

(2009) 12 DEL CK 0169
In the Delhi High Court
Case No : OMP No. 614 of 2007

Wire and Wireless (India) Ltd. and Another	APPELLANT
Vs	
Mr. Anirudh Singh Jadeja	RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7, 9
Contract Act, 1872 — Section 27

Citation : (2009) 12 DEL CK 0169

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Pratibha Singh and Surbhi Mehta, for the Appellant; N. Ganpathy and Yati Soni, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The facts of the aforesaid cases are more or less similar. Reference is therefore being made to the facts of the OMP No. 614/2007.

2. The petitioner in this case by means of this OMP u/s 9 of the Arbitration and Conciliation Act, 1996 in effect prays for the following reliefs, though the reliefs in the prayer Clauses of the petition are differently worded:

(i) Seeking a restraint against the respondent from using the control room/head-end and the network operations/assets/equipment of the petitioners.

(ii) Restraining the respondent from running cable networking business either in his name or any other name;

(iii) Restraining the respondent from interfering with the entire cable network business including rights over cable operators/franchisees and subscriber base/connectivity of the petitioners.

(iv) Appointment of a Commissioner to make inventories and take over the assets of the petitioners with the respondent (which reliefs have more or less

been granted).

(v) Restraining the respondent from using the trademark/logos of the petitioners namely "Siti Cable", "Channel Siti", "Siti Music", "Siti Hulchul" or any other mark/logos connected or linked with the petitioner No. 1.

Other incidental orders with respect to the aforesaid reliefs have also been asked for.

3. This court when this case came up for admission on 6.11.2007, passed the following order:

Issue notice, returnable on 12.02.2008.

The learned Counsel for the plaintiff has drawn my attention to the agreement in question and has also indicated that in similar circumstances in respect of other parties where the same cause of action had arisen, this court had passed ad interim ex parte orders. That matter was OMP327/2004 and the order passed thereon was dated 21.09.2004.

Considering all these circumstances, I direct that till the next date of hearing, the respondent is restrained from using the logos "Siti Cable" and "Siti Channels" owned by the petitioner No. 1 and/or from creating any third party interest in the movable assets owned by the petitioners and which are listed in documents 12, 13, 14 and Annexure A to the Agreement.

I also appoint Mr. Tejinder Singh, Advocate (R/o A-162, Gujranwala Town, Part-1, Delhi 110033 Tel: 27141005 Mobile-9810526009) as a receiver to take possession of the equipments detailed in document Nos. 12, 13, 14 and Annexure A to the said agreement dated 01.05.2004. The receiver shall prepare an inventory of all the movables. Thereafter, the movables shall be stored in a place to be provided by the petitioners. The above named receiver shall proceed to the address noted in prayer b (i) for the aforesaid purpose. Insofar as the address given at b (ii) of the prayer Clause i.e., C-202, Sahajanand Complex, 2nd Floor, Opp Swaminarayan Mandir, Shahi Baug, Ahmedabad-380004, Mr. Navin Chawla, Advocate (Mobile: 981011498) is appointed as a receiver to take the possession of the assets indicated above which may be lying in these premises. After preparing an inventory, he shall store the same in the place to be provided by the petitioners. The respondent is also restrained from collecting any subscription on behalf of the petitioner Nos. 1 and 2 and shall not interfere with the subscriber base and connectivity of the petitioners. The said receivers shall be paid a sum of Rs. 30,000/- each as fees.

Dasti.

IA No. 12739/2007

Allowed subject to all just exceptions.

4. The Counsel for the respondent has not disputed the directions passed by the

order dated 6.11.2007, except the portion "shall not interfere with the subscriber base and connectivity of the petitioners". The Counsel for the respondent states that the respondent is not interested in any of the assets or the decoders or the trade marks/logos or connectivity of the petitioners and undertakes not to use them. Though, most of the assets according to the Counsel for the respondent have been handed over pursuant to the orders of this Court, however, assuming that there are any other assets, the same shall be handed over to the petitioners.

