IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 18TH DAY OF JULY 2019

THE HON'BLE MR. JUSTICE KRISHNAN RAMASAMY

O.A. No.211 of 2019
in
C.S. No.166 of 2019

P.Suresh,
S/o.Late Padmanabha Pothi,
aged 57 years, Old No.53,
New No.109, Armenian Street,
Chennai-600 001. ... Applicant/Plaintiff

-Versus-

M/s.Super Foodis (P) Ltd.,
rep. by its Director,
Mr.R.Adhavan,
No.23, Old No.35, 10th Avenue,
Ashok Nagar, Chennai-600 083. ... Respondent/Defendant

Original Application praying that this Hon'ble Court be pleased to grant interim injunction restraining the respondent/defendant or their agents, representatives, assignees or heirs from infringing the registered trademark SANGEETHA'S Desi mane and running the restaurant in the name and style SANGEETHA'S Desi mane pending disposal of the suit.

This Original Application coming on this day before this court for hearing, the Court made the following order:-

The applicant/plaintiff filed the present Original Application to grant interim injunction, restraining the respondent/defendant or their agents, representatives, assignees or heirs from infringing the plaintiff's registered trademark 'Sangeetha's Desi mane' and running the restaurant in the name and style SANGEETHAS Desi mane, pending disposal of the suit.

2. Mr. L.Rajasekar, the learned counsel appearing for the applicant/plaintiff contended that the plaintiff is the Proprietor of the registered trademark 'SANGEETHA'S Desi Mane', bearing No.1591975, under class 42, which was registered with effect from 20.08.2007, and valid upto 2027. The said trade mark was originally registered in the name of plaintiff, P.Suresh and his brother Mr.P.Rajagopal, as an Indian Partnership Firm, and the plaintiff is running the business under the name and style trading as 'Sangeetha Caterers and Consultants'.

2.1 The learned counsel further contended that, later, the said Partnership Firm was converted into a Limited Liability Partnership and called as M/s.Sangeetha Caters and Consultants LLP. The said M/s.Sangeetha Caters and Consultants LLP executed an assignment deed dated 01.04.2016, assigning the registered trademark in the name of the plaintiff. Pursuant to the same, the applicant/plaintiff submitted Form TM 24, dated 09.05.2016, to the Registrar of Trademark, Chennai, and the Trademark Registry passed an order dated 17.03.2018, by bringing on record the applicant/plaintiff as the owner of the Trademark. The applicant/plaintiff also obtained a legal user certificate issued by the Registrar of Trademark, dated 23.10.2018. Therefore, the learned counsel submitted that the applicant/plaintiff has been running the business under the said trademark for the past 12 years without any interruption from any quarters.

2.2. The learned counsel further submitted that, the applicant/plaintiff was one of the promoters of the defendant Company in the name and style, 'Super Foodis (P) Ltd.', which was incorporated on 24.05.2016. The applicant/plaintiff as the brand owner of the trademark, 'SANGEETHA'S Desi Mane' entered into a franchise agreement dated 12.08.2016, with the defendant-Company, Super Foodis (P) Ltd', to run a vegetarian restaurant under the name and style SANGEETHA'S Desi mane for a period of three years, i.e. from 12.08.2016 to 11.08.2019 and the said agreement was signed on behalf of the company by the Vice President, Mary Christina Rosario, who was also the Operating Director of the Company.

2.3. It is his further contention that before entering into such agreement, the defendant-Company also had a discussion about entering into such franchise agreement with the plaintiff in its 4th Board Meeting held on 01.08.2016. The learned counsel also drawn the attention of this Court to the true copy of the Minutes produced by the applicant upon the direction of this Court, which was dated as 08.08.2016, and stated that, due to typographical error, the date of the Board Meeting was wrongly mentioned as 08.08.2016, instead of 01.08.2016, however, the contents of the draft is one and the same as recorded in the original Minutes dated 01.08.2016, as such, the typographical mistake is genuine and bona fide, and not an deliberate mistake to suppress any fact.

