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

Date of decision: 02.07.2024

+ **O.M.P.(I) (COMM.) 176/2024**

AZURE HOSPITALITY PVT. LTD.

..... Petitioner

Through Mr. Santanam Swaminatham, Mr.
Kartik Malhotra, Mr. Anindhith
Mandal, Mr. Darsh Bansal and Ms.
Shreya Mansi James, Advs.

versus

M/S. PURUSHA HOSPITALITY & ORS.

..... Respondent

Through Mr. Subham Jain, Adv and Mohit
Mudgal, Adv for R-1 to 3.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking the following reliefs:-

“(a) Pass an order of ad-interim injunction directing the Respondents to continue operations of the “Mamagoto” restaurant located at SH/2F/03, Second Floor, Pacific Mall, Netaji Subhash Place, New Delhi – 110034 in terms of and until the termination of the Franchise Agreement dated 11.11.2021.

IN THE ALTERNATIVE:

Pass an order of ad-interim injunction directing the Respondents to allow the Petitioner to exclusively run (without interference from the Respondents) the operations of the “Mamagoto” restaurant located at SH/2F/03, Second Floor, Pacific Mall,



Netaji Subhash Place, New Delhi – 110034 and to utilise the revenues earned therefrom in terms of the Franchise Agreement dated 11.11.2021.

(b) Pass an order of ad-interim injunction directing the Respondent No.1 & 2 to open and operate the Escrow Account in terms of Article Four (A) of the Franchise Agreement dated 11.11.2021 and to utilise the funds strictly as per the Franchise Agreement 11.11.2021.

(c) Pass an order of ad-interim injunction restraining the Respondents from dismantling/removing the present fixtures fittings and furniture and/or opening/operating any other restaurant or establishment at the current premises of the Restaurant “Mamagoto” at SH/2F/03, Second Floor, Pacific Mall, Netaji Subhash Place, New Delhi – 110034 during the subsistence of the Franchise Agreement dated 11.11.2021 and License Agreement dated 12.10.2021.

(d) Pass an order ad interim direction the Respondent No.1 and Respondent No.2 to deposit a sum of Rs.15,14,404/- (Rupees Fifteen Lakhs Fourteen Thousand Four Hundred and Four only), before this Hon'ble Court in form of FDR to protect / secure the Petitioner's outstanding dues up to the month of April 2024, recoverable from the Respondent No.1 and 2;

(e) Pass ad-interim directions against the Respondents No.1 and 2 to produce their books of accounts starting from the financial year 2021-2022 till date;

(f) Pass the Orders in Prayers (a) to (e) above ex parte and confirm the same upon disposal of the present petition; and

(g). Pass any other order(s) that this Hon'ble Court may deem fit and necessary in the interest of justice.”

2. The facts in brief are that the parties entered into a Franchise Agreement dated 11.11.2021, wherein the respondent No. 2 was to run



“Mamagoto” Restaurant located at SH/2F/03, Second Floor, Pacific Mall, Netaji Subhash Place, New Delhi- 110034.

3. The respondent No. 1 and respondent No. 2 companies are under the control of respondent No. 3, i.e. Mr. Anuj Aggarwal. The petitioners submit that they are governed by the Group of Companies Doctrine as laid down in Cox and Kings Ltd. v. SAP India Pvt. Ltd. (2024) 4 SCC1.

4. It was agreed by the petitioner at the request of respondent No.3 that the operations under the Franchise Agreement, would be carried out through a related party in which respondent no. 3's is a partner, namely respondent No.1 and with whom a license agreement for the restaurant location SH/2F/03, Second Floor, Pacific Mall, Netaji Subhash Place, New Delhi (NSP Outlet) had been entered into with respondent No.4, i.e. Pacific Mall.

5. Mr. Swaminatham, learned counsel for the petitioner draws my attention to Clause 3.2 and Clause 6.2 of the Agreement, which read as under:-

*“3.2 **Day-to-Day Operation of the Restaurant.** Project Manager and Franchisee both shall mutually exercise their decision-making authority with respect to the day-to-day operation, direction, management and supervision of the Restaurant. The Restaurant shall, at all times, and at Franchisee's sole cost and expense, be staffed, furnished, supplied, repaired, restored, marketed and in all ways maintained, managed and operated by Project Manager. Franchisee and Project Manager acknowledge that the Restaurant and all the Furniture and Equipment and all other personal property located in the Restaurant are and, shall remain the exclusive property of Franchisee. Notwithstanding the foregoing the Franchisee shall at all times be responsible to ensure that the Restaurant are being run in accordance with applicable laws and comply with all necessary licensing and*



other applicable conditions. The Franchisee shall overall be responsible for obtaining and complying with licenses, approvals, authorizations, consents etc. and for day to day running of the Restaurant, and all such costs associated thereto be it capital expenditure and/or revenue expenditure, which shall be borne by the Franchisee. The Franchisee shall be listed as the point of contact and person responsible for compliance in all government filings relating to the Restaurant.

