Instrumentation Laboratory S.P.A. & ... vs Compact Diagnostics India Pvt. Ltd. on 4 January, 2011

Author: Vipin Sanghi

Bench: Vipin Sanghi

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*     IN THE HIGH COURT OF DELHI AT NEW DELHI

                Judgment reserved on: 01.11.2010

%               Judgment delivered on: 04.01.2011

+                       O.M.P. No.661/2009


      INSTRUMENTATION LABORATORY S.P.A. & ORS. .... Petitioner
                Through: Mr. Sandeep Sethi, Sr. Adv.
                         with Mr. Ganpathy, Advocate

                versus


      COMPACT DIAGNOSTICS INDIA PVT. LTD.          .... Respondent
                Through:   Mr. Rakesh Munjal, Sr. Adv. with
                           Mr. Amit Prasad, Advocate


CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1.    Whether the Reporters of local papers may
      be allowed to see the judgment?                :     No

2.    To be referred to Reporter or not?             :     No

3.    Whether the judgment should be reported
      in the Digest?                                 :     No

                              JUDGMENT
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VIPIN SANGHI, J.

1. This petition has been filed by the petitioner under Section 9 of the Arbitration & Conciliation Act, 1996 (the Act) primarily to enforce a negative covenant contained in Article 11.2 of the joint venture and shareholders agreement dated 22.03.2007 (hereinafter referred as the said agreement) executed between the parties, which reads: "during the subsistence of this agreement, each party agrees not to either himself, itself or through any of its family members/representatives, severally or

jointly, directly or indirectly, carry on or be engaged in any business competing with the business of the Company." The expression „company used in the aforesaid Article, and as used in this order as well, refers to petitioner No.2 - Instrumental Laboratory India Pvt. Ltd., i.e. the joint venture company.

2. The petitioner No.1 is a company incorporated under the laws of Italy. It is engaged in the business of developing, manufacturing and distribution of diagnostic instruments, reagents, and other consumables which are primarily used in hospital laboratories and diagnostic facilities. The respondent No.2, Sh. S.K. Chauhan is the Managing Director of the respondent No.1 and also a Director of petitioner No.2 company. Petitioner No.2 is the joint venture company between the petitioner No.1 and the respondents, wherein the petitioner No.1 holds 80% of the shareholding, while respondent No.1 holds the remaining 20% shares.

3. The parties entered into the said agreement on 22.03.2007. At the time when the said agreement was entered into, respondent Nos.1 & 2 were engaged in the business of purchasing, importing, marketing, distribution and sale of medical equipments and reagents etc. in the whole of India. The objective of the parties was to establish a joint venture, to be run through the vehicle of petitioner no.2, which was to take over the then existing business of respondent No.1, and to developed it further. Under the joint venture agreement, the petitioner No.1 retained 80% of the shareholding, and the respondent No.1 acquired the remaining 20% shareholding in petitioner no.2 joint venture company. The recitals contained in the said agreement dated 22.03.2007 set out the background in which the said agreement was entered into. The abbreviation "IL SPA" refers to petitioner no.1; „CDIPL refers to respondent no.1, and "Chauhan" refers to respondents no.2. The same reads as follows:

> "A. WHEREAS, IL SPA is engaged in the business of developing, manufacturing and distribution in various parts of the world, of critical care and in vitro diagnostics instruments and related reagents, controls, other consumables ("Equipment") and services for use primarily in hospital laboratories and hospital point-of-care locations.
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> B. WHEREAS, CDIPL is currently engaged in the business of purchasing, importing, marketing, distribution and selling the „Equipment in the whole of India ("Business").
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> C. WHEREAS, CDIPL is wholly owned by Chauhan and members of his family.
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> D. WHEREAS, IL SPA and CDIPL are desirous of establishing a joint venture for undertaking inter alia the Business.
>
> E. WHEREAS, in furtherance of the aforesaid objective IL SPA has incorporated the Company as a wholly owned subsidiary with an initial authorized capital of Rs.5,000,000 and issued and allotted 10,000 fully paid up equity shares, par value of Rs.10 per share, to IL SPA and its nominee.

F. WHEREAS, in consideration of the foregoing and in furtherance of the purpose of the Parties, the Parties have discussed and agreed to transfer the Business of CDIPL to the Company as a going concern on an "as is where is basis" pursuant to the execution of an agreement for sale of business ("Business Sale Agreement") on the Effective Date (as defined below).

G. WHEREAS, pursuant to the execution of this Agreement, on or before the Effective Date, the Company shall increase its authorized capital to Rs.50,000,000 and issue and allot fully paid up 3,990,000 equity shares of Rs.10/- each to IL SPA and its nominee(s) and the total number of shares issued and allotted to IL SPA shall be 4,000,000 for a total consideration of Rs.40,000,000 ("IL SP Shares").

