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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 05, 2009

Date of Order: May 11, 2009

+ IA Nos. 12672-12674/2007 in CS (OS) 1592/2007

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Goyal MG Gases Pvt. Ltd.

Through : Mr. Arvind Nigam, Advocate

11.05.2009

...Plaintiff

Versus

Air Liquide Deutschland GmbH & Ors. ...Defendants

Through: Mr. Gaurab Banney, Sr. Adv. with Mr. P. D. Tyagi, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

ORDER

IA No.12674/2007

1. By this order I shall dispose of this application under Order 7 Rule 11 made by defendant No.1 for rejection of the plaint.
2. Plaintiff has filed this suit based on a non-competition clause contained in Share Purchase Cooperation Agreement (SPCA) entered into between plaintiff and defendant No.1 on 12th May 1995. Undisputedly, this SPCA has come to an end because of various intervening circumstances as pleaded by plaintiff in the plaint and on February 2006, defendant No.1 who had purchased the shares of plaintiff under SPCA sold its entire shareholding to plaintiff group of companies. Plaintiff, however, pleaded that despite SPCA

having come to an end, the negative covenant as contained in the share purchase agreement and as modified by the Board Resolution dated 28th July 1999, of the plaintiff company remains binding on defendant No.1 and other defendants having financial unity with defendant No.1 prohibiting defendants from competing with plaintiff in India and to enter into business of sale, manufacture and distribution of industrial gases upto 2015. Plaintiff therefore filed this suit seeking a decree of permanent injunction restraining defendants and their group of companies, subsidiary holding companies, associates companies and other companies in which defendants have direct or indirect control from competing in India with the plaintiff in business of Industrial gases up to 2015.

3. The non-competition clause and other relevant clause as contained in SPCA read as under:

“9. Non-competition clause

GGL (Plaintiff herein) and all Goyal Group companies will cooperate in the Indian market with right to first refusal basis with MGG (Defendant No.1 herein) and will not for the duration of this cooperation, support in any way – directly or indirectly – the activities of MGG’s competitors with regard to gas business. MGG will give written information to gas business. MGG will give written information to GGL about every business opportunity it plans to take in the Indian market in regard to industrial gases and related business and GGL may decide if it wants to participate in it (right of first refusal). In case GGL does not within a period of two months after receiving MGG’s notice declare in writing that it is willing and able to participate in the planned business, MGG is free to proceed with this business on its own. However, MGG will give due consideration to the interest of GGL being its group company. Such new business which MGG

undertakes should be business of gas supply to few major dedicated customers only and not to general market supply."

"12. Term of Agreement / Legal successors

12.1 This Agreement shall become effective upon being signed by the parties and shall stay in force as long as MGG or its legal successor holds an equity not less than 25% in GGL."

4. The contention of counsel for plaintiff is that during continuation of SPCA, disputes arose between the parties and arbitral proceedings started between the parties. Plaintiff and defendant No.1 started negotiations for an amicable settlement of disputes and Mr. Herbert Rudolf and Dr. Schlotter , Members of Board of Management of defendant No.1 joined on Board of Directors of plaintiff as nominee directors and in a meeting of board of directors of plaintiff held on 28th July 1999, these two persons were appointed as additional directors of plaintiff. In the said meeting, the Board of Directors of Plaintiff Company passed following resolution:

"RESOLVED THAT the Board of Directors accept the assurance and undertaking of Mr. Rudolf and Dr. Schlotter on behalf of Messer Griesheim GmbH that Messer will abide by the non-competition clause contained in the SPCA dated 12.05.1995 upto 20 years from the date of SPCA or till the SPCA stay in force whichever is later."

5. It is submitted that the effect of the above Board Resolution was that the defendant No.1 was not allowed to do any business in industrial gases directly or indirectly for a period of 20 years from the date of agreement i.e. up to 2015. It is submitted that on 10th September 2004, Steel Authority of

India Limited (SAIL) called a meeting of leading players in industrial gases in India and this meeting was attended by plaintiff and also by defendant No.3. SAIL informed about its substantial expansion plans and told that it would be tendering for procurement of gases to the tune of Rs.800 crore. Defendant No.8, a 100% subsidiary of defendant No.2, gave a technical and financial guarantee to SAIL in favour of Defendant No.3, in direct competition with the plaintiff that implies that implies that defendant No.1 and 2, through device of other defendants were competing with the plaintiff. It is submitted by the plaintiff that since defendant No.1 and 3 to 8 are 100% subsidiaries of defendant No.2 and are one common economic unit, so defendant No.1 and 3 to 8 were agents of defendant No.2 and under SPCA, as modified by the Board Resolution, defendant No.1, despite ceasing to hold any share of plaintiff company, could not undertake any business in direct competition of plaintiff and also could not disclose any information to any person under clause 11 of SPCA, a secrecy clause prohibiting disclosure of any information of plaintiff. It is submitted by plaintiff that due to defendant No.1 being in cooperation with plaintiff under SPCA, defendant had gathered crucial information about the business of industrial gases and about filling of tender documents and their being in competition with plaintiff was contrary to the contract between the parties under SPCA.

