

(1999) 05 DEL CK 0121
In the Delhi High Court
Case No : O.M.P. No. 36 of 1999

Shubh mangal Merchantile (P.) Ltd.

APPELLANT

Vs

Trion Restaurants (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 24-05-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : AIR 2000 Delhi 13 : (1999) 4 CivCC 644 : (1999) 79 DLT 777 : (1999) 50 DRJ 437 : (1999) 2 ILR Delhi 375 : (1999) 3 RCR(Civil) 452

Hon'ble Judges : M.S.A. Siddiqui, J

Bench : Single Bench

Advocate : A.M. Singhvi, Rajiv Talwar and Shahid Rizvi, for the Appellant; Arun Jaitley, Senior Advocate, Amar Gupta and Jyoti Mehndiratta, for the Respondent

Final Decision : Dismissed

Judgement

M.S.A. Siddiqui, J.—By this petition u/s 9 of the Arbitration and Conciliation Act, 1996, the petitioner seeks the following interim reliefs against the respondents :

"(a) pass ad interim injunction against respondents from appointing and/or awarding and/or contracting and/or assigning and/or allowing any other developer and/or agent and/or dealer to develop and/or run Pizza Hut outlets in Mumbai and Navi Mumbai other than the petitioner and/or ;

(b) pass an ad interim injunction in favor of the petitioner and against the respondents and/or its officers, employees; and/or agents from preventing and/or interfering and/or in any manner obstructing the petitioner from running the Pizza Hut outlets at Hyde Park and Gulmohar Road (Juhu) and/or ;

(c) pass ad interim injunction against the respondents from authorising and/or assigning the trademarks or trade name rights to any other person and for the use in the territory of Mumbai and Navi Mumbai ;

(d) pass ad interim order directing the respondents to deposit the damages with

this honourable court or in the alternative to furnish security for the said amounts recoverable and the damages by furnishing bank guarantees."

2. The brief facts giving rise to this petition are : Respondent No. 1 and its affiliated companies originated and own a distinctive restaurant operation system (the "Pizza Hut system"), which they license directly or through affiliates throughout the world. Respondent No. 1 has the exclusive right within India to use and to sublicense the use of the Pizza Hut system. On October 27, 1997, three agreements, namely development agreement, technology license agreement and trademark franchise agreement were executed by the petitioner and respondent No. 1, whereunder respondent No. 1 granted to the petitioner non-exclusive right to operate 25 Pizza Hut outlets for the territory of Mumbai and Navi Mumbai. The terms and conditions of the license were specified in the said agreements. The aforesaid agreements provided for termination of the contract by respondent No. 1 on the happening of any of certain specified events. These agreements also provided for adjudication of any dispute or difference of any nature to arbitration. At the time of execution of the agreements, the petitioner paid a sum of Rs. 18 lakhs to respondent No. 1 by way of advance. After execution of the agreements, the petitioner selected three sites for operating Pizza Hut outlets. By the letter dated March 23, 1998, respondent No. 1 communicated to the petitioner about the grant of exclusive right to use the Pizza Hut system for the territory of Mumbai and Navi Mumbai. On August 26, 1998, respondent No. 1 finally approved the sites and plans of the buildings proposed to be constructed for operating these outlets. However, the schedule for operating the said outlets by January 31, 1999, was not adhered to by the parties and the time was extended up to mid-1999. Thereafter, the petitioner started development of three outlets at Hyde Park, Gulmohar Road (Juhu) and Worli in accordance with the development agreement.

3. It is alleged that the petitioner also paid to respondent No. 1 a sum of Rs. 38 lakhs in terms of the agreements. While the outlets at Gulmohar Road, and Hyde Park were to be ready to go into operation in January, 1999, the petitioner received a notice dated December 14, 1998, terminating the contract on the grounds specified therein. According to the petitioner, the alleged termination of the contract is illegal. It is also alleged that the contract cannot be terminated with regard to the outlets at Hyde Park and Gulmohar as these outlets were to be ready to go into operation in January, 1999 and so they do not fall within the termination clause of the main contract. It is further alleged that since the petitioner was granted exclusive right to use the Pizza Hut system in Mumbai and Navi Mumbai, the respondents cannot repudiate the contract and grant the said license to a third party.

