Pranshu Mishra vs Guru Gowri Krupa Technologies Private ... on 27 December, 2017

Author: B. Siva Sankara Rao

Bench: B. Siva Sankara Rao

HONBLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL MISCELLANEOUS APPEAL No.1247 of 2017

27-12-2017

Pranshu Mishra .Petitioner

Guru Gowri Krupa Technologies Private Ltd., Respondent

Counsel for Petitioner :Sri P. Kiran

Counsel for Respondents:Sri Vedula Srinivas appearing
for Sri T.Vijaykumar Reddy

<GIST:

>HEAD NOTE:

? CITATIONS:

1. AIR 1984 AP 110
2. AIR 1980 SC 1717
3. AIR 1954 SC 44
4. 1999 Law Suit (Del) 542
5. (2006) 4 SCC 227
6. (1995) 5 SCC 545
7. (1995) 3 SCC 257
8. (2002) 5 SCC 760
9. (1968) 1 WLR 157 : (1967) 3 All ER 822
10. AIR 2007 MADRAS 237
11. 2006 LawSuit (Del) 1027
12. AIR 1997 GUJARAT 177
13. 2016 LawSuit (Del) 4956
14. 2003 LawSuit (Bom) 30

HONBLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL MISCELLANEOUS APPEAL No.1247 of 2017

JUDGMENT :

The defendant in O.S.No.881 of 2017 on the file of the III Additional District Judge, Ranga Reddy District at L.B.Nagar, in the suit filed against him by the plaintiff entity for the relief of permanent prohibitory injunction restraining the defendant from working with the plaintiffs client organization i.e., Eastman Chemical India Private Limited on whose projects the defendant had worked in the 12 months, immediately preceding the defendant separated from the plaintiff entity, for a period of 12 months with effect from 13.05.2017 and for a direction to pay Rs.7,00,000/- towards compensation/special/punitive/liquidated damages, financial loss said to have been caused by the defendant to the plaintiff entity on account of breach of the conditions of the employment agreement, dated 17.04.2015, from the temporary injunction application in I.A.No.636 of 2017 filed by the plaintiff to grant temporary injunction restraining defendant from working with plaintiffs client organization supra or any other clients of plaintiffs company in whose projects the defendant had worked preceding the defendant separation from the plaintiff company that was on contest, by order, dated 27.10.2017, was allowed by the learned III Additional District Judge supra is impugned in the revision.

2. The averments in the temporary injunction application vis--vis plaint in a nut shell are that the plaintiff a registered company, the deponent of which is its director, vide authorization of board resolution, dated 26.06.2017, engaged in the business of providing wide range of Information Technology Solutions, support of services in different fields since 2004 to more than 100 companies across the world, having its registered office at Jubilee Hills, Hyderabad, that the defendant was an employee of the plaintiff company from 17.04.2015 to 12.05.2017 with employment I.D.No.912, that at the time of taking up the employment the defendant agreed to the terms of employment and duly signed vide employment agreement, dated 17.04.2015 and that the employment agreement contains clauses relating to place of work, notice period, duties, hours of work, non-solicitation, non-compete and survival. It is further averred that in order to adequately protect the interest of the plaintiff company from divulging such confidential information, the defendant agreed by non-solicitation clause 7 and non-compete clause 10 of the agreement, which reads thus:

> 7. Non-Solicitation & Non Compete Subsequent to your separation from the Company, for a period of twelve months you will not take up any job or assignment, either full time or otherwise, either directly or indirectly for/on behalf of any other organization working with the client of the Company, whose assignment you have worked on in the twelve months immediately preceding your separation from the Company.

You also hereby further agree that during the term of this agreement and for a period of 12 months immediately following the cessation/termination of your employment with the Company, you shall not directly or indirectly a. Solicit or attempt to solicit any of the Companys Employees to work for you or any other person, firm, company, partnership or corporation competitive with the Company;

b. Request or advise any person, firm, entity, or organization to not negotiate with, contract with or engage in business with the Company, or to withdraw, curtail or cancel its business with the

Company.

c. Provide labour or services to any of he client with whom you had contact or became aware of while working for the Company that are similar in nature to any labour or services provided to such client by you during your employment with the Company; or d. Own any interest (except as a shareholder in a publicly traded corporation) in any corporation, firm, partnership, business or enterprise that competes with the Company.

10. Survival:

> Notwithstanding anything contained in this Agreement, upon termination of this Agreement, for whatsoever reason, Clause 6, 7 and 8 shall survive even after termination of this Agreement and you here by agree to abide yourself all the time with the Clauses mentioned in this Clause.
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> It is further averred that one of the plaintiffs client, by name, Eastern Chemical Company (for short, ECC) with whom the plaintiff entered into a Consulting and Professional Services Agreement, dated 23.04.2015, to provide its services and as per Clause 1.13 of the said service agreement with ECC, it means and includes of its affiliated entities, the affiliated entities defined under Clause 1.3 of the Service Agreement to mean of entities controlling or controlled by, or under common control with Eastman including, but not limited to employees and agents. The official website of the Eastman displayed all its worldwide locations including Hyderabad office, known as, Eastman Chemical India Private Limited and USA office location ECC and thereby it is deemed that Eastman Chemical India Private Limited is also the client of plaintiff/GGK Tech. It is averred that the defendant was assigned in the course of employment to handle the project/support/BI Bravo Team, which belongs to the plaintiff and same is evident from the invoices raised by the plaintiff company on the client, against the services rendered by the defendant during his employment and while so working on the project, the defendant had access to a wide range of technical, confidential and proprietary information belonging to plaintiff company and client companies of plaintiff including, inter alia, Eastman Chemical India Private Limited, which is a Indian entity of the ECC. The plaintiff has made available all technical, confidential information and proprietary information to the defendant out of utmost faith and also firm belief that the same would be utilized for the benefit of the plaintiff company since the defendant worked with plaintiff for two years, he has acquainted with all technical, confidential and proprietary information belongs to the plaintiff relating to the aforesaid project.

