O.A.Nos.521 and 522 of 2021

a n d

Arb.Appln No.190 of 2021

N.SATHISH KUMAR,J

Original Application No.521 of 2021 has been filed to pass an order of ad-interim injunction, restraining the respondent, their men, agents, representatives from entering into any agreement with any other third party similar to the Services Agreement, dated 20th September 2019 executed with the applicant with respect to the Resident Dwelling Space located at 71/16 Amirjan Street, Choolaimedu, Chennai 600 094.

2. Original Application No.522 of 2021 has been filed to restrain the respondent their men, agents, representatives from implementing or acting upon in any manner whatsoever the "Agreement to Lease" dated 29th July 2021 executed with Dtwelve Spaces Private Limited.

3. Arbitration Application No.190 of 2021 has been filed to direct the respondent their men, agents, representatives from granting access or permitting any third party or person except the applicant from managing or rendering services upon the Resident Dwelling Space located at 71/16 Amirjan Street, Choolaimedu, Chennai 600 094, as provided under Clause 3.1 of the Services Agreement dated 19th September 2019.

4. Applicant is a technology based company engaged in the business of providing a platform for residential dwelling units. The applicant charges a Service Provider Fee from the owners of the residential dwelling units. The applicant and the respondent entered into a Services Agreement, dated 20th September 2019, wherein the respondent had agreed that the applicant would provide a proprietary web and mobile based technology solutions to support different activities relating to the managing of RDS and coordinate with the respondent and the potential occupants/customers of the RDS. RDS has 18 units which are currently in operation and the services commenced on 25th September 2019. RDS owned by the respondent would

also include and not be limited to

a. Showcasing of the RDS on the web-based platform of the applicant;

b. Licensee Fee Collection from the potential Licensees.

c. Grievance Handling

d. Communication Platform for the owner and the Licensees.

e. General Maintenance Services for the RDS.

5. The entire scope of services to be provided by the applicant has been provided at Clauses 2.1 and 2.2 of the Services Agreement. The applicant shall as an agent of the owner entered into Standard Leave and License Agreements with the Licensees in the format, as provided under Annexure D of the Services Agreement. Owner has also executed a notarized specific Power of Attorney, dated 20th September 2019, in favour of the applicant for the purposes of executing the Leave and License Agreement.

6. Pursuant to the above Agreement, the applicant has executed 31 number of Leave and License Agreements with the Licensees which are currently in force and operation. As per the Contract, an average of Rs.12,600/- per unit, per month, across 18 units available for licensing at the RDS with a Net Owner Receivable of Rs.2,25,000/- per month subject to increase by 5% every 12 months. Service provider Fee to be paid by the respondent to the applicant for the services would be Rs.100/- per unit available for licensing at the RDS. Applicant also deposited Rs.6,75,000/- which shall be refundable at the end of the term of the Services Agreement.

7. Notice for eviction, dated 12th August, 2021 was issued, directing the applicant to evict the RDS by end of August 2021. Eviction notice issued by the respondent is contrary to the terms and conditions of the Service Agreement, dated 20th September 2019 is unsustainable in law. Action of the respondent is tainted with malafides, arbitrary. The respondent has explicitly disclosed the fact that it has been entered into an "Agreement to Lease", dated 29th July 2021 with another competitor of the

applicant by the name and style of "DTwelve Spaces Private Limited". The respondent not only communicated the fact that he has entered into an Agreement to Lease but has also shared the entire Agreement. The respondent has executed an agreement with the applicant's competitor even 13 days before the issuance of Notice of Eviction. Hence it is his contention that the Service Agreement, dated 20th September 2019 provides for an Exclusivity Clause which restrains the respondent from entering into similar agreements with other parties.

8. Termination Clause under Clause 7.1 provides for the right of an aggrieved party to terminate in event of there being material breach which cannot be cured within 30 days. Termination Clause in the contract require two months time which has not been complied.

