Manali Petrochemicals Limited vs Mr.Kennadi Paulchamy on 3 August, 2018

Author: Pushpa Sathyanarayana

Bench: Pushpa Sathyanarayana

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.08.2018

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.759 of 2017

Manali Petrochemicals Limited,
SPIC House, 88, Mount Road,
Guindy, Chennai-600 032
represented by its
Whole Time Director (Works) .. Petitioner

Vs.

Mr.Kennadi Paulchamy,
B-Block, Floor 17, Apartment No-6,
Rytham Avenue Service Apartment,
City Mall USJ 19,
47620 Subang Jaya
selangor Darul Ehsan,
Malaysia. .. Respondent

* * *

Prayer : Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 199

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For Petitioner : Mr.P.Raghunathan
Senior Counsel for M/s.T.S.Gopalan & Co.,

For Respondent : Dr.Nilesh Shah

O R D E R

This Original Petition is filed seeking for appointment of an Arbitrator to adjudicate upon the disputes between the petitioner and the respondent.

2. The petitioner is a company registered under the Companies Act and it offered employment to the respondent as Manager, Research, Development and Quality Assurance (RDQA). Such kind of employees are required to undertake that they would not take up employment directly or indirectly with any competitor for a period of two years after cessation of employment. They would also for a period of two years from the date of cessation of their employment either directly or indirectly or through affiliates solicit or employ any of the serving officers of the petitioner without obtaining prior written consent. The respondent was offered the appointment as Manager on 15.10.2014 and he was also asked to execute a Secrecy Agreement with the petitioner. As the respondent was a person deployed in R and D and QA, he was expected to keep all information, disclosed or made known to him or which he may come across, as secret and confidential and should not disclose the same to any third party. The respondent was also provided with the copy of the Confidentiality and Non-disclosure Agreement, which was signed on 30.10.2014.

3. It is stated that as per the said agreement, for any violation or breaking the clauses regarding non-solicitation, the respondent would become liable to the petitioner and compensate for the loss sustained, in addition to the right of recovery of liquidated damages not exceeding Rs.10,00,000/-. It is stated further that the respondent was given exposure to various systems procedures, know-how, techniques and technology of the petitioner, including R & D. Hence, yet another agreement containing similar terms and conditions of the non-disclosure agreement was entered into on 01.06.2015 only modifying liquidated damages clause from Rs.10,00,000/- to Rs.50,00,000/-. The said agreement also contained a similar arbitration clause in Clause 10.

4. While so, the respondent resigned on 12.09.2016 from the petitioner's employment. The petitioner also agreed to relieve the respondent, upon expiry of the notice period. It was only during exit interview, the petitioner learnt that the respondent had obtained employment with a competitor abroad and requested the respondent to confirm that he would not take up the said employment in breach of the terms and conditions of the secrecy and non-disclosure agreement. The respondent left the petitioner employment on 12.12.2016, even without being relieved from service and not reported to work thereafter. Hence, the petitioner sent a letter dated 23.03.2017 calling upon the respondent to pay a sum of Rs.50,00,000/- by way of liquidated damages for breach of the contract. As there was no response, a legal notice was also caused on 29.03.2017.

5. The respondent also sent a reply denying breach of the said contract. As stated earlier, clause 10 of the agreement provided for arbitration in the event of any disputes to be held in Chennai. Accordingly, the petitioner sent a letter dated 29.05.2017 about appointing a sole arbitrator to decide the disputes that had arisen between the petitioner and the respondent. The respondent sent a letter dated 14.06.2017 to the nominated arbitrator denying the existence of any dispute and questioning the validity of appointment and requested him to abstain from acting as the Arbitrator.

6. It is stated that when clause 10 of the confidential and non-disclosure agreement provides for appointment of a sole arbitrator and the liability of the respondent to pay the petitioner a sum of Rs.50,00,000/- as liquidated damages for the breach of the confidential and non-disclosure agreement dated 30.10.2014 as modified by the agreement dated 01.06.2015, is the arbitrable dispute, the above petition has been filed seeking appointment of a sole Arbitrator.

7. The respondent resisted the said petition contending, inter alia, that the petition itself is not maintainable. It is contended that the petitioner while offering employment vide appointment letter dated 15.10.2014 did not indicate about the restrictions on taking the new employment for a period of two years from the date of resignation, instead, it is contended that only after resignation from the service of the previous employer and joining the service of the petitioner, the petitioner asked the respondent to execute the confidential and non-disclosure agreement dated 30.10.2014. Though the execution of the said agreement is admitted by the respondent, it is stated that the same was without free consent. According to the respondent, the restrictive covenants contained in the said agreement are against the public policy and are unenforceable under Section 27 of the Contract Act. The second agreement dated 01.06.2015 was also denied by the respondent for having been executed with free-will and consent. According to the respondent, the restrictive covenants in the Confidential and Non-Disclosure Agreement are unreasonable and opposed to public policy.

8. Heard both sides.

9. The questions that arise for consideration are (i) whether the restrictive covenant mentioned in the second agreement dated 01.06.2015 is opposed to public policy and makes the contract void ? and (ii) Whether the validity of the contract can be gone into, when Section 11(6-A) of the Arbitration and Conciliation Act, 1996 mandates the Court to confine only to the examination of the existence of an arbitration agreement ?