In contemplation of acquirement of such specialized skills by the defendant during course of employment with plaintiff company and also with the object that the defendant should refrain from using such confidential information to the detriment of plaintiff interest, both agreed under Clause 7 of the Employment Agreement referred supra. The defendant got promoted as Senior Software Engineer in February, 2017, and he later submitted his resignation to the employment with plaintiff

vide letter, dated 17.03.2017, which plaintiff accepted and issued acceptance of resignation vide letter, dated 12.05.2017, to the defendant by reiterating the employment agreement terms and defendant accepted by signing the acceptance of resignation letter which reads You agree to accept that after the termination of your employment with GGK, you will not own, manage, participate in, be employed by, or connected in any way with clients of GGK.

3. It is further averred that despite the above, in June 2017, the defendant taken up the employment with the plaintiffs clients organization i.e., Eastman Chemical India Private Limited, which is an affiliated entity of Eastman US on whose project the defendant worked during his tenure with plaintiff company, which is evident on various information channels of Eastman India that defendant joined as System Analyst in the Corporate division of Eastman India from 05.06.2017 as a regular employee and the same is also evident from emal ID Pra.Mishra@eastman.com. The action of the defendant is breach of the employment agreement, from which the plaintiff is suffering from financially and also reputation and intellectual property loss, business loss and anticipating the manpower loss. The Indian Contract Act does not prohibit partial restraint, which is reasonable to both employer and employee and in this case, the negative covenant operating is only to restrain him from taking up any employment with plaintiff company clients and not anyone else with whom he has worked in the preceding 12 months of his termination/separation and the defendant in blatant disregard for law and agreement terms, joined with plaintiffs client after he left plaintiffs company. For the legal notice issued by the plaintiff to the defendant to determine from working with plaintiffs clients, defendant replied that he is unaware of any such agreement and sought copies of the agreement and the plaintiff shared the documents to the defendant, the defendant issued reply to the rejoinder stating that he is in the process of examining the agreement and respond within 30 days and further reply letter of him, dated 09.08.2017 confirming that he is working with Eastman India and stating that Eastman Chemical India Private Limited is not a client of the plaintiff company and it is a violation and the breach of the contractual obligations with causes loss to the plaintiff and thereby constrained to file suit for injunction and the plaintiff got therefrom a prima facie case and suffer irreparable loss, unless the defendant is restrained by injunction from working with the plaintiffs client organization i.e., Eastman Chemical India Private Limited or any other clients of plaintiff company on whose projects the defendant had worked only 12 months immediately preceding the defendant separation from the plaintiff company as sought for.

4. In the counter affidavit filed by the defendant before the lower Court, admitted about he was the ex employee of the plaintiff company and joined in that company on 16.04.2015 and provided his services till 12.05.2017 and as per the contractual agreement, the term prescribed under a contractual period is one year, however subject to the satisfaction of the plaintiff company, his services were extended for two consecutive years. The defendant specifically denied that he signed the employment agreement neither 16.04.2015 nor 17.04.2015, whereby after receiving the summons and the copy of enclosures along with the plaint and the petition, he found that the employment agreement was re-modified and the date is re-corrected as 17th April instead of 16th April and it is pertinent to mention that the copy of the employment agreement was never given to him in spite of being made requests to provide the document while he was employment. The defendant though not denied as to the execution of employment agreement on 16th April, 2015, but the contents therein are subsequently incorporated after he signed in the employment agreement,

