

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

+ O.M.P.(I) 454/2015 & I.A. Nos.17627/2015, 19315/2015 &
19316/2015

% **Date of Decision: 19th October, 2015**

SWIFT INITIATIVE PVT. LTD. Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr.Nikhil Rohatgi, Mr. Mohit
Khubchandani, Advocates.
versus

DILIP CHHABRIA DESIGN PVT. LTD. Respondent
Through: Mr. Atul Nanda, Senior Advocate
with Ms. Rameeza Hakeem, Mr.Rajat
Brar and Mr. Parinay T. Vasandani,
Advocates.

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996, in which the petitioner has sought the following reliefs against the respondent: -

“A. Pass an ad-interim ex-parte order restraining the Respondent and all its agents, employees, representatives and assigns from making any sales whatsoever in the territories of NCT of Delhi, Chandigarh, Ludhiana, Lucknow and NOIDA except through the Petitioner,

B. Pass an ad-interim ex-parte order restraining the Respondent and all its agents, employees, representatives and assigns from making any sales to persons who are residents of the NCT of Delhi.”

2. *Factual matrix*

2.1. The respondent is engaged in the business of designing and modifying various models of cars and manufacturing a sports car known as ‘*D.C. Avanti*’.

2.2. Vide five separate Franchise agreements all dated 27th September, 2013, the respondent appointed the petitioner as its franchise in respect of five territories, namely, Lucknow, Noida, Gurgaon, Ludhiana and Chandigarh.

2.3. Under clause 3.2 of the agreements, the petitioner was given the exclusive right to operate the franchise business in the territories mentioned in the agreements. The '*Franchise Business*' has been defined as selling of the respondent's products from the showroom premises. The '*Showroom Premises*' has been defined as designated addressed showrooms. The relevant clauses of the Franchise Agreements are reproduced hereunder:

“ARTICLE 1
DEFINITIONS

When used in this Agreement, the defined terms set forth in this Article 1 shall have, unless otherwise required by the context thereof, the following meanings:

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Franchised Business means the selling of the Products from the Showroom Premises.

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Products means all products as described in Annexure B to the agreement and as modified from time to time.

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Showroom Premises have the meaning set forth in the recitals to this agreement and shall mean the Franchisee Owned and Franchisee Operated (FOFO) showrooms as well as additional showroom premises that have been rented/leased/licensed by the Franchisee in the Territory for the purposes of the Franchised Business.

ARTICLE 2

TERM

2.1 Initial Term

The agreement shall commence from the Commencement Date and shall expire after a term of five (5) years, unless sooner determined; by the Franchisor. However neither the Franchisee nor the Franchisor shall be entitled to terminate this Agreement before expiry of the lock in period i.e. five years, except in accordance with the terms and conditions as provided hereinafter.

2.2 Renewal

Upon the expiration of term of 5 (five) years the Agreement may be renewed for the further term of 5 (five) years upon same terms and conditions between the Parties, such option being available to the Franchisee on account of payment of Franchisee Fee as acknowledged in this Agreement. Further in the event the Franchisee is desirous of renewing the Agreement for a further term of 5 (five) he will have to give written notice of the same to the Franchisor 3 (three) months before the expiration of the Initial Term of 5 (five) years.

ARTICLE 3

GRANT

3.1 Franchisee Business

Subject to the terms and conditions of this Agreement and the due continuing performance by the Franchisee of its obligations hereunder, the

Franchisor hereby grants to the Franchisee, for and during the Term, a non-transferable right and license to operate the Franchised Business in the Territory and to use for such purpose, the Brand Name, the intellectual property, the System and any Confidential Information in association thereof (hereinafter referred to as the “Franchise”). The Franchisee accepts the said grant of Franchisee and agrees to operate the Franchised Business in accordance with the provisions thereto.

