Superintendence Company Of India (P) ... vs Sh. Krishan Murgai on 21 March, 1980

Equivalent citations: AIR1980SC1717, [1980(41)FLR137], (1981)ILLJ121SC, (1981)2SCC246, [1980]3SCR1278

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Bench: A.P. Sen, N.L. Untwalia, V.D. Tulzapurkar

JUDGMENT

V.D. Tulzapurkar, J.

1. This appeal at the instance of the appellant company (original plaintiff) is directed against an interlocutory order passed by the High Court in F.A.O. (O.S.) 86 of 1979 refusing to grant temporary injunction in a suit which is still pending. Principally it raises two substantial questions: (a) whether a post-service restrictive covenant in restraint of trade as contained in Clause (10) of the service agreement between the parties is void Under Section 27 of the Indian Contract Act? and (b) whether the said restrictive covenant, assuming it to be valid, is on its terms enforceable at the instance of the appellant company against the respondent ?

2. On March 21, 1980 we dismissed the appeal at the conclusion pf the hearing and it was stated that our reasons will follow. We now proceed to give our reasons for the dismissal.

3. Briefly stated the facts are these. The appellant company carries on business as valuers and surveyors, undertaking inspection of quality, weightment, analysis, sampling of merchandise and commodities, cargoes, industrial products, machinery, textiles, etc. It has established a reputation and goodwill in its business by developing its own techniques for quality testing and control and possesses trade secrets in the form of these techniques and clientele. It has its head office at Calcutta and a branch at New Delhi and employs various persons as managers and in other capacities in Calcutta, New Delhi and other places. On March 27, 1971 the respondent was employed by the appellant company as the Branch Manager of its New Delhi office on terms and conditions contained in the letter of appointment issued to him on the same date. Clause (10) of the terms and conditions of employment placed the respondent under a post-service restraint that he shall not serve any other competitive firm nor carry on business on his own in similar line as that of the appellant company for two years at the place of his last posting. Since it is vital we set out the said clause which ran thus:-

> 10. That you will not be permitted to join any firm of our competitors or run a

business of your own in similar lines directly and/or indirectly, for a period of two years at the place of your last posting after you leave the company.

4. On November 24, 1978 the appellant company terminated the respondent's services with effect from December 27, 1978. Thereafter the respondent started his own business under the name and style of "Superintendence and Surveillance Inspectorate of India" at B-22, South Extension, New Delhi on lines identical with or substantially similar to that of the appellant company. On April 19, 1979 the appellant company brought a suit in the Delhi High Court on its Original Side claiming Rs. 55,000/- as damages on account of the breach of the aforesaid negative covenant contained in Clause (10) and, for permanent injunction restraining the respondent by himself, his servants, agents or otherwise, from carrying on the said business or any other business on lines similar to that of the appellant company or associating or representing any competitors of the appellant company before the expiry of two years from December 27, 1978. After filing the suit the appellant company sought an interim injunction by way of enforcing the aforesaid negative covenant and a Singly Judges of the Delhi High Court initially granted an ad interim injunction on April 29, 1979 which was confirmed by him on May 25, 1979 after hearing the respondent. The learned Single Judge took the view that the negative covenant, being in partial restraint of trade, was reasonable inasmuch as it was limited both in point of time (two years) as well as the area of operation (New Delhi which was his last posting) and, therefore, was not hit by Section 27 of the Contract Act. He also took the view that the negative covenant was enforceable as the expression "leave" in Clause (10) was not confined to voluntarily leaving of the service by the respondent but was wide enough to include termination of his services by the appellant company. On appeal by the respondent, a Division Bench of the High Court reversed the order of the learned Single Judge on both the points and that is how the two questions indicated at the commencement of this judgment arise for our determination in this appeal.

5. Since in our view the appeal is capable of being disposed of on the second point we think it unnecessary to decide or express our opinion on the first question which was hotly and ably debated at the bar by counsel on either side but we will indicate briefly the rival lines on which the arguments proceeded. On the one hand counsel for the respondent tried to support the view of the Division Bench by pointing out that in India the law on the subject was codified by statute which was exhaustive and on the topic of agreements in restraint of trade and exceptions in that behalf the Indian Courts cannot invoke or derive assistance from the English Common Law and the exceptions) developed thereto by English decisions from time to time, that Section 27 of the Indian Contract Act was absolute in terms in that it did not make any distinction between partial or general restraints and that unless a case was covered by the Exception provided thereunder every restraint of trade, whether partial or general would be void under that Section. In this behalf reliance was placed on a number of decisions of various High Courts commencing from the celebrated decision, of Sir Richard Couch, C.J. in Madhub Chunder v. Rajcoomar Doss [1874] 14 Beng. L.R. 76 where Section 27 was interpreted in the aforesaid manner. Counsel urged that a distinction between a negative covenant operative during the period of employment and one that is operative during post-service period has been well recognised and that all post-service restrictive covenants were prima facie void, that the only exceptions were those given in the statute and that the exceptions developed by the English case law could not be invoked here. According to him the test of

