M/S.Flsmidth Pvt.Ltd vs M/S.Secan Invescast (India) Pvt.Ltd on 1 February, 2013

Author: R.Banumathi

Bench: R.Banumathi, K.K.Sasidharan

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 01.02.2013
CORAM:
THE HON'BLE MRS.JUSTICE R.BANUMATHI
AND
THE HON'BLE MR.JUSTICE K.K.SASIDHARAN
O.S.A.No.314 of 2012
M/s.FLSmidth Pvt.Ltd.,
having its Office at FL Smidth House,
34,Egatoor, Kelambakkam,
Rajiv Gandhi Salai,
Chennai 603 103,
represented by its Power of Attorney Holder,
Mr.V.Rajagopalan ... Appellant

Vs.

M/s.Secan Invescast (India) Pvt.Ltd.,
having its address at S.F.No.504/2C,
L&T By Pass Road,
Near ARC Parcel Service, Eachanari P.O.,
Coimbatore 641 021. ... Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of O.S.Rules read wi

For Appellant : Mr.Vijay Narayan
Senior Counsel
for
Mr.Ananth Padmanabhan

For Respondent : Mr.Murari,
Senior Counsel
for

Ms.Hema Srinivasan Thriyambak

JUDGMENT

R.BANUMATHI,J.

Aggrieved by the order passed by the learned single Judge dated 10.7.2012 dismissing the application filed by the Appellant/plaintiff for interim injunction restraining the respondent/defendant from directly or in its capacity as sub-contractor to any of the appellant's competitors, taking orders from any of the customers of the appellant, the present appeal is filed.

2. According to the appellant, it is a leading global OEM (Original Equipment Manufacturer) and supplying cement plant machinery, spare parts and services to various customers in India and globally for the past 128 years. The appellant, being a part of an international conglomerate, its Research and Developmental activities take place globally in various centres of excellence. The appellant and its sister concerns supply the cement and mineral industries globally with everything ranging from engineering, single machines and complete processing plants, to maintenance, support services and operation of processing facilities and they have developed a vast global pool of specialised engineering resources that is unique to the cement industry. The conglomerate's Dania test centre in Denmark is the cement industry's largest with laboratories and pilot testing facilities for global projects, including a broad range of emissions and environmental solutions for new and existing plants. The customer base of the appellant is wide ranging and includes reputed players in the cement industry, such as Madras Cements Ltd., Chettinad Cements, Binani Cements Ltd., JK Lakshmi Cements, ACC Limited, Ambuja Cements, Rain Cements, Dalmia Cements, Ultratech Cements Ltd., etc.

3. It is the further case of the appellant that in the course of its business activities it developed the respondent as a vendor for manufacturing heat resistant castings, such as dip tubes/casted central tubes, kiln outlet sector, Inlet sectors etc., for the cement industry and supplying the same to the customers of the appellant. These castings were to be manufactured by the respondent strictly in accordance with the specifications and requirements of the appellant. Apart from this, the respondent was also manufacturing various connected ancillaries such as grizzly bars, parts of cast central tube, namely, hanger elements, top elements, etc. Several proprietary information and material belonging to the appellant, such as technical and manufacturing drawings, material specifications and documents containing knowhow, created specifically by the appellant were furnished to the respondent. The respondent's mandate was to use appellant's drawings/prototypes to manufacture the final product, after approval of the model by the appellant, and to supply the same to the appellant for final supply to the end-user.

4. It is the further case of the appellant that to protect the confidentiality and secrecy associated with the appellant's trade secrets due to their innovativeness and high commercial significance, the appellant had entered into a Non-Disclosure Agreement dated 22.05.2006 with the respondent. Subsequent to the execution of non-disclosure agreement, the appellant passed on several vital proprietary information including technical drawings, trade secrets, quality requirements and

