SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Arvinder Singh and Anr. Vs. Lal Pathlabs Pvt. Ltd. and Ors.

Arvinder Singh and Anr. Vs. Lal Pathlabs Pvt. Ltd. and Ors.

SooperKanoon Citation : sooperkanoon.com/49399

Court : Delhi

Decided On : Mar-26-2015

Judge : Pradeep Nandrajog

Appellant : Arvinder Singh and Anr.

Respondent : Lal Pathlabs Pvt. Ltd. and Ors.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on: March 10, 2015 Judgment Delivered on: March 26, 2015 % + FAO (OS) 473/2014 & CM No.20860/2014 ARVINDER SINGH AND ANR ..... Appellants Represented by: Mr.Krishnendu Datta, Mr.Sanyat Lodha and Mr.Rahul Malhotra, Advocates versus LAL PATHLABS PVT LTD AND ORS ..... Respondents Represented by: Mr.Sanjeev Sharma, Advocate with Mr.Angad Kochhar and Mr.Abhishek Shivpuri, Advocates for R-1 and R-2 Mr.Jayant K.Mehta, Advocate with Mr.Kapil Rustagi and Ms.Madhavi Khare, Advocates for R-3 CORAM: HON'BLE MR. JUSTICE PARDEEP NANDRAJOG HON'BLE MS. JUSTICE PRATIBHA RANI PARDEEP NANDRAJOG, J.

1. The appellants : Dr.Arvinder Singh and Dr.Rajendra Kachhawa are residents of the city of Udaipur in the State of Rajasthan. Whereas the former has a degree in Medicine (Pathology), the latter has a degree in Radiology. Both of them belong to the medical profession and are registered with the respective body, without being registered with which, they would not be entitled to practice their vocation as a

Pathologist and a Radiologist respectively. Treating them with respect the society calls them Doctor Sahib. The two are good friends and stand by each other in thick and thin.

2. The two entered into a partnership in the year 1999 and carried on business of a pathlab and diagnostic centre under the name and style M/s.Amolak X-Ray and Diagnostic Centre in the city of Udaipur. In the year 2003 the two set up a company : M/s.Piramal Diagnostic Services Pvt. Ltd. which took over the business of the partnership firm, but under the name Wellspring Amolak Pathlab Diagnostic, which was later on changed to Piramal Amolak Diagnostics.

3. The entire shareholding of the company was held by the appellants. The company acquired a plot of land in Udaipur on which a building was constructed. A pathlab and a diagnostic centre was set up therein.

4. The appellants incorporated the company M/s.Amolak Diagnostics Pvt. Ltd. 100% equity of which was held by them. On November 24, 2009 M/s.Amolak Diagnostics Pvt. Ltd. acquired the assets and liabilities of M/s.Piramal Diagnostics Services Pvt. Ltd. It was followed by a share purchase agreement dated January 21, 2011 under which the first respondent : Dr.Lal Pathlabs Pvt. Ltd. acquired all the shares of M/s.Amolak Diagnostics Pvt. Ltd. and took over the business and assets of M/s.Amolak Diagnostics Pvt. Ltd. This agreement has a non-compete covenant (10.4.1) which reads as under:

10.4.1 Non-Compete. From the Completion Date, the Sellers shall not, directly or indirectly, at any point of time, whether through partnership or as a shareholder, joint venture partner, collaborator, employee, consultant or agent or through relative or in any manner whatsoever, whether for profit or otherwise, carry on any business which competes directly or indirectly with the whole or any part of the business carried on by the Company on the Completion Date. The Sellers expressly agree that they shall not engage in any business which competes directly or indirectly with the Company, whether during the continuance of their agreement for providing their services to the Company or thereafter. It is hereby made clear that going forward at any point of time the Sellers whether they are associated or not with the Purchaser will engage directly or indirectly in any

business which competes with the business of the Purchaser.

5. It is apparent that there is a typographic error in the last sentence of the above noted paragraph for the reason the sentence It is hereby made clear that going forward at any point of time the Sellers whether they are associated or not with the Purchaser will engage directly or indirectly in any business which competes with the business of the Purchaser, literally read would mean that the sellers are bound to engage directly or indirectly in the business which competes with the business of the plaintiff. The word not has to be inserted between the words will and engage, to read will not engage.

6. Simultaneously, the appellants executed Retainership Agreements dated January 21, 2011 with Dr.Lal Pathlabs Pvt. Ltd. in which the two agreed to work for Dr.Lal Pathlabs Pvt. Ltd. on the terms contained in the Retainership Agreement. The two agreed to render professional services to Dr.Lal Pathlabs Pvt. Ltd. for a minimum of three years. The two also agreed that for a period of five years thereafter they would not compete with the business of Dr.Lal Pathlabs Pvt. Ltd., and we note the relevant clause is identically worded in the two agreements which appellants executed with Dr.Lal Pathlabs Pvt. Ltd. We verbatim note the same from the Retainership Agreement executed by Dr.Arvinder, the first appellant. It reads:

9. Non-solicitation of Employees and Clients, Noncompete Dr.Arvinder represents and warrants that during the Initial Term of his retainership with the Company and for a period of five years immediately following the termination of this Agreement for any reason, whether with or without cause, he shall/shall not: a. Directly or indirectly solicit, induce, recruit or encourage any of the Companys employees to leave their employment with the Company, or join any other employment or undertake any other activity that is of similar nature so as to give any sort of competition to the business of the Company. b. Take away any clients or customers of the Company or attempt to solicit, induce, recruit, encourage or take away clients or customers of the Company. c. Undertake and ensure that all business opportunities known to Dr.Arvinder or made known to Dr.Arvinder at any time, with respect to and/or connected with the business of the Company and are

not undertaken in any other Company or entity with which Dr.Arvinder is directly or indirectly associated without the prior written consent of the Board. Any question in this regard, shall be determined by the Board as its sole discretion which shall be final and binding.

