

(2006) 09 CAL CK 0068

In the Calcutta High Court

Case No : C.O. No"s. 3287 and 4305 of 2005 and 866 of 2006

Bijul Pharma-Chem (P) Ltd.

APPELLANT

Vs

E.R. Squibb and Sons LLC
 E.R. Squibb and Sons LLC
Vs Bijul Pharma-Chem (P) Ltd.

RESPONDENT

Date of Decision : 27-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1963 — Section 10, 14(1), 34, 41, 41(1)

Citation : (2007) 2 CHN 713

Hon'ble Judges : Pranab Kumar Deb, J

Bench : Single Bench

Advocate : P.N. Mishra, for the Appellant;Ranjan Bachwat, D. Basak, S. Ginodia and Preetu Agarwal, for the Respondent

Judgement

Pranab Kumar Deb, J.—The two revisional applications being C.O. No. 4305 of 2005 and C.O. No. 866 of 2006 filed by the Bijul Pharma-Chem (P) Ltd. have been heard along with the revisional application being C.O. No. 3287 of 2005 filed by M/S. E. R. Squibb & Sons LLC The revisional application being C.O. No. 4305 of 2005 has been directed against the order dated 28.10.05, whereby the petition under Order 6 Rule 17 CPC for amendment of the prayer portion of the plaint was rejected. The revisional application being No. 866 of 2006 was directed against the order dated 28.02.06 passed by the learned District Judge in Misc. Appeal No. 237 of 2004, whereby the prayer for extension of the period of supply was rejected. The revisional application being No. 3287 of 2005 was filed by M/s. Squibb & Sons LLC challenging the order dated 12th May, 2005, in Misc. Appeal No. 237 of 2004, whereby the learned District Judge, Howrah was pleased to extend the period of supply of goods in terms of the contract for a period of four months to the extent of letter of credit.

2. Appearing on behalf of Bijul Pharma-Chem(P) Ltd. in revisional application No. 4305 of 2005 and revisional application No. 866 of 2006, Mr. P.N. Mishra has submitted that in rejecting the prayer for amendment of the plaint for

incorporating the relief of specific performance of contract and by refusing to extend the interim order of injunction passed in Misc. Appeal No. 237 of 2004, the learned Court placed undue importance on Clause 5 of the agreement made between the petitioner and the respondent without properly appreciating the relevant provision contained in Clause 20 of the agreement. It is submitted that the respondent vide notice dated 31.08.04 intimated the petitioner that the Non-Exclusive Distribution Agreement dated 23rd November, 2002 would come to an end on 22nd November, 2004 without assigning any reason whatsoever. It is submitted that the petitioner had placed orders for life saving Ostomy appliances worth US Dollar 67,640/-. The illegal termination of contract in breach of the Clause 20 of the agreement, it is submitted, has caused untold hardship and suffering to cancerous Ostomates/patients for non-supply of life saving duty-free Ostomy appliances. The termination of agreement for distribution and supply of Ostomy appliances was made, ignoring the acute demand of various cancer hospitals. Appreciating the acute need of supply of Ostomy appliances and considering the termination of contract to be highly illegal, the Hon'ble Court in disposing of earlier revisional application directed continuation of the supply of Ostomy appliances. Judging the importance of uninterrupted supply of Ostomy appliances and illegality of the notice of the termination, the Appellate Court, it is submitted, earlier directed continuation of supply of Ostomy appliances for a stopgap period of four months to the extent of letter of credit. Side-stepping the principle of injunction, the Trial Court refused to extend the supply of goods till the disposal of the suit.

3. Referring to Section 10 of the Specific Relief Act, it is argued that relief as sought for by the petitioner ought to have been granted in favour of the petitioner, inasmuch as there existed no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done. When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief injunction ought to be granted. Citing the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , it is submitted that in considering the application for injunction, the issue is to be looked from the point of view as to whether on refusal of injunction the plaintiff would suffer irreparable loss and injury. Balance of convenience or inconvenience ought to be considered as important requirement. The Court is required to consider as to whether the grant or refusal of injunction will adversely affect the interest of general public, which can or cannot be compensated otherwise. In refusing to extend the period of supply further, the Trial Court, it is contended, failed to appreciate that the general public would suffer tremendous hardship and agony because of sudden stoppage of non-supply of essential life saving appliances. Had these aspects been considered in proper prospectives, the Trial Court would have allowed the prayer for amendment of the plaint by incorporating the prayer for specific performance of contract as well as the prayer for further extension of the period of supply. Relying on the case of Jabalpur Cable Network Pvt. Ltd. Vs. E.S.P.N.

Software India Pvt. Ltd. and Others, , Mr. Mishra has argued that damage even does not always furnish and adequate remedy in case of breach of contract for sale of movable.