reasonableness had been wrongly adopted by the learned Single Judge. He pointed out that accepting the interpretation placed on Section 27 by High Courts even the Law Commission has recommended a change in that, by suitable legislation. He further pointed out that the Division Bench has gone a step further and after considering whether the instant case would fall within those exceptions developed by English case Law has come to a negative conclusion against the appellant company.

6. On the other hand counsel for the appellant company contended that the interpretation of Section 27 as given by various High Courts including Sir Richard Couch's decision in Madhub Chunder's case (supra) has not been so far considered by this Court and it requires to be examined and considered by this Court especially in view of certain observations made by this Court in Niranjan Shankar Golikari's case which warrant such reconsideration. Though it was a easel dealing with negative covenant that was operative during the employment period counsel pointed out that entire case law Indian as well as English was discussed and this Court at page 389 of the report observed thus:

> The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract.
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> According to counsel the very fact that this Court has observed that considerations qua post-service restrictions are different from those that are to be considered in cases of restrictions during the employment suggests that perhaps a rigorous test of reasonableness may have to be adopted in the former cases but there would be cases where post-service restrictions, if reasonable, even after applying the rigorous tests may be valid as not falling Under Section 27 of the Act, it was, therefore, not correct to say that all post-service restrictions were void. His precise contention was that even a post-service restrictive covenant, if it was reasonable, qualified or limited in operation both in point of time and area, as was the case here, 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 and, therefore, valid. As regards the argument based on codified exception, counsel pointed out, that even the case of a restrictive covenant operative during the period of employment between master and servant had not been provided for as an exception below Section 27 but even so such restrictive covenant was never regarded us amounting to restraint of trade Under Section 27 mainly because it was always regarded as reasonable and necessary to protect the employer's interests, which shows that the statutory exceptions were not exhaustive. Lastly, counsel urged that the Law Commission's recommendation on which reliance was placed by respondent's counsel would be inconsequential because it proceeds on the acceptance of the interpretation placed on Section 27 by various High Courts and he is seeking to) get that interpretation examined and considered by this Court.

7. However, as we have said above, we do not propose to discuss or decide the aforesaid question inasmuch as this appeal can be disposed of by deciding the second question that has been raised before us and for that purpose we shall proceed on the assumption that the negative covenant contained in Clause (10) of the service agreement is valid and not hit by Section 27 of the Contract Act. The question is whether the said restrictive covenant is on its terms enforceable against the respondent at the instance of the appellant company.

8. We have already quoted the restrictive covenant contained in Clause (10). In terms the clause provides that the restriction contained therein will come into operation "after you (respondent) leave the company". Admittedly in the instant case the respondent had not on his own left the company but his services were terminated by the appellant company by a notice dated November 24, 1978 with effect from December 27, 1978. The question is whether the phrase "after you leave the company" means the leaving of service by the respondent voluntarily or would include even the case of termination of his services by the appellant company. The Division Bench of the High Court has taken the view that the word "leave" does not include termination of service by the employer. Counsel for the appellant company contended that the word "leave" occurring in the phrase "after you leave the company" would be wide enough to include all cases of cessation of service whether brought about by voluntary quitting on the part of the employee or termination of his services by the employer and in that behalf reliance was placed upon an English decision in Murray v. Clese 32 Law Times Old Series 89 where it was held that an agreement restricting competition with an employer "after leaving his service" would be operative on the termination, however accomplished, of the service, e.g. by a dismissal without notice. (vide : Stroud's Judicial Dictionery, 4th Edn., Vol. 3, page 1508, Item 13, under the word 'leaving').

