

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

Reserved on: 13th February, 2018

Date of decision: 20th March, 2018

+ **ARB. A. (COMM.) 12/2017**

ASCOT HOTELS AND RESORTS PVT. LTD & ANR.

.... Appellants

Through: Mr. Rajat Arora and Ms.
Vishalakshi Singh, Advs.

versus

CONNAUGHT PLAZA RESTAURANTS PVT. LTD.

..... Respondent

Through Mr.Sandeep Sethi, Sr. Adv. with
Ms.Kanika Agnihotri, Mr.Preet
Singh Oberoi, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This appeal has been filed by the appellant under Section 37(2) of the Arbitration & Conciliation Act, 1996 challenging the order dated 12th April, 2017 passed by the Sole Arbitrator in arbitration proceedings No. DAC/1476/12-16, Connaught Plaza Restaurant vs. Ascot Hotels & Resorts Ltd. & Anr. The Arbitrator *vide* his impugned order has directed maintenance of status quo with respect to the 'license area' that is an area of approximately 2500 sq.ft, covered area along with terrace in the building constructed on Khasra No.656/1 and Khasra No.621 in Mauja Gahi, Tehsil Kasauli, District Solan, Himachal Pradesh along with storage area of 450 sq.ft in the basement of the said property.

2. The disputes between the parties arise out of the License Agreement dated 19th December, 2006 by which the license area along with the storage area in the basement was given on a license basis by the appellant to the respondent for running of a restaurant in the name of McDonald's Family Restaurants. The license was for a period of 20 years with an option to renew the same for a further term of 5 years. Some of the terms and conditions of the License Agreement that are relevant for the purposes of present appeal are reproduced herein under:-

“2. GRANT OF LICENSE

2.1. In consideration of the license fees, covenants and agreements herein contained, AHRL agrees to give on license basis to CPRL and CPRL agrees to take on license from AHRL the Licensed Area along with storage of 450 sq ft built up covered area in the basement at a mutually agreed area, for a period of 20(Twenty years) with an option to renew the license for a period of one further term of 5 (Five) years upon serving a three months notice in advance prior to the expiry of the license and subject to the provisions of this agreement, with the right to use the common facilities in the Complex and for lawful purposes only including the right to ingress and egress into the Licensed Area.

4. TERM

4.1 PRIMARY TERM

This agreement is for a term commencing from the date of restaurant being opened to the public (hereinafter referred to as the effective date) for business and ending 20 years from the effective date subject to the renewal of the agreement between AHRL and KK Ropeways Limited and renewal of the lease of the Licensed Area in favour of K.K. Ropeways. However, in the event the Lease in

respect of the Licensed Area is not renewed in favour of KK Ropeways, AHRL / K.K Ropeways shall provide a suitable alternative location in the said property.

4.2 OPTION TERM

At the end of the Primary Term, the parties can renew for further period of 5 years on the same terms and conditions thereafter on the basis of mutually agreed terms.

6. LICENSE FEES

- 6.1 *“CPRL” in consideration for using and operating the Licensed Area for the purpose of running the restaurant shall pay to AHRL subject to withholding of taxes, License fee at the rate of 8% (Eight Percentage) of the Gross Sales (as defined below), generated every month from “McDonald's Family Restaurant” operated by CPRL from the Licensed Area or a minimum guaranteed amount of Rs. 1.50,000/- whichever is higher. The Minimum Guaranteed amount shall be increased by 15% every 5 years from the effective date.*
- 6.2 *The gross sales for the purpose of determining the revenue share shall mean all receipts (cash, cash equivalent, credit or redeemed gift certificates) made exclusively from the Licensed area but shall not include any sales tax and/or Excise Duty or any Value Added Tax (VAT) imposed and collected or such taxes that may be imposed and collected in future by the Central, State, Municipal or other Public Authority on sales made to customers, from the licensed area. It is further agreed between the parties, that the gross sales shall not include the sale of gift certificates, employee sales, non-edible non-profitable promotional items sold from the licensed, area by the "Second Party".*
- 6.3. *CPRL shall pay to AHRL the above mentioned license fees (fixed as well as variable license fees)*

