

(1996) 05 DEL CK 0056

In the Delhi High Court

Case No : Inter in Application No's. 560 and 561 of 1996 and Suit No. 182 of 1996

Mukand Ltd.

APPELLANT

Vs

Tyazhprom Expon

RESPONDENT

Date of Decision : 01-05-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1996) 3 AD 369 : (1996) 25 ARBLR 615 : (1996) 37 DRJ 533

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Mukul Rohatagi, Sandeep Sethi, A.S. Chandhiok, S.R. Grover, Sangeeta Grover, V.R. Reddy, Vijay Hansaria, S. Poddar and Monica Rohtagi, for the Appellant;

Judgement

S.K. Mahajan, J.

(1) Due to the alleged existence of a negative covenant in the agreement stated to have been arrived at between the plaintiff and defendant No.1, the plaintiff, by this suit, wants to restrain defendant No.1 from in any manner directly or indirectly pursuing or making any other agreements with defendant No.2 or with any other party with respect to the contract for Sinter Plant-3 (Package SP3-2), raw material, storage and handling system at Bhilai Steel Plant of defendant No.2. Alternatively, the plaintiff has claimed a decree for Rs.5 crores against defendant No.1 along With the pendente lite interest. Along with the suit, an application for injunction was filed for restraining defendant No.1 from directly or indirectly pursuing or making any other agreements with defendant No.2 or with any other person with respect to the aforesaid contract and further directing the said defendant to exclusively deal and cooperate with the plaintiff for the performance of the said contract, as contained in the consortium agreement dated August 19, 1995. Brief facts giving rise to the present suit are : -

(2) That defendant No.1 invited global tenders for pre-qualification for

constructing a main Sinter Plant machine and raw material storage and handling system at their Bhilai Steel Plant for Sinter Plant-3 (in short referred to as the "project") and defendant No.1 got pre-qualified in February 1995 for the said project. Proposals for the said project were thereafter to be submitted to defendant No.2

13.1The Members shall collaborate on an exclusive basis in the framework of this consortium.

13.2From the date of signing of this Agreement and during validity of this Agreement, the Members shall cooperate exclusively within the framework of this Agreement and shall not, directly or indirectly make any other Agreements with the Customer or with any third party with respect to the proposal of contract, if the latter is signed Any additional portion of work of any further Addenda to the contract shall be performed within the framework of the Agreement.

13.3Terms of Article 13.2 do not debar Members from the right to enter into any temporary associations with Indian foreign companies with the aim of performing their share under the Contract, in consultation with Members."

(3) An abridged agreement is stated to have been made out for submission to defendant No.2 to satisfy its formal requirement and the said agreement was submitted on August 26, 1995 to the said defendant Consortium's Techno Commercial bid was stated to have been found in order and defendant No.2 had, Therefore, invited price bids on 29th September and October 19, 1995 for the two packages under the project. The price bids were submitted by the consortium for each of the two bids and the package of the consortium was found to be third lowest for the first package and lowest for the second package i.e. raw material storage and handling system at Bhilai Steel Plant. It is alleged that defendant No.2 then requested the consortium to give their best possible discount in price for this second package by December 19, 1995. It is alleged that though the consortium had agreed to give a discount of 5% spread over two installments of initial 4% and subsequent 1% which was also communicated by joint letter dated December 20, 1995 to defendant No.1, the said defendant had started attempts to exclude the consortium members and instead joined some other persons for execution of the contract and the plaintiff is alleged to .have been shocked to receive a letter from defendant No.1 on December 20, 1995 alleging that as no price reduction was given by other consortium members, defendant No.1 had solely prepared and submitted a revised offer to defendant No.2;

(4) That defendant No.1 has subsequently introduced another member by the name of M/S.Tyazhprom India Private Limited as its associate in the execution of the project. It is, Therefore, alleged that as the plaintiff had been involved with the project right from its inception and had expended considerable time, effort and money in bidding and getting the project awarded to the consortium and as the members of the consortium had agreed to collaborate on "Exclusive Right

Basis" in the execution of the project, defendant No.1 did not have any right to execute the project with any person other than the members of the consortium and the reliefs as mentioned earlier were claimed in the suit.