9. In our view, the word "leave" has various shades of meaning depending upon the context or intent with which it is used. According to the plain grammatical meaning that word in relation to an employee, would normally be construed as meaning voluntary leaving of the service by him and would not include a case where he is discharged or dismissed or his services are terminated by his employer. Ordinarily the word "leave" appears to connote voluntary action. In Words & Phrases Permanent Edition Vol. 24 at page 499 the following statement of law based on an American decision occurs:

> An application for the employment of a street car conductor provided that in the event of his leaving the services for any reasons whatever within six months, the money paid to him for work under instruction while on trial should be deducted from such moneys as should be due from the company on the date of his, "leaving". Held, that the word "leaving" meant to quit or depart, implying volition on the part of the person leaving, and limited the forfeiture of the instruction wages to a case where plaintiff left defendant's employ of his own volition, nor was such instruction effected by the words, "for any reason whatsoever." Muesling v. International Ry. Co., 147 N.Y.S. 177, 178, 85 Misc. 309.
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> In our view having regard to the context in which the expression "leave" occurs in Clause (10) of the service agreement and reading it alongwith all the other terms of

> employment it seems to us clear that in the instant case 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, and since here the respondent's services were terminated by the appellant company the restrictive covenant contained in Clause (10) would be inapplicable and, therefore, not enforceable against the respondent at the instance of the appellant company. Counsel for the appellant company urged that our construction would lead to putting a premium upon an dishonest employee who by his own misdemeanour and misbehavior may invite termination of his services. All that we can say is that the appellant company should have taken care td use appropriate language while incorporating such restrictive covenant so as to include every case of cessation of employment arising from any reason whatsoever and not used the expression "leave," which normally is synonymous to the expression "quit" and indicates voluntary act on the part of the employee.

10. In the result the appeal is dismissed with no order as to costs.

A.P. Sen, J.

11. I regret that my learned brethren propose to express no opinion on the question on which, in my view, the appeal turns. The question is whether a negative covenant which restricts the right of the employee, after the conclusion of the term of service, or the termination of the employment for other reasons, to engage in any business similar to or competitive with that of the employer, is in restraint of trade and, therefore, void Under Section 27 of the Contract Act, 1972. I have no doubt in my mind that the appeal cannot be decided without deciding this question.

12. This appeal on certificate from a judgment of the Delhi High court, relates to a covenant in restraint of trade contained in an agreement between the appellant company and the respondent in circumstances which we will explain. The appellant company carries on the business of valuer, surveyor, inspection of quality, weightment, analysis, sampling of merchandise and commodities, cargoes, industrial products, machinery, textiles, etc. It has its head office at Calcutta with a branch at New Delhi. On or about March 27,1971, the respondent who is a surveyor and valuer was employed by the appellant as the Branch Manager of its New Delhi office. One of the terms and conditions of the employment was that the respondent would not serve elsewhere or enter into any business for a period of 2 years after leaving the service. The term is contained in Clause 10 of the agreement which reads :

> 10. That you will not be permitted to join any firm of our competitors or run a business of your own in similarity as directly and/or indirectly, for a period of two years at the place of your last posting after you leave the Company.

13. The appellant terminated the services of the respondent by its letter dated December 27, 1978. Thereafter the respondent started a business of his own under the name and style of "Superintendence and Surveillance Inspectorate of India" at E-22, South Extension, New Delhi on

lines identical with and substantially similar to that of the appellant. On April 19, 1979, the, appellant commenced a suit in the Delhi High Court in its original side claiming Rs. 55,000/- as damages on account of breach of the covenant and for permanent injunction to restrain the respondent by himself, his servants or agents or otherwise from carrying on the said business or any other business on lines similar to that of the appellant or associating or representing any Competitors of the appellant before the expiry of two years from December 27, 1978.

14. A Single Judge of the Delhi High Court adopting the test of reasonableness, held that Under Section 27 of the Contract Act to determine whether the agreement is void, one has to see whether the restraint is reasonable; and if so the negative covenent can be enforced as enjoined by illustrations (c) and (d) to Section 57 of the specific Relief Act, 1963. He held that Clause 10 of the agreement is not unreasonable, because the area of restraint is restricted to New Delhi, the place of last posting of the respondent and is not unlimited, being limited to a period of two years from the date he left the service. He went on to say that negative covenant in a contract of employment has always been enforced, if it is in the protection of the employer, and referred to Niranjan Shankar Golikari v. Century Spinning and Mfg. Co. Ltd. . He further held that the negative covenant was operative as the word "leave" in Clause 10 was wide enough to include termination of service. He, accordingly, by his order dated May 25, 1979, made the earlier ex parte ad interim injunction granted by him on April 24, 1979 absolute but restricted its operation to New Delhi and for the period ending 27th December, 1980 or till the decision of suit, whichever is earlier.

