

M/S One 97 Communications Ltd vs Mr. Jassjeet Bhandari & Ors on 9 April, 2013

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IN THE COURT OF MS POONAM CHAUDHARY, ADJ-05, SAKET COURTS
COMPLEX, NEW DELHI.

CS NO. 588/2012

IN THE MATTER OF

M/s One 97 Communications Ltd.
VERSUS
Mr. Jassjeet Bhandari & Ors.

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Date: 09.04.2013

Present: Sh. Ankit Bhatnagar counsel for plaintiff.
Defendant No.1 in person.
Ms. Sneh Thakur counsel for defendant No. 2.

O R D E R

1. Vide this order I proceed to dispose off the application filed by the plaintiff, under order 39 rule 1 & 2 read with section 151 Code of Civil Proceedings (hereinafter referred to as CPC), for grant of an interim injunction restraining the defendants from committing breach of employment agreement entered into between the plaintiff and defendant No. 1 dated 13.10.2008, and the agreement between the plaintiff and defendant No. 2 dated 07.06.2007, and also restraining the defendants from being associated in any manner with the organization having direct business competition with the plaintiff company and also restraining the defendants from defaming the plaintiff company.

2. Briefly stated the averments made are that the plaintiff has filed the suit for mandatory and prohibitory injunctions, rendition of accounts and recovery of damages on the allegations that the plaintiff company is duly incorporated & registered under the Companies Act. It is further alleged that the plaintiff is carrying on business in the area of telecommunication and the plaintiff is a pioneer in mobile internet services for consumers in India.

3. It is further alleged that the plaintiff negotiated the terms of employment for the service of defendant No. 1 & 2. It is also averred that defendant No. 1 was appointed as a Vice President Sales of the plaintiff company on 13.10.2008. It is also alleged that the terms of the employment for service were communicated to defendant No. 1 & 2 and were accepted by them vide employment agreement dated 13.10.08 and 07.06.2007 respectively.

4. It is further alleged that defendant No. 1 was entrusted with confidential managerial functions and was heading the overall sales and business for Airtel, Vodafone, Aircel, Tata Docomo and Uninor. It is further alleged that defendant No. 1 was responsible for corporate relationship with the said operators. He had complete knowledge and exposure of the plaintiff company's portfolios and contacts of all the clients and plaintiff's final commercial details. It is further alleged that at the time of resignation defendant No. 2 was under the direct control of defendant No.1.

5. It is further averred that defendant No. 1 resigned on 12.04.2012 and at the time of his resignation he undertook not to take any employment with any company in direct competition with the plaintiff company or to associate with any entity having business operations with plaintiff company. It is further alleged that resignation of defendant No. 1 was accepted on the same day despite the clause in the agreement requiring him to offer his service to the plaintiff for the mandatory (two months) notice period. It is further stated that similarly defendant No. 2 was also relieved from his official duties on 14.04.2012 i.e. one month before the two months notice period expired.

6. It is further alleged that under the clauses of employment agreements, defendant No. 1 & 2 were not to divulge any confidential information of plaintiff company. The defendants were also required to refrain for a period of one year from the date of being relieved from having any interest of any nature whatsoever in the organization involved in the business which is competitive to the business of plaintiff. Further, the defendants were under legal obligation not to solicit business from any of the plaintiff's customers for the period of two years from the date they were relieved. It is also stated that in addition thereto defendants were also under legal obligation not to solicit the service of any other employee of the plaintiff company for a period of two years from the date they were relieved.

7. It is further submitted that defendants under the stewardship of defendant No. 1 have in a clandestine manner breached the condition of contractual obligation and are not only closely associated with the rival business company of the plaintiff but they have also tried to solicit the business of plaintiff's customers.

8. It is alleged that plaintiff apprehends that defendants have been successful or are likely to be successful in soliciting some of the plaintiff's business by making defamatory comments against the plaintiff company. It is also alleged that defendants are divulging the confidential information of the plaintiff company in order to get business from the plaintiff's customers. It is further alleged that defendant No. 1 had solicited the service of defendant No. 2 in violation of the contractual and legal obligations.

9. It is further alleged that defendant No. 1 is exploiting the personal relationship that he developed with senior officers of telecom operators by virtue of his tenure as senior officer of the plaintiff's company for causing loss to the plaintiff. It is further alleged that loss of goodwill and reputation of plaintiff company cannot be quantified in terms of money and is resulting in financial losses to the plaintiff company.

10. It is further stated that plaintiff has prima facie case against the defendants as there is breach of non solicitation clause of agreement by the defendants. It is also alleged that the balance of

convenience lies in favour of the plaintiff and against the defendant and that the plaintiff will suffer irreparable loss and injury in case the injunction is not granted as plaintiff is a pioneer in its business domain and if not restrained the defendants are likely to erode the customer base of the plaintiff. It is also alleged that plaintiff will suffer both in terms of money and goodwill which cannot be adequately compensated in terms of money.