....

6.2 Franchisee's Termination Rights. *The Franchisee shall have the right to terminate this Agreement upon notice to Project Manager after the occurrence of any one or more of the following events and only under such circumstances:*

- (i) immediately, by simple written notice without the need of any authority resolution, if Project Manager becomes the subject of a Bankruptcy; or*
- (ii) if Project Manager fails, in any material respect, in the performance of or compliance with any of the material covenants, agreements, terms or conditions contained in this Agreement, provided that such failure by the Project Manager did not arise as a result of a breach of the obligations of the Franchisee under the Agreement, including without limitation if the right to use of any portion of the IP shall cease for any reason and such failure continues for a period of thirty (30) days after notice thereof from Franchisee to the Project Manager specifying in detail the nature of such failure, or, in the case such failure is curable but cannot with due diligence be cured within such period of thirty (30) days, if the Project Manager fails within such thirty (30) day period to commence cure of such default and with due diligence thereafter proceed to prosecute the cure, it being intended that in connection with a failure not susceptible of being cured with due diligence within thirty (30) days that the time within which to cure the same shall be*



extended for such period as may be reasonably necessary to complete the same with all due diligence; or

(iii) The Franchisee may terminate this agreement, after the expiry of the Lock-in as mentioned in Clause 6.1 above, without providing any sufficient reasons by serving a notice of Three months to the Project Manager.”

6. The learned counsel for the petitioner states that a combined reading of the abovementioned two clauses shows that there is a negative covenant which can be enforced by the petitioner.

7. It is stated by the learned counsel for the petitioner that the respondents were required to run the restaurant under the name and style of “Mamagoto” for the entire duration of the Franchise Agreement and in the event of termination after the lock in period, the respondents were required to give a three months notice. Hence, it is urged that the respondent should be restrained for a period of three months from the notice dated 06.05.2024 (which, if at all, can be construed as a notice of termination) from running a restaurant with a different brand.

8. When the matter came up for the first time on 30.05.2024, this court directed the respondent to continue with the fit-out operations but not to open a new restaurant till 02.07.2024.

9. Mr. Jain, learned counsel for the respondent no.1 to 3 has filed a reply stating that the premises is ready for operation and therefore prayers that the interim order dated 30.05.2024 be vacated.

10. I have heard the learned counsel for the parties.

11. A negative covenant is an agreement to not do a certain act. It requires strict construction. The judgment of the Hon’ble Supreme Court in



Administrator of the Specified Undertaking of the UTI v. Garware Polyester Ltd., (2005) 10 SCC 682 has observed as under:-

“29. It is true that a negative covenant by itself is not invalid in law. But it is also true that it requires a strict construction. The agreement is a commercial document. Commercial documents must be construed in a manner as are understood in commercial parlance. A commercial document must be read reasonably. It must be construed in such a manner so that it is made workable.”

12. In the present case, I am of the view that the clause 6.3 of the agreement is not a negative covenant as alleged because it does not restrict the respondents from running a restaurant with another partner, franchise or collaborator. It only obliges the respondent to give a three month's notice. The respondent issued notice dated 06.05.2024 terminating the agreement between the parties. It reads as under:-

*“8. As you have failed to address these issues in a timely and satisfactory manner and have continuously breached your obligations under the Franchise Agreement, my Client does not owe you any amount towards the royalty fee as claimed in the Notice under reply. You have left my Client with no choice but to **stop the Restaurant's operations from 31 May 2024.** My Client has further instructed me to explore all available legal avenues to protect his interests and seek appropriate remedies.”*

13. A perusal of the same shows that the intention of the respondent was to sever the subsisting relationship between the parties and to put an end to the contract existing.

14. In these circumstances, at best the petitioner can claim damages for



the violation of the required notice period. The petitioner however cannot seek continuation of operations of the franchise restaurant “*Mamagoto*” at this instance when the contract between the parties has been severed.

15. Mr. Swaminatham, learned counsel for the petitioner has relied upon the judgment of Division Bench of this court in FAO(OS) (COMM) 7/2023 titled “*Global Music Junction Pvt. Ltd. v Shatrughan Kumar AKA Khesari Lal Yadav and Ors.*,” more particularly paragraphs 51, 86-88, which read as under:-

“51. The uniform and consistent practice of Courts in India and England has been to enforce negative covenants in an agreement.

