

(1989) 02 DEL CK 0025

In the Delhi High Court

Case No : First Appeal No. 119 of 1988

R.K.B. Herbals (P) Ltd.

APPELLANT

Vs

Enterprises Advertising (P) Ltd. and Others

RESPONDENT

Date of Decision : 06-02-1989

Acts Referred:

Citation : AIR 1989 Delhi 253 : (1989) 38 DLT 85

Hon'ble Judges : B.N. Kirpal, J

Bench : Single Bench

Advocate : M.L. Lonial, Vinay Bhasin, R.K.Virman, H.N. Salve and A.K. Sharma, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) This appeal is directed against the orders of the Additional District Judge, Delhi who declined to grant an interim injunction prayed for by the plaintiff-appellant.

(2) Briefly stated, the facts are that the plaintiff filed a suit against the respondents for the grant of a permanent injunction. It is alleged that respondent No. 1, which is an Advertising Agency, had entered into an agreement with the plaintiff for handling the advertisements of the plaintiff's products. Respondent No. 2 was the Indian Newspaper Society of which the Advertising Agents are members. Respondent No. 3 is the Advertising Agencies Association of India of, which also the advertising agents including respondent No. 1 were members. Respondent No. 4 was the Convener of the Advertising Agencies Association of India.

(3) It was alleged in the plaint filed by the appellant that due to poor quality and delayed advertisements released by respondent No. 1, the appellant suffered loss and damage. The advertising agreement was terminated and it was alleged that an amount of Rs. 15,81,819 was not payable for reasons like poor reproduction of advertisement improper art work etc. It was further alleged in the plaint that

efforts were made by the President of respondent No. 3 to try and bring about an amicable settlement but those efforts failed. On 4th April, 1988 the appellant is said to have received letter circulated by respondents 1 to 4 requesting the advertising agencies not to release advertisements to the plaintiff till the settlement of the dispute between the parties. It appears that after the termination of the agreement with respondent No. 1, the appellant had entered into an agreement with another agency, namely. Tara Sinha Associates (P) Limited and a copy of this letter was also sent to that agency. According to the appellant the circulation of such letters operates as a virtual ban on the appellant's advertisements and is not warranted by law. The appellant, Therefore, prayed in the suit that the defendants should be restrained by a perpetual injunction from interfering with the advertising and business of the appellant.

(4) Along with the plaint, the appellant also filed an application under Order 39 rules I and 2 praying for an interim injunction for restraining the defendants from giving effect to the said circulars.

(5) The respondents filed their written statements in which it was, inter alia, contended that the dispute between the plaintiff and defendant No. 1 had been gone into by the? Disputes Committee of defendant No. 3 and despite an amount having been settled by the said Disputes Committee, the same was not paid. According to the respondents the amount which was arrived at by the Disputes Committee, which was required to be paid by the appellant to the respondents, was Rs. 15,81,819. It was further the case of the respondents that because of the nonpayment of the dues by a client, the Association of the Advertising Agencies and I.N.S. were entitled to inform its members about the said dispute and non-payment of bills and thereupon the members of the Association arc not required to print any advertisements of the defaulting clients. It was contended that no illegality has been committed in this case and, Therefore, the injunction should be refused.

(6) By the impugned order dated 7th June, 1988, the Additional District Judge, Delhi came to the conclusion that there was no merit in the application of the appellant and be dismissed the application for temporary injunction. Aggrieved by the said decision, the present appeal has been filed.

(7) According to the learned counsel for the appellant, a bona fide dispute had been raised in "the present case as there were defaults which had been committed by respondent No. 1 pertaining to the advertisements which had to be published on behalf of the appellant. It was submitted that some of the advertisements which were published were of poor quality and were not according to the approved material and there had also been considerable delay on the part of the respondents in taking out the advertisements. It was submitted that the appellant had never agreed to have its disputes with respondent No. I settled by the Disputes Committee and, Therefore, any action which is taken by the said Committee was not warranted. Relying upon Mehboob

Productions (Pvt.) Ltd. Vs. Morion Pictures Association and Others, and Bowen v. Hall and others. 6 Q.B.D. 333 (2) it was submitted by the learned counsel for the appellant that the respondents cannot interfere with the appellants carrying on its business. It was submitted that the appellant has a right to carry on business and the issuance of the circulars by the respondents amounted to an illegal interference in the carrying out of the business and advertising of the appellant.

