IN THE HIGH COURT OF BOMBAY AT GOA.

(LD-VC-CW-330/2020)

Source It out KPS Services
Pvt. Ltd. Rep. By its Director,
Aditya Varma …Petitioner

Vs

Symbio Energy Limited, thr. Its
Directors. …Respondent

Shri Nigel Costa Frias, Advocate for the petitioner.
Shri D. Pangam and Shri P. Sawant, Advocates for the respondent.

Coram:- DAMA SESHADRI NAIDU, J.

Date:7th November 2020.

ORDER:

The petitioner and the respondent are two companies having a service agreement between them. The respondent is an overseas company registered in the UK, and the service agreement, dated 17.5.2019, is said to be still subsisting. Under this service agreement, the petitioner company engages its IT Professionals to discharge the respondent company's functions—in the manner of out-sourcing.

2. That service agreement has an arbitration clause. Now, the petitioner company has filed this petition under Section 9 of the Arbitration and Conciliation Act 1996. It is on the premise that the respondent company has been trying to violate the contract. So, before the petitioner could proceed with the arbitration, it wants the Court to protect its interest through injunctive relief. In fact, the petitioner has approached this Court directly because the dispute comes under international arbitration.

3. Shri Nigel Costa Frias, the learned counsel for the petitioner, and Shri Devidas Pangam, the learned counsel for the respondent, have advanced elaborate arguments, besides filing their respective pleadings: petition, reply, rejoinder and relevant documents.

4. But I do not desire at this stage to enter into the details of the controversy. It will suffice if I adjudicate on the issue whether the petitioner is entitled to interim protection pending further adjudication of the Section 9 application.

5. Shri Frias has submitted that the respondent company is acting contrary to clauses 18.1 and 18.2 of the service agreement. To elaborate, he submits that the respondent company has been inducing the petitioner's employees to leave its service and join the respondent. According to him, the petitioner's company has spent vast amounts in training its employees, and the respondent company's poaching or luring away its employees is not only unethical but also against the agreed terms of the contract. He stresses that unless the Court injuncts the respondent from violating the contract, the petitioner will suffer irreparable loss and hardships.

6. As per his contentions, the Agreement does not fall within the mischief of section 27 of the Indian Contract Act. To drive home this legal proposition, Shri Frias has relied on a few judgments.

7. On the other hand, Shri D. Pangam, the learned counsel for the respondent, has submitted that the petitioner company has been incorporated at the respondent company's behest. In fact, the petitioner is only the respondent's creation for having its business interests sub-served. He drew my attention to the material on record to stress that there has been an arrangement between these two company for the merger or amalgamation of the petitioner with the respondent. Shri Pangam also points out that the respondent holds a majority stake in the petitioner company.

8. That apart, Shri Pangam has laid much emphasis on section 27 of the Contract Act and insisted that clauses 18.1 and 18.2 of service agreement squarely stand hit by the legislative mandate of that section. He too has relied on a few decisions.

9. Heard Shri Nigel Costa Frais, the learned counsel for the petitioner and Shri D. Pangam the learned counsel for the respondent.

Discussion:

10. The contractual terms that matter for us are these:

> 18.1 Neither Party shall, for the Term of this Agreement and for a period of 24 months after its termination or expiry, employ or contract the services of any person who is or was employed or otherwise engaged by the other Party at any time in relation to this Agreement without the express written consent of that Party.
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> 18.2 Neither Party shall, for the term of this Agreement and for a period of 24 months after its termination or expiry, solicit or entice away from the other Party any customer or client where any such solicitation or enticement would cause damage to the business of the that Party without the express written consent of that Party.

11. The question is whether those terms violate section 27 of the Indian Contract Act. If they do not, should the petitioner get the injunctive relief: restraining the respondents from breaching the above two terms. At this stage, it is only a prima facie consideration, though.