...

86. To conclude, the Amendment Act, 2018 has taken away the discretion of the Courts in granting specific performance. Altering the nature of specific relief from an exceptional rule to a general rule has been done to ensure contractual enforcement and to increase adherence to the sanctity of contracts.

87. In any event, Courts are not precluded from granting an injunction to perform a negative covenant and the same is in no manner controlled/ affected by Section 14 of the Act, 1963.

88. Accordingly, keeping in view the aforesaid conclusions, the impugned judgment is set aside and this Court injuncts the Respondent No.1/ Defendant No.6 from engaging with any third person including Respondents No.2 to 5 and/ or Appellant/ Plaintiff’s competitor for monetising of any new song till 30th September, 2025, except when the Appellant/ Plaintiff refuses to



accept delivery of the said song subject to the Appellant/ Plaintiff proving its bonafides by depositing the balance fee (i.e. Rs.2.20 crores) with the Registry of this Court. The release of the said amount shall abide by final judgment/order to be passed by the learned Single Judge. To place the matter beyond controversy, it is clarified that the Respondent No.1/ Defendant No.6 can continue to act, sing, dance in the Bhojpuri Film Industry as well as on national TV channels, social media platforms and on stages, but he can't sell his new songs to distributors/ music companies/ producers/ third parties like Respondents No.2 to 5 etc. till the Appellant/ Plaintiff refuses to accept delivery of the said new songs.”

16. The abovesaid judgment is distinguishable as in that judgment the agreement between the petitioner and the respondent clearly contained negative covenant in clauses 3.5 and 3.6 of the Agreement. The clauses 3.5 and 3.6 read as under:-

“3.5 The Artist shall not work with any third-party whatsoever for creating any new Intellectual Property or content of any kind during the Term. Notwithstanding anything herein, the Parties agree that the Artist may provide content to excluded parties as listed in Annexure D herein, provided that the terms and conditions of the said Annexure D are followed by the Artist.

3.6 The Parties agree that in the event that the Artist is found to have breached this Agreement or any part thereof, the Producer shall have the right but not obligation to, without prejudice to any other right or remedy available to it under this Agreement, law or



fort, to restrict the Artist from producing and/ or publishing any further content of any kind, including without limitation as per detailed in Annexure D herein, until such time that the breach made by the Artist has been cured in full or damages incurred by the Producer due to such breach have been paid in full.”

17. The above mentioned clauses restricts the party artist from undertaking any work with a third party for creating any new intellectual property or content of any kind during the term; in breach of which, the other party shall have the right to restrict the artist from producing and/or publishing any content till the breach made has been cured in full or damages incurred have been paid in full.

18. However, in the present case there is no such similar explicit clause in the agreement between the parties restricting the respondent from undertaking any work with a third party or starting a new restaurant, therefore no injunction praying the same can be granted in view of Section 14(1) (d) read with 41(e) of the Specific Relief Act, 1963.

19. For the said reasons, the present petition is dismissed.

20. Mr. Swaminatham, learned counsel for the petitioner at this stage states that an Arbitrator be appointed for adjudication of the disputes between the parties and also states that prayer (d) and (e) be decided by the Arbitrator at the earliest. The prayer (d) and (e) reads as under:-

(d) Pass an order with ad interim direction to the Respondent No.1 and Respondent No.2 to deposit a sum of Rs.15,14,404/- (Rupees Fifteen Lakhs Fourteen Thousand Four Hundred and Four only), before this Hon'ble Court in form of FDR to protect / secure the Petitioner's outstanding dues up to the month of April 2024, recoverable from the Respondent No.1 and 2;



(e) Pass ad-interim directions against the Respondents No.1 and 2 to produce their books of accounts starting from the financial year 2021-2022 till date;

21. With consent of parties, an Arbitrator is appointed to adjudicate the dispute between the parties, the following directions are issued:-

- i) Mr. Vikas Chopra, Adv (Mob. No. 9212036118) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The parties are at liberty to file their respective Claims and Counter Claims.
- iii) The learned Arbitrator shall decide prayer (d) and (e) at the earliest.
- iv) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- v) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- vi) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- vii) The parties shall approach the learned Arbitrator within one



weeks from the date of uploading of this order.

22. The interim order dated 30.05.2024 stands vacated.

JASMEET SINGH, J

JULY 2, 2024/NG