3.2 Exclusivity & Additional Showroom Premises

- (a) *In consideration of the payment agreed to be paid by the Franchisor to the Franchisee as stipulated in Article 5 and by the Franchisee to the Franchisor as stipulated in Article 6, and the performance by the Franchisee of the other covenants and Agreements herein contained, the Franchisor grants to the Franchisee an exclusive right to operate the Franchised Business in the Territory during the Term.*
- (b) *It is agreed that in case of expansion, if the Franchisor seeks to grant another franchise in the Territory of the Franchisee demonstrates need for expansion, then notwithstanding anything contained herein, the Franchisee shall at its sole option have the right to establish and operate additional Showroom Premises in the Territory under this Agreement, as an addendum to the present Agreement without requiring execution of fresh agreement however.*
- (c) *It is agreed that the Franchisee shall be solely responsible for and liable to the Franchisor to ensure that the Franchised Business in such additional Showroom Premises (subject to prior approval of the Franchisor) is carried out as agreement in the same manner and upon the same terms and conditions as the present*

Agreement. The Franchisee shall keep the Franchisor fully indemnified in respect of any third party claims of whatsoever nature in relation to operation and functioning of such additional Showroom Premises.

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6.3 Establishment of Showroom and layout.

(a) The Franchisee assumes all cost, liability, expense and responsibility for locating, obtaining and developing the Showroom Premises, and for constructing, equipping, and furnishing the Showroom Premises as per the Franchisor's specifications as stated in Annexure C to this Agreement. Further the Franchisee undertakes that it will obtain an additional space for an Assembly Unit within one year of the setting up of the Showroom Premises.

(b) The Franchisee agrees to set up the Showroom Premises as stated in Article 6.3 (a) of this Agreement on or before 27th September, 2013. In the event the Franchisee fails to set up the Showroom Premises as stated herein the Franchisor shall have a right to revise the terms and conditions of this Agreement or terminate this Agreement as the Franchisor may deem fit.

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ARTICLE 11

TERMINATION

11.1 Termination of the Contract:

11.1.1 Termination with cause: *Franchisee may terminate this Agreement immediately upon written notice to Franchisor in the event that there is a change in control of Franchisor, or existing Director-Mr. Bonito Dilip Chhabria is changed.*

11.1.2 Termination without cause: *Either party by giving not less than 180 days written notice to the*

other party may terminate this Agreement without cause during the renewed Term i.e. after expiration of the initial Term. However, notwithstanding anything contained herein, (a) If the Franchisor terminates this Agreement without cause during the renewed Term then the Franchisee Fee as paid under this Agreement shall be refundable to the Franchisee; (b) if the Franchisee terminates this agreement during the renewed Term i.e. after expiry of the initial Term, whether with or without cause there shall be no refund of the Franchisee Fee.

11.1.3 Termination with cause: A party (a “Non-Defaulting Party”) may terminate this Agreement without liability by notice in writing (the “Termination Notice”) to the other party (a “Defaulting Party”) if the Defaulting party;

(i) commits a material breach of its obligations under this Agreement and fails to remedy the breach within thirty (30) days of being specifically required in writing to do so by the Non-Defaulting Party;

(ii) makes an assignment for the benefit of creditors generally;

(iii) suffers any distress, execution, sequestration or other similar process is levied or enforced upon or sued out against its property which is not discharged: or an encumbrance takes possession of, or an administrator, an administrative receiver, a receiver, a trustee, liquidator or similar person is appointed over the whole or any substantial part of its undertaking, property or assets or those of its Holding Company; or order is made or a resolution is passed for the winding-up of the Defaulting Party: or enters into any agreement or arrangement with any one or more of its creditors with a view to the general readjustment or rescheduling of its indebtedness; or avails of any statutory protection or proceedings or takes any other acts for protection against its creditors generally.

