an eviction petition for sub-letting. Learned counsel further submitted that after the first agreement the defendant, despite the injunction as granted by this court vide order dated 19.8.1996, in blatant defiance and contempt, has entered into a second agency agreement with M/s. Adidas India Trading Pvt. Ltd., which is clearly the creation of third party interest in the premises. Learned counsel for the plaintiff, Therefore, submits that defendant is liable to be proceeded against and punished under Order XXXIX rule 2A of the Code of Civil Procedure.

6. Learned counsel for the plaintiff, in support of his submission that there is creation of third party interest in contravention of the order dated 19.8.1996, has relied on the following :

(i) Clause IV of the franchise agreement dated 10.10.1997, which provides that

the defendant shall undertake, at its own cost, whatever furnishing is required by the company, i.e. Adidas India Trading Pvt. Ltd. to equip the showroom in accordance with the scheme and design approved by them. In other words, Adidas India Trading Pvt. Ltd. shall have complete say in the matter of furnishing interiors and designing.

(ii) The right provided to M/s. Adidas India Trading Pvt. Ltd. under Clause 11, to enter upon the premises in order to exercise its right to repossess its stocks in the event of default in payment by the defendant.

(iii) Clause 14 of the Agreement by virtue of which the defendant was to deal only with the products of Adidas and no others.

(iv) Clause 19 (e) by which the defendant undertook to indemnify Adidas India Trading Pvt. Ltd. in respect of any liabilities or payments made by Adidas in relation to the showroom.

Learned counsel, by placing reliance on the aforesaid terms, sought to urge that the real control of the premises was with Adidas and it is they who were running the show. The transaction between the parties, in fact, was that of a subtenancy and, in any case, it created third party interests in the premises.

7. Referring to the earlier agreement with M/s. Alternative Fashions Pvt. Ltd., learned counsel submitted that the same was also a camouflage. The defendant had not produced on record any document to show the actual performance or implementation of the said agreement. Thus, it was urged that the defendant flouted the order of the Court and was liable to be proceeded against for contempt, otherwise it would be putting premium on dishonesty. Learned counsel submitted that from the pleadings and the documents on record the plaintiff had made out a prima facie case which raise serious questions requiring consideration and the plaintiff was entitled to have the injunction confirmed. No other point has been urged by the counsel for the plaintiff.

8. The question that arises for consideration is whether the agreement entered into by the defendant with M/s. Alternative Fashions Pvt. Ltd. and the subsequent Franchise agreement with M/s. Adidas India Trading Pvt. Ltd. amounted to sub-letting, parting with possession or creating third party interest, which would violate the injunction granted and render the defendant liable for contempt.

9. It is fairly well-settled that it is the substance of the agreement and not the form which is to be considered to determine the intention of the parties and the real nature of the transaction. Reference in this connection is invited to Associated Hotels of India Ltd. Vs. R.N. Kapoor, , Vayallakath Muhammodkutty Vs. Illikkal Moosakutty, and Rajdhani Chit Fund (P) Ltd. Vs. Mukesh Maheshwari, .

10. In the instant case, a perusal of the agreement dated 1.6.1996 entered into by the defendant with M/s. Alternative Fashions Pvt. Ltd. shows that the said agreement created an agency for a term of eight years, subject to further

extension, as may be agreed mutually. The defendant under the agreement was to sell only the products of M/s. Alternative Fashions Pvt. Ltd. from the premises and remit the sale proceeds after deducting the sales tax which was to be deposited with the authorities. The business or the sales conducted at the showroom were to be manned by the employees of the defendant. Salaries, rent of the premises, telephone bills, water and electricity charges were to be borne by the defendant. Accounts and stocks were to be maintained by the defendant. M/s. Alternatives Fashions Pvt. Ltd. only had a right to joint inspection of the stocks. The defendant was to install air conditioners at its own cost. Defendant was, however, to follow the guidelines and marketing strategies for sales as advised by M/s. Alternative Fashions Pvt. Ltd. The agreement prescribed varying rates of commission, based on the quantum of sales in a month. The clauses containing specific stipulations, which may usefully be reproduced, are Clauses (6), (9), (13) and (16):

"6. The parties of the first part (defendant) and second part has agreed that all expenses incidental to the carrying on of the business by the party of the first part including inter alias the salaries of the employees, rent of the business premises, telephone bills, water and electricity charges etc. will be borne by the party of the first part and that the party of the second part will have no interest or any concern therewith."