11. Reply was filed by defendant No. 1 and Defendant No. 2, separately opposing the application on the ground that plaintiff has filed the suit for collateral purposes to monopolize the trade and by restraining the defendants from carrying business of competitive nature and for trying to create barrier for new entrants in the market which cannot be allowed. It is further alleged that the suit is hit by Section 27 of Indian Contract Act and Section 3 & 4 of the Competition Act 2002. It is denied that defendants executed the employment agreement with the plaintiff as alleged. It is also stated that any agreement putting a restrain on trade and profession is void ab initio. It is also alleged that a contract containing post termination restraint on an employee is unenforceable void and against the public policy and prohibited by law. It is further stated that plaintiff had not approached the court with clean hands and has forged and fabricated various agreements which defendants had never executed. It is also averred that plaintiff dishonestly interpolated alleged clauses in the appointment letter and agreement regarding non solicitation and non competition which are contrary to the appointment letter given by the plaintiff.

12. It is further alleged that plaintiff does not have any proprietary right or copy right in the customer base. It is also averred that there are only handful of mobile operators in India which are common customers of various companies and information regarding the said customers is in public domain on which the plaintiff does not have any proprietary right in the same, as such it cannot be termed as an exclusive asset of plaintiff. It is also averred that defendants are no more employee of the plaintiff's company and any negative covenants restraining the defendants right to seek employment or do business in the same field after the termination of employment is void ab initio. It is also submitted that restriction in the agreement which interferes with the rights to livelihood of any employee after the termination of employment are invalid. It is further submitted that the relief claimed by the plaintiff is barred by the Competition Act 2002, the object of which is to prevent practices having adverse effect on competition. It is further alleged that plaintiff does not have prima facie case, neither balance of convenience lies in its favour as the suit is based on alleged agreement which are forged and fabricated and null and void. It is also alleged that plaintiff has not suffered any irreparable injury which cannot be compensated in terms of money.

13. I have heard the Ld. Counsels for parties and perused the record. Ld. Counsel for plaintiff submits that defendants have committed blatant breach of non solicitation clause, as defendant No. 1 approached the clients of plaintiff whose portfolios were being handled by him while in service of the plaintiff. It is also alleged that defendant No. 1 has also solicited the service of defendant No. 2 who is also an employee of plaintiff and was working directly under defendant No.1 when defendants were under the employment of plaintiff.

14. Ld. Counsel for plaintiff further submits that non competition and non solicitation clauses are mutually exclusive and different from one another. It is also stated that negative covenant in section

27 of the Indian Contract Act pertains only to non compete clause and does not include within its ambit non-solicitation clause.

15. It is further held that non solicitation clause being outside the purview of section 27 of Indian Contract Act is enforceable and in this regard reliance has been placed upon Deciccant Rotors International Pvt. Ltd. vs. Bappaditya Sarkar & Ors. MANU/DE/1215/2009, wherein it has been held as under : ".....The injunction only restrains Defendant No. 1 from approaching the plaintiffs suppliers and customers for soliciting business which is in direct competition with the business of the Plaintiff. Hence, the injunction which has already been granted by order dated February 20,2008 is made absolute..."

16. Ld. Counsel for plaintiff further submitted that in the case of Embee Software Private Ltd. Vs. Samir Kumar Shaw & Ors. AIR 2012 Cal 141, the Hon'ble Court specifically restrained the respondents from soliciting the clients or customers of the plaintiff. In the same case, the Hon'ble Court cited a previous judgement of the Hon'ble Delhi High Court and observed, "... in Wipro Limited Vs. Beckman Coulter International S. A. 131(2006) DLT681 the Hon'ble Court categorically observed that, "the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act 1872 as being void."

17. It is further submitted that thus, agreements which provide for non solicitation is legal and binding and enforceable against the defendants and defendants be restrained from soliciting business of the plaintiff's customers.

18. It is further submitted that the object of non solicitation clause is to protect the commercial and trade secret of employer from being divulge by the employee after latter leaves the employment. It is also contended that in case of Embee Software Pvt.Ltd. (Supra) it has been held that "clause which prohibits the employee from disclosing the commercial and trade secret is not restraint of trade". and would be not hit by section 27 of the Contract Act, as being void.

19. It is further submitted that the Competition Act 2002 on which the reliance has been placed by Ld. Counsel for defendant is not applicable to commercial and contractual matters, pertaining to employer-employee relationship inter-se. The said matters are within realm of contractual dispute and are governed by the Indian Contract Act. It is further alleged that dispute arising under Competition Act can be addressed before the forum provided under the said act and civil courts do not have jurisdiction to adjudicate upon the disputes arising under the said Act.