12. Section 27 of the Indian Contract reads:

> "27. *Agreement in restraint of trade void*,—Every Agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent *void*.
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> *Exception 1*.—Saving of Agreement is not to carry on business of which goodwill is sold.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like

> business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

13. As both parties have taken precedential props to support their arguments, let us examine them.

14. In *Superintendence Co. of India v. Krishan Murgai*[1], the contract was between the employer and the employee. The Supreme Court has held that even a post-service restrictive covenant if it is reasonable, qualified, or limited in operation both in point of time and area, as was in that case, does not amount to any restraint of trade at all within the meaning of Section 27. And such restrictive covenant could be justified as being necessary and essential to protect the employer's interests, his trade secrets, and his trade connections. So it is valid.

15. In clause (10) of the Agreement, the restrictive covenant comes into play "after [the employee] leaves the company". The question is whether that phrase means the leaving of service by the respondent voluntarily or would include even the case of termination of his services by the appellant company.

16. The Supreme Court has held that the word "leave" was intended by the parties to refer only to a case where the employee has voluntarily left the services of the appellant company of his own, but not where he has been removed from service.

17. In *Percept D'Mark (India) Pvt. Ltd v. Zaheer Khan*[2], the Apex Court has noted that under S. 27 of the Contract Act (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable; (b) The doctrine of restraint of trade does not apply during the continuance of the contract for employment, and it applied only when the

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1[] (1981) 2 SCC 246
2[] AIR 2006 SC 3426

contract ends; (c) This doctrine is not confined only to contracts of employment, but also applies to all other contracts such as promotional, advertising, endorsement, event management agency contracts.

18. In *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co., Ltd.*[3], the Supreme Court has ruled that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract from those where it is to operate during the period of the contract.

19. Negative covenants when the contract of employment is subsisting that the employee must serve his employer exclusively are rarely regarded as a restraint of trade. So, they do not fall under Section 27 of the Contract Act. In that context, the Supreme Court has held that there is nothing to prevent the court from granting a limited injunction to the extent that is necessary to protect the employer's interests where the negative stipulation is not void.

20. In *Tata Sons Limited v. Mastech Corporation*[4], the High Court of Madras has considered a similar issue. In that case, the petitioner has argued that even though the term in the Agreement, restraining the employees from the petitioner's service is considered a negative covenant, still it can be enforced. It is because, as the petitioner contends, negative covenants operate during the period of employment when the employee is bound to serve his employer exclusively. So those covenants rarely are regarded as restraint of trade. As a result, they do not fall under Section 27 of the Contract Act. The Madras High Court has agreed with that proposition. Indeed, the respondent argued that if the petitioner's employees have left their service for better prospects, it cannot be stated that it is due to the respondent's inducement.

3[] AIR 1967 SC 1098
4[] 1996 (2) CTC 752

So there is no necessity for an injunction. In that context, the Court has observed that

> [I]f really there was no inducement by respondents 1 and 2 through the third respondent, issuing an injunction restraining them from inducing the employees of the plaintiff to leave the services of the plaintiff in utter disregard to the service agreement entered by them with the employer will not cause any prejudice to the respondents.

21. I am afraid a party does not get an injunction against another merely because it does not prejudice the other party. On the contrary, the suitor must earn the injunctive relief on the bedrock of the common law cannons: (a) prima facie case, (b) balance of convenience, and (c) the irreparable loss and hardship.

22. In *M/s. Jay Ushin Limited v. M/s. U-Shin Ltd.*[5], the petitioner has contended that there is a joint venture agreement between the petitioner and the respondent. That JVA has still been subsisting. In fact, the petitioner purchased the technology from the respondent. But the respondent, an overseas venture, has already its intention to form another JVA with another Indian company. This is said to be against the terms of the JVA it initially entered into with the petitioner. So the petitioner wanted the Delhi High Court to injunct the respondent from breaching the JVA. I do not think this case has anything do with the controversy before me.