(iv) *the Defaulting Party is subject to any decision, ruling, judgment, order, law, regulation, decree or other intervention of a regulatory authority or government which prevents or materially affects its continued involvement in its business in relation to this Agreement and which the Parties are unable to mitigate the effects of.*

(v) *undergoes liquidation, insolvency, voluntary or involuntary winding up, except winding up in the course of an amalgamation or merger.*

11.1.4 Either of the Parties hereto shall be entitled at its sole discretion to terminate this Agreement forthwith by a notice to the other party, if any direction or order from any authority in the either Party's territorial jurisdiction and/or the Republic of India or any change in applicable statutes, rules and regulations or government policies is made which prevents or significantly impairs the implementation of this Agreement or directly or indirectly so restricts the scope and exercise of rights and privileges or either of the Parties hereto so as to render the objectives of this Agreement impossible to achieve.

11.1.5 Either party may terminate this Agreement on account of material breach that renders the performance of reciprocal obligations, as per this Agreement, impossible. For example, if the Franchisor defaults in payment of commission for over two months or in case the Franchisee fails to deposit the sales proceeds in accordance with this Agreement, acts similar to these shall constitute a material breach of this Agreement. Any failure to rectify a material breach of this Agreement by the defaulting party within 15 days of notice by the non-defaulting party, will give the right to the non-defaulting Party in addition to and without prejudice to other remedies to terminate this Agreement, notwithstanding any the lock-in-period in the initial Term.

11.2 Consequences of Termination

Upon termination of this Agreement, whether by efflux of time, by termination pursuant to any provision of this Agreement, by mutual consent of the parties, by operation of law, or in any other manner, the Franchisee shall cease to be the Franchisee of the Franchisor and shall hand over all the products lying with them including kits of the Demo Vehicles to the Franchisor immediately and full accounts in respect of the Product sold and shortage or less if any and to pay immediately without demur any amounts owing to the Franchisor, as per the Franchisor's book of accounts. Further, the Franchisee shall do cause to be done the following:

- (a) Immediately and permanently discontinue the use of any of the Trade Names, Brand Name any of the Logos or any marks which in the opinion of the Franchisor are confusingly similar thereto, or any other materials which may in any way indicate or tend to indicate that Franchisee is or was in any way associated with the Trade Name.*
- (b) Immediately and permanently remove and surrender, at Franchisee's expense, all signs and signages containing any of the marks, Trade Names, Logos, or other things the use of which is prohibited by paragraph above.*
- (c) Promptly surrender to the Franchisor all stationery, letterheads, forms, printed matter, promotional displays, and advertising containing any of the marks, names, Logos, or other things as the use of which is prohibited by paragraph above.*
- (d) Immediately return to Franchisor all copies of the guidelines, instructions and advertisement materials, for the Franchised Business which have been provided to it by Franchisor.*
- (e) All accounts between the Parties shall be settled within 15(fifteen) days of the termination of the Agreement as stated above.*

(f) Termination of this Agreement under any circumstances shall not abrogate, impair, release, or extinguish any debt, obligation, or liability of the Franchisor that may have accrued hereunder, including without limitation, any such debt, obligation, or liability that was the cause of termination or arose out of such cause.

(g) All covenants and Agreements of the parties hereto, which by their terms or by reasonable implication are to be performed, in whole or in part, after the termination of this Agreement, shall survive such termination.”

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ARTICLE 14

LAW AND ARBITRATION

14.1 Any and all breach of warranty) or claims, disputes, questions or controversies involving the Parties hereto or arising out of or in connection with this Agreement, including its execution, interpretation, validity, performance, breach of termination (collectively, “Disputes”), shall be referred to and finally resolved by binding arbitration at the Delhi International Arbitration Centre in accordance with its Rules (as amended at www.dacdelhi.org). The parties agree to seek to resolve any Dispute arising out of the Agreement in accordance with the following escalation procedure before commencing the arbitration procedures described below.

14.2 The Contact Persons (as defined above) of both parties shall work in good faith to try to resolve and/or cure the Dispute within fifteen days from the date that a party first gives notice that a Dispute has occurred. In case of failure by the Contact Persons to resolve the Dispute within a further period of 15 days (i.e. 30 days in all) either Party shall be free to apply for and refer the Dispute to arbitration.