(8) Before dealing with the aforesaid contention, it is necessary to take into consideration the additional facts, which are not disputed. It is an admitted case that a sum of Rs. 11,69,831, out of the aforesaid amount of Rs. 15,81,819 was admitted to be paid by the appellant to respondent No. 1 when the present suit was filed no part of Rs. 15,81,819 had been paid. All that the appellant had done was that it had forwarded to the Chairman of respondent No. 3 Fixed Deposit Receipt for a sum of Rs. 4,66,000. This Fixed Deposit Receipt was not meant to be paid to respondent No. 1 but was meant to be kept by respondent No. 3 to show the bona fides of the appellant for the settlement of the dispute. Be that as it may, the fact remains that on the date of the filing of the suit, the admitted amount of Rs. 11,69,831 had also not been paid by the appellant to respondent No. 1. When the trial court declined to grant ad interim ex parte injunction, the appellant filed a Revision Petition in this Court being Civil Revision No. 203 of 1988. On 14th April, 1988 I his Court stayed the operation of the letters dated 15-2-1988 and 25-3-88 issued by respondents 3 and 2 respectively on the condition that the appellant pays a sum of Rs. 7,03,831 by 16th April, 1988 and on the appellant also giving an undertaking to pay Rs. 4,66,000 after the F.D.R. is returned to the appellant.

(9) The amount of Rs. 7,03,831 was not paid on 16th April, 1988 and ultimately, though the F.D.R. for Rs. 4,66,000 had been returned to the appellant, a bank draft for Rs. 7,03,831 was handed over on 9th May, 1988 and bank drafts totalling Rs. 4,66,000 were handed over on 13th May, 1988. This means that the amount now outstanding is what is disputed by the appellant. The aforesaid Civil Revision was dismissed as withdrawn because the trial court was going to decide the injunction application on merits, which it did by the passing of the impugned order.

(10) The appellant has relied on the single Bench decision of this Court in the case of Mehboob Productions (supra). It was submitted by Shri Lonial that the appellant is entitled to protection against the monopolistic action of the respondents and this is what is alleged to have been held in Mehboob Productions" case (supra). In that case, Mehboob Productions wanted to become a member of the Motion Pictures Association. The Association did not admit the said Mehboob Productions as one of its member. This action was challenged by filing a suit for injunction in this Court. It was held by this Court that if an Association rejects the candidature arbitrarily and capriciously then the Courts will have the jurisdiction to see that the predominant power wielded by these authorities over the exercise of a trade or profession is not abused. In my

opinion the learned counsel can have no support from this decision. Firstly, in that case the plaintiff wanted to become a member of an Association and that application was rejected. Mehboob Productions could, possibly, not have carried out its business activities of production and distribution of films without becoming a member of the Association, In the present case, the plaintiff is carrying on the business of manufacture and sale of herbal drugs. It is not in the business of advertising. The appellant does not wish to become a member of the respondent Agencies but, on the contrary, it wants the respondent Agencies to do its work. Secondly, in Mehboob Productions" case it was found that the action which was taken to refuse admission was arbitrary and capricious and unreasonable. In the present case, I am unable to come to such a conclusion. In the present case, as will be presently seen, the respondents have acted in the interest of trade and not with the intention of harming the appellant.