23. In *Dr Lal Pathlabs Pvt. Ltd. v. Dr Arvinder Singh*[6], the plaintiffs, among other things, sought a decree of permanent injunction restraining the defendants no. 1 & 2 from soliciting and recruiting the plaintiff's employees, clients, and doctors by inducing them to leave the plaintiff's employment and join the defendant no.3. In fact, the defendant nos.1 & 2 themselves were the plaintiff's employees. They executed 'Retainership Agreements' "to serve the

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5[] 2013 SCC OnLine Del 1197
6[] 2014 SCC OnLine Del 2033

plaintiffs for a minimum period of three years, and Clause 9 whereof contains a non-solicitation of employees and clients and non-compete covenant". So the issue was regarding the plaintiff's employees leaving the employment, joining a rival and soliciting on their behalf. So, at this stage, this case, too, needs no further elaboration.

24. Besides, on the fact, in the end, the Delhi High Court has considered the plaintiff's application under Order 39, Rule 2A of CPC. It has ruled that merely because the defendant no. 2 joined the employment of the defendant no. 3, it cannot be said that the defendant no. 2 has divulged any proprietary information of the plaintiffs to the defendant no. 3 or has solicited and recruited employees and doctors of the plaintiffs.

25. In *Kores Manufacturing Co. Ltd., v. Kolok Manufacturing Co. Ltd.*[7], the facts are these: By letters dated August 30, 1934, and September 3, 1934, respectively, two companies agreed that neither company would, without the written consent of the other company, employ at any time any person who had been a servant of the other company during the period of five years before that time. The letters were silent as to the duration of the proposed Agreement. Both companies manufactured similar products involving chemical processes, including exceedingly dirty work, in relation to which their respective technical employees might become possessed of confidential information and trade secrets. It was contemplated at the time of the Agreement that their factories would be adjoining.

26. In an action commenced in 1957 by one of the companies against the other company claiming (1) a declaration that the Agreement was a valid and subsisting agreement; (2) an injunction to restrain the defendants from employing a certain employee of the plaintiffs without the plaintiffs' consent in writing contrary to the Agreement and (3) an injunction to restrain the

7[] (1958) 2 WLR 858 (CA)

defendants from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the service of the plaintiffs. The Court of Appeals, the UK, has held that

> (1) a contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public;
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> (2) the mere fact that parties dealing on equal terms had entered into an agreement subjecting themselves to restraints of trade did not preclude the court, where the restraints were clearly unreasonable in the interests of the parties, from holding it bad on that ground;
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> (3) assuming that the Agreement of 1934 was not impliedly terminable on reasonable notice, the restraint to which each party subjected itself was grossly in excess of what was adequate to protect that for which the other party required protection from the dangers against which protection was required; and that the Agreement accordingly was unreasonable in the interests of the parties to it;
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> (4) even assuming that the Agreement of 1934 was terminable by six months' notice on either side, it was still unreasonable in the interests of the parties; it spread its blanket over all employees irrespective of the nature and terms of their employment or the circumstances in which they left it;
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> (5) accordingly, the Agreement failed to satisfy the first of the two conditions which a contract in restraint of trade must satisfy in order to be held valid, and it was void and unenforceable.

27. Now we may turn our attention to *Wipro Ltd. v. Beckman Coulter International*[8]. In that case, in a petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner wanted the Court to restrain the respondent from employing any person who is or has been employed with the petitioner, during the pendency of arbitral proceedings. The relationship between the petitioner and the respondent is that of a distributor and

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8[] *S*A, (2006) 131 DLT 681

principal. That relationship subsisted for almost 17 with periodic renewals. The Agreement ('Exhibit-D') had Clause 5, which reads:

> "5. *Non-solicitation of employees*:
> Both parties agree that for a period of two (2) years from the date of termination of the Agreement to which this appendix is attached, including termination by either party with or without cause, either directly or indirectly solicit, induce or encourage any employee(s) to terminate their employment with or to accept employment with any competitor, supplier or customer of the other party, nor shall either party cooperate with any other in doing or attempting to do so.