10. In so far the first question is concerned, the respondent was appointed on 15.10.2014 and he resigned on 12.09.2016. A legal notice was sent on 29.03.2017. The respondent also had executed a confidential and non-disclosure agreement on 30.10.2014. The recitals in the said agreement go to show why non-disclosure was essential and that it was executed to protect the interest of the company. The confidentiality and non-disclosure were restricted to two years after cessation. On 01.06.2015, one more confidentiality and non-disclosure agreement was executed by the respondent. This was due to the exposure given to the respondent to various systems, procedures, techniques, technologies including R & D. Though the respondent resigned on 12.09.2016, he was not relieved and the respondent left on his own on 12.12.2017, which amounts to breach of the contract. On 23.03.2017 and again on 29.03.2017 notices were issued to the respondent calling upon him for payment of liquidated damages. The claim of the liquidated damages was because the respondent had breached the confidential and non-disclosure agreement.

11. It is the definite case of the petitioner that the respondent was not relieved as his resignation was not accepted. However, it is stated that it was open to the employee to leave the company, because one cannot be compelled to work for them. The act of the respondent quitting the company on his own volition is in breach of contract. It is submitted by the petitioner that the term of employment was till the date of his retirement, as the petitioner had not terminated his service.

12. Per contra, learned counsel for the respondent submitted that Niranjan Shankar Golikari V. Century Spinning and Manufacturing Co. Ltd., AIR 1967 SC 1098 is wrongly understood that the term of employment was till the age of his retirement.

..... 17. 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 as in the case of W.H. Milsted & Son Ltd. Both the trial court and the High Court have found, and in our view, rightly, that the negative covenant in the present case restricted as it is to the period of employment and to work similar or substantially similar to the one carried on by the appellant when he was in the employ of the respondent Company was reasonable and necessary for the protection of the company's interests and not such as the court would refuse to enforce. There is therefore no validity in the contention that the negative covenant contained in clause 17 amounted to a restraint of trade and therefore against public policy.

13. Placing reliance on the above, learned counsel for the respondent submitted that the restrictive covenant on the employee, while he is in service is reasonable and post service restriction is void. Admittedly, in this case, the breach alleged is only after the resignation. If the service of the employee is terminated by the employer, then the restrictive covenant will not have any force.

14. On the contrary, if the employee desires to leave his employment on his own, then he is bound by the negative covenant. In the present case also, the respondent had tendered his resignation and left the employer on his own accord, during the subsistence of the contract.

15. The question that has to be decided, upon reference to the Arbitrator is whether the restrictive covenant would operate during the term of the contract or after the termination of the services ?

16. It is contended by the learned counsel for the respondent that the employment contract operating even after cessation of the employment, that is, after the resignation, is void on the ground of Section 27 of the Contract Act. Reliance was placed on Swiss Timing Ltd. V. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677. It is held by the Apex Court that wherever the contract is against public policy, it is void.

17. Reliance was placed on Superintendence Company of India (P) Limited V. Krishan Murgai, (1981) 2 SCC 246, wherein it is held that a service covenant which extended post termination of the service is void.

18. In Niranjan Shankar Golikari V. Century Spinning and Manufacturing Co. Ltd., AIR 1967 SC 1098, it was acts of punishment during the term of the contract, whereas, in Superintendence Company of India (P) Limited V. Krishan Murgai, (1981) 2 SCC 246, it was a case of termination by the employer and the Supreme Court held that when the employer terminates the contract of the employee, he cannot thereafter, seek to enforce any petition and non-disclosure clause.

19. Therefore, if the employee is resigning and leaving the company, the contract will become binding upon proof, in the circumstances, the restriction being justifiable.

20. This is because any such restrictive covenant will not curtail the respondent's future liberty to carry on his own business. Therefore, it is argued by the learned counsel for the petitioner that the negative covenant present in the agreement does not prevent the respondent from leaving the company and joining another company for the future prospects. But the only requirement is that the employee has to compensate the loss or injuries suffered by the company because of his leaving the company before the expiry of the agreed term. Be that as it may, it is admitted by both the learned counsels that there is a clause for arbitration in the Confidential and non-disclosure agreement. Whether the presence of the restrictive covenant would make this agreement void as a whole is left open to the Tribunal to decide.

21. In so far as Section 11(6-A) of the Arbitration and Conciliation Act is concerned, it is clear that the Court is to confine only to the examination of the existence of an arbitration clause in the arbitration agreement.

22. The Apex Court in Duro Felguera, S.A. V. Gangavaram Port Limited, (2017) 9 SCC 729 has discussed the effect of changes introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) with particular reference to Section 11(6) and 11(6-A) of the Act, more particularly, the position prior to the amendment Act 3 of 2016 and post amendment Act and held as follows :

> .... 48. From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect - the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple - it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.
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> 59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. V. Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd., V. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6A) ought to be respected.

23. Therefore, upon consent, this Court appoints Mr.V.Vijay Shankar, Advocate, having office at No.67, Law Chambers, High Court Buildings, Chennai-600 104 (Mobile No.044-25342014), as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as

expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

24. The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

03.08.2018 gg PUSHPA SATHYANARAYANA, J.

gg 03.08.2018