

(2009) 06 MAD CK 0202

In the Madras High Court

Case No : O.A. No. 89 of 2009 and Application No. 1121 of 2009 in C.S. No. 75 of 2009

Strides Arcolab Limited, Grandix Pharmaceuticals Limited and
Grandix Laboratories Limited

APPELLANT

Vs

Dr. A. Ramamurthy and Others
Dr. A. Ramamurthy and
Others Vs Strides Arcolab Limited, Grandix Pharmaceuticals
Limited, Grandix Laboratories Limited and Bharati Life
Sciences Pvt. Ltd.

RESPONDENT

Date of Decision : 08-06-2009

Acts Referred:

Citation : (2009) 06 MAD CK 0202

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : Arvind P. Dattar for R. Senthilkumar, for the Appellant; P.S. Raman
for P.R. Raman, for the Respondent

Judgement

M. Jeyapaul, J.—Original Application No. 89 of 2009 is filed seeking an order of ad interim injunction restraining the respondents from carrying on any business competing with the business of the second and third applicants for a period of three years from 9.6.2007.

2. Application No. 1121 of 2009 is filed praying to vacate the order of interim injunction dated 5.2.2009 passed in O.A.Nos.88 and 89 of 2009.

3. To avoid confusion and also for the sake of clarity, the applicants in O.A. No. 89 of 2009 and the respondents in Application No. 1121 of 2009 are referred as applicants and the respondents in O.A. No. 89 of 2009 and the applicants in Application No. 1121 of 2009 are referred as respondents.

4. The brief averment found in the application is as follows:

The first applicant envisaged the acquisition of the second and third applicants by way of a share purchase. As a preliminary step, non-competition and non-solicit

agreements dated 25.5.2007 were entered into by the promoters of the second and third applicants with the first applicant. In terms of the said agreements, the promoters of the second and third applicants undertook that they shall not, directly or through any affiliates, carry on any competing business. Thereafter, the first applicant entered into share purchase agreement dated 9.6.2007 with the first and second respondents. As per the terms of the share purchase agreement, the first and second respondents sold their share in the second applicant to the first applicant. The acquisition of the third applicant was effected by transferring shares of the third applicant to the second applicant. The second applicant is engaged in the business of marketing various medical and surgical products. The third respondent, which is an affiliate of the first and second respondents, is now offering products services relating to surgical instruments. The first respondent is now doing the same business of the second and third applicants. The third respondent is now competing directly with the second and third applicants. Therefore, the applicants have sought for the aforesaid reliefs.

5. The respondents have contended in their common counter as follows:

The first applicant Company is engaged in the pharmaceutical business and was looking to expand its reach and size. The first and second respondents, being the promoters of the second and third applicants, executed a non-competition and non-solicit agreement. The business contemplated in the non-competition clause relates to only the pharmaceutical business. It is true that even in the share purchase agreement, respondents 1 and 2 undertook to refrain from engaging in pharmaceutical business that may compete with the business of the applicants. The acquisition in the agreement was only in respect of pharmaceutical business. The applicants, having abused the process of law, have come out with the application seeking to restrain the respondents from carrying on the business in surgical devices. Therefore, the application filed by the applicants be dismissed.

6. The short point which arises for consideration is whether respondents 1 and 2, by virtue of the non-competition and non-solicit agreement, undertook not to carry on business in surgical instruments.

7. Shri.Arvind P.Dattar, learned Senior Counsel appearing for the applicants would vehemently submit that the non-competition and non-solicit agreement should be read in conjunction with the terms of the share purchase agreement. The conjoint reading of the agreement would go to show that respondents 1 and 2 have undertaken not to trade in surgical instruments also.

8. Per contra, Shri.P.S.Raman, learned Senior Counsel appearing for the respondents would submit that by no stretch of imagination, the scope of pharmaceutical business can be extended to cover the business in surgical instruments. The non-competition and non-solicit agreement would categorically state that the first and second respondents, being the promoters of the second and third applicants, shall not trade in pharmaceutical business to compete with the applicants. Therefore, the applications seeking injunction are liable to be

dismissed.

9. The non-competition and non-solicit agreement dated 25.5.2007 has been entered into by the first and second respondents along with other Directors with the first applicant. Under Clause 1.1(c) of the said agreement the term "business" has been referred/employed as follows:

"Business" shall mean the business for the time being carried on either of manufacture and distribution of pharmaceutical products by the Companies

It is to be noted that the word "business" was not defined in the share purchase agreement that was entered into between the parties on 9.6.2007. Under Clause 3.2(a) of the non-competition and non-solicit agreement, the promoters viz., respondents 1 and 2 have specifically undertaken to the first applicant that they shall not, personally or through a Company or otherwise, engage, manage, operate directly or indirectly providing, manufacturing, operating, selling or distributing products or services which compete or may compete with the business.