7. Arth Diagnostics Pvt. Ltd. (impleaded as defendant No.3 in the suit and as respondent No.3 in the appeal) was incorporated on June 14, 2012. It carried on business of pathological and radiological services in the city of Udaipur.

8. The appellants did not serve Dr.Lal Pathlabs Pvt. Ltd. for a period of three years. Whereas appellant No.1 resigned on May 23, 2013, the appellant No.2 completed his retainership of three years and left M/s.Amolak Diagnostics Pvt. Ltd. on January 21, 2014. Both took up employment with M/s.Arth Diagnostics Pvt. Ltd.

9. Dr.Lal Pathlabs Pvt. Ltd. and M/s.Amolak Diagnostic Pvt. Ltd., joined as plaintiffs No.1 and 2, in an action seeking a decree for permanent injunction against the appellants and M/s.Arth Diagnostics Pvt. Ltd., pleading the facts which we have noted in paragraphs 1 to 5 above with further pleadings that appellant No.1 joined M/s.Arth Diagnostics Pvt. Ltd. as its Chief Managing Director and Chief Pathologist and that even appellant No.2 joined M/s.Arth Diagnostics Pvt. Ltd. as a Radiologist. It is pleaded in the plaint that M/s.Arth Diagnostics Pvt. Ltd. was set up by one Satyendra Singh Panwar (not impleaded as a defendant in the suit) with further pleadings that the appellants have transferred substantial sums of money to the account maintained by Mr.Satyendra Singh Panwar who was also an employee of M/s.Amolak Diagnostic Pvt. Ltd.

10. Pithily put, the prolix plaint premises a two pronged attack for the relief of injunction claimed. Firstly, by placing reliance upon clause 10.4.1 of the share purchase agreement dated January 21, 2011 with an additional layer of reliance upon clause 9 of the Retainership Agreement of even date i.e. January 21, 2011. Secondly upon the first appellant joining M/s.Arth Diagnostics Pvt. Ltd. as its Chief Managing Director and Chief Pathologist; the second appellant joining the same company as a Radiologist; Satyendra Singh Panwar being an ex-employee of M/s.Amolak Diagnostic Pvt. Ltd; the appellants transferring money to Satyendra Singh Panwar to set up M/s.Amolak Diagnostic Pvt. Ltd. In a nut shell, the second

attack was upon lifting the veil of secrecy, effectively the appellants were M/s.Arth Diagnostic Pvt. Ltd. which was carrying on the same business as that of the plaintiffs i.e. the business of a Pathlab and a Radiology Diagnostic Centre.

11. Three written statements were filed, one each by the appellants and the third by M/s.Arth Diagnostic Pvt. Ltd. As regards the appellants they did not deny the facts pleaded in the plaint and as succinctly noted by us in paragraphs 1 to 6 above as also that the two had since joined service with M/s.Arth Diagnostic Pvt. Ltd. They admitted having transferred some money to Satyendra Singh Panwar, but claimed that it was a loan. M/s.Arth Diagnostic Pvt. Ltd. filed a written statement under the signatures of Satyendra Singh Panwar admitting that some (not substantial) money was received from the appellants. As per M/s.Arth Diagnostic Pvt. Ltd., neither Dr.Arvinder Singh nor Dr.Rajendra Kachhawa own any share of M/s.Arth Diagnostic Pvt. Ltd. FAO (OS) No.473/2014 Though not pleaded in the written statement, Page 5 of 30 documents have been filed by M/s.Arth Diagnostic Pvt. Ltd. of having obtained a loan in sum of `60,00,000/- from State Bank of India at Udaipur to set up a pathlab. Documents have been filed regarding shareholding of M/s.Arth Diagnostics Pvt. Ltd. as per which not a single share is owned by the appellants.

12. On the aforesaid respective pleadings the application for interim injunction filed by Dr.Lal Pathlabs Pvt. Ltd. and M/s.Amolak Diagnostics Pvt. Ltd. has been decided by the learned Single Judge keeping in view that the decree sought in the plaint was to restrain defendants No.1 and 2 (i.e. the appellants) from directly or indirectly carrying on business activity competing with that of the plaintiffs.

13. At the heart of the debate was Section 27 of the Contract Act which reads as under:

27. Agreement in restraint of trade, void - Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Exception 1 - Saving of agreement not to carry on business of which goodwill is sold - One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him,

carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

14. After analyzing the share purchase agreement dated January 21, 2011, the learned Single Judge has held that when Dr.Lal Pathlabs Pvt. Ltd. acquired the 100% shareholding of M/s.Amolak Diagnostics Pvt. Ltd. even its goodwill was purchased and thus proceeded to consider the applicability of the exception to Section 27 of the Contract Act.

15. Noting twelve judgments cited on behalf of the plaintiffs and half a dozen by the appellants, cherry picking only two, and adding on a few which were not even cited; influenced largely by the decision of the Supreme Court reported as (1989) 2 SCC754UOI Vs. Raghuveer Singh, wherein it was held that one needs to re-adjust in changing societies and re-align legal norms, the learned Single Judge has held that the principle of ejusdem generis (para 27 of the impugned decision) would lead him to the view that the Section in question i.e. 27 does not carve out any distinction between profession, trade and business. Holding that the decision of another learned Single Judge of this Court in the decision reported as 2014 (III) AD (Delhi) 636 Le Passage to India Tours & Travels Pvt. Ltd. Vs. Deepak Bhatnagar, would not bind him because the said decision did not consider whether the three words profession, trade or business in Section 27 of the Contract Act, 1872 could be read ejusdem generis, in paragraphs 28 to 30 of the impugned decision, the learned Single Judge has taken the view that if people while selling their business also transfer/sell the goodwill, it would be an affront to justice to permit these persons to carry on activities using their personal skills as professionals. Since this reasoning forms the heart and soul of the impugned decision, we note, in the words of the learned Single Judge the view expressed. It is in para 28 of the impugned decision. The learned Single Judge expresses himself : It would be a great affront and injustice to tradesmen and businessmen to say that they carry on their respective activities without being possessed of any skill or that their skill is any less than that of a person who may claim himself to be a professional instead of a tradesman or a businessman. Moreover though at the time of enactment of the Indian Contract Act, 1872, the skill required and demanded for carrying on trade and business may have been much less than the