means/ways to achieve the required quality for the part/product and information pertaining to its customers, to the respondent. The respondent started manufacturing different parts for the cement industry based on the primary contract between the appellant and its customers. While so, after two years, the appellant came to know of a serious violation of the agreement dated 22.05.2006 as well as breach of fiduciary duty on the part of the respondent. In November, 2008, the appellant came to know that the respondent had directly taken an order from a customer of the appellant, namely, Madras Cements and had written to the respondent in this regard vide letter dated 12.11.2008. The respondent's Managing Director Mr.V.Veluswamy had come to the appellant's office and given an undertaking not to continue such conduct. Though the appellant took the undertaking of the respondent as a positive assurance from their part, they stopped giving any further orders for execution to the respondent; but did not formally terminate its contractual arrangement with the respondent. However, the respondent has directly approached most of the appellant's existing customers such as Madras Cements, Chettinad Cements, etc., with price quotation for supply of casted central tubes/dip tubes and other castings in accordance with the appellant's technical drawings, specifications, technical knowhow and entered into contracts with them for supply of casted central tubes and dip tubes and other castings, which is in gross violation of the terms of the Non-Disclosure Agreement. Hence, the appellant issued a legal notice dated 11.11.2011 asking the respondent to furnish a list of its customers/clients with whom it had shared the appellant's confidential information for which the respondent sent an evasive reply. Thereafter, the appellant issued another legal notice dated 25.01.2012 and for which, the respondent sent a reply conceding that it has directly approached Madras Cements, a leading customer of the appellant. Due to the respondent's conduct, the appellant has suffered a loss of sales in dip tubes alone to its existing customers, ranging about Rs.10 to 12 crores. Hence, the appellant filed the suit. Along with the suit, the appellant filed applications seeking interim injunction.

5. The learned single Judge initially passed an order dated 25.04.2012 granting interim injunction in O.A.No.356 of 2012.

6. The respondent filed counter and also an Application No.2352 of 2012 to vacate the interim injunction granted in O.A.No.356 of 2012 contending that the relief sought for by the appellant is contrary to law and it restricts the respondent's fundamental rights to trade apart from seeking to restrict the competition and, therefore, ought to be rejected in limini. The relief sought for by the appellant/plaintiff is for enforcement of the Non-Disclosure Agreement dated 22.05.2006 which is void since the agreement is contrary to section 27 of the Contract Act. Clause 6 of the agreement restricts the respondent from quoting directly to the appellant's customers. The Non-Disclosure Agreement does not provide a list of the appellant's alleged customers which the appellant has now sought to attach.

7. It is the further case of respondent that the respondent is a small scale unit started in the year 2000 and is in the business of jobbing foundry works which manufactures castings and other parts based on individual customer specifications and drawings. The respondent manufactures around 340 items of equipment of its own based on the respondent's own research and development and have developed its own standards. The respondent is in the business of the manufacture of heat resistant castings such as dip tubes, central tubes and immersion tubes for almost 12 years. They

have been supplying the products directly and indirectly to the cement companies both as a sub-contractor as well as a direct vendor. Even before the execution of non-disclosure agreement dated 22.05.2006, the respondent was supplying to M/s.India Cements Limited. In fact, the appellant approached the respondent to act as its sub-contractor because it was aware of their experience with the cement industry. Though the arrangement between the appellant was for a period of 5 years, the appellant did not proceed with the arrangement beyond January 2009 since the appellant has terminated the agreement by their letter dated 06.01.2009, whereby it requested the respondent to return all the appellant's patterns since it had started its own foundry division. It is further contended that there is no violation of the trade secrets of the appellant. The respondent has duly returned all the information, material and drawings including the patterns to the appellant. The respondent had always been manufacturing and supplying for various industries including the cement industry even prior to the agreement with the appellant. According to respondent, there has been no violation of the agreement dated 22.05.2006 nor any alleged breach of fiduciary duty by the respondent.

8. Upon consideration of the rival contentions of the parties, the learned single Judge held that the negative covenants in agreement could be enforced only during the pendency of the contract and not beyond the expiry of the agreement period and that there cannot be any post-contract restriction. The learned single Judge further held that clause 6 - negative covenant of the agreement can be enforced only during the period of contract and the same cannot be enforced after the expiry of agreement period and even a non-solicitation clause cannot be enforced after the expiry of the agreement period. Holding that the relief sought for by the appellant cannot be granted the single judge dismissed the application. Being aggrieved by the dismissal of application, appellant has preferred this appeal.

9. Contentions:- Mr.Vijay Narayan, learned Senior Counsel for the appellant submitted that as per clause 6 of the agreement, the respondent should not go directly to appellant's customers or not to engage any activities of competing nature, which are detrimental to the interest of the appellant. It was contended that clause 6 does not restrict the right of respondent to do trade and that it only says that the respondent should not solicit the customers of the appellant, that too, only for a further period of five years after 21.5.2011. It was further contended that the learned single judge has not considered the important role played by a non-solicitation clause in protecting goodwill which is an intangible property right having as much value for a business as a statutorily recognised intellectual property right and the learned single judge did not properly examine the nature of prohibition contained in clause 6 and make an assessment as to the reasonableness of the clause.