15. On appeal by the respondent, a Division Bench of the High Court reversed the order of the learned Single Judge holding that negative covenant operating beyond the period of employment was in restraint of trade and, therefore, void Under Section 27 of the Contract Act

16. Four questions arise in this appeal 1. Whether Clause 10 of the agreement was in restraint of trade; and if so, being partial was valid and enforceable being reasonable? 2. Whether according to the test of reasonableness laid down by Lord Macnaghten in Nordenfelt v. Hakim Nordenfelt Guns & Ammunition Co. Ltd. L.R. [1894] A.C. 535 an injunction to enforce the negative covenent can be granted under illustrations (c) and (d) to Section 57 of the Specific Relief Act, 1963, despite Section 27 of the Contract Act, 1872 ? 3. Whether, and to what extent, the provisions of Section 27 of the Contract Act are subject to the common law doctrine of restraint of trade ? 4. Whether the word "leave" in Clause 10 of the agreement between the parties makes the negative covenant operative only when a servant voluntarily leaves his employment, or, applies even in a case of termination of his services by an order of dismissal or termination of his services?

17. Agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are not void Under Section 27 of the Contract Act, on the ground that they are in restraint of trade. Such agreements are enforceable. The reason is obvious. The doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end. While during the period of employment, the Courts undoubtedly would not grant any specific performance of a contract of personal service, nevertheless; Section 57 of the Specific Relief Act clearly provides for the grant of an injunction to restrain the breach of such a covenant as it is not in restraint of, but in furtherance

of trade.

18. In Niranjan Shankar Golikari's case, supra, this Court drew a distinction between a restriction in a contract of employment which is operative during the period of employment and one which is to operate after the termination of employment. After referring to certain English cases where such distinction had been drawn, the Court observed:

> A similar distinction has also been drawn by the Courts in India and a restraint by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act.

19. It referred to with approval the decision in The Brahmaputra Tea Co. Ltd. v. Scarth, I.L.R. (1885) 11 Cal, 545, where the condition under which the covenantee was partially restrained from competing after the term of his engagement with his former employer, was held to be bad but the condition by which he bound himself during the term of his agreement, not, directly or indirectly, to compete with his employer was held good, and observed:

> At page 550 of the report the Court observed that an agreement of service by which a person binds himself during the term of the agreement not to take service with any one else, or directly, or indirectly take part in, promote or did any business in direct competition with that of his employer was not hit by Section 27.
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> The Court further observed:
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> An agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force.

20. The Court also approved of the several Indian decisions where an agreement of service contained both a positive covenant viz, that the employee shall devote his whole-time attention to the service of the employers and also a negative covenant preventing the employee from working elsewhere during the term of the agreement, and the High Courts have enforced such a negative covenant during the term of employment having regard to illustrations (c) and (d) to Section 57 of the Specific Relief Act which, in terms, recognised such contracts and the existence of negative covenants therein, and stated that the contention that the existence of such a negative covenant in a service agreement made the agreement void on the ground that it was in restraint of trade and contrary to Section 27 of the Contract Act had no validity.

21. In conclusion, the Court observed:

> The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the

termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall Under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided.

(Emphasis supplied)

22. The decision in Niranjan Shankar Golikari's case supra is therefore of little assistance to the appellant. It is not seeking to enforce the negative covenant during the term of employment of the respondent but after the termination of his services. The restriction contained in Clause 10 of the agreement is obviously in restraint of trade and, therefore, illegal and unenforceable Under Section 27 of the Contract Act.

23. In support of the appeal, learned Counsel for the appellant has, in substance, advanced a two-fold contention. It is submitted, firstly, upon the common law doctrine of restraint of trade that though the covenant is in restraint of trade, it satisfies the 'test of reasonableness', as laid down by Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns Sr. Ammunition Co Ltd., supra, and is, therefore, enforceable despite Section 27 of the Contract Act, 1872, and, secondly, that the word "leave" in Clause 10 of the agreement is wide enough to make the covenant operative even on the termination of employment i.e. it includes the case of dismissal. I am afraid, the contentions are wholly devoid of substance.

24. While the Contract Act, 1872, does not profess to be a complete code dealing with the law relating to contracts, we emphasise that to the extent the Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English Law de hors the statutory provision, unless the statute is such that it cannot be understood without the aid of the English Law. The provisions of Section 27 of the Act were lifted from Hom. David D. Field's Draft Code for New York based upon the old English doctrine of 'restraint of trade, as prevailing in ancient times. When a rule of English law receives statutory recognition by the Indian Legislature, it is the language of the Act which determines the scope, uninfluenced by the manner in which the anologous provision comes to be construed narrowly, or, otherwise modified, in order to bring the construction within the scope and limitations of the rule governing the English' doctrine of restraint of trade.