"9. That the party of the first part has agreed that it will not assign any interest, rights and obligations arising out of these presents to any third party to the detriment of the party of the second part."

"13. That both the parties have agreed that the party of the second part will have no right, title or interest of any nature whatsoever, in the business premises of the party of the 1st part and that the business premises of the 1st part shall at all times remain under the exclusive control, possession, supervision by the party of the 1st part and that the party of the second part shall have no right, claim or interest of any nature in any manner whatsoever to interfere with the business premises of the party of the First part. They have further agreed that the party of the 2nd part shall not claim any right or interest whatsoever in the tenancy rights of the said business premises of the party of the first part."

"16. That both the parties have agreed that the party of the second part will have a right to terminate the Agency Agreement at its option. It has further been agreed that in the event of termination of this agreement, the party of the second part will give a notice of at least three months by registered post about its intentions to so terminate the Agency agreement, failing which the party of the first part will be paid commission for the unexpired period at the rate of average commission for the preceding three months."

From an analysis of the foregoing provisions, it would be seen that the defendant retained complete and exclusive control and possession of the premises and M/s. Alternative Fashions Pvt. Ltd. have been specifically excluded from having any

right or interest in the premises or tenancy. Moreover, even the sales operation and running of the showroom business was by the defendant. The mere fact of following marketing strategies or instructions on decoration and design of M/s. Alternative Fashions Pvt. Ltd. would not dilute this position. The unsold stock was to be removed by M/s. Alternative Fashions Pvt. Ltd. There is nothing on record to prima facie support plaintiff's contention that the agreement was a sham one and the real nature of the transaction was that of creation of a tenancy or a third party interest. This further receives support from the fact that M/s. Alternative Fashions Pvt. Ltd., in accordance with the agreement provision, terminated the same and removed their goods. It, thus, lends support to the defendant's case that it was an agency agreement which was acted upon and not a camouflage for a tenancy.

11. Coming to the second agreement with M/s. Adidas India Trading Pvt.Ltd., a perusal of the agreement shows that it is a franchise agreement where the sale by adidas to the defendant is on a principal to principal basis. The defendant pays the price, which leaves a margin of 24 per cent on the prices for the benefit of the defendant. The relevant clauses which need to be noticed are Clauses (14), (16), (19), (20) and (21).

"14. In view of the special features of the product, the special requirements regarding decoration and structuring of the showroom in order to preserve the identity and uniqueness of the sales and marketing network of the Company and for the diverse other reasons, the Franchisee shall display, sell or otherwise deal with only the stocks supplied by the company and no other products except by prior written consent of the Company."

"16. The Company shall sell to the Franchisee such of the products, forming part of the Company's stocks from time to time, as may be required by the Franchisee, provided the same are available with the Company. The Franchisee will buy stock only from the Company for the purpose of sale only in retail and at prices not exceeding the Maximum Recommended Price fixed by the Company from time to time, in accordance with law.

"19. The Franchisee shall be responsible for and shall bear all recurring charges and expenses whatsoever incurred or to be incurred in carrying on the business in the showroom including those relating to the property on which the showroom is situated. Without prejudice to the generality of the foregoing the franchisee shall bear and pay:-

(a) All rates and taxes and other outgoing payable to local authorities in respect of the showroom.

(b) all wages, salaries, employee payment of any kind including terminal benefits and all other expenses of the showroom operations including telephones charges, wrappings, electricity charges and charges for cleaning an upkeep of the showroom, postal and band charges and all operation expenses whatsoever.

(c) all charges in connection with the decoration and timings of the windows of the showroom.

(d) all rent, maintenance and related expenses of the showroom.

(e) The franchisee hereby agrees and undertakes to indemnify the company against any claims, liabilities made against or borne by the company in relation to the showroom and/or under the lease agreement for the showroom.

