Le Passage To India Tours & Travels Pvt ... vs Deepak Bhatnagar on 20 January, 2013

Author: Mukta Gupta

Bench: Mukta Gupta

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*      IN THE HIGH COURT OF DELHI AT NEW DELHI

+    IA Nos. 15636/2013, 16770/2013 & 16817/2013 in CS(OS) 1881/2013

%                                              Reserved on: 5th December, 2013
                                               Decided on: 20th January, 2013

       LE PASSAGE TO INDIA TOURS & TRAVELS PVT LTD
                                                          ..... Plaintiff
                     Through  Mr. Neeraj K. Kaul, Sr. Adv., Mr.
                              Rajiv Nayar, Sr. Adv. with Mr.
                              Abhimanyu Mahajan, Adv.

                            versus

       DEEPAK BHATNAGAR
                                                                ..... Defendant
                            Through        Mr. C.A. Sundram, Sr. Adv. Mr.
                                           Abhinav Vashisht, Sr. Adv. with Mr.
                                           Saurav Aggarwal, Mr. Trinath, Mr.
                                           Mrinal Ojha, Advs.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
IA 15636/2013 (u/O XXXIX R 1&2 CPC)
IA 16770/2013 (by defendant u/O XXXIX R 4 CPC)

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The plaintiff has filed the present suit, inter alia, seeking injunction against the defendant from entering into/ doing/ conducting/ promoting/ soliciting/ canvassing etc. any business of travel and tourism or any connected or incidental or supplementary activity, or venture, individually or jointly, whether as a shareholder, director, partner, proprietor, employee, advisor, etc. contrary to the terms of Non Compete Agreement (in short the NCA) dated 1st April, 2005 executed between the plaintiff No.2 and the defendant and also restraining the defendant from utilizing the data, confidential information, list of clients, list of customers etc., of the plaintiff No.1 company.

2. Learned counsel for the plaintiff contends that the NCA between the plaintiff No.2 and defendant is saved by the exception to Section 27 of the Contract Act, as in the present case the transaction between the parties was not relating to restraint on trade but to sale of business with goodwill, reputation etc. The defendant cannot be first permitted to take advantage of the agreement and

thereafter turn around and say that he is not bound by it. The defendant first converted his firm into private company i.e. M/s. Le Passage To India Pvt. Ltd. wherein the plaintiff No.2 bought 50% shares and since the defendant wanted further investments, the plaintiff No.2 brought a German investor who bought the balance 50% share holdings of the defendant and 30 other shareholders. On 22 nd January, 2003 the plaintiff No.1 company had allotted 8500 shares to the defendant, besides the 5000 shares, at par value of Rs. 10 per share. Defendant sold 7900 shares and was thus left with 5600 shares. For these 5600 shares he was paid a total sum of Rs. 1,44,00,000/-. The defendant had started with the salary of Rs.6 lakhs per annum and thus this amount which was paid in one go would have been his earnings of the years' together. The plaintiff No.2 had bought 50% shares of the plaintiff No.1 company as Chief Mentor for Rs. 145 per share and when the balance 50% share were bought they were sold by the defendant and 30 other shareholders at Rs. 2580/- per share. Thus, the value of the shares given to the defendant within three months was very high. This consideration can never be a consideration between an employer and employee and thus this is clearly a case of sale of business and goodwill. As a matter of fact, 20 years of salary was given to the defendant in one go. The NCA was a voluntary action on the part of the defendant who agreed to sign the same. Even as per Article 4 Clause 2 of the Share Purchase Agreement (in short the SPA) Covenant □d' of the NCA clearly notes that the defendant who was a shareholder and employee of Le Passage had acquired extensive experience, knowledge, reputation and goodwill over the years in the travel and tourism industry and one of the express terms on which plaintiff No.2 had purchased the shares of plaintiff No.1 from the defendant were that after the sales of shares the defendant shall not carry on, within or outside India, directly or indirectly, any business which competes with the Le Passage business for the term of the agreement, since by doing so the defendant would be affecting adversely the business of the company. It is contended that when men in business consciously enter into an agreement they are bound by the same. Thus, from the covenant □d' it is clear that the defendant was expressly selling reputation, goodwill and business of plaintiff No.1 to plaintiff No.2 and agreeing that he will not compete with the business of plaintiff No.1 in any manner whatsoever. The underlying principle under Section 27 of the Contract Act is that a person cannot be reduced to a state of penury and idleness. However, in the present case the defendant took exorbitant consideration for the sale of his shareholding which was almost 20 years' salary of the defendant. The present is not a case of hapless employee who has been left on the road by execution of the NCA. The defendant worked with the plaintiff No.1 for 8 years after entering into the NCA and not only enjoyed the fruits of sale of the shares but also employment with salary, ultimately enhanced to Rs. 58 lakhs per annum as the last drawn salary. Thus, neither equity nor law is in favour of the defendant. The contention of learned counsel for the defendant is that there is a deliberate concealment of the agreement dated 27th April, 2005 i.e. appointment letter by virtue of which the salary of the defendant was revised and he was designated as Vice-President. The agreement dated 27th April, 2005 regarding the employment of the defendant did not supersede the agreement dated 1st April, 2005. This was a case where the defendant not only agreed for the sale of business, but also took the employment with the plaintiff No.1. Further, the contention that no constraint on future employment can be made is also incorrect as by exception to Section 27 of the Contract Act the entire agreement is saved which may include business, profession, employment etc. The exception cannot be read to mean that it saves the agreement only to the extent of business. No Statute can be interpreted so as to defeat the terms of the provision. The exception to Section 27 of the Contract Act cannot be read so as to allow the defendant to carry on the employment, though not