on or before 10th day of the succeeding month starting from the effective date. In the event. CPRL defaults in making payment of the License Fee, on the due date of 10th working day if shall be liable to pay interest@ 12% per year to AHRL for the delayed period. CPRL shall furnish to AHRL for each quarter on or before 10th working day from the close of the quarter, a statement of quarterly gross sales at the restaurant for the purpose of accounting.

- 6.4. AHRL shall acknowledge and give valid receipts for receipt of license fees and such receipts shall be duly stamped and signed by AHRL or their duly authorized agents respectively, which shall be the conclusive proof of such payments.*

7. DEPOSIT

- 7.1 "CPRL" has paid AHRL a sum of Rs. 1.75 crores (Rupees One crore seventy five lakhs only) as security deposit on the date of signing of the agreement. Out of the said sum of Rs. 1.75 crores, Rs. 25 lakhs will stand as interest free refundable security deposit, and the balance amount of Rs. 1.5 crores will be refunded with interest to CPRL by AHRL in the following manner.*

- 7.2 AHRL shall pay interest on the sum of Rs. 1.5 crores from the date of receipt of the said sum at the rate of 3% over and above the Bank Rate of 6% prevailing on the date of signing the agreement. Interest will be paid by AHRL to CPRL quarterly from the date of commencement of the commercial operation of the restaurant. The Principal amount of Rs. 1.5 crores shall be refunded by AHRL to CPRL at the end of period of two years from the date of commercial operations of the restaurant. The balance amount of Rs. 25 lakhs shall be repaid by AHRL to CPRL on the termination of the Agreement.*

- 7.3 *In the event of the earlier termination of agreement after the Lock in period, AHRL shall refund the entire refundable security deposit. AHRL is however entitled to recover any of its agreed dues, if any, out of the security deposit and refund the balance.*
- 7.4 *In the event of failure on the part of AHRL to refund the amount of Rs. 1.5 crores at the time mentioned above or or failure on the party of AHRL to pay Interest as mentioned in this agreement, CPRL will be entitled to adjust the said amounts with interest from the License Fee payable to AHRL every month.*

22. TERMINATION

- 22.1 *Save as otherwise provided under this agreement, this Agreement cannot be terminated before the expiry of 3 (Three) years from the effective date by CPRL. However, 90 days before the expiry of 3 (Three) years as mentioned above, CPRL may give a notice in writing to AHRL to terminate the agreement. However during the said period of 3 (Three) years if the Licensed Area or the main complex is closed or ceases to operate, there from for a continuous period of three months or more for any reason other than renovations i.e. on account of Force Majeure conditions including but not limited on account of any Government directives or/any other authority, which might disable CPRL from obtaining requisite licenses for operating the restaurant and thereby cause the closure of the restaurant, then CPRL at its option has the right to terminate this agreement by serving advance written notice of 90 days on AHRL and this Management Agreement shall stand terminated after the expiry of 90 days notice, without being liable to continue operations of the restaurant for the remainder of the lock in period.*
- 22.2 *CPRL may terminate this License Agreement at any time after 3 (Three) years by serving advance*

written notice of 90 days on the Developer. In the event of the termination of the License Agreement CPRL shall have no further rights, duties or obligations under this License Agreement except that all commissions taxes and other monetary obligations that may have been pre-paid by CPRL to AHRL shall be pro-rated for the applicable period and refunded simultaneously with handing over vacant possession to AHRL at the expiry of the notice period upon termination, subject to the adjustment of dues, if any of AHRL.