particularly page No.4 not possessed his signature and clause 7 (Non-Solicitation) and clause 10 (non-compete) of the agreement are ultra virus to the employment agreement as even after relieving from the office of the employee, restraining the ex-employee from joining the company other than the plaintiff company is arbitrary, unjust and against the principle of natural law. The defendant further stated in the counter affidavit that he is a software employee and his work is related to the subject matter which is one and the common in almost most of the companies and once the employee relieves from the services, such employee is free to work with any other company, who appoints him on his caliber and on merits and in the same manner the defendant joined in Eastman Chemicals India Private Limited, Hyderabad, subsequent to the relieving from the plaintiff company on 12.05.2017. The plaintiff company neither provided the employment agreement to him nor the client companies list, the question of knowing about he rendering services to the client of Plaintiff Company, i.e., Eastman Chemicals India Private Limited, Hyderabad, does not arise. As per Section 27 of the Indian Contract Act, 1872, every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. It is further averred in the counter that the plaintiff has to establish that the plaintiff company is having any professional business with Eastman Chemicals India Private Limited and the Eastman Chemicals India Private Limited is controlling and affiliated entities including ECC as it is displayed all its worldwide locations including Hyderabad office i.e., Eastman Chemicals India Private Limited and USA office location i.e., ECC. Unless the plaintiff company is taken permission from the ECC, it cannot be said that Eastman Chemicals India Private Limited is affiliated company. It is averred that during course of employment the defendant had entrusted with several projects and completed the work as per the schedule and his services provided only to plaintiff company, but not for plaintiff clients organization and as the invoice raised by the plaintiff, he has to answer about the defendant worked with the project of plaintiffs client company. More over, the plaintiff company is very well aware as to the defendant leaving the company and joining in other software company, the plaintiff with an ill intention, forced to make him to settle their scores, filed the false claim. Once the defendant relieved from the plaintiff company, he is free to join any company and the plaintiff cannot curtail or restrain him from doing so and restraining him from its lawful employment with other company is void. The defendant made signatures on 16.04.2015, but the employment agreement annexed to the plaint shows on 17.04.2015, which shows the plaintiff company incorporated clauses 7, 10 and other clauses as per their whims and fancies only to harass him and the clause 7 of employment agreement is void ab initio, which is made for the selfish purpose of plaintiff company to gain monitory benefit and to make loss to the defendant and if a agreement executed between the parties, it shall be for the benefit of both parties to the agreement. But, here the plaintiff company compelled the defendant to sign on the agreement for its selfish motto to safeguard the personal and professional interest. It is further averred in the counter that unless and until the plaintiff company establishes that due to joining of defendant to the Eastman Chemicals India Private Limited, the plaintiff company is suffering financial, reputation and intellectual property loss, business loss and manpower loss and the plaintiff company has no cause of action to approach this court with a relief of restraining him from working with the plaintiffs client company.

5. The plaintiff company filed rejoinder to the counter filed by the defendant, where it is averred that the client of plaintiff company i.e., ECC at USA terminated the contract with the plaintiff with whose affiliate the defendant is currently working and due to the said termination, the plaintiff company

had incurred a permanent revenue loss of more than USD 2,00,000/-, which is purely attributable on the defendant and in view of the termination of the said contract by client of the plaintiff, the plaintiff is under a great apprehension that the defendant would influence the employees of the plaintiff and cause loss of manpower to the plaintiff by building a team under him to serve the client of the plaintiff. Further, the employees, who are working on projects of Eastman are under the apprehension that they may become jobless till plaintiff gets another project. If the defendant would not violate or breach of the terms of the employment agreement, the loss of revenue to the plaintiff and anticipated loss of jobs to its employees would not occur. Under these circumstances, the defendant be restrained from working with the client of the plaintiff company till next 12 months starting from the date of his separation from the plaintiff company, else the plaintiff company would suffer irreparable loss and injury, which cannot be compensated by any other means. The trial Court upon hearing and perusing the documents granted injunction in I.A.No.636 of 2017 against the defendant on 23.08.2017. As there was no fixed term prescribed in the employment agreement, the plaintiff company denied that the term of the contractual agreement is for one year and also denied the allegation of the employment agreement was modified subsequent to the signing of the said agreement by both the plaintiff and defendant and also denied about giving of copy of employment agreement to the defendant. In fact, the defendant signed on all the papers of the employment agreement and the allegation of page 4 of the employment agreement not containing the signature of the defendant concerned, it is some how due to some inadvertent reason the defendant may not be signed, however, the fact that all the other pages have been signed by the defendant and it would show that it was part of the employment agreement signed by the defendant and the paragraph numbers were in sequence as well. A copy of the employment agreement was provided to the defendant immediately after its execution for his record and the defendant has well aware of the terms of the said agreement since the time of his joining in plaintiff company. It is denied that the referred clauses are ultra virus to the employment agreement and is restraining the defendant from joining the company other than the plaintiff company. The main purpose of filing of the suit by the plaintiff is to stop the defendant from working with the client of the plaintiff company, with whom the defendant had worked in preceding 12 months of his separation from the plaintiff company, therefore, question of restraining him from working with the companies other than the plaintiff company does not arise and is frivolous and baseless. It is evident from the email dated 28.04.2017 sent by the defendant with regard to the work done of ECC during the month of April 2017 that Eastman Chemicals India Private Limited is an affiliate of ECC and is the client of the plaintiff company, therefore, the defendant cannot claim that he is unaware of the client from whom he is working with and as per Section 27 of the Indian Contract Act, allows for partial restrain. It is further averred in the rejoinder that the survival clause is applicable to the defendant even after the termination of the agreement. Further, the defendant agreed and accepted that after leaving the plaintiff company, he will not own, manage, participate in or be employed or connected in any way with the clients of GGK Tech, therefore he cannot claim now that he is unaware of such restriction. In fact, clause 1.3 of the Consulting and Professional Services Agreement executed between the plaintiff and ECC, wherein the term affiliated entities has been defined as all entitles controlling or controlled by or under common control with ECC including, but not limited to employees and agents. Further, clause 1.13 of the employment agreement shows the terms eastman is defined above shall also include its affiliated entitles. Therefore, it is crystal clear that Eastman Chemicals India Private Limited is an affiliated entity of ECC and thus the defendant be restrained from working

with the affiliated entity and the website of ECC/Eastman itself shows that Eastman Chemicals India Private Limited is part of the Eastman network worldwide. It is denied that there is any ill intention on the part of the plaintiff company against the defendant and also restrained him from joining any software company. To protect the interest of the plaintiff company, the plaintiff company approached this Court and the balance of convenience is also very much in favour of the plaintiff company and prayed to make the ad interim injunction absolute till the disposal of the suit.