25. It has often been pointed out by the Privy Council and this Court that where there is positive enactment of Indian Legislature the proper course is to examine; the language of the statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or the English law upon which it may be founded. In Satyavrata Ghosh v. Kurmee Ram Bangor [1954] S.C.R. 310, Mukherjee J. while dealing with the doctrine of frustration of contract

observed that the Courts in India are to be strictly governed by the provisions of Section 56 of the Contract Act and not to be influenced by the prevailing concepts of the English Law, as it has passed through various stages of development since the enactment of the Contract Act and the principles enunciated in the various decided cases are not easy to reconcile. What he says of the doctrine of frustration Under Section 56 of the Contract Act is equally true of the doctrine of restraint of trade Under Section 27 of the Act.

26. Now, so far as the present case is concerned, the law is to be found; in Section 27 of the Contract Act 1872, which 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.

Exception : 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 other 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.

The Section is general in terms, and declares all agreements in restraint void pro tanto, except in the case specified in the exception.

27. The question whether an agreement is void Under Section 27 must be decided upon the wording of that Section. There is nothing in the wording of Section 27 to suggest that the principle stated therein does not apply when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the fact fall within the exception to the Section.

28. 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. This view of the Section was expressed by Sir Richard Couch C.J. in celebrated judgment in Madkub Chunder v. Rajcoomar Doss [1874] Beng L.R. 76 at pp. 85-86 laying down that whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade, it was void.

29. The observations of Sir Richard Couch, C.J., in Madkub Chunder v. Rajcoomar Doss, supra, which have become the locus classicus were these :

> The words 'restraint from exercising a lawful profession, trade or business' do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary." Moreover, "in the following Section (Section 28) the legislative authority when it intends to speak of an absolute restraint and not a partial one, has

> introduced the word 'absolutely'... The use of this word in Section 28 supports the view that in Section 27 it was intended to prevent not merely a total restraint from carrying on trade or business but a partial one. 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 them the meaning which they appear plainly to bear.

30. The test laid down by Sir Richard Couch, C.J. in Madhub Chunder v. Rajcoomar Doss, supra, has stood the test of time and has invariably been followed by all the High Courts in India.

31. The agreement in question is not a 'goodwill of business' type of contract and, therefore, does not fall within the exception. If the agreement on the part of the respondent puts aj restraint even though partial, it was void, and, therefore, the contract must be treated as one which cannot be enforced.

32. It is, however, argued that the test of the validity of a restraint, whether general or partial, is dependent on its reasonableness. It is pointed out that the distinction drawn by Lord Macclesfield in Mitchel v. Reynolds (1711) 1 PMas 161 between general and partial restraint, was removed by the House of Lords in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. (supra). According to the judgment of Lord Macnaghten in Nordenfelts case, the validity in either case was reasonableness with reference to particular circumstances. It is urged that all covenants in restraint of trade partial as well as general are prima facie void and they cannot be enforced, according to the test laid down by Lord Macnaghten in Nordenfelts case and accepted by the House of Lords in Mason v. Provident Clothing and Supply Co. Ltd., L.R. [1930] A.C. 724, unless the test of reasonableness is testified. It is also urged that while an employer is not entitled to protect himself against competition per se on the part of an employee after the employment has ceased, he is entitled to protection of his proprietary interest viz. his trade secrets, if any, and a business connection.

33. The test of reasonableness which now governs the common law doctrine of restraint of trade has been stated in Chitty on Contracts 23rd Edn., Vol. I. p. 867 :

> While all restraint of trade to which, the doctrine applied are prima facie unenforceable, all, whether partial or total, are enforceable, if reasonable.

34. A contract in restraint 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.

35. In Elizabethan days, all agreements in restraint of trade, whether general or restrictive to a particular area, were held to be bad; but a distinction came to be taken between covenant in general restraint of trade, and those where the restraints were only partial.

36. According to the test laid down by Parker, C.J. (later Earl of Macclesfield) in Mitchel v. Reynolds, supra, the general restraint was one which covered an indefinite area, and was, as a rule held bad while a partial restraint was valid if reasonable, the onus being upon the covenanter to show it to be unreasonable.

