

**Usha Intercontinental (India) Vs. Omicron Electronics Gmbh**

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**Court :** Delhi

**Decided On :** Oct-15-2004

**Reported in :** 114(2004)DLT740

**Judge :** Vikramajit Sen, J.

**Acts :** Code of Civil Procedure (CPC) - Order 39, Rules 1, 2 and 4; [Specific Relief Act, 1963](#) - Sections 14, 16, 41 and 42

**Appeal No. :** IAs No. 5997 and 6711/2004 in CS(OS) No. 990/2004

**Appellant :** Usha Intercontinental (India)

**Respondent :** Omicron Electronics Gmbh

**Advocate for Def. :** Neeraj K. Kaul, Sr. Adv., ; Aseem Chandra, ; Anurag Singh

**Advocate for Pet/Ap. :** Arun Jaitley,; H.L. Tiku, ; Chetan Sharma, Sr. Adv.,;

**Judgement :**

**Vikramajit Sen, J.**

1. The Plaintiff has prayed for the issuance of an injunction restraining the Defendants from marketing/ selling their products in India either directly or through an agent other than the Plaintiff. In respect of its application under Order XXXIX Rules 1 and 2 of the CPC an ex parte ad interim injunction had issued on the first

date of hearing on 15.9.2004. This Order was partially modified on the following date, that is, 5.10.2004 permitting the Defendant to submit its Tenders for ABB (internally), ABB (KPCL), NTPC Auriry (KPCL), Siemens Mumbai and Power Grid CIL (Southern R.). The Defendant has also filed an application under Order XXXIX Rule 4 seeking the recalling of the ex parte ad interim injunction. These applications shall be disposed of by these Orders.

2. Mr. Jaitley, learned Senior Counsel for the Plaintiff has read out extensively from the correspondence exchanged between the parties. It is his contention that a perusal of the correspondence discloses that the Defendant had contracted to sell its products in India exclusively through the Plaintiff. He has predicated his arguments on the fact that various third parties had been diverted by the Defendant to the Plaintiff for all trade purposes ; that representations have been made by the Defendant to the effect that the Plaintiff is its exclusive distributor in India and that the Defendant would be looking forward to serve all prospective clients through the Plaintiff; and that it had issued a General Certification dated 27.5.2002 stating that the Plaintiff is its sole authorised representative in India. These arguments were addressed specifically for the reason that avowedly no written contract exists between the parties hereto. At this stage of the proceedings the Court must be convinced that a prima facie case has been disclosed, namely, that there is a preponderant possibility that the Plaintiff may prove its case after the Trial. For the issuance of a temporary injunction the Plaintiff is not required to conclusively or overwhelmingly prove all the necessary facts which would entitle it to a Decree. It certainly appears to me that Mr. Jaitley is correct in contending that over the years the fluid commercial relationship between the parties had transformed into a fixed one where the Plaintiff acted as the Sole Representative of the Defendant in India. I shall revert to the aspect of the existence of a prima facie case again, later in these Orders.

3. The argument of Mr. Jaitley is that the balance of convenience lies in favor of the Plaintiff. Business was being transacted in India by the Plaintiff on behalf of the Defendant for several years. There were parleys and negotiations of the manner in which this relationship could be brought to an end amicably and to the mutual benefit of both the parties. From the correspondence it is evident that there was a

proposal to continue with the relationship for periods ranging between three years to five years. Ordinarily the Court would lean towards the maintenance of status quo during the pendency of the legal action. In this case, however, the correspondence also bears out that the Plaintiff was well aware of the termination of the relationship with effect from 30.9.2004. The Plaintiff itself contains this recital and the claim of damages could have been prayed for only on the assumption of this termination..

4. In paragraph 20 wherein it has been stated that - 'the unilateral and illegal act of the plaintiff (sic. the defendant) thereby deciding to prematurely terminate the agreement and/or to act in repudiator breach thereof, has caused immense business loss of a conservative estimate of not less than 4 Crores 12 Lacs of Rupees besides loss of goodwill and reputation amounting conservative estimate of Rs. 30 Lacs to the Plaintiff'. Mr. Kaul, learned Senior Counsel for the Defendant had highlighted that the Plaintiff would stand disentitled to discretionary relief if it has approached the Court with unclean hands. It is his submission that a false impression had been created by the Plaintiff, in by the PGCIL informing the Plaintiff that the Defendant had informed PGCIL of the termination of the business relationship between the parties. I will not dwell in great detail on this aspect of the dispute although there does seem to be substance in this argument of the Defendant. Certainly the Plaintiff has not been entirely forthright and candid in filing all the correspondence but what is complained of is not of such a magnitude as would justify non-suiting the Plaintiff on this ground alone. This is evident from the Defendant letter dated 30.6.2004 to the Plaintiff of the recording of the mutual understanding that the relationship between them will officially be terminated on 30.9.2004 and that all orders booked between 1.10.2004 and 31.12.2004 will be honoured as part of the defined grace period of three months and based on the same conditions as mentioned above. This commitment has been reiterated and reaffirmed by learned counsel for the Defendant in the course of arguments and has resulted in the view that has been taken by me. The discussion on balance of convenience needs to be left open-ended.

5. The obstacle in the way of the Plaintiff, which I find to be unsurmountable by it, is that a prima facie case does not exist in its favor for legal reasons, and that it

will not suffer irreparable loss and injury. The caption in the Plaint itself labels it as a 'Suit for damages and permanent injunction'. The first prayer is for the passing of a decree for Rs.4,12,00,000/- towards damages and a sum of Rs.30,00,000/- towards loss of goodwill in favor of the Plaintiff and against the Defendant jointly and severally. The Plaintiff has, therefore, indubitably calculated a rough pre-estimate of the damages which it has incurred as a result of the termination of the contract between the parties. Having done so there is no scope whatsoever to plead that irreparable loss and injury would be caused to the Plaintiff if the injunction prayed for by it is not granted.