6. From the above pleadings and after hearing, by the impugned order, dated 27.10.2017, the lower Court while granting the injunction observed that from the professional service agreement between plaintiff and Eastman (ECC), dated 23.04.2015, relied on by the plaintiff shows that the employer of the defendant is client of the plaintiff though defendant contends that he is not aware about those aspects and the contention of Eastman Chemical India Private Limited is no way concerned with ECC. The plaintiff filed Xerox copy of a document showing Eastman Chemical India Private Limited is the sister concern of ECC and thereby there is no substance in the said contention of the defendant. Further, what the plaintiff filed Eastman Company locations worldwide at Page 35, it is mentioned that ECC, Kingsport, TN, USA as a corporate headquarters with branch at Hyderabad, India, Service Centre and that substantiates the contention of the plaintiff and the resignation letter of the defendant, dated 17.03.2017, signed by him shows defendant agreed and accepted that after termination of his employment with plaintiff company will not own, manage, participate in or be employed by, or connected in any way with clients of plaintiff company and that the plaintiff and the defendant entered employment agreement, dated 17.04.2015, and worked till he resigned from the resignation accepted on 17.05.2017 not in dispute and he is working with ECC, Hyderabad, also not in dispute. It is therefrom to consider Section 27 of the Indian Contract Act will come to the rescue of parties are not concerned since from June 2016 also not in dispute he is in employment with Eastman Chemical India Private Limited. What the defendant contends of he got a fundamental right to employment, cannot be taken away by plaintiff and the Court also cannot pass any orders by preventing his such right of employment. It is observed therefrom that in N.V.Chowdhary v. Hindustan Steel Works Construction Limited , the Division Bench of the High Court observed that, grant of interim injunction is a discretionary and the considerations are prima facie case is sine qua non, also balance of convenience as to whether it could cause greater inconvenience to plaintiff if injunction is not granted than the inconvenience which defendant be put to if the injunction is granted and other aspect as to whether party seeking injunction could be adequately compensated by awarding damages and the defendant would be in a financial position to pay them and whether persons seeking temporary injunction would suffer irreparable loss. The Apex court in MANU/SC/0364/1967 in Niranjan Shankar Golikari v. The Century Spinning and Manufacturing Co.Ltd. observed that, there is nothing to prevent the Court from granting a limited injunction to the extent that is necessary to protect the employers interests where the negative stipulation is not void. There is also nothing to show that if the negative covenant is enforced the appellant would be driven to idleness or would be compelled to go back to the defendant company.

7. The grounds urged in the appeal therefrom are that the order of the lower Court is contrary to law, weight of evidence and probabilities of the case and the defendant had not violated any term under the contract of employment and the Eastman Chemical India Private Limited is not the client of the plaintiff company at the time of above contract or at any point of time and thus, the very

pre-condition to invoke this clause is not fulfilled by the plaintiff company and the terms of the employment agreement are uncertain and vague and the act of restraining the defendant with respect to future clients of the company is nothing but barring the current and future prospects of the defendant in a disguised manner and without his notice and consent. The trial Court erred in considering a material fact contained in a document, which was later withdrawn the plaintiff company and the said withdrawal of the affidavit is filed in view of challenging the correctness and illegality in filing such sort of documents and the impugned order suffers from prohibition laid down under Sections 91, 92 and 144 of the Indian Evidence Act and also against the bar created under Section 10 of the Indian Contract Act and Section 9 of the Transfer of Property Act and the trial Court failed to take into consideration of the principles laid under Sections 20 and 37 of the Specific Relief Act and also pre-requisite principles of prima facie case, balance of convenience and irreparable injury and also erred in not giving any reasons for the absence of signature of plaintiff in the relevant page of the alleged contract over which the prohibition of undertaking employment said to have agreed and thereby impugned order conclusions are perverse and hence to set aside by allowing the revision.

8. The counsel for the defendant/appellant reiterated the above contentions raised in the ground and also his counter before the trial Court. Whereas, the counsel for the plaintiff as respondent to the appeal supported the order of the lower court saying there is nothing for this Court to interfere by recording several contentions raised in the material placed before the lower Court in support of the order of the lower Court by referring to the expressions.

9. Heard both parties and perused the material on record.

10. Before going into further facts and law, it is necessary to reproduce Section 27 of the Indian Contract Act 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. 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 1.Saving of agreement 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.