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22.4 *AHRL cannot terminate this agreement except in the event of any three consecutive defaults by CPRL to pay the license fees. Notwithstanding the above, AHRL shall be entitled to terminate the Agreement only in the event of CPRL failing to make good the default as mentioned above within a grace period of 30 days after receiving a notice from AHRL in this regard. CPRL will pay interest at the rate of 12% per annum for each days delay in paying the License fees beyond the 10th day of the month. ”*

3. As certain disputes arose between the parties in relation to the Common Area Maintenance (hereinafter referred to as ‘CAM’) charges, the respondent filed an application under Section 9 of the Act before the Additional District Judge, Patiala being Arbitration No.154/2016. The Additional District Judge *vide ad interim* order dated 20.05.2016 directed the appellant to immediately restore the water and electricity supply to the respondent, subject to the respondent continuing to pay to the appellant the usage charges for electricity and water and such other dues as per the terms already agreed. The application was finally disposed of by order dated 7th October, 2016, extending the interim protection by a

further period of two weeks, while giving liberty to the respondent to approach the Delhi International Arbitration Centre (DIAC) for seeking appointment of a Sole Arbitrator in terms of the arbitration agreement between the parties.

4. The respondent thereafter filed an application under Section 11 of the Act being ARB P. 643/16 seeking appointment of a Sole Arbitrator. This Court, *vide* its order dated 30.11.2016 appointed the Sole Arbitrator to adjudicate all the disputes, including their claims and counter claims.

5. On an application seeking modification of the above order filed by the appellant, this Court *vide* its order dated 16.12.2016 clarified that even with respect to CAM charges and water charges the appellant shall be free to lead evidence before the Arbitrator.

6. The appellant claims that the direction issued by this Court on 30.11.2016 remained uncomplied with by the respondent.

7. On 27.01.2017 the appellant claims to have sent, by e-mail and speed-post, a Show Cause Notice to the respondent alleging therein that as the respondent had failed to take steps to ensure that sales are maximized and in installing the Diesel Generation sets, it was in breach of the terms of the agreement and had caused loss to the appellant. The Show Cause Notice gave thirty days time to the respondent to Show Cause why the License Agreement be not terminated for such breach.

8. Appellant submits that as no response to the above Show Cause Notice was received from the respondent, by notice dated 01.03.2017 the appellant terminated the License Agreement and called upon the respondent to hand over the vacant possession of the license area to the appellant.

9. The appellant further contends that it was only upon the issuance of the Notice of Termination of the License Agreement, that the appellant received the reply sent on behalf of the respondent to the Show Cause Notice.

10. The Arbitrator, on an application under Section 17 of the Act filed by the respondent, *vide* order dated 04.03.2017, while issuing notice on the application, directed the parties to maintain *status quo*. This order has been confirmed by the Impugned Order dated 12.04.2017.

11. The Arbitrator in the Impugned Order, after relying upon various Clauses of the agreement has held that the appellant has been unable to show the three consecutive defaults in the payment of license fee by the respondent as required in Clause 22.4 of the License Agreement. Even the notice of termination dated 27.01.2017 does not refer to any such default. The Arbitrator therefore, holds that in the absence of such ground being made, the respondent is able to make out a *prima facie* case and cannot be compensated in terms of money in case interim protection is not granted in its favour. The Arbitrator further holds that the balance of convenience is also in favour of the respondent and against the appellant. As far as Section 14(1)(c) of the Specific Relief Act, 1963 is concerned, the Arbitrator holds the same would not apply in the facts of the present case as the contract was not determinable unilaterally at the instance of the appellant, but only for specific defaults. He further holds that grant of interim relief would, in the present case be a “Just” exercise of the power of the Tribunal under Section 17(1)(e) of the Arbitration and Conciliation Act, 1996. He further holds that in the present case the respondent is not seeking specific performance of the agreement and is only challenging

the wrongful termination of the same by the appellant. The Arbitrator relying upon the judgment of this Court in *Upma Khanna & Anr. v. Tarun Sawhney & Ors.* MANU/DE/2558/2012 held that in the present case denial of the interim protection to the respondent would in fact, amount to allowing the party committing the wrong to take advantage of its own neglect and default.