H. Simultaneously, with the execution of the Business Sale Agreement, CDIPL shall subscribe to and the Company shall issue and allot to CDIPL 1,000,000 equity shares in the Company constituting 20% of the issued and paid up capital of the Company ("CDIPL Shares").

I. WHEREAS, the Parties are desirous of entering into this Agreement to reduce into writing the terms of their understanding as regards CDIPL s participation in the share capital of the Company, to regulate their relationship, the conduct of the Business of the Company, the allocation, transfer and other dispositions of shares, as well as to define the management of the Company, their respective roles in that regard and certain other matters related thereto."

4. Under the terms of the said agreement, the respondent No.2 was appointed as the Managing Director of petitioner No.2 company. His terms of employment were contained in Ex. B to the said agreement. Under Article 3.1 of the said agreement, it was recorded that the business of the company shall be to produce, purchase, import, market, distribute and sell the equipment (which is defined in recital A quoted above) in the whole of territory of India, as well as services for use primarily in hospital laboratories and hospital point-of- care locations. The Article also acknowledges that respondent No.1 has transferred the business, and that it was entering into the agreement for the purpose that the company carries on the business.

5. Article 4.1(a) provides that for the first three years of the effective date, the Board shall consist of three directors, of whom two shall be designated by petitioner No.1 and the third shall be designated by the respondent No.1. The respondent No.1 designated respondent No.2 as its permanent nominee on the Board of the company. It was agreed that the company shall have a chairman designated by petitioner No.1. It was further agreed that so long as respondent No.1 holds shares in petitioner No.2, respondent No.2 or any of his legal heirs nominated by him shall be a member of the Board of the company. Article 4.1(b) provides that petitioner No.2 shall cause the reconstitution of the composition of the Board of directors of the company as provided in Article 4.1(a) and that respondent No.2 shall be appointed as the Managing Director.

6. Article 9 of the agreement states that the agreement shall remain in force and effect so long as both the parties continue to own their respective shares in petitioner no.1 and respondent no.1 companies. Article 9.2 states that the agreement may be terminated, inter alia, automatically if a

party commits any material breach of any its obligation under the agreement and the same is not remedied (if capable of remedy) within 30 days after being given notice of remedy.

7. Article 11.2 is relevant and reads as follows:

> "11.2 During the subsistence of this Agreement, each Party agrees not to either himself/itself or through any of its family members/representatives, severally or jointly, directly or indirectly, carry on or be engaged in any business competing with the Business of the Company. This non compete obligation shall be also applicable to CDIPL and/or Chauhan for a period of one year following termination of this Agreement if the termination is a consequence of a material breach of CDIPL s and/or Chauhan s obligations under this Agreement."

8. Article 12.1 provides that respondent no.1 shall procure respondent no.2 to use his expertise and reasonable resources to assist in the companies performance, which shall extend to his knowledge on human resources, sourcing and manufacturing matters to attract and retain employees of the company.

9. Article 12.4(c), (d) and (e) contain the arbitration agreement between the parties.

10. The parties also entered into an amendment agreement on 28.11.2007 to amend the terms of the original contract. By this agreement, various purchased equipment set out in Annexure-I to the said amendment agreement, and contracts relating to sale of purchased equipment set out in Annexure-II to the amendment agreement, were transferred by respondent no.1 to petitioner no.2 for a consideration of ` 1.15 crores. Under the amendment agreement, the expression "effective date" in the original agreement was substituted with the expression "closing date" which was stated to be 04.12.2007 or such other date as may be mutually agreed to by the parties in writing.

11. The grievance of the petitioner is that despite the specific non compete Article contained in Article 11 of the agreement, respondent no.2 continued to carry on competing business in the same line of trade by directly selling equipment covered under the non compete Article to customers during the period April 2008 to April 2009. It is submitted by learned senior counsel for the petitioner that the respondents, particularly respondent no.2, has breached his fiduciary duty owed to petitioner no.2 company as its Managing Director, apart from contravening Article 11.2 of the joint venture and shareholders agreement. Various instances of sale of equipment by the respondents in alleged breach of the non compete Article are enumerated by the petitioner, by reference to the following documents:

> (i) Delivery Challan dated 29.04.2008 evidencing delivery of equipments to M/s Sher-

E-Kashmir Institute of Medical Sciences. Tax invoice dated 30.04.2008 further confirms sale of equipment to M/s Sher-E-Kashmir Institute of Medical Sciences.

(ii) Purchase Order dated 08.07.2008 placed by M/s Sher-E-Kashmir Institute of Medical Sciences on respondent No.1.

(iii) Tax Invoice dated 23.07.2008 evidencing sale of equipments to M/s Sher-E-Kashmir Institute of Medical Sciences by respondent No.1.

(iv) Proforma Invoice dated 26.12.2008 sent by Respondent No.1 to M/s Sher-E-Kashmir Institute of Medical Sciences.

(v) Tax invoice dated 24.04.2009 evidencing sale of equipments to M/s Chemicals & Instruments Corporation.

