

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 19.01.2022

PRONOUNCING ORDERS ON : 24.01.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

O.A.No.794 of 2021

in C.S.No.117 of 2021

(Comm.Div)

Amica Financial Technologies Pvt.Ltd.,
Rep.by its Authorised Signatory
Tressa Stalin,
32, 3rd Floor, Viraj Building
Plot No.124, S.V.Road, Khar West
Mumbai 500 052.

..Applicant/Plaintiff

. Vs.

1. Hip Bar Pvt.Ltd.
7, Kamaraj Avenue, 1st street,
Adyar, Chennai - 600 020.
2. Mr.Prasanna Natarajan
7, Crescent Avenue
Kesavaperumal Puram
Chennai – 600 028.
3. Mrs. Rajalakshmi Natarajan
7 Crescent Avenue, Kesavaperumal Puram
Chennai - 600 028.
4. Sipping Spirits Pvt. Ltd.
No.4 Crescent Avenue
Kesavaperumalpuram
Chennai - 600 028.

5. Dreaming Technologies Pvt.Ltd.,
404 Uphar II CHS Ltd.,
Plot No.5 BHD Sanjeeva ENCL, 7 Bunglows
Near Juhu Circle
Mumbai - 400 061.

.. Respondents/Defendants

Prayer in O.A.No.794of 2021: Judge's Summons filed under Order XIV Rule 8 of Original Side Rules read with Order XXXIX Rules 1 and 2 CPC and Section 151 of the Code of Civil Procedure, 1908.

- a. This application should not be treated as Urgent?
- b. This Hon'ble Court be not pleased to grant an interim injunction restraining the defendants and/or anyone acting for, through or under them, from undertaking any business in connection with the PPI License dated 22.08.2016; and
- c. Pass such or further orders as this Hon'ble Court deems fit and proper in the circumstances of the case.

For Applicant : Mr.T.K.Bhaskar
for Mrs.Ashwini Vaithialingam

For Respondents : Mr.P.S.Raman
Senior Counsel
for Mrs.Deepika Murali
for R1 and R 5

Mr.Anirudh Krishnan
for R2 to R4

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N. ANAND VENKATESH, J.

This application has been filed by the applicant/plaintiff seeking for an order of interim injunction restraining the respondents/defendants from undertaking any business in connection with the pre-paid instruments license (hereinafter referred to as "**PPI License**"), dated 22.08.2016.

2.The case of the applicant/plaintiff is that they are engaged in the business of providing technology solutions and services by way of digital based platforms for payment and card related processes, offering products and services in relation to savings credit facilities, investment products and financial management to its customers and providing credit facility to the customers under its brand name and a variety of financial services.

3.The applicant initiated negotiations with the 1st and 2nd respondents to acquire 100% shareholding in the 1st respondent Company, in August 2021. The applicant was interested in acquiring the 1st respondent Company, as a valid PPI License would have enabled them to carryout business related to payment systems for semi-closed pre-paid instruments. After negotiations, on 12.08.2021, a Term Sheet was executed by the

applicant and the 1st and 2nd respondents. Thereafter, this Term Sheet was superseded by a Binding Term Sheet dated 23.08.2021. According to the applicant, Clauses 10, 11 and 12 of the Binding Term Sheet specifically dealt with confidentiality, exclusivity and binding effect of the covenants on the respective parties.

4.The further case of the applicant is that pursuant to the Binding Term Sheet, the applicant disclosed to the 1st and 2nd respondents certain trade secrets which, inter alia, included business plans and objectives of the applicant in respect of the proposed PPI business. According to the applicant, after the execution of the Binding Term Sheet, the parties were required to discharge various obligations which also includes the execution of definitive agreements. The applicant was calling upon the 1st and 2nd respondents to provide updates on the definitive agreements. It is contended that the 1st and 2nd respondents failed to respond or take any steps and that by the end of September 2021, the applicant got an impression that the 1st and 2nd respondents had no intention to adhere to their obligations under the Binding Term Sheet. The applicant was not even provided with the information as to whether the PPI License had been renewed with the Reserve Bank of India (RBI). Ultimately, the applicant was informed by the 2nd respondent on 10.01.2021 that the investment was deferred and by an e-mail dated 12.10.2021, the 2nd respondent informed the applicant that the deal cannot be continued.