5. In view of the above, the disputes to be decided by this order fall in a very narrow compass under two heads. The first head being of restraint against the respondent from carrying on the business of a cable operator/networking and business related therewith. The second aspect is with regard to interference by the respondent in the subscriber base of the petitioner No. 2 and which relief in sum and substance is that the respondent should not cater to the subscriber base of the petitioners. Some of the relevant Clauses of the "Right to Use" Agreement dated 1.5.2004 between the parties, and, as relied upon by the Counsel for the petitioners are as under:

Clause 17 (Maintenance & Growth of Connectivity): That Second Party hereby agrees and undertakes to maintain the connectivity of the first party during the validity of this agreement. At the time of expiration or termination of this agreement, as the case may be, the second party shall hand over the connectivity of the first party in the same condition as it was handed over at the time of execution of this agreement including any new subscribers added thereto. For the removal of doubts it is hereby clarified that any increase of subscriber base in the present area of the first party in the Ahmedabad City shall be the subscribers of the first party. The total list of the franchisees and there connectivity, area of operation shall be provided by the second party to the first over running cable network business by the second party to the first party. The list of franchises/cable operators with connectivity and area of operations are herewith enclosed as Annexure D.

Clause 21 (Ownership): It is understood by the Second Party that all the assets, equipments and materials used in establishing and running the network, exclusively belong to First Party and the Second Party shall not have any right/claim, of whatsoever nature, over the assets or cable television networking business, except as provided in this agreement. It is also understood by the Second Party that all the subscribers (existing subscribers and any new subscribers added thereto) shall belong to the First Party and the Second Party shall have no right of any nature over such subscribers.

Clause 23 (Non-Compete): The Second Party shall not be entitled to enter into any agreements or arrangements, whether directly or indirectly with any party, firm, company carrying on the business similar to the First party or to assist or guide anyone regarding cable television networking business during the period of this agreement and two year thereafter in Ahmedabad City and its adjoining areas. The first party shall not be entitled to enter into any agreements or

arrangements, whether directly or indirectly, with any party, firm, company carrying on the business similar to the First party or to assist or guide anyone regarding cable television networking business during the period of this Agreement.

6. So far as the aspect that the respondent should not carry on any business of a cable operator, not much stress was or could be laid by Counsel for the petitioners in view of the provision of Section 27 of the Contract Act, 1872 and the judgment of the Supreme court reported as *Percept D" Mark (India) Private Limited v. Zaheer Khan* 2006 (4) SCC 227 and as per which, there cannot be contractual restrictions after the contractual period between the parties has come to an end. Since in the present case the restraint which is being sought against the respondent from carrying on the business, pertains to the period after the termination of the contractual obligation between the parties, the relief of injunction as prayed for that the respondent should not carry on similar business cannot therefore be granted in view of the provision of Section 27 of the Contract Act and the aforesaid judgment of Supreme Court in the case of *Percept D? Mark (India) Private Limited* (supra).

7. That takes me to the main issue which has been very strongly urged and argued by the Counsel for the parties. This aspect pertains to the entitlement of the petitioners, as claimed by it, is for exclusivity in the subscriber base of the petitioner No. 2. Putting it differently, what is said is that when the respondent carries on an independent business, he should not use the subscriber base/ customers which were the customers of the petitioners and more particularly of the petitioner No. 2. In my opinion, this second and the main issue argued is inextricably linked with the first issue of Section 27 of the Contract Act. As already discussed, u/s 27 of the Contract Act after termination of the contractual relationship, no one can be restrained from carrying on business, then if that be so, then in such a case, if what cannot be done directly, then surely the same cannot be done indirectly as well. By seeking restraint against the respondent from not using the subscriber base of the petitioner No. 2, effectively, the petitioners are seeking to restrain the respondent from independently carrying on its business, because, it is to these very customers/ subscribers that the cable network services are being provided by the respondent. I may note that it is not the contention of the petitioners that it has any copyright under the Copyright Act, 1957 in the list of the subscribers and if there is no copyright, the list of the customers/subscribers are such which are in the public domain and if the respondent seeks to carry on business with those subscribers using his own network/assets/control room and so on, there can be absolutely no legal basis to prevent the respondent from carrying on his business in as much as such an injunction will indirectly do what is directly prevented by Section 27 of the Contract Act. For this reason therefore the injunction against the respondent from using the subscriber base cannot be granted.

8. I am also doubtful whether a subscriber base can be said to be an "asset"

once it is admitted that no copyright in the same exists. A person has an absolute right when an asset which is owned by him. A list of subscribers in public domain is surely not an asset and not a property and therefore it is not permissible to seek a restraint against use of such "property" by another person. At the cost of repetition, I may state that list of customers can be an asset only if the same is a list in which a right vests under the Copyright Act, 1957. Thus, looking at this issue from this angle also, I find that there cannot be any restraint against the respondent, because there is no asset in the ownership of the petitioner which it seeks to restrain the respondent from using. Even under the Copyright Act, it has been held by a learned Single Judge of this Court in the judgment reported as *Diljeet Titus v. Alfred A. Adebare* 2006 (130) DLT 330 (paras 69 & 72) that though an injunction can be granted against a person from using the information in a copyrighted list, however, if any details of a person found in the copyright list, otherwise also exists in common/public domain, the copyright in the details of the person appearing in the copyrighted list does not survive.