6. Mr. Jaitley had contended that on a reading of the observations of the Hon'ble Supreme Court in M/s. Gujarat Bottling Co. Ltd. and others vs . Coca Cola Company and others : AIR 1995 SC2372 it would be indubitably clear that negative covenants, gathered by implication from the dealing between the parties, can be enforced by injunctory orders. Reliance has also been placed on Wellman Hindustan Ltd. vs. N.C.R. Corporation, 48(1992) DLT 683. My attention has also further been drawn to the decision of a learned Single Judge of this Court in J.K. Industries Limited vs . International Cooperative Alliance Domus Trust and Others, : 79(1999)DLT1 , where an interim injunction had been granted in a Suit for Specific Performance even in the absence of a written contract by gathering, assimilating and discerning the Agreement from the dealings between the parties. The question which needs to be determined immediately is what was the character and content of the negative covenant.

7. Mr. Kaul, learned Senior Counsel for the Defendant has contended that there is no material before the Court to come to the extreme conclusion that the negative covenant relied upon by the Plaintiff goes any further than a commitment that the Plaintiff alone shall act as the Representative of the Defendant in India. It is his contention that even if a negative covenant can be gathered from the dealings of the parties in favor of the Plaintiff it does not indicate that the Defendant could not transact business directly. Reliance has also been placed on J.K. Industries Limited vs . International Cooperative Alliance Domus Trust and Others, : 79(1999)DLT1 , Vidya Securities Ltd. vs. M/s. Comfort Living Hotels Pvt. Ltd. 2003 II AD (Delhi) 329, Shubhmangal Merchantile (P) Ltd. vs . Tricon Restaurants

(India) Pvt. Ltd. : AIR2000 Delhi13 , M/s. Pepsi Foods Limited vs. M/s. Jai Drinks Pvt. Ltd. 1996 I AD (Delhi) 1097, G.D. Green Flora Resorts Pvt. Limited vs . M/s. Kuhn-Rikon Asia Pte. Ltd. : AIR1999 Delhi229 , Goyal MG Gases Ltd. Another vs . M/s. Griesheim GmbH : 75(1998)DLT737 and Media Transasia India Ltd. and another vs . Indian Airlines Ltd. and others : AIR2003 Delhi27 . On a consideration of these Judgments I am persuaded to hold, prima facie, that even if an exclusive arrangement had been developed between the parties it did not preclude the Defendant from directly entering upon the Indian market. Learned counsel for the Plaintiff had eloquently and forcefully submitted that the market in India had been developed entirely by the Plaintiff, and after riding 'piggy- back' on the efforts of the Plaintiff the Defendant has dishonestly terminated the Agreement and is desirous of reaping the profits for itself alone. Mr. Jaitley has argued that all over the world, jurisprudence is veering towards the enforcement of a contract rather than relegating a party to claiming damages for its breach. Unfortunately, the [Specific Relief Act, 1963](#), does not keep abreast of this view and approach until Parliament sees the wisdom in changing the law, I have no alternative but to implement the mandate that is plainly preached by Sections 14, 16 and 41(e) of that Act. If an injunction of the nature prayed for in the application is to issue it would have the effect of specifically enforcing the contract that had emerged between the parties. Section 14(a) prohibits the specific enforcement of a contract for the non-performance of which compensation is an adequate relief. On a reading of the Plaint no opinion can be reached other than that the compensation/damages has been seen by the Plaintiff to be an adequate relief and has even been quantified. Section 16 further clarifies that the specific performance of a contract cannot be enforced in favor of a person who would not be entitled to recover compensation for its breach. In other words where compensation has been claimed by the Plaintiff itself specific performance cannot be granted.

8. In conclusion, in order to succeed the Plaintiff should be able to show the existence of a prima facie case both on facts as well as in law. While it may have succeeded in the former, it has failed in the latter. The provisions of the Specific Relief Act prohibit the grant of injunctory relief which has the effect of directing the specific performance of a contract. Even when Section 42 is applied, at the highest the Plaintiff has succeeded in disclosing that a negative covenant had come into

existence between the parties whereby the Plaintiff was permitted to market the Defendant's products exclusively in India. However, this exclusivity cannot extend to disentitling and disabling the Defendant to enter the market directly. Exclusivity does not mean exclusion even of the Principal. Furthermore, since the Plaintiff has itself initiated an action for recovery of damages, it cannot be heard to complain that no compensation for the breach of the contract by the Defendant is available to the Plaintiff.

9. The parties are commercial giants in their stature. It would have been prudent for the Plaintiff to reduce into writing all the covenants, especially disentitling the Defendant to venture into the Indian market directly so as to protect its commercial future and to insulate against its present complaint, viz. that the Defendant is dishonestly reaping the benefits of the Plaintiff's hard work in India. However, the Defendant is directed to ensure the compliance of its commitment contained in its letter dated 30.6.2004.

10. In these circumstances the interim Orders passed on 15.9.2004 are recalled. is No.5997/2004 filed by the Plaintiff under Order XXXIX Rules 1 and 2 is dismissed and is No.6711/2004 filed by the Defendant under Order XXXIX Rule 4 is allowed.

IA No. 6954/2004 in CS(OS) No.990/2004

11. Renotify on 29.11.2004.

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