

## DELHI HIGH COURT

Modern Food Industries India Ltd.

Vs.

S. K. Bottlers (P) Ltd.

I. A. Nos. 719 and 793 of 1983. In Suit No. 255-A of 1983.

(Charanjit Talwar, J.)

30.3.1983

### JUDGEMENT

#### **Charanjit Talwar, J.**

1. On 8th March, 1983, for reasons to be recorded later on, I allowed I. A. No. 793 of 1983 filed by the defendant herein under Order 39, Rule 4 of the Civil Procedure Code seeking vacation of the *ex parte* ad interim injunction passed on 16th February, 1983, and thus dismissed the plaintiff's application, I. A. No. 719 of 1983.

2. The plaintiff (herein called 'the petitioner') Modern Food Industries Ltd., is the owner of trade mark '77' an aerated water soft drink. It has filed a petition under Section 20 of the Indian Arbitration Act seeking that the original arbitration agreement contained in the contract between it and M/s. Shri Krishna Bottlers Pvt. Ltd., be filed in Court and the disputes raised by it in para 16 of the petition be referred to arbitration in accordance with arbitration clause of the contract.

3. It is the case of the petitioner that it has entered into franchise agreements with different bottlers in various parts of the country. Under those agreements it sells concentrate for manufacturing "77" to the bottlers who actually manufacture and bottle the said aerated water drink and distribute it in their respective territories. According to it, it had entered into such a franchise agreement with the respondent, a private limited company, carrying on the business of manufacturing, bottling and distributing soft drinks at Hyderabad. The agreement executed between them on 17th March, 1982, was valid for a period of five years in the first instance. By another agreement of the same date between them the petitioner in addition was to supply the concentrate of another

aerated water soft drink known as "Tingler". The allegations are that the respondent on one pretext or the other not only failed to bottle and market the soft drink '77', but has now entered into an agreement with another company M/s. McDowell Company to bottle and market their aerated water soft drink known as 'Thril' in contravention of the said agreement of 17th March, 1982. Further, the case is that that soft drink is absolutely akin, similar in flavor, taste etc. to '77'. The grievance of the petitioner is that the defendant (herein called 'the respondent') by virtue of the existing agreement between them, is prohibited from manufacturing or selling or in any manner dealing with any other product which is akin in taste, color and flavor or design to the beverage of the petitioner-company without its written permission, and that because of that agreement between the parties the petitioner could not enter into a franchise agreement for the territory of Hyderabad with other bottlers. It is further pleaded that "in case the respondent does not manufacture and market the products of the petitioner in its territory during the current year, the petitioner's products would not become known in that territory and it would suffer huge and irreparable losses": The loss has been quantified at Rs. 60 lacs for the current season.

4. Along with the suit the petitioner filed application, I. A. No. 719 of 1983, whereby the respondent-company was sought to be restrained from manufacturing, marketing or in any other manner dealing with or promoting the interests of aerated water 'Thril'. While issuing notice of the application for 25th March, 1983, interim order in these terms was issued. The respondent moved application (I. A. No. 793 of 1983) under Order 39 Rule 4 on 22nd February, 1983. The submission made was that the *ex parte* ad interim order was obtained by the petitioner by suppressing the facts. Notice of that application was issued for 24th February, 1983. Because of the urgency involved in the matter at joint request of the counsel for the parties I advanced the hearing of the petitioner's application and heard counsel for the parties on both the applications.

5. After hearing them at length I passed the short order, as noticed above.

6. The dispute sought to be referred is contained in para 16 of the petition and the petitioner vide prayer clause (b) seeks reference of that dispute to arbitration. That paragraph reads as follows:

"16. That disputes and controversies have arisen between the parties concerning

the rights, duties and liabilities of the parties towards each other. The refusal of the respondents to manufacture the products of the petitioner is a dispute between the parties. The petitioner will suffer loss of Rs. 60 lakhs in one season because of the conduct of the respondent before it can make arrangements with other bottlers for next season".

7. I may note here that during the course of arguments on these applications one of the objections raised by the respondent was that the damages having been quantified; the injunction sought for ought not be granted as the petitioner on its own showing has only a claim for damages. The petitioner thereafter filed an application on 8th March, 1983, bearing No. 1072 of 1983 seeking deletion of words "paragraph 16 of" in the prayer clause on the ground that these words have crept in by inadvertence. That application is pending consideration.

8. Mr. V.P. Singh, learned counsel for the petitioner, submitted that apart from the above dispute another dispute which has arisen is because of the fact that the respondent has entered into an agreement with M/s. McDowell Company to manufacture and market their product 'Thrill' during the currency of the present agreement. It is urged that this dispute is apparent from the pleadings.

9. I may note here that a preliminary objection has been taken by the respondent that the dispute regarding the non-performance of the negative agreement as urged not having been taken in paragraph 16 of the main petition, it cannot be referred under Section 20 of the Arbitration Act. Mr. Narula, however, submitted that for deciding these applications, it may be presumed for the time being that such a dispute does exist between the parties, even then, he submitted, the injunction sought for cannot be granted under Section 41 (e) read with Section 14 (a) and (c) of the Specific Relief Act.