12. The grievance of the appellant is that the agreement between the parties being that of a grant of license, the same by its very nature was determinable and in any case, even if the termination of the License Agreement was later found to be incorrect, the respondent could always be compensated in the form of damages. Relying upon Section 41(e) read with 14(1)(a) and 14(1)(c) of the Specific Relief Act, 1963, it is submitted that an injunction against the appellant for seeking recovery of the licensed premises could not have been granted by the Arbitrator. Reliance has also been placed on the judgment of the Supreme Court in *Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors.* (1991) 1 SCC 533 as also in judgment of this Court in *Planet M Retail Ltd. v. Select Infrastructure Pvt. Ltd.* 2014 (145) DRJ 654 to contend that whether the determination of the license is contrary to the terms of the agreement or is illegal, is a question to be decided by the Arbitral Tribunal in its final Award, however, no interim protection can be granted in favour of the respondent on this ground.

13. It is further submitted that the Arbitrator has completely misdirected himself in holding that the relief claimed by the respondent is not for the specific performance of the agreement, but for declaring that the termination of the License Agreement is illegal and unlawful. The

learned counsel for the petitioner submits that the nature of the relief claimed by the respondent is one of specific performance and in fact, there is no averment in the Statement of Claim challenging the termination of the License Agreement by the appellant. He submits that the Arbitrator has completely misconstrued the pleadings of the respondent in the Statement of Claim and in absence of such pleadings, no relief could have been granted to the respondent on mere oral submissions. In this regard he relied upon the judgment of the Supreme Court in ***Bachhaj Nahar v. Nilima Mandal & Ors.*** AIR 2009 SC 1103.

14. On the other hand, the learned senior counsel for the respondent submits that the License Agreement between the parties, in form of Clause 22.4 thereof, contains a negative covenant which prohibits the termination of the agreement “except in the event of any three consecutive defaults” by the respondent in the payment of the license fee. He submits that in the Show Cause Notice dated 27.01.2017 or the Termination Notice dated 01.03.2017 there is no allegation made that the respondent has not paid the license fee in accordance with Clause 6.1 of the License Agreement for three consecutive months. He submits that in view of the above, the Termination Notice, *ex facie* is illegal and cannot be given effect to. He further submits that in the present case, the respondent had made a huge investment in the form of the Security Deposit of Rs. 1.75 crores and also otherwise in setting up the restaurant at the licensed premises. He submits that the respondent has acquired goodwill for the place of business and has made such investment on an express promise that the License Agreement shall not be terminated except for the reasons mentioned in the Clause 22.4 of the License

Agreement. Relying upon the judgment of this Court in ***Old World Hospitality Pvt. Ltd. v. India Habitat Centre*** 1998 (73) DLT 374, he submits that in such a case it cannot be said that the respondent can be compensated in the form of damages. He further submits that once the right of the appellant to terminate the contract has been restricted in the form of Clause 22.4 of the License Agreement, it could not also be said that the contract in its very nature is determinable. He therefore, submits that in the present case, Section 14(1)(a) and Section 14(1)(c) of the Specific Relief Act, 1963 shall have no application and on the other hand, the injunction is rightly being granted in favour of the respondent in terms of Section 42 of the Specific Relief Act, 1963. On being queried if the license by its very nature is revocable as it does not create any right in the property in favour of the licensee, the learned senior counsel for the respondent, relying upon the judgment of the Supreme Court in ***Ram Sarup Gupta (Dead) by Lrs. V. Bishun Narain Inter College & Ors.*** AIR 1987 SC 1242 submits that the Supreme has held that Section 60 of the Indian Easement Act, 1882 is not exhaustive and there may be a case where a grantor of the license may enter into the agreement with the licensee making the license irrevocable, even though none of the two clauses as specified under Section 60 are fulfilled; the present is one such case.