10. Refuting the contentions, on behalf of the respondent, the learned Senior Counsel Mr.Murari contended that the provisions of non-disclosure agreement, being restrictive to trade, is contrary to the provisions of Section 27 of the Contract Act. The learned Senior Counsel submitted that even assuming without admitting that non-disclosure agreement is in existence and it is valid, there has neither been any violation by the respondent of the provisions of the Non-Disclosure Agreement nor any infringement of the Copyright of the appellant/plaintiff. Contention of respondents is that post-contract restriction contained in Clause 6 is not legally valid and is against the provisions of Section 27 of the Contract Act, because it restrains the right and any restraint could be enforced only

during the period of contract.

11. Points:- Upon consideration of the rival contentions, the following points arise for consideration:

> "1. Whether Clause 6 of the Agreement (dated 22.5.2006) between the appellant and the respondent would amount to restraint of trade prohibited under Section 27 of the Indian Contract Act?
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> 2. Whether the appellant is entitled to invoke the provisions of the non-compete clause of the agreement even after the period of expiry of the agreement?
>
> 3. Whether the appellant has established a prima facie case and whether the learned single judge was not right in declining temporary injunction?"

12. Discussion:- The appellant is a leading global OEM and has been supplying cement plant machinery, spare parts and services to various customers in India. They have developed the respondent as a vendor for manufacturing heat resistant castings such as dip tubes/casted central tubes, etc. They have also furnished several proprietary information and material belonging to the appellant, such as technical and manufacturing drawings, material specifications and documents containing knowhow, to the respondent. To protect confidentiality, a Non-Disclosure Agreement dated 22.05.2006 was entered into by the appellant with the respondent. Under Clauses 1 to 4 of the agreement, the respondent agreed that all datas and drawings will be treated as confidential information and would not be disclosed or made available by them directly or indirectly to any third parties without prior written consent of the appellant. Clauses 1 to 4 are non-disclosure agreement clauses.

13. Clause 6 of the agreement dated 22.05.2006 contains non-compete clause. Clause 6 reads as under:

> "During the period of this agreement and for further period of 5 Years from the date of termination under the provisions of the agreement, VENDOR covenants not to quote directly to customers or not to engage in activities of competing nature which are detrimental to the interest of FLS"

14. Case of appellant is that respondent approached most of appellant's existing customers such as Madras Cements Limited, Chettinad Cements, ACC Limited, Rain Cements and many others with price quotations for supply of casted central tubes/dip tubes and other castings in accordance with appellant's technical drawings, specifications, technical knowhow and subsequently entered into contracts with them for supply of casted central tubes/dip tubes and other castings. Further case of appellant is that the act of the respondent directly taking the orders from appellant's customers is in gross violation of the terms of the Non-Disclosure Agreement dated 22.05.2006 as well as in abuse of its fiduciary capacity. The learned Senior Counsel for appellant drew our attention to the quotations placed by the respondent with ACC Limited, Rain Industries, Madras Cements Limited and others.

15. Contention of Respondents is that Clause 6 non-compete clause in the agreement amounts to restraint in trade and that under Section 27 of the Contract Act, Clause 6 is void in nature. Per contra, contention of appellant is that Clause 6 of the agreement consists of two parts i.e., (i) during the period of agreement; and (ii) for a further period of five years. According to appellant, from the date of termination under the provisions of the agreement, respondent should not go directly to the customers of the appellant or not to engage in activities of competing nature.

16. In order to appreciate the rival contentions of the parties, it is necessary to analyse the scope of negative covenants agreement in restraint of trade in the Indian Contract Act.

17. Section 27 of the Indian Contract Act, 1972 reads as under:

> "Every agreement by which anyone is restrained from exercising a lawful profession or trade or business of any kind, is to that extent void.
>
> Exception 1. - Saving of agreement not to carry on business of which goodwill is sold. - One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business"

18. Section 27 of Indian Contract Act stipulates that an agreement, which restrains anyone from carrying on a lawful profession, trade or business, is void to that extent. However, as exception, if a party sells his goodwill to another, he can agree with the buyer that he will not carry on a similar business within the specified local limits.

