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

Date of Decision: 26th April, 2018

\+ **RFA 702/2016**

BIG SHOE BAZAR INDIA PVT LTD. ..... Appellant

Through: Mr. Rupesh Kumar Tyagi, Advocate. (M:9958872981)

versus

VIVEK GANDHI ..... Respondent

Through: Mr. Shalabh Singhal, Advocate. (M:9810653635)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. This is an appeal against the final judgment and decree dated 26th May, 2016 by which the Trial Court has decreed the suit of the Respondent/Plaintiff (*hereinafter, 'Franchisee'*) in the following terms:

> "*50. In view of aforesaid discussion of the court, suit of the plaintiff is decreed with cost for recovery of Rs.7,07,981/- (Seven Lakh Seven Thousand Nine Hundred Eighty One) alongwith pendente-lite and future interest @ 13% per annum.*"

2. A Franchise Agreement (*hereinafter 'Agreement'*) was entered into between the Appellant/Defendant- BIG SHOE BAZAR INDIA PVT LTD (*hereinafter, 'BSB'*) which operated an e-commerce website by the name *www.bigshoebazaar.net.* The Agreement, *inter alia*, contained the following terms and conditions.

> "*1. BSB and the Franchisee have mutually*

decided to do business wherein, the Franchisee has agreed to open a Bigshoebazaar store at ***Civil Lines, Bijnour, U.P.***
2. To open this store, the Franchisee has minimum area is ***650 sq. ft. approx*** *and investment is around* ***8 Lakh Rs*** *for stock deposit only and* ***4 lakh*** *for infrastructure costing.*
3. This agreement will be for a period of ***9 years*** *and can be extended further after* ***3 years*** *as mutually agreed by the both parties.*
4. During this period, the Franchisee would maintain a store branded as Bigshoebazaar or by whatever name the BSB brand is known as.

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11. For the purchases made, the Franchisee would get ***45 thousand as a minimum guarantee plus 7%*** *commission on sales every month. This amount would be given as cheque/RTGS payment on every* ***10^{th} of each month. VAT would be reimbursed by the company****.*

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19. To finalize this agreement the Franchisee is giving a cheque of ***8.5 lakhs*** *rupees in the name of* ***Bigshoebazaar India Pvt. Ltd.*** *and its dated* ***8.5 lakhs****. This amount would be treated as advance given to the company against future* ***purchase of stocks*** *at the store. Cheque no-011721/011724.*
20. ***BSB and franchise will have work together for 3 years****. After completion of this period any side can wind up operation with 60 days prior notice.*

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24. Franchisee will purchase Rs.2 lakh as a stock in between Durga puja and Diwali in this year.”

3. The Franchisee – the proprietor of M/s Gandhi Enterprises, referred to as Franchisee in the Agreement was to run a retail show room of *Bigshoebazaar.net.* in the city of Bijnour, Uttar Pradesh. The date of the Agreement is 13th August, 2010 and the same was for a period of 9 years extendible for a further period of 3 years. There was a lock-in period of 3 years as per clause 20. Disputes arose between the parties very early after the execution of the Agreement and notice dated 12th August, 2011 was served upon the Franchisee, *inter alia*, alleging the following violations by the Franchisee:

> "*1. There is no support from your side to the manager which is hampering the business.*
> *2. You are not allowing our team to install the Logic Software as agreed.*
> *3. You do not update POS on immediate basis. The Company officials have reminded you various times. However you still continue to do so.*
> *4. Your behaviour with the store manager Mr. Nahar Singh is not professional. You behave with him in a highly unprofessional manner. Even you have not allowed our store manager to go to the store room.*
> *5. Your sell sometimes products without bills.*
> *6. You are not passing the discounts to the customers which Company is providing you.*
> *7. You do not allow to use the computers to our team so that they can make the necessary entries relating to the sale of the products.*
> *8. Your actual stock is tallying with the accounting records.*"

4. In reply to this letter, the Franchisee simply replied that the company secretary was not authorised to issue the show cause notice. Thereafter,

however, it appears that the Agreement was implemented by the parties and the Franchisee purchased the products from BSB periodically. The Franchisee has placed on record several e-mails to show that the relationship between the parties continued till 2013.

5. As per the Agreement, the minimum guarantee amount of Rs.45,000/- per month was to be paid by BSB to Franchisee which, according to the Franchisee, was not paid despite repeated requests. Finally, the Franchisee issued letter dated 19th August, 2013 and gave notice of 60 days of termination of the Agreement. Since the minimum guarantee amount was not paid, the present suit was instituted before the Trial Court seeking payment of minimum guarantee amount. Prayers of the suit are as under:

> "*(a) pass a money decree for recovery of Rs.7,07,981/- (Rs. Seven Lac Seven Thousand Nine Hundred Eighty One Only) in favour of the plaintiff and against the defendant.*
> *(b) Award future and pendente-lite interest @ 18% per annum on the decretal amount from the date of filing of the suit till actual realization of the amount.*
> *(c) Award cost of litigation in favour of the plaintiff.*
> *(d) Pass such further order/direction which this Hon'ble court may deem fit and proper in the facts and circumstances of the present case."*

6. BSB filed its written statement and took the defence that the Franchisee was in deliberate violation of various clauses of the Agreement. It also stated in the written statement that the Agreement did not survive after October, 2011 and that the minimum guarantee amount is being demanded only by means of extortion.

