

12.01.2022

The matter has been taken up through VC via Cisco Webex.

Present: Sh. Manish Kumar, ld. counsel for plaintiff along
with AR of the plaintiff Sh. Gaurav Uppal.
Sh. Jitesh Tejawani, ld. counsel for defendant.

Arguments heard on the application under order 39
Rule 1 & 2 r/w 151 CPC.

Vide this order I shall proceed to dispose of the application filed by the plaintiff under Order 39 Rule 1 and 2 CPC read with Section 151 CPC for grant of ad interim injunction restraining the defendants from committing breach of employment agreement entered into between the plaintiff and defendant and also restraining the defendant from contacting or soliciting any clients/customers of the plaintiff's company which he had contacted while in the service tenure of the the plaintiff's company.

It is stated by the ld counsel for the plaintiff that plaintiff filed the suit for mandatory injunction and for damages against the defendant which is pending adjudication before this Hon'ble Court. That the defendant joined the services of the plaintiff as employee vide agreement of employment dated 05.07.2010. It is further stated that the aforesaid agreement of employment contained a non-solicitation clause at serial no. 11 which prohibits the defendant from soliciting business from any

customers served or solicited by him or the employer during the service tenure or for the period of three consecutive English calendar year following leaving/termination of the services of its employees. It is further stated that the defendant has resigned from the services of the plaintiff's company vide resignation dated 13.01.2020 and he was relieved by the plaintiff's company on 11.03.2020. It is further stated that after leaving the plaintiff's company, the defendant started his own proprietorship concern having similar nature of business. During this period, the defendant contacted, entertained and solicited business from the plaintiff's clients. It is further stated that defendant solicited the business of those customers within the period of three years from leaving the services of the plaintiff's company and has thus, violated the said clause 11 of the agreement. It is further argued that due to the aforesaid act of defendant, the plaintiff's company has not only suffered a monetary loss but also lost its faith among its customers and its employees which is very harmful for smooth functioning of its business. He relied upon the "*Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar & Ors*" CS(OS) No. 337/2008 passed by the Hon'ble High Court of Delhi wherein the Hon'ble High Court of Delhi after considering the judgments of the Hon'ble Supreme Court of India i.e. *Superintendence Co. of India (P) Ltd. v. Krishan Murgai* {(1981) 2 SC 246} and *Percept D'Mark (India) (P) Ltd. v. Zaheer Khan and Anr.* {(2006) 2 SCC 227}, held that ".....the injunction only restrains defendant no. 1 from approaching the plaintiffs suppliers and customers for soliciting business which is in direct competition with the business of the plaintiff. Hence, the injunction which has already been granted by order dated

February 20, 2008 is made absolute”. It is further observed that “non solicitation is legal and binding and enforceable against the defendants and defendants be restrained from soliciting business of the plaintiff’s customers.”

It is stated by the plaintiff that he has suffered a huge loss and is likely to suffer further irreparable loss which cannot be measured/compensated in terms of money. He further argued that the plaintiff has a prima facie case in his favour and the balance of convenience is also lies in favour of the plaintiff’s company. It is stated that there is no other efficacious remedy available to the plaintiff. He prayed that temporary injunction may kindly be granted in favour of plaintiff and against the defendant.

On the other hand, Id counsel for the defendant argued that the defendant neither joined the services of the plaintiff on 05.07.2010 and nor became employee of the company of the plaintiff. He further stated that the plaintiff has filed the present suit on the basis of false and fabricated documents as can be clearly observed even from cursory look and alleged agreement of employment dated 05.07.2010 filed by the plaintiff, as it neither contain the signatures of the defendant on each page nor it has been notarized properly. He argued that the alleged clause 11 is in violation of Section 27 of Indian Contract Act, 1872 as well as Article 19(1)(g) of the Constitution of India which makes it void ab initio. He prayed that the present application under Order 39 Rule 1 and 2 CPC be dismissed with exemplary cost as there is no prima facie case in favour of the plaintiff, no balance of convenience lies in favour of the plaintiff and plaintiff has not come to the court with clean hands. He

relied upon the following judgment:-

“1. *Superintendence Company of India (P) Ltd. v. Krishan Murgai* {1980 AIR 1717, 1980 SCR (3) 1278}, wherein it is observed that “A contract, which has for its object a restraint of trade, is prima facie, void. Section 27 of the Contract Act is general in terms and unless a particular contract can be distinctly brought within Exception 1 there is no escape from the prohibition. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act and put upon the meaning which they appear plainly to bear.”