5. At this point of time, the applicant learnt that the 5th respondent/5th defendant is going to acquire the 1st respondent Company with a view to engage in the PPI business. Lawyer's notices were exchanged between the parties. Ultimately, the applicant apprehended that the trade secrets that were shared with the 1st and 2nd respondents is being used in breach of the confidentiality clause and that the 5th respondent was hurriedly deciding to acquire the 1st respondent Company in violation of the Binding Term Sheet. This led to the filing of the present suit wherein, the applicant has sought for the relief of mandatory injunction forbearing the respondents/defendants from in any manner violating the Binding Term Sheet dated 23.08.2021 and from undertaking any business in connection with the PPI license dated 22.08.2016 and for the payment of compensation for damages and losses suffered by the applicant and for rendition of accounts.

6. The respondents have filed counter affidavits. They have taken a stand to the effect that the 1st respondent Company is a wholly owned subsidiary of the 5th respondent Company. It is contended that the applicant, without seeking specific performance of the term sheet, has sought for certain consequential reliefs which is not maintainable. They have also taken a clear stand that the applicant did not specifically share any trade secret and even without making any averment as to when, where and how this trade secret was shared and what this trade secret is, and that there is not even a cause of action for filing the present suit. The respondents contend that that the

applicant did not have any unique model and what is being used are the available models for payments made through PPI and NBFC (Non-Banking Financial Company) integration which is highly regulated through approvals granted by RBI.

7. In other words, according to the respondents since definitive agreements were not executed within the stipulated period, there is no legally enforceable right in favor of the applicant. The respondents have sought to vacate the order of *Status quo* granted by this Court on the ground that the applicant, even without having a valid right or establishing a *prima facie* case, has attempted to restrain the respondents from carrying on with their business and that the respondents have been put to irreparable loss and hardship as a consequence thereof.

8. Heard Mr. T.K. Bhaskar, learned counsel for the applicant / plaintiff, Mr. P.S. Raman, Senior Counsel for respondents/defendants 1 & 5 and Mr. Anirudh Krishnan, learned counsel for respondents/defendants 2 to 4.

9. When the matter was taken up for hearing, the first question that was posed by this Court was as to the nature of confidential information/trade secret that was exchanged by the applicant with respondents 1 and 2, which justified the continuation of the injunction against the respondents. It is obvious that, without being aware of this vital fact, any attempt to assess a *prima facie* case in favor of the applicant would be akin to this Court taking blind shots at a hidden target. More importantly, the specific

stand of the respondents is that no such trade secret was shared by the applicant with respondents 1 and 2 at the time of entering the Binding Term Sheet.

10.The learned counsel for the applicant in answer to the said query, submitted that the nature of trade secret/confidential information that was shared with the 1st and 2nd respondents, cannot be revealed in the averments both in the plaint as well as in the application for interim injunction since such revelation would expose the secret to everyone and the uniqueness of the business model that has been formulated by the applicant will consequently be exposed. The learned counsel submits that a confidentiality club must be formed in line with what was suggested by the Delhi High Court in ***Telefonaktiebolaget LM Ericsson (PUBL). v. Xiaomi Technology & Ors.***, reported in ***2017 SCC Online Del 11069*** and in line with a procedure followed in the Delhi High Court by virtue of Rule 17 under Chapter VII r/w Annexure F of the Delhi High Court Original Side Rules. According to the learned counsel for the applicant, the trade secret/confidential information will be submitted in a sealed cover by furnishing a copy to the counsel appearing on the side of the respondents and this should not be revealed to anyone, and it should remain within the confidentiality club. The learned counsel submitted that this is the only way the confidential information can be exchanged and therefore, the learned counsel wanted to file an affidavit to that effect along with the confidential information in a sealed cover.