(11) Learned counsel also ruled on the case of Be won v. Hall and others, (supra). In that case it was held that an action lies against the third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed. It was sought to be contended by Shri Lonial that the respondents have sought to induce M/s. Tara Sinha Associates Private Ltd. to break the contract which it had entered with the appellant and, Therefore, the ratio of the aforesaid decision clearly applied. I am unable to come to such a conclusion. In Bowen's case, the sole intention of the third party was to bring about a breach in the contract between the two parties. The third party in that case had not acted in general interest of trade or commerce or self-interest. In the present case, the members 459 had been informed by the respondents that the appellant is a defaulter qua respondent No. I and, Therefore, the members should not have business dealings with the appellant. Notwithstanding the circular to this effect having been issued M/s. Tara Sinha Associates Pvt. Ltd. have admittedly entered into an agreement with the appellant for handling its advertisements on television. It may be that the said Agency may have refrained from handling the appellant's work with regard to advertisements in paper, because of the impugned circular, nevertheless the action of the respondents in circulating the circulars was purely with a view to protect its members and not with the sole object of harming the appellant.

(12) The impugned letters are in the nature of a decision taken by Trade Agencies to black-list a defaulter. It was the experience of the members of the trade that a defaulting client would repeatedly change its agencies without paying the amounts due to the members. In order to protect its interests, rules were framed to the effect that if the Association is satisfied that money has not been paid to an Advertising Agency without reasonable cause then, in that case, circular would be issued whereby other members and agencies would be informed not to deal with the defaulting client. As the agencies are also members of Indian Newspaper Society, the said Society also in turn issued such a circular

under rule 56 of the Rules governing the Accreditation of Advertising Agencies and Ruling of the Society. The aforesaid rule 56(a) and (L), which is relevant, reads as under :

"56.(a) Where an advertiser fails to pay and in consequence the agency is unable to pay publications, Iens upon being authentically informed by the agency and being so satisfied will advise its member publications to suspend the advertisements of the concerned advertiser, until payment is realised This is without prejudice to the agency's clear liability to pay its dues even if its client has not paid.

(B)On bung so advised by the Iens, the newspaper shall not refuse to publish the advertisements ,scheduled by the concerned agency on behalf of its ad vertices ,whose previous advertisements have been paid for. Fuller, a newspaper shall have the right to suspend the advertisements of an advertiser, scheduled by an agency, if payment for the previous advertisements of the said advertiser has not been received by the publication within the credit period. This is without prejudice to the agency's clear liability to pay the newspapers even if its claim has not paid.

THE protection under this clause will not be available to an advertising agency if it has bills pending payment with the publication for six months or over, from the date of publication. The protection under clause will, further, not be available to an advertising agency if the advertiser has paid his bills."

IT is pertinent to note that in the suit filed in the present case, there is no challenge to the aforesaid rule. Furthermore, as on the day when the suit was filed, and certainly when the impugned letters were issued, an admitted amount of Rs. 11,69,831 had not been paid. Moreover, it appears that there was some dialogue between the Chairman of respondent No. 3 and the appellant for the amicable settlement of the dispute between the appellant and respondent No. 1. It was in furtherance thereto that an F.D.R. for Rs. 4,66,000 was handed over by the appellant to respondent No. 3. Respondent No. 3 has a Disputes Committee which investigated the claims and took into consideration the case of the appellant-herein. A detailed report was submitted according to which respondent No. 1 was held liable to give a credit of Rs. 40,694 and it was held that the balance amount of Rs. 15,40,855 was payable. It was after thin decision, that the impugned letters were issued by the two Associations.

(13) Learned counsel for the appellant submit that the decision arrived at by the Disputes Committee was not binding on the appellant. This may be so but nevertheless as far as respondent No. 3 is concerned, it investigated, independently, the claims of the rival parties and then came to the conclusion that a sum of Rs. 15,40,855 was payable by the appellant to one of its member agencies, namely, respondent No. 1. Having come to such a conclusion, it was but natural that the Association should warn its other member agencies about the default which had been committed by the appellant. I am not going into the

question as to whether the decision of the Disputes Committee that Rs. 15,40,855 were payable by the appellant to respondent No. 1 is correct or not. All that has to be noted is that that was the conclusion which was arrived at by the Trade Associations and once having arrived at that conclusion it purported to act in the interest of its members by warning other members about the alleged wrongful conduct of one of the clients of respondent No. 1.