skill required to practice the profession as of a lawyer or a doctor or an accountant, but the same with trade and business in the fields, say of electronics and information technology having developed, no longer holds good. Today, admissions to a Bachelor and Master of Business Administration Educational Programmes/Courses are no less tougher than admissions to law schools or Medical Schools. The learned Single Judge concludes in paragraph 30 that over the years the nature of profession has changed and that in the world of today professional activities have become highly organized : akin to businesses because professionals have started working in groups. The learned Single Judge has highlighted what we are noticing in Courts today : lawyers forming association and working in a group under the banner of a trade name. The learned Single Judge has concluded, not by lifting the corporate veil of M/s.Arth Diagnostics Pvt. Ltd., but on the reasoning that the appellants who were the 100% shareholders of M/s.Amolak Diagnostics Pvt. Ltd. having sold the company along with its goodwill to Dr.Lal Pathlabs Pvt. Ltd., could not for the duration of five years after they left service of the plaintiffs engage themselves in the professional activity in which they were skilled i.e. as a Radiologist or a Pathologist. The two have been restrained till January 21, 2019 from carrying on practice/business/profession as a Pathologist or as a Radiologist in the city of Udaipur, and though it is difficult on a reading of the judgment to find out whether it was covenant 10.4.1 of the share purchase agreement dated January 21, 2011 or clause 9 of the Retainership Agreement of even date which was the foundation for the injunction, but it appears that it is an amalgamation of both.

16. As per Section 27 of the Contract Act every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extend void. It is the exception which protects from being void such an agreement provided the conditions envisaged by the exceptions are satisfied. The condition for the exception is that if the goodwill of a business has been sold, an agreement to refrain from carrying on similar business, if it appears to the Court to be reasonable, would be protected and would be enforced.

17. At the heart of the exception is the phrase sells the goodwill of a business. The exception makes enforceable the agreement to refrain from carrying on similar

business.

18. Concededly the appellants sold the goodwill of M/s.Amolak Diagnostics Pvt.Ltd. to Dr.Lal Pathlabs Pvt.Ltd. and thus it is a case where the phrase sells the goodwill of a business would be met.

19. But the question would be whether the second phrase to refrain from carrying on similar business is met.

20. As noted in paragraph 9 above, the prolix plaint launches a two pronged attack for the relief of injunction. The first is that in view of covenant 10.4.1 of the Share Purchase Agreement dated January 21, 2011 read with clause 9 of the Retainership Agreement of even date, the appellants could not do any activity relating to pathology or radiology. Secondly that they could not carry on similar business under the garb of M/s.Arth Diagnostics Pvt.Ltd.

21. The second attack required a piercing of the veil concerning ownership of M/s.Arth Diagnostics Pvt.Ltd. For if one could hold that Satyendra Singh Panwar was a front man and the real promoters behind the company were the appellants, could one say that the appellants were carrying on a similar business.

22. The learned Single Judge has not pierced the veil and that explains the respondents having filed cross-objections vide CM No.20860/2014, challenging the impugned order insofar relief has been denied by not lifting the veil.

23. Whereas the main body of the section (27 of the Contract Act) uses three words : (i) profession; (ii) trade and (iii) business, the exception only uses one word business.

24. Would it therefore mean that the exception applies only to a business and not to a profession or a trade?.

25. As noted above in paragraph 15, the learned Single Judge has held that the principle of ejusdem generis would apply in the instant case to give colour to the word profession, and though the reasoning is a little hazy, if the conclusion is looked at, the reasoning of the learned Single Judge would be that if the goodwill

of a profession is sold it would amount to selling a goodwill of the business and thereby attracting the exception. In other words the word business in the exception has actually been reinterpreted by the learned Single Judge to include a profession or a trade. This explains the reasoning of the learned Single Judge in para 28 to 30 of the impugned decision, an extract whereof has been made by us in paragraph 15 of our opinion above. The learned Single Judge has reasoned that in todays environment tradesmen and businessmen possess same skills as professionals and therefore to treat them lesser than professionals would demean their standing in the society. Referring to the law declared in Raghuveer Singhs case (supra), the learned Single Judge has held that the decision recognizes to readjust legal norms and realign the same in a changing society. The view taken by the learned Single Judge is that if professional corporatize their affairs by setting up a company and then sell the company along with the goodwill, a negative covenant of non-compete would mean that they cannot even render service as a professional. Another independent reasoning is flowing. The same is that in other activities where service is rendered expert knowledge of the same kind as is acquired by professionals is acquired and thus to put professionals on a higher plank than others who render services using expert knowledge would be unfair to the others. Though not expressly stated by the learned Single Judge, the reasoning is that in todays environment managing corporate affairs requires same kind of personal skills and knowledge which are acquired by professionals.