2.4. Therefore, the learned counsel submitted that the as per the 6.3 a) of the franchise agreement, dated 12.08.2016, entered into between the applicant/plaintiff and the respondent/defendant, the respondent-Company has to pay a sum of Rs.15,00,000/- towards Technical Know-How fee to the applicant/plaintiff plus applicable taxes and as per the clause 6.3 (b) running royalty @ 5% of the gross revenue plus applicable service taxes, net of applicable Sales taxes, towards running royalty shall be paid monthly by the 10th of the following month for the sales made in a month and the running royalty shall be paid on a monthly basis.

2.5. The learned counsel contended that, as per the said agreement, plaintiff was having 25% of equity shares in the Company and the remaining equity shares in the company were held by Mary Christina Rosario, Praveena Krishnan, Naveen

Raj and Raghavendra Rao, who are Directors of the Defendant-Company, to an extent of 50%, 10%, 10%, 5% respectively. Further, it is submitted that, the said franchise agreement stipulated the use of the brand name, maintain high standard in the operations of the restaurant and strict quality control, hygienic condition, and it is further stipulated that the franchisee, (viz., the defendant herein) should pay 5% as royalty on the gross sale value to the applicant/plaintiff.

2.6 The applicant submits that the respondent commenced its operation with effect from 13.11.2016. Therefore, the respondent is liable to pay franchise royalty fee, as agreed in the franchise agreement dated 12.08.2016. When such being the position, during the course of the business of the respondent company, one Mr. Rajendran, one of the Directors of the respondent-Company approached the plaintiff and other share holders for the purchase of 90% shares of the respondent-Company and he purchased 90% shares in the Company and the said Mr.Rajendran, also took over the management, with effect from 01.03.2018.

2.7. The learned counsel further submitted that the respondent-Company is bound to comply with the terms and conditions of the franchise agreement and pay the royalty fee as agreed therein. The Balance Sheet as on 31.03.2018 was prepared and signed by the said Mr.Rajendran along with other Directors, viz., P.Suresh, Praveena krishnan, Mary Christina Rosario, wherein, the technical know-how fee was mentioned as Rs.15,00,000/- (as stated in the franchise agreement) and that, for year to year, it was shown that, a sum of Rs.3.00 lakhs were amortized and subsequently as on 30.03.2018, the technical know-how fee was shown under other non current assets as a sum of Rs.12.00 lakhs after written off a sum for three lakhs. Thus, as per the non current assets, the respondent-Company is amortizing their 1/5th technical know-how fee every year and the same has been reflected in the balance sheet for the year 31.03.2018 was signed by P.Suresh, Mary Christina Rosario along with Rajendran, who took over the management.

2.8. Therefore, the learned counsel contended that all these facts would clear that the franchise agreement was taken into consideration and they have recorded the technical know-how fee of Rs.15,00,000/-, in their balance sheet. However, running royalty of 5% of the gross revenue has not been paid as agreed in terms of clause 6.3 (b) of the said franchise agreement and the respondent-Company has paid only Rs.10,000/- towards running royalty from March 2018 to June 2018 and thereafter, committed default in payment and the applicant also issued part payment invoices in respect of such payments made by the respondent-Company. Therefore, the applicant was constrained to send an email dated 26.07.2018 to the respondent. However, the Operating Director, Mary Christina Rosario sought time to reply vide email dated 01.09.2018. The plaintiff again sent an email dated 02.09.2018, demanding the payment of outstanding royalty amount. However, Mr.Rajendran, who took over the 90% of shares of the company, sent e-mail dated 28.09.2018, seeking time to reply for the plaintiff e-mail dated 02.09.2018. Since no payment was forthcoming, the applicant sent an email dated 22.10.2018, demanding the outstanding amount for which Mr.Rajendran sent a reply email dated 29.10.2018 answering for the outstanding on all the heads. Finally, the applicant issued a notice of cure dated 13.11.2018 addressed to all the Directors of the respondent-Compnay by giving 30 days time, to which, the said Mr.Rajendran, has sent a reply on behalf of the other Directors by way of email dated 11.12.2018, making contradictory statements regarding the use of trade name, 'Sangeetha's Desi Mane' without payment of any nominal royalty amount.