4. Respondent No. 1 resisted the petition contending that the present petition is not maintainable inasmuch as respondent No. 2, namely, M/s. Pizza Hut Inc. was admittedly not a party to the arbitration agreement pursuant to which the present proceedings have been initiated. It is alleged that as per agreements,

the petitioner was granted non-exclusive right to develop and operate Pizza Hut outlets in the territory of Mumbai and Navi Mumbai and the contract was terminated in terms of the agreement due to the petitioner's failure to develop and operate the outlets within the time stipulated therein. Further, the petitioner committed breaches of the contract inasmuch as certain cheques issued by the petitioner bounced when presented for encashment. Respondent No. 1 also discovered that the petitioner's financial position was not sound and further the managing director of the petitioner-company, namely, Dr. Viral Shah was also involved in a criminal case. It is also alleged that the development agreement dated October 27, 1998, contemplates the execution of a further contract of trade mark franchise between the petitioner, and respondent No. 2, namely, Pizza Hut Inc. In this view of the matter, the petitioner is not entitled to the interim relief inasmuch as neither the outlet agreement nor the trade mark franchise agreement has been executed between the petitioner and respondent No. 2, who is the owner of the trade mark "Pizza Hut". As per the development agreement, no outlet can be operated for trade prior to the execution of the trade mark license agreement between the developer (the petitioner) and respondent No. 2. It is further alleged that the development agreement dated October 27, 1997, falls in the category of contracts, the specific performance of which is barred u/s 14 of the Specific Relief Act, 1963 and so the petitioner is not entitled to the grant of interim injunction.

5. The principles to grant an injunction as an interim measure was the subject of discussion in several judicial pronouncements but the consensus opinion is that the grant of an injunction is a matter of discretion of the court and while exercising the discretion the court applies the following tests :

- (a) Whether the plaintiff has a prima facie case ;
- (b) Whether the balance of convenience is in favor of the plaintiff ;
- (c) Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

6. Needless to add that the court grants such interim relief according to the legal principles *ex debito justitiae*. In this context, I may profitably refer to the decision rendered in the case of *M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others*, , wherein the apex court laid down the following principles (page 652) :

"The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the

uncertainty were resolved in his favor at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the balance of convenience lies. (See : Wander Ltd. and Another Vs. Antox India P. Ltd., ."

7. Bearing in mind the said principles, I will now proceed to consider the question as to whether the petitioner has made out a prima facie case for the grant of temporary injunction. The learned senior counsel Mr. Singhvi appearing for the petitioner contended that since the petitioner has not committed any breach of the contract, its termination by respondent No. 1 was not valid and further the disputes between the parties with respect to the agreements dated October 27, 1997, have been referred to the Arbitral Tribunal, the termination of the agreement by the respondent cannot be treated as finality and, Therefore, the petitioner is entitled to interim protection till the matter is decided by the Arbitral Tribunal. According to him, respondent No. 1 was not legally entitled to exercise the right of termination of the contract with respect to outlets developed by the petitioner at Hyde Park and Juhu as they were substantially completed and were to be ready to go into operation in January, 1999. Reliance was placed on Clauses 9.1 and 6.5 of the development agreement dated October 27, 1997, in support of the said submission. On the other hand, it is contended by learned senior counsel Mr. Arun Jaitley that the petitioner having itself acted in violation of the terms of the development agreement dated October 27, 1997, and having breached the contract, cannot legally claim any interim protection from the court particularly as the petitioner itself is primarily responsible for having brought about the state of things complained by it. He also contended that the agreement falls in the category of contracts the specific performance of which is barred by Section 14 of the Specific Relief Act, 1963. He further contended that the contract has been terminated by respondent No. 1 and if the interim relief sought by the petitioner is granted it would have the effect of practically granting decree for specific performance of the contract, which is impermissible in law. Lastly, he contended that the petitioner can be adequately compensated for the loss caused to it by award of damages in the event of it succeeding in the arbitral proceedings and so the petitioner is not entitled to the grant of temporary injunction.

8. Admittedly, the disputes between the parties with respect to the contract in question have been referred to the Arbitral Tribunal. Learned senior counsel for the petitioner has highlighted certain facts to show that termination of the contract was illegal whereas learned senior counsel for respondent No. 1 has attempted to justify repudiation of the contract by respondent No. 1. The question whether the petitioner was responsible for the breach of the contract or not is to be decided by the Arbitral Tribunal. I do not propose to go into the same and leave it to the Arbitral Tribunal to deal with it.

9. It is significant to mention that the agreements dated October 27, 1997, set out the details of procedural, functional and operational issues, which involve prolonged watching over and supervision for their due performance within the time stipulated therein. Learned senior counsel for respondent No. 1 contended that a court cannot stop its normal functions for the purpose of giving effect to the terms of a contract which cannot conveniently be supervised or be enforced by the court itself. He also contended that the arrangement entered into between the parties is a commercial contract, a breach of which can always be compensated in money. He further contended that Clause 9 of the development agreement provided for termination of the contract by respondent No. 1 on the happening of any of certain specified events. According to him, a contract which is in its nature determinable cannot be specifically enforced and if a contract cannot be specifically enforced because it is covered by Section 14 of the Specific Relief Act, no injunction can be granted to prevent breach of such contract. On the contrary, learned senior counsel for the petitioner submitted that the agreements executed by the parties do not fall within the mischief of Section 14 of the Specific Relief Act inasmuch as clause 13.11.1 of the development agreement empowers arbitrators to order specific performance of the contract. It is significant to mention that admittedly the contract was terminated by respondent No. 1 vide notice dated December 14, 1998, The dispute between the parties has been referred to the Arbitral Tribunal in accordance with the arbitration agreement. The petitioner can be adequately compensated for the loss caused by award of damages in the event of it succeeding in the arbitral proceedings. Moreover, if the interim reliefs sought by the petitioner are granted it would have the effect of practically granting a decree for specific performance of the contract.

10. Next it was contended by Mr. Singhvi that respondent No. 1's letter dated March 23, 1998, constitutes a contract conferring exclusive right on the petitioner to operate the Pizza Hut outlets within the territory of Mumbai and Navi Mumbai and thus impliedly contains a negative covenant restraining the respondents from granting the trade mark license namely "Pizza Hut" to a third party for the said designated territory. The question for consideration is whether there was a contract between the petitioner and respondent No. 1 containing a negative covenant ? If so, whether the alleged negative covenant can be enforced by grant of an ad interim injunction disregarding the balance of convenience, irreparable loss or comparative hardship.

11. At the outset, I must make it clear that Section 42 of the Special Relief Act does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is, Therefore, a question of interpretation in each case whether a particular contract can be said to have a negative covenant, express or implied contained within it. The object of interfering with a contract is to ascertain the intention of the contracting parties. Inevitably, the issue here has to run around the terms of the contract, and Therefore, the relevant provisions of the agreements dated October 27, 1997,

may be read at the very outset.

12. The technology license agreement dated October 27, 1997, gives "background facts" as under :

"Licensor and/or its affiliated companies have developed a unique and valuable system, Pizza Hut system, for the preparation, marketing and sale of certain quality food products under various trade marks, service marks and trade names owned by them.

The system is a comprehensive quick service restaurant system for the retailing of a limited menu of uniform and quality food products. Emphasising prompt and courteous service in a clean and wholesome atmosphere which is intended to be particularly attractive to families. The foundation and essence of the system is the adherence by licensees to standards and policies providing for the uniform operation of all restaurants within the system including but not limited to serving designated food and beverage products ; the use of only prescribed equipment and building layout and designs ; and strict adherence to designated food and beverage specifications and to prescribed standards of quality, service and cleanliness in restaurant operations. Compliance by licensees with the foregoing standards and policies in conjunction with the trade marks, service marks and trade names provides the basis for the valuable goodwill and wide acceptance of the system. Moreover, the establishment and maintenance of a close personal working relationship with the licensee in the conduct of its restaurant business, its accountability for performance of the obligations contained in this agreement, and its adherence to the tenets of the system constitute the essence of the license provided for herein.

The licensor and licensee have entered into a development agreement dated October 27, 1997 (the development agreement) pursuant to which and subject to the terms whereof, the licensor granted to the licensee certain nonexclusive rights to establish outlets in the territory.

To allow the licensees to use the marks in the operation of the outlets developed there under a trade mark license agreement dated the date hereof has been entered into between the licensee and Pizza Hut Inc. ("PHI")

The licensee desires the use of the system to operate the outlets developed under the development agreement and the licensor is entitled to grant to third parties the right to use the system on the terms and conditions of this agreement."

13. Clauses 1.1 and 1.4 of the said agreement are as under :

"1.1 The licensor grants to the licensee the non-exclusive right to use the system for the term solely in connection with the conduct of the business at the outlets developed by the licensee in accordance with the development agreement and subject to the terms and conditions of this agreement.

1.4 No exclusive territory, protection or other right in the contiguous space, area or market of the outlets is expressly or impliedly granted to the licensee. The licensor has the right to use, and to grant to other parties the right to use, the marks and the system or any other marks, names or systems in connection with any product or service, including the approved products, at any location other than the outlets through any outlets, food service concept or distribution channel. The licensee acknowledges that the licensor and its affiliated companies operate systems for the sales of food products and services which are competitive with the system and may compete directly with the business."

14. Similarly Clause 1.2 of the development agreement provides that rights granted to the petitioner are not exclusive. The said clause is as under :

"1.2 Rights not exclusive.--No exclusive territorial or exclusive development rights are granted to the developer under this agreement or any other agreement between the licensor and developer. The licensor expressly reserves to itself and its affiliated companies (for development and operation by itself, its affiliated companies or through other developer) all other development rights in the territory."

15. Thus, both the aforesaid agreements make it clear that the petitioner was not granted exclusive rights to operate Pizza Hut restaurants for the territory of Mumbai and Navi Mumbai. At this juncture, learned senior counsel Mr. Singhvi has invited my attention to the letter dated March 23, 1998, written by respondent No. 1 in support of his contention that exclusive license was granted to the petitioner to operate restaurant outlets for the aforesaid territory. The letter dated March 23, 1998, is as under :

"March 23, 1998.

Shubh mangal Merchantile (P.) Ltd.

401, Kshmalaya,

37, New Marine Lines,

Mumbai-400 020.

Dear Sir,

This is to certify that PepsiCo Restaurants International (I) Pvt. Ltd. was a 100% subsidiary of PepsiCo Restaurants Inc., USA. Subsequent to a global business restructuring, the restaurant business of PepsiCo Inc, was hived off into a separate company called Trion Global Restaurants Inc. Effective October 6, 1997, the name of PepsiCo Restaurants International (I) Pvt. Ltd. has been changed to Trion Restaurants (I) Pvt. Ltd., which is an ultimate subsidiary of Trion Global Restaurants Inc.

Trion Restaurants (I) Pvt. Ltd. had granted Shubh mangal Merchantile (P) Ltd. all rights and obligations under the development, trademark and franchise

agreement for Pizza Hut, exclusively for the territory of Mumbai and Navi Mumbai.

Accordingly, Shubh mangal Merchantile (P) Ltd. is authorised to open a chain of stores selling products under the brand name "Pizza Hut" in Mumbai and Navi Mumbai. Thanking you, Yours faithfully, (Sd.) Tricon Bhansali, Director--Finance and Planning."

16. According to Mr. Singhvi, the said letter has to be construed as a written contract between the parties superseding Clauses 1.1 and 1.4 of the technology license agreement and Clause 1.2 of the development agreement and since it contains exclusivity provision conferring exclusive right on the petitioner to operate restaurant outlets within the territory of Mumbai and Navi Mumbai, it impliedly contains a negative covenant restraining the respondents from granting sublicense to a third party for operating these outlets within the said designated territory. Learned senior counsel for respondent No. 1 contended that the letter dated March 23, 1998, cannot be construed as a concluded contract inasmuch as execution of a further formal agreement to change or vary any term of the agreements dated October 27, 1997, was made a condition or term of the bargain and the said letter does not fulfill the said condition. He further contended that even assuming for a moment that the said letter could be construed as a contract, it does not override the terms of the main contract or otherwise create any obligation or liability independently of the main contract. In other words it does not grant exclusive license to the petitioner to operate Pizza Hut outlets within the territory of Mumbai and Navi Mumbai and, Therefore, the present petition for interim relief is not maintainable.