(14) The question which would, Therefore, arise for consideration is whether, in law, such circular letters can be issued by Trade Association with a view to protect their interest. At least as far as England is concerned, this question has been settled by a series of decisions. It has been held that when black-lists or stop-lists or circulars are issued in pursuit of legitimate trade object and without ill will towards the person injured, then the issuance of such list is lawful. If, however, the object of issuing such a list is not to protect its business but the sole object is to harm another person then that person can take action in tort against the issuance Of such a circular.

(15) This question was first considered by the House of Lords in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1892) App Cas 25. The head note of that case which is accurate reads as follows :

" HELD, that since, the acts of the defendants were done with the lawful object of protecting and their trade and increasing their extending profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action." This was followed by the decisions in the case of *Allen v. Flood* (1898) AC 1 and *Quinn v. Leathem* (1901) App Cas 495. All these three cases were considered at length by the House of Lords, once again, in the case of *Sorrell v. Smith and others*, (1925) App Cas 700 (6) where the famous dictum of Viscount Cave, L.C. was laid down. After considering the aforesaid authorities is was held as follows:

"AND from these authorities, which I have carefully read and considered, I deduce as material for the decision of the present case two propositions of law, which may be stated as follows:-

(1)A combination of two or more presents willfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

(2)If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues."

THESE cases again came up for consideration in *Crofter Hand Woven Harris Tweed Co. Ltd. and others v. Veitch and another*. 1942(1) ALL ELR 142. The Head Note of the decision clearly sets out the facts and brings out the principles enunciated therein:

"HARRIS tweed was originally made in the islands of the Outer Hebrides from yarn spun by hand in the islands and woven there in the crofters" cottages. It was thus a hand-produced and an island-produced product. By 1930 the hand-

spinning of wool into yarn had ceased to be commercially practicable, and from that time many of the weavers on the island of Lewis imported yarn from the mainland. There were, however, on the island, five spinning mills, and the yarn spun by these mills was woven by crofters on the island. The millowners alleged that the cloth woven in the island from mainland yarn could be sold at a much cheaper price than that made from the yarn spun in the island, and negotiations had been carried on with the object of fixing a minimum selling price. 90 per cent of the work-people in the mills were members of the Transport and General Workers' Union, and the Dockers at the docks on the island were also members of that union. The union were anxious that some of their members should be employed in the spinning mills and approached the mill-owners with the object of securing this, and an increase in wages. The millowners replied that they could not agree to this on account of the competition of the crofters who wove yarn imported from the mainland. After considerable negotiation the respondents, who were the Scottish Area Secretary of the Union and the Branch Secretary for Stornaway, imposed an embargo "at the port of Stornaway, the main port on the island of Lewis, upon all Harris tweed dispatched by the crofters who had woven Harris tweed from mainland yarn. The effect of the embargo was to stop the sale of tweed made from mainland yarn and to allow the sale of tweed made from island spun yarn. The appellants were seven producers in a small way of tweed made from the mainland-spun yarn, and they brought this action against the two union officials claiming that, in imposing the embargo, they had conspired to injure the appellants, since the natural result of the embargo was the destruction of the appellants' businesses. It was, however, found as a fact that the real purpose with which the embargo was imposed was to benefit the employees who were members of the union :

Held : the real purpose of the embargo being to benefit the members of the trade union, the fact that it inflicted damage upon the appellants did not make it an unlawful conspiracy which was actionable at law."

Lastly, House of Lords once again considered this question in *Lonrho Ltd. and others v. Shell Petroleum Co. Ltd. and others* 1981(2) All. E.R. 456. It was held that the scope of the tort of conspiracy was restricted to acts done in the execution of an agreement between two or more persons for the purpose of injuring the plaintiff's interest and did not extend to acts done by such persons merely for the purpose of protecting their own interests. Since, in that case, the purpose of the respondents in entering into any agreement to contravene the sanctions order would have been to further their own commercial interests, rather than to injure the appellants, it was held that there could be no claim against the respondents in conspiracy.