15. I have considered the submissions made by the counsel for the parties. Before dealing with the same, I must emphasize that the power being exercised by me is one under Section 37(2)(b) of the Act. In ***Wander Ltd. And Anr. vs Antox India P. Ltd.***, 1990 Supp (1) SCC 727, the Supreme Court while examining the power of the Appellate Court to

examine the validity of the interim order passed by the Trial Court held as under:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant of refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton ‘... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

The appellate judgment does not seem to defer to this principle.”

16. In the present case, as observed above, the Arbitrator has held that the respondent has been able to make out a strong *prima facie* case in its favour based on Clause 22.4 of the License Agreement which restricted the right of the appellant to terminate the License Agreement only in the

event of three consecutive defaults by the respondent to pay the license fee. Even before me, it is not contended by the counsel for the appellant that there was any default committed by the respondent in the payment of the license fee.

17. It is the contention of the counsel for the appellant that the license fee payable under Clause 6.1 of the License Agreement is on a revenue share basis and provides for a “minimum guarantee” amount, whichever is higher. He submits that as the respondent had failed to install the Diesel Generator set as obligated on it under Clause 9.1 of the License Agreement, there was a loss of revenue earned by the respondent, which resultantly leads to a loss of license fee in favour of the appellant. He therefore submits that this itself would mean that the respondent has not paid the license fee in accordance with Clause 6.1 of the License Agreement.

18. Though on first blush this argument seems attractive, however, cannot be accepted at this stage to set aside the discretionary order passed by the Sole Arbitrator under Section 17 of the Act. As narrated in the brief facts above, it is admitted case of the appellant that the respondent had not installed the Diesel Generator set in discharge of its obligation under Clause 9.1 of the License Agreement and in fact, it was the appellant who was supplying electricity from its own Diesel Generator set till some time in 2016. Thereafter there were certain disputes that had arisen between the parties in relation to payment of CAM charges and had culminated in the order dated 30.11.2016 passed by this Court in ARB P. 643/2016, referring the parties to arbitration. The said order had extended this arrangement and granted eight weeks’ time to the

respondent to install its own Diesel Generator set. This period would have expired only in January, 2017. The appellant, however, vide its notice dated 27.01.2017 issued notice of default to the respondent. Therefore, two questions would arise:-

(i) Whether failure to install the Diesel Generator set can be construed to be a failure to pay license fee in terms of Clause 6.1 of the License Agreement;

(ii) Even assuming that the answer on the first issue is in the favour of the appellant, where, in view of the order dated 30.11.2016 passed by this Court, as on 27.01.2017 the respondent can be said to be in default for three consecutive months.

19. *Prima facie*, the submissions of the appellant therefore do not seem to be correct that purportive loss of revenue due to non installation of the Diesel Generator set would also amount to a failure of payment of license fee for purposes of Clause 22.4 of the License Agreement.

20. The counsel for the appellant further contended that the last recital of the License Agreement and Clause 2.1 thereof, clearly provide that the grant of license itself is subject to the respondent complying with its obligations under the License Agreement. He submits that once the respondent fails to discharge its obligations under the License Agreement, it will lose its right to occupy the licensed premises under the License Agreement and cannot, therefore, be granted any protection by way of an injunction. *Prima facie*, I find no merit in the said contention. Clause 22.4 of License Agreement has restricted the right of termination of the License Agreement by the appellant only to a case of three consecutive defaults in payment of the license fees. There is a

specific prohibition by use of the word “Except”. It seems that the parties intended that for other defaults of the obligations under the License Agreement, damages would be an adequate remedy for the appellant, but the appellant would not be entitled to terminate the License Agreement for such defaults. In any case, this will be an issue to be determined by the Arbitrator upon analyzing the evidence and submissions made before him. At this stage, in my opinion, Clause 22.4 of the License Agreement is itself sufficient to establish a *prima facie* case in favour of the respondent.