the business. The agreement is saved as a whole by the exception. The case of the plaintiff is relating to the contract as vendor and vendee and the employment agreement has no relevance to the present suit, thus the non-filing of the same cannot be said to be suppression of material facts. The alleged letter of employment dated 27th April, 2005 is not a letter of appointment but a letter revising the remuneration payable to the Defendant in his capacity as Vice President of the Plaintiff No. 1 Company and as such is not material in the present case by which the Plaintiffs are enforcing the terms of the NCA, which were executed by the Defendant in his capacity as a seller of business and goodwill. The NCA is independent of the letter dated 27 th April, 2005.

Reliance is placed on Superintendence Company of India (P) Ltd. Vs. Shri Krishan Murgai (1981) 2 SCC 246.

3. Learned counsel for the defendant on the contrary points out that the law in relation to contracts for restraint of trade in India and England are different. Under the English law any contract in relation to trade has to be reasonable thereby meaning that the contract is permitted except when not reasonable. However, in India the general rule is that every contract seeking restraint of trade is void except the one that is saved by the exception to Section 27 of the Contract Act. Thus, where contracts of service are tied up with the contracts of business, the same would be void. A reading of the terms of the agreement does not show that any goodwill in the business was sold by the defendant to the plaintiff No.1. In the absence of the goodwill in the business being sold, the SPA and the NCA were not protected by the exception to Section 27 of the Contract Act. Even assuming for the sake of argument that the goodwill in the business was sold by defendant to plaintiff No.2, the same in any manner cannot curtail the right of the defendant to carry on an employment. Further, the contention of learned counsel for the plaintiff that in the guise of service, the defendant is carrying on business is based on conjecture and surmises, and no prima facie case in his favour has been made out by the plaintiff, thus no injunction can be granted. It will be for the plaintiff to prove in the trial where after this Court can consider whether an injunction can be granted. Further, it can at best be the sale of goodwill in the business as on the date of agreement and not thereafter. The agreement nowhere specifies as to what information was invested as goodwill, it does not specify what special knowledge the defendant acquired as goodwill. The prayer of the plaintiff seeking injunction is very wide with no particulars given. Vide exception to Section 27 of the Contract Act, the protection is not to the sale of business but to the sale of goodwill. If the contention of the plaintiff is to be accepted, then in any case where the defendant enters into a NCA he has to retire thereafter and can do no work. It is a hard reality that if a person is experienced in one particular field, after separation from the business or resignation from the employment he would try to find out employment in an industry to which he is attuned. To attract the exception to Section 27 of the Indian Contract Act, there should be a sale of goodwill. Goodwill should be identifiable, it should be shown that the person is using that particular goodwill which has been sold and not that if he is into that business or work it will be assumed that he is using the goodwill. Thus, the plaintiff to show a prima facie case has to demonstrate that the defendant is doing a similar business using the goodwill he had sold. The goodwill will not include knowledge or experience acquired after entering into the agreement. The words □within specified local limits used in this exception to Section 27 of the Contract Act are of great importance. Despite an amendment carried out in the Contract Act in 1991, the Legislature choose not to amend the phrase □within specified local limits . Even if this

Court comes to the conclusion that it is a case of sale of goodwill, the plaintiff is still required to show that the restraint imposed is reasonable and further that it is subject to reasonable limits geographically. Before seeking injunction regarding the confidentiality clause, the plaintiff is first required to demonstrate that there is a confidentiality clause, which confidential information has been given to defendant, the confidential information has to be specified at least in a sealed cover and further that the confidential information was given to the defendant as confidential information. As regards the injunction qua confidentiality, relying on Halsbury's Laws of England it is stated that the plaintiff is required to prove that the information was confidential, it had limited public availability and was of a specific character. There are two aspects to the NCA i.e. qua the employment and qua the goodwill. If the contention of the learned counsel for the plaintiff is to be accepted that the agreement cannot be severed, the employment cannot be entered into by the defendant, and the employment was an integral part of the agreement, then the entire agreement is required to be declared void. Reliance is placed on Bharat Hari Singhania and Ors. Vs. Commissioner of Wealth Tax (Central) & Ors. 1994 Suppl. 3 SCC 46 to contend that shareholders cannot claim any portion of the property of the company. Since a shareholder has no right in the assets or goodwill of the company, he cannot transfer the same to anybody. Business has been defined by the parties in the NCA which has a wide range of activities including business, incentive tour, conference handling, mountaineering, sight-seeing and special interest tours, ticketing etc. It also include foreign currency, money changing services and cargo management. Thus, if the contention of the plaintiff is accepted that the defendant is barred from conducting any of these wide range of activities, then the defendant cannot perform any kind of work. Further Rs. 100/- as offered for the consideration has not been paid till date and hence the contention of the plaintiff cannot be accepted. Section 2 Clause 2.1 of the NCA is in two parts. The first part relates to the employment and the second part post-employment. The NCA is void ab-initio, as it does not fit into exception to Section 27 of the Contract Act qua post-employment contract. It has also failed on the test of reasonableness. There has been concealment of material facts as the letter dated 27th April, 2005 appointing the defendant as the Vice-President of plaintiff No.1 has not been placed with this Court. Further, the arbitration Clause between the parties has not been brought to the notice of this Court. Reliance is placed on Percept D'Mark (India) (P) Ltd. Vs. Zaheer Khan and Anr. (2006) 4 SCC 227. Reliance is also placed on Pepsi Foods Ltd. & Ors. Vs. Bharat Coca-cola Holdings Pvt. Ltd. & Ors. 81 (1999) DLT 122; American Express Bank Ltd. Vs. Priya Puri 2006 (3) LLJ 540; Vogueserv International Pvt. Ltd. Vs. Rajesh Gosain & Ors. 2013 (137) DRJ 244 and Bharat Hari Singhania and Ors. Vs. Commissioner of Wealth Tax (Central) & Ors. 1994 Supp (3) SCC 46.