17. It is significant to mention that Clause 13.6.2 of the development agreement and Clause 21.6.2 of the technology license agreement clearly provide that the terms of the agreements may be changed only in writing signed by both the parties. It follows that execution of a written agreement by the contracting parties was a prerequisite to the coming into effect of any agreement regarding variation of any of the terms of the main contract. Needless to add where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not in writing and signed by the parties, there is no concluded contract. Reference may, in this connection, be made to the following observations of Lord Cairns in *W.J. Rossiter, George Curtis v. Daniel Miller* [1878] 3 AC 1124:

"If you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract."

18. As noticed earlier, the agreements dated October 27, 1997, provide for grant of non-exclusive license to the petitioner to operate 25 "Pizza Hut" outlets within

the territory of Mumbai and Navi Mumbai. As per the agreements, the aforesaid terms of the agreements can be changed only in writing signed by both the parties. Undisputedly, the letter dated March 23, 1998, was not signed by the respondents. Consequently, the letter dated March 23, 1998, does not satisfy the requirements of the aforesaid clauses of the main contract and, Therefore, cannot override the main contract or otherwise create any obligation or liability independently of the main contract pertaining to grant of non-exclusive right to the petitioner to operate Pizza Hut outlets within the territory of Mumbai and Navi Mumbai.

19. Even assuming for a moment that the letter dated March 23, 1998, can be construed as a concluded contract, the question that arises for consideration is whether it contains a negative covenant restraining the respondents from granting license to a third party for operating Pizza Hut outlets within the territory of Mumbai and Navi Mumbai. Mr. Singhvi learned senior counsel, has laid much emphasis on the expression "exclusively for the territory of Mumbai and Navi Mumbai" used in the said letter, in support of his submission that it clearly suggests that the petitioner will have a monopoly on the franchised rights in the designated territory. Learned senior counsel, with some ingenuity has also attempted to seek the aid of the dictionary meaning of the word "exclusively" as defined in Black's Law Dictionary (6th Edition) in support of his submission that the word "exclusively" is synonymous in legal import with the word "monopoly". Black's Law Dictionary defines the word "exclusively" as under :

"One granted exclusive right and license to use, manufacture, and sell patented article , . . one having exclusive right to use patented method and apparatus in designated territory."

20. According to learned senior counsel, the term "exclusively" was used in the letter dated March 23, 1998, to mean that the petitioner was the only licensed franchisee within the territory of Mumbai and Navi Mumbai and the absolute exclusivity in the said designated area constitutes a negative covenant restraining the respondents from granting right to a third party for operating the Pizza Hut outlets. Learned senior counsel Mr. Arun Jaitley, on the other hand, contended that the meaning of the word "exclusively" is to be determined with reference to the context and the relevant clauses of the main contract. In this connection, W. Michael Garner on Franchise and Distribution Law and Practice (vol 1) 1996 cumulative supplement has stated at page 9 as under :

"The notion of exclusive franchise rights has great allure, presumably because it suggests that the franchisee will have a monopoly on the franchised rights in a particular territory. However, the term is a potential source of confusion, and great care should be taken in determining what "exclusively" means in a particular agreement, if the term or concept is used at all."

21. In *H. Rubenstein and Co. v. Edgar Francis* AIR 1930 Lah 597, it was held that the mere use of the word "exclusively" does not imply a negative covenant to

refrain from doing certain things. I am in respectful agreement with the view taken by the Lahore High Court. When guidance is available from the said decision, reference to the dictionary meaning of the word "exclusively" becomes unnecessary. Consequently, the letter dated March 23, 1998, does not entitle the petitioner to claim the relief of interim injunction against the respondents. That apart, assuming that there was a negative covenant in the agreement, the same will be confined in its application to the period of subsistence of the contract and the restriction imposed therein is operative only during subsistence of the main contract. In the instant case, the agreements are no longer in operation since they have been terminated and so the question of enforcing the alleged negative covenant by granting the interim injunction does not arise.

22. For the reasons discussed above, I find and hold that the petitioner has failed to make out a prima facie case for grant of interim injunction. The balance of convenience also does not lie in favor of grant of the interim injunction as it would do more injury to the respondents than its refusal would occasion to the petitioner. Consequently, the petition is dismissed. Before I part with this order, I would like to make it clear that nothing stated herein shall affect the rights of the parties that are being agitated before the Arbitral Tribunal.