26. To support the impugned order the learned counsel for Dr.Lal Pathlabs Pvt. Ltd. cited the decisions reported as 1965 (16) STC350MP Bajranglal Bajaj Vs. State of A.P. & Ors., AIR 1961 SC1010S.C.Cambatta & Co.Pvt. Ltd. Vs. Commissioner of Excess Profit Tax Bombay, AIR1971 Cal. 70 Commissioner of Income Tax West Bengal Vs. Chunilal Prabhulal & Co., (2012) 252 CTR (SC) 232 Commissioner of Income Tax Kolkata Vs. SMIFS Securities Ltd., AIR1980 Rajasthan 155 Hukami Chand Vs. Jaipur Ice & Oil Mills Co. & Ors. and (1988) IRLR60Allied Dunbar Ltd. Vs. Weisinger as also relied upon study material of the Institute of Chartered Accountants to bring home the point that when Dr.Arvinder Singh and Dr.Rajendra Kachhawa sold all the shares of M/s.Amolak Diagnostics Pvt. Ltd. to Dr.Lal Pathlabs Pvt. Ltd., they sold even the goodwill of the company and that the restriction prohibiting the two from carrying on similar business or

even rendering professional service in the city of Udaipur for a period of 5 years was reasonable.

27. Since learned counsel for the appellants did not dispute that even goodwill of M/s.Amolak Diagnostic Pvt. Ltd. was sold, evidenced by the valuation of the price of the shares, we need not discuss the law concerning valuation of a stock and principles of determining goodwill. We also need not discuss the issue of reasonableness of the period of restriction, for the reason at base the issue between the parties was whether the prohibition could extend to Dr.Arvinder Singh and Dr.Rajendra Kachhawa rendering professional services as a Pathologist and a Radiologist for a remuneration i.e. could the two carry on the profession of a Pathologist and a Radiologist respectively.

28. Learned counsel for Dr.Lal Pathlabs Pvt. Ltd. relied upon the decisions reported as AIR 1979 SC1132S.Mohanlal Vs. R.Kondiah, AIR 1981 SC1047 Barendra Prasad Ray & Ors. Vs. Income Tax Officer, A Ward, Foreign Section & Ors., (1997) 225 ITR936Natvarlal Ambalal Dave Vs. Commissioner of Income Tax, (1997) 139 CTR (Ker) 518 Commissioner of Income Tax Vs. Upasana Hospital, AIR1970 Mad 460 Dr.P.Vadamalayan Vs. The Commissioner of Income Tax Madras and (1980) 18 CTR (Mad) 33 Commissioner of Income Tax, Tamil Nadu IV Vs. V.K.Ramachandran to urge that as per the same there was no distinction between a profession and a business. Learned counsel also cited the decision reported as (2003) 4 SCC601State of Maharashtra Vs. Dr.Praful B.Desai to urge that the principle of updating construction, to march with the time, has to be adopted by the Court while interpreting a statute, to make it relevant in its application to the time when it is being interpreted. Counsel also cited the decision reported as (2005) 8 SCC534State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat & Ors. to urge that stare decisis is not a dogmatic rule, allergic to logic and reason. It is a flexible principle of law operating in the province of precedents, providing room to collaborate with the demands of changing times dictated by social means, state policy and judicial conscience.

29. Per contra, the learned counsel for the appellants cited the decisions reported as (1981) 2 SCC246Superintendence Company of India (P) Ltd. Vs. Krishan

Murgai, AIR 1967 SC1098 Niranjan Shankar Golikari Vs. The Century Spinning and Manufacturing Co. Ltd., (2006) 4 SCC227Percept DMark (India) Pvt. Ltd. Vs. Zaheer Khan & Ors., 209 (2014) DLT554Le Passage to India Tours & Travels Pvt. Ltd. Vs. Deepak Bhatnagar and AIR1966 Gujarat 189 M/s Lalbhai Dalpatbhai & Co. Vs. Chittranjan Pandya to press the point that post-contractual covenants in case of employer-employee contracts to restrain an employee from taking subsequent employment after termination of the retainership agreement are not enforceable being void by virtue of Section 27 of the Indian Contract Act. Learned counsel also relied upon the decisions reported as AIR1994 Kerala 278 Dr.M.M.Hassan Vs. T.C.Mohammed, (2005) 7 SCC283M.P.Electricity Board & Ors. Vs. Shiv Narayan & Anr. and (2008) 1 SCC246G.K.Choksi & Company Vs. CIT, Gujarat. to urge that a profession, a business and a trade are distinct terms. On how should a statute be interpreted, learned counsel cited the decisions reported as 1992 Supp (1) SCC A.N.Sehgal & Ors. Vs. Raje Ram Sheoran & Ors., 1997 (3) SCC353Satnam Singh & ors. Vs. Punjab & Haryana High Court & Ors., (1990) 1 SCC400 Frick India Ltd. Vs. UoI & Ors., (2007) 3 SCC700National Insurance Co. Ltd. Vs. Laxmi Narain Dhut and AIR 1957 SC768Commissioner of Income Tax, West Bengal Vs. Benoy Kumar Sahas Roy to urge that it is settled law that where the language of a provision is plain and unambiguous the statute has to be given a clear meaning and has to be interpreted in its own context. Neither could a progressive interpretation thereof be allowed nor could headings or alien statutes be called to aid in the interpretation. Relying upon the decision reported as (2003) 5 SCC448State of Bihar Vs. Kalika Kuer & Ors. counsel urged that the impugned judgment suffers from gross errors in not following the judgment of a co-ordinate bench of this Court in Le Passage to India Tours & Travelss case (supra) and thus contravening judicial propriety for the reason the learned Single Judge has while noting the said decision expressed disagreement with the view taken by the learned Single Judge. Lastly, learned counsel urged that in view of the decision reported as 2005 (10) SCC11Ajendraprasadji Narendraprasadji Vs. Swami K. Narayandasji & Ors. it is settled law that it is mandatory and incumbent upon the court while deciding an application for interim injunction under O. XXXIX Rule 1 and 2 to arrive at categorical and well-reasoned findings regarding there being a prima facie case, balance of convenience and that of irreparable injury and

lack of such findings vitiates the order granting injunction.