No doubt, the very Section 27 of the Indian Contract Act deals with agreement in restraint of any kind exercising of a lawful profession, trade or business of any kind and did not deal with agreement in restraint of employment, for the same might not be in vogue by the time the Contract Act came into force in 1872. However, in the course of time, it is extended to employment also by judicial interpretations not in dispute by both sides. From this, mainly coming to the expression of the Apex Court in Niranjan Shankar Golikari supra of 1967 referring to Section 27 of the Indian Contract Act, it speaks particularly from last but one para that Courts have a wide discretion to enforce by injunction a negative covenant. Both the courts below have concurrently found that the apprehension of the respondent company that information regarding the special processes and the special machinery imparted to and acquired by the appellant during the period of training and

thereafter might be divulged was justified; that the information and knowledge disclosed to him during this period was different from the general knowledge and experience that he might have gained while in the service of the respondent company and that it was against his disclosing the former to the rival company which required protection.. It was argued, however, that the terms of clause 17, which provides in the event of the employee leaving, abandoning or resigning the service of the company in breach of the terms of the agreement before the expiry of the said period of five years he shall not directly or indirectly engage in or carry on of his own accord or in partnership with others the business at present being carried on by the company and he shall not serve in any capacity, whatsoever or be associated with any person, firm or company carrying on such business for the remainder of the said period and in addition pay to the company as liquidated damages 'an amount equal to the salaries the employee would have received during the period of six months thereafter and shall further reimburse to the company any amount that the company may have spent on the employee's training. It is argued that the terms of said clause 17 were too wide and that the court cannot sever the good from the bad and issue an injunction to the extent that was good. But the rule against severance applies to cases where the covenant is bad in law and it is in such cases that the court is precluded from severing the good from the bad. But 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. There is also nothing to show that if the negative covenant is enforced the appellant would be driven to idleness or would be compelled to go back to the respondent company. It may be that if he is not permitted to get himself employed in another similar employment, he might perhaps get a lesser remuneration than the one agreed to by Rajasthan Rayon. But that is no consideration against enforcing the covenant. The evidence is clear that the appellant has torn the agreement to pieces only because he was offered a higher remuneration. Obviously he cannot be heard to say that no injunction should be granted against him to enforce the negative covenant which is not opposed to public policy. The injunction issued against him is restricted as to time, the nature of employment and as to area and cannot therefore be said to be too wide or unreasonable or unnecessary for the protection of the interests of the respondent company.

11. In fact, the apex Court Three Judge Bench in Superintendence Company of India (P) Ltd v. Krishna Murgai referring to Section 57 of the Specific Relief Act, 1963 and Section 27 of the Indian Contract Act supra, in relation to the Post service negative covenant and its enforceability concerned, having referred Niranjan Shankar Golikari supra of the Two Judge Bench in 1967and the earlier judgments to it including Satyabrata Ghosh v. Mugnee Ram Bangor , by referring to the Single Judge expression of the Delhi High Court observation on facts in that matter of 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 and he left the service and negative covenant in a contract of employment is enforceable as held by the Apex Court in Niranjan Shankar Golikari. Whereas the Division Bench of the Delhi High Court in appeal against the learned Single Judge reversed the order holding the negative covenant operating beyond the period of employment was in restraint of trade and, therefore, void under Section 27 of the Contract Act. In dealing with the appeal by the Apex Court therefrom in Krishna Murgai supra (Three-Judge Bench of 1980) observed as follows:

> Four questions arise in that appeal as (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 covenant can be granted under illustrations
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> (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?

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.

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.
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> 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:
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> 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.

The Court further observed:

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.

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) 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.

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.
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> 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.

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.

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

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.

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.

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.
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> 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.
>
> 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.
>
> 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.

> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.

Later on he goes on to observe :

> 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.

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 industrialization and improved means of communication.

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.

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.

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.

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.

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'.
>
> 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.
>
> 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.
>
> 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.
>
> 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.

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.

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) 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.

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.

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.

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.

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 :-

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.

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.

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.

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.

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.

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."

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.

> 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.
>
> 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.
>
> 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.
>
> 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.

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

12. Among the Three-Judge Bench in Krishna Murgai supra, Justice Tulzapurkar delivered the judgment for himself and Justice N.L.Untwalia and Justice A.P.Sen delivered the independent judgment.

13. The restriction being too wide and violative of Section 27 of the Contract Act, must be subjected to a narrow construction and the appeal dismissed ultimately by the Apex Court Three-Judge Bench

supra confirming the expression of the Division Bench of Delhi High Court.

14. It is clearly held that neither the test of reasonableness nor the principle that the restraint being partial was reasonable is 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. 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. Thus, the expression of Niranjan Shankar golikari placed reliance by the trial Court and the plaintiff is not of avail after the Three-Judge Bench expression of the Apex court in Krishna Murgai supra is very clear of Niranjan Shankar Golikari is of little assistance to enforce the negative covenant after the termination of service and a service covenant under Section 27 of the Contract Act extended beyond the termination of the service is void.

15. In Division Bench expression of the Madras High Court in R.Babu and another v. TTK LIG Ltd in O.S.A.No.6 of 2003, dated 01.03.2004 observed at para 6 that in Krishan Murgai's case relating to the violation of Section 27 of the Indian Contract Act, his Lordship Justice A.P.Sen, dissented with the majority of the two other learned Judges of the Bench and as such, the same is not applicable is though argued, we do not agree with the said argument. A perusal of the said judgment discloses that no injunction can be granted against an employee after the termination of his employment, restraining him from carrying on a competitive trade. In fact, even though the above proposition of law was laid down by the learned Judge, finally all the three learned Judges held that the judgment of the Division Bench of the Delhi High Court was correct and dismissed the appeal. Hence, the judgment of His Lordship A.P.Sen, J., cannot be construed as a dissenting judgment. It is a case in which two learned Judges of the Bench did not deal with the question while the third learned Judge dealt with and also declared the law. The dictum of His Lordship A.P.Sen, J., is undoubtedly the law declared by the Supreme Court as contemplated by Article 141 of the Constitution of India and it shall be binding on all Courts within the territory of India and there is no escape from that conclusion. Apart from it, once the learned Three Judge Bench in Krishna Murgai with the ultimate concurrent opinion in accepting conclusion arrived by the Division Bench of Delhi High court while sitting in appeal against, came to the conclusion and even taken for arguments sake what the Honble Justice A.P.Sen in his separate judgment dealt on non-maintainability, as rightly pointed out by the Division Bench of Madras High Court in R. Babu supra, otherwise even when considered the earlier judgment of the Two Judge Bench in Niranjan Shankar Golikari, this High Court cannot sit against the wisdom of the Honble Apex Court Judges supra, but for to say that judgment is binding as also rightly concluded by the Madras High Court and even otherwise as referred supra.