9. Counter affidavit has been filed by the sole respondent, wherein, it is stated that the applications are not maintainable and the applicant has suppressed the material facts. Though service Agreement was entered on

20/9/2019 for monthly payment of Rs.2,25,000/- p.m., from 13/4/2020. The applicant hopelessly breached this term, which would be evident from the following table:-

Month	***Rent received (in Rs.)***	***Balance Rent due (in Rs.)***
13/4/2020	1,50,750/-	74,250/-
8/5/2020	1,50,000/-	75,000/-
10/6/2020	1,52,000/-	73,000/-
July 2020	Not paid	2,25,000/-
3/8/2020	1,95,000/-	30,000/-
2/9/2020	1,50,000/-	75,000/-
12/10/2020	45,929/-	1,79,071/-
November 2020	Not paid	2,25,000/-
15/12/2020	1,43,028/-	81,972/-
11/1/2021	73,326/-	1,47,674/-
11/2/2021	1,15,000/-	1,10,000/-
11/3/2021	1,15,000/-	1,10,000/-
9/4/2021	1,15,000/-	1,10,000/-
20/5/2021	1,15,000/-	1,10,000/-
14/6/2021	90,000/-	Agreed rent for May 2021
14/7/2021	90,000/-	25,000/-
11/8/2021	90,000/-	25,000/-
/9/2021 (for the	Not paid	1,15,000/-

Month	***Rent received (in Rs.)***	***Balance Rent due (in Rs.)***
month of August)		

10. The applicant has breached the requirement of payment of agreed owner receivables and had not even been able to pay the revised agreed rents for the months of June & July 2021 and have not paid a single rupee as rent for the month of August 2021 even though they were in possession and enjoyment of the premises. This is apart from the fact that they have run up an EB bill for July and August 2021 amounting to Rs.1,00,000/- (approx), which they have failed to pay, compelling the respondent to bear the aforesaid expenditure. This is apart from the various items they have damaged all of which have been fully documented. The dues payable to the respondent have exceeded the security deposit amount of Rs.6,75,000/-. It is for this reason, the applicant had peacefully vacated premises and handed over vacant possession to the respondent. This fact has been completely suppressed. As a matter of fact, single Sentence in the entire affidavit which discloses the factum of possession.

11. It is further stated in the counter affidavit that the agreement dated 20/9/2019 is determinable in nature, which is evident from a reading of Clause 7 which provides for termination. The respondent is in absolute possession and enjoyment and no alleged licensee inducted at the instance of the applicant is in occupation of the premises. Once the termination had been effected, 14 (d) of the Specific Relief Act, 1963 would attract. Hence, no injunction could be granted in view of the express bar contained in Section 41 (e) of the Specific Relief Act, 1963.

12. It is further stated in the affidavit that in view of the whatsapp message, dated 13/8/2021, agreeing to "proceed further", which has not been disputed, no injunction can be granted in view of the express bar contained in Section 41 (g) of the Specific Relief Act. Once it is clear that the applicant has no personal interest in the agreement, dated 29/7/2021, no injunction would lie to restrain its enforcement in view of the express bar contained in Section 41 (j) of the Specific Relief Act, 1963.

13. In view of the provisions of the Specific Relief Act, 1963, prays for dismissal of the applications.

14. Heard Mr.P.H.Aravindh Pandian, learned Senior Counsel for Mr.Pawan Jhabakh, learned counsel for the applicant and Mr.K.Sharath Chandran, learned counsel for the respondent.

15. Mr.P.H.Aravindh Pandian, learned Senior Counsel appearing for the applicant submitted that eviction notice issued by the respondent is contrary to the terms and conditions of the Service Agreement dated 20th September 2019 and is unsustainable in law.

16. It is his further contention that the termination Clause in the agreement would indicate that either party may terminate the Agreement on the material breach of the Agreement by the other party, where such breach is incurable, or where curable, it is not cured within a period of 30 days of

receipt of a written notice of such breach.

17. Learned Senior Counsel appearing for the applicant further submitted that pursuant to the Services Agreement, executed 31 number of Leave and License Agreements with the licensees which are currently in force and operation.

18. It is his further contention that the Service Agreement dated 20th September 2019 provides for an exclusivity Clause which restrains the respondent from entering into similar agreements with other parties. Exclusivity obligation upon the respondent has been provided at Clause 3 of the Services Agreement, wherein it is stated that during the term of the Agreement, the applicant shall have the exclusive right to manage/render service upon the RDS and the respondent cannot enter into any other similar arrangement, as contemplated under the Services Agreement involving the

Licensees or lessees with respect to the RDS without the prior consent of the applicant.