30. Concerning the decisions cited by learned counsel for Dr.Lal Pathlabs Pvt. Ltd. to urge that law draws no distinction between a profession and a business, we note that S.Mohan Lals case (supra) was concerned with Section 10(3)(a)(iii) of the Andhra Pradesh Buildings (Lease Rent and Eviction) Control Act, 1960 which conferred a right on the landlord to evict the tenant on the ground that the landlord requires the premises for the purposes of carrying a business. The landlord was an advocate and had sought to evict the tenant on the ground that he needed the premises for his professional activity. The tenant urged that there was a clear distinction between business and profession and highlighted that the practice of a liberal profession like that of a doctor was not commercial like a business. The court held that the expression business and profession had not been defined under the Act and that they are common expressions used by themselves and sometimes in the collocation of words as in business, profession, and trade. The Court held that the word business had large and wide implication, capable of various meaning, depending upon its use in the statute. In the broadest sense, business meant everything that occupies the time, attention and labour of men for the purpose of profit. In the narrow sense it is confined to commercial activity. The court held that the meaning of a word in a statute must be gleaned from the context in which it is used. With reference to the context in which the word business occurred in the statute the Court held that the scheme of the Act was to prevent unnecessary eviction of a tenant by a landlord and that in the context of the purpose of the statute carrying on business would be in the wider sense of the meaning of the word business.

31. In Barendra Prasad Rays case (supra) the issue arose with reference to the fee paid to a foreign lawyer. Whether it was paid to the lawyer in furtherance of business of the lawyer. The Court held that the word business has a wide import and may mean an activity carried on continuously and systematically by a person by his labour and skill with a view to earn profit and was not confined to meaning trade or manufacture only. Recognizing that it was the context in which the word was used as the guiding star, the Court held that for the purposes of the statute in question the money would be required to be paid pertaining to the business

activity of the foreign lawyer.

32. In Natvarlal Ambalal Daves case (supra) the issue was, whether the assessee was carrying a profession or a business. The court held that even though a person happens to be a doctor, it can be said that such person is carrying on an activity of a business. The court further held that professional activity can also be characterized as an activity of carrying on a business if it is carried on like a commercial activity. Therefore, giving a wide connotation to the word business, the court held that if an activity, garbed as a profession which is commercial or, in any event, if the vocation of the assessee is an admixture of both, then the assessee would be entitled to relief for development rebate as claimed. On facts it need to be noted that the assessee was a doctor and a specialist in Radiology and was carrying on the activity of an X-ray clinic where persons were x-rayed, films were prepared for charges, and of course the x-ray was studied and report given.

33. In Upasana Hospitals case (supra) the issue was whether the assessee-firm was entitled to investment allowance under Section 32A of the Income Tax Act, 1961. The court held that the object of making profit is the guiding force that sustains all occupations and professions coming within the expressions of business. Organized business activity combining professionals and non-professionals together can be imagined in a commercially developing society when profit is available. A joint cooperative venture of doctors and non-doctors was held to be an activity to gain profit and thus though the predominant nature of work was to render a medical aid in which major contribution was the input of a professional, the overall activity would be a business activity and hence entitled to investment allowance.

34. In Dr.P.Vadamalayans case (supra) the Court held, with reference to Section 66(1) of the Income Tax Act, 1922 that the profession of medicine enfolded into its conclave only members who practice such profession as a vocation and not as a trade. But centrifugal activity, though related to a profession, in a given circumstance can be understood in a commercial way. An expert professional, who has the inclination, capacity and zeal to expand his activities may do so by entering into the arena of business activity. Thus, if an expert equips himself as in

the aforesaid case with plant and machinery with which he, along with the aid of his professional skills and qualified assistance turns an activity which is not strictly a professional activity into a commercial activity, it should not be understood that he is mechanically exercising his professions. If an assessee who is a professional and a expert, contemporaneously carries on a trade which is associated to such a profession by which he can take advantage of a fiscal Act by claiming and allowance or rebate along with a lighter burden of tax, then he has a right to take advantage of the same.

35. V.K.Ramachandrans case (supra) was concerned with Section 28 and Section 154 of the Income Tax Act, 1961. The issue before the Court was whether the Tribunal was right in holding that there was commercial activity amounting to business and the assessee was entitled to business rebate on Xray equipment. The court held that a professional person, as adjunct to his professional activities i.e. radiological institute, does not disable him to run it as a commercial venture and earning profit therefrom.

36. In Dr.M.M.Hassans case (supra), the petitioner was a tenant and a qualified doctor. He was carrying on the activity of a nursing home from the tenanted premises. He was resisting eviction from the tenanted premises claiming protection of the second proviso to Section 11(3) of the Kerala Buildings Act, 1965 which stipulated that the Rent Controller shall not issue any direction to a tenant to put a landlord in possession, if the tenant is dependant for his livelihood mainly on the income derived from any trade or business carried on in such building and there is no other suitable building available in the locality for such person to carry on such trade or business. The Court denied the benefit of the restriction holding that the petitioner was carrying on a professional activity and was not carrying on trade or business within the meaning of Section 11(3) of the said Act. The Court noted that the word business was capable of a wide or a narrow meaning and that the context in which it was used in the statute would determine its meaning.

37. In M.P.Electricity Boards case (supra), the issue arose relating to the tariff to be charged with respect to electricity consumed by an advocate in his office. Different tariffs were fixed under the heading commercial and domestic. As per the

Electricity Board the place wherefrom the advocate was carrying on his activity was not his house and therefore it would be entitled to charge the tariff under the heading commercial. The Court held that whereas a distinction could be drawn between a user of a premises which is domestic vis-a-vis non-domestic, but that would not automatically mean that everything which was non-domestic would be commercial. The Court held that the word commercial originates from the word commerce and of necessity would have the concept of a trading activity which is a generic term for all aspects of buying and selling.