4. Heard learned counsel for the parties. A brief exposition of facts as per the plaint is that plaintiff No.1 company was incorporated on 4 th September, 2002 for the purpose of carrying on business of tours and travels and plaintiff No.2 is presently the Chairman and Managing Director of the plaintiff No.1 company. The defendant was once the managing partner of the firm called M/s. Le Passage to India formed on 10th July, 2002. By an agreement dated 10th September, 2002 the defendant and other partners of M/s. Le Passage to India sold their business to plaintiff No.1 company. The defendant was one of the original subscribers to the Memorandum of Association of the plaintiff No.1 company and had subscribed 5000 shares of the plaintiff No.1 company on its incorporation i.e. on 4th September, 2002. On 22nd January, 2003 the defendant was allotted further 8500 shares in the plaintiff No.1 company at par value of Rs. 10 per share. Subsequently, the defendant

gave 7900 shares and was thus left with 5600 shares. The defendant was also promoter director of plaintiff No.1 company and had been working for the plaintiff No.1 company since its incorporation. He resigned from the plaintiff No.1 company by a letter dated 12 th August, 2013 when he was the joint managing director of the plaintiff No.1 company. After the incorporation of the plaintiff No.1 company on 1 st April, 2005 the plaintiff No.2 purchased the entire share holding of the defendant in plaintiff No.1 company at a huge profit and SPA was entered into parties which also stipulated that the parties would enter into a NCA which was also executed between them. The plaintiff No.2 had in fact purchased the entire share holding of the defendant along with 30 other shareholders of the plaintiff No.1 company amounting to 50% of the paid up share capital of the plaintiff No.1 company. The plaintiff No.2 was earlier 50% shareholder of the company. The 50% shares were sold by the defendant and the 30 other shareholders to the plaintiff No.2 at a huge premium and thus the same were not only sold for consideration of the business but also for the sale of the goodwill of the said business. This 50% shareholding of the defendant and the other 30 shareholders was sold to the plaintiff No.2 to be further sold to one TUI-AG a German company which is a leading tour operating company in the world which offered to acquire estate in the plaintiff No.1 company. The said investment would have given a substantial boost to the business of plaintiff No.1 company. Thus, the defendant and all other 30 shareholders agreed to the same. The two main conditions of TUI-AG were that it would not deal with 31 different shareholders for acquiring 50% stake in the plaintiff No.1 company and that it would buy the shares from plaintiff No.2 after he had purchased the shares from 31 different shareholders including the defendant and that the transferor shareholders would enter into a NCA that they would not compete with the business of the plaintiff No.1 company. The defendant and all other 30 shareholders agreed to the same and thus TUI-AG agreed to acquire 50% stake in the plaintiff No.1 company by acquiring 81,313 shares held by the 31 shareholders including the defendant in the plaintiff No.1 company. The said 50% share capital of 81,313 was sold at a huge premium which not only included the consideration for the sale of the business but also for the sale of the goodwill of the said business. Thus, on 4th March, 2005, 31 shareholders including the defendant entered into SPA and also individually executed a NCA dated 1 st April, 2005. It is this NCA which is the bone of contention between the parties.

5. Some of the salient terms of the SPA are as under:

> ☐Article 4 Undertaking of the Sellers
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> 1. The sellers desire that they would like to invest a part of the consideration to be received by each of them for sale of shares under this Agreement in Bonds and or shares of a specified class of SWT, as may be agreed by them with Mr. Arjun Sharma and SWT. For the purpose, the Sellers are agreeable to enter into a Shareholders Agreement with Mr. Arjun Sharma and SWT.
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> 2. The Sellers further irrevocably agree and undertake that each of them will execute a non-compete agreement with Mr. Arjun Sharma as in Appendix 4.2.