16. The sum and substance of the law is a service covenant under Section 27 of the Contract Act extended beyond the termination of service is void. In Pepsi Foods Limited and others v. Bharat Coco- Cola Holdings Private Limited , the learned Single Judge of the Delhi High Court observed at paras 140 that in the service and employment of the plaintiffs, there is a negative covenant clause, restraining an employee from engaging or undertaking employment for 12 months after he has left the plaintiffs service, such post termination restraint from the well settled law under Indian law is in violation of Section 27 of the Contract Act and such contracts are unenforceable, void and against

the public policy. What is prohibited by law cannot be permitted by Courts injunction. The relevant paras of the judgment are reproduced for more clarity, as follows:

> 146. On consideration of the totality of the facts and circumstances of this case, prima facie, in my considered opinion, the plaintiffs are not entitled to injunction for the following reasons:
>
> (I) Admittedly in the service and employment contracts of the plaintiffs, there is a negative covenant clause, restraining an employee from engaging or undertaking employment for 12 months after he has left the plaintiffs' service. It is well settled that such post termination restraint, under Indian Law, is in violation of Section 27 of the Contract Act. Such contracts are unenforceable, void and against the public policy. What is prohibited by law cannot be permitted by Court's injunction. (II) All crucial, vital and important averments of the plaint have been specifically denied in the written statements. The defendants on the basis of documentary evidence have tried to discredit the veracity and truthfullness of the plaintiffs aver ments. Some of the averments of the plaintiffs which have been specifically denied in the written statements are recapitulated as under:-
>
> (II) (a) Mr. Jitender Nayyar : In this case the plaintiffs have alleged that the defendants have induced him to break his contract with Pepsi. In the written statements, this averment is pecifically denied and it is incorporated, that he left the plaintiffs' employment in December, 1995 and joined Ranbaxy aboratory where he worked from January, 1996 to December, 1996. It is only after working for one year that he joined the employment with defendant No.8 on 6.1.1997. (II) (b) Mr. Gaurav Duggal : The same allegations were made against the defendants with regard to Mr. Gaurav Duggal. In the written statements, it is clearly mentioned that Mr. Gaurav Duggal was transferred to a remote part of Gujrat. He did not want to shift and chose to leave the employment of the plaintiffs. Mr. Duggal was given a letter of release by Pepsi and it was only after this that he joined the employment of defendant No.8.
>
> (II) (c) Mr. Johny George : Similar allegations were made by the plaintiffs against the defendants in the case of Mr. Johny George. In the written statements it is mentioned that he joined the employment of defendant No.8 in response to a public advertisement dated 18.12.1996.
>
> (II) (d) Mr. Sailesh Joshi and Mr. Sushil Kr. Jain : Similar allegations were made against the defendants with regards to these two employees also. In the written statement it is clearly mentioned that these two employees joined defendant Nos. 5 and 6 only after completing their notice period on the terms of their contract of employment.
>
> (II) (e) Mr. Bipaschit Bose: The defendants while denying the averments of the plaint have specifically incorporated in their written statements that he was not an

employee of the defendants. He is a professional and independent consultant who runs his placement agency.

(II) (f) Similarly the averments regarding Hotel Hyatt Regency have also been specifically denied. In the written statements it is clearly mentioned that Hotel Hyatt Regency stocked and served amongst other beverages, both Pepsi and Coke and was not and is not a one product hotel.

(II) (g) Goa Bottling Company : The allegation that the entire team of GBC comprising of 61 sales officer resigned to take up employment with the defendants is factually incorrect.

According to the written statements of the defendants, only three out of 61 individuals preferred to work for GBC. (II) (h) Kanpur Sales Team : In reply to the allegation, defendants 9,10,11 and 12 in conspiracy with defendant No. 16 took away the entire Kanpur Sales Team of the plaintiffs with a view to directly injure the plaintiffs. In reply to this allegation, it is submitted that only three employees of the plaintiff have joined employment with the defendants. It is further incorporated in the written statements and none of these three employees breached their respective contracts of employment with the plain tiffs. The contracts of employment were terminable upon three months notice or salary in lieu thereof.

147. These instances can be multiplied. In view of the categorical denial in the written statements, at this stage, it is difficult for the court to ascertain the veracity and truthfulness of the averments and allegations mentioned in the plaint. This can only be ascertained after the parties have been given an opportunity of adducing their evidence and opportunity to cross-examine the witnesses.

148. I do not deem it appropriate to give my findings on the aforesaid averments and submissions. Any expression of definite opinion at this stage may eventually prejudice the trial of this suit.