4. Commenting on the arbitrary and abrupt termination of contract, it is submitted that if the contract is rescinded by a stroke of pen without giving an opportunity to the other side to know the reasons or without affording him to file any show-cause against the proposed termination, it would be just mockery of the Constitutional protection. Reliance has been placed on the case of Bhaskar Aditya Vs. Smt. Minati Majumdar and Others, , in support of his contention that the Court will not remain helpless when a weaker side is subjected the arbitrary actions and deliberate acts of oppression.

5. In dealing with the aspect of long-standing contractual business, Mr. Mishra has submitted that the petitioner had entered into an agreement with the respondent way back in 1994. The contract was renewed from time to time under the stipulated renewal Clause. The business in which the petitioner had invested huge amount of money cannot be scrapped overnight under the pretext of change of policy. The case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , has been cited to vindicate his stand that long-running business cannot be forced to stop all on a sudden. The plea of arbitrariness/mala fides as applicable in public law would have the same force in private law as well. The instant contract having been terminated arbitrarily, mala fide and contrary to provision of Clause 20 of the agreement, the Trial Court ought to have allowed the prayer of the petitioner for amendment of the pleadings and for extension of period of supply of goods, treating the contract as subsisting.

6. Assailing the order of the Trial Court, Mr. Mishra has submitted that the Trial Court had failed to appreciate that the declaratory reliefs sought for by the petitioner can be granted u/s 34 of the Specific Relief Act. It is argued that the Trial Court proceeded on a fallacious premise that the suit was for enforcement of a contract of employment. Mr. Mishra has referred to the case of Ashok Kumar Srivastav Vs. National Insurance Company Limited and Others, , to substantiate his view that maintainability of a suit cannot be adjudged from the effect which the decree may cause. It cannot be determined on the basis of the ostensible pleadings made and the stated reliefs claimed in the plaint.

7. On the question of termination and grant of injunction, Mr. Mishra has submitted that where a contract comprises an affirmative agreement to do a certain act, coupled with negative agreement expressed or implied, not to do a certain act and the plaint contains a prayer for specific performance of the positive contract and an injunction for the negative contract, the Court cannot be divested of the power of granting an injunction to enforce the negative agreement; provided the applicant has performed the contractual obligations on his part. In view of the petitioner asking for injunction banking on the negative covenant incorporated an agreement, the refusal to grant injunction is not sustainable in law, as urged by Mr. Mishra.

8. Mr. Mishra has argued that the Trial Court has failed to decipher the proper meaning of the contract. In dealing with the contract, the Trial Court placed too much reliance on Clause 5 of the agreement without paying any attention to Clause 20 of the agreement. Reliance has also been placed on the case of *Garuda Satyanarayana Vs. Grandhi Venkatachalapathi Rao and Another*, , to substantiate that the if the later Clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed in the deed. In the event of ambiguity in the document, the entire document has to be considered and the surrounding circumstances are to be taken into consideration for ascertaining the purported true meaning of the document. Had the agreement deed been read between the lines, the Trial Court would have considered the termination as illegal as being contrary to the provisions of law, as submitted by Mr. Mishra.

9. Appearing on behalf of E.R. Squibb & Sons LLC, Mr. Ranjan Bachwat, learned Counsel has submitted that since the contract by its nature determinable, there cannot be extension of the aforesaid contract after his due termination. It is argued that the extension of the contract after his valid termination will be against the principle as embodied in Section 14(1)(c) of the Specific Relief Act, 1963. It is submitted that it was clearly stipulated in the contract that it would be in force and govern all transaction between the parties for two years from 23rd November, 2002, unless it was terminated before that upon expiration of the initial term, the agreement would be renewed automatically for additional term of one year each, unless notice of non-renewal was provided by one party to the other not less than 60 days prior to the expiration of the initial or any renewal term. Sixty days notice having been issued, intimating the factum of non-renewal of agreement, such contract cannot be specifically enforced in terms of the provision of Section 14(1)(c) of the Specific Relief Act.

10. Challenging the initial order for extension of the agreement by four months, Mr. Bachwat has submitted that the only remedy available to Bijul Pharma-Chem (P) Ltd. was to seek damages for the alleged loss and suffering. Referring to the case of *Jai Drinks Pvt. Ltd. v. Pepsi Foods Limited* reported in 1996(1) AD (DELHI) 1097, it is contended that even in the case of termination of an agreement being found wrongful, what would be available to the petitioner was to seek damages for such wrongful termination. In such type of contract where two parties had fallen out, it was within the right of one of the parties to terminate such type of contract. In case the termination being found wrongful, the party would be entitled to damage. The party, however, cannot compel the other party to continue to act under the agreement as it will amount to specify performance of an agreement which under the law cannot be specifically enforced. Mr. Bachwat has also relied on the case of *Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others*, , to substantiate his stand that where the service is terminated on three months" notice, all that he would be entitled to, even if the dismissal is wrongful, is a decree for damages.

