THE INDIA FITNESS CONNECT PVT. LTD Vs OZONE SPA PVT. LTD. & ANR

Court: Delhi High Court

Date of Decision: Jan. 15, 2018

Acts Referred: Negotiable Instruments Act, 1881, Section 139 - Presumption in favour of holder

Hon'ble Judges: Jayant Nath

Bench: Single Bench

Advocate: Ankur Mittal, Abhay Gupta, Kirti Uppal, Sidharth Chopra, Charu Rustagi, Aknsha Singh, Parika Gupta

Final Decision: Dismissed

Judgement

IA No. 7012/2017

1. This application is filed for seeking ex parte injunction in favour of the plaintiff to restrain the defendants from presenting cheques for clearing.

2. The plaintiff has filed the present suit seeking a declaration in favour of the plaintiff and against the defendants declaring agreement dated

21.04.2016 as null and void. Other consequential directions are also sought. The case of the plaintiff is that defendant No. 1 claims itself to be a

leading player of gymnasium chains and spa in the Northern Indian Market. Defendant No. 2 is the promoter of defendant No.1.

3. It is pleaded that the defendants had been dealing with the distributor of the gym products, namely, M/s Gympac Fitness Systems Pvt. Ltd.

(Gympac). The said Gympac were acting as agent on behalf of the Precor Inc a multinational company dealing in Gym equipment (Precor).

Defendant No.1 had placed two purchase orders for supply of gym products of Precor worth Rs.2.48 crores to Gympac. The equipments were

installed in the premises of the defendants in Delhi and Hyderabad with a 5 years deferred payment plan.

4. In the meantime, as Gympac ceased to be a distributor of Precor, the plaintiff became the distributor w.e.f. 01.01.2016. As on 31.12.2015, the

defendants owed a huge amount to Gympac i.e. Rs. 2.19 crores on account of the earlier transactions relating to gymnasium equipments

purchased. It is the plea of the plaintiff that defendant No.2 made tall promises to the plaintiff that he would open multiple gymnasium across

Northern India. It was proposed that the plaintiff should pay the balance installments for the gymnasium equipments supplied to Defence Colony,

Delhi and Hyderabad gymnasiums by Gympac. The payment was to be made to defendant No.1. It is further pleaded that defendant No. 2 lured

the plaintiff in a meeting held on 13.04.2016 that minimum five gymnasium orders would be placed on the plaintiff for minimum US$ 6 lakhs. In

fact, defendant No.2 also made a commitment for a supply order for gymnasium equipments to 15 gymnasiums of the defendants in the next three

years. Defendants however insisted that the plaintiff should take over the pending liability of Gympac. Relying upon the

representations/commitments of defendant No.2, the parties entered into the agreement dated 21.04.2016. The plaintiff signed and delivered

cheques for Rs. 2,46,84,750/- payable in 53 monthly installments of Rs.4,65,750/- each payable w.e.f. May 2016 to September 2020. It is

pleaded that the agreement stipulates that the payment is being made to the defendant no.1 for advertisement expenses whereas the payment was

made for discounts payable to the defendants for the promised orders.

5. It is the plea of the plaintiff that it bona fidely continued to make payment for six months commencing from May 2016 to October 2016. A total

amount of Rs. 28,44,180/- was paid. Finally, vide letter dated 26.10.2016 as nothing fructified and no orders were placed by the defendants, the

plaintiff cancelled and terminated the agreement dated 21.04.2016 and complete business arrangement. It is pleaded that despite termination of the

agreement, the defendants illegally continue to present cheques for clearing.

6. The defendants have denied the plea of the plaintiff stating that the plaintiff wanted to use the gym of the defendants to advertise the Precor

products. It is pleaded that potential customers of the plaintiff were brought to the gym of the defendants to show the Precor equipments as the

gym of the defendants has only Precor equipments. Hence, it is pleaded that the plaintiff are bound by the promises made and no injunction can be

passed restraining the defendants from presenting the post dated cheques for payment.

7. I have heard learned counsel for the parties.

8. Learned counsel for the plaintiff has vehemently argued that the agreement between the parties dated 21.04.2016 is without consideration and

void. No advertisement whatsoever has been made or carried out by the plaintiff at the defendants'' gym. Even otherwise the agreement on the

face of it is terminable and stands terminated by the termination letter dated 26.10.2016. It is also pleaded that the agreement is induced by fraud

and is void.

9. Leaned counsel for the plaintiff has also relied upon the termination letter dated 26.10.2016 to point out that the clear stand of the plaintiff is that

the agreement between the parties dated 21.04.2016 was only a front for the actual arrangement, namely, that the defendant was to give purchase

orders for other gyms to the plaintiff and that is why the plaintiff agreed to make the said payments to the defendants. It is pointed that even

otherwise, there was no reason or occasion for the plaintiff to agree to pay such huge amount of Rs.2,46,84,750/- to the defendants. Reliance is

also placed on the judgment of the Madras High Court in SBQ Steels Ltd. vs. Goyal Gases Pvt. Ltd., 2014 (3) CTC 586 to contend that this

court has the powers to restrain the defendants from presenting the post dated cheques to the bankers. It is pleaded that if the said order is not

passed irreparable prejudice is caused to the plaintiff to who is based in Bombay and will have to defend a criminal action in Delhi.