2.9. The learned counsel submitted that the plaintiff, who got frustrated with the conduct of the respondent/defendant, sent an email dated 19.12.2018, indicating about the termination of the franchise agreement and also informed the respondent/defendant not to use the trade mark Sangeetha's Desi Mane, failing which, the defendant is liable for infringement. However, the defendant did not choose to stop running the business, by using the plaintiff's trademark, 'Sangeetha's Desi Mane', and therefore, plaintiff is constrained to issue a paper publication in the English Newspaper, "Hindu" on 26.12.2018 notifying the termination agreement dated 19.12.2018, which was followed by paper publications in Tamil Newspapers "Daily Thanthi" and "Malai Malar" on 05.01.2019 and also in "Malai Murasu" on 06.01.2019. The defendant has sent a reply notice dated 19.02.2019, again containing contradictory statements about the franchise agreement, for the usage of the trade mark "Sangeetha's Desi Mane".

2.10. The learned counsel contended that the applicant/plaintiff, having left with no other option, has approached this Hon'ble Court by way of filing the present suit for the appropriate relief for infringing their trade mark and has filed the present application for an interim injunction, restraining the respondent/defendant from using the registered trademark of the plaintiff, namely Sangeetha's Desi Mane until the disposal of the suit, on the ground that since the franchise agreement was terminated, the respondent/defendant has no authority to use the trade name of the plaintiff any more. Therefore, he prayed for the interim injunction.

3. On the other hand, Mr.V.Raghavachari, the learned counsel appearing for the respondent/defendant submits that there was no such franchise agreement dated 12.08.2016 entered into between the applicant and the respondent, as alleged by the applicant and the said franchise agreement has been created in collusion with one of the Directors of the respondent-Company namely Mary Christina Rosario, who signed the said franchise agreement on behalf of the respondent-Company.

3.1. The learned counsel further contended that Mr.Rajendran, one of the Directors of the respondent-Company purchased 90% of shares of the applicant-Company and took over the management of the company with effect from 01.03.2019. Since the plaintiff-Firm was running at a loss of Rs.63,14,452/-, Mr.Rajendiran, the Director of the respondent-Company took over the management of the respondent-Company along with the assets and liability of the plaintiff-Company and paid 3.42 crores for this loss making Unit. Otherwise, there was no necessity for the respondent-Company to take over the plaintiff-Company, and the said loss is evident from the statement of income of the year ending upto 31.03.2017 to an extent of sum of Rs.63,14,452/-.

3.2 Further, the learned counsel contended that what was taken over by the respondent-Company is not only the business run by the plaintiff but also the mark as a whole. The learned counsel also brought to the knowledge of this Court that the trade mark registered by the plaintiff-Firm is only the suffix words, 'Desi Mane' and not the prefix word 'Sangeetha'. Further, he fairly admitted the fact that they have paid sum of Rs.10,000/- per month towards royalty from March 2018 to June 2018, but the same is due to the fact that the respondent-Company was allowed to carry on the business in the same name and style, Sangeetha's Desi Mnai. It is his further contention that even in the notes forming part of balance sheet, there is no reference to the payment of franchise fee. Therefore, he contended that there is no need to pay any franchise fee as alleged by the plaintiff.

3.3. The learned counsel further contended that, this Court, in order to ascertain whether the defendant-Company had a discussion about entering into such franchise agreement with the plaintiff in its 4th Board Meeting held on 01.08.2016, before entering into franchise agreement with the plaintiff, the applicant produced true copies of the 4th Meeting. dated 08.08.2016, in the form of additional typed-set of papers, and hence, the defendant filed objection to the same, by stating that, there was no such meeting held on 08.08.2016, and to prove the same, the defendant also produced the attendance register and when the same was produced, the applicant took a different stand by stating that due to typographical error, the date of the 4th Board Meeting was mentioned wrongly as 08.08.2016, instead of 01.08.2016.