21. It is further contended by the counsel for the appellant that even assuming that the termination of the agreement by the appellant is illegal, as the respondent can be compensated in terms of money, respondent would not be entitled to grant of injunction in its favour. On the other hand, the learned senior counsel for the respondent submits that the respondent had made huge investment in the property based on the assurance of the long period of license as provided in the License Agreement. He further submits that the property was being used for commercial purposes and the respondent has acquired a goodwill in the same. He submits that the respondent, therefore, cannot be compensated in terms of money.

22. In ***Old World Hospitality Pvt. Ltd. (Supra)*** this Court had rejected a similar contention as raised by the appellant, observing as under:-

“114. In the Law of Contract by Hugh Collins 2nd Ed. 1993 the learned Author has posited as under:

“Although the Courts still repeat the rule that damages must be inadequate before they will award an order for compulsory

performance, the" rule has been subtly modified in recent years. In Beswick v. Beswick, (1968 Ac 58), an elderly and ailing coal merchant sold his business to his nephew in return for various promises including a promise to pay his widow Pond 5 per week after his death. When the nephew refused to pay, the widow in her capacity as administratrix of her husband's estate claimed specific performance of the contract. Since the estate had lost nothing by the nephew's breach of contract, because the payments were owed to the widow personally, it was likely that the measure of damages would be nominal. The House of Lords ordered specific performance of the contract even though an award of nominal damages would have covered all the losses of the estate. The Court made the award of compulsory performance because they thought that it achieved a just result, for otherwise the nephew would have been unjustly enriched by being entitled to hold onto his uncle's business without paying his aunt penny. The modern judicial test asks the question: is it just in all the circumstances that the plaintiff should be confined to his remedy in damages?"

This test squarely raises the issue of describing the circumstances which induce a Court to find the award of the remedy of specific performance more just than damages.

The key to the law of compulsory performance lies in recognizing that such a remedy is not designed to compensate the injured party for the losses, but to force performance of the contract. Normally a Court declines to order performance because damages provide a sufficient incentive to complete most contracts except where the defendant hopes to achieve unusual economic benefits from breach, in which case to compel performance would only serve to discourage contracts and to reduce the combined wealth of the contracting parties. A remedy of compulsory performance, therefore, deliberately overrides these normal considerations concerning remedies in order to serve different policies. Courts use orders of compulsory performance to resist exploitation of relations of domination and to prevent unfair outcomes arising from break of contract.

In amplifying further, the learned Author has pointed out the question of fairness would also arise. Again the Author has said :

*“A concern for fairness has also motivated the use of compulsory performance in a few cases. We saw considerations of distributive justice influence the Court in *Beswik v. Beswick*, to prevent the nephew from being unjustly enriched at his widowed aunt's expense. The order for specific performance of the payment of an annuity prevented the nephew from obtaining the business without having to pay for it. The most common kind of case where compulsory performance is ordered for distributive purposes involves transactions for the transfer of an asset which will provide an opportunity to earn an uncertain income. If the injured party cannot prove his losses with sufficient certainty to satisfy the compensatory principle, a Court may order specific performance. For example, an injured party may be able to enforce a sale of shares which would give him control over a Corporation, because damages for his loss of the right to control the Corporation are too speculative to be compensatable. Similarly, the loss of the right to be an exclusive distributor of a product may lead to the loss of goodwill and trade reputation, items which are hard to quantify under the compensatory principle, but which can be protected by an injunction. The fundamental problem here is not that damages are inadequate to cover these kinds of losses but that the losses cannot be proven, and in order to overcome these evidentiary difficulties, the Courts are prepared to order compulsory performance where this will lead to a fair distributive consequence.*

These examples of oppression through bilateral monopoly and dependence, and injustice in the outcome of awards of damages, do not exhaust the occasions when an order for specific performance may achieve what the Court perceives to be more complete justice between the parties. The Courts reserve a discretion to award compulsory performance whenever it seems appropriate to do justice in the case.”