38. In G.K.Choksi & Co.s case (supra) the appellant assessee was a firm of chartered accountants. During the year 1984-85 the firm constructed a building for residence of its low paid employees and claimed initial depreciation @ 40% u/s 32(1)(iv) of the Income Tax Act, 1961 which extended certain benefits to persons employed in business. The Income Tax Officer rejected the claim on the ground that the section was applicable only to an assessee carrying on business and not to professionals. The court held that wherever the legislature intended that the benefit of a particular provision should be for both business or profession, it has used the expression business or profession and wherever it intended to restrict the benefit to either of the two they have used either the term business or the term profession i.e. one would not include the other. It was thus held that there is nothing in section 32(1)(iv) which envisages the scope of the word business to include in it profession as well and giving it such a wide interpretation would amount to first creating an imaginative lacuna and then filling it up, which cannot be allowed.

39. Apart from the decisions cited by learned counsel for the parties, we find three other decisions of relevance to be noted on the subject of a business and a profession. In the decision reported as AIR 1981 SC1047 Barendra Prasad Ray Vs. Income Tax Officer, 'A' Ward, Foreign Section it was observed that the word 'business' is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earn an income. In the decision reported as 1919 (2 KB) 731 William Esplen, Son and Swainston, Ld. v. Inland Revenue Commrs., it was observed that it is of the essence of a profession that the profits should be dependent mainly upon the

personal qualifications of the person by whom it is carried on, and that can only be an individual. In the decision reported as AIR1967 Ker 88 Sethurama Menon v. Meenakshi Amma it was observed at page 89 that the expression 'trade or business' as we understand it, connotes a commercial activity. The expression 'profession' does not, and is virtually at the other end of the scale.

40. Thus, an analysis of the six decisions cited by Dr.Lal Pathlabs Pvt. Ltd. and the three decisions cited by Dr.Arvinder Singh and Dr.Rajendra Kachhawa as also the three other decisions noted by us would guide that the context in which the word business occurs in a statute has to be kept in mind and that the word business is capable of a range of meanings; the broadest meaning would be everything that occupies the time, attention and labour of men for the purpose of profit and in the narrow sense may be simply confined to a commercial activity. No doubt a professional activity can also be characterized as an activity of carrying on a business, but only if it is carried on like a commercial activity. An organized business activity combining professionals and non-professionals together is a reality of life because of the commercially developing society. But in such a case, profit sharing exists. In other words a centrifugal activity relating to a profession, in a given circumstance may become commercial. For example if a doctor equips himself with plant and machinery, with which he, uses qualified assistance by a non-professional, adding on the input of his professional skill, earns a profit it can be said that the professional doctor is engaged in a commercial activity. But where the doctor only indulges in the centrifugal activity of using his skill and knowledge to give an output, it would be a case of a non-commercial activity.

41. It may be true that in Dr.Praful B.Desais case (supra), the principle of updating construction was recognized to keep a statute live and kicking in the context of revolutionary changes in technology, communication and transmission and in Mirzapur Moti Kureshis case (supra) the Court held that one should not be a prisoner of stare decisis and the Constitution Bench of the Supreme Court in the decision reported as (1989) 2 SCC754UOI & Ors. Vs. Raghubir Singh (Dead) by LRs opined that law must forever adopt new principles from life and hive off the old ones and the judicial search for solutions must take into account the changed social era in which the problem arises and needs to be resolved.

42. But that would not mean that the doctrine of binding precedents can be thrown to the winds. The task of changing over requires a delicate balancing of the old with the current and hence forward to the future. There have to be no creative surprises. The reason for evolving a new principle must be succinctly stated and the contours of the new principle properly defined. Or else, the impression would be that justice has flown from the foot of the Lord.

43. In every society people undertake various activities to satisfy their needs which may be broadly classified into two groups - economic and noneconomic. Economic activities are those by which we earn our livelihood. These activities may be divided into three major categories : Business, Profession and Employment.

44. Business refers to those economic activities which are connected with production or purchase and sale of goods or supply or services with main object of earning profits, profession on the other hand includes those economic activities which require special knowledge and skill to be applied by individuals in their occupation.

45. Business activities may be classified into two broad categories - industry and commerce. Industry refers to economic activities which are connected with conversion of resources into useful goods and involve mechanical appliances and technical skills. Commerce covers two types of activities - trade and auxiliaries to trade. Buying and selling of goods is termed as trade. The other activities required to facilitate this buying and selling are called services or auxiliaries to trade. For example: transport, banking, insurance, communication, advertising, packaging and warehousing. Thus, business is the genus of which trade is a specie.

46. Put in a flow chart, a graphic view of what we have penned above, would look like this: ACTIVITIES ECONOMIC PROFESSION NON ECONOMIC BUSINESS INDUSTRY COMMERCE TRADE FAO (OS) No.473/2014 EMPLOYMENT AUXILIARIES TO TRADE Page 21 of 30 47. To carry on economic activities, which will include a business, a trade as also auxiliary to trade, a series of different activities or functions aimed at achieving the goals of the organization have to be carried out. These interconnected and inter-dependent functions are not achieved by chance, but by following a deliberate process, which may be called

management. Mangers perform these functions. Management is a very wide term and is used extensibly for all types of activities and mainly for taking charge of different activities in an enterprise. People in organizations perform diverse tasks but they are all working towards the same goal. Management could therefore be defined as a process of getting things done with the aim of achieving goals effectively and efficiently.

48. The three words : (i) process, (ii) effectively, and (iii) efficiently are therefore caught by the eye when one talks of management. The three concepts therefore need a little elaboration.