(5) While written statement has been filed by defendant No.2, defendant No.1 has filed reply to the application. Defendant No.2 in the written statement has stated that the relief of injunction has become infructuous in as much as defendant No.2 had already awarded the contract in favor of defendant No.1 vide letter of intent dated December 29, 1995 and a formal contract has already been executed between defendant No.2 on the one hand and defendant No.1 audits Indian associate, namely, M/s.Tyazhprom India Private Limited, on the other hand. It is also stated that there was no privity of contract between the plaintiff and defendant No.2 and as such no relief can be granted in favor of the plaintiff which would in fact operate against defendant No.2. It is further stated that in the consortium agreement furnished to defendant No.2, there was no clause regarding the joint collaboration of the members of the consortium on "exclusive right basis" and, Therefore, there was no question of the plaintiff being entitled to be associated with the project on "exclusivity basis" as alleged in the plaint. It is also alleged that no decree for mandatory injunction u/s 39 of the Specific Relief Act can be granted in favor of the plaintiff and the suit was also stated to be bad for non-joinder of necessary parties, namely, M/s.Tyazhprom India Private Limited. It is also alleged that the plaintiff has suppressed the material fact of its having also participated in the pre-qualification bid and having not qualified therein. It is, Therefore, stated that the plaintiff having not come to the Court with clean hands, was not entitled to any injunction.

(6) In its reply to the application for injunction, defendant No.1 has taken the preliminary objection that there was no concluded contract or consortium agreement between the parties and the alleged agreement was inchoate and did not go beyond negotiations and that a mere contract to negotiate cannot be enforced in law. It is also alleged that any consortium which was to be formed by the parties was necessarily to be approved by defendant No.2 and as no such approval has been given, the alleged consortium did not come into existence. Bank guarantees submitted along with the bid to defendant No.2 were stated to have been given at the instance of defendant No.1 and not the plaintiff as alleged in the plaint; than the suit was bad for mis-joinder of parties in as much as not only that defendant No.2 was not a necessary party to the suit but M/s.Tyazhprom India Private Limited and other associates and sub-contractors who had joined defendant No.1 in the execution of the project were stated to be necessary parties and the suit, according to defendant No.1, deserved to be dismissed on account of the said parties having not been impleaded and no orders against them could be passed at their back. Certain other pleas have also been taken and it is stated that the plaintiff itself has not asked for specific performance of the alleged agreement and there was, Therefore, no question of any injunction being granted in favor of the plaintiff.

(7) The main thrust of the arguments of Mr.Mukul Rohtagi, Sr.Advocate, appearing on behalf of the plaintiff was that as the parties had agreed to form a consortium on "exclusive right basis" and the understanding was that defendant No.1 was to deal only with the plaintiff and nobody else, the said defendant cannot be allowed to execute the project with any person other than the plaintiff. The contention of Mr.Rohtagi is that the plaintiff has spent considerable time and effort in preparing the scope of work, -etc. and it was only with the efforts of the plaintiff that defendant No.1 was able to secure the project which it has now agreed to execute with the assistance of M/s.Tyazbprom India Private Limited. Defendant No.1 having taken advantage of hard work and labour of the plaintiff cannot, according to the plaintiff, be allowed to wash its hand off the agreement which had been arrived at between the parties. Relying upon the "exclusivity clause" as contained in Article 13 of the consortium agreement, the plaintiff contends that plaintiff is entitled to an injunction restraining the defendant from executing the project with any person other than the plaintiff. Relying upon the judgment reported as M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, , Mr.Rohtagi seeks to argue on the following prepositions: i) If the contract is clear and unambiguous and the breach was also clear then the injunction must follow as a matter of course on proof of breach; ii) Courts will not use its discretion to grant or not to grant an injunction in case of a negative covenant and the injunction does nothing more than sanction what the parties had .with open eyes agreed to do or not to do; iii) In such a case balance of convenience will not be considered by the Court and even if the issue of an injunction is against public interest, Court will not take the same into consideration; and Finally iv) Injunction ought to be granted even if it has the effect of specific performance of the affirmative contract.

(8) u/s 41(e) of the Specific Relief Act, an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. Section 42 of the Act, however, is an exception to 41(e). Section 42 of the Act reads as under: -

"NOT WITH STANDING 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 circumstance 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."

