

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 4th March, 2014.

+ CS(OS) 2638/2013 & IA No.20999/2013 (u/O 39 R-1&2) & IA No.3945/2014 (u/O 1 R-10) & IA No.3946/2014 (u/O 39 R-1&2)

SANJEEV MITTAL

..... Plaintiff

Through: Mr. Rajat Wadhwa with Ms. Chiral Dugar, Ms. Sonakshi Awasthi and Mr. Honey Jain, Advs.

Versus

**M/S TIRUPATI INFRAPROJECTS PVT. LTD.
& ANR**

..... Defendants

Through: Mr. Rajiv Aneja with Mr. Asit Tewari, Advs. for D-1&2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for permanent injunction, pleading:
 - (i) that the defendant No.1 Company of which the defendant No.2 Mr. Adarsh Mohan is the Director, is the owner of Shopping Mall/Complex D Mall at Plot No.D, District Centre, Outer Ring Road, Paschim Vihar, New Delhi-110063;
 - (ii) that the plaintiff is engaged in the business of running liquor shop in and around Delhi and had approached the defendants for

taking two showrooms/shops on the ground floor of the said Mall on lease and the defendants had issued an “Exclusive No Objection Certificate” dated 10th April, 2011 to the plaintiff certifying that the plaintiff will be given exclusive right for opening of wine and beer shop under license issued by the Department of Excise, Government of Delhi and further gave him an assurance that the defendants would not give any permission of opening another wine and beer shop in the said Mall under any license whatsoever to anyone else in future;

(iii) that the plaintiff took the aforesaid two shops on rent on the aforesaid assurance and entered into a Lease Deed dated 18th April, 2011 with the defendant No.1 with respect to shops No.8 & 9 for the period starting from 15th June, 2011 till 14th June, 2020 with a lock-in period of 24 months;

(iv) that the plaintiff was asked to pay a higher rent amount than the normal rate in the said Mall owing to being conferred an exclusive right as aforesaid;

(v) that the defendant No.1 Company, after letting aforesaid shops to the plaintiff, sold shop No.8 to one Mr. Om Prakash (not a party to the suit) and the plaintiff has thereafter entered into a registered Lease

Deed with the said Mr. Om Prakash with respect to the said shop;

(vi) that the defendant No.1 also sold shop No.9 to one Mr. Jagdish Ahuja and Mrs. Simmi Ahuja (not parties to the suit) and the plaintiff has entered into a registered Lease Deed with respect to shop No.9 with the said Mr. Jagdish Ahuja and Mrs. Simmi Ahuja;

(vii) that the plaintiff in October, 2013 learnt that the defendants were negotiating with third parties having interest in opening liquor shop in the said Mall in violation of the “Exclusive No Objection Certificate” dated 10th April, 2011 issued to the plaintiff.

Hence, the suit for injunction to restrain the defendants from selling, letting, assigning or parting with possession of any showroom/shop for the purpose of opening and operating wine and beer/liquor shop in the Mall aforesaid.

2. Summons of the suit were issued to the defendants and though no *ex-parte* ad-interim relief as sought by the plaintiff, granted but it was ordered that the action taken by the defendants shall be subject to further orders in the suit and application.

3. However, after the defendants appeared before this Court, vide ad-interim order dated 5th February, 2014, the defendants were directed to

maintain *status quo* with regard to opening of another wine and beer/liquor shop in the Mall.

4. The plaintiff thereafter filed I.A. No.3945/2014 to implead M/s. HBN Dairies & Allied Ltd. as a party to the present suit, contending that the defendants, to defeat the interim orders in this suit against them have transferred a shop in the Mall to the said M/s. HBN Dairies & Allied Ltd., which is a sister concern of the defendant No.1 Company with the defendant No.1 Company and the said M/s. HBN Dairies & Allied Ltd. are having common Directors, together with I.A. No.3946/2014 to restrain the said M/s. HBN Dairies & Allied Ltd. also from opening a liquor shop or letting out the shop transferred to them for the purposes of vending liquor therefrom.

5. The aforesaid applications came up before this Court first on 28th February, 2014, when the entitlement of the plaintiff to maintain a suit for injunction as claimed, was enquired into and it was further enquired as to how the “Exclusive No Objection Certificate”, even if an enforceable agreement, was not in restraint of trade and anti competition and how the same could be enforced. It was also enquired as to how the Certificate, issued by the defendants being developers/builders of the Mall, was enforceable against persons to whom the defendants transferred different

shops/spaces in the Mall and whether not such persons were entitled to carry on any business/trade therefrom including of vending liquor.

6. On the request of the counsel for the plaintiff, the matter was adjourned to today and in the meanwhile, notice of the applications was also issued to the defendants as well as proposed defendants.

7. The report of service of the notice issued is awaited. However, the counsel for the defendants appears. He states that he is not the counsel for the proposed defendant M/s. HBN Dairies & Allied Ltd.

8. The counsel for the plaintiff has been heard on the aspect of entitlement of the plaintiff to the injunction claimed.

9. The counsel for the plaintiff has argued:

(a) that Section 6(d) of the Transfer of Property Act, 1882 provides that property of any kind may be transferred except as otherwise provided by the said Act or by any law for the time being in force and makes all interest in property restricted in enjoyment to the owner personally, non-transferable. On the basis thereof, it is contended that the defendants, while transferring different shops/spaces in the Mall to others, were / are obliged to restrict enjoyment thereof in terms of the Certificate issued by them to the plaintiff;

(b) attention was next invited to Section 55(1)(a) of the Transfer of Property Act dealing with rights and liabilities of buyer and seller—in the absence of a contract to the contrary, and providing that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware. On the basis thereof also it is argued that the defendants as sellers of different shops/spaces in the Mall were / are bound to disclose to the transferees/purchasers that the shops/spaces transferred to them could not be used for the purpose of vending liquor;

(c) that the question whether Agreement aforesaid between the plaintiff and the defendants as contained in the “Exclusive No Objection Certificate” is anti competitive or not, can be determined only by the Competition Commission of India established under The Competition Act, 2002 and the jurisdiction of the Civil Court to go into the said question is barred. Reference in this regard is made to Sections 3, 19 & 61 of the said Act;

(d) that Section 3 of the Competition Act prohibits agreement which causes or is likely to cause an appreciable adverse effect within India and will have no application to competition within the Mall;

- (e) that the plaintiff in equity, is entitled to the injunction claimed. Reliance in this regard is placed on the judgment dated 16th January, 1889 of the Supreme Court of Alabama in *Clay Vs. Powell ET AL*;
- (f) that the plaintiff agreed to pay a higher rent for the said shop in consideration of the “Exclusive No Objection Certificate”;
- (g) that the aforesaid “Exclusive No Objection Certificate” in the form of a negative covenant can be enforced;
- (h) that Section 27 of the Indian Contract Act making the agreements in restraint of trade void, would also not apply as the trade of the defendants is of selling/leasing spaces and the plaintiff is not restraining the defendant from doing so and the defendants from the other shops/spaces in the said Mall can carry on businesses other than of vending liquor;
- (i) that since the leases of the plaintiff are subsisting, the negative covenant has to be enforced, during the subsistence thereof;
- (j) that an affidavit of the Advocate for the plaintiff is also handed over to argue that the defendant No.1 Company and M/s. HBN Dairies & Allied Ltd. have as many as four common Directors;

10. During the course of hearing, attention of the counsel for the plaintiff was also invited to Section 11 of the Transfer of Property Act which provides that where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of transfer direct that such interest shall be applied or enjoyed by him in a particular manner, the transferee shall be entitled to receive and dispose of such interest as if there was no such direction, and it was enquired from the counsel for the plaintiff, whether not a condition if imposed by the defendants, while selling/transferring other shops/spaces in the Mall, that the same will not be used or permitted to be used for vending liquor, would be in contravention of Section 11 of the Act.

11. The counsel for the plaintiff has responded by referring to ***Bhagwat Prasad Vs. Damodar Das*** AIR 1976 Allahabad 411 and has argued that such a restriction would fall within the second part of Section 11 of the Transfer of Property Act which provides that where such restriction has been made in respect of a piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, the first part of Section 11 shall not apply.

12. The counsel for the plaintiff, after close of hearing has also submitted

copies of the judgment in *M/s. Gujarat Bottling Co. Ltd. Vs. Coca Cola Company* AIR 1995 SC 2372 and *Vijaya Minerals Pvt. Ltd. Vs. Bikash Chandra Deb* AIR 1996 Calcutta 67 and *Joseph George Vs. Chacko Thomas* MANU/KE/0323/1991 (DB), with special reference to Section 40 of the Transfer of Property Act.

13. I have during the hearing also enquired from the counsel for the plaintiff as to how the suit for injunction is not barred by Section 41 of the Specific Relief Act, 1963 which bars an injunction from being granted where the contract of which performance is claimed by injunction, is not specifically enforceable. It was further enquired from the counsel for the plaintiff whether not the remedy if any of the plaintiff is by seeking either a reduction in rent or by claiming damages.