In my opinion additionally, if such third person whose name appears in the copyrighted list seeks to independently approach, for entering into a contract with a person (for example a cable operator) other than the person (another cable operator) who has the details of such person in his copyrighted list, then, no injunction can be granted against the third person inasmuch as there cannot arise an issue pertaining to violation of a copyright in such a situation because we are then looking at the independent freedom of action of a person. This is because a person whose name and particulars exists in the copyrighted list, is surely legally justified in adopting whatever course of action he chooses because he has complete freedom of action so as to enter into a contract with anyone and in the guise of obtaining an injunction on the basis of the copyright list, a wholly independent third person cannot be prevented from acting in a manner, he so chooses, for entering into any contract with any person. Surely, an injunction cannot operate against a person who is not a party to a contract, and a third person who is not party to a contract, therefore, cannot in effect be restrained from independently exercising his volition to enter into a contract with any person. These observations are being made for the reason that a subscriber/customer of a cable service network provider is fully entitled to approach any cable network service provider by entering into a contract with such service provider and it cannot be said that there can in effect be an injunction against such third person simply because of a contract between two cable service providers that a subscriber/customer is his "asset" and who cannot approach one or other particular cable network service provider although it is at the customer's own volition. Thus assuming for the sake of argument an injunction is granted as prayed for by the petitioner, there cannot be an injunction against the respondent from giving services to a customer who directly approaches the respondent. For this reason also the relief as prayed cannot be granted.

9. Therefore, looking at the issue from the point of view of either the fact that

the respondent cannot be restrained from carrying out his business in terms of Section 27 of the Contract Act or that a list of subscriber is not an asset or that even if there is a copyrighted list a customer/subscriber cannot be prevented from approaching any cable network service provider because of the right of freedom of action of such independent customer, the petitioner cannot succeed in seeking the interim relief to prevent the respondent from entering into contracts with customers/subscribers and nor can such subscribers/customers in effect be prohibited from entering into a contract with the respondent.

10. I could have disposed of this case on a preliminary point that the present petition is not maintainable, but, as arguments were addressed in detail, I have opted to take the course of deciding the issue also on merits. A preliminary objection which was argued was that the petition u/s 9 is not maintainable because there is no arbitration agreement between the parties as envisaged by law because an Arbitration Agreement has necessarily to be a written contract as per Section 7 of the Arbitration and Conciliation Act, 1996. What the respondent contends is that as per the case of the petitioners themselves, the contract which was entered into between the parties, is the Right to Use Agreement dated 1.5.2004, and admittedly, that Agreement was only valid for a period of one year which expired on 30.4.2005. Thereafter, according to the Counsel for the respondent, even according to the petitioner, it is only an oral understanding that continued between the parties and therefore it is contended that no petition can be filed where the arbitration Clause is on an oral understanding.

11. Para 7 of the petition is relevant in this regard and runs as under:

7. The agreement was initially for a period of one year till 30.4.2005 and the same was renewed for a further period of 2 years as per oral understanding arrived between the parties on agreed terms and conditions between the parties. Even as per oral understanding/arrangement arrived with the Respondents has come to an end on 30.4.2007.

The first line of para 17 of the petition also is relevant and the same reads as under:

That as per oral understanding arrived between the parties.

The aforesaid averments as made in the petition make it more than clear that the petitioner itself relies not on the written contract but only on oral understanding between the parties.

12. Section 7 of the Arbitration and Conciliation Act, 1996 requires that the agreement between the parties has to be in writing. On the admission of the petitioner itself that it was an oral understanding/arrangement/agreement only on the basis of which the contractual relationship was continuing, it is therefore, quite clear that after 30.4.2005, there was no written contract but only an oral contract between the parties. If there is no written contract, then, the Clause of arbitration in the written agreement dated 1.5.2004 surely is no longer operative

between the parties for periods after 30.4.2005 when oral agreement is said to be operative as between the parties. Accordingly, I am of the opinion that the present petition is not maintainable u/s 9 of the Arbitration and Conciliation Act, 1996 because there is no written Agreement between the parties and which is a sine qua non for a petition to be filed u/s 9.

13. Accordingly, both on merits as well as on non- maintainability, the present petitions are dismissed with costs of Rs. 25,000/- in each of the petition.