6. Defendant No.1 in the present application under Order 7 Rule 11 has stated that non-competition clause as contained in SPCA has exhausted itself with the termination of SPCA. Since SPCA ceased to be in force, the non-competing clause also came to an end and the present suit was vexatious. Regarding Board Resolution, it is submitted by defendant that the board resolution was an internal affair of the plaintiff company and could not bind

defendant No.1. It is submitted that this board resolution was not pleaded by plaintiff in any of the prior litigation between the parties and this was a novel pleading raised by plaintiff. It is also submitted that SPCA could only be amended or modified by the written contract between the parties signed by two members of management board of defendant No.1 and approved by a board resolution of defendant No.2 in terms of clause 1.3 of the SPCA. Since there was no written amendment of SPCA as in terms of clause 1.3, any board resolution passed by the board of plaintiff could not bind defendant No.1 and could not amount to amendment of SPCA.

7. Clause 1.3 of SPCA reads as under:-

“any agreement (s) which may be entered into between GGL or any members of the Goyal Group and MGG or any member of its group shall be legally binding only if made in writing, signed respectively by a main board director of GGL and two members of the management board of MGG and approved by board resolution of GGL and MGG respectively.”

8. It is settled law that a suit can be rejected under Order 7 Rule 11 if it does not disclose a cause of action. However, for deciding an application under order 7 Rule 11 CPC, the Court has to consider the pleadings as given in the plaint by the plaintiff and the documents relied upon by the plaintiff. It is not disputed by plaintiff that SPCA contained Clause 1.3 which provided that after SPCA an agreement can only be made in terms of procedure provided in Clause 1.3. It is settled law that the board resolution of one company cannot bind other companies. The board of directors of a company can manage the affairs of that company alone. They can force any other

company to enter into a contract with another company. By a board resolution, no company can create obligations for another company until and unless other company is wholly owned 100% subsidiary of that company. It is not the case of the plaintiff that defendant No.1 was a wholly owned subsidiary of the plaintiff. The Plaintiff, by its board resolution could not have bound or could not have created a binding contract for defendant No.1. *Mr. Rudolf and Dr. Schlotter* joined as additional directors on the board of plaintiff company, but that does not mean that defendant No.1 by sending its representative to become additional directors would be bound by resolutions passed by board of directors of plaintiff. The contract between defendant No.1 and plaintiff has to be a decision of board of directors of two companies i.e. plaintiff and defendant No.1 and in terms of clause 1.3, I consider additions or modifications to the contract could only be made with the consent of board of directors of defendant No.1. I therefore consider that the board resolution dated 28th July 1999 as passed by the plaintiff company could not have created a binding contract between the plaintiff and defendant No.1.

9. A perusal of clause 9, the non-competition clause, shows that this clause was effective only during the continuation of the contract (SPCA) between the parties and this clause has no force after SPCA ended between the parties.

10. The parties had taken their disputes to the International Court of Arbitration and at the request of the parties, the Tribunal was constituted by the International Chambers of Commerce. This Tribunal passed an award by consent of parties on 21st September 2000 i.e. after passing of alleged board

resolution. The award as passed by the Tribunal by consent of parties recorded agreed position:

1(d) The arrangement enumerated above is only for the present business. However, it is expressly agreed between the parties that in case of any new business proposed to be undertaken in India by MCG in terms of clause 9 of the share purchase and cooperation agreement dated 12th May 1995 the Claimant No.1 will always have majority control in the said business if it agrees to participate in the said new business. Further, MCG will cooperate in the Indian Market with the Claimant No.1 and will not for the duration of this cooperation support in any way directly or indirectly the activities of the competitors of Claimant No.1."

(emphasis added)

11. The above award passed by the Tribunal at the request of parties shows that clause 9 of SPCA was effective only during duration of the agreement. Plaintiff herein had not pleaded before the Arbitral Tribunal that non competitive clause of this agreement was effective for 20 years from the date of the agreement.

12. In my view, plaintiff cannot take shelter of its own board resolution to create a new contract between itself and defendant No.1 or any of its associates or subsidiary companies. I also consider that SPCA did not provide for survival of the non-competition clause after the lifetime of SPCA. Since SPCA itself has come to an end, non-competition clause does not survive and this suit based on presumptive existence of non-competition clause is not maintainable. The suit filed by the plaintiff is without any cause of action and is liable to be dismissed. Resultantly, this application under Order 7 Rule 11

CPC is allowed and the suit filed by the plaintiff is hereby dismissed with costs of Rs.20,000/- to be paid to each of defendant by the plaintiff.

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1. Since by above order I have dismissed the suit filed by the plaintiff, these applications have become infructuous and are hereby dismissed as such.

May 11, 2009
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SHIV NARAYAN DHINGRA J.