

Dispute Resolution Hotline

May 13, 2009

CORPORATE PRIVACY AND CONFIDENTIALITY

For many companies protection of confidential information is a huge concern. The media appears to be the very nemesis of confidentiality with its scoops and paparazzi. In the recent judgment in *Petronet LNG Limited v. Indian Petro Group & Anr*¹, the hon'ble Delhi High Court was asked to decide on whether the right to freedom of speech and expression was trumped by the right of privacy and the circumstances of confidentiality.

FACTS OF THE CASE:

Petronet LNG Ltd ("PLL") is a public listed company promoted by four public sector undertakings collectively holding 50% and with 34.8% of its shares held by the public at large.

Indian Petro Group ("IPG") operates a website called www.indianpetro.com (the "Website").

PLL alleged in the instant suit that

- IPG, by way of publishing certain articles on its Website released PLL's confidential information of a price sensitive nature to the public in violation of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (the "Regulations").
- IPG had published incorrect and misleading information regarding PLL's confidential negotiations with third parties and had, in the process, diminished PLL's position in such negotiations and placed PLL of being in a position of breaching confidentiality provisions under various agreements it had entered into.

IPG responded that the information was not confidential and that they had consistently published articles of a similar nature regarding various companies in the sector including PLL's promoter entities. It further responded that much of the information in the impugned articles had also appeared in other publications that were not impleaded in the instant case.

At the initial stage of the Suit, the hon'ble Court had passed an ex parte ad interim injunction against IPG restraining them from publishing anything relating to PLL without PLL's consent.

JUDGMENT:

The hearing of the interim application as well as the suit was taken up together and the hon'ble Court after considering the facts and the applicable law dismissed the suit and awarded compensation of Rs. 100,000 (approx. USD 2000) in favour of IPG.

The hon'ble Court framed 3 issues and dealt with them one by one, as follows:

The first issue was whether PLL can claim the right to privacy, and on that basis seek an injunction against IPG restraining them from publishing articles or reports on the Website. The hon'ble Court in this respect examined numerous judgments including *Gobind Singh v. State of Madhya Pradesh*², dealing with the right to privacy. In these judgments, the right to privacy has been read into the 'right to life' enshrined in Article 21 of the Constitution of India. The hon'ble Court observed that the right to privacy in India applied only to individuals and that no construction of the said right could extend the same to juristic or artificial entities. Since there is no Indian case on the subject, the hon'ble Court examined the position in Australia and the United States of America and found that the position was similar in both the jurisdictions. It further observed that, this fundamental right is not available against non-state actors.

The second question considered by the hon'ble Court was whether PLL could maintain the Suit on the ground of entitlement to confidentiality of information. The hon'ble Court observed that the suit, being a suit to prevent the breach of an (implicit) obligation, was maintainable under Section 9 of the Code of Civil Procedure, 1908³ read with Sections 38 and 39 of the Specific Relief Act, 1963⁴. After examining numerous English judgments on the question, the hon'ble Court observed the shift in the trend of the English Courts with regard to the implied obligation of confidentiality.

The hon'ble Court came to the conclusion that with respect to corporations and businesses, there could be legitimate concerns about its internal processes, strategies and secrets in their nascent stages which, if prematurely made public, could result in irreversible and unknown commercial consequences. The hon'ble Court was therefore of the opinion that PLL could maintain the Suit on the assertion of its right to confidentiality in its information.

The third question the hon'ble Court dealt with was whether, in the event that PLL could maintain a suit for breach of confidentiality, the hon'ble Court should grant the injunction sought and restrain IPG from making further publications of a nature similar to the impugned articles. The hon'ble Court herein examined the specific contentions made by PLL.

The hon'ble Court observed that the various courses mandated by the Regulations that PLL had shown to the Court

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primarily dealt with internal processes of a company as well as information relating to insider trading, share prices and other product information; the need to maintain 'Chinese Walls' for ensuring integrity of information flow within the organization and so on. However, these provisions nowhere inhibit the publication of information which is otherwise available to third parties or becomes available to a third party. No sanctions were indicated nor shown to the Court. Therefore, PLL's allegation of its being possibly held liable for SEBI violations was accordingly overruled.

The court relied on the following test laid out in *HRH Prince of Wales v. Associated Newspapers Ltd.*⁵:

"The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.

..In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important."

The hon'ble Court observed that the activities of PLL were of a publically important nature and, though it was not a public sector enterprise, it missed the required threshold by just 1%. This essentially meant that the hon'ble Court needed to strike a balance in this regard between confidentiality and accountability to the general public. The hon'ble Court further observed that IPG's right to freedom of speech and expression under Article 19 (1) (a) of the Constitution of India also needed to be protected and that the Supreme Court had held in the past that ensuring the dissemination of news and the free flow of ideas was paramount to upholding this right. With respect to published materials that aggrieve a party many remedies exist, including suits for libel and defamation. The hon'ble Court observed that the sanctity of the freedom of speech and needed to be preserved and that IPG's publications were not 'unprotected' for the purposes of Article 19 (1) (a). The hon'ble Court also examined each of the impugned articles in order to determine whether the information provided by IPG was general in nature or indeed amounted to confidential and/or price sensitive information and observed that:

- PLL has been unable to substantiate its claim for confidentiality or that the information is of such sensitive nature as to warrant prior restraint from its disclosure.
- IPG was able to show public interest in news reporting and discussion of PLL's functioning.
- The grant of injunction would destroy the very essence of press freedom and the right of the general public to be informed about the functioning of the entity in which 50 % is held by the Central Public Sector Undertakings.

Concordantly, the hon'ble Court held that the injunctions sought by PLL could not be granted. The suit and the interim application were accordingly dismissed.

ANALYSIS

This judgment once again re-affirms that in the Indian context, the right to privacy is only available to individuals and not to juristic persons such as companies and that the right is exercisable only against the state. When dealing with the right of companies to protect their confidential information, certain other aspects are also to be considered viz. nature of the relevant information, the corresponding duty of confidentiality to the receiver of such information, and the balance of the right to confidentiality and freedom of press under Article 19 (1) (a) of the Constitution of India. Companies should have extremely strict internal policies and processes so that the sensitive information is not leaked to the press. Once the information reaches the press and is published, it will be difficult to control its further dissemination as well as to sue for prevention of such dissemination or for damages.

- Arjun Rajgopal & Gowree Gokhale

1. Delhi HC – CS (OS) No. 1102/2006, judgment pronounced on April 13, 2009
2. (1975) 2 SCC 148
3. Section 9 permits a court to try any civil suit unless its jurisdiction is specifically barred.
4. Section 38 deals with perpetual injunctions and Section 39 deals with mandatory injunctions (injunctions that require positive action on the part of the person they are granted against).
5. [2007] 2 All ER 139.

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