19. Upon a literal construction, Section 27 of the Indian Contract Act invalidates all the agreements that impose a total bar on the exercise of a lawful business. Although the section states that all agreements in restraint of any profession, trade or business are void, on many occasions, business exigencies require impositions of certain restraints. The attitude towards public policy is always subject to change in tandem with the change and development in trade and economic developments.

20. As per various judicial pronouncements, the reasonable restraint is permitted and does not render the contract void ab initio. Reasonable restrictions can be placed in the following ways:-

> 1. Distance: suitable restrictions can be placed on employee to not practice the same profession within a stipulated distance, the stipulation being reasonable.
>
> 2. Time limit: if there is a reasonable time provided in this clause then it will fall under reasonable restrictions.
>
> 3. Trade secrets: The employer can put reasonable restrictions on the letting out of trade secrets.

4. Goodwill: There is an exception under section 27 of the Indian Contract Act on the distribution of goodwill.

Reasonableness of restraint depends upon various factors, and the restraint in order to prevent divulgence of trade secrets or business connections has to be reasonable in the interest of the parties to ensure adequate protection to the covenantee.

21 With the increase in cross-border trade and an enhanced competitive climate in India, confidentiality, non-compete, and non-solicitation agreements are becoming increasingly popular, especially in the IT and technology sectors. An increasing number of outsourcing and IT companies are incorporating confidentiality, non-compete, and non-solicitation clauses in agreements with their employees, with terms ranging from a few months to several years after the employment relationship are terminated. The companies claim that such restrictions are necessary to protect their proprietary rights and their confidential information.

22. The parties have entered into a non-disclosure agreement on 22.05.2006 whereby and whereunder the respondent has agreed not to quote directly to the customers of appellant or to engage in activities of competing nature which are detrimental to the interest of the appellants during the period of agreement (five years) and for a further period of five years from the date of termination under the provisions of the agreement. Clause 14 of the agreement contains the period of agreement. Parties have agreed that the agreement would be valid for a period of five years from the date of signing agreement viz., 22.05.2006. Clause 15 of the agreement provides for termination at the instance of either party by giving six months notice in writing. Even according to the appellant, the agreement came to an end by efflux of time on 22.05.2011.

23. When the term of contract expired on 22.5.2011, whether the non-compete clause could be extended beyond the term of the contract is the other point falling for consideration.

24. A non-compete clause used in agreements can be categorised into two categories contract term and post-term covenants. The distinction between restraint imposed by a contract operative during the subsistence of the contract and those operative after the term of the contract is of fundamental character. The consistent view taken by the Hon'ble Supreme Court and the High Court is that the negative covenants operative during the term of the contract are not hit by Section 27 of the Contract Act because they are designed to fulfil the contract and not to restrict them. On the other hand, the restraints operative after the termination of the contract no longer works within the contract and therefore hit by Section 27 of the Contract Act.

25. Before we further analyse Clause 6 of the agreement, we may usefully refer to the case laws on restraint of trade. The doctrine of restraint of trade was introduced in Indian Courts by the earlier decision in (1874) 14 Beng. L.R. 76 - Madhub Chunder v. Rajcoomar Doss. In the said case, Sir Richard Couch held that all agreements in restraint of trade, whether partial or general, qualified or otherwise, was void and observed as under:

> "The words 'restraint from exercising a lawful profession, trade or business' do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary ... in the following Section (Section 28) the legislative authority when it intends to speak of an absolute restraint and not a partial one, has introduced the word 'absolutely' ... The use of this word in Section 28 supports the view that in Section 27 it was intended to prevent not merely a total restraint from carrying on trade or business but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them them eaning which they appear plainly to bear."

26. The view in Madhub Chunder case that Section 27 was absolute in scope, and allowed of no exceptions (but that of sale of goodwill, specifically mentioned) was stressed in several other subsequent decisions. In (1909) 13 Cal WN 388 Shaikh Kalu v. Ram Saran Bhagat, it was held as under:

> "As observed, however, by Sir Richard Couch .... we have nothing to do with the policy of the law, specially as the Legislature has deliberately left he provision in Section 27, in its original form, though other provisions of the Contract Act have from time to time been amended. The interference would be almost irresistible under these circumstances, that the Courts have rightly ascertained the intention of the legislature. The silence of the Legislature in a case of this description is almost as emphatic as an express recognition of the construction which has been judicially put upon the statute during many years past. "

27. Post contract Post Employment Restrictive Covenants:- Indian Courts consistently refused to enforce post- termination - non-compete clause in employment contracts. Viewing them as a restraint of trade imperative under Section 27, in AIR 1967 SC 1098 = (1967) 2 SCR 367 Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co.Ltd., appellant thereon accepted post of Shift Supervisor and signed standard firm contract of five years. The appellant received training for nine months and thereafter absented himself and then handed over his resignation letter. Observing that negative covenant operative during period of contract do not fall under Section 27 and that clause 17 of the Contract does not amount to restraint in trade, the Honourable Supreme court has held as under:

> "20. 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. (1927) W.N.233. 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 employment 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".