115. In *Halsbury's Laws of England Vol. 44 4th Edn.*, the statement of law is in the following terms:

"In certain circumstances the Court may even grant a mandatory injunction directly requiring a party to the contract to perform his contractual obligations either on an interlocutory application or at the trial of the action." The footnote given in this Volume there is considerable law on the point and the same is in the following terms:

"Smith v. Peters, (875) Lr 20 Eq 511, where a vendor was ordered to give a valuer access to premises; Sky Petroleum Ltd. v. Vip Petroleum Ltd., (1974) 1 All Er 954, (1974) 1 WLR 567, where the defendants were ordered not to withhold supplies of motor fuel from the plaintiffs; filling stations, no alternative sources of supply being available; Astro Exito Navegacion S.A. v. Southland Enterprise Co. Ltd. (Chase Manhattan Bank N. Aintervening). The Messinikai Tolmi (1982) 3 All ER 335, (1982) 3 WLR 296, Ca (cited in Practice And Procedure, Vol. 37, para 361), where the buyers of a ship were ordered to sign a notice of readiness in order to enable money secured by a confirmed letter of credit to be paid out before the expiration of the letter. See also Acrow (Automation) Ltd. Rex Chainbelt Inc (1971) 3 All Er 1175, (1971) 1 WLR 1676, CA. Puddephat v. Leith (1916) 1 Ch 200, where a shareholder was ordered to exercise voting rights in accordance with a contractual undertaking (Greenwell v. Porter (1902) 1 Ch 530, where an injunction was granted restraining shareholders from voting contrary to their undertakings); Bourne v. Me Donald, (1950) 2 Kb 422, (1950) 2 All Er 183, Ca, where the defendant was ordered to carry out his contractual undertaking to build a fence in an action commenced in a country Court but not within the Court's statutory jurisdiction relating to specific performance."

116. In *Chave v. Breamer, 1976 Q.B. 76*, Rosekill learned Judges said *"In principle contracts are made to be performed and not to be avoided according to whims of the market fluctuations where there is a free choice between the two possible constructions of a*

contract, I think the Court should tend to prefer the construction which will infer performance and not encourage avoidance of contractual obligations.”

23. In the present case, the respondent has clearly made out a case which falls in the exception to the rule as provided in Section 14(1)(a) of the Specific Relief Act, 1963.

24. Similarly, reliance of the appellant on Section 14(1)(c) of the Specific Relief Act, 1963 is also ill-founded. In the License Agreement, there is a specific prohibition on the appellant from terminating the agreement “except” in the case of three consecutive defaults in the payment of the license fee by the respondent. In view of the prohibition, it cannot be said that the agreement is determinable by its very nature. This Court in *Upma Khanna & Anr. (Supra)* after analyzing Section 14(1)(c) of the Act has held as under:-

“15. What is the meaning of the expression: a contract which is in its nature determinable.

16. The New Shorter Oxford English Dictionary defines “determinable” to mean, if used as an adjective, fixed, definite. As a general meaning, to mean: “liable to come to an end”. The dictionary by Jowitt’s, Second Edition explains determinable: “an interest is said to determine when it comes to an end, whether by limitation, efflux of time, merger, surrender or otherwise”. Thus, it is possible to argue that for whatever reasons it may be the cause for, if an interest comes to an end by efflux of time, a contract would be determinable in nature. This would be an argument in support of the appellants, and as urged.

17. But, the argument overlooks the concept of a fault liability and a fault effect and a no fault liability and a no fault effect. It

overlooks the point that one should not rush to conclusions. Clause (c) uses the expression “in its nature determinable” and does not throw any light whether the determination contemplated embraces a fault effect determination.

