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

\+ Crl.M.C.No. 1968/2015

Judgment reserved on : 17.01.2018
Date of decision : 28.02.2018

P.N. FLOWERS ..... Petitioner

Through: Ms. Ananya Bhattacharya, Advocate

versus

M/S FERNS & PETALS PVT. LTD. & ORS...... Respondents

Through:

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. Vide the present petition Crl. M.C. 1968/2015, the petitioner P.N. Flowers through its proprietor Mr. Pulkit Gera assails the impugned order dated 04.04.2015 of the ASJ-01, West, Tis Hazari Courts whereby in CR No. 32/14 the order dated 21.07.2014 of the MM concerned in CC No. 141/P/14 vide which the complaint CC No.141/P/14 filed by the petitioner under Sections 409/420/120B IPC, 1860 was dismissed, was upheld observing to the effect that there was no illegality, infirmity or perversity therein observing to the effect that there was no reason to summon the persons arrayed as the proposed accused for the offences alleged inasmuch as the petitioner was admittedly availing of an efficacious remedy available under the civil

law before the appropriate forum in relation to the stated breach of an agreement.

2. The TCR has been requisitioned and has been received and written submissions were submitted on behalf of the petitioner and oral arguments were also addressed.

3. Vide the complaint filed by the petitioner under Sections 409/420/120-B IPC, 1860, the complainant i.e. the present petitioner alleged that it is a proprietorship concern and through its proprietor Shri Pulkit Gera, the petitioner entered into a franchise agreement dated 22.10.2012 for a initial term of three years which was executed by Shri CK Gudgudhia, Director of M/s Ferns & Petals Pvt. Ltd. arrayed as respondent no.3. on behalf of the M/s Ferns & Petals Pvt. Ltd. the accused no.1 and the petitioner was made to part with his hard earned money amounting to Rs. 5 lacs as a non-refundable security amount and Rs. 12,000/- per month as a franchise fee. The petitioner herein i.e. the complainant also submitted that in terms of the agreed specific terms of the franchise agreement between the franchisor, the accused could grant the franchise(s) to the other third parties within a vicinity but could not do so within a radius of 2 kms. of the franchised outlet of the petitioner. Clause 7.5 of the agreement entered into between the petitioner and the respondent no.2 was to the effect that:-

> *"the parties hereby acknowledge and agree that franchisor may grant other franchises within the vicinity, which will not be in the radius of two kilometers of this outlet."*

4. The petitioner alleged that contrary to this specific term agreed between the parties, the accused persons deliberately, dishonestly and

behind the back of the complainant entered into another franchise agreement with another entity at shop no.2, 3/72 Old Rajinder Nagar, main Shankar Road, New Delhi admittedly within a radius of 2 kms. of the outlet of the complainant in direct contravention and contrary to the specific agreed terms of the franchisee agreement.

5. The petitioner further submitted that during the first week of July (apparently a reference to July, 2013), the petitioner was shocked to notice that the renovation and interior work was being carried at shop no.2, 3/72 Old Rajinder Nagar, main Shankar Road, New Delhi with the board M/s Ferns & Petals Pvt. Ltd. and thereafter on 4th July, the complainant lodged his written protest against the accused persons. It was submitted by the petitioner further that the accused persons on 6th July, 2013 in complete derogation of the franchisee agreement informed the complainant i.e. the present petitioner that the accused persons had amended the terms of the franchisee agreement with immediate effect to read as under:

> *"the parties hereby acknowledge and agree that franchisor may grant other franchises within the vicinity, which will not be in the radius of one kilometre of this outlet."*

6. *Inter alia* the petitioner submitted that the mala-fide intention of the accused persons was also brought forth through the factum that they were not marking their e-com orders due to which the petitioner was suffering irreparable losses of amounts per day and their credibility was being affected in the eyes of the public at large and that the sole intention of the accused persons was that the business of the complainant be destroyed completely. The petitioner further

alleged through the complaint as submitted before the Magistrate that the accused persons was deliberately creating impediments for the complainant with the mala-fide intention that the complainant incurred huge amount of losses each day and that whereas the complainant was getting orders worth above more than Rs. 2,500/- per day by way of e-commerce under the control of the accused persons which had now been deliberately reduced to Rs. 5,00/- per day which according to the petitioner conclusively proved that the accused persons were deliberately causing huge losses to the appellant and legal notice dated 08.07.2013 was sent on behalf of the complainant i.e. the present petitioner to the accused persons which was not replied to by the accused.