The Hon'ble Supreme Court drew a clear distinction between a restriction in a contract of employment which is operative during the period of employment and one which is to operate after the termination of employment.

28. The same view has been reiterated in AIR 1980 SC 1717 - Superintendence Company of India Pvt.Ltd. v. Krishana Murgai, wherein, the Hon'ble Apex Court observed that doctrine of restraint of trade does not apply during the continuance of contract for employees and it apply only when the contract comes to an end. In Superintendence Company case, the same view has been accepted. In Superintendence Company case, it was held as under:-

> "Agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are not void under Section 27 of the Contract Act, on the ground that they are in restraint of trade. Such agreements are enforceable.... the doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end."

29. In (1995) 5 SCC 545 = AIR 1995 SC 2372 - Gujarat Bottling Co.Ltd. and others Vs. Coca Cola Company and others, the agreement contained para 14 a negative covenant by GBC not to manufacture bottle, sell, deal or otherwise be concerned with the products, beverages on any other brands or trade marks/trade names during the subsistence of the agreement including the period of one years' notice as contemplated in paragraph 21. The Hon'ble Supreme Court has held that the negative stipulation contained in Paragraph 14 is confined in its application to the period of subsistence of the agreement and the restriction imposed therein is operative only during the period the 1993 agreement is subsisting and the said stipulation cannot be held to be restraint of trade so as to attract Section 27 of the Contract Act.

30. In Gujarat Bottling Company case, the Supreme Court exhaustively reviewed the law relating to the validity of the contracts containing a negative covenant in commercial agreements. In paragraph No. 14 of the agreement entered into in the year 1993 between the parties in Gujarat Bottling Company's case provided that the Bottler would not manufacture, bottle, sale deed or otherwise be connected with the products, beverages of any other brands or trademarks/trade names during the subsistence of the agreement including the period of one year notice of termination. The 1993

agreement between the parties in that case was construed by the Supreme Court to be an agreement of a grant by Coca Cola as a franchiser to Gujarat Botting Co. (GBC) as a franchisee whereby the GBC had been permitted to manufacture, bottle and sell beverages covered by the trade marks in the area covered by the agreement. The Supreme Court was required to consider whether the negative stipulation contained in paragraph No. 14 of the 1993 agreement being in restraint of trade was void under the provisions of section 27 of the Contract Act. After referring to Niranjan Shankar Golikari, in (1995) 5 SCC 545 Gujarat Bottling Company's case, the Hon'ble Supreme Court held as under:

> "32. Similarly, in Superintendence Co., (supra). A.P.Sen,J., in his concurring judgment, has said that the doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end . (SCR p. 1289 : SCC p. 255, paragraph 18)
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> 33. Shri Shanti Bhushan has submitted that these observations must be confined only to contracts of employment and that this principle does not apply to other contracts. We are unable to agree. We find no rational basis for confining this principle to a contract for employment and excluding its application to other contracts. The underlying principle governing contracts in restraint of trade is the same and as a matter of fact the courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements. We may refer to the following observations of Lord Pearce in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. ((1968) AC 269= (1967) 1 All ER 699) -
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> When a contract ties the parties only during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises.
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> 34. Since the negative stipulation in paragraph 14 of the 1993 Agreement is confined in its application to the period of subsistence of the agreement and the restriction imposed therein is operative only during the period the 1993 Agreement is subsisting, the said stipulation cannot be held to be in restraint of trade so as to attract the bar of Section 27 of the Contract Act. We are, therefore, unable to uphold the contention of Shri Shanti Bhushan that the negative stipulation contained in paragraph 14 of the 1993 Agreement, being in restraint of trade, is void under Section 27 of the Contract Act."

31. It is well settled that the negative covenants operative during the period of contract are not to be regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. The scope of restraint of trade is fairly wide; it includes master-servant agreements, covenants the

protection of goodwill, exclusive dealing contracts, and agreements whereