

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE

RESERVED ON : 20-11-2006

DATE OF DECISION: 23-11-2006

IA No.8363/2006 in CS(OS)No.1500/2006

Norma (India) Ltd. Plaintiff
Through: Mr. Umesh Kumar, Adv.

VERSUS

Mr.Sameer Khandelwal & Ors. Defendants
Through: Ms.Pooja Saigal, Adv. for
defendants No.1 to 3
Mr.Vibhu Bakhru, Adv.
for defendants No.4 & 5

PRADEEP NANDRAJOG, J.

1. By and under the present order I dispose of IA No.8363/2006 filed by the plaintiff under Order 39 Rule 1 & 2 CPC praying that pending disposal of the suit, defendants No.1 to 3 be restrained from carrying on competing business with that of the plaintiff; defendants No.4 and 5 be restrained from carrying on competing business with that of the plaintiff; defendants No.1 to 3 be restrained from dealing with the customers of the plaintiff; defendants No.1 to 3 be restrained from transferring, alienating or creating third party rights in the movable and immovable assets of defendants No.4 and 5.

2. Vide order dated 31.7.2006 while issuing notice in the application, defendants No.1 to 3 were restrained from transferring, alienating, or creating third party rights in the movable and immovable properties of defendants No.4 and 5.

3. Since I am dealing with an interim injunction, I would be briefly noting the rival versions. Needless to state, observations and findings in the present order would be for purposes of forming a prima facie opinion. Nothing stated in this order would be read as an expression on the merits of the controversy between the parties. The ultimate fate of the suit would be decided in view of the evidence led by the parties.

4. Suit has been instituted by a private limited company. Plaintiff has been signed and verified on behalf of the plaintiff by one Gautam Khandelwal styling himself as the director of the plaintiff.

5. Case pleaded in the plaint is that Late G.D.Khandelwal was the proud father of 5 sons. The five sons carried on various businesses either as co-partnerships or as private limited companies. That share of the respective branches, whether as partners or as shareholders of the companies was in proportion to their share as if the assets were joint family assets. That 2 companies, namely, the plaintiff and Uma Shanker Forging Limited were constituted by the brothers. 2 partnership firms, M/s.Uma Shanker Khandelwal & Co. and M/s. Bansi Dhar Chiranji Lal were constituted. That the two companies and the two firms were popularly known as the 'Khandelwal Group'.

6. Gautam Khandelwal is a son of the fourth son G.D.Khandelwal. Defendant No.1 is the son of the second son of G.D.Khandelwal. Defendants No.2 and 3 are the wife and son respectively of the fifth son of late Shri G.D.Khandelwal.

7. It is stated in the plaint that as the family grew, it became more and more difficult for the various groups to stay together and on 15.1.2004 a minutes of meeting was recorded as per which the plaintiff company was assigned to the family members of the fourth son of Shri G.D.Khandelwal. It is stated that the minutes of the meeting contemplated division of the other family businesses. Qua defendants No.4 and 5, in paras 9 to 13 of the plaint it is pleaded as under:-

“9. It is submitted that since the year 2001, Mr.Subhash Khandelwal, Mr.Sameer Khandelwal and Mr.Abhey Shanker Khandelwal started siphoning funds from the family businesses and set up two competing businesses by the name of M/s. USK Exports Pvt. Ltd. (defendant No.4) and M/s. USK Trading Pvt. Ltd. (defendant No.5). M/s.USK Exports Pvt. Ltd. was incorporated on 13.02.2001. It is submitted that the shareholders of M/s. USK Exports Pvt. Ltd. included Mr.Kapil Khandelwal (defendant No.3) s/o Mr.Subhash Khandelwal, Mr.Sameer Khandelwal (defendant No.1) s/o Mr.Abhey Shanker Khandelwal, Mr.Subhash Khandelwa, Mrs.Madhu Khandelwal (defendant No.2) (wife of Mr.Subhash Khandelwal and Director in the plaintiff), Mrs. Ritu Khandelwal (Wife of Mr.Sameer Khandelwal) and Ms.Shreya Khandelwal (daughter of Mr.Sameer Khandelwal). The annual return of defendant No.4 for the year 2001-02 shows the list of shareholder of M/s.USK Exports Pvt. Ltd. as on 30.09.2002. The annual return also shows that Mr.Sameer Khandelwal and Mr.Kapil Khandelwal were directors in M/s.USK Exports Pvt. Ltd. The lists of shareholders of M/s. USK Exports Pvt. Ltd. and M/s.USK Trading Pvt. Ltd. will show that Mr.Subhash Khandelwal individually owned approximately 25% shares in M/s.USK Exports Pvt. Ltd. and his family members together owned the balance 25% shares. The balance 50% shares in M/s.USK Exports Pvt. Ltd. were held by Mr.Abhey Shanker Khandelwal and his family members.

10. The plaintiff states that M/s.USK Exports Pvt. Ltd. was set up for dealing in iron and steel and manufacturing of forgings etc. with similar facilities as that of the plaintiff. The defendant No.4 is directly in competing business with the plaintiff.

11. The plaintiff states that with the intention of further damaging the business of the plaintiff company, in the year 2002, another company by the name of M/s.USK Trading Pvt. Ltd. (defendant No.5) was incorporated by Mr.Sameer Khandelwal (defendant No.1). That M/s.USK Trading Pvt. Ltd. is in the business, inter alia, of purchase and sale of licences, etc. M/s. USK Trading Pvt. Ltd. has been set up by Mr.Sameer Khandelwal (son of Mr.Abhey Shanker Khandelwal) and Mr.Subhash Khandelwal [husband of Madhu Khandelwal (defendant no.2) and father of Mr.Kapil Khandelwal (defendant No.3) who are shareholders in the plaintiff]. It is submitted that M/s.USK Trading Pvt. Ltd. is carrying on the business of trading in iron and steel, and also in business of sale and purchase of licences and other related items, etc.

12. The plaintiff states that Memorandum and Articles of M/s.USK Exports Pvt. Ltd. will show that the business of the company is, inter alia, manufacture, processing and export of forgings. At the time of incorporation of M/s.USK Exports Pvt. Ltd., the defendant No.1 along with his family members and Mr.Subhash Khandelwal devised the method of transferring of unsecured creditors and loans to M/s.USK Exports Pvt. Ltd. It is submitted that certain unsecured creditors in M/s.Uma Shanker Khandelwal & Co. were paid off by Mr.Subhash Khandelwal and Mr. Abhey Shanker Khandelwal. The same persons were thereafter allotted shares in M/s. USK Exports Pvt. Ltd. The annual return of M/s. USK Exports Pvt. Ltd. for the year 2001-02 shows that Mrs.Asha Khandelwal and Mr.Vijay Khandelwal who were unsecured creditors of M/s.Uma Shanker Khandelwal & Co., were allotted shares in M/s.USK Exports Pvt. Ltd.

13. The plaintiff states that defendant No.1 and defendant No.3, in connivance with Mr.Subhash Khandelwal and Mr.Abhey Shanker Khandelwal, not only started siphoning funds from the family businesses to set up the business of M/s.USK Exports Pvt. Ltd. and M/s.USK Trading Pvt. Ltd. but also adopted the modus of diverting orders from the family businesses into M/s.USK Exports Pvt.Ltd. and M/s.USK Trading Pvt. Ltd. The plaintiff submits that the orders which were obtained in the name of the family businesses were either partially or wholly executed through M/s.USK Exports Pvt. Ltd. and M/s. USK Trading Pvt. Ltd. The plaintiff states that the orders diverted by the defendant Nos.1 and 2 could have been executed from the plaintiff as it had sufficient capacities and clearances to execute the orders. The plaintiff states that by siphoning funds and diverting orders from the plaintiff, the defendant Nos.1, 2 and 3 have caused monetary loss and damage to the plaintiff.”

8. It is thereafter alleged in the plaint that defendants No.1 and 2 who were the directors of the plaintiff used business connections and business practices of the Khandelwal Group and procured raw materials in bulk quantities at lower/discounted prices for defendant No.4. It is stated that this was done with the sole intention of closing down the plaintiff. It is stated that defendants No.4 and 5 are controlled by defendants No.1 to 3 and are in competing business with the plaintiff. It is stated that defendants No.1 to 3 owe a fiduciary duty to the plaintiff, in that, are obliged to carry on all business activities for the benefit of the plaintiff and therefore said defendants cannot associate themselves with companies which are doing competing business.

9. The core area of the allegations are as pleaded in para 14, 15 and 17 of the plaint. The same read as under:-

“14. The plaintiff states that since the defendant No.1 and 2 are the directors of the plaintiff, they not only have access to all the records, documents including quotations submitted by the plaintiff, orders procured, rates at which the raw materials were procured, etc. but are also dealing with customers on behalf of the plaintiff. It is submitted that using the business connections and business practices of the family businesses of the Khandelwal group, Mr.Sameer Khandelwal, in connivance with Mr.Subhash Khandelwal and Mr. Abhey Shanker Khandelwal started negotiating with the vendors of the family businesses and procured raw materials at bulk quantities at lower/discounted prices for M/s.USK Exports Pvt. Ltd. They also instructed the vendors and suppliers not to work with the plaintiff. Mr.Sameer Khandelwal in connivance with Mr.Subhash Khandelwal sometimes purchased raw materials for the family businesses at a higher cost and obtained raw materials for M/s.USK Exports Pvt. Ltd. from the same suppliers at a lower cost. This was done with the sole intention of closing down the plaintiff along with the other family business to promote the business of M/s.USK Exports Pvt. Ltd. and M/s.USK Trading Pvt. Ltd. In view of the above the plaintiff submits that defendants have not only caused monetary loss and damage to the good will of the plaintiff but have also ensured that there is loss of business or loss of business opportunity for the plaintiff.

15. As stated above, funds were siphoned off from the family businesses to M/s.USK Exports Pvt. Ltd. and M/s.USK Trading Pvt. Ltd. by Mr.Sameer Khandelwal with the assistance of Mr.Subhash Khandelwal and Mr.Abhey Shanker Khandelwal. Thus, Mr.Sameer Khandelwal breached his fiduciary duties owed by him towards the plaintiff in which they or their family members were shareholders/directors.

x x x x x x x x x x

17. It is submitted that using the business connections and business practices of M/s.Uma Shanker Khandelwal & Co. and the other family businesses of the Khandelwal Group, Mr.Subhash Khandelwal, in connivance with Mr.Abhey Shanker Khandelwal and Mr.Sameer Khandelwal, started negotiating with the vendors of the family businesses and procured raw materials at bulk quantities at lower/discounted prices for M/s.USK Exports Pvt. Ltd. They also instructed the vendors and suppliers not to work with respondent No.1 company. Thus Mr.Subhash Khandelwal caused benefit to M/s.USK Exports Pvt. Ltd. at the cost of the family businesses. It is submitted that Mr.Subhash Khandelwal and Mr.Sameer Khandelwal sometimes obtained raw materials for the family businesses at a higher cost and obtained raw materials for M/s.USK Exports Pvt. Ltd. from the same suppliers at a lower cost. The funds were siphoned off from the family businesses to M/s.USK Exports Pvt. Ltd. by Mr.Subhash Khandelwal, Mr.Abhey Shanker Khandelwal and Mr.Sameer Khandelwal. Thus, Mr.Subhash Khandelwal, Mr.Abhey Shanker Khandelwal and Mr.Sameer Khandelwal breached their fiduciary duties owed by them towards the plaintiff in which they or their family members were shareholders/directors.”

10. At the outset, it may be noted that there are no assertions in the plaint regarding any proceedings inter se the family members pending before the company law board. However, I note that an affidavit sworn by Gautam Khandelwal was filed on 31.7.2006 i.e. the date when the suit was listed for preliminary hearing. The said affidavit was filed in the registry vide filing No.19228. In the said affidavit reference has been made to CP No.110/2005 in which CA No.39/2006 is stated to have been filed, both proceedings being before the company law board.

11. Relevant for the purposes of the present order is the following statement in para 3 of the affidavit:-

“3. I say that along with the company petition the Hon'ble Company Law Board heard the CA No.39/2006. I say that the reliefs claimed by me in the CA No.39/2006 in the Company Law Board were similar to the reliefs claimed by the plaintiff herein.”

12. Opposing the application, defendants have stated that incorporation of defendants No.4 and 5 was within the knowledge of the family members. That no diversion of any business has been done. That there is no prohibition for directors of a company to be directors of a second company doing competing business. That the plaintiff has not disclosed to this court that defendants No.1 to 3 had filed CP No.110/2005 before the company law board as Gautam Khandelwal and his group ousted them from the management of the plaintiff company. The said petition invoked Section 397 of the Companies Act. That in said petition, Gautam Khandelwal filed CA No.39/2006 alleging that defendants No.1 to 3 had diverted the business of the plaintiff company to defendants No.4 and 5. Request was made to the company law board to implead defendants No.4 and 5 as parties in CP No.110/2005 and thereafter direct defendants No.4 and 5 to submit their accounts to the company law board. Profits derived by defendants No.4 and 5 to be paid over to Norma (India) Ltd. was also a prayer therein. Prayer was also made to restrain defendants No.4 and 5 from creating any third party liabilities in respect of their movable and immovable assets.

13. Law of interim injunction is clear. Apart from establishing a prima facie case, plaintiff has to establish that balance of convenience lies in favour of grant of injunction and that irreparable loss and injury shall be caused to the plaintiffs, which loss and injury cannot be made good by granting money, if injunction is not granted. Further, since injunction is an equitable relief, person coming to court must make complete and truthful disclosure of relevant facts and must not do something which takes away equities from him.

14. It is settled law that jurisdiction of the company law board under the Companies Act in relation to Section 397 of the said Act is a concurrent jurisdiction which may be exercised by civil courts where allegations pertaining to oppression and mismanagement partake the character of a civil dispute. Thus, it was the duty of the plaintiff to have made averments in the plaint or in the injunction application, giving material particulars of the dispute pending before the company law board. In particular, plaintiff ought to have disclosed about CA No.39/2006 filed under signatures of Shri Gautam Khandelwal.

15. I may note that the prayers made in CA No.39/2006 are as under:-

“(a) implead M/s.USK Exports Private Limited having its registered office at 61/4, Ramjas Road, Karol Bagh, New Delhi-110 005 as a party respondent in company petition No.110 of 2005.

(b) implead M/s.USK Trading Private Limited having its registered office at 61/4, Ramjas Road, Karol Bagh, New Delhi-110 005 as a party respondent in company petition No.110 of 2005.

(c) restrain petitioners No.1 and 2 from attending the board meetings of respondent No.1 company as directors.

(d) restrain petitioner No.1 and 2 from holding themselves out as directors in respondent No.1 company or to attend the board meetings of respondent No.1 company.

(e) appoint an administrator/special officer to take charge of the management of the newly impleaded respondents (M/s.USK Exports Private Limited and M/s.USK Trading Private Limited).

(f) direct M/s.USK Exports Private Limited and M/s.USK Trading Private Limited to submit accounts from their incorporation before this Hon'ble Board.

(g) direct M/s.USK Exports Private Limited and M/s.USK Trading Private Limited to submit to this Hon'ble Board weekly accounts in future, and

(h) direct that the profits of USK Exports Private Limited and USK Trading Private Limited prior to the MOM dated 15.01.2004 be paid over to respondent No.1 company.

(i) restrain USK Exports Private Limited and USK Trading Private Limited from creating any liabilities, debts, or taking any loans from banks, financial institutions or otherwise, pending the hearing of the Company Petition No.110 of 2005; and

(j) pass such other order(s) as this Hon'ble Board may deem fit in this interests of justice.”

16. Prayers made in the plaint are as under:-

“(a) pass a decree of permanent injunction restraining the defendant Nos.1 to 3 individually or in association with any third party from directly or indirectly carrying on competitive business with that of the plaintiff company.

(b) pass a decree of permanent injunction restraining the defendants Nos. 4 and 5 from directly or indirectly carrying on competitive business with that of the plaintiff company.

- (c) pass a decree directing the defendant Nos.4 and 5 to disclose to this Hon'ble Court the nature and operations of the business of M/s.USK Exports Pvt. Ltd. and USK Trading Pvt. Ltd. along with complete details of land, building and machinery installed including the cost and source of funds;
- (d) pass a decree directing the defendants Nos.1 to 3 to render accounts of defendants No.4 and 5 to the plaintiff company and pay all such profits derived by them to the plaintiff company;
- (e) pass a decree directing the defendants to transfer to the plaintiff company the profits earned and assets of the defendants Nos. 4 and 5 since their incorporation;
- (f) pass a decree restraining the defendant Nos.1 and 2 from attending the Board meetings of the plaintiff company.
- (g) pass a decree restraining the defendant Nos.1 & 3 from exercising their rights as directors including having access to the records, documents, minutes book etc.;
- (h) pass a decree restraining the defendant Nos.1 to 3 from transferring, alienating or creating any third party rights in the immovable/movable assets, land, building, plant and machinery of the defendant Nos.4 and 5 companies;
- (i) award costs of the suit to the plaintiff; and
- (j) pass any other or further orders and reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

17. I have noted herein above, relevant part of para 3 of the affidavit filed by Gautam Khandelwal on 31.7.2006.

18. There is a clear admission that reliefs prayed for in CA No.39/2006 pending before the company law board and reliefs prays in the present suit are similar.

19. Arguments of learned counsel for the plaintiff that the plaintiff was not an applicant before the company law board is a smoke screen for the reason a company always acts through individuals. Gautam Khandelwal is the author of CA No.39/2006. He has signed the plaint and has instituted the suit under his signatures on behalf of the plaintiff.

20. Knowledge about the business of defendants No.4 and 5 by all family members of the Khandelwal Group is evidenced from the minutes of the meeting relied upon by the plaintiff. No doubt, the said minutes of the meeting dated 15.1.2005 is a subject matter of debate between the parties but the contents thereof show that the various branches of the Khandelwal family including Shri Gautam Khandelwal were aware of the nature of business conducted by defendants No.4 and 5. The minutes of the meeting are self-

evident. Competing business done by said two companies is brought out in the minutes of the meeting dated 15.1.2004.

21. I reproduce the minutes of the meeting in their entirety. The same are as under:-
“Minutes of meeting held at Norma (India) Pvt. Ltd. on 15th January 2004

Present :

Shri Uma Shanker Khandelwal
Shri Abhey Shanker Khandelwal
Shri Udai Shanker Khandelwal
Shri Subhash Khandelwal
Shri Rohit Khandelwal
Shri Praveen Khandelwal
Shri Gautam Khandelwal

This is agreed that Abhey Shanker will do the valuation of the properties of Uma Shanker Khandelwal & Co. and its allied concerns. The first choice of business will go to Shri Uma Shanker Khandelwal, second choice will go to Shri Subhash Khandelwal and the last choice will be of Shri Abhey Shanker Khandelwal.

Shri Abhey Shanker has valued the assets as follows:

1. Uma Shanker Khandelwal & Co. - 9.00 Cr.
2. Uma Shanker Khandelwal Forgings- 8.00 Cr.
3. NORMA INDIA & B.D.C.L. (Shahdara) (including the liability of Rs.26.00 Lacs payable to Shri Sunil Khandelwal)- 6.50 Cr.
4. Rs.3.50 Cr. Cash assets at Okhla.

Shri Uma Shanker has the first choice for USK Forgings, second choice of U.S.K. & Co. is for Shri Subhash Khandelwal. Third choice of Norma & B.D.C.L. of Shri Udai Shanker and fourth choice of cash goes to Shri Abhey Shanker.

The total assets comes out to Rs.27.00 Cr. The share of each party comes to Rs.6.75 Cr. Total of net payable to Shri Abhey Shanker is Rs.6.75 Cr. out of this Shri Subhash Khandelwal will pay Rs.5.75 Cr. and Rs.1.00 Cr. will be paid by Shri Uma Shanker.

Further, the following points were raised by Shri Uma Shanker.

1. The pending order (export) are to be executed for which Shri Subhash Khandelwal has agreed to do so provided that upto date statement of pending orders is given to him immediately. Mr.Rohit Khandelwal will do so by tomorrow.

2. Total requirements of U.S.K. & Co. for next one year will be executed at existing prices + 33% on agreed prices on profile items. The forgings for flanges @Rs.7.00/-kg. At derabassi and Rs.5.50/kg at norma.

3. Pending orders for flanges will be executed at Rs.6.00/- Kg. at Derabassi Rs.5.00/kg. At Norma.

The existing dispute of duty drawback which is running in court if & when settled will be distributed among all the four partners. All the expenses will be borne by all partners.

The demand dispute of customs against the hammer will be shared by all partners. All the foundation springs are to be supplied by Gerb. The balance payment will be done by Shri Subhash Khandelwal. Compressors- 2 Nos., hammer plates and other 4.0 ton hammer parts excluding presses which are lying in USK & Co. will be given to Norma 4.0 TON hammer dies will be send to Norma.

The dies pertaining to Telco and Carraro will go to USK & Co.

Dies for Crankshaft if belong to DVS would be returned to DVS if DVS demands. All flanges dies wherever lying will go to Norma/USK Forgings. Paintline lying at USK & Co. will be shifted to Norma. The cost of Rs.Forty Thousand payable to Garg will be paid by Norma on installation.

The agreement is effective from immediate effect. The legal effect of this agreement will be given as soon as possible. The liability of income taxes will be borne jointly upto 15.01.04.”

22. As is evident from the averments made in para 1 of the plaint, plaintiff is in the business of steel forgings including exports of flanges. Minutes of the meeting clearly show that defendants No.4 and 5 are also in the business of forging flanges. The minutes also show that the said two companies are exporting metal products to their parties.

23. To my mind, aforesaid facts are sufficient to non suit the plaintiff for purposes of being granted any interim relief. Therefore, I need not discuss any other parameters for grant or refusal of an interim injunction.

24. Suffice would it be to record that the issue raised is a subject matter of consideration before the company law board. I was informed at the bar that the company law board has heard arguments in CP No.110/2005 and CA No.39/2006. After hearing arguments, judgment has been reserved.

25. I therefore dismiss IA No.8363/2006. The ex-parte injunction granted on 31.7.2006 is vacated.

November 23, 2006

SD./-
PRADEEP NANDRAJOG,J