12. It is further stated that the respondents have pocketed the income derived from the aforesaid transactions, which lawfully belongs to petitioner no.2. The petitioners further state that by a board resolution dated 02.06.2009 passed by the Board of Directors of petitioner no.2 company, the services of respondent no.2 as the Managing Director have been terminated for breach of material obligation under the employment agreement, including breach of the non compete Article. The petitioner no.2 convened its Extraordinary General Meeting (EGM) at the behest of petitioner no.1 on 09.06.2009 to consider the removal of respondent no.2 as the director of the petitioner no.2 company.

13. The respondents then preferred OMP No.323/2009 under section 9 of the Act before this Court, inter alia, seeking that the board resolution passed on 02.06.2009 removing respondent no.2 as Managing Director of petitioner no.2 should not be given effect to, and the petitioner no.2 should be restrained from holding the EGM on 09.06.2009. On 08.06.2009, this Court passed an order that the resolution passed on 02.06.2009 by the Board of Directors and the proposed EGM of the petitioner no.2 company would be subject to the outcome of the said OMP. The petitioner further states that the petitioners decided not to hold the EGM as scheduled on 09.06.2009. Consequently, respondent no.2 still continues to remain as director of the petitioner no.2 company. The said OMP was withdrawn by the respondents on 21.12.2009.

14. The petitioner further discloses that the respondent served a notice dated 06.06.2009 under section 11(6) of the Act on the petitioners for invoking the arbitration agreement to raise the dispute relating to removal of respondent no.2 from the position of Managing Director before a panel of three arbitrators as envisaged in the said agreement. It is stated that the petitioners eventually agreed to have the disputes resolved through a sole arbitrator and agreed that Mr. Justice S.K. Mahajan (Retd.) be appointed as the sole arbitrator.

15. The petitioner states that in the first week of September 2009, the petitioner no.2 reliably learnt that the respondent had directly approached All India Institute of Medical Sciences (AIIMS) to divert the business of petitioner no.2 to respondent no.1. In the said letter, the respondents stated that they have parted ways with the petitioners and that the future of petitioner no.2 is not certain. The respondents also stated that they are back in business with various products which form part of the business under the said agreement. This conduct of the respondents is alleged to be unethical

and dishonest, vis-à-vis the petitioners.

16. The petitioners, consequently, sent a letter to the Head of the Department, Department of Medical Sciences of AIIMS bringing to its notice the contractual obligations of the respondent under the said agreement.

17. The petitioner further states that the respondents have sent a letter dated 19.09.2009 to AIIMS to solicit competing business from them. Similarly, it is stated that Safdarjung Hospital, New Delhi had invited tenders for fully automated Coagulation Analyzer which is covered by the definition of the expression "business" of petitioner no.2 under Article 3.1 of the said agreement. The petitioner no.2 submitted its bid in response to the said tender on 19.10.2009. It is stated that respondent no.1 has also submitted its bid in the said tender on 19.10.2009. It is further stated that the respondents are advertising their products, including in health magazines, which only shows that they are bent upon indulging in competing business with that of petitioner no.2 in breach of Article 11.2 of the said agreement.

18. With the aforesaid pleadings, the petitioner seeks the following reliefs:

> "I. pass an order of injunction restraining the Respondent No.1, its directors including Respondent No.2, employees, subsidiary companies, controlled companies, affiliates or associate companies or concerns from carrying on or be engaged in any business directly or indirectly in completion with the business of Petitioner No.2 during the subsistence of the Joint Venture and Share Holders Agreement dated 22.03.2007 (Annexure P-3);
>
> II. pass an order of injunction restraining Respondent No.1, its directors including Respondent No.2, employees, agents and representatives, subsidiary companies, controlled companies, affiliates or associate companies or concerns, from advertising any of the products of Respondent No.1 in competition with the products of Petitioner No.2, in any manner whatsoever;
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> III. pass an order of injunction restraining the Respondent No.1, its directors including Respondent No.2, employees, agents and representatives from directly or indirectly giving negative publicity against the Petitioners and/or from doing any acts or deeds which would affect the business prospects and/or reputation of the Petitioners;"

19. Mr. Sethi, learned senior counsel for the petitioner also refers to the affidavit filed by the petitioner on 02.12.2009 to bring on record subsequent events and additional documents. It is stated that the respondents, on their website www.compacthealthcare.com have claimed that in 2004, they were authorized by petitioner no.2 for entering India for critical care and clinical chemistry. It is submitted that respondent no.1 is willfully misrepresenting to the general public that it is the authorized distributor of petitioner no.1 with a view to solicit and divert the customers of petitioner no.2. It is submitted that this is in contravention of the said agreement, which precludes the respondents from dealing with petitioner no.1. It is further argued that „Accustar Diagnostic

Instruments and Reagents is an entity which is related to respondent no.1 and is doing business in competition with respondent no.1 under the brand name „Accustar . The petitioners state that the respondents are carrying on business in - (i) Clinical Biochemistry Analyzers; (ii) Electrolyte Analyzer; (iii) Blood Gas Analyzer; (iv) Coagulation Analyzer - Automated, and (v) „Sonoclot - which is a kind of coagulation analyzer, and these are all products in which the petitioners are also dealing.