37. There is no higher authority upon this subject than Tindal, C.J. who had to do much with moulding of the law on this subject and bringing it into harmony with the needs of the changing times. In Mornen v. Graves [1831] 7 Bing. 735, Tindal, C.J. said :

> The law upon this subject (i.e. restraint of trade) has been laid down with so much authority and precision by Parker, C.J., in giving the judgment of the Court of B.R. (King's Bench) in the case of Mitchel v. Reynolds which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now the rule laid down by the court in that case is 'that voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration, but particular restraints of trading, if made upon a good and adequate consideration, so as to be a proper and useful contract, that is, so as it is a reasonable restraint only, are good.
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> Later on he goes on to observe :
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> Parker, C.J., says, : a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good, which are rather instances and examples than limits of the application of the rule, which can only be at least what is a reasonable restraint with reference to the particular cases.
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> By decrees, the common law doctrine of restraint of trade has been progressively expanded and the legal principles applied and developed so as to suit the exigencies of the times, with the growth of trade and commerce, rapid industrialisation and improved means of communicatioa.

38. In Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd., (supra), Lord Macnaghton held that the only true test in all cases, whether of partial or general restraint, was the test proposed by Tindal, C.J. : What is a reasonable restraint with reference to a particular case? Thereby he denied that general and partial restraints fall into distinct categories. A partial restraint in his opinion was not prima facie valid. It was on the same footing as a general restraint i.e. prima facie void, but valid, if reasonable.

39. In Mason v. Provident Clothing and Supply Co. Ltd., supra, the House of Lords held that Lord Macnaghton's proposition was a correct statement of the modern law. The House of Lords in this case developed the law in two respects : First, it held that all covenants in restraint of trade, partial as well as general, prima facie void and that they cannot be enforced unless the test of reasonableness as propounded by Lord Macnaghton is satisfied. Secondly, it made a sharp

distinction, stressed as long ago as 1869 by James, L.J., in Leather Cloth Co. v. Lorsont [1869] L.R. 9 Eq. 345, between contracts of service and contracts for the sale of a business.

40. In Herbert Morris Ltd. v. Saxelby, supra, the House of Lords held that a master cannot protect himself from competition by an ex-servant or his new employer. He cannot stipulate freedom from competition. But he can protect his trade secrets or his confidential information.

41. The 'test of reasonableness' evolved in common law after the decision of Lord Macnaghton, in Nordenfelt's case, supra, and re-affirmed by the two decisions in Mason v. Provident Clothing & Supply Co. Ltd. and Herbert Morris Ltd. v. Sexelby, supra, is that such covenants are prima facie, void and the onus rests upon the covenante to prove that the restraint is reasonable. In Nordenfelt's case. Lord Macnaghton also adverted to the distinction between covenant entered by the seller of the business on the one hand and the covenant by the employee on the other.

42. Framers of Section 833 of Field's Draft Code for New York designed some hundred and twenty-five years ago, expressed the intention to replace the common law stating that "contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent", and they proceeded to draft the provision with the deliberate intention of narrowing the law. The provision was never applied to New York, but found its way into the) Contract Act, 1872 as Section 27. Several sections of the Field's Code were enacted in the Act. The Code was anathema to Sir Frederick Pollock who in his preface to Pollock and Mulla's Indian Contract Act, p. 5, described the Code as the evil genius of the Act, the worst principles of codification ever produced, and advocated that 'whenever the Act was revised everything taken from the Code should be struck out'.

43. It must be remembered that the test of reasonableness comes from the judgment of Lord Macnaghten in Nordenfelt's case in the House of Lords in 1894. In 1862, however, when the Field provision was drafted, it was not easy to foresee that the common law would shortly discard the distinction drawn by Lord Macclesfield in Mitchel v. Reynolds in 1711, between general and partial restraints. A general restraint was one which covered an indefinite area, and was, as a rule, held bad, while a partial restraint was valid, if reasonable, the onus being upon the covenantor to show it to be unreasonable. This was a mere rule of thumb, but was stubbornly adhered to by as great a common lawyer as Bowen, L.J., as late as 1893, when the Nordenfelt's case was in the Court of Appeals : L.R. [1893] 1 Ch. D. 630.

44. Be that as it may, in Field's draft, as early as 1862, are clearly expressed two principles that govern the modern common law today, but were unknown to it at that stage, and were not unequivocally stated until 1916, first that restrictive covenants are prima facie invalid, and secondly between master and servant covenants on the one hand and vendor and purchaser covenants on the other there is a great gulf fixed. The onus of proving reasonableness under Exception 1, was placed on the covenantee, while the common law at the time placed it upon the covenanter to show unreasonableness.