6. The terms of the NCA dated 1st April, 2005 between the defendant and plaintiff No.2 are as under:

□NON COMPETE AGREEMENT This Agreement is made at New Delhi as of this 1st day of April, 2005 by and between:

Mr. Arjun Sharma, an individual, son of Mr. Inder Sharma, resident of 27 Sunder Nagar, New Delhi 110003 of the FIRST PART which term includes his legal heirs, representatives and assigns;

AND Mr. Deepak Bhatnagar, an individual, son of Shri J.K. Bhatnagar, resident of 245, Dharamkunj Apartment, Plot No. 40, Sector-9, Rohini, Delhi 110085 (hereinafter referred to as □Covenantor) of the SECOND PART;

WHEREAS:

A. Le Passage (a term defined hereinafter) is an internationally reputed company engaged in the travel and tourism business which term will include the change in its corporate name, if any, its successors or assigns;

B. The Covenantor was a shareholder and is an employee of Le Passage and by virtue of the same has been actively associated with the business of travel and tourism and other related businesses and has acquired considerable skills, expertise and experience in and knowledge of the aforesaid business;

C. By a Share Purchase Agreement dated 4th March, 2005 (Share Purchase Agreement) entered into between Mr. Deepak Bhatnagar and Mr. Arjun Sharma. One of the express terms upon which Mr. Arjun Sharma has purchased the shareholding from Mr. Deepak Bhatnagar is that after the sale of the shareholding to Mr. Arjun Sharma, Mr. Bhatnagar has agreed to enter into an appropriate non-compete agreement in the manner hereinafter appearing; D. Considering the extensive experience and knowledge of the Covenantor and the reputation and goodwill acquired over the years by the Covenantor in the travel and tourism industry, one of the express terms upon which Mr. Arjun Sharma has purchased the shares of Le Passage from the Covenantor is that after the sale of shares of Le passage to Mr. Arjun Sharma, the Covenantor shall not carry on within or outside India, directly or indirectly, any business which competes with the Le Passage Business (as that term is defined hereinafter) for the term of the Agreement since by doing so the Covenantor would be effecting adversely the business of the company by virtue of such competition and the information which the Covenantor has with respect to the business and affairs of the company by virtue of their association with the company; and E. The parties hereto have reached certain agreements with respect to the above which are set forth hereunder.

NOW THEREFORE IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

SECTION 1 - Definitions For the purpose of this Agreement, the following expressions shall have the meaning specified hereunder:

□Agreement' shall mean this Non compete Agreement or any modifications or amendment thereto;

□Affiliate' shall mean, when referring to the Sellers and Le Passage, any individual, partnership, joint venture, company or any legal entity or person which:

(i) is directly or indirectly under the control of either party, or

(ii) is directly or indirectly under common control with either party, or

(iii) ultimately, controls either party.

For the purpose thereof, □control with respect to a company means (i) ownership of 50% or more of the voting rights of the company or (ii) the power to direct the management of the company, or to appoint a majority of the directors of the company, whether such power results from ownership of shares, or from a contract or otherwise.

□Le Passage' shall mean Le Passage to India Tours and Travels Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at E-29, Hauz Khas, Main Market, New Delhi 100016, including its successors and assigns.

□Le Passage Business' shall mean the business of inbound, outbound and business travel including business/ incentive tours, conference handling, adventure, mountaineering, sight seeing and special interest tours, ticketing, etc. It shall also include foreign currency, money changing services and cargo management. Without prejudice to the generality of the above, it shall also be deemed to include the following:

The business carried on by Le Passage and/or its Affiliates from time to time. It is understood that Le Passage and its Affiliates are engaged in the travel and tourism business world wide and that the term, □travel and tourism business' shall include all activities which connected to or is incidental/ complementary or assists such business. □Relative(s) shall have the meaning as set out under the Companies Act, 1956 SECTION 2 - Non Competition 2.1 In consideration of payment of the sum stated in Section 3 hereof, except as specifically agreed between the parties in writing, the covenantor undertakes to Mr. Arjun Sharma that from the date of receipt of the amount stated in Section 3 he/she shall not and shall procure that none of his/ her Affiliates shall, either on his/ her own account or in association with others engage or participate directly or indirectly, whether as shareholder, director, partner, proprietor, member, agent, distributor or otherwise, within India or outside India, during the period of his/ her employment in whatever capacity in Le Passage and for a further period of five years from the date of ceasing to be in such employment of Le

Passage, for whatever reasons:

(a) in any business which involves, relates to or competes with the Le Passage Business;

(b) establish, develop, carry on or assist in carrying on or be engaged, concerned, interested or employed in any business enterprise or venture competing with the Le Passage Business;

(c) Solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) from the Le Passage Business, or from any Affiliate of Le Passage or Le Passage, any person, firm or company who was at any time during the period of one year immediately preceding the date of the said payment, a client of the Le Passage Business, for the purpose of offering to such client or customer, goods or services similar to or competing with those of the Le Passage Business;

(d) solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) any of the employees including the senior employees and/or technical or sales and marketing staff from le Passage or from any of its Affiliates, for the purpose of employment by the Covenantor in an enterprise or venture competing with the Le Passage Business whether or not such person would commit a breach of contract by reason of leaving service;

(e) Solicit, canvass, or entice away (or endeavour to solicit canvass or entice away) any supplier of Le Passage or of any of its Affiliates or use its knowledge of or influence over any such supplier to or for its benefit or for the benefit of any other person carrying on business competing with the le Passage Business with any of Le Passage's Affiliates;

(f) act as an advisor, consultant, trustee or agent for any third person who is engaged or proposes to start any business which directly or indirectly relates to the Le Passage business or promote, start, engage in or do any business that directly or indirectly relates to the Le Passage Business;

(g) establish after the execution hereof at any future point of time any business or trade under a name that is identical or similar to □Le Passage or which in any way suggests any connection with Le Passage without written consent of Le Passage. For the purpose of clarification, it is agreed by the parties that the obligation, not to use a name which is identical or similar to □Le Passage shall not be limited to the said term referred to in Section 2.1 above, in which case this restraint will have effect for an indefinite period.