11.The learned counsel for the applicant further submitted that in a case of this nature, the way an application for interim injunction should be considered was dealt with by the Bombay High Court in **Zee Telefilms Ltd v. Sundial Communications Pvt., Ltd., and Others** reported in **2003 (3) Mah.L.J. 695** and relied upon paragraphs 10 to 13 which are extracted hereunder:

“10. The law of the confidence is different from law of copyright. In paragraph 21.2 (page 721), the learned author has pointed out that right to restrain publication of work upon the grounds, that to do so would be breach of trust of confidence, is a broader right than proprietary right of copyright. There can be no copyright of ideas or information and it is not infringement of copyright to adopt or appropriate ideas of another or to publish information received from another, provided there is no substantial copying of the form in which those ideas have, or that information has, been previously embodied. But if the ideas or information have been acquired by a person under such circumstances that it would be a breach of good faith to publish them and he has no just case or excuses for doing so, the court may grant injunction against him. The distinction between the copyright and confidence may be of considerable importance with regard to unpublished manuscripts / works submitted, and not accepted, for publication or use. Whereas copyright protects material that has been reduced to permanent form, the general law of confidence may protect either written or oral confidential communication. Copyright is good against the world generally while confidence operates against those who receive information or ideas in confidence. Copyright has a fixed statutory time limit which does not apply to confidential information,

though in practice application of confidence usually ceases when the information or ideas becomes public knowledge. Further the obligation of confidence rests not only on the original recipient, but also on any person who received the information with knowledge acquired at the time or subsequently that it was originally given in confidence.

11. *On the general principles of law of confidence, the learned counsel for the plaintiffs relied upon Salman Engineering Co.Ltd. v. Campbell Engineering Co.Ltd., (1948) 65 RPC 203 and in particular in the statement of principles in the judgment of Lord Greene (at page 213):-*

"If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

12. *With regard to the requirement of form and degree of development of information or ideas, learned counsel for the plaintiffs placed strong reliance on Seager v. Copydex Ltd., (1967) 2 All ER 415. In this case the plaintiff, in the course of discussion*

*with the defendants of a carpet grip described as 'the germ of the idea' for a different form of carpet grip which the plaintiff had devised. Later the defendants developed and marketed the carpet grip which was unwittingly based on the plaintiff's alternate type of grip. The Court of Appeal concluded that the plaintiff's idea was 'the springboard' which enabled the defendants to devise their own grip and held that the defendants were liable for breach of confidence. The learned counsel also referred to a judgment of Megarry J in *Coco v. A.N. Clark (Engineering) Ltd.* (1969) RPC 41 where springboard doctrine was elaborately discussed. He also referred to a judgment in *Franchy v. Franchy (Extension Ch D)*, (1967) 5 Reports of Patent and Design and Trade Mark Cases 149 where Cross J. observed: -*

"Clearly a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them."

13. Our attention was also drawn to the case of *CMI Centers for Medical Innovation GMBH and anr. vs. Phytopharm PLC*, (1999) Fleet Street Reports 235 where the Court held that for a plaintiff to succeed in a breach of confidence action he had to address at least four matters; i.e. (i) he had to identify clearly what was the information he was relying on; (ii) he had to show that it was handed over in the circumstance of confidence; (iii) he had to show that it was information of the type which could be treated as confidential; and (iv) he had to show that it was used without his licence or there must be threat to use it. It was added that at interlocutory stage, the plaintiff does not have to prove (ii) and (iv)

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as he will at the trial. But he must address them and show that he has at least a seriously arguable case in relation to each of them.”

12.The learned counsel submitted that even to satisfy limbs (i) and (iii) of the test applied at paragraph 13 of the above judgment, the confidential information, should be permitted to be shared only by setting up a confidentiality club.