11. Challenging the contention that the contract is required to be extended till disposal of the suit, it is submitted that the contract being determinable in nature it cannot be enforced after lawful termination. Citing the case of The Oil and Natural Gas Commission and another Vs. The Association of Natural Gas Consuming Industries of Gujarat and others, etc. etc., , it is argued the when fresh contract is not entered into after the expiry of the original contract, the Court would not be entitled to direct a party to the contract to maintain the supply of goods.

12. Drawing the attention of the Court to the agreement made between the parties, Mr. Bachwat has submitted that there was no negative covenant stipulated in the contract. In the absence of any Clause containing the negative agreement, there was no occasion whatsoever for the Trial Court to implement the negative agreement, as urged by Mr. Bachwat.

13. The suit for declaration was filed by Bijul Pharma-Chem (P) Ltd. against E.R. Squibb & Sons LLC. It was urged before the Trial Court since the termination of the agreement had been made in violation of the Clause 20 of the agreement, such notice of termination would not have any binding force. It was agitated before the Trial Court that none of the three conditions stipulated in Clause 20 of the agreement having been established, the termination of the agreement should be treated as void ab initio.

14. The agreement made between the parties contained a Clause, whereby the termination could be effected under certain circumstances. It listed the conditions wherein the termination could be effected:

1. In the event of distributor being found not having sufficient working capital to discharge its obligation under the Act;
2. The distributor failing to comply with any of its obligation under the agreement.

15. Bijul Pharma-Chem (P) Ltd. proceed on the wrong footing that such termination was effected under Clause 20 of the agreement. In fact, E.R. Squibb & Sons LLC never came up with the allegation that the distributor did not have sufficient working capital to discharge its obligation under the agreement or it had failed to comply with any of the obligation under the agreement. What they sought to implement was Clause 5 of the agreement. The termination of the agreement is required to be considered in the backdrop of provision contained in Clause 5 of such agreement.

16. As provided in Clause 5 of the agreement, the agreement would continue to be in force and govern all transactions and relations between the parties for two years from 23rd November, 2002, unless it was terminated before that. Upon expiration of the initial term, the agreement would be renewed automatically for additional term of one year each unless notice of non-renewal was provided by one party to the other not less than 60 days prior to the expiration of the initial or any renewed term. There was also provision for non-renewal of agreement. In

the instant case, E.R. Squibb & Sons LLC decided on non-renewal of the agreement. Such decision was sought to be implemented by issuing sixty days notice prior to the expiration of the term. The agreement being found determinable in nature, the other party cannot insist on continuation of the contract.

17. In contract between unequals, the Courts have deprecated the idea of incorporation of arbitrary and unreasonable Clause of termination. A party cannot be made to suffer because of incorporation of unethical and arbitrary clause. He is entitled to seek relief before the Court of Law. Such principles, however, are not applied in purely business transaction. The condition incorporated in Clause 5 of the agreement does not seem to be arbitrary or unethical either.

Section 42 of the Specific Relief Act postulates:

Notwithstanding anything contained in Clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement: Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

18. In the agreement made between E.R. Squibb & Sons LLC. and Bijul Pharma-Chem(P) Ltd., there was no negative covenant which was sought to be implemented. In the guise of a declaratory suit, Bijul Pharma-Chem (P) Ltd. sought to implement an affirmative agreement to do a certain act. Since the Trial Court was not in a position to compel specific performance of the affirmative agreement, it rightly refused to extend the period of agreement and also declined to accept the prayer of Bijul Pharma-Chem(P) Ltd for a relief of specific performance of contract for enforcement of an affirmative agreement The prayer of injunction and further reliefs as sought for by Brjul Pharma-Chem (P) Ltd cannot be granted in view of the clear provisions of Section 14(1)(c) and 41(1) (e) of the Specific Relief Act The contract being determinable in nature, Bijul Pharma-Chem (P) Ltd is entitled to seek damage for the alleged loss sustained by it

19. The Trial Court was absolutely justified in rejecting the prayer for amendment of the plaint for the purpose of converting it into a suit for specific performance The Trial Court was also justified in not extending the period of supply The revisional applications being C.O. No. 4305 of 2005 and C.O. No. 866 of 2006 are, thus, liable to be dismissed Since the supply was made in terms of the earlier order of the Appellate Court, the revisional application being C.O. No. 3287 of 2005 has become infructuous.

20. In the result, two revisional applications being C.O. No. 4305 of 2005 and C.O. No. 866 of 2006 are dismissed and the civil revisional application being No. 3287 of 2005 is disposed of with the observation that with the execution of the

order passed in Misc Appeal No. 237 of 2004 for supply of goods for a limited period of four months to the extent letter of credit, the revisional application being C.O. No. 3287 OF 2005 has become infructuous.

21. The Id Court is directed to dispose of the suit within five months from the date of communication of this order.

22. Urgent xerox certified copies, if applied for, are to be supplied.