20. The petitioners further submit that respondent no.1 is seeking to expand its competing operations in India and is recruiting employees at different levels for this purpose. They have also participated and advertising their products at the Golden Jubilee Conference of Indian Society of Hematology and Transfusion Medicine held at AIIMS from 19.11.2009 to 22.11.2009. The respondents issued invitation letters to customers of petitioner no.2 to advertise the competing products that they are marketing.

21. Mr. Sethi submits that the conduct of the respondents is highly contumacious. Despite the order dated 04.12.2009 passed in these proceedings, whereby the respondents had given the assurance that they would not write any letter to any third party regarding the joint venture company, the respondents in breach of their aforesaid statement/undertaking, which was accepted by the court and by which they were bound, have sent a communication dated 23.09.2010 stating that they are "the joint venture partner of IL India and I have also worked as Managing Director of IL India for two years". In this letter, the respondents have further stated:

> "As per your commitment with IL India, you are supposed to give them a business of Rs.2 Lakhs/month where your monthly business is exceeding Rs.4 Lakhs/months. In the given situation if you can buy few of the products from us manufactured by Technoclone GmbH which are of International Standard, you can save lot of money on it.
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> ....
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> If you really compare most of our Items are much cheaper as compared to IL and quality wise they are at par. Please also note that there is no wastage of cuvettes as it happens in any centrifugal Analyser like ACL 200, ACL 7000 & ACL Elite Pro, where they require 3 cuvettes to analyse 1 sample for PT. We will be happy to give the demonstration of our analyzer to check the quality of few of our products or we may give as free samples to analyze the quantity."

22. Mr. Sethi submits that the employment agreement could be terminated by the company under Article 13 within a period of four years from the date of commencement thereof on the occurrence of "termination events". The termination events, inter alia, include willful misconduct of respondent no.2 "that causes significant or irreparable injury to the businesses and affairs of company". He submits that the conduct of the respondents in carrying out competing business by, inter alia, misrepresenting to the prospective buyers, as aforesaid, constitutes misconduct which has caused significant or irreparable injury to the business and affairs of the joint venture company. He,

therefore, submits that the respondent no.2 is not entitled to any compensation in terms of Article 13.5.

23. Mr. Sethi by reference to the reply filed by the respondents submits that the respondents virtually admit that they are carrying on competing business in breach of Article 11.2 of the said agreement. He particularly refers to para 5 of the reply, wherein the respondents state that they have not interfered with the existing contracts between the hospitals and petitioner no.2 and they are merely exploring a new business which is available in the open market. He submits that the stand taken by the respondent in para (I) of the preliminary submissions is dishonest, inasmuch, as, it is claimed that no compensation was paid to the respondents for transfer of existing business of respondent no.1 to petitioner no.2 and that on this ground the agreement is void and not enforceable. He submits that the respondent no.2 is a seasoned businessman. After having received a huge amount ` 1.90 crores from the petitioners, the respondents have now become dishonest and want to carry on their own competing business despite being joint venture partners with the petitioners.

24. He submits that even if, according to the respondent, the petitioners have breached the said agreement, that does not by itself give right to them to carry on competing business in breach of Article 11.2. Mr. Sethi relies on the decision of the Supreme Court in M/s. Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Company & Ors., 1995 (5) SCC 545 to submit that the negative covenant contained in Article 11.2 being a reasonable condition between the joint venture partners is enforceable and is not hit by section 23 of the Contract Act.

25. The petition has been opposed by the respondents. Mr. Rakesh Munjal, learned senior counsel for the respondents submit that the petitioners have exploited the respondents by breaching the said agreement in a fundamental manner. He submits that one of the central term of the said agreement was that the respondent no.2 would be appointed as, and remain as the Managing Director of petitioner no.2 company. He submits that the respondents at the time of entering into the said agreement with the petitioner no.1 had vast experience and were very well entrenched in the business in question, and this is also acknowledged in the said agreement in recital (B), as well as in Article 12.1 of the said agreement.

26. He submits that the respondents were lured into entering into the joint venture by the petitioners on the premise of even better prospects and larger business and income than what was being derived by the respondents on their own. It is on that premise that the respondents agreed to enter into the joint venture with the petitioners, wherein the respondents acquired 20% stake in the joint venture, i.e. petitioner no.2 and agreed to merge the business of respondent no.1 with the business of petitioner no.2. The respondent no.2 was appointed as the Managing Director of petitioner no.2 on the terms and conditions set out in Annexure-B of the joint venture and shareholders agreement.

27. The capital requirements of the joint venture company were open to review upon mutual approval under Article 3.3 of the said agreement. He submits that the premise on which the respondent company agreed to form the joint venture is set out in Article 7.2 which states that "the

parties are establishing the company as a joint venture effort for undertaking inter alia the business and CDIPL is transferring the business solely based on this objective of the parties. CPIDL would not transfer the business otherwise if the objective of the parties is not as so stated". He submits that one of the objectives of the parties was to place the respondent no.2, who has vast experience in the field and knowledge about the domestic market, as the Managing Director, particularly because the petitioner no.1 is a foreign company and had practically no direct presence in India earlier. It was respondent no.2 who was to manage the joint venture business, and respondent no.2 was entitled to be paid salary and perks as per the terms of the said agreement.

28. Mr. Munjal submits that under Article 2, the initial period of employment of respondent no. 2 was four years from the date of execution of the employment agreement, unless terminated in accordance with other terms of the agreement and in particular, Article

13. Under Article 4 of the employment agreement contained in Exhibit B to the said agreement, the basic salary payable to respondent no.2 was US$ 48,000 p.a. Apart from that under Article 4.4, the respondent no.2 was also entitled to bonus of US$ 50,000 for the first year itself.

29. Under Article 4.5, respondent no.2 was entitled to participate in and to receive benefits under the provident fund scheme, gratuity scheme and employees state insurance scheme. Article 5 provides for other perks such as paid holidays and leave encashment. Article 6 entitles the respondent no.2 to receive a motor car worth ` 12 lacs with all expenses in relation thereto except cost of the drivers salary. Under Article 7, the telephone and petrol bills were reimbursable. He also refers to various clauses whereunder wide powers of administration of the business were vested in respondent no.2.

30. Article 13 provides for termination upon one months notice, or salary in lieu of such notice. Article 13.2 entitles the non defaulting party to terminate for breach of any material term of the employment agreement, in case the breach is not remedied despite 14 days notice.

31. Mr. Munjal submits that no notice of termination, thereby granting 14 days prior notice to the respondent no.2, to remedy the breach was ever issued by the petitioner no.2, and the petitioners have sought to terminate the employment agreement unilaterally, without prior notice and illegally.

32. He submits that respondent no.2 received a notice dated 19.05.2009 from the company making false, frivolous and concocted allegations against him. Respondent no.2 was called upon to show cause within 10 days from the date of receipt of this notice as to why his employment as the Managing Director with petitioner no.2 be not terminated for the alleged willful misconduct, allegedly causing significant irreparable injury to the business of petitioner no.1.

33. He submits that vide e-mail dated 21.05.2009, i.e. just two days later, respondent no.2 was informed by the petitioners that he had been removed from the position of Managing Director of petitioner no.2. Mr. Munjal submits that this clearly shows that the petitioners had already decided to remove respondent no.2 form the position of Managing Director on false and concocted grounds even without waiting for the respondents reply. He further submits another notice dated 22.05.2009

was received on behalf of petitioner no.2 company by respondent no.2, wherein it was informed that petitioner no.2 shall be holding the EGM of petitioner no.2 on 09.06.2009 to consider the removal of respondent no.2 as a director of the company. No reason for his removal as a director of petitioner no.2 company was stated in the notice dated 22.05.2009.

34. Mr. Munjal submits that the show cause notice dated 19.05.2009 was received by the respondent no.2 only on 23.05.2009. On 29.05.2009, a detailed reply to the said show cause notice was given denying each and every allegation made in the said notice. However, in a preplanned manner, the respondent no.2 was again removed as the Managing Director of petitioner no.2 company on 02.06.2009, without paying the compensation or following the procedure prescribed in the said agreement.

35. He submits that by the said termination of the employment of respondent no.2 as the Managing Director of the company, the petitioners have materially breached the said agreement, and thereby liberated the respondents from the obligation cast under Article 11.2 of the said agreement.

36. Mr. Munjal, by reference to the business plan and budget, submits that the gross profit of petitioner no.2 had increased by 27% during the year 2008 and by another 20.75% during the year 2009. He submits that without the commitment of respondent no.2 to promotion of business of petitioner no.2, the same would not have been possible. The allegations of respondent no.2 acting contrary to the interest of petitioner no.2 were, therefore, falsely made.

37. Mr. Munjal submits that the endeavour of the petitioners is to coerce the respondents to sell their 20% shareholding in the petitioner no.2 company at the price determined by the petitioners and to take undue advantage of the hard work carried done by respondent no.2 in the development and establishment of petitioner no.2 company. He points out that the petitioners, after illegally removing the respondent no.2 from the position of Managing Director, appointed one Mr. Manuel Zea in his place and were incurring huge expenses towards him, which amounted to 40-42% of the total expense of the petitioner no.2 company. He submits that the appointment of Mr. Zea was made in contravention of the powers vested in respondent no.2 to hire new personnel in the Schedule of Authority - Annex I to the said Agreement.

38. Mr. Munjal has referred to the email communication received from Mr. Zamora of the petitioners dated 15.05.2009. Along with this communication, Mr. Zamora sent a draft letter of resignation, and a draft letter of intent, that the respondents were being forced to sign. In this communication, the respondents were threatened that in case they do no sigh these documents, the petitioner no.1 would take other steps to terminate the arrangement. Under the letter of intent drafted by the petitioners, the respondent desired to put a one year embargo on the respondents from carrying out or engaging in any business competing with the business of petitioner no.2. He submits that since the respondents did not agree to be coerced by the petitioner no.1, the petitioner sought to issue a notice dated 19.05.2009 making various vague and non-specific allegations regarding the conduct of respondent no.2.

39. Mr. Munjal submits that the allegation that the respondents conducted business against the interest of petitioner no.2 and against the terms of the said agreement is completely false. He has referred to the email communication dated 06.02.2008 issued by Mr. Zamora, wherein he had communicated the discussions which had taken place between the parties. One of the aspects agreed upon was that in relation to five entities, the respondents could directly conduct business as the authorized distributors. This email communication was followed up by an inter office memo issued by Mr. Atul Goyal, Finance Controller of the petitioner. To the same effect, another communication was issued on 08.02.2008 which referred to the decision taken by the management and the email of Mr. Zamora. By this communication, the respondents were authorized to act as the petitioners authorized distributor in relation to the following customers/users:

1. St. Stephen s Hospital, Delhi

2. City Hospital, Delhi

3. Escorts Hospital, Faridabad

4. Sher-E-Kashmir Institute of Medical Science, Srinagar, J&K

5. Santokba Durlabji Memorial Hospital, Jaipur.

40. Consequently, it is argued, that the allegation that the respondents had unauthorisedly made supplies to Sher-E-Kashmir Institute of Medical Science is patently false.

41. Mr. Munjal submits that the petitioners sought to suffocate and stifle the respondent no.2 by withholding the payments due to him. Repeated communications were issued by respondent no.2 to the petitioners in this respect from 30.06.2009 onwards, but to no avail.

42. Mr.Munjal submits that the petitioners purported to hold meetings of the joint venture company in Barcelona, Spain in disregard with the spirit of the said agreement. He submits that the said meeting was held abroad only to deprive the respondent No.2 the right to attend the said meeting.

43. Having heard learned counsel for the parties and perused the documents relied upon by them, prima facie, I am of the view that the petitioner s action of terminating the appointment of respondent No.2 as a Managing Director of joint venture company was unjustified in the facts of the case, and by terminating the said appointment, the petitioners breached one of the fundamental terms of the said agreement. A discussion of this aspect follows. A party who is itself in breach of an agreement cannot seek to enforce the same agreement. Moreover, the conduct of the respondents in transacting business with five customers/users as per the agreement of the parties reflected in the communication dated 8.02.2008 of the petitioners cannot, in any event, be said to fall foul of Article 11.2 of the joint venture and shareholders agreement which the petitioners seek to enforce. Pertinently, the petitioners did not produce some of the most relevant documents, namely, the email communication from Mr.Zamora dated 06.02.2008; office memo issued by Mr.Atul Goel, Finance Controller of the petitioner, and; the communication dated 08.02.2008 issued by the petitioners

whereunder the respondents were authorized to act as the petitioner s authorized distributor in relation to five customers/users, namely (i) St. Stephens Hospital, Delhi (ii) City Hospital, Delhi; (iii) Escorts Hospital, Faridabad, (iv) Sher-E-Kashmir Institute of Medical Science, Srinagar, J & K and (v) Satokba Durlabji Memorial Hospital, Jaipur. A perusal of the petition shows that the petitioners sought to allege breach of the said agreement by the respondents, and in particular Article 11.2 thereof, inter alia, by placing reliance upon various documents pertaining to equipment supplies made to Sher-E- Kashmir Institute of Medical Sciences. In this regard, reference may be made to para 12 of the petition which reads as follows:-

> "12. However, in utter disregard of its material non- compete obligation during the subsistence of the JV&SHA, Respondent No.1, of which Respondent No.2 is the Managing Director, has been found to have indulged in competing business activities with that of Petitioner no.2 by directly selling equipments to customers without any reference or information to petitioner no.2. The transactions whereby the respondent no.1 has directly sold equipments covered under the non-compete clause of the JV&SHA to its customers, as discovered by the Petitioners during the period April to October, 2009 are as follows:
>
> (i) Delivery Challan dated 29.04.2008 evidencing delivery of equipments to M/s. Sher-E-Kashmir Institute of Medical Sciences, a copy of which is annexed hereto and marked as Annexure P-5. Tax invoice dated 30.04.2008, a copy of which is annexed hereto and marked as Annexure P-6, which further confirms sale of equipments to M/s. Sher-E-Kashmir Institute of Medical Sciences.

(ii) Purchase Order dated 08.07.2008 placed by M/s Sher-E-Kashmir Institute of Medical Sciences on Respondent No.1, a copy of which is annexed hereto and marked as Annexure P-7.

(iii) Tax Invoice dated 23.07.2008 evidencing sale of equipments to M/s Sher-E-Kashmir Institute of Medical Sciences by Respondent No.1, a copy of which is annexed hereto and marked as Annexure P-8.

(iv) Proforma Invoice dated 26.12.2008 sent by Respondent No.1 to M/s Sher-E-Kashmir Institute of Medical Sciences, a copy of which is annexed hereto and marked as Annexure P-9.

(v) Tax invoice dated 24.04.2009 evidencing sale of equipments to M/s. Chemicals & Instruments Corporation, a copy of which is annexed hereto and marked as Annexure P-10."

44. The aforesaid clearly shows that the petitioners deliberately suppressed material documents and information from the Court and did not made the averments in relation thereto, with a view to mislead the Court and to obtain ex-parte ad-interim orders of injunction against the respondents. The conduct of the petitioners in this regard deserves denunciation and also disentitles the petitioner from claiming any discretionary relief from this Court under Section 9 of the Act.

45. The show cause notice dated 19.05.2009 issued by the petitioners to respondent No2, which too has not been filed on record by the petitioners, makes various allegations against the respondents, without elaborating them. These allegations read as follows:-

> "(a) non-preparation and non submission of quarterly reports relating to the business and functioning of the Company to the board of directors ("Board") despite reminders by the Board, thereby being in continuous breach of Article 1.4 of the Employment Agreement;
>
> (b) not providing support and co-operation for the growth of business of the Company in the Southern and Eastern Zone. This constitutes breach of Article 1.5 of the Employment Agreement;
>
> (c) expanding the business of Compact Diagnostics (India) Private Limited ("Compact") indirectly, in different zones and engaging in business in competition with the business of the Company. These are clear instances of breach of obligations provided under Articles 1.5 and 1.7 of the Employment Agreement;
>
> (d) carrying on competitive business activities for Compact by dealing directly with the competitors, and selling competitive products through Compact (invoice dated 1, November 2008 issued by Compact for sale of competitive equipment). This constitutes breach of Article 12.1 of the Employment Agreement;
>
> (e) attempting to solicit the services of Mr.Debojyoti Mukherjee, Senior Sales and Service Engineer of the Company in the Eastern region. This constitutes breach of obligations under Article 12.2(b) of the Employment Agreement;
>
> (f) being insensitive to customer complaints and customer orders; unsupportive to regional business heads of the Company; non-transparent in HR matters resulting in discontentment among loyal employees. This is a breach of your duty to be responsible and to ensure high degree of professionalism and competence.
>
> (g) Purchasing a car in the name of the Company to be used by your family without authorization of IL SPA head quarter (breach of your duty to take authorization of the IL SPA head quarters for any change in your employment benefits).
>
> (h) Failing to fulfill your commitments of settling all overdue invoices to IL Spa by March 31st bringing the open account to a limit of 400,000,00 USD as stated in the email dated December 26th 2008.
>
> (i) Falsification of documents related to the notice of vacation of premises issued and given on April 7th, 2009 but dated on January 30th 2009."

46. It is also pertinent to note that prior to the issuance of the said show cause notice dated 19.05.2009, it appears, the petitioners did not raise any of these issues in any earlier communication. A perusal of the aforesaid allegations shows that they are mostly vague and devoid of specific particulars. Reference may be made to allegations (a), (b), (c) and (f). Prima facie, the respondent No.2 was, therefore, prevented from effectively dealing with these allegations. The respondent No.2 had sent his reply dated 29.05.2009 to the said show cause notice. The board meeting of the company was deliberately held in Barcelona, Spain on 2.06.2009 to consider the representation of respondent No.2 and also to consider his removal from the board of directors of the company, so as to keep respondent No.2 away from the said meeting. Prima facie, I fail to understand as to why such an important meeting of the board of directors, of the company, wherein the aspect of removal of the Managing Director had to be considered should have been held in far-flung Barcelona, Spain when the then Managing Director is an Indian; residing in India; and the board meeting pertained to an Indian company. Obviously, it appears that the endeavor was to prevent respondent No.2 from participating in the board meeting to explain his position. Even from the minutes of the said board meeting (which have been filed by the petitioner) dated 2.06.2009, it appears that there was hardly any reason recorded as to why response given by respondent No.2 to the show cause notice was out rightly rejected. It is not stated in the minutes as to why the explanation offered by respondent No.2 was perceived as evasive and not bona fide and why his explanation was found to be not satisfactory and not acceptable. The minutes make reference to "the evidence against him which clearly indicate that Mr.Chauhan, despite being the Managing Director of the company, has acted against the interest of the company." However, what is that evidence has not been disclosed- neither in those minutes, nor before me in this petition. The minutes further record that respondent No.2 "has committed breach of material obligations and is guilty of willful misconduct causing significant and irreparable injury to the business of the company." However, it is not stated as to on what basis the said conclusion has been reached.

47. One cannot lose sight of the fact that the respondents were well established and deeply entrenched in the business of marketing diagnostic instruments, reagents, consumables etc. in the Indian market all over the country. The respondents had experience of nearly eleven years in the field. Respondent No.1 was appointed as the distributor for North India by the petitioners, and appears to have successfully marketed the equipment of the petitioners. After having snapped their ties with the respondents, petitioner No.1 came back to the respondents to again engage them in business and on this occasion entered into the joint venture agreement with respondent No.2 whereunder the business of petitioner No.1 was sought to be taken over by the joint venture company. Respondent No.1 was given 20% equity in the joint venture company, respondent No.2 was offered the post of Managing Director with handsome salary of `1.8 lacs per month and other perks including rental income of `2.5 lacs from the office space provided by the respondents to petitioner No.2. It, therefore, appears that the appointment and continuation of respondent No.2 as the Managing Director of the joint venture company was one of the cornerstones of the said agreement. Otherwise, there was no charm for respondent No.2 to give up his well established business, over which he had complete control, in favour of the petitioners while retaining only a minority stake of merely 20% shareholding in the joint venture company. With the said minority stake, the respondents can possibly have no effective and meaningful control over the affairs of the joint venture company, and the petitioners can effectively drive the respondent out of business with

no source of livelihood. This is also demonstrated by the fact that the petitioners have appointed their own nominee viz. Mr. Zea to replace respondent no.2, and the incomes of the company are to a large measure, being spent to maintain him in his position in the company, despite the protests of respondent no.2. The negative covenant contained in Article 11.2 of the joint venture agreement has to be read and understood in the overall context of the arrangement arrived at between the parties under the said agreement. Clause 11.2 presupposes that the parties to the said agreement would remain actively involved in the conduct of business of the joint venture company. It is in that eventuality that the parties agreed not to, either themselves or indirectly through any other family member/representative, undertake any other competing business with that of the joint venture company. The said negative covenant cannot be understood to bind the parties even in a situation like the present where, prima facie, respondent No.2 had been divested of his position as the Managing Director of the joint venture company, prima facie, an illegal and unjustified manner. By adopting the modus operandi as done by the petitioners, they have effectively sought to render the respondents without any avocation, business and source of livelihood and income.

48. In M/s. Gujarat Bottling Co. Ltd. & Others (Supra), the Supreme Court while observing that a negative covenant may be enforced against the defendant held that "this is subject to the proviso that the plaintiff has not failed to perform the contract so far as it binding on him. The Court, is however, not bound to grant injunction in every case and an injunction to enforce the negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer".

49. The position as it emerges as of now is that petitioner No.1 controls petitioner No.2 with 80% shareholding therein. Petitioner No.2 is conducting its business without the participation of the joint venture partner, i.e. the respondent No.2 (who owns and controls respondent no.1) who had agreed to bring in his knowledge, experience, expertise and skill in the business of marketing diagnostic instruments reagents etc. As the petitioners themselves appear to have breached the fundamental terms on which the joint venture and shareholders agreement was entered into, in my view they are not entitled to grant of injunction as prayed for in this petition. They have deliberately suppressed vital and most relevant documents and information from this Court as discussed above. This Court in Satish Khosla Vs. M/s. Eli Lilly Ranbaxy Ltd., 71 (1998) DLTI (DB) has held as follows :-

> "..... .... A party must come to the Court with clean hands and must disclose all the relevant facts which may result in appreciating the rival contentions of the parties. In our view, a litigant, who approaches the Court, must produce all the documents which are relevant to the litigation and he must also disclose to the Court about the pendency of any earlier litigation between the parties and the result thereof..... ....".

50. Therefore, the petitioner is not entitled to restrain the respondents from conducting their business of marketing the equipments and conducting competing business with that of petitioner No.2.

51. At the same time, the respondents have no business to hold themselves out as the representatives of the petitioner No.1 in the conduct of their business. The respondents have no justification to undertake correspondence so as to cast doubts on the existence or success of the petitioners, as done by them in their communication dated 04.10.2009 to the All India Institute of Medical Sciences. Therefore, the respondents are restrained from carrying out a negative campaign against the petitioners, or from claiming themselves to be their representatives of the petitioner in the conduct of their business.

52. Needless to state that my findings as aforesaid are merely founded upon a prima facie evaluation of the materials placed before me and are not conclusive. They shall not bind the learned Arbitrator and he shall be free to arrive at his own findings in the course of the arbitral proceedings and while rendering this award.

53. In the facts of the case, this petition is disposed of with the aforesaid terms with costs quantified at ` One lakh in favour of the respondents.

(VIPIN SANGHI) JUDGE JANUARY 04, 2011 rsk/sr