13.The learned counsel appearing on either side raised various issues on the merits of the claim and the conduct of the parties. This Court is consciously refraining from going into these issues in this application as they require a deeper probe which could only be done after evidence is led in the matter.

14.For the present, the prayer in the application is for an ad-interim injunction, and the approach of this Court must be to scrutinize the materials available on record and apply the time-honored triple test of *prima facie* case, irreparable loss/ hardship, and balance of convenience.

15The applicant is apprehending that the trade secrets which includes, inter alia, business plans and objectives of the applicant in respect of the proposed PPI business, which was shared with the 1st and 2nd respondents, will be used by the 5th respondent which is in the process of acquiring the 1st respondent Company and thereby the interest of the applicant will be adversely affected. To claim such a protection, the

applicant must, *at least prima facie*, establish through some material that such information was communicated or imparted to the 1st and 2nd respondents. The applicant must also, *prima facie*, establish that the information in question is confidential in nature. Further, the applicant must also show that the confidential information is under a threat of being unauthorizedly used by the respondents for wrongful gain.

16.Faced with the aforesaid predicament, the learned counsel for the applicant came up with a request to constitute a confidentiality club. As to what exactly is a 'confidentiality club' : one cannot better the following exposition of Buxton LJ in ***Lilly Icos Limited v Pfizer Limited*** [2002 1 WLR 2253]:

“At the start of these proceedings the parties followed the normal practice in patent actions of entering into what is called, perhaps slightly unfortunately, a “confidentiality club”. That is an agreement that during the proceedings documents designated as confidential shall be seen only by a strictly limited number of people on each side, almost entirely professional advisers, who are bound by undertakings of confidence in relation to them.”

17.Though the Rules of this Court do not explicitly provide for constitution of confidentiality clubs like the Delhi High Court Original Side Rules, 2018, the basis of such orders is the Court's inherent jurisdiction under Clause 37 of the Letters Patent and

Section 151 of the Code to regulate its own procedure in the interests of justice. Confidentiality clubs are typically employed in antitrust or intellectual property litigation to protect confidentially sensitive information. However, its constitution involves a careful balancing exercise requiring the applicant to establish that there is a real risk, either deliberate or inadvertent, of a party using the sensitive information for a collateral purpose. An illustrative list of factors which the Court ought to weigh in the balance have been set out in the judgment of Hamblen, LJ of the UK Court of Appeal in ***The Libyan Investment Authority v Societe Generale S.A [2015] EWHC 550 (QB)***:

“(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club - see, for example, Inter Digital Technology Corporation v Nokia [2008] EWHC 969.

(2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club - see, for example, Warner-Lambert v Glaxo Laboratories [1975] RPC 354.

(3) The importance of the confidential information to the issues in the case - IPCom GmbH v HTC Europe [2013] EWHC 52 (Pat).

(4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge - see IPCom GmbH v HTC Europe (supra)

(5) Practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information”

It is clear from the aforesaid discussion, that the onus of pleading and establishing the

necessity of a confidentiality club lies on the applicant and that orders of such nature cannot be made on the mere ipse dixits of one party.

18.The learned counsel for the applicant has also placed reliance on the decision of the Delhi High Court in ***Telefonaktiebolaget LM Ericsson (PUBL). v. Xiaomi Technology & Ors.***, reported in ***2017 SCC Online Del 11069***. This was a patent infringement case where the plaintiff had taken out an application praying for the constitution of a confidentiality club. As is evident from paragraph 9 of the said decision, the Delhi High Court had drawn inspiration from Section 103(3) of the Patents Act, 1970 to set up a confidentiality club involving the Advocate of the other side and other independent experts as was mutually agreed upon.