45. Sir Frederick Pollock's criticism Pollock & Milla's India Contract and Specific Relief Act, 9th Ed., at pp. 271, 274 and 292 of the substantive part of Section 27 was that it laid down too rigid a rule of

invalidity, not merely for general but also for partial restraints, and of the exceptions that they were too narrow, being based upon an idea of the common law, now outmoded, that a restraint must be confined within local limits. His views on the main body of the section may be illustrated by two quotations :

> The law of India...is tied down by the language of the section to the principle, now exploded in England, of a hard and fast rule qualified by strictly limited exceptions....
>
> To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and general.

46. Two passages from his comments on Exception 1 may also be cited :

> The extension of modern commerce and means of communication has displaced the old doctrine that the operation of agreements of this kind must be confined within a definite neighbourhood. But the Anglo Indian law has stereotyped that doctrine in a narrower form than even the old authorities would justify.
>
> Meanwhile the common law has, on the contrary, been widening the old fixed rules as to limits of space have been broken down, and the court has only to consider in every case of a restrictive agreement whether the restriction is reasonable in reference to the interests of the parties concerned reasonable in reference to the interests of the public.

47. Reverting to the judgment of Sir Richard Couch in Madhub Chunder v. Rajcoomar Doss, supra, we find that that eminent Judge held that Section 27 of the Contract Act does away with the distinction observed in English cases following upon Mitchel v. Reynolds, supra, between partial and total restraints of trade, and makes all contracts falling within the terms of section, void, unless they fall within the exceptions. As already stated, that decision has always been followed.

48. In Shaikh Kalu v. Ram Saran Bhagat [1908] 13 C.W.N. 388 Mukherjee and Carnduff, JJ, referred to the history of the legislation on the subject and observed that the framers of the Act deliberately reproduced Section 833 of Field's Code with the full knowledge that the effect would be to lay down a rule much narrower than what was recognised at the time by the common law, while the rules of the common law, on the other hand, had since been considerably widened and developed, on entirely new lines. They held that the wider construction put upon Section 27 by Sir Richard Couch in Madhub Chundur v. Raj Coomar Doss, supra, is plainly justified by the language used, and that the selection had abolished the distinction between partial and total restraints of trade and said :

> The result is that the rule as embodied in Section 27 of the Indian Contract Act presents an almost startling dissimilarity to the most modern phase of the English rule on the subject.

They went on to observe:

> As observed, however, by Sir Richard Couch in the case to which we have referred, we have nothing to do with the policy of the law, specially as the Legislature has deliberately left the provision in Section 27, in its original form, though other provisions of the Contract Act have from time to time been amended. The interference would be almost irresistible under these circumstances, that the Courts have rightly ascertained the intention of the legislature. The silence of the Legislature in a case of this description is almost as emphatic as an express recognition of the construction which has been judicially put upon the statute during many years past. In this view of the matter, if we adopt the construction of Section 27 of the Indian Contract Act as first suggested by Sir Richard Couch and subsequently affirmed in the cases to which we have referred, a construction which is consistent with the plain language of the section, the agreement in this case must be pronounced to be void.
>
> (Emphasis supplied)

49. The Law Commission, in its Thirteenth Report, has recommended that Section 27 of the Act should be suitably amended to allow such restrictions and all contracts in restraint of trade, general or partial, as were reasonable, in the interest of the parties as well as of the public. That, however involves a question of policy and that is a matter for Parliament to decide. The duty of the Court is to interpret the section according to its plain language.

50. The question for consideration is whether, assuming that the wider construction placed by Sir Richard Couch in Madhub Chundur v. Raj Coomar Doss, supra, to have been the law, at the time of enactment, it has since become obsolete. A law does not cease to be operative because it is an anachronism or because it is antiquated or because the reason why it originally became the law, would be no reason for the introduction of such a law at the present time.

51. Neither the test of reasonableness nor the principle of that the restraint being partial was reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within Exception 1. We, therefore, feel that no useful purpose will be served in discussing the several English Decisions cited at the Bar.

52. Under Section 27 of the Contract Act, a service covenant extended beyond the termination of the service is void. Not a single Indian Decision has been brought to our notice where an injunction has been granted against an employee after the termination of his employment.

53. There remains the question whether the word 'leave' in Clause 10 of the agreement is wide enough to make the negative covenant operative on the termination of employment. We may for convenience of reference, reproduce that covenant below :-

> 10. that you shall not be permitted to join any firm of our competitors or run business of your own in similarity as directly and/or indirectly for a period of 2 years at the

place of your last posting after you leave the Company.