(9) The Judgment in Gujarat Bottling Company Limited "and Ors. Vs. Coca Cola Company and Ors., (Supra), is being relied upon by both the parties. Mr.Rohtagi placed reliance upon the following observations of the Supreme Court in this case, in support of his contention that the plaintiff is entitled to the grant of an injunction against the defendant:-

"IN the matter of grant of injunction, the practice in England is that where a contract is negative in nature, or contains an express negative stipulation, breach

of it may be restrained by injunction and injunction is normally granted as a matter of course, even though the remedy is equitable and thus in principle a discretionary one and a defendant cannot resist an injunction simply on the ground that observance of the contract is burdensome to him and its breach would cause little or no prejudice to the plaintiff and that breach of an express negative stipulation can be restrained even though the plaintiff cannot show that the breach will cause him any loss. [See : Chitty on Contracts, 27th Edn., Vol.I, General Principles, paragraph 27-040 at p.1310; Halsburs Law of England, 4th Edn., Vol.24, paragraph 992.) In India Section 42 of the Specific Relief Act, 1963 prescribes that 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 circumstance 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. This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer. [See: Ehrman V.Bartholomew; N.S.Golikari at p389]."

(10) It is further contended that in case an injunction is not granted, the plaintiff would suffer an irreparable injury in as much as award of the contract would have added to the reputation of the plaintiff and conversely non-award would result in the loss of reputation; moreover, the plaintiff has provided technical data and research work in the preparation of the bid, the same was the intellectual property of the plaintiff and the defendant could not be allowed to divulge the secrets of the plaintiff to the third parties and it was only on account of the information and data and research work prepared by the plaintiff that defendant No. 1 was able to get the contract. It is in this context that Mr.Rohtagi contends that the plaintiff is entitled to issue of an injunction even if the same was against the public interest and has the effect of specific performance of the affirmative contract. In support of his propositions, reliance is again placed upon the following observations of the Supreme Court in Gujarat Bottling's Case: -

"THE inter in injunction granted by the High Court has been assailed by the appellants on the ground that as a result of refusal by Coca Cola to continue with the supply of essence/ syrup and/or materials the bottling plants of Gbc at Ahmedabad and Rajkot would remain idle and a large number of workmen who were employed in the said plants would be rendered unemployed. We cannot lose sight of the fact that this complaint is being made by Pepsi through the mouth of the appellants. It is difficult to appreciate how Pepsi can ask Coca Cola to part with its trade secrets to its business rival by supplying the essence/syrup etc. for which Coca Cola holds the trade marks, to Gbc which is under effective control of Pepsi. Pepsi took a deliberate decision to take over Gbc with the full knowledge of the terms of the 1993 Agreement. It did so with a view to paralyse

the operations of Coca Cola in that region and promote its products. In view of the negative stipulation contained in paragraph 14 of the 1993 Agreement which has been enforced by the High Court, Pepsi has not succeeded in this effort. It must suffer the consequences of the failure of the effort and it cannot assail the inter in injunction granted by the High Court by invoking the plight of the work peon who are employed in the bottling plants of GBC."

(11) MR.REDDY, Additional Solicitor General, appearing on behalf of defendant No.2 has argued that as" there was no privity of contract between the plaintiff and defendant No.2, any order which may be passed against defendant No.1 would have the effect of paralyzing the project of defendant No.2 which will also be against the public interest. It is submitted that the plaintiff himself had applied for being short listed and it was only after the plaintiff had failed in his effort to be short listed that it started negotiations with defendant No.1 for forming a consortium to execute the project in case it was awarded to the said defendant. According to Mr.Reddy, techno commercial bid was given only by defendant No.1 and defendant No.2 cannot recognise any other person other than defendant No.1 for execution of the project which had been awarded to the said defendant. It is also the contention of Mr.Reddy that the consortium agreement which had been given to it by defendant No.1 did not contain any exclusivity clause and as such the plaintiff could not invoke the same so as to be entitled to an injunction against defendant No.1. Moreover, the bank guarantee which had been furnished was furnished by defendant No.1 and nowhere it had been remotely suggested that the same had been given at the instance of the plaintiff. It is his submission that in case the plaintiff had any grievance against defendant No.1 it had an opportunity to write to defendant No.2 and may be that on receipt of such a communication from the plaintiff, defendant No.2 might have taken an action not to award the work to defendant No. 1, however, now that the work has already been awarded and is in progress, the plaintiff cannot be allowed to stop the work in between so as to cause loss not only to defendant No.2 but which will also be against the public interest. He also submits that final offer of giving rebate was received by defendant No.1 on December 21, 1995 and the next day said defendant gave a letter confirming its overall responsibility in execution of the project. On December 29, 1995 letter of intent had been issued to defendant No.1 and actual contract had been signed on January 10, 1996. It is contended by Mr.Reddy that the plaintiff-having slept over his rights for a considerable time. and having no correspondence with defendant No.2, it is too late a stage now to cause hindrances in the work so as to adversely affect the interest of defendant No.2. It is-also submitted that the plaintiff in fact acquiesced in the award of work to defendant No.1 and cannot now at this stage object to the same. Reliance is being placed by Mr.Reddy on paragraph 2009 and 2010 Vol.I, 26th edition of Chitty on Contracts) which reads as under: -