7. The following issues were struck in the suit on 11th April, 2014.

> "*1. Whether the plaintiff committed breach of franchisee agreement dated 13.08.2010, if so its effect? OPD*
> *2. Whether plaintiff is entitled for recovery of any amount from defendant, as prayed? OPP*
> *3. If the previous issue is decided in favour of plaintiff, to what amount actually plaintiff is entitled? OPP*
> *4. Whether plaintiff is entitled for interest, if so on what rate and for what period? OPP*
> *5. Relief.*"

8. The Franchisee led the evidence of Shri Vivek Gandhi, PW1 who exhibited the following documents:

> a) **Ex.PW 1/1** – Franchise Agreement dated 13th August, 2010;"
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> b) **Ex.PW 1/2 – Ex.PW 1/20 & Ex.PW 1/61 and Ex.PW 1/62** – Copies of communication letters and postal receipts;
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> c) **Ex.PW 1/20 – Ex.PW 1/38** – Copies of emails along with attachments exchanged between parties;
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> d) **Ex.PW 1/39 – Ex.PW 1/41** – Copies of clippings of newspaper Hindi Daily Dainik Jagran along with photographs;
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> e) **Ex.PW 1/42 – Ex.PW 1/43** – Photographs of 'bigshoebazar' store;
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> f) **Ex.PW 1/44 – Ex.PW 1/46** – Rent receipts;
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> g) **Ex. PW 1/47** – Appointment letter of Mr. Ajay Sharma – Store Manager;

h) **Ex.PW 1/48 – Ex.PW 1/60** – Vouchers showing payment of salary to Mr. Ajay Sharma;

i) **Ex.PW 1/63** – Copy of ledger maintained on the website of in the name and style of *'bigshoebazar.net'*

9. Despite repeated opportunities being granted to BSB, cross-examination of the Franchisee's witness was not conducted. The witness was repeatedly appearing before the Trial Court and finally on 13th May, 2015 the following order was passed:

> "*An application under Order IX Rule 7 CPC filed on behalf of defendant. Copy supplied.*
>
> *Arguments on the application heard.*
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> *It is stated in the application that proxy counsel for defendant appeared in the court on 23.03.2015 when the matter was adjourned for hearing on 13.04.2015. By mistake Learned proxy counsel noted a wrong date being 30.04.2015 which sound phonetically similar to 13.04.2015. It is further stated that for this reason, learned counsel for defendant could not appear in the court on 13.04.2015.*
>
> *This is a suit for recovery. No prejudice which cannot be compensated by way of cost is going to be caused to the plaintiff, if the parties are allowed to contest their respective case on merits. Further on 13.04.2015 witness Vivek Gandhi was present, who had come all the way from, Bijnore, U.P. for the purpose of examination in this case. He is required to be called again by the plaintiff. Considering the facts and circumstances, application under Order IX Rule 7 CPC is allowed subject to payment of cost of Rs.10,000/- in favour of plaintiff to be paid within a week from today.*
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> *The cost be tendered in the office of Learned*

counsel for plaintiff or be deposited in the account bearing No.165005000007, LEXJURIS, ICICI Bank, Bhogal Branch, New Delhi-110014, which is provided by Learned Sh. Manas Kumar today in the court to Sh. Srikant.

Subject to deposition/receipt of cost, plaintiff shall produce the witness for his cross examination by defendant on 28.05.2015. In case of failure of deposition of cost, the parties shall be prepared for final arguments. "

10. An application came to be filed under Order IX Rule 7 of CPC seeking an opportunity to cross-examine the Franchisee's witness and the same was allowed subject to payment of Rs.10,000/- as costs. However, the said cost was not paid. On 28th May, 2015, the Trial Court held that due to non-payment of costs, BSB cannot be allowed to cross-examine the Franchisee's witness or to proceed with the defence. Another application under Section 151 CPC came to be moved by the Defendant, which was again heard by the Trial Court on 10th September, 2015. The Trial Court records that in the interest of justice, one more opportunity is given to BSB subject to payment of Rs.15,000/- as costs. Even this cost was not paid by BSB. On 8th March, 2016 an application for waiver of costs was filed by BSB in which the following order was passed:

"*Fresh vakalatnama filed by Sh. Gaurav Garg, Advocate for defendant.*

An application u/s 151 CPC seeking waiver of cost of Rs.15,000/- has been moved by defendant.

Arguments heard.

It is stated by learned counsel for defendant that financial condition of the defendant is not well and even a petition for winding up of the defendant is pending before Hon'ble High Court *of Delhi.*

From the copy of the order sheets and the company petition 605/15, which is attached alongwith application, it is seen that the petition is filed by some third party. Date of hearing in the petition was fixed on 26.02.16. On being specifically asked as to what happened on 26.02.2016, it is stated by learned Sh. Gaurav that the defendant, who is respondent in the petition did not appear in the petition. Defendant appears to be interested in delaying the case only. Accordingly, the application u/s 151 CPC is dismissed.