14. It was yet further enquired from the counsel for the plaintiff, whether not the grant of injunction in such a case, would be against public interest by forcing all visitors/customers of the said Mall to purchase liquor only from the plaintiff and who would thus be deprived of making a choice.

15. No cogent answers have been forthcoming.

16. The counsel for the defendants has not made any submissions on the aforesaid aspect.

17. I have considered the matter. At the outset, I may clarify that though the summons of the suit have been issued and the defendants have not filed written statement as yet but the counsel for the plaintiff has been heard on the aforesaid aspects, since the same do not entail any factual controversy and further since it has been felt that if the plaintiff is, for the reasons aforesaid, not found entitled to the relief of injunction, no purpose would be served by putting the suit through the rigmarole of procedures.

18. I conclude that the plaintiff is not entitled to the relief of permanent injunction restraining the opening/setting up of any other liquor shop in the aforesaid Mall, inspite of the defendants, being the developers/builders thereof, having issued the Exclusive No Objection Certificate aforesaid to the plaintiff, for the following reasons:

- (I) The “Exclusive No Objection Certificate” dated 10th April, 2011 on which the claim of the plaintiff is based, is as under:

“Exclusive No Objection Certificate

This is to certify that Tirupati Infraprojects Pvt. Ltd., has given exclusive right to Mr. Sanjeev Mittal for opening of wine and beer shop under licence issued by Department of Excise, Govt. of Delhi, at D Mall, Plot No. ‘D’ District Centre, Paschim Vihar, New Delhi 110063. The company has given full commitment and assurity to Mr. Sanjeev Mittal that we will not give permission for opening of another wine and beer shop in the mall under

any licence whatsoever to any one else in future and fully understands that Mr. Sanjeev Mittal has taken the shops on lease in the mall on this condition only.

For Tirupati Infraprojects Pvt. Ltd.

Sd./-

Director.

Place : New Delhi

Date : 10.04.2011”

- (II) Lease of shops No.8&9 was granted by the defendant No.1 Company to the plaintiff vide unregistered Deed dated 18th April, 2011. The said Lease, though was for a period of nine years, but being unregistered was a tenancy from month to month, terminable by either party by a fifteen days notice; though the same provided for a lock-in period of 24 months but with a further stipulation that in the event of breach thereof, the rent for the full period would have to be paid. Thus, as per the unregistered Lease Deed also, the plaintiff was entitled to terminate the Lease at any time and could not be enjoined from doing so and the only liability would be for payment of damages. The said Lease also required the plaintiff to obtain all licenses required to open a wine and

beer shop in a Mall and did not contain any stipulation, as in the “Exclusive No Objection Certificate” aforesaid.

(III) The registered Lease Deeds executed by the plaintiff with the persons to whom the defendant No.1 Company has transferred the shops and in the tenancy of the plaintiff, also do not contain any such clause as in the “Exclusive No Objection Certificate” aforesaid. Rather, the said Lease Deeds do not contain any reference to the earlier Lease Deed dated 18th April, 2011 granted by the defendant No.1 Company to the plaintiff and are for a period of nine years with effect from 1st January, 2012.

(IV) The business of vending wine and beer/liquor is regulated by the Delhi Excise Act, 2009 and the license obtained by the plaintiff and copy of which has been filed before this Court is not found to contain any such condition that there will be no other liquor shop in the vicinity. No law/regulation also to the said effect has been cited.

(V) Section 21 of the Delhi Excise Act enables the Government

only to grant exclusive privilege *inter alia* of sale by retail within any local area. Rule 22 of the Delhi Excise Rules, 2010 vests the power to determine the number of liquor shops in any area, depending upon the necessity to meet the reasonable requirement of the population. Vide Rule 50, every licensee, as the plaintiff claims to be, is bound by the provisions of the Act and the Rules.

(VI) The plaintiff and the defendants, it thus appears, cannot be permitted by Agreement among themselves to wrest the power which under the Act and the Rules aforesaid vests in the Government i.e. to determine a number of liquor shops in any area and to grant exclusive privilege to retail liquor in any local area, as would be the effect of granting the injunction sought by the plaintiff.

(VII) Rule 53(6)(b) of the Rules aforesaid also suggests that a licensee can deal in liquor of one brand only. The effect of granting the injunction claimed by the plaintiff would be to force the buyers, visitors and consumers of the subject Mall to buy liquor only of the brand stocked by the plaintiff.