3.4 Therefore, the learned counsel contended that there was clear dispute on the date of the Board Meeting and also there is a doubt about the franchise agreement said to have signed on 12.08.2016 and the documents produced by the applicant/plaintiff cannot be relied upon, as they are fabricated and concocted one to suit the requirement of the plaintiff. Hence, he pleaded the entire facts can be proved only during trial, till such time, there is no prima facie case made out by the applicant for grant of interim injunction, and therefore, the present application is liable to be dismissed and sought for a direction upon the parties to go for trial and prove the case.

4. This Court heard the learned counsel appearing for the applicant and respondent and also gone through the averments set out in the application, counter and written submissions submitted by both the parties.

5. It is an admitted fact that Mr.Rajendran, took over the management of the plaintiff-Company with effect from 01.03.2018 and he also purchased 90% of the shares in the company. It is also an admitted fact that a sum of Rs.10,000/- has been paid towards the royalty every month starting from March 2018 to June 2018, and thereafter, the respondent has not made any payment towards the royalty to the applicant.

5.1 As far as the franchise agreement is concerned, the respondent/defendant is strictly disputing the execution of the said agreement, on the basis that the same has not been brought into the knowledge of the Mr.Rajendran, Director of the respondent-Company at the time of purchasing 90% shares.

5.2 On the other hand, the applicant submits that the said agreement was brought into the knowledge of the respondent-Company at the time of taking over the management, and that is the reason, why, the respondent/defendant paid a sum of Rs.10,000 towards the royalty amount, from March, 2018 to June, 2018, for which, the applicant also issued part payment invoices. However, this Court is at loss to understand as to why, the applicant raised such part payment invoices only for Rs.10,000/- and why he has not made full invoices based on the franchise agreement. Therefore, this

Court is of the view that all these issues are disputed questions of fact, which cannot be gone into at this stage of the matter, and the same could be proved only during trial. Hence, this Court, is prima facie of the view that, it would be appropriate to let the parties go for trial, only thereafter, this Court can decide about that validity of the franchise agreement and whether the applicant made any request to furnish detailed turnover on the respondent based on the franchise agreement and there is failure on the part of the respondent to furnish such details to the applicant. These facts can be proved only in the trial after hearing the parties in full and not at this stage.

5.3. However, it is an admitted fact by both the parties that the respondent paid a sum of Rs.10,000/- as royalty from the date of taking over of the Management from March 2018 to June 2018, and thereafter, failed to make any payment towards royalty. When the respondent admitted the fact that they paid sum of Rs.10,000/- towards running royalty from March 2018 to June 2018, it would be appropriate to direct the respondent to pay the said running royalty of Rs.10,000/- from July 2018 until the date of disposal of the Suit on every month.

5.4 No doubt, the technical know-how fee mentioned in the franchise agreement is also mentioned in the balance sheet for the year 2016-2017 and 2017-2018. Since the respondent-Company has paid the technical know-how fee, in terms of the franchise agreement, respondent-Company is amortizing their 1/5th right every year and the same got reflected in the notes forming part of the balance sheet for every year

5.5. Taking into consideration of these facts, this Court is of the view that it would be appropriate to direct the respondent/defendant to pay a sum of Rs.10,000/- every month towards running royalty as admitted by them from the month of July 2018 to till the date of disposal of the suit. Therefore, this Court directs the respondent/defendant to pay the arrears for the month starting from July 2018 to June 2019, a sum of Rs.1,20,000/- on or before 31.07.2019 and thereafter, the respondent/defendant is directed to pay a sum of Rs.10,000/- on or before 10th of every month until the disposal of the suit. In case, if there is any failure on the part of the respondent/defendant to comply with the order of this Court, there shall be an order of interim injunction as prayed for by the applicant/plaintiff from the date of non compliance of this order.

6. With the above observations, the application stands disposed of.

Sd./-K.R.J

18.07.2019

//Certified to be true copy//

Dated at Madras this the day of 2019.

JJ 08/08/2019

COURT OFFICER(O.S.)

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