20. On the other hand Ld. Counsel for defendants submitted that post termination restraint restricting the right of employee to seek employment is in violation of Section 27 of Indian Contract Act, such contract are unenforceable void and against the public policy and what is prohibited by law cannot be permitted by court's order. It is further alleged that injunction prayed for by the plaintiff has a direct impact on the freedom of employee for improving their future prospects, change of employment and service conditions. It is also alleged that right of employee to seek better employment cannot be restricted by an injunction. It is stated that on similar facts the Hon'ble High Court of Delhi in case titled as Pepsi food Ltd. and Others Vs. Bharat Coca-Cola Holdings Pvt. Ltd.

& ors, 1999 (50) DRJ, refused to grant temporary injunction.

21. Ld. Counsel for defendant has also placed reliance upon case titled as Wipro Ltd. vs. Beckam Coulter International S. A, 2006 (4) R. A. J, 514, Delhi wherein it has been held as follows: "Employing a person by respondent already employed with the petitioner Restraint on , denial of, validity, determination Petitioner seeking directions restraining the respondent from employing any person who is, or has been employed with the petitioner during the pendency of arbitral proceedings Non Solicitation clause prohibits either party from enticing or alluring each other's employees away from their respective employments Held, injunction cannot be granted restraining the respondent from employing even those employee of the petitioner who were allured by the solicitation held out by the respondent."

22. Ld. Counsel for defendant also placed reliance upon in case titled as VFS Global Services Pvt. Ltd vs. Suprit Roy, 2008 (3) Mh. L. J. 266, wherein it has been held that : " Contract Act, S. 27 A clause prohibiting the employee from disclosing commercial and trade secret not in restraint of trade".

23. It has been further held as follows:

" The effect of such a clause is not to restrain the employee from exercising a lawful profession, trade or business within the meaning of section 27 of the contract Act. A distinction has been drawn in Indian law between a restrictive condition in a contract of employment which is operative during the period of employment and one which is to operate after the termination of the employment. A restriction during the terms of employment is regarded as valid and not in restraint of trade. A condition which operates after the terms of employment ceases is in restraint of trade."

24. Ld. Counsel for defendant also placed reliance upon 2010 (5) R.A.J. 219 Delhi, of Hon'ble High Court of Delhi in case titled as Wire & Wireless (India) Ltd. & Ors. vs. Mr. Anirudh Singh Jadeja, wherein it has been held as follows:

" Arbitration and Conciliation Act, 1996 Section 9 Similar business Interim injunction to carry on, denial to grant, when valid Interim injunction sought to restraint respondent to carry on any business of a cable operator Held, since injunction sought pertains to period after termination of contractual obligation between the parties, the relief of injunction restraining respondent to carry on similar business can not be granted in view of section 7 of Contract Act Contract Act 1872 Section 27. (para6) Arbitration and Conciliation Act, 1996 Section 9 Cable operator Restraint to use subscriber base/customers of petitioners in business of, denial to grant, when valid Interim injunction Entitlement to Interim injunction sought to restrain respondent to use subscriber base/customers of petitioners in business of cable operator Held, the respondent cannot be restrained from carrying out his business in terms of section 27 of Contract Act after termination of contractual relationship Further, a list of subscriber is not

an asset and even if there is copyright in list, a customer/ subscriber cannot be prevented from approaching any cable network service provider because of right of freedom of action of such independent customer. Petitioner therefore not entitled to injunction as sought for Contract Act, 1872 Section

27. (Paras 7 to 9) Contract Act, 1872 Section 27 Scope Held, by virtue said provision, after termination of contractual relationship between parties, no one can be restrained from carrying on business. (Para 7) Practice and procedure Relief Scope to grant If what can not be done directly , then surely the same cannot be done indirectly as well. (Para 7)."

25. After giving my careful thought to the submissions of Ld. Counsels for parties, I am of the view that the contention and rival contention raised by the parties are mater of trial. However, keeping in view the latest judgment i.e. AIR 2012 Calcutta 141 titled as Embee Software Private Ltd. vs. Samir Kumar Shaw & Ors, (SUPRA), relied upon by the Ld. Counsel for plaintiff, the defendant cannot be allowed to solicit clients and customers of plaintiff so as to damage the business of plaintiff. I accordingly, restrain the defendants from approaching the plaintiffs supplier and customer for soliciting business which is in direct competition with the business of the plaintiff during the pendency of the suit or till further orders. However, no observations made in this order will tantamount to expression of opinion on the merits of this case. Application is accordingly, disposed off.

26. To come up now for admission/denial of documents and framing of issues on 29.05.2013.

[POONAM CHAUDHARY] ADJ - 05, SOUTH DISTRICT SAKET COURTS COMPLEX NEW DELHI,
09.04.2013