49. Process would mean the primary functions or activities that management performs to get things done. These functions include planning, organizing, staffing, directing and controlling. Effective would mean finishing the given task. It is concerned with the end result. But it is not enough to just complete the task, it has to be completed efficiently. To complete a work efficiently would mean not only completing the work correctly but with minimum cost. Minimum costs would mean least resources input. The inputs of resources would include money, material, equipment and persons required to do a particular task.

50. Understanding the basic concepts of process, effectively and efficiently as above, it dawns that there would be some elements which may be called the basic characteristic of management, and these characteristic would be : (i) A goal-oriented process which means uniting the efforts of different individuals in the organization towards achieving the goals. (ii) A pervasive character. A departmental store, a petrol pump, a school, a hospital, a factory - all need to be managed. What managers do in Spain or England is done by mangers in India. (iii) A multi dimensional character. Management is a complex activity and broadly has three dimensions. In its dimension of work it translates the work performed by individuals in terms of goals to be achieved with the Manager assigning the means to achieve the goals. This is done in terms of problems to be solved, decisions to be made, plans to be established, budgets to be prepared, responsibilities to be assigned and the authority to be delegated. In its dimension of managing human resources it requires dealing with employees as individuals with diverse needs and

behaviour and also includes dealing with individuals as a group of people. The task of management towards human resources is to make people work towards achieving the goals of the organization by making their strengths effective and their weaknesses irrelevant. Management in its dimension of operations requires a production process which entails the flow of input material and technology for transforming this input into the desire output for consumption. This is inter-linked with both the management of work and management of people. The dimension of management as a group activity is co-ordination of individual effort into a team work having a common direction.

51. Thus, management is an intangible force that cannot be seen but its presence can be felt in the way the organization functions.

52. It could thus be said that management is an art and a science because art pre-supposes the existence of certain theoretical knowledge, and since this basic knowledge varies from individual to individual it would therefore be a very personalized concept. It also involves the creative practice of existing theoretical knowledge. For example what makes the composition of a musician unique is the use of the notes by the musician in a creative manner that is entirely his own interpretation. Science is a systematized body of knowledge that explains certain general truths or the operation of general laws. Its principles are based on a cause and effect relationship. Scientific principles are first developed through observation and then tested through repeated experimentation under controlled condition.

53. This tends to give colour to management as a profession.

54. Does this imply that management is a profession?.

55. To answer the question one needs to examine the salient features of profession and then see whether management satisfies them.

56. A profession has the following features:- (i) Well defined body of knowledge: A profession is a well-defined body of knowledge, an intellectual discipline which is acquired through instruction. In order to practice a profession, a person requires specialized knowledge of its principle and techniques. (ii) Restricted Entry: No one

can enter a profession without qualifying the examination or acquiring the degree prescribed by the regulatory body. For example, in order to enter the field of law in India, an advocate must acquire LL.B. degree from a recognized institution. (iii) Professional association: Every profession is regulated by a professional body or association which regulates entry, grants certificates and formulates and enforces a code of conduct for the members. To be able to practice in India lawyers have to become members of the Bar Council. (iv) Ethical Code of Conduct: Members of a profession have to abide by the rules and regulations prescribed by the professional body laying down the norms of integrity, honesty and professional ethics. (v) Service Motive: Although a profession is a means of livelihood but the basic motive of a profession is to render dedicated service to the community. For Example, the primary motive of a lawyer is to ensure that his client gets justice.

57. Looked in the light of a profession, management has only the following features:(i) Growth of management as a discipline is a common phenomenon world over. It consists of systematic body of knowledge comprising of defined principles based on variety of business situations. Institutions imparting Management education and degree in management are mushrooming and admission in such institutions is mostly through an examination. (ii) Even in the field of management many associations are formed, for instance AIMA (All India Management Association), which have laid down rules and ethical codes regulating activities of the members. (iii) The basic motive of management is to help the organization fulfill its objective and such objectives will depend on the type of organization. While for some it could profit maximization, for others it could be serving the society. The motive of a manager will thus vary accordingly.

58. With respect to feature No.(i) pertaining to management, it is unlike a profession, with the rider that there is no bar on a person who does not have a degree in management to be appointed as manager of an enterprise though a qualification or a degree may be desirable. With respect to feature No.(ii) the distinction would be that these associations are not statutory and therefore it is not mandatory for a manager to be a member of such an association.

59. From the above discussion it can be reasonably stated that albeit management has some features of profession yet it does not meet the exact criteria of a profession. Thus management cannot be equated with profession properly so called.

60. Whereas managers provide services, as do professionals, and where, say for example, a group of experts in insurance, banking and finance get together and open a consultancy firm where a customer can walk in with a specific problem and seek a solution, it may be said that these gentlemen are rendering occupational services. Though both, a person engaged in a profession and a person in an occupation largely discharge their duties using their personal intellectual skill, but there would still be a thin line of demarcation, which may vary from time to time, but the substantial difference would be that in an occupation the focus would be on moving towards achieving a desired specific goal.

61. To put it differently occupations which would be regarded as profession have four characteristics. (i) Substantial part of the work is mental rather than manual. (ii) A commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client. (iii) Professional association which not only regulate admissions but enforces, through professional course, matters of conduct and ethics. (iv) A high status in the society : Vakil Sahab, Dr.Sahab.