(16) From the aforesaid decisions, it would follow that if two or more persons agree to act in concert with a view to protect their own business interest then if any action is taken in that regard, the same cannot be regarded as unlawful even though the taking of such an action may harm or damage another party .An

action in tort would lie only if a person deliberately acts solely with a view to harm another. It had been held in the aforesaid cases, as is evident from Lonrho's decision, that the action in tort can arise if economic loss is caused by a combination of persons and not by a person singly. It appears that Lord Diplock had some reservations about the applicability of such a principle in the present day and age as is evident from the following portion of his speech:

"ASI recall from my early years in the law, first as a student and then as a young barrister, during its chequered history between Lord Coleridge CJ's judgment at first instance in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1882) 21 Qbd 544 and the *Crofter* case, the civil tort of conspiracy attracted more academic controversy than success in practical application. Why should an act which causes economic loss to A but is not actionable at his suit if done by B alone become actionable because it did it pursuant to an agreement between B and C? An Explanation given at the close of the nineteenth century by Bowen in the *Mogul* case 23 Qbd 598 at 616 when it was before the Court of Appeal was : "The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise,... ." But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or Bp does not exercise greater economic power than any combination of small businesses is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of the 1939-45 war. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff must I think be accepted by this House as too well-established to be discarded, however anomalous it may seem today. It was applied by this House eighty years ago in *Quinn v. Leathern* (1901) Ac 495, (1900) All Er Rep I, and accepted as good law in the *Crofter* case in 1942, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done."

IN India ,no direct authority has been brought to my notice dealing with such a case of civil tort of conspiracy to injure another "person"s commercial interest, I see no reason as to why the principles which have been applied, in this regard, for over 90 years in England should not be invoked in this country except that I see no logic as to why any distinction should be drawn between a person acting singly or in concert or combination with another with a view to harm a third person. If a person acts singly or in concert with one or more persons solely with a view - to protect its own interest and business then no action in tort will lie against that person or combination of persons even if the fall out of that action may be that it causes loss or damage to another person. But if the motivation for

taking the action, whether singly or jointly, is to harm another person then such an action can be challenged in a court of law.

(17) In the present case, the letters and circulars were issued only with a view to warn other members of the Association that the appellant is "a defaulting party and, Therefore, it will be risky to do business with the appellant. It is not as if the action was taken by the respondents purely with a view to harm the appellant or even in an effort to extract money from it. The complaint of respondent No. 1 was looked into by the Disputes Committee before any action was taken. Admittedly, large sum of money was owed to respondent No. 1 by the appellant at the time when the impugned circulars were issued. The respondents have acted in furtherance of their common business interest and with a view to protect each other and, Therefore, no fault can be found with the decision which they have taken.

(18) Before concluding, I might note that the Supreme Court has had an occasion to deal with case of black-listing but where the authority which black-listed was the Government. The question regarding validity of black-listing arose for consideration in the case of *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, The Supreme Court in this case decide that before a person is black-listed he should be given a hearing. In other words, the principles of natural justice were applicable because black-listing of a person entailed civil consequences. The Supreme Court did not hold that no person could be black-listed. In fact it observed that "the State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him". The principles of natural justice, which are applicable against the Government concerning contractual rights and obligations, may not be applicable in the present case. Nevertheless, the appellant did approach the President of respondent No. 3 who, thereupon, directed the Disputes Committee to go into the question as to how much money, if any, was due from the appellant to respondent No. 1. Before the Disputes Committee, the appellant may not have been personally heard but the Disputes Committee did go at least into some of the contentions raised by the appellant. In my view, Therefore, the appellant cannot find fault with the action which has been taken by the respondents.

(19) For the aforesaid reasons, the appeal is dismissed with costs.