18. If a defence by a contracting party that the sufferance of the default and hence the determination of the contract is to be accepted, it would amount to allowing the party committing the wrong to take advance of its own neglect and this would ex-facie not be acceptable to a court of equity.”

25. In fact, Clause 22.4 of the License Agreement would also amount to a negative covenant, which can be enforced under Section 42 of the Specific Relief Act, 1963. In ***M/s Gujarat Bottling Co. Ltd. and others v. Coca Cola Company and others*** (1995) 5 SCC 545, Supreme Court has held as under:-

“47. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated.

Under Order 39 of the Code of civil procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the CPC, but also in respect of the party approaching the Court for

vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings.

48. Analyzing the conduct of the GBC in the light of the above principles, it will be seen that GBC, who was a party to the 1993 Agreement, has not acted in conformity with the terms set out in the said agreement. It was itself, prima facie, responsible for the breach of the agreement, as would be evident from the facts set out earlier. Neither the consent of Coca Cola was obtained for transfer of shares of GBC nor was Coca Cola informed of the names of persons to whom the shares were proposed to be transferred. Coca Cola, therefore, had the right to terminate the agreement but it did not do so. On the contrary, GBC itself issued the notice for terminating the agreements by giving three months notice.

49. It is contended by Shri Nariman and in our opinion, rightly, that the GBC, having itself acted in violation of the terms of agreement and having breached the contract, cannot legally claim that the order of injunction be vacated particularly as the GBC itself is primarily responsible for having brought about the state of things complained of by it. Since GBC has acted in an unfair and inequitable manner in its dealings with Coca Cola, there was hardly any occasion to vacate the injunction order and the order passed by the Bombay High Court cannot be interfered with not even on the ground of closure of factory, as the party responsible, prima facie, for breach of contract cannot be permitted to raise this grievance.”

26. Reliance of the petitioner on the judgment of the Supreme Court in **Indian Oil Corporation Ltd** (Supra) and of this Court in **Planet M Retail Ltd.** (Supra) also cannot be accepted. In both **Indian Oil Corporation Ltd** and **Planet M Retail Ltd.** the contract provided for a right in the parties to terminate the agreement on giving a notice without cause. As noted above, in view of Clause 22.4 of the agreement, in the present case such a right cannot be said to be vested in the appellant.

27. In **Ram Sarup Gupta (Dead) by Lrs. (Supra)**, Supreme Court after analyzing Section 60 of the Easement Act, 1882 has held that, apart from the two circumstances mentioned in the said section, there may be a case, where the grantor of the license may enter into an agreement with the licensee making the license irrevocable. Present may be one such case. In **Corporation of Calicut v. K. Sreenivasan** (2002) 5 SCC 361, Supreme court has held as under:-

“16. It is true that a licensee does not acquire any interest in the property by virtue or grant of licence in his favour in relation to any immovable property, but once the authority to occupy and use the same is granted in his favour by way of licence, he continues to exercise that right so long the authority has not expired or has not been determined for any reason whatsoever, meaning thereby so long the period of licence has not expired or the same has not been determined on the grounds permissible under the contract or law. Occupation of the licensee is permissive by virtue of the grant of licence in his favour, through he does not acquire any right in the property and the property remains in possession and control of the grantor, but by virtue of such a grant, he acquires a right to remain in occupation so long the licence is not revoked and/or he is not evicted from its occupation either in accordance with law or otherwise.”

28. In the present case, *prima facie* it does not appear that the agreement has been terminated in accordance with Clause 22.4 of the License Agreement. The respondent, therefore, is entitled to a relief of injunction as granted by the Arbitrator.

29. In view of the above, I find no merit in the present appeal and the same is accordingly dismissed, with no order as to costs.

30. I may hasten to add that any of my above observations would not bind or influence the Arbitrator while adjudicating the disputes between the parties on their merit.

NAVIN CHAWLA, J.

MARCH 20, 2018/Rekha/rv