62. In Corpus Juris Secundum, (Vol.72) at pages 1215-19, one finds a very illuminating discussion on what distinguishes a profession from an occupation or a vocation, and we quote the extracts:"Profession ...While the word 'profession' may be broadly defined as meaning vocation, calling, occupation, or employment, literally, the terms is applied to a calling or vocation requiring special knowledge of a branch of science or learning and in this somewhat restricted sense the word 'profession' means an employment requiring a learned education, as a profession of arms, the profession of a clergyman, lawyer or physician, the profession of chemistry or physics. Profession' is further defined as meaning the occupation which one professes to be skilled in an to follow, the business which one professes to understand and to follow, for subsistence, the occupation, if not

mechanical or agricultural, or the like, to which one devotes oneself, any calling or occupation involving special mental and other attainments or special discipline, as editing, acting, engineering, authorship, an occupation which properly involves a liberal education or its equivalent and mental, rather than manual, labour, especially one of three learned professions. The word 'profession' implies professed attainments in special knowledge as distinguished from mere skill..... A profession involves labour, skill, education and special knowledge and implies a vocation requiring higher education and learning, intellectual skill as distinguished from that used in an occupation for the production of sale of commodities..... While a profession is not a money getting business and has no element of commercialism in it, it does involve compensation or profit, and it is of the essence of a profession that the profits should be dependent mainly on the personal qualifications of the person by whom it is carried on....."

63. Even in todays environment, the distinction between a profession, occupation, trade and business is well-defined and in our opinion to give a status different to a profession would not mean that others are demystified. It would not be an affront to the dignity or the integrity of a professional manager if he is held to be a different category vis--vis a person in a profession.

64. The learned Single Judge has applied the rule of ejusdem generis to give colour to word profession in the phrase business, trade or profession. There are no reasons as to why and on what logic the principle of ejusdem generis has been adopted.

65. The rule of ejusdem generis has to be applied with great caution, because it implies a departure from the natural meaning of words, in order to give them a meaning on the supposed intention of the legislature. FAO (OS) No.473/2014 application was illustratively brought out by the Supreme Court in the decision reported as AIR 2010 SC2735UOI & Ors. Vs. Alok Kumar. The decision highlights the well-known underlying philosophy behind the rule : if one can identify words pertaining to a class, category or genus which are followed by general words, the latter would take their meaning as limited to the things of the same kind as are specified before. Unless the general words bring out a class of genus and are not

a heterogeneous collection of items, ejusdem generis would have no application.

66. Probably, what the learned Single Judge had in mind was the rule of noscitur a sociis. The meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it. When two or more words which are susceptible of analogous meaning are coupled together (noscitur a sociis) they are understood to be used in their cognate sense. They take their colour from each other, that is, more general is restricted to a sense analogous to the less essential.

67. The words profession trade and business used in Section 27 are specific words and we see no scope to give meaning to the word profession applying the rule of noscitur a sociis.

68. The injunction granted by the learned Single Judge against the appellants is : are restrained from carrying on practice/business/profession as a Pathologist or as a Radiologist in the city of Udaipur in any manner whatsoever including by providing consultancy services or by associating with any other person or body providing such services.

69. The reasoning of the learned Single Judge is obviously on the basis that the activity of a profession is akin to that of a business, for if this was not the reasoning, the exception to Section 27 of the Contract Act would not even apply. Such agreements not to carry on business if goodwill of a business is sold, subject to the restriction being reasonable, are alone carved out from the general embargo embossed by Section 27 of the Contract Act.

70. The sweep of the span of the injunction to prohibit the appellants to carry on their profession as Pathologist or Radiologist in any manner whatsoever would render the appellants incapable of working as a Pathologist or Radiologist in any capacity whatsoever, and this would be contrary to Section 27 of the Contract Act.

71. Of course, the appellants cannot overtly or covertly carry on a business of running a Pathlab or a X-ray Diagnostic Centre by forming a venture where the organizational structure has the essential attributes of a business i.e. employing workmen, laboratory technicians, paramedics etc; what we mean to say a

hierarchal structure where work is assigned to different people, all working towards a common goal to earn profit.

72. There is a cross appeal filed by the respondents because the learned Single Judge has not pierced the veil to see whether the appellants were the real face of M/s.Arth Diagnostics Pvt. Ltd., and for which only three facts have been asserted. `10,00,000/- advanced by appellant No.1 to Satyendra Singh Panwar who was also employed with M/s.Amolak Diagnostic Pvt. Ltd. Both appellants working with M/s.Arth Diagnostics Pvt. Ltd. and appellant No.1 writing on his visiting card that he was the Chief Managing Director and Chief Pathologist of M/s.Arth Diagnostics Pvt. Ltd.

73. The only argument to pierce the corporate veil is that Dr.Arvinder Singh had advanced `10,00,000/- to Satyendra Singh Panwar and that Dr.Arvinder Singh had started holding himself as the Chief Managing Director and Chief Pathologist of M/s.Arth Diagnostics Pvt. Ltd. Whereas receipt of `10,00,000/- by Satyendra Singh Panwar has been admitted, the other allegation is denied. The shareholding pattern of M/s.Arth Diagnostics Pvt. Ltd. has been highlighted as per which neither Dr.Arvinder Singh nor Dr.Rajendra Kachhawa own any share of M/s.Arth Diagnostics Pvt. Ltd. Loan in sum of `60,00,000/- taken from State Bank of India by Satyendra Singh Panwar to set up the pathlab has been highlighted.

74. Thus, at this stage prima-facie no case is made out to lift the veil of M/s.Arth Diagnostics Pvt. Ltd.

75. The view taken by the learned Single Judge that the appellants cannot carry on any activity as professionals is thus contrary to law and is set aside.

76. Dismissing CM No.20860/2014 filed by the respondents, we dispose of the appeal setting aside the impugned order dated October 15, 2014 and dispose of IA No.2965/2014 filed by the plaintiffs permitting the appellants to carry on professional activities as a Pathologist and Radiologist respectively, but not in a manner which would amount to carrying on business by corporatizing themselves.

77. Nothing stated by us would be treated as an expression on the merits of the case set up by the rival parties which would be decided post-trial by the learned Single Judge in view of the evidence led and the documents proved.

78. Parties shall bear their own costs all throughout. (PARDEEP NANDRAJOG) JUDGE (PRATIBHA RANI) JUDGE MARCH26 2015 Mamta

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com