2.2. Each of the above covenants shall be construed as a separate covenant and if one or more of the covenants is held to be unlawful, the remaining covenants shall continue to bind the covenantor and

their Affiliates.

2.3 It is expressly agreed by the parties hereto that the covenantor's obligations under this Agreement shall mean to include that the covenantor shall not directly or indirectly in any manner whatsoever undertake any competing business through his relatives. The covenantor shall promptly inform the party of the FIRST PART as and when he has knowledge of the fact that any of his relatives are undertaking or propose to undertake any competing business.

2.4 For the purpose of this Section, the expression □competing with the Le Passage Business or □competes with the Le Passage Business or □Competing Business shall be deemed to include the following:

(a) setting up, promoting or investing in a business, venture, activity or company which entails or proposes to compete against the business of Le Passage by inter alia offering same or similar service as are offered or proposed to be offered by Le Passage and or its Affiliate;

(b) entering into any agreement or arrangement, with any third party which results or is likely to result in making available same or similar service as are offered or proposed to be offered by Le Passage and or its Affiliate;

(c) entering into any agreement with any third party for the transfer of business knowledge or information to any third party so as to offer the third party an opportunity to compete with the services and business of Le Passage by inter alia offering same or similar services as are offered or proposed to be offered by Le Passage and or its Affiliate.

SECTION 3 - Consideration 3.1 In consideration of the purchase consideration paid by Mr. Arjun Sharma under the Share Purchase Agreement to the Covenantor, and further in consideration of Rs. 100 (Rupees One hundred only), the covenantor has agreed to assume the obligations set out in this agreement.

SECTION 4 - Confidentiality 4.1 The covenantor hereby undertake that he shall, and shall cause their representatives and Affiliates to, treat any information (i) related to the Le Passage Business, (ii) the information (□confidential Information) received from Le Passage or from any of Le Passage's Affiliates, as strictly confidential and that they shall refrain from making any disclosure to anybody for whatever purpose such Confidential Information, unless such Confidential Information is in the public domain through no fault of the Covenantor or their representatives or of any of their Affiliates.

4.2 None of the parties hereto shall disclose the contents of this Agreement to any third party without the prior consent of the other party, except to the extent of any disclosure which might be required to be made under any statutory or other applicable regulation or by the effect of a court order/ administrative order.

7. Section 27 of the Contract Act provides as under:

> □27. Agreement in restraint of trade, void.-Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
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> 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.

8. It is thus evident that unlike the English law wherein contracts which are reasonable in restraint of trade are permitted, under the Indian Contract Act there is a complete embargo to an agreement in restraint of the trade with the sole exception that one who sells goodwill of a business may agree with the buyer to refrain from carrying a similar business □within specified local limits provided that such limits appear to the Court to be reasonable, regard being had to the nature of the business. Further the exception to Section 27 Contract Act though speaks about the business but does not include profession.

9. Learned counsel for the plaintiff has stressed that in view of clause □D'of the NCA and the fact that the shares of the defendant were purchased by the plaintiff No.2 for hefty consideration, the defendant had actually sold the goodwill of the business and had agreed not to carry on a similar business directly or indirectly so as to adversely affect the business of the Plaintiff No. 1 by virtue of such competition and the information which the defendant had with respect to the business and affairs of the company by virtue of his association with the company. Clause □D' of the NCA notes that the agreement was entered into between the parties considering the extensive experience and knowledge of the defendant and the reputation and goodwill acquired over the years by the defendant in the travel and tourism industry. Thus, even according to the plaintiff it was the reputation and goodwill which was acquired by the defendant and not the business carried on by the defendant. There can be no covenant to sell the skills of an individual as the same is contrary to Section 27 of the Contract Act.

10. Even accepting the contention of the learned counsel for the plaintiff that the defendant sold the goodwill in the business to the plaintiff No.1 by virtue of the NCA, the defendant agreed not to carry on within India or outside India, directly or indirectly any business which competes with the Le Passage business for the term of the agreement since by doing so the defendant would be adversely affecting the business of the company, the other terms of the agreement are very wide and contrary to law and thus the agreement will have to be given a narrower construction. In terms of Section 2 of the NCA in consideration of the sum stated in Section 3 the defendant inter alia further undertook to plaintiff No.2 that from the date of receipt of the amount stated in Section 3 he shall not and none of his affiliates shall, either on his own account or in association with others engage or participate directly or indirectly, whether as shareholder, director, partner, proprietor, member, agent,

distributor or otherwise, within India or outside India, during the period of his employment in whatever capacity in Le Passage and for a further period of five years from the date of ceasing to be in such employment of Le Passage, for whatever reason, in any business which involves, relates to or competes with the Le Passage business; engaged, concerned, interested or employed in any business competing with Le Passage business, solicit, canvass or entice away from the Le Passage business or from any affiliate of Le Passage, any person, firm or company etc.; or act as a consultant, advisor, trustee or agent for any third person who is engaged or proposes to start any business which directly or indirectly relates to Le Passage business. It is, thus, apparent that the terms of the agreement are very wide, imposing a complete embargo on the working of the defendant and through the defendant on other persons unconnected to the agreement as well. A reading of the exception to Section 27 also demonstrates that even on a person who sells goodwill of the business only reasonable restrictions can be imposed and not complete pervasive restrictions. This is contrary to Section 27 of the Indian Contract Act and is thus void.