14.3 The arbitration shall be held in New Delhi by a sole arbitrator appointed in accordance with the Rules of the Delhi International Arbitration Centre. The language of the arbitration shall be English. The governing law of the arbitration shall be Arbitration and Conciliation Act, 1996 as amended. The award of the arbitrator, including the apportionment of the expenses of the arbitration, shall be final and binding upon the parties, and judgment upon the award rendered may be entered in any court having jurisdiction.

14.4 The Parties hereto expressly understand and agree that the award made by the arbitrator shall be sole, exclusive, final and binding remedy regarding any and all Disputes presented to the sole arbitrator. In the event of either parties refusal to adhere to the foregoing arbitration provision, that exclusive jurisdiction and venue with respect to any claims or disputes arising under this Agreement shall lie in the courts of New Delhi, India.

14.5 The parties may bring Court action to seek interim protection as per Section 9 of the Arbitration and Conciliation Act, 1996.

(Emphasis supplied)

2.4. The Petitioner was required to set up the showrooms in the five territories namely Ludhiana, Chandigarh, Gurgaon, Lucknow and Noida by 27th September, 2013 in terms of clause 6.3(b) of the Franchise agreements. However, the petitioner did not open the showrooms at Lucknow and Noida. The Petitioner opened the showrooms at Ludhiana, Chandigarh and Gurgaon but the same were closed on the 9th April, 2015, 22nd April, 2015 and 12th May, 2015 respectively. After closure of the Gurgaon showroom, the Respondent opened the showroom in the same premises and is directly carrying on

the business there.

2.5. Vide notice dated 24th March, 2015, the respondent terminated the Franchise agreements. The petitioner sent the reply dated 11th April, 2015 to the termination notice dated 24th March, 2015. Both the parties are blaming each other for breach of the terms and conditions of the Franchise agreements.

3. **Petitioner's submissions:**

3.1. The termination of the Franchise agreements dated 27th September, 2013 vide notice dated 24th March, 2015 is illegal. The notice dated 24th March, 2015 is vague and not in terms of the agreement. The initial term of the Franchise agreements was five years from 27th September, 2013 to 27th September, 2018 and Clause 2.1 provides that neither party can terminate the agreements before the expiry of five year period. Clause 11.1.2 relating to termination without cause can be invoked only after the expiration of initial period of five years. Clause 11.1.3 relating to termination with cause can be invoked only after a mandatory notice and failure of the petitioner to remedy the breach within 30 days thereof. However, neither any notice under Clause 11.1.3 has been given by the respondent nor any opportunity has been afforded to the petitioner to remedy the breach.

3.2. Clause 3.2(a) of the Franchise agreements grants an exclusive right to the petitioner to operate the franchise business in the five territories. Clause 3.2(a) constitutes a negative covenant in respect of which the petitioner is seeking injunction under Section 42 of the Specific Relief Act.

3.3. Reliance is placed on *Gujarat Bottling Co. Ltd. v. Coca Cola Co.* (1995) 5 SCC 545, *Image Advertising v. Anand Prakash* 2011 (176) DLT 97, *Frank Simoes Advertising (P) Ltd. v. Hada Leasing and Industries Ltd.* AIR 1988 Delhi 362 and *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.*, AIR 1967 SC 1098. Reliance is also placed on Corpus Juris Secundum Vol. XXXIII, in which word ‘*Exclusive*’ has been defined to mean “*to the exclusion of others, only and sole*”. Reliance is also placed on the definition of ‘*Exclusive*’ in American Jurisprudence which means and includes “*the grant also excludes competitive business by the grantor himself*”.