20. The Franchisee shall at his own expense and cost provide for as many suitable personnel as the company may consider necessary for providing efficient services to the customers for maintaining the premises, for displaying the stocks and for carrying out other functions. The company shall, if required by the Franchisee, assist the Franchisee in the selection, recruitment and training of such personnel. The Franchisee shall bear all salaries, expenses and contribution including statutory contributions in respect of such personnel and they shall at no point of time be the employees of the Company. The Franchisee will provide for and also ensure that the sales personnel are outfitted in the company's products. The Franchisee shall be entirely responsible for all acts of omission and commission by any such personnel and shall indemnify the company against any such act of omission and commission resulting in claims against the company or in damage to the property, image and/or reputation of the company.

21. The Franchisee shall company with all the regulations as may be required to be complied with as per the local laws, legislation of the Government, local bodies or any other authority."

A perusal of these clauses, especially Clauses (16), (19) and (20) shows that all the expenses and recurring charges, including rent, etc. were to be borne by the defendant. The defendant was to employ the staff at its own expense. The fact that the parties, with a view to exploit the reputation and goodwill of Adidas and its products agreed to mode of advertisement of the showroom as being one for Adidas products or the defendant agreeing to follow the decoration and design requirements and instructions of Adidas in matters of interior design and decoration will not alter the nature of the transaction which is of a franchise agreement, wherein the defendant exclusively sells the products of adidas, giving the benefit of 24% margin to the defendant. The defendants have produced on record the invoices raised by the Adidas on them for the sale of its products, which supports the contention of the defendant that it is a principal to principal transaction and in accordance with the franchise agreement. Besides, there is nothing in the agreement which creates any interest in the tenanted premises or a relationship which may be akin to that of a tenancy. The premises remained under the overall control of the defendant. The defendant is even obliged to indemnify Adidas in case of any claim in relation to the lease agreement or the showroom being made on them by a third party. The agreement has a termination clause.

12. From the foregoing discussion and analysis of the provisions of the

agreements between the parties and the documents placed on record, in my view, the plaintiff has failed to make out a prima facie case for grant of injunction or to show that there has been sub-letting or creation of a third party interest by the agreements with M/s. Adidas or Alternatives Fashions Pvt. Ltd. plaintiff has failed to prima facie demonstrate that the said agreements are a camouflage.

13. Coming to the application filed by the plaintiff under Order XXXIX Rule 2A of the Code of Civil Procedure, this Court vide order dated 12.8.1996 had modified the earlier order permitting the defendant to take up renovation work within the four walls of the showroom. The defendants, in their affidavits, have denied the carrying out of any unauthorised construction of pillars or demolition of any load bearing walls or additions, alterations and renovations to make the entire ground floor as one hall or to have covered the verandah measuring 17"x17", as alleged by the plaintiff. plaintiffs have failed to place on record any documents with regard to any notice or demolition action by the MCD, as claimed by them. On the other hand, defendants have placed on record photographs, Annexures R-1 and R-2 respectively, which prima facie show the internal changes which appear to have been carried out for the purposes of sales of the products of, first, the Alternative Fashions Pvt. Ltd. and, secondly, of M/s. Adidas, in terms of lighting, racks and display.

14. Mr. A.K. Mukherjee, learned counsel appearing on behalf of respondent No. 4, Adidas, submitted that they had no knowledge of the orders dated 19.8.1996 and 12.9.1996. Besides, they are not in possession of the premises and none of their employees work there. In these circumstances, there is no cause of action against Adidas, who are imp leaded as respondent No. 4 in IA. 10922/97.

15. In my view, plaintiff has failed to establish any deliberate breach or flouting of the order of this Court by the alleged contemnors. Moreover, considering the facts and circumstances of this case, I am of the view that, in any event, it is not a fit case for taking action for contempt where the requirement is of a willful or contumacious defiance of the order of this Court.

16. IAs. 7529/96 and 10922/97 have no merit and are dismissed.

17. The findings given in this order are for the purposes of disposal of the interim application only and are based on a prima facie view of the pleadings and documents on record. These will not affect the trial of the suit on merits.