7. *Inter alia* the petitioner herein as complainant through the complaint before the MM concerned submitted that the accused no.1 was a legal entity managed by the CEO accused no.2 and the Directors of the accused no.1 i.e. accused nos. 3, 4, 5, 6 & 7 its Vice-President who were all well-aware of the specific terms of the franchise agreement and in connivance with each other had breached the specific terms of the legal contract and committed the offences for which the accused persons are liable to be prosecuted. The petitioner through its complaint before the MM had thus sought that the cognizance of the offences committed by the accused persons be taken under Sections 409/420/120-B IPC, 1860 be taken and that the accused persons be summons and prosecuted.

8. Vide order dated 21.07.2014, the ACMM (West) dismissed the complaint observing that no ground for summoning of the accused

persons was made out (after consideration of the testimony of the complainant as CW-1 in which he had stated that he had entered into a franchisee agreement with the accused persons on 22.10.2012, had paid a sum of Rs. 5 lacs to the accused person for grant of franchisee for three years and a monthly royalty of Rs. 12,000/- per month plus taxes and had also deposed that as per the franchisee agreement that he agreed that no other franchisee would be granted within the radius of 2 kms from shop of the complainant and that in the first week of July, 2013, he noticed the board of his shop hanging over an under construction shop at Shankar Road and stated that the shop was within the radius of 2 km from his shop and the same was in violation of Clause 7.5 of the franchisee agreement. The observations in the order dated 21.07.2014 of the ACMM, West are to the effect:

> *"It is the admitted case of the complainant that he had paid a sum of Rs. 5 Lacs to the accused as non-refundable security amount for grant of franchisee for a period of three years. It is also the case of the complainant that the complainant was liable to pay a sum of Rs. 12,000/- pm to the accused as franchisee fee. The complainant in his complaint or his testimony recorded in the court had nowhere alleged that the accused persons had cancelled his franchisee before the expiry of stipulated period of three years. The agreement between the parties was executed on 22.10.2012 and the said period of three years is yet to expire. The accused*

persons had not cancelled the franchisee of the complainant.

The case of the complainant is that an agreement was executed between the parties on 22.10.2012 and in pursuance of the said agreement the complainant started his business. As per complainant, in first week of July 2013 i.e. after about 8 months of his starting his business, he noticed that one shop under construction was having the board of the accused No. 1. During the course of arguments Ld counsel for the complainant had stated that due to protest made by the complainant, the said shop never became operational and it was closed even before commencing of the business.

The basic grievance of the complainant is that the accused persons had amended clause 7.5 of the franchisee agreement dated 22.10.2012 unilaterally and without obtaining his consent. As per clause 7.5 of the said agreement the accused persons had undertaken not to grant franchisee within a radius of 2 KM from the shop of the complainant. Perusal of franchisee agreement dated 22.10.2012 shows that as per clause 7.4 of the said agreement, the agreement may be amended/modified or discharged in whole or in part by the parties to the said agreement. However, in the present case, the same was done by the accused persons without obtaining the consent of the complainant.

I am of the considered view that the mere act of amending one clause of the agreement without obtaining the consent of the complainant ipso facto does not amount to criminal breach of trust, cheating etc. more particularly in view of the fact that the shop at Shankar Road never started functioning and it was closed even before commencement of the business by it. The complainant had never demanded back the sum of Rs. 5 Lacs paid by him to the accused persons and it is nowhere alleged that the accused persons had refused to do so. It is also pertinent to mention that the said amount, as per complainant himself was non refundable. The franchisee agreement is still subsisting between the parties. Ld counsel for complainant had also stated at Bar that civil suit is also pending between the parties.

Keeping in view facts and circumstances as well as the discussion made hereinabove, I am of the considered view that the complainant has. failed to show that wrongful loss was caused to him or wrongful gain was caused by the accused persons to themselves. I am also of the considered view, that mere unilateral amendment in one clause of an agreement does not amount to criminal breach of trust or any other offence. The act of the accused persons at the most is a civil breach of a term/ clause of an agreement and the same in itself does not amount to a criminal act entailing criminal action".

9. Vide the order dated 04.04.2015 the learned ASJ-01 (West) in CR 32/14 held that even if it is taken to be true that the terms of the franchise agreement had been violated, it tantamounts to breach of agreement and the petitioner had admittedly availed the efficacious remedy available under the civil law by way of filing a civil suit in the appropriate forum and it was thus observed that there was no reason to summon the accused persons as sought by the petitioner.