54. On a true construction of Clause 10 of the agreement, the negative covenant not to serve elsewhere or enter into a competitive business does not, in my view, arise when the employee does not leave the services but is dismissed from service. Wrongful dismissal is a repudiation of contract of service which relieved the employee of the restrictive covenant General Billposting v. Atkinson L.R. [1909] A.C. 116.

55. It is, however, urged that the word leave' must, in the context in which it appears, be construed to mean as operative on the termination of employment. Our attention is drawn to Stroud's Judicial Dictionary, 4th Edn., Vol. II, Pr. 13 p. 1503. There is reference to Mars v. Close, 32 L.T.O.S. 89. An agreement restricting competition with an employer "after leaving his service" was held to be operative on the termination, however, accomplished, of the service, e.g. by a dismissal without notice.

56. The word 'leave' has various shades of meaning depending upon the context or intent with which it is used. According to the plain meaning, the word 'leave' in relation to an employee, should be construed to mean where he "voluntarily" leaves i.e. of his own volition and does not include a case of dismissal. The word leave' appears to connect voluntary action, and is synonymous with the word 'quit'. It does not refer to the expulsion of an employee by the act of his employer without his consent and against his remonstrance. That is a meaning in consonance with justice and fair play. It is also the ordinary plain meaning of the word 'leave'. In shorter Oxford English Dictionary, 3rd Ed. Vol. X, page 1192, the following meaning is given-

to depart from; quit; relinquish, to quit the service of a person.

57. The drafting of a negative covenant in a contract of employment is often a matter of great difficulty. In the employment cases so far discussed, the issue has been as to the validity of the covenant operating after the end of the period of service. Restrictions on competition during that period are normally valid, and indeed may be implied by law by virtue of the servant's duty of fidelity. In such cases the restriction is generally reasonable, having regard to the interest of the employer, and does not cause any undue hardship to the employee, who will receive a wage or salary for the period in question. But if the covenant is to operate after the termination of services, or is too widely worded, the Court may refuse to enforce it.

58. It is well settled that employees covenants should be carefully scrutinised because there is inequality of bargaining power between the parties; indeed no bargaining power may occur because the employee is presented with a standard form of contract to accepts or reject. At the time of the agreement, the employee may have given little thought to the restriction because of his eagerness for a job; such contracts "tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression."

59. There exists a difference in the nature of the interest sought to be protected in the case of an employee and of a purchaser and, therefore, as a positive rule of law, the extent of restraint

permissible in the two types of case is different. The essential line of distinction is that the purchaser is entitled to protect himself against competition on the part of his vendor, while the employer is not entitled to protection against mere competition on the part of his servant. In addition thereto, a restrictive covenant ancillary to a contract of employment is likely to affect the employee's means or procuring a livelihood for himself and his family to a greater degree than that of a seller, who usually receive ample consideration for the sale of the goodwill of his business.

60. The distinction rests upon a substantial basis, since, in the former class of contracts we deal with the sale of commodities, and in the latter class with the performance of personal service-altogether different in substance; and the social and economic implications are vastly different.

61. The Courts, therefore, view with disfavour a restrictive covenant by an employee not to engage in a business similar to or competitive with that of the employer after the termination of his contract of employment.

62. The true rule of construction is that when a covenant or agreement is impeached on the ground that it is in restraint of trade, the duty of the Court is, first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties. If there is an ambiguity it must receive a narrower construction than the wider. In Mills v. Dunham, L.R. [1891] 1 Chapter 576, Kay, LJ. observed :

> If there is any ambiguity in a stipulation between employer and employee imposing a restriction on the latter, it ought to receive the narrower construction rather than the wider-the employed ought to have the benefit of the doubt. It would hot be following out that principle correctly to give the stipulation a wide construction so as to make it illegal and thus set the employed free from all restraint. It is also a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void.

63. The restraint may not be greater than necessary to protect the employer, nor unduly harsh and oppressive to the employee. I would, therefore, for my part, even if the word 'leave' contained in Clause 10 of the agreement is susceptible of another construction as being operative on termination, however, accomplished of the service e.g. by dismissal without notice, would, having regard to the provisions of Section 27 of the Contract Act, 1872, try to preserve the covenant in Clause 10 by giving to it a restrictive meaning, as implying volition i.e. where the employee resigns or voluntarily leaves the services. The restriction being too wide, and violative of Section 27 of the Contract Act, must be subjected to a narrower construction.

64. In the result, the appeal must fail and is dismissed but there shall be no order as to costs.