4. **Submissions of the respondent:**

4.1. The petition is barred by Section 41(e) read with Section 14(1)(a) and (c) of the Specific Relief Act, 1963 as the Franchise agreements are determinable in nature and compensation in money is an adequate relief for the alleged non-performance. The injunction sought for by the petitioner amounts to a virtual specific performance of the agreement which is not permissible in law. Reliance is placed on *Rajasthan Breweries Ltd. Vs Stroh Brewery Co.* (2008) 55 DRJ 68, *India Oil Corporation Ltd. vs. Amritsar Gas Services* 1991 (1) SCC 533, *E. Venkatakrishna vs. Indian Oil Corporation* (2000) 7 SCC 764, *Bharat Catering Corporation vs. India Railway Catering and Tourism* 164 (2009) DLT 530 (DB), *Cox and Kings India Ltd. vs. India Railway Catering* ILR (2012) I Delhi 1, *Percept D’Mark India Pvt. Ltd. vs. Zaheer Khan* (2006) 4 SCC 227. Reliance is also placed on *Ravissant Pvt. Ltd. Vs D F Export SA* 2008 (38) PTC 222

(Del), *M/s Vidya Securities Ltd. Vs M/s Comfort Living Hotels Pvt. Ltd.* AIR 2003 Delhi 214, *Cogent Silver Fibre Pvt. Ltd. Vs Noble Fibre Technologies Inc.* AIR 2006 Delhi 292, *Mittal Services vs Escotel Mobile Communication Ltd.* AIR 2003 Delhi 410.

4.2. The petitioner has already invoked the arbitration and has filed statement of claim in which the petitioner has quantified the loss occasioned due to the termination of the Franchise agreements as under:

“Prayer (Relief Sought)

A. DAMAGES PAYABLE AS OF DATE:-

a. Actual Losses:

- i Capital Expenditure = Architect's & Contractor's bills = Rs.2,56,60,150 + Mobile App. Rs.24,00,000 + Kits: Rs.51,06,750 + Tables: Rs.3,71,541 + Computers: 3,13,450+ 8 Demo Cars: Rs.95,50,000/-*
= Rs.4,34,01,891/-
- ii Running Expenditure (4 operational showrooms, Excluding Corporate Office) = Rs.7,24,55,037/-*
- iii Franchisee Fee = Rs.2,25,00,000/-*

b Existing Liabilities:

- i Unpaid Commissions (non-Avanti + 18% Interest p.a. for 10 months) (Avanti + 18% Interest p.a. for 2 years) = (49,52,570+ 7,42,885) + (76,78,600 + 27,64,296) = Rs.1,61,38,351/-*
- ii Loans + Interest: Rs.6,79,15,116 + Rs.2,04,35,843 = Rs.8,83,50,959*

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C. LOSS OF PROFITS:-

- a. Opportunity Loss till date: Revenue that could have been earned till date (As per business plan) (minus) (Sum total of Revenue actually collected plus Capital Expenditure plus Running Expenditure till date) i.e: (29,79,925 per month x 6 showrooms x 18.75 months = 335241562.5) (minus) (Commissions earned till date i.e. 11677817 + Commissions adjusted with DC Design 35,00,000 15177817) plus Capital Expenditure i.e. 6,51,02,836.5 (4 showrooms actually made + 2 which would have been made) plus Running Expenditure till date (4 showrooms i.e. 7,24,55,037 + average running expenditure for remaining 2 non-operational showrooms i.e. 3,62,27,518.5) = Rs.14,62,78,353.5
- b. Loss of Future Profits: (Revenue that would be earned in the future as per business plan i.e. 29,79,925 per month x 42 months x 6 showrooms) 75,09,41,100 (minus) (Running Expenditure which would have been incurred till 27.09.2018 for 6 showrooms i.e. 23,01,29,487 = Rs.52,08,11,613/-

D. OTHER LOSSES:-

- a. Goodwill = Rs.5,00,00,000/-
- b. Mental Torture and agony = Rs.1,00,00,000/- "

4.3. Clause 3.2 relied upon by the petitioner is not a negative covenant inasmuch as there is no express or implied negative agreement in terms of Section 42.

4.4. The petitioner has neither pleaded any negative covenant in the petition nor made any prayer for seeking injunction in respect of a negative covenant dated 24th March, 2015.

4.5. Even assuming Clause 3.2 to be a negative covenant, it would operate only during the pendency of the Franchise agreements and not after the termination.

4.6. Without prejudice, it was submitted that the petitioner cannot seek injunction against the respondent from directly undertaking any sales. Reliance was placed on *Usha International (India) Pvt. Ltd. v. Omicrom Electronics GMBH* 114 (2004) DLT 740.

4.7. Without prejudice, it was submitted that the petitioner's claim was barred by the Proviso to Section 42 of the Specific Relief Act as the petitioner has failed to perform the terms of the Franchise agreements. Admittedly, the petitioner has closed down the showrooms at Ludhiana, Chandigarh and Gurgaon. The petitioner did not open the showrooms at Lucknow and Noida. The petitioner is not ready and willing to perform his obligations under the contract. The petitioner has accepted the termination dated 24th March, 2015 and also accepted the refund of the franchise amount from the respondent in respect of Lucknow territory. Reliance is placed on *Shubhmangal Mercantile Ltd Vs Tricon Restaurants (India) Pvt. Ltd-* 1999 (50) DRJ 437, and *S.K Gupta, Prop, M/s Rohini Times Vs. Hyderabad Allywn Ltd* 34 (1998) DLT 27, *Fashion Television India Pvt. Ltd Vs FTV Bvi* 2012 (127) DRJ 535, *Yogesh Radhakrishnan Vs Media Networks & Distribution* 201 (2013) DLT 773 and *M/s Krishav*

Trade Concern Vs Translumina Therapeutics LLP 2014 (2) R.A.J 412 (Del).

4.8. The petitioner has approached this Court after more than five months of the termination and is not entitled to the injunction.

4.9. The petition is also barred by Sections 182, 205, 206 & 207 of the Contract Act. Section 182 defines the relationship of principal and agent. Sections 205 to 207 of the Contract Act provide the remedy of compensation alone in the event of the revocation of the agency without sufficient cause. Reliance was placed on ***R.M.S.T. Narayana Chettiar v. The Kaleeswarar Mills Ltd.*** AIR (39) 1952 Madras 515 (C.N. 116).

4.10. The balance of convenience is in favour of the respondent and against the petitioner. If the respondent is restrained from carrying on the business as prayed for by the petitioner, the loss occasioned by the respondent cannot be compensated in terms of the money if the respondent ultimately succeeds before the arbitrator. On the other hand, if the petitioner succeeds before the arbitrator, the petitioner can be compensated in terms of money.

5. **Legal Position**

The law with respect to the grant of injunction in commercial contracts is well settled. Section 14(1)(c) bars the specific performance of contracts in respect of which the compensation in money is an adequate relief for their non-performance. Section 14(1)(c) bars the specific performance of contracts which are determinable in nature. Section 41(e) of the Specific Relief Act

provides that no injunction can be granted in respect of the contracts which cannot be specifically enforced. However, Section 42 of the Specific Relief Act empowers the Court to grant an injunction in respect of a negative agreement provided that the plaintiff has not failed to perform his obligation under the contract. The relevant provisions of the Specific Relief Act, 1963 are reproduced hereunder:-

“Section 14. Contracts not specifically enforceable.”-(1)

The following contracts cannot be specifically enforced, namely:--

(a) a contract for the non-performance of which compensation in money is an adequate relief;

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(c) a contract which is in its nature determinable;

Section 41. Injunction when refused. - *An injunction cannot be granted-*

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(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

Section 42. Injunction to perform negative agreement.-

Notwithstanding anything contained in clause (e) of section 41, 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 circumstance 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:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.”

6. **Nature of Franchise Agreements**

From the conjoint reading of Clauses 2.1, 11.1.1, 11.1.2, 11.1.3, 11.1.4 and 11.1.5, it is clear that the Franchise agreements are commercial contracts determinable in nature and compensation is adequate relief for their non-performance. In that view of the matter, Section 14(1)(a) and (c) of the Specific Relief Act bars their specific performance and Section 41(e) bars the grant of injunction in respect of the Franchise agreements. However, the petitioner is not seeking the specific performance of the Franchise agreements. In that view of the matter, the judgments mentioned in paragraphs 4.1 and 4.2 above do not need any discussion. The Petitioner is claiming injunction to enforce the negative covenant and therefore, this Court has to consider whether Clause 3.2(a) constitutes a negative covenant and if so, whether the petitioner is entitled to an injunction under Section 42 of the Specific Relief Act. The petitioner has relied upon ***Gujarat Bottling Co. Ltd. v. Coca Cola Co.*** (supra) and three other judgments mentioned in para 3.3 above in which injunction was granted to enforce a negative covenant whereas the Respondent is relying upon judgments mentioned in para 4.7 in which the injunction to enforce a negative covenant was declined. The legal principles with respect to the grant of injunction to enforce negative covenant under Section 42 of the Specific Relief Act are well settled. The Court has to examine the facts of this case to decide whether the injunction should be granted or not. The ratio of one case cannot be mechanically applied to another case without regard to the factual situation and circumstances of the two cases. A judicial precedent has to be applied

with reference to the facts of the case involved in it. The ratio of any decision has to be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation made in it.

7. **Whether Article 3.2(a) constitutes a negative covenant**

Clause 3.2(a) grants the exclusive right to the petitioner to operate the franchise business in the territories during the term which constitutes a negative covenant according to the petitioner. According to the respondent, it is not a negative covenant. This Court is of the view that Clause 3.2(a) bars the respondent from appointing any other franchise in the marked territory during the term of the agreements and is, therefore, a negative covenant. However, the prohibition shall operate during the validity of the contract and not after its termination. If the intention of the parties had been to bar the respondent from appointing any other franchise even after the termination, the parties would have specifically incorporated the same in Clause 3.2(a) or Clause 11. Secondly, Clause 3.2(a) cannot be interpreted to prohibit the respondent from directly carrying on the business without appointing a franchisee. In ***Usha International (India) Pvt. Ltd. v. Omicrom Electronics GMBH***, 114 (2004) DLT 740, this Court considered whether the exclusivity clause would disentitle the franchiser from directly entering the market. This Court held that the exclusivity clause does not mean exclusion even of the principal and cannot be extended to disentitle and disable the principal from directly entering the market. This Court agrees with the view taken by this Court in this judgment.

8. **Whether the petitioner is entitled to an injunction under Section 42 of the Specific Relief Act**

Section 42 of the Specific Relief Act empowers the Court to grant an injunction to perform a negative covenant provided that the petitioner has not failed to perform the contract so far it was binding on him. In the present case, Clause 6.3(b) provides that the petitioner shall set up the showrooms on or before 27th September, 2013 failing which the respondent would be entitled to terminate the agreements. Admittedly, the petitioner never opened the showrooms at Lucknow and Noida. The petitioner opened the showrooms at Ludhiana, Chandigarh and Gurgaon but the same were also closed down well before filing the petition. On the date of filing of the petition, the petitioner was not operating any showroom in the territories. The petitioner has also accepted refund of the Franchise fees in respect of the Lucknow showroom. After closure of the Gurgaon showroom, the Respondent opened the showroom in the same premises without any objection from the Petitioner. In that view of the matter, the Proviso to Section 42 disentitles the petitioner to seek the injunction against the respondent.

9. **Termination of the Franchise agreements**

The respondent has terminated the Franchise Agreements vide notice dated 24th March, 2015. Clause 2.1 prohibits the termination of the agreements without cause for the lock-in period of five years. However, Clause 11.1.3 and 11.1.5 provide for termination with cause during the lock-in period subject to the notice and petitioner's failure to remedy the breach within the notice period. The respondent has

admittedly not given any such notice to the petitioner to remedy the breach and has proceeded to straight away terminate the agreements by notice dated 24th March, 2015. The petitioner is claiming the termination to be illegal and is seeking a declaration to that effect in the statement of claim before the arbitrator. The termination notice dated 24th March, 2015 is not in terms of Clause 11 of the Franchise Agreement inasmuch as the mandatory notice to remedy the breach has not been given to the petitioner before termination. Validity and consequences of such termination shall be considered by the arbitrator. However, it appears that the petitioner has accepted the termination as the petitioner has closed down the Ludhiana, Chandigarh and Gurgaon showrooms; did not even open the showrooms at Lucknow and Noida and was not ready and willing to operate the showrooms. It is not the petitioner's case that the petitioner temporarily closed the showrooms and wanted to re-open them.

10. **Prima facie case**

As per clause 3.2 of the Franchise agreements, the Petitioner has exclusive right to operate the Franchise business meaning thereby that the Respondent cannot appoint any other franchisee if the Petitioner operates the showrooms in terms of the Franchise agreements. The Petitioner could claim an injunction to enforce clause 3.2 if the Petitioner was operating all the five showrooms in terms of the Franchise agreements. However, the petitioner has failed to open the two showrooms at Lucknow and Noida and closed the three showrooms at Ludhiana, Chandigarh and Gurgaon with no intention

to re-open them and has therefore lost the right to seek the injunction. There is no prima facie case in favour of the petitioner to seek an injunction against the respondent.

11. **Balance of convenience**

At the time of filing of this petition, petitioner was not operating any showroom in any of the five territories mentioned in the agreements. The petitioner has admittedly closed the showrooms at Ludhiana, Chandigarh and Gurgaon whereas the showrooms at Lucknow and Noida were not even opened. The petitioner is claiming compensation to the tune of Rs.96,99,36,204/- including loss of future profits to the tune of Rs.52,08,11,613/-. The balance of convenience is in favour of the respondent. If the injunction prayed for is granted to the petitioner, the petitioner would not be able to carry on the business whereas if the injunction is declined, the petitioner has already computed its loss in the statement of claim. The effect of the injunction sought by the petitioner would be that neither the petitioner nor the respondent will carry on any business which itself appears to be inequitable and would also prejudice the petitioner's claim for damages. It would be inequitable to restrain the respondent from carrying on the business and still award loss of future profits to the petitioner. To balance the equities, it would be appropriate to permit the respondent to carry on the business and keep the proper accounts during the pendency of the arbitration proceedings.

12. **Irreparable loss and injury**

No irreparable loss or injury would be caused to the petitioner if the injunction is not granted as the petitioner has already computed its

loss in its statement of claim reproduced in para 4.3 above. On the other hand, the respondent would suffer irreparable loss and injury if the injunction prayed for, is granted to the petitioner as the respondent is directly carrying on the business after the termination. The respondent is also directly running the Gurgaon showroom from the same premises where the petitioner closed down. The respondent claims to have 200 employees at the Gurgaon showroom/workshop. The respondent also claims to have booked orders but the production has been put on hold due to the *ex parte* interim order dated 20th August, 2015.

13. **Conclusion**

On careful consideration of the rival contentions raised by the parties, this Court is of the view that the petitioner is not entitled to the injunction prayed for. The petition is therefore dismissed. However, the respondent is directed to maintain true accounts of the business, carried out either directly or through franchisee(s), and shall file quarterly accounts of its business before the learned arbitrator. I.A. no. 19315/15 is allowed and the interim order dated 20th August, 2015 is vacated. The other applications are hereby disposed of.

Needless to say that the observations made above are *prima facie* and are not intended to influence the decision of the arbitrator.

**J.R. MIDHA
(JUDGE)**

OCTOBER 19, 2015
dk