149. However, I deem it appropriate to observe that equitable relief of injunction can only be granted if the plaintiffs have approached the Court by disclosing the whole truth and have inspired implicit trust and confidence of the Court by demonstrating their conduct.

150. The plaintiffs are not entitled for injunction for the following reasons also :

(a) The injunction, as prayed for by the plaintiffs, if granted would certainly have a direct impact of curtailing the freedom of employees for improving their future prospects and service conditions by changing their employment.

(b) Rights of an employee to seek and search for better employment cannot be restricted by an injunction.

(c) Injunction cannot be granted to create a situation such as "Once a Pepsi employee, always a Pepsi employee". It would almost be a situation of `economic

terrorism' or a situation creating conditions of `bonded labour'.

(d) Freedom of changing employment for improving service conditions is a vital and important right of an employee, which cannot be restricted or curtailed by a Court injunction.

(e) Inter-changeability of service is an accepted norm of Service Jurisprudence which cannot be curtailed by a Court injunction.

(f) 'Employees' right to terminate their contracts also cannot be curtailed by Court injunction.

(g) An injunction can be granted only for protecting the rights of the plaintiffs, but cannot be granted to limit the legal rights of the defendants.

(h) An injunction cannot be granted where the Courts have a doubt in the credibility, veracity and truthfulness of the plaintiff's version.

(i) An injunction also cannot be granted in a case where the Court directly or indirectly gets the impression that the injunction has been sought for extraneous considerations or oblique motives.

(j) Rough and tumble of the business including stiff competition has to be faced in a free market economy. The problems which should be settled in the market place cannot be brought to Law Courts or settled by a Court injunction.

(k) In economic matters, while granting injunction, business ealities have to be taken into consideration. The employees seek betterment and advancement of their careers, while they are in service. It is impracticable and unrealistic to artificially create a situation by a Court injunction when employees would first leave the employment and then look for better service conditions and job opportunities elsewhere.

(l) Most of the senior employees of the plaintiffs or the defendants were working with other multinationals or business organisations. They joined the plaintiffs or the defendants because attractive salaries and better service conditions were offered by them. The plaintiffs themselves have engaged a large number of employees who were working in other multi national or business organisations. They were appointed because they had work experience with other organisations.

The same plaintiffs are not justified in seeking an injuncion so that their employees may not join the defendants. All that is to be seen is whether the defendants had adopted unfair means in advancing their business interests or not.

(m) In a free market economy, everyone concerned, must learn that the only way to retain their employees is to provide them attractive salaries and better service conditions. The employees cannot be retained in the employment perpetually or by a Court injunction.

(n) Free, fair and uninterrupted competition is the life of the ade and business. This freedom in free market economy has to be zealously protected in the larger interest of free trade and business. No injunction cane be granted which is likely to restrict or curtail this freedom.

(o) It is difficult to hold at this stage that the predominant object and paramount consideration behind the actions of the defendants was designed to injure the plaintiffs.

(p) At this stage, it is also difficult to hold that the defendnts resorted to business practices which are unethical, illegal and constitute tortious interference in the business of the plaintiffs.

151. On consideration of the totality of the facts and circumstances, the aintiffs have not made out a strong prima facie case for the grant of injunction at this stage. The balance of convenience is also not in favour of the plaintiffs. No irreparable injury is likely to be caused to the plaintiffs.

17. In Percept DMark (India) (P) Ltd. V. Zaheer Khan and another , which is a case in relation to the advertisement contract and post-contractual covenants and restrictions and its permissibility and its enforceability with the scope of Section 27 of the Indian Contract Act from the clauses in the agreement entered inter se between the parties, the Two Judge Bench held from paras 58 to 64, by referred to Niranjan Shankar Golikari, Krishna Murgai and Gujarat Bottling Co.Ltd. v. Coca-Cola Co , observed that the doctrine is not confined only to contracts of employment, but is also applicable to all other contracts. However, the Apex Court has consistently held that there shall be no specific performance of contracts for personal services, confidential and fiduciary services are barred by Section 14(1) of the Specific Relief Act and this amounting to granting the whole or entire relief which may be claimed at the conclusion of the trial, that is also impermissible as held in Bank of Maharashtra v. Race Shipping and Transport Co. (P) Ltd. , apart from the requirement of prima facie case which lacks from the above the other two aspects of consideration of balance of convenience and irreparable injury, that where the appellant could be compensated in monetary terms if succeeded in the suit or trail, respondent could never be compensated for being forced to enter into a contract with a party he did not desire to deal with as held in Hindustan Petroleum Corpn. Ltd. V. Sriman Narayan and further the principles which govern injunctive reliefs in cases of contracts of a personal or fiduciary nature, such as management and agency contracts for sportsmen or performing artistes, are excellently summarized in a judgment of the Chancery Division reported in Page Once Records v. Britton , that although the appellant had established a prima facie case of breach of contract entitling them to damages, it did not follow that entire of them were entitled to the injunction sought; that the totality of the obligations between the parties gave rise to the fiduciary relationship and the injunction would not be granted, first, because the performance of the duties imposed on the appellant could not be enforced at the instance of the defendants and, second, because enforcement of the negative covenants would be tantamount to ordering specific performance of this contract of personal services by the appellant on pain of the group remaining idle and it would be wrong to put pressure on the defendants to continue to employ in the fiduciary

capacity of a manager and agent someone in whom he had lost confidence.

