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

Court: Delhi High Court

Date of Decision: May 25, 2018

Acts Referred: Code of Civil Procedure, 1908 â€" Section 13
Negotiable Instruments Act, 1881 â€" Section 138, 139

Hon'ble Judges: SANJIV KHANNA; CHANDER SHEKHAR

Bench: Division Bench

Advocate: Ankur Mittal, Abhay Gupta, Kirti Uppal, Rajesh Mahendra, Vaibhav Jairaj

Final Decision: Dismissed

Judgement

CM No.22032/2018 Learned Senior Counsel for the respondents, who appears on advance notice, states that he has no objection in case delay of 40

days in re-filing of the appeal is condoned. In view of the statement, the application is allowed. FAO(OS) (Comm) No.114/2018 & CM No. CM

Nos.22029-31/2018 & CAV No.506/2018

1. The present intra court appeal under Order XLIII of th eCode of Civil Procedure, 1908, read with Section 13 of the Commercial Courts,

Commercial Division and Commercial Appellate Division of High Courts Act, 2015, is directed against the order dated 15.1.2018 passed by the

learned Single Judge in IA No.7012/2017

2. The appellant herein, The India Fitness Connect Pvt. Ltd. has filed CS(Comm) 421/2017 against Ozone SPA Pvt. Ltd. and Naveen Khandari,

Promoter and Managing Director of the former, who are the defendant Nos.1 and 2 in the suit and respondent Nos.1 and 2 in the present appeal. The

suit is for declaration that the agreement with defendant No.1 (Ozone SPA Pvt. Ltd.) is null and void ab initio, being without consideration and induced

by fraud and deception; a decree of mandatory injunction directing the defendants to handover all cheques issued by the plaintiff and to injunct the

defendants, their representatives and assigns from presenting the cheques issued for payment. In the alternative, it is prayed that a decree of

mandatory injunction be passed directing the defendants to forthwith deliver and destroy the cheques issued by the plaintiff. Lastly, prayer has been

made to pass a decree for recovery of money of Rs.28,44,180/- in favour of the plaintiff and against the defendants along with pendent lite and future

interest @ 18% p.a.

3. The impugned order rejects the application for interim injunction filed by the appellant, after referring to the agreement dated 21.4.2016, which is

rather a short one and reads as under: Ã¢â‚¬Å“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

CS(COMM) 421/2017 Page 5 of 7 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.Ã¢â‚¬â€‹

4. The appellant accepts and admits execution of the agreement and that they had issued 53 cheques of Rs.4,74,030/-, inclusive of service tax @

14.5% payable each month as expense/rent for use of space for advertisement and equipment, in terms of the said agreement. Six cheques of

Rs.4,74,030/-each have been encashed and the appellant has accordingly sought recovery of Rs.28,44,180/- from the defendants.

5. Learned counsel for the appellant has drawn our attention to the e-mails exchanged between the appellant and their principal, namely, M/s. Precor

Inc., a company based in U.S.A., who, it is stated, are manufacturers and suppliers of gymnasium equipment. It is submitted that the first defendant is

liable to make substantial payment to the earlier distributor of M/s. Precor Inc., namely, M/s. Gympac Fitness Systems Private Limited. The

submission is that there was a connect between the agreement dated 21.4.2016 executed between the appellant and the first defendant and payment

due and payable by the first defendant to M/s. Gympac Fitness Systems Private Limited.

6. The impugned order refers to the contention raised and records that this could be a matter of evidence to be adduced and led. Appellant has to

establish the assertions and allegations. Prima facie, the learned Single Judge has observed, the appellant has not been able to discharge onus and

establish that the agreement dated 21.4.2016 was vitiated and void. The impugned order also refers to Section 138 of the Negotiable Instruments Act,

1881 (Ã¢â‚¬ËœNI ActÃ¢â‚¬â„¢) and rebuttable presumption that the cheques were for discharge of debt or liability. First defendant has initiated proceedings

under Section 138 of the NI Act on account of dishonour of cheques. Reference is made to a SMS sent by the appellant to the said defendant, which

reads as under:- Ã¢â‚¬Å“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.Ã¢â‚¬ Ã¢â‚¬Å“29/11/2016 Good morning Sir.

Kindly call me back. Need to talk to you. Please.Ã¢â‚¬â€‹

7. We find that the aforesaid reasoning given by the learned Single Judge is cogent and befitting. The e-mails referred to by learned counsel for the

appellant, it is noticeable, are between the appellant and M/s. Precor Inc. Even if it is assumed that certain dues were payable by the first defendant to

M/s. Gympac Fitness Systems Private Limited, there is no privity of contract between the appellant and the first defendant in respect of equipments

supplied earlier and prior in point of time. It is not the case of the appellant that any amount is due and payable to them by the first defendant. There

appears to be some disconnect in the argument raised, for if the first defendant was in debt and liable, the appellant would not have issued post-dated

cheques for Rs.2,51,23,590/-, a substantial sum of money, to the first defendant.

8. Contention of the appellant that the defendants had agreed or promised to purchase new equipment for 15 gymnasiums, which were to be set-up

and established in the next three years, is not specifically recorded and stated in the agreement dated 21.4.2016. No written contract is pleaded.

Learned Single Judge has, therefore, rightly observed that the appellant had not been able to make out a prima facie case and dislodge presumption

under Section 139 of the NI Act on the basis of the evidence and material on record. Ocular evidence has to be led by the appellant to establish their

case. Once the appellant accepts the agreement was signed, cheques were issued and honoured for six months, we do not think that this is a fit case

for grant of interim injunction.

9. We, however, clarify that the observations made by the learned Single Judge in the impugned order and by us in this order are for disposal of the

application for interim injunction and this appeal. These would not be treated as binding and final findings on merits.

10. The appeal is dismissed. All the pending applications and caveat are also disposed of. No costs.