19. It is his further contention that notice of eviction is prima facie bad in law, ultra vires. Such notice was issued at the convenience of the respondent causing severe prejudice and irreparable damages upon the applicant. The applicant has established a prima facie case and balance of convenience is in favour of the applicant.

20. Learned counsel appearing for the respondent submitted that the applicant has breached the requirement of payment of agreed owner receivables and had not paid the revised agreed rents for the months of June & July 2021 and had not paid a single rupee as rent for the month of August 2021. Respondent is in possession and enjoyment of the premises. In view of the whatsapp message agreeing to "proceed further", the claimant has clearly acquiesced to any alleged breach. Hence no injunction could be

granted in view of the express bar contained in Section 41 (g) of the Specific Relief Act, 1963.

21. Learned counsel appearing for the respondent would further submit that once the applicant has no personal interest in the agreement dated 29/7/2021, entered into between the respondent and D Twelve Spaces Private Limited, no injunction would lie to restrain its enforcement in view of the express bar contained in Section 41 (j) of the Specific Relief Act, 1963.

22. It is not disputed by both sides that in the contract in the nature of service agreement was executed between the applicant and respondent on 20/9/2019 and the respondent is the owner of the properties the applicant is the service provider.

23. It is the contention of the learned counsel for the applicant that pursuant to the agreement, 18 units are currently in operation of the services

rendered on 25th September 2019, whereas the respondent in the counter specifically took a stand that though the monthly rent agreed at Rs.2,25,000/-, which has not been paid regularly, there was a default which resulted in a amended agreement came into existence between them, on 12/7/2021 for the modified rent at the rate of Rs.1,15,000/- p.m., from June 2021 and even the revised rate has not been paid from June 2021 and it is also his contention that as the liability of the applicant exceeded the security deposit amount, the respondent has issued a notice of eviction which has been accepted and all the licensees were evicted from the premises on 30/8/2021 itself. Hence it is the specific stand of the respondent that the applicant was not in possession of the property.

24. With regard to the above submissions, when the Court posed a specific question as to the possession of the property, the learned Senior Counsel appearing for the applicant has submitted that at present, 31 licensees were accommodated at some other place. Therefore, it is his contention that only after injunction is granted, all the licensees could be relocated to the subject property and will remain there till the agreement

period.

25. With regard to the submissions as to the payment of rent, no submission has been made by the applicant. It is also relevant to note that in fact, it is pleaded in the applications that service provider viz., the applicant is in possession of the premises. There is no whisper whatsoever made in the application that they were evicted already. Though much emphasis was made with regard to the exclusivity Clause, it is useful to refer the exclusivity Clause. Clause 3 in the Contract reads as follows:-

> "3.1 During the Term of this Agreement, subject to the terms and conditions herein, the Service Provider shall have the exclusive right to manage and/or render services towards the RDS (as defined under the Scope of Work, Clause (2.1) on behalf of the owner.
>
> 3.2 The owner through this Agreement also

provides exclusivity to the Service Provider to offer and manage the Zolo Service Package offering to the Licensees availing the product defined as the RDS.

3.3 In relation thereof ("Exclusivity") and to that extent, the owner undertakes not to, without the prior written consent of the Service Provider:

(a). enter into any other arrangement similar to this Agreement involving Licensees or lessees with respect to the RDS;

(b). transfer any right, title and/or interest (whether by way of sale, lease, license, paying guest etc.) in the RDS, or agree to do so;

(c). In the event wherein the owner intends to sell/transfer/assign his ownership rights in whole or in part during the subsistence of this Agreement to a third party ("Subsequent Right

Holder"), the owner shall ensure that such sale/transfer/assignment shall be subject to the rights of the Service Provider under this Agreement. The owner warrants that the Subsequent Right Holder shall enter into an agreement with the Service Provider on the same terms and conditions as are contained herein. For avoidance of doubt, it is hereby acknowledged that the "Service Provider Refundable Amount" paid by the Service Provider to the owner shall also be transferred to the Subsequent Right Holder and all necessary adjustments shall be made accordingly. The owner further covenants with the Service Provider that the Owner shall ensure the Subsequent Right Holder or assignee to execute an appropriate deed of novation in favour of the Service Provider and shall also extend full cooperation to the Service Provider to protect its rights therein.”