" ACQUIESCENCE. "If a person having a right, and seeing another person about to commit, or in course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who

might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act". In this sense of the term (which has been described as the only proper one) acquiescence by the plaintiff amounts to the waiver of his rights and raises a species of estoppel preventing him from subsequently enforcing them. The conduct of the plaintiff need not necessarily bear any relation to lapse of time, because it may take place before or at the time when his rights are violated. The essential ingredients of a defense of acquiescence are, however, by no means clear. In *Willmott V. Barber*, Fry J. laid down no less than five requirements for such a defense. -But it has been said that more recent cases indicate "a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behavior "

" LATCHES. The essence of the doctrine of latches is that if the plaintiff has not been reasonably diligent in seeking relief, it will be inferred that he has acquiesced in the state of affairs of which he complains, and so will be denied relief. What amounts to reasonable diligence varies greatly with the type of relief sought and the circumstances of each particular case."

(12) Referring to the judgment of the Supreme Court in *Gujarat Bottling Company Limited and Ors. Vs. Coca Cola Company and Ors.*, (Supra), it is submitted by Mr.Reddy that paragraph 42 of the judgment on which reliance has been placed by the plaintiff is not what has been held by the Court.

(13) MR.CHANDHIOK, appearing on behalf of defendant No.1, argues almost on the same lines as Mr.Reddy and further submits that defendant No.1 has been short listed on the basis of his own strength, experience and technology; bank guarantees had been issued at the instance of defendant No.1 and not the plaintiff and that parties were only at the negotiating stage and no concluded agreement had been arrived at between them.

(14) The first question which arises for consideration is as to whether there was a concluded contract between the parties and as to whether such a contract contain a negative covenant or an "exclusivity clause" so as to restrain defendant No.1 from executing the contract without associating the plaintiff with it? Though in paragraph 8 of the plaint it is mentioned that on March 20, 1995 a Memorandum of Understanding was entered into between the parties whereby the parties had agreed to act as a consortium and cooperate on exclusive right basis, however, the detailed consortium agreement was still to be framed. The fact that in March 1995 no agreement, had come into existence is also clear from the averments made in paragraph 17 of the plaint wherein the plaintiff states that on August 19, 1995 pursuant to detailed discussions and negotiations, the consortium agreement was entered into between the four consortium members.

In case, the consortium agreement was entered into on August 19, 1995 there could not have been any agreement in March, 1995 and it is this agreement of August 19, 1995 that the plaintiff is relying upon. Though in the agreement dated August 19, 1995 there is an "exclusivity clause" as contained in Article 13, however, in the agreement which was provided to defendant No.2 which also bears the same date as the earlier agreement, no such "exclusivity clause" exists. It was on this basis that it was argued by Mr.Reddy that the alleged exclusivity clause cannot be enforced so as to stop the work which had been awarded by defendant No.2 to defendant No.1. Moreover as on December 19, 1995 parties were still negotiating about the rebate which was to be offered and though it is the case of the plaintiff that they had agreed upon a rebate of 5%, defendant No.1's case is that no such rebate was offered and it was on the failure of the plaintiff to agree to a rebate that defendant No.1 decided to go ahead with the project independently of the plaintiff.