18. Further in a Single Judge, subsequent expression of Madras High Court, in M/s.Sanmar Speciality Chemicals Ltd. V. Dr.Biswajit Roy referring to Zaheer Khan supra among other expressions observed that in a service contract referring to Section 27 of the Contract Act, confidentiality and non-compete agreement whereunder respondent shall not disclose confidential information to any person after cessation of employment with appellant and shall not take up any employment or involve himself with any other person or body corporate in similar field of activity is a competitive in nature and same is contrary to provisions of Section 27 of the Contract Act and order of injunction cannot be granted to enforce it at interim stage itself.

19. Coming to another Single Judge Bench expression of the Delhi High Court in Wipro Limited v. Beckman Coulter International S A with reference to Section 27 of the Contract Act, 42 of Specific Relief Act and Section 9 of the Arbitration and Conciliation Act, where Niranjan Shankar Golikari supra and Gujarat Bottling Co.Ltd. supra, also referred and discussed besides Halsburys Laws of England (3rd edition) Volume 38, at page 15, what constitutes restraint of trade and also referring to Krishna Murgai, the statutory provision of Section 27 of the Indian Contract Act alone has to be examined anything as if a covenant falls within the scope of that Section as amounting to a restraint of trade, business or profession, then whether it is partial or general or whether it is reasonable or unreasonable would not be a material question. Ultimately at para 47 of the judgment, it is observed that 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 and no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness. The Courts shall take a stricter view in employer-employee contracts than in other 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. 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. It is also discussed as to whether non-solicitation clause in question amounts to a restraint of trade, business or profession and observed that the clause itself does not put any restriction on the employees, the restriction is put on the petitioner and the respondent has to be viewed more liberally than a restriction in an employer-employee contract. However, the question that arises is what happens when the respondent has solicited or induced or encouraged employees of the petitioner to leave or resign from such employment and join the respondent. If an injunction is granted, it would imply that the respondent cannot employ such employees who have responded to the advertisement, but it would also mean that employees who did not have any such restrictive covenant in their employment contracts, would be barred from taking up employment with the respondent. 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.

20. In Sandhya Organic Chemicals P. Ltd., and others v. United Phosphorous Ltd. and another , a Single Judge of Gujarat High Court observed by referring to Krishna Murgai supra of the Apex Court that the Supreme Court gives complete answer in the area of post employment negative contract unenforceable and that a service covenant extended beyond the termination of the service is void and the defendant cannot be restrained for all times to come from using his knowledge and experience which he gained during the course of his employment either with the plaintiff or for that matter with any other employer, but for to decide the lis on full-fledged trial, it is not proper to grant injunction restraining the defendant from employing elsewhere pursuant to the covenant.

21. In Stellar Information Technology Private Ltd. v. Rakesh Kumar and others , another Single Judge of the Delhi High Court on the scope of Section 27 of the Contract Act referring to Krishna Murgai supra of the Apex Court Three-Judge Bench, holding a covenant in restraint of trade, whether partial or not is void by virtue of Section 27 of the Indian Contract Act and the question whether a restriction is reasonable or not is relevant only in case falls within the exception to Section 27.

22. In Star India Private Limited v. Laxmiraj Seetharam Nayak , the Bombay High Court referred to Section 27 and referring to Niranjan Shankar Golikari, Krishna Murgai, Gujarath Bottling Co. Ltd., etc., expressions of the Apex Court among other, observed at para 16 that, considering all the facts and circumstances and the principles laid down, there is nothing on record to show in what manner the plaintiff would suffer an irreparable injury if the 1st defendant is not injuncted from leaving the employment and from joining the defendant No.2, besides the fact that there is nothing on record to show what trade secrets were confided exclusively or specially in the 1st defendant and there is no material to consider in what manner the plaintiffs business would suffer in the absence of the 1st defendant. The plaintiff would be following its usual business pattern of selling its airtime in accordance with the rates and the popularity of the serials and the plaintiff would perhaps need the negotiating skill of the 1st defendant and the grant of injunction would cause greater harm and injury to the 1st defendant than the benefit which would accrue to the plaintiff, thereby no injunction can be granted.

23. From the above legal positions, coming back to the facts, the negative covenant is not enforceable on the post-resignation or removal, as the case may be. Once such is the case, there is no prima facie case to grant injunction in favour of the plaintiff and against the defendant, leave about the irreparable injury rather than the plaintiff, the defendant would suffer if prevented from employment and leave about the balance of convenience in favour of the defendant rather than the plaintiff, and the plaintiff is entitled if at all any claim of damages and thereby the lower Court granting injunction restraining the defendant from pursuing the employment even it is the obligation of the terms of the contract of employment to such clause by defendant having entered with plaintiff, leave about the very clause and entries pursuant thereto, that is required to be decided after full- fledged trial and ultimately if the plaintiff succeeds can claim damages.

24. Accordingly and in the result, the civil miscellaneous appeal is allowed and the temporary injunction granted by the lower Court is vacated. However, it is made clear that none of the observations herein above will influence the mind of trial Court in deciding the suit but on own

merits from trial.

Miscellaneous petitions pending, if any, shall stand dismissed. No order as to costs.

_____ Dr. B. SIVA SANKARA RAO, J 27th December 2017.