19.In the case at hand, quite apart from the fact that there is not even an application seeking the constitution of a confidentiality club; the request for its constitution was made, through a sidewind as it were, for the first time in the arguments in this application. The requirement of showing a prima facie case for grant of ad-interim relief cannot be circumvented by seeking for the constitution of a confidentiality club. This Court is also of the considered view that there must be some basis or materials which should establish that such a confidential information/trade secret was in fact exchanged between the parties. The safest way to find out this fact is to see if there is any material as to when such confidential information was shared and/or where it was shared and/or to whom it was shared. Once this foundation is laid, this Court can go to

the next step of considering the formation of a confidentiality club. Formulation of a confidentiality club cannot be done in a hasty manner merely based on the *ipse dixit* of the plaintiff and the Court must be satisfied based on materials and the plaintiff must necessarily lay a foundation before making such a request.

20.This Court has carefully examined the pleadings and the documents relied upon by the applicant and is not able to satisfy itself that the applicant has established the fundamental requirements for the grant of an ad-interim injunction. Except stating that a trade secret/confidential information was shared with the 1st and 2nd respondents, there is not a whisper as to when, where and how such information was shared. Faced with this insurmountable difficulty, the applicant came up with a request to constitute a confidentiality club, and that too after the respondents had taken a specific stand that no confidential information had been divulged. It is all too apparent that the request to constitute a confidentiality club is a red herring intended to deflect the real issue in this application i.e., the existence or non-existence of a prima facie case for the grant of an ad-interim injunction.

21.In the absence of any material, any interim order that the Court makes will be based merely on assumptions and without any material to satisfy the triple test for the grant of injunction. In cases of this nature where the applicant/plaintiff does not want to divulge the confidential information by way of averments in the pleadings, some

indication must be given in the pleadings to that effect and the confidential information must be presented to the Court in a sealed cover to enable the Court to satisfy itself that there is, in fact, a confidential information which is unique and has been formulated exclusively by the applicant/plaintiff. In the absence of the same, no interim orders can be granted on surmises.

22.It is seen from records that the 2nd respondent has shared the business plan of the 1st respondent with the applicant and the same is evident from the e-mail dated 27.08.2021. This was the business plan which was submitted to the RBI on 21.09.2021, while seeking for extension of license. If the applicant had anything unique to contribute to the business plan, they should have at least informed the 1st and 2nd respondents by means of a reply to this e-mail communication. It is seen that the PPI business is regulated by RBI and while considering the extension of license, a business plan is in fact submitted to the RBI for consideration. Under such circumstances, it is not known as to what unique business model was proposed by the applicant as an improvement to the business model formulated by the 1st and 2nd respondents.

23.In the considered view of this Court, *in hindsight*, an ex-parte order of *status quo* was not required without the applicant showing even a semblance of a *prima facie* case. Once this position is noted, the consequence is that the interim order must be

vacated immediately to prevent miscarriage of justice.

24. There is yet another angle to the issue. While considering the grant of an order of interim injunction, even if the applicant makes out a good case, an order of injunction will not be granted, as a rule, if a remedy by way of damages is available to the plaintiff. In the present case, the plaintiff has invited this Court to adjudicate on imponderables in the form of so-called confidential information. If at a future point of time, this Court permits the confidential information to be brought in by forming a confidentiality club, the Court can always assess as to whether the defendants have misused the uniqueness of the trade secret of the plaintiff to their advantage and have unjustly enriched themselves. If ultimately this Court finds that the confidential information/trade secret has been exploited unlawfully, this Court can always compensate the plaintiff in terms of damages. On the other hand, if the defendants are enjoined from carrying on with their business, and it is eventually found that there is nothing unique in the so-called trade secret/confidential information provided by the plaintiff, the comparative hardship that would befall the defendants from the grant of an order of ad-interim injunction would be far greater than withholding its grant in favor of the plaintiff. On this short score, the balance of convenience squarely lies in declining injunctive relief.

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25.In the result, the order of *status quo* granted on 10.12.2021 stands vacated.
Consequently, O.A 794 of 2021 will stand dismissed. There shall be no order as to costs.

24.01.2022

KP

Internet: Yes

Index: Yes

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