28. Then, the question is whether this 'non-solicitation of employees' is enforceable in law. On the facts, in that case, the issue was whether the one employer's advertisement amounted to a solicitation. The High Court of Delhi in *Wipro Ltd.* has examined many a precedent and summarised the precedential propositions:

> (1) Negative covenants tied up with positive covenants during the subsistence of contact be it of employment, partnership, commerce, agency or the like, would not normally be regarded as being in restraint of trade, the business or profession unless the same are unconscionable or wholly one-sided;
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> (2) Negative covenants between employer and employee contracts pertaining to the period post-termination and restricting an employee's right to seek employment and/or to do business in the same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;
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> (3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the Courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts,

the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;

(4) The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of a contract is or is not in restraint of trade, business or profession.

29. Applying those principles to the facts, *Wipro Ltd.*, has examined whether the non-solicitation clause in the contract amounts to a restraint of trade, business, or profession. It has, first, noted that it was not a contract between an employer and an employee. It is, in fact, a covenant which prohibits either employer from enticing or alluring each other's employees away from their respective employments. It is a restriction cast upon the contracting parties and not on the employees.

30. As is evident, there is no bar on the petitioner's employees leaving its employment and joining the respondent's and *vice versa*. The bar or restriction is on the petitioner and the respondent from offering inducements to the other's employees to give up employment and join them. Therefore, the clause by itself puts no restriction on the employees. The restriction is put on the petitioner and the respondent and, therefore, has to be viewed more liberally than a restriction in an employer-employee contract. In the Court's view, the non-solicitation clause does not amount to a restraint of trade, business, or profession and would not be hit by Section 27 of the Indian Contract Act, 1872, as being void.

31. Then, *Wipro Ltd.*, poses unto itself a question: What happens if the respondent has solicited or induced or encouraged the petitioner's employees to leave or resign from his post and join the respondent? Can the Court

grant an injunction restraining the respondent from giving employment to such employees?

32. According to it, if an injunction is granted, it implies that the respondent cannot employ such employees who have responded to its advertisement. But it also means that employees without any such restrictive covenant in their employment contracts will also be barred from taking up employment with the respondent. In other words, we may be reading into their employment contracts a negative covenant that they should not seek employment after termination of their present employment with the respondent.

33. If such a term were to be introduced in their employment contracts, because of the settled legal principles, it would be void being in restraint of trade. Consequently, when such employees cannot be restrained from directly seeking the employment of the respondent, they cannot be restrained indirectly by preventing the respondent from employing them. Therefore, an injunction cannot be granted restraining the respondent from employing even those employees of the petitioner company who were allured by the solicitation held out by the respondent in the said advertisement.

34. We need not refer to the rest of the judgment, which carves out an exception to the above proposition. We will examine this question, of course prima facie, from another perspective. There is a group of employers in a particular trade; their employees discharge similar functions. No employer imposes on his employee a condition that offends section 27 of the Contract Act. Instead, all these employers in this particular profession or trade will contract among themselves that they will not engage another's employees. This amounts to their collectively imposing a negative covenant on their respective employees without offending section 27 of the Contract Act. It

gives rise to employers' cartels. And that will be opposed to public policy. To avoid this collateral damage to the employees, the employment-based restrictive covenants must be employer-and-employee centric. And other restrictive trade covenants may be permissible between or among the employers themselves, who contract as traders *per se* rather than as employers.

35. Right to profession or trade is constitutionally consecrated, of course, subject to reasonable restrictions as set out in the very article: Article 19 of the Constitution of India. That right encompasses the choice of profession and the choice of employer, too. An employee may contract out any of the privileges conferred on him. We need not visit this complex legal arena, now.

36. To my specific query, the petitioner's counsel has submitted that the petitioner company has restrictive provisions in its contract with its employees as well. And, as we have seen above, so long as the employment is subsisting, the employer can enforce those contractual terms vis-à-vis its employees. But those terms cannot be collaterally enforced in the name of restrictive covenants between the employer and employer, ultimately affecting the employees. What cannot be achieved directly cannot be achieved indirectly, too.

I, therefore, decline to grant any interim protection. Let the matter stand over soon after the vacation.

DAMA SESHADRI NAIDU, J.

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