10. In the order dated 21.07.2014 of the ACMM, West in the complaint filed by the petitioner in in CC141/P/14 it has *inter alia* been observed to the effect that:

> "*During the course of arguments ld. Counsel for the complainant had stated that due to protest made by the complainant, the said shop never became operational and it was closed even before commencing of the business. The observations made in the said order were also reflected in the order dated 04.04.2015 of the ASJ-01 (West)".*

11. On behalf of the petitioner during the course of submissions made in the present petition it is indicated that on 01.07.2015 it was submitted on behalf of the petitioner that it was never asserted on behalf of the petitioner before the trial Court that due to the protest, the petitioner/complainant's shop had not become functional and had closed even before commencing the business and time was sought on behalf of the petitioner to file an affidavit in relation thereto. The proceedings dated 01.07.2015 are to the effect:

*"………….**CRL.M.C. 1968/2015**, Learned counsel for petitioner submits that it was never asserted on behalf of petitioner before trial court that due to protest, petitioner/complainant's shop had not become functional and had closed even before commencing the business.*

Learned counsel for petitioner submits that an affidavit to this effect would be filed within four weeks from today. Trial court record be requisitioned".

12. Vide affidavit dated 04.09.2015 it was stated by Advocate Ms. Ananya Bhattacharya enrollment D-1515/2005 *inter alia* to the effect that:

"I further state that no statement was ever made by any of the Ld. Counsels during the course of the submission of the arguments before the trial court to the effect that due to protest made by the petitioner the respondent's shop had not become functional and had closed even before commencing the business. Rather, it is an admitted fact that the shop was allowed to become functional by the respondent even after the protest was made by the petitioner".

to contend that the shop of the respondent was functional even after the protest made by the petitioner.

13. Through written submissions submitted on behalf of the petitioner it was submitted that in the civil suit filed by the petitioner herein as plaintiff thereof it was submitted that in the written statement, the accused persons as defendants admitted the commencement of the operation of the franchisee Ms. Ekta Chhabra for the Shankar Road area w.e.f. 22.07.2013 as stated in para-2 of the written statement:

> *"2. That the present suit is also not maintainable already having become infructuous as the defendant company had already appointed Mrs. Ekta Chhabbra as its franchisee for the Shankar Road Area before the filing of the present suit and that the said person had commenced its operation as Franchisee of the defendant Company on 22.07.2013, and as such the present suit deserves dismissal".*

14. It was thus submitted on behalf of the petitioner that the factum that the respondents had allowed the opening of the franchisee outlet within a radius of 2 kms from the outlet of the petitioner, contrary to the agreed terms of the franchisee agreement without obtaining the consent of the petitioner and had amended the franchisee agreement even in violation of Clause 7.4 of the agreement while changing the limitations of opening of a franchisee shop within the radius of 2 kms. of the shop of the complainant to 1 km. which was done unilaterally without any prior intimation or consent of the complainant i.e. the petitioner and the same had been done arbitrarily which had resulted in unlawful gain to the accused persons and unlawful loss to the

complainant, which amounted to the commission of criminal offences of a criminal breach to trust amongst others committed by the accused.

15. *Inter alia* it was submitted on behalf of the petitioner that merely because the act of the accused brought forth a civil liability that does not mean that criminal liability of the accused could not be attracted and that the criminal liability and the dishonest and criminal act of the accused persons was evident from the very beginning and that the accused persons had with malafide intention led the complainant to enter into the franchisee agreement by deliberately and dishonestly misrepresenting the facts and usurped the money of the complainant and after the franchisee agreement being signed, the non-refundable franchisee fee had been usurped by the accused to the tune of Rs. 5 lacs.

16. On a consideration of the averments made in the complaint in CC141/P/14, East Patel Nagar, the testimony of the complainant CW-1 recorded in the said complaint case and on perusal of the order dated 21.07.2014 of the ACMM, West and order dated 04.04.2015 of the ASJ-01, West, Tis Hazari Courts, even on taking into consideration the affidavit filed by the learned counsel for the petitioner to contend that there was admittedly a franchisee shop opened within a radius of 2 kms of the franchisee shop of the petitioner which had been allowed to be made functional despite the protest of the petitioner, it is essential to observe that the said violation even if done unilaterally by the respondents in contravention of Clauses 7.4 and 7.5 of the franchisee agreement dated 22.10.2012 between the accused no.1

through accused no.3 on its behalf and the petitioner herein, can only be termed to be violation and breach of the terms of the agreement entered into between the petitioner and the respondents for which the petitioner can seek and is already seeking redressal before the Civil Court.

17. In the circumstances of the instant case as rightly observed vide the order dated 04.04.2015 of the ASJ-01, West, Tis Hazari Courts and vide order dated 21.07.2014, the ACMM, West, no summons can be issued qua the alleged accused persons for any criminal liability for the alleged commission of offences punishable under Section 406/409/420/120-B IPC, 1860.

18. The petition is thus dismissed.

ANU MALHOTRA, J.

FEBRUARY 28, 2018
vm