10. Learned senior counsel appearing for the defendants had denied the pleas of the plaintiff. He has pointed out that real cause of problem was

lack of fund. He relies upon the SMS messages received from the plaintiff on 28.11.2016 after the termination of the agreement where the plaintiff

has pleaded lack of funds.

11. I may first look at the agreement dated 21.04.2016 between the parties. The said agreement reads as follows:-

A. WHEREAS First Part/OSPL is the absolute owner and in peaceful possession of D27 Defence Colony (hereinafter referred to as ""the Land"")

and has developed and constructed a building thereon known as ""Ozone Spa Pvt Ltd"" (the ""Building"").

B. WHEREAS as per the discussion and meeting held on 14.04.2016 at Ozone Spa Pvt Ltd, Defence Colony, New Delhi, wherein it was

discussed and agreed that Second Part will use the space at Ozone Spa Pvt Ltd herein referred to as First Part for advertising its equipments till

01st September 2020 and that the Second Part in return will pay Rs. 2,51,23,590/- for 53 months i.e.Rs. 4,74,030/- per month including service

tax @14.5% as expenses/rent for the usage of space for advertising the equipments at the premises of First Part i.e. D-27, Defence Colony, New

Delhi 110024 till 53 months.

C. WHEREAS if there is any change in the service tax as per the guidelines of Government of India then in that case the Second Part agrees to

pay the differential amount of the service tax and all other applicable taxes to the First Part.

D. WHEREAS it is of the essence of this agreement that the said agreement can neither be revoked nor terminated until entire payment i.e. Rs.

2,51,23,590/- inclusive of service tax is paid.

E. The confidentiality of agreement is hereby ratified and confirmed between the parties thereto and will be subject to New Delhi Jurisdiction only.

12. What the plaintiff claims is that this payment as per the agreement was to be made to the defendants not on account of any advertisements to

be done in the gymnasium of the defendants as stated in the agreement but was an inducement/incentive being paid to defendant No.1 on account

of promise made to order large amount of equipments for the proposed new gymnasiums of defendant No.1. As no such gymnasiums or fresh

orders fructified, it is pleaded that the agreement is void and without consideration.

13. It is no doubt true that the parties can lead evidence to show that a document is a sham document and not intended for the purpose it was

entered into [Ref. (i) Tyagaraja Mudaliya and Anr. vs. Vedathanni, AIR 1936 PC 70, (ii) Gurdial Singh and Ors. vs. Raj Kumar Aneja and Ors.,

(2002) 2 SCC 445, (iii) Smt. Gangabai vs. Smt. Chhaburai, (1982) 1 SCC 4, (iv)K. Bhaskaran Nair vs. Habeed Mohammed and Ors., AIR

2002 Kerala 308 and (v) Ishwar Dass Jain vs. Sohan Lal, (2000) 1 SCC 434]. The legal position that would follow from the above judgments is

that it is permissible for the defendant to raise the plea that the documents relied upon by the plaintiff were sham documents and that the actual

transaction was different as what is sought to be projected in the documents executed by the parties. However, as stated above, the onus to prove

the same would be on the defendant and though direct evidence may not be available, the inference to be drawn from circumstances should be an

irresistible one and not merely a matter of conjectures and surmises.

14. I may also look at the SMSs sent by the plaintiff on 19.11.2016 after termination of the contract which reads as follows:-

Dear Sir

We request you not to present the cheques due to the current bank situation. The business has gone down considerably. We will get everything

sorted out once the situation becomes normal. Hope you understand.

Best Regards.

29/11/2016

Good morning Sir.

Kindly call me back. Need to talk to you. Please.

15. At this stage, it is not possible to accept the plea of the plaintiff. The onus to prove this contention is on the plaintiff which onus could only be

discharged after the plaintiff leads his evidence.

16. Even otherwise I may note that under Section 139 of the Negotiable Instrument Act unless a contrary is proved, it is presumed that the holder

of the cheque received the cheque for discharge of a debt or liability. At this stage, the defendants are holding the post dated cheques which are

presumed to have been given for discharge of a debt or liability unless the contrary is proved by the plaintiff. The argument that the agreement

dated 21.04.2016 is a sham document without consideration or motivated by fraud is an issue which can normally only be adjudicated upon only

after evidence is led by the parties.

17. In my opinion, the plaintiff has failed to make out a prima facie case. Balance of convenience is also not in favour of the plaintiff. The present

application is accordingly without any merit and is dismissed.

CS(COMM) 421/2017

List before Joint Registrar for further proceedings on 16.02.2018.