

(1996) 03 DEL CK 0065

In the Delhi High Court

Case No : Interim Application No's. 3959 and 8182 of 1992 and Suit No. 1570 of 1992

Pepsi Foods

APPELLANT

Vs

Jai Drinks (P) Ltd.
 Jai Drinks (P) Ltd. Vs Pepsi Foods Ltd.

RESPONDENT

Date of Decision : 04-03-1996

Acts Referred:

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

Citation : (1996) 36 DRJ 711

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : R.K.P. Shankar Das, Amar Gupta, Arun Mohan and P.K. Agarwal, for the Appellant;

Judgement

S.K. Mahajan, J.

(1) The plaintiff in suit No.1570/92 is Pepsi Foods Limited (In short referred to as "PEPSI").

(2) This suit has been filed by "PEPSI" for declaration, injunction and rendition of accounts. Suit No.2110/92 has been filed by Jai Drinks Private Limited (In short referred to as "JAI") against Pepsi Foods Limited for declaration and for recovery of money. This order will dispose of the application for injunction filed by "PEPSI" in suit No.1570/92 as also the application of "JAI" in the same suit for vacation of stay, which had been granted ex parte on April 29, 1992. It will also dispose of the application of "JAI" in suit No.2110/92 for an injunction against "PEPSI". The facts in short which have given rise to the filing of these suits are that : -

(3) "PEPSI" being the proprietor of the trade mark Lehar Pepsi, Seven Up and Lehar Mirinda, manufactures soft drink concentrate for beverages being bottled under the aforesaid trade marks. "PEPSI" then enters into an agreement for sale of concentrates to various franchised bottlers for manufacturing and bottling soft

drinks/beverages. One such bottling agreement was entered into by "PEPSI" with "JAI" on or about 8th May, 1990 granting license to use the trade mark Lehar in conjunction with trade marks Pepsi Cola. Pepsi 7UP" and Lehar Mirinda. This bottling agreement was in respect of a territory known as Jaipur territory which included many districts of Rajasthan. The agreement was initially for a term of 10 years from the date of the agreement with a right to "PEPSI" to terminate the same upon the failure of "JAI" to perform or comply with any one or more terms and conditions of the agreement. The agreement could be terminated by giving 12 months notice in writing without assigning any reason for such termination. It is the case of the "PEPSI" that it had received numerous complaints from the trade and consumers as to the quality of products manufactured by "JAI" and in spite of diverse directions given to "JAI" to improve the quality, "JAI" were not able to improve their performance. The "PEPSI", Therefore, by a notice sent on or around December 31, 1991 terminated the agreement effective immediately without prejudice to the second notice of termination. The second notice gave 12 months notice for the termination and the notice was also stated to be without prejudice to the First notice of termination. "JAI" did not contest or challenge the said termination and subsequent to the date of termination "PEPSI" did not sell any concentrate to it. However, it is alleged that "JAI" despite termination continued to manufacture sub-standard quality beverages and market them under the trade marks of "PEPSI", which acts of "JAI" were stated to be illegal without authority and malafide. The suit was, Therefore, filed by the "PEPSI" for a declaration that the bottling agreement dated May 8, 1990 between the parties stood terminated and also for an injunction restraining "JAI" from manufacturing and selling beverages under the aforesaid bottling agreement under the trade marks Lehar Pepsi, Lehar 7 Up and Lehar Mirinda. Damages for infringement and passing off were also claimed in the suit.

(4) Along with the suit an application for an ex parte order of injunction was also filed and this Court by order dated April 29, 1992 restrained "JAI" by an ex parte order of injunction from using the trade mark/brand name of the "PEPSI" and also from using the trade mark/brand name Lehar Pepsi, Lehar 7 Up and Lehar Mirinda on the beverages manufactured by "JAI".

(5) On receipt of summons of the suit, "JAI" not only filed an application under Order 39 Rule 4 CPC for vacation of the ex parte stay granted by this Court but simultaneously also filed a suit against "PEPSI" for a declaration that the termination notices dated December 31, 1991 were illegal, invalid and non-operative and for an injunction restraining "PEPSI" from appointing any bottler/franchiser for manufacturing or sale of its soft drinks in the Rajasthan territory for a period of ten years commencing from May 1990. An application for ad interim injunction during the pendency of the suit was also filed Along with the suit.

(6) The short point involved for decision of these applications is whether at this stage "PEPSI" can be directed to continue to supply its concentrate in "JAI" so as

to enable it to manufacture and market the products for which the "PEPSI" had entered into a franchise agreement with "JAI". Section 14 of the Specific Relief Act enumerates the contracts which cannot be specifically enforced. u/s 14(i)(c) of the Act, the contract which is in its nature determinable cannot be specifically enforced. u/s 41(e) of the Act, an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. On a conjoint reading of both the Sections, it is clear that the Court will not grant an injunction to prevent the breach of a contract performance of which cannot be specifically enforced u/s 14(i)(c) of the Act.

(7) MR.ARUN Mohan, Sr. Advocate appearing on behalf of "JAI", submits that it was by way of an agreement dated August 15, 1989 that "PEPSI" had agreed to appoint "JAI" as its bottler on the terms and conditions contained in the said agreement. These conditions were agreed to by "JAI" and on this assurance of the "PEPSI", "JAI" had invested considerable money in its bottling plant and a formal agreement thereafter was entered into between the parties on May 8, 1990. The contention is that as the agreement was for a period of ten years, "PEPSI" could not terminate the same and in any case, "PEPSI" is estopped from terminating it on account of "JAI" having changed its stand by investing considerable amount in its bottling plant for manufacturing and marketing the products for which a license had been given by "PEPSI" to "JAI". It is also the contention of Mr.Arun Mohan that there were no complaints against "JAI" and, Therefore, there was no occasion for "PEPSI" to terminate the agreement.

(8) In my opinion, these are not the questions which have to be gone into at this stage of the suit. Moreover, in case it is ultimately held that the termination of the agreement wrongful, the only relief to which "JAI" may be entitled is damages for such wrongful termination. In such type of a contract, in case two parties have fallen out, it was within the right of one of the parties to terminate such type of a contract. In case, the termination is wrongful, the party will be entitled to damages, however, the party cannot compel the other party to continue to act under the agreement as it will amount to specific performance of an agreement which under the law cannot be specifically enforced. Moreover, after letter of termination dated December 31, 1991 was issued, "JAI" did not take any action against "PEPSI" nor it had challenged the said termination in any forum. It appears that "JAI" were satisfied with the termination and it was only after "PEPSI" filed a suit against "JAI" and summons were served upst "JAI" not only filed a suit against "PEPSI" for a direction to it to continue to supply its concentrate but an application under Order 39 Rule 4 was also filed in the suit which has been filed by the "PEPSI" for vacation of the ex parte stay granted against it. "PEPSI" has already entered into an agreement with Agra beverages giving them the franchise for bottling its products in the territory of Rajasthan. The said Agra beverages had not been made party in the suit and, in my opinion, Therefore, it will not be proper to grant any injunction in favor of "JAI" which would have the result of passing of an order against Agra beverages who is not party to the suit.

(9) In *Classic Motors Limited Vs. Maruti Udyog Limited*, this Court under similar circumstances while deciding an application for injunction, had held that the question as to whether a party had a right to terminate the contract requires adjudication. According to the Court, in a franchise agreement, there was an implied term that it would not be terminated arbitrarily and in bad faith. According to the Court, as the plaintiff in that case had already spent huge amount in infrastructure plant and machinery, engagement of labour, managerial staff, etc., the plaintiff will be crippled in case the defendant was allowed to terminate the contract and the same may also amount to throwing out the labour and managerial staff on the road which would create a human problem to a large extent. The Court had, Therefore, passed an order of injunction staying the notice of termination of the franchised agreement. An appeal was filed against the aforesaid order in *Classic Motor's* case and the Supreme Court by judgment passed in SLP (c). 4490/95 passed on November 3, 1995 set aside the said findings of this Court.

(10) In *S.K. Gupta Vs. Hyderabad Allywn Ltd.*, , it was held as under :-

"If ind that the memorandum of understanding placed on record by the respondent Along with its counter- affidavit is not disputed by the petitioner. As per CI.I of the said memorandum, the appointment of the petitioner as a sole stockist was to remain in force for six months from the date of its execution and the respondent "Principal" had reserved the right to terminate this memorandum of understanding within this period with or without notice at any time and without assigning any reason whatsoever. Under S. 14(l)(c) of the Act a contract which is in its nature determinable cannot be specifically enforced. Since in the present case the contract was determinable under CI.1 of the memorandum of understanding it is clear that it was a contract which is covered by S. 14(l)(c) of the Act. Now, under S. 41(e) of the Act an injunction cannot be granted in a suit filed to prevent the breach of a contract the performance of which would not be specifically enforced. Thus, once it is found that the contract cannot be specifically enforced because it is covered by S. 14(l)(c) of the Act, no injunction can be granted to prevent the breach of such a contract. S. 42 of the act however provides that 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. If there is a negative covenant in the agreement even if the affirmative agreement is hit by S. 41(e) of the Act, injunction can be granted for enforcing the negative agreement. I find no force in the contention of the learned counsel for the petitioner that there is a negative covenant that the respondent will not appoint any other stockist and that this negative covenant could be enforced by the petitioner by obtaining a permanent injunction restraining the respondent from appointing other dealers in the same area. From the perusal of the agreement in question I find that there is no negative covenant in the said agreement. If there had been a condition imposed

on the petitioner that it will not be authorised stockist or dealer for any other watch company it could be said that there is a negative covenant as envisaged in S. 42 of the Act. But that is not so in the present case."

(11) In my opinion, the facts of that case are fully applicable to the present case. Even assuming the letter of termination to be not in accordance with the terms and conditions of the agreement and even assuming that the said letter of termination is illegal, prima facie, it appears that the only recourse open to "JAI" is to file a suit for damages. "JAI", in my opinion, has an equally efficacious remedy of claiming damages and it is, Therefore, not entitled to the grant of an injunction which is otherwise barred by Section 41(e) of the Specific Relief Act.

(12) As I have already held that prima facie, "PEPSI" had a right under the contract to terminate the license agreement and the only right available to "JAI" was to file a suit for damages, "JAI" cannot continue to manufacture or market the products for which the license had been given by "PEPSI" "PEPSI" is, Therefore, entitled to an injunction restraining "JAI" from manufacturing or marketing the products under the brand name of Lehar Pepsi, Lehar 7 Up and Lehar Mirinda.

(13) For the aforesaid reasons, I allow application of "PEPSI" being I.A.No-3959/92 and confirm the parte order of April 29, 1992 till the disposal of the suit. Application of the "JAI" being IA.No.8182/92 in suit No.1570/92 and I.A.No-3187/92 in suit No.2110/92 are dismissed.

(14) Any observation made in this order will not affect the merits of the case.