10. Mr. V.P. Singh, learned counsel for the petitioner, submitted while relying on the clauses of the agreement that the contract comprises an affirmative agreement to manufacture and bottle the products of the petitioner by the respondent and also expressly a negative agreement not to manufacture or bottle any other soft drink by it excepting for 'Nova Cola' and that too for a period of one year only. He urged that by virtue of Section 42 of the Specific Relief Act, injunction being sought for against the respondent, namely, restraining it from manufacturing and marketing or in any other manner dealing with or promoting the interest of aerated water soft drink known as 'Thrill' is liable to be granted.

According to him the prohibition imposed by Section 41 (e) of the said Act is not applicable in the instant case. To meet the argument of Mr. Narula that this contract which in its nature is determinable and therefore its performance cannot be specifically enforced, Mr. V.P. Singh contended that the petitioner having performed its part of the contract by supplying the concentrate of '77' which is the only part which was binding on it to be performed, the injunction to perform the negative agreement, i.e., to manufacture 'Thril' as the respondent has threatened to do, ought to be granted.

11. For deciding these applications, the negative agreement, which can be spelled out from the clauses of the agreement, coupled with the admitted fact that respondent has entered into another contract with M/s. McDowell Company to manufacture and bottle their soft drink 'Thril', the dispute not to manufacture 'Thril' may be presumed to exist between parties although the application seeking amendment of the main petition is pending decision.

12. Another relevant fact which occurred during the pendency of the petition and which fact has been highlighted by the respondent to show that the contract is determinable is that after notice this suit was served on the respondent, the respondent without prejudice to its rights exercised its right to terminate the contract under clause 21-B and has given the requisite six months' notice in writing to the petitioner. A copy of that notice dated 28th February, 1983, was brought on the record.

13. The respondent has also produced on record, some documents to show that the petitioner had earlier entered into a franchise agreement for manufacturing and bottling of the soft drink '77' and 'Tingler' in the territory of Andhra Pradesh including the territory of Hyderabad with M/s. Spencer and Company Ltd., under which agreement the soft drinks in question were being and continue to be sold in the city of Hyderabad by their authorized distributors. A bill dated 22nd February, 1983, from M/s. Kanuri Enterprises has been placed on the record in support of this contention that even after the petitioner had entered into the agreement with the respondent, their product '77' was being sold and is available in that city. In its rejoinder the petitioner while admitting the agreement with M/s Spencer and Company has averred that on the insistence of the respondent-company the territory in the State of Andhra Pradesh in which M/s Spencer and Company could sell the soft drinks, was reduced and the territory of Hyderabad and *Secunderabad* was exclusively allotted to the

respondent. The petitioner denied that the said drinks are being sold in the cities of Hyderabad and *Secunderabad* through authorized agents of M/s Spencer and Company. That company, it is alleged, could no longer market those soft drinks in those cities because of the agreement between the parties herein.

14. It is the respondent's case that the petitioner was to advance Rs. 30 lakhs to it as soft loan to enable it to buy empty bottles and to commence production of the petitioner's soft drinks. As that loan was not advanced on the terms agreeable, the date for the commencement of the implementation of the agreement between them could not be fixed and hence the respondent had no option but to enter into an agreement with M/s. McDowell Company for manufacturing and marketing their product 'Thril'. As per the agreement in question the respondent who was already bottling and marketing a soft drink called 'Nova Cola' was allowed to continue to do so for another year. The respondent alleges that that period of one year was to expire on 17th March, 1983, and thereafter the business of the respondent would have come to an end and therefore due to this compelling reason and the non-co-operative attitude of the petitioner the respondent entered into another agreement with M/s. McDowell Company.

15. The respondent alleges that with effect from 13th February, 1983, it has, started to produce the soft drink 'Thril' and continued to do so till 19th February, 1983, when it was served with the order of injunction of the Court. The details of the production have been given in Annexures A and B to I. A. No. 793 of 1983. Because of the injunction, it is alleged, the production of that soft drink has been stopped and the loss per day worked out by the respondent is stated to be at Rs. 30,830/-. To support its contention that the respondent has started this production, photostat copies of the daily production reports passed by the officials of the excise department have been placed on the record.

16. Further, it is the case of respondent that under clause 18 of the agreement between the parties in the event of the respondent not complying with some of the conditions, it would result into automatic termination not only of the contract but may entail the forfeiture of the security deposited by it. Even otherwise, the case of the respondent is that the agreement between the parties is determinable under clause 21 thereof. The petitioner has a right under sub-clause (a) of that clause to terminate the agreement with prior notice "if the bottler fails to perform any or all of its obligations under this agreement" and

the respondent by giving a notice in writing within six months in advance.

17. As stated earlier, the respondent has already served this six months' notice on the petitioner on 28th February, 1983.

18. Now turning to the preliminary objection noticed earlier, in my view, it is open to the Court to grant injunction directing the respondent not to manufacture 'Thrill', the prohibition under Section 41 of the Act is not applicable. The question which arises, however, is it a fit case where such an injunction be issued?

19. Mr. V.P. Singh urged that while deciding a case which falls within the purview of Section 42 of the Specific Relief Act the only test laid down by the Courts for granting such an injunction was the test of reasonableness and not the principles governing issuance of temporary injunction under Order 39, Rules 1 and 2 of the Civil Procedure Code. In support of his contention Mr. V.P. Singh relied upon *M/s. Lalbhai Dalpatbhai and Co. v. Chittranjan Chandulal*,<sup>1</sup> In the said case the negative stipulation in the contract of service not to serve another employer during the currency of the contract fell for consideration. Bhagwati J. (As his Lordship then was) speaking for the Court held that two conditions must be fulfilled before the restraint imposed by the negative covenant can be held to be enforceable by an injunction. It was, *inter alia*, observed. "In the first place it must be reasonable in reference to the interest of the contracting parties and secondly it must be reasonable in reference to the interest of the public. In the case of each condition the test of reasonableness must be satisfied. To be reasonable in reference to the interest of the contracting parties, the restraint must not afford no more than adequate protection to the party in whose favor it is imposed. To be reasonable in reference to the interest of the public, it must be in no way injurious to the public".

20. The argument before me, however, loses sight of the further observations made in that authority. In para 9 of the judgment the above principles have been elaborated. It is, *inter alia* observed.-

"An injunction if otherwise properly granted may have the effect of inducing or tempting the employee to go back to the service of his employer but that is not the object for which injunction can be granted by the Court. It must, therefore, be seen whether the enforcement of the negative stipulation is reasonable necessary for the protection of the legitimate interest of the employer. If it is not

going to benefit the employer in any legitimate manner, the Court would not injunct the employee from exercising his skill, training and knowledge merely because the employee has agreed to it. Of course when we say this we do not for a moment wish to suggest that in such cases sanctity of contract may not be respected or may be violated with impunity. The question is only one of remedy. The employee having agreed to the negative stipulation the negative stipulation must be held binding on him and if there is breach of the negative stipulation, the employer would have his remedy in damages, if any, but the Court would not grant the extraordinary remedy by way of an injunction because by doing so, beyond a mere enforcement of contractual obligation, no legitimate object or purpose would be advanced".

21. It appears from the above-cited authority that in case it is found that if a remedy by way of damages in a given case was more efficacious, it is not reasonable to grant injunction even where negative stipulation can be enforced. *Prima facie* I am of the view that such an injunction ought to be granted only in exceptional cases; for example, where the employer or the principal has imparted specialized knowledge or technical know how to his employee or agent to train them for a specific specialized field of work and during the currency of the contract or employment that specialized knowledge or know-how ought not be allowed to be used to the detriment of the employer or the principal. The enforcement of a negative stipulation ought not be granted only to spite a party proceeded against.

22. I am fortified in the above view from the principles which can be spelled out from the authority of the Supreme Court in *Niranjan Shankar Golikari v. Century Spg. and Mfg. Ltd.*,<sup>2</sup>

23. Keeping in view the above principles I have to assess the facts which have been brought on the record.

24. According to the petitioner, it is likely to suffer damages to the tune of rupees sixty lakhs because of the non-performance of the contract by the respondent in the next six months, the agreement having not been adhered to by the respondent. However, *prima facie*, it has to be held that the petitioner has arrangements with M/s. Spencer and Company to market and bottle their products in the State of Andhra Pradesh. The franchise agreements of the petitioner with the bottler provide for extension or reduction of the territory. It is

true that because of the agreement in question the territory of Hyderabad and *Secunderabad* was excluded from the territory allotted to M/s. Spencer and Company. Nevertheless it appears that although the respondent has not yet started manufacturing and bottling of the petitioner's products in those cities for reasons in which I do not propose to go into at the moment as it might prejudice one or the other party on merits of the main petition, yet the soft drinks in question are available in those cities. The case of the respondent is that the approved distributors of M/s. Spencer and Company are marketing and selling the products of the petitioner in Hyderabad and *Secunderabad* . It is apparent that without much of effort the petitioner is in a position to market and sell their products in these two cities. The respondent, on the other hand, if injuncted from selling the soft drink 'Thril' under the agreement with M/s. McDowell Company, are likely to suffer irreparable loss because it has stopped production of its own product 'Nova Cola' and instead has started manufacturing and marketing the product 'Thril' of M/s. McDowell and Company. For this purpose it can be presumed that the respondent must have invested heavily to buy empty bottles for marketing and selling the soft drink 'Thril'. The balance of convenience, therefore, is not in favor of the petitioner.

25. For these reasons I dismissed the application I. A. No. 719 of 1983 and allowed the respondent's application I. A. No. 793 of 1983. The injunction order passed on 16th Feb. 1983, was consequently vacated.

26. I leave the parties to bear their own costs.

Order accordingly.

Cases Referred.

1. AIR 1966 Gujarat 189.
2. AIR 1967 Supreme Court 1098.