THOUGH on the basis of the material on record it, prima facie, appears that no concluded agreement had been arrived at between the parties, however, I am not basing my decision on this application simply on the ground that no concluded agreement had been arrived at and I am proceeding on the assumption that the parties had agreed to work in a consortium for execution of the project which was to be awarded by defendant No.2. The question which I am to consider is whether there was any negative covenant in the agreement and secondly, whether the plaintiff is entitled to an injunction? As observed above, admittedly in the agreement which had been forwarded to defendant No.2, the exclusivity clause did not exist. Even assuming that it was an abridged agreement, as argued by Mr.Rohtagi, the impression which had been given by the parties to defendant No.2 was that there was no exclusivity clause or a negative covenant and the said defendant was at liberty to deal with defendant No.1 in any manner it likes. Had this clause been appearing in the agreement which had been forwarded to defendant No.2, the said defendant could have been put to guard not to deal with any other person and in that eventuality defendant No.2 would have been dealing with the said party with open eyes knowing fully that a negative covenant is existing and as held by the Supreme Court, it must suffer the consequences. However, in the absence of a negative covenant appearing in the agreement forwarded to defendant No.2, in my opinion, it could not be expected of the said defendant not to deal with defendant No.1 in isolation of the other members of the consortium which is alleged to have been formed for execution of this project. Defendant No.2, Therefore, having already entered into a contract with defendant No.1, I feel that the plaintiff is not entitled to any injunction restraining the execution of the project by defendant No.1.

(15) Moreover, on the facts and circumstances of the case, I do not feel that the plaintiff is entitled to an injunction even assuming that a negative covenant did exist in the agreement between the parties. I am not in agreement with Mr.Rohtagi that on proof of breach injunction must follow as a matter of course

or that Court will not take into consideration even the public interest in such a case. As already observed above, the Supreme Court in *Gujarat Bottling Company Limited and Ors. Vs. Coca Cola Company and Ors.* (Supra), had in paragraph 42 referred to the practice in England but it has not been said that the same practice has to be followed in India. The Supreme Court has held that the grant of an interlocutory injunction requires the exercise of discretion by the Court and while exercising such discretion, the Court must apply tests which are otherwise applicable for the grant of an injunction under Order 39 Rules I and 2 GPC. The relevant observations of the Supreme Court are as under : -

"THE grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising "the discretion the court applies the following tests - i) whether the plaintiff has a prima facie case; ii) whether the balance of convenience is in favor of the plaintiff; and iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. [See : *Wander Ltd. V.Antox India (P) Ltd.*, (SCC at pp.731-32.) In order to protect the defendant while granting an interlocutory injunction in his favor the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favor at the trial."

(16) In case, an injunction is granted in favor of the plaintiff, it is not only that interest of defendant No.1 will suffer but defendant Nos.4 and 5 will also be affected. Moreover, M/s.Tyazhprom India Private Limited which has now been associated for the execution of the project with defendant No.1 is not a party to the suit and any order of injunction which may be passed on the application of the plaintiff will necessarily affect the said party. The plaintiff having chosen not to implead M/s.Tyazhprom India Private Limited as a party to the suit, in my opinion, it is not entitled to grant of an injunction as claimed in the suit. Moreover, the plaintiff does not have any privity of contract with defendant No.2 and any order passed against defendant No.1 will necessarily affect the project which is being undertaken by defendant No.2. It is not only that interest of

defendant No.2 will suffer but, in my opinion, even the national interests will be affected, in case an injunction is granted. It is in public interest that steel plant should be upgraded. It is not a case of two rival competitors who are trying to project their own personal image or are trying to derive benefits for the personal gains, but it is a project which will be in national interest and the same cannot be allowed to be stopped at an inter in stage merely because there was any alleged negative covenant in an agreement which had been entered into between the plaintiff and defendant No.1 by which the said defendant had agreed to execute the project in exclusivity with the plaintiff. Work has already been awarded on 10th January, 1996 even before the filing of the suit and a final contract has come into existence and, in my opinion, Therefore, it will not be proper to pass any order of injunction in favor of the plaintiff. Assuming that there was a breach of the agreement, as contended by the plaintiff, I, prima facie, feel that the plaintiff can be compensated in terms of money and there is no case for specific performance of the same.

(17) For all the above reasons, the application of the plaintiff is dismissed.

(18) Any observation made in this order will, however, have no bearing on the merits of the case.