11. Thus the covenant imposing a ban on the defendant from taking employment for a period of five years from the date he ceases to be in employment of Le Passage is not only contrary to Section 27 of the Contract Act but also contrary to the terms of agreement of employment between the parties. The defendant has placed on record the employment letter dated 27 th April, 2005 whereby it was informed that his salary has been revised with effect from 1st April, 2005 with the designation as Vice-President. The said letter also contains a confidentiality and non-competition clause whereby it was noted that the defendant shall not either on his own account or in association with others engage or participate, directly or indirectly, within India or outside India, for a period of one month from the date of ceasing to be in such employment of Le Passage and the company may at its discretion increase the above period of one month by another 6 months by paying 50% of the last drawn salary. Thus, two agreements i.e. NCA and the employment letter are contrary to each other. By virtue of the NCA the defendant cannot take an employment in a business similar to that of the plaintiff No.1 for a period of five years whereas as per the employment letter he cannot take the employment for a period of one month which is extendable for a further period of six months on payment of 50% of the last drawn salary. It is not the case of the plaintiffs that the plaintiffs have extended the period further for six months unilaterally on payment of 50% of the last drawn salary. Learned counsel for the plaintiff had tried to persuade this Court by saying that the employment letter dated 27th April, 2005 was a routine letter given to all the employees in the ordinary course of nature and would not amount to novation of the NCA dated 1st April, 2005. Even if it is taken that the employment letter dated 27th April, 2005 of the plaintiff did not novate the contract dated 1st April, 2005, however as regards the terms of employment are concerned, the letter dated 27th April, 2005 would be binding on the defendant. Thus the NCA cannot bar the defendant from taking an employment after one month.

12. Learned counsel for the Plaintiff relying upon Niranjan Shankar Golikari vs. Century Spinning and Manufacturing Co. Ltd., AIR 1967 SC 1098 has reiterated the principle that public policy requires for men of full age and understanding the utmost freedom of contract and once they enter into the agreement, the vendee is protected from a competition by a vendor in any form, whether by opening of a new business or carrying on an employment. In Niranjan Shankar Golikari (supra) the Hon'ble Supreme Court held that courts take a far strict view between Master and servants then it

does for a similar covenant between the vendee and purchaser or in partnership agreement. It was further held that an agreement restraining an employee from carrying out a similar employment after the contract between the parties expired was unreasonable and void. The report noted:

> 12. As to what constitutes restraint of trade is summarised in Halsbury's Laws of England (3rd Edn.), Vol. 38, at p. 15 and onwards. It is a general principal of the common law that a person is entitled to exercise his lawful trade or calling as and when he wills and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State. This principle is not confined to restraint of trade in the ordinary meaning of the word □trade and includes restraints on the right of being employed. The court takes a far stricter view of covenants between master and servant than it does of similar covenants between vendor and purchaser or in partnership agreements. An employer, for instance, is not entitled to protect himself against competition on the part of an employee after the employment has ceased but a purchaser of a business is entitled to protect himself against competition per se on the part of the vendor. This principle is based on the footing that an employer has no legitimate interest in preventing an employee after he leaves his service from entering the service of a competitor merely on the ground that he is a competitor.

[Kores Manufacturing Co. Ltd. v. Kolak Manufacturing Co. Ltd., (1959) Ch 108, 126]. The attitude of the courts as regards public policy however has not been inflexible. Decisions on public policy have been subject to change and development with the change in trade and in economic thought and the general principle once applicable to agreements in restraints of trade have been considerably modified by later decisions. The rule now is that restraints whether general or partial may be good if they are reasonable. A restraint upon freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it. [E. Underwood & Son Ltd. v. Barker, (1899) 1 Ch 300 CA]. A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object. In such a case the general principle of freedom of trade must be applied with due regard to the principle that public policy requires for men of full age and understanding the utmost freedom of contract and that it is public policy to allow a trader to dispose of his business to a successor by whom it may be efficiently carried on and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his trade and its secrets without fear of their becoming his competitors. [Fitch v. Dewes, (1921) 2 AC 158, 162-167]. Where an agreement is challenged on the ground of its being a restraint of trade the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once, this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract. [See Cheshire's Law of Contract, (6th Edn.) 328, Mason v. Provident Clothing and Supply Co. Ltd., 1913 AC 724 and A.G. of Commonwealth of Australia v. Adelaide Steamship Co. Ltd., 1913 AC 781, 796].

13. The courts however have drawn a distinction between restraints applicable during the term of the contract of employment and those that apply after its cessation. [Halsbury's Laws of England (3rd Edn.), Vol. 38, p. 31]. But in W.H. Milsted & Son Ltd. v. Hamp, (1927) 2 AC 158, 162-167 where the contract of service was terminable only by notice by the employer, Eve, J. held it to be bad as being wholly one-sided. But where the contract is not assailable on any such ground, a stipulation therein that the employee shall devote his whole time to the employer, and shall not during the term of the contract serve any other employer would generally be enforceable. In Gaumont Corporation v. Alexander, (1936) 2 ALI ER 1686 clause 8 of the agreement provided that-- □the engagement is an exclusive engagement by the corporation of the entire service of the artiste for the period mentioned in clause 2 and accordingly the artiste agrees with the corporation that from the date hereof until the expiration of her said engagement the artiste shall not without receiving the previous consent of the corporation do any work or perform or render any services whatsoever to any person, firm or company other than the corporation and its sub-lessees .

On a contention that this clause was a restraint of trade, Porter, J. held that restrictions placed upon an employee under a contract of service could take effect during the period of contract and are not in general against public policy. But the learned Judge at p. 1692 observed that a contract would be thought to be contrary to public policy if there were a restraint, such as a restraint of trade, which would be unjustifiable for the business of the claimants in the case. He however added that he did not know of any case, although it was possible, there might be one, where circumstances might arise in which it would be held that a restraint during the progress of the contract itself was an undue restraint. He also observed that though for the most part, those who contract with persons and enter into contracts which one might for this purpose describe as contracts of service, have generally imposed upon them the position that they should occupy themselves solely in the business of those whom they serve but that it would be a question largely of evidence how far the protection of clauses of that kind would extend, at any rate during the existence of the contract of service. Therefore, though as a general rule restraints placed upon an employee are not against public policy, there might, according to the learned Judge, be cases where a covenant might exceed the requirement of protection of the employer and the court might in such cases refuse to enforce such a covenant by injunction. In William Robinson & Co. Ltd. v. Heuer, (1988) 2 Ch 451, the contract provided that Heuer would not during this engagement without the previous consent in writing of William Robinson & Co., □carry on or be engaged directly or indirectly, as principal, agent, servant or otherwise, in any trade, business or calling, either relating to goods of any description sold or manufactured by the said W. Robinson & Co. Ltd., ... or in any other business whatsoever . Lindley, M.R. there observed that there was no authority whatsoever to show that the said agreement was illegal, that is to say, that it was unreasonable or went further than was reasonably necessary for the protection of the plaintiffs. It was confined to the period of the engagement, and meant simply that □so long as you are in our employ you shall not work for anybody else or engage in any other business . There was, therefore, according to him, nothing unreasonable in such an agreement. Applying these observations Branson, J. in Warner Brothers Pictures v. Nelson, (1937) 1 KB 209 held a covenant of a similar nature not to be void. The defendant, a film artist, entered into a contract with the plaintiffs, film producers, for fifty-two weeks, renewable for a further period of fifty-two weeks at the option of the plaintiffs, whereby she agreed to render her exclusive service as such artist to the plaintiffs, and by way of negative stipulation not to render, during the period of the

contract, such services to any other person. In breach of the agreement she entered into a contract to perform as a film artist for a third person. It was held that in such a case an injunction would issue though it might be limited to a period and in terms which the court in its discretion thought reasonable.

14. A similar distinction has also been drawn by 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. In Brahmaputra Tea Co. Ltd. v. Scarth, ILR (XI) Cal 545, the condition under which the covenantee was partially restrained from competing after the term of his engagement was over 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. At p. 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 aid any business in direct competition with that of his employer was not hit by Section 27. The Court 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. [See also Pragji v. Pranjiwan, 5 Bom LR 872, and Lalbhai Dalpatbhai & Co. v. Chittaranjan Chandulal Pandya, AIR 1966 Guj 189]. In Deshpande v. Arbind Mills Co., 48 Bom LR 90, 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. Relying on Pragji v Pranjiwan Charlesworth v.MacDonald, ILR 23 Bom 103, Madras Railway Company v, Rust, ILR 14 Mad 18, Subba Naidu v. Haji Badsha Sahib, ILR 26 Mad 168 and Burn & Co. v. MacDonald, ILR 36 Cal 354 as instances where such a negative covenant was enforced, the learned Judges observed that Illustrations
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> (c) and (d) to Section 57 of the Specific Relief Act in terms recognised such contracts and the existence of negative covenants therein and that therefore 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.

15. Counsel for the appellant, however, relied on Ehrman v.Bartholomew, (1898) I Ch 671 as an illustration where the negative stipulation in the contract was held to be unreasonable and therefore unenforceable. Clause 3 of the agreement there provided that the employee shall devote the whole of his time during the usual business hours in the transaction of the business of the firm and shall not in any manner directly or indirectly engage or employ himself in any other business, or transact any business with or for any person or persons other than the firm during the continuance of this agreement. Clause 13 of the agreement further provided that after the termination of the

employment by any means, the employee should not, either on his sole account or jointly with any other person, directly or indirectly supply any of the then or past customers of the firm with wines etc. or solicit for orders any such customers and should not be employed in any capacity whatsoever or be concerned, engaged or employed in any business of a wine or spirit merchant in which any former partner of the firm was engaged. Romer, J. held these clauses to be unreasonable on the ground that clause 3 was to operate for a period of 10 years or for so much of that period as the employer chose and that the word □business therein mentioned could not be held limited by the context to a wine merchant's business or in any similar way. So that the court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. The other decision relied on by him was Mason v. Provident Clothing and Supply Co. Ltd.,. This was a case of a negative covenant not to serve elsewhere for three years after the termination of the contract. In this case the court applied the test of what was reasonable for the protection of the plaintiffs' interest. It was also not a case of the employee possessing any special talent but that of a mere canvasser. This decision, however, cannot assist us as the negative covenant therein was to operate after the termination of the contract. Herbert Morris v. Saxelby, 1916 AC 688 and Attwood v. Lamont, 1920 3 KB 571 are also cases where the restrictive covenants were to apply after the termination of the employment. In Commercial Plastics Ltd. v. Vincent, 3 ALL ER 546, also the negative covenant was to operate for a year after the employee left the employment and the Court held that the restriction was void inasmuch as it went beyond what was reasonably necessary for the protection of the employer's legitimate interests.

13. It is thus evident that a contract of employment which debars an employee restraining him to carry on an employment after the term of employment is not protected under Section 27 of the Contract Act. Thus the Hon'ble Supreme Court drew a distinction between a restriction in a contract of employment which is operative during the period of employment and one which operates after the term of employment. The present is a case where in the garb of the alleged sale of goodwill of the trade, the Plaintiffs are trying to enforce a restraint on the employment of the Defendant even after the Defendant has ceased to be in the employment of the Plaintiffs.

14. Learned counsel for the Plaintiff further relying upon Superintendence Company of India (P) Ltd. Vs. Shri Krishan Murgai (supra) has contended that if the restraint is made upon a good and adequate consideration so as to be a proper and useful contract then the same is legally valid. The case of the Plaintiff is that the shares of the Defendant were purchased by the Plaintiff No. 2 at a huge premium of approximately 1781% over the market price and included not only a consideration for sale of business but also the sale of goodwill of the said business. The Defendant was fully compensated for the sale of business/goodwill in the Plaintiff No. 1 company as the Defendant for his 5,600/- share which costed only Rs. 56,000/- was given a huge sum of Rs. 1,48,64,800/- in April, 2005. Further the Defendant who was earning approximately Rs. 6 lakhs per annum from the Plaintiff No.1 company was also given double the salary of Rs. 12 lakhs per annum which was increased every year and his last drawn salary was approximately Rs. 58 lakhs per annum. Thus the Defendant having been adequately compensated for his future life, post employment as well, the negative covenant restraining him to take any employment in a similar trade for a period of five years after ceasing to be in employment cannot be said to be unreasonable.

In Shri Krishan Murgai (supra) the Hon'ble Supreme Court decided the issue on the basis that the services of the employee therein were terminated and he did not leave the services, thus the negative covenant was not applicable. In the report Justice A.P. Sen while concurring with the majority view further held:-

> 53. 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.
>
> 54. 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 [Ed. See note under para 3 on p. 250] :

> 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.
>
> 55. 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 relieves the employee of the restrictive covenant:
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> General Billposting Co. v. Atkinson [LR 1909 AC 118 : 99 LT 943] .
>
> 56. 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, para 13, p. 1503.

There is reference to Murray v. Close [32 LT OS 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.

57. 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 connote 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 Edn., Vol. I, p. 1192, the following meaning is given: "To depart from; quit; relinquish; to quit the service of a person.

58. 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.

59. 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 accept 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."

60. 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.

61. 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.

62. 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.

63. 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 Cha 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 not 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.

64. 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.

15. The decisions rendered on the issue by the Supreme Court also answer the contention of the leaned counsel for the Plaintiff that by the exception to Section 27 of the Contract Act the entire agreement is save. As held in such cases the Court is required to give a construction to the covenant so as not to be greater than necessary to protect the employer nor unduly harsh and oppressive on the employee. In view of the legal position the restraint on carrying on the employment of the Defendant being prima facie unreasonable, while maintaining the ex parte interim order dated 27th September, 2013, the same is modified to the extent that the Defendant is not restrained from carrying out the employment other than with the Plaintiff No. 1.

16. Applications are disposed of.

IA 16817/2013 (by plaintiff u/O XXXIX R 2A CPC)

17. By this application the Plaintiff seeks action against the Defendant for violating the ad-interim ex-parte order of this Court dated 27th September, 2013 whereby this court directed as follows:

> In view of the facts pleaded and the documents filed, I am of the considered view that the Plaintiffs have made out a prima facie case in their favour and the balance of convenience also lies in favour of the Plaintiffs. Further in case no ad-interim injunction is granted the Plaintiffs will suffer irreparable loss. Consequently, the Defendant, his agents, assignees, employees etc. are restrained from enticing or luring any of the Plaintiff No.1's employees or indulging into activities contrary to the agreement dated 1st April, 2005 entered into between the Plaintiff No. 2 and the Defendant, till the next date of hearing. The Defendant is further restrained from using or utilising the data or confidential information etc. of the Plaintiff No. 1 company till the next date of hearing.

18. It is contended by the learned counsel for the Plaintiff/applicants that the Defendant in violation of the above order has lured the employees of the Plaintiff No. 1 for competitor companies, that is

M/s Caper Travel Company Pvt. Ltd. and/or its other company M/s Amantran Travels. The applicants have further pleaded that despite the interim order the Defendant continued working and attending the office of M/s Amantran Travels. The case of the Defendant is that he has been visiting various friends and travel agents amongst Amantran Travels and its various offices as the Defendant is without job on account of the Plaintiffs sanction, besides contending that the present suit is not maintainable as the same is an abuse of process of the Court. Since this court has already held that there is an apparent conflict between the non-compete agreement dated 1st April, 2005and the employment letter dated 27th April, 2005 with regard to employment to be carried out by the Defendant after leaving the employment with the Plaintiff No. 1 and further that this Court had vide its order dated 22nd October, 2013 granted liberty to the Defendant to give interviews in the various companies though he would not enter into an agreement of employment, I am not inclined to proceed on the present application.

19. Application is dismissed.

(MUKTA GUPTA) JUDGE JANUARY 20, 2014 'ga'