10. The word "business" referred to in Clause 3.2 of the said agreement will acquire the meaning given under Clause 1.1(c) thereof.

11. The cumulative reading of the definition of the word business and the undertaking given by respondents 1 and 2 to the first applicant with respect to such a business would go to show prima facie that respondents 1 and 2 have candidly undertaken not to carry on any pharmaceutical business.

12. The share purchase agreement between the parties was entered on 9.6.2007 wherein the products were defined under 1.1(pp) and detailed under annexure 11. Under Clause 10.1, the non-competition clause found in the non-competition and non-solicit agreement has been reiterated and three years time from the closing date has been prescribed for the restriction imposed under the non-competition clause. As already point out by this Court, the term "business" has not been defined under the share purchase agreement entered into between the parties. Therefore, the definition of the word "business" referred to in the non-competition clause found in the share purchase agreement will have to be traced only to the non-competition and non-solicit agreement entered into between the parties.

13. As rightly contended by the respondents, the acquisition under the share purchase agreement was only in respect of the pharmaceutical business. A bare perusal of the definition of the term "business" found in the non-competition and non-solicit agreement and the details of the products, services and suppliers as enlisted in the share purchase agreement under annexure 11 would, prima facie, establish that the entire venture related only to pharmaceuticals and not surgical instruments.

14. The learned Senior Counsel appearing for the applicants would submit that the underlying commercial purpose of the contract will have to be gathered by

the court not only from the terms of the agreement but also from the experience of the court with respect to similar business contracts. He would also refer to the observation of the Supreme Court in *Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai*, which reads as follows:

The true rule of construction is that when a covenant or agreement is impeached on the ground that it is in restraint of trade, the duty of the Court is first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties. If there is an ambiguity it must receive a narrower construction than the wider. In *Mills v. Dunham* (1891) 1 Ch 576 Kay, L.J., observed:

If there is any ambiguity in a stipulating between employer and employed imposing a restriction on the latter, it ought to receive the narrower construction rather than the wider - the employed ought to have the benefit of the doubt. It would not be following out that principle correctly to give the stipulation a wide construction so as to make it illegal and thus set the employed free from all restraint. It is also a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void.

15. That was a case where the restrictive clause found in the terms and conditions of employment agreement entered into between the employer and employee was interpreted by the Supreme Court. A restriction was imposed by the employer under the said agreement that the employee shall not commence a competitive business for two years at the place of his last business after he left the Company. The word "leave" was interpreted by the Supreme Court to mean the voluntary departure of service by the employee and not discharge or dismissal from services. Under such circumstances, the Honourable Single Judge, having found that no opinion was expressed by the other two Honourable Judges, observed as detailed above in the judgment.

16. The court finds that there is no ambiguity in the definition of the word "business" found in the non-competition and non-solicit agreement. The parties have thought it fit that the word "business" has no relevance as far as the share purchase agreement is concerned. That was the reason why the word "business" was not separately defined therein. The word "business" has been defined with more clarity in non-competition and non-solicit agreement. Further, when the parties had thought of restricting one of the parties under the agreement for a particular period from entering into a specific competitive business, the court cannot subscribe its wisdom to enlarge the scope of the term "business" to include all business relating to health. If we enlarge the scope of the word "business" beyond the understanding of the parties, the respondents may not be in a position to open a hospital as it relates to health care. They cannot even be in a position to open a blood bank as it relates to health care. The scope of the pharmaceutical business is totally different from the business in surgical products. Therefore, the aforesaid observation of the Supreme Court does not

come to the rescue of the applicants.

17. Considering the above facts and circumstances, the court comes to the conclusion that the applicants have not established prima facie case. They have come to the court seeking an order of injunction in order to ruin the business venture of the respondents which was not covered under the agreement entered into between the parties. Much hardship will be caused if the order of injunction already granted is sustained. The balance of convenience is found only in favour of the respondents. Therefore, the order of injunction granted with respect to the surgical instruments business carried on by the respondents stands vacated.

18. Consequently, O.A. No. 89 of 2009 stands dismissed. Application No. 1121 of 2009 with respect to the prayer for vacating the order of injunction relating to the surgical instruments business of the first and second respondents is allowed. There is no order as to costs.