Cost may be included in the decree, if not paid.

Both the learned counsel for the parties seeks adjournment for final arguments.

Matter be put up for final arguments on ***16.5.16***."

11. The matter was finally heard on behalf of both the counsels for Franchisee and BSB and the impugned judgment came to be passed.

12. In the present appeal on 11th January, 2017 this Court recorded that BSB is not in a position to deposit the decretal amount and hence the stay application was not pressed by BSB.

13. Trial court record has been summoned and final arguments in the matter have now been heard. A perusal of the trial court record shows that this is a classic case where a commercial suit is being unnecessarily delayed due to the recalcitrant attitude of BSB. The Trial Court has repeatedly given opportunities to BSB to cross examine the Franchisee's witness as also to lead its evidence in defence. BSB, initially, did not avail of the opportunities to cross examine the Franchisee's witness. Finally when the costs were

imposed, it did not deposit the costs on both the occasions on the ground of financial difficulties. At a later stage it paid the cost of Rs.10,000/- belatedly but later cost of Rs. 15,000/-, which was imposed, was not deposited. What is important is the fact that opportunity for cross-examination of Franchisee's witness was not availed of and in any event BSB led no evidence. BSB chose to participate in the final hearing of the suit and even addressed arguments before the Trial Court. Under such circumstances, the Trial Court's manner of proceeding in the matter cannot be faulted with.

14. Now coming to the merits of the case, the main contention of learned counsel for BSB is that the Franchisee was in violation of the terms of the Agreement. Reliance has been placed on notice dated 12th August, 2011, which enumerates various violations by the Franchisee. The said allegations have been duly responded to by the Franchisee's witness in his evidence. The main allegations in the said notice are dealt with herein below.

i) Non-installation of logic software;
ii) Selling of products without bills;
iii) Employees not being appointed to run store properly;
iv) Running of courier business from the same premises;
v) Non-furnishing of accounts regularly; and
vi) Not allowing inspection.

15. In response to each of the allegations, the Franchisee's witness has placed on record voluminous documents which establish that after issuing of the notice dated 12th August, 2011 continuous correspondence has taken place between the parties at least till April, 2012. The Franchisee's witness has also placed on record the various letters including postal receipts to show that the Franchisee was continuously keeping BSB informed of all the

violations that were being done by BSB.

16. What is important is the e-mails exchanged between the parties during the period of October, November and December, 2011. The e-mails go to show that the Franchisee and BSB were in continuous business transactions with each other subsequent to issuance of notice in August 2011 by BSB. The e-mails also show that there has been correspondence in respect of C-forms, Vat-form, credit notes and all other business related documents. Thus, from the documents it is clear that subsequent to August, 2011, the parties have been conducting regular business between each other. It is also clear from the correspondence that the initial issues mentioned in the letter dated 12th August 2011 stood addressed by the Franchisee. If there were outstanding issues, then BSB would not have conducted business with the Franchisee for several months after issuing the said letter.

17. Learned counsel for BSB submits that none of these e-mails can be considered, as a certificate as per Section 65B of the Indian Evidence Act, 1872 has not been placed on record. The Franchisee's witness - Mr. Vivek Gandhi, who appeared before the Court, has himself stated in the evidence that he had personally sent the said e-mails and have received the responses from BSB. Under such circumstances, there is no reason as to why the said e-mails should not be believed especially because there is no denial of receipt of the said e-mails and reply thereof. The Franchisee's witness has also placed on record the photographs of the shop showing the manner in which the board of Bigshoebazar was erected on the shop as of 10th September 2013.

18 Learned counsel for BSB further submits that in April, 2012, e-mails which have been sent by BSB, were actually sent by the employee of BSB

from his private e-mail and cannot be taken into consideration. Such an allegation, when admittedly the said email has all details of the various supplies made, credit notes issued, amounts deposited etc., is not liable to be entertained. Frequently employees use their private email Ids especially if they are not in the office premises. That by itself cannot render the said emails unofficial or unreliable.

19. On an overall perusal and appreciation of the evidence on record and documents, it seems that BSB has been grossly negligent in proving its defence before the Trial Court. The Trial Court had no option but to proceed with the suit in the manner in which it has done. Even on merits, the Franchisee's witness has given sufficient evidence and documents to show that the allegations of BSB were false. Thus the Minimum guarantee amount had to be paid by BSB to the Franchisee so long as the business relationship continued between the parties.

20. However, since the last correspondence between the parties placed on record is of April, 2012, it is directed that the impugned judgment and decree shall be modified to the effect that the minimum guarantee amount of Rs.45,000/- per month shall be payable till April, 2012 and not till November, 2012 as awarded by the Trial Court. The interest payable would be 8% per annum from date of suit till date of payment. The impugned judgement and decree is modified in these terms. Decree sheet be drawn up.

21. Appeal is disposed of in the above terms.

PRATHIBA M. SINGH, J.
JUDGE

APRIL 26, 2018/*dk*