2. *Percept D'Markr (India) Pvt. Ltd. v. Zaheer Khan & Anr.* {Appeal (Civil) 5573-5574 of 2004} wherein it is observed that “The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within express exception engrafted in Section 27.”

3. *Tapas Kanti Mandal v. Cosmo Films Ltd.* {Writ Petition No. 2875 of 2018} wherein it is observed that “A negative covenant, which oppresses a person either to perform personal service or to remain idle or starve is considered inequitable, onerous and oppressive term and tends to obliterate the object underlying section 27 of the Indian Contract Act forbidding a compelled servitude. An employee seeking better employment would not be enjoined on the ground that he has confidential information and under the grab of confidentiality employer cannot be allowed to perpetuate forced employment. Freedom to change employment is a vital and important right of an employee, which cannot be curtailed on the ground of confidentiality and such a restriction will be hit by Section 27 of the Contract Act. As such, injunction would not issue.”

I have heard the rival contentions of the parties and gone through the material on record.

On perusal of the record, I find that the agreement of employment was executed on 05.07.2010 between the plaintiff's company and the alleged defendant. In clause 11 of the aforesaid agreement, a non-solicitation clause is contained which prohibits the employee of the plaintiff's company directly or indirectly for soliciting the business of any type from any of the customers of the plaintiff's company for a period of three consecutive english calender years following the leaving/termination of its employee. At the end of the agreement of employment, there are signatures of first party-employer as well as second party-employee (i.e. alleged defendant Kunal Sadana). "On careful perusal of the WS filed by the defendant at Para 4 of the reply on merits, the defendant has admitted that the management of the plaintiff had created such hostile working environment against the defendant that the defendant was left with no option but to leave the services of the plaintiff".

It is clearly admitted by the defendant that he served as an employee of the plaintiff's company. As far as the contentions raised by the defendant that the non-solicitation clause is violation of Section 27 of the Indian Contract Act, 1872. On perusal of the Desiccant Rotors (Supra), the court held that the non-solicitation clause is outside the purview of the Section 27 of the Indian Contract Act, 1872 and is legal, binding and enforceable. In *Wipro Limited v. Beckman Coulter International S.A.* [131(2006)DLT681], the Hon'ble Delhi High Court categorically observed that non-solicitation clause does not amount to restrain on trade, business or profession and would not

be hit by Section 27 of Indian Contract Act, 1872, as being void.

Further, whether non-covenant clause is reasonable or not is depends upon the contents of impugned clause. The clause 11 is a non-solicitation clause in the present case and is not restraining the defendant forever to do competing business, trade etc. It merely restrained the defendant for a period of three years after leaving the plaintiff's company which seems to be just and reasonable.

In *Superintendence Company of India (p) Ltd. v. Krishan Murgai* {(1981), 2 SC 246}, the Hon'ble Supreme Court of India observed that “ A contract in restrained of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses. A contract of this class is prima facie void, but is becomes binding upon proof that the restriction is justifiable in the circumstances as being reasonable from the point of view of the parties themselves and also of the community.”

Therefore, after giving my careful thought to the submissions of Id counsel for the parties and perusal of the material on record, I find that the plaintiff's company has a prima facie case in his favour and irreparable loss would be caused if the defendant is not restrained to do competent business, balance of convenience is also lies in favour of the plaintiff and the plaintiff would not be compensated in terms of money if relief of temporary injunction is not granted in favour of the plaintiff and against the defendant.

Hence, the defendant is restrained from contacting or soliciting any clients/customers of the plaintiff which he had contacted while in the service tenure of the plaintiff company for

the period of three consecutive english calender year following leaving of the services of its employees in the present suit or till further orders, whichever is earlier.

Put up for arguments on application u/o 7 Rule 11 CPC as well as for framing of issues on **11.05.2022**.

It is stated by the ld counsel for the defendant that reply to the aforesaid application has not been filed till date. On perusal of the case file, the reply to the aforesaid application as well as another application u/o 11 Rule 14 r/w section 151 CPC are already filed by the ld counsel for the plaintiff along with the judgments. Same are already on record. Replication is also on record.

Put up on date already fixed.

(Surender Mohit Singh)
ADJ-04, North, Rohini Courts,
Delhi/12.01.2022