26. Though the above contract makes it very clear that during the subsistence of the contract, the owner without prior consent of applicant shall enter arrangement similar to the agreement or with regard to RDS. Further, Termination Clause provided under Clause 7 indicate that 30 days notice is required by other party.

27. Mr. Arvindh Pandiyan, learned Senior Counsel for the applicant has placed much emphasis on the termination Clause that even to determine the contract, there must be a notice , as per the contract. Whereas in the given case, even before termination through whatsapp, respondent has already entered into contract with third party. Hence, it is his contention that negative covenant could be specifically enforced against the respondent. He has placed reliance on the Division Bench judgment of this Court, in A.P.INTERNATIONAL VS. 1. V.CREATIONS AND

ANOTHER (O.S.A.No.284 of 2017), wherein the Hon'ble Division Bench has held that "as long as the negative covenant operates within a limited time and space, while the agreement is subsisting, its effect cannot be nullified by VC". The above judgment passed in different context taking note of the termination of the agreement which relate to the release of a movie and therefore, the above judgment cannot be applied to the facts of the present case.

28. In ASCOT HOTELS AND RESORTS PVT LTD AND ANOTHER Vs. CONNAUGHT PLAZA RESTAURANTS PVT LTD {ARB.A.(COMM.) NO.12 OF 2017, dated 20/3/2018), which was relied by the learned Senior Counsel for the applicant, wherein Delhi High Court has held that as the termination of the agreement is not in accordance with the license agreement, the claimant is entitled to relief of injunction and the termination is not as per the contract and negative covenant can be enforced. Absolutely, there is no dispute with the above judgment, whereas in this case, payment of rent has not been paid, as per the contract. There

was a breach committed by the applicant from the inception, though initially Rs.2,25,000/- has been agreed, as the amount could not be paid, amended agreement also came into existence which is also not disputed by the parties. Whatsapp messages were exchanged between the parties from 22/7/2021, where the respondent has requested the applicant to pay Rs.1.5 lakhs and from August 2021, he requested him to give 2.25 lakhs. On 16/8/2021, the respondent had requested the applicant to handover the possession of the building, at the end of August 2021. Thereafter, on 30th August 2021, reply was sent, contending that termination is not valid. But the fact remains that the claimant is not in possession of the property, at present. Though it appears that termination is not as per the contract, the fact that they are not in possession of the property was not disputed. When the very obligation of the payment of rent itself has not been performed by the claimant and has committed a breach, this Court is of the view that Section 42 of the Specific Relief Act, 1963 cannot be pressed into service to enforce the negative covenant. Therefore, the exclusivity Clause cannot be pressed into service when the very obligation of payment of rent was not complied.

29. The very Section itself clearly indicate that when there is a breach of contractual obligations, the negative covenant cannot be enforced. Further, applicant is not in possession of the property. This fact has been suppressed by the applicant in the petition. Further, as per the contract, notice of 30 days is required to be given for termination and the fact remains that the applicant has received the notice and in fact, he was also aware of the similar contract entered by the respondent. In any event, the applicant has not come to Court with clean hands. Therefore, merely on the basis of the contractual terms, if any order is passed by this Court, it will amount to just passing a mandatory injunction, directing the parties to restore possession of the licensees, who have already been evicted.

30. Such being the position, this Court is of the view that there is no prima facie case made out for the applicant to seek interim injunction as

prayed for. It is for the applicant to claim for damages before the arbitral tribunal by submitting relevant materials to prove any loss by unilateral termination of contract. Accordingly, this Court finds that there is no prima facie case is made out and balance of convenience is also not in favour of the applicant and imminent threat of dispossession is also not there, since they have already been evicted. In such a view of the matter, O.A.Nos.521 and 522 of 2021 and Arbitration Application No.522 of 2021 are rejected and the same are dismissed.

24/9/2021

mvs.

Index: Yes/No

Internet: Yes/No

Speaking/Non-speaking order

N.SATHISH KUMAR,J

mvs.

Pre-delivery common order in
O.A.Nos.521 and 522 of 2021
a n d
Arb.Appln No.190 of 2021

24/9/2021