(VIII) The Agreement of the defendants with the plaintiff as contained in the “Exclusive No Objection Certificate” aforesaid was only to not give permission for opening of another wine and beer shop in the Mall to anyone else in future. Though the said Agreement was a precursor/part and parcel of the contract of letting between the plaintiff and the defendants but upon the defendant No.1 Company selling/transferring the shops let out to the plaintiff to others and the plaintiff attorning to the said others as landlord and entering into fresh Lease Deeds with the others, the relationship between the plaintiff and the defendant No.1 Company has ceased to exist and I am unable to see as to how the contract as contained in the “Exclusive No Objection Certificate” issued by the defendant No.1 to the plaintiff would survive such attornment by the plaintiff of others as landlord in substitution of the defendant No.1 Company.

(IX) Even if the contract as contained in the Exclusive No Objection Certificate of the plaintiff with the defendant No.1 Company were to be held to survive the attornment by the

plaintiff of others as landlord, the said contract as aforesaid, was only not to give permission for opening of another wine and beer shop in the Mall. The question of granting such permission by the defendants would arise only if the permission of the defendant No.1 Company were to be required.

- (X) In my view, no permission of the defendant No.1 as developer/builder of the Mall for opening of such liquor shops would be required, if the transferees of other shops/spaces in the Mall were to desire to open a liquor shop.
- (XI) The agreement/contract aforesaid did not require the defendant No.1 Company to, while transferring such shops/spaces impose on the transferee, any such condition, not to use shop/space for the purpose of vending liquor.
- (XII) The practice of the developers/builders of such commercial buildings/malls entering into an agreements to transfer spaces therein, even prior to the completion of construction is common to the trade. It is highly unlikely that the defendant

No.1 Company, prior to issuing the “Exclusive No Objection Certificate” dated 10th April, 2011 to the plaintiff, had not transferred any other shops/spaces in the Mall to others. No such restriction in any case could be placed on such transferees and the said transferees would be entitled to, without seeking any permission from the defendant No.1, use the shops/spaces acquired by them for any purpose including of vending liquor. It is not the case of the plaintiff that the defendant No.1 Company till 10th April, 2011 had not transferred any other shop/space in the said Mall. Once, it is held that such transferees could not be restrained and more than one liquor shops could thus find its way in the Mall, I fail to see the purpose in granting the injunction against the defendant.

(XIII) I also do not find any merit in the argument of the counsel for the plaintiff that the defendant No.1 Company as developer/builder of the Mall is entitled to, while selling/transferring the shops/spaces in the Mall, impose any such condition on the transferee. In my view, such a

condition would clearly be unenforceable under the first part of Section 11 of the Transfer of Property Act and the second part thereof relied upon by the counsel for the plaintiff has no application. The counsel for the plaintiff has not able to show as to how the same is for beneficial enjoyment of another piece of such property or with respect to which portion of the property, the direction/restriction has been made; the second part of Section 11 is to deal with the situations as the right of way etc, as was the case in ***Joseph George*** supra. The reliance placed by the counsel for the plaintiff on Section 6(d) and Section 55(1)(a) of the Transfer of Property Act, is found to be misplaced;

(XIV) I am further of the view that the Agreement aforesaid, is clearly in restraint of trade and anti competition and void for the said reason. The invocation of the exception to Section 27 of the Contract Act is again misplaced. Section 3 of the Competition Act also provides that no agreement *inter alia* for provision of services which causes or is likely to cause an appreciable adverse effect on competition, shall be entered

into and if entered into, shall be void.

(XV) The grant of such an injunction is also found to be contrary to the public interest and such an Agreement is also not found to be specifically enforceable for the reason of compensation in money being adequate relief therefor;

(XVI) The judgment in *M/s. Gujarat Bottling Co. Ltd* supra on Section 27 of the Contract Act and the other judgments cited by the counsel for the plaintiff are found to have no applicability. The judgment of the Supreme Court of Alabama in *Clay Vs. Powell ET AL* is of an era prior to the provisions such as in Section 27 of the Contract Act and the Competition Act, also can have no application. Rather, the same also holds that the agreement not to allow another to carry on the business of tobacco in the hotel could not be enforced against the transferees of the persons who had so contracted.

(XVII) I fail to see as to how the jurisdiction of the Civil Court can be said to be barred as is claimed.

19. The suit is accordingly dismissed.
20. No costs. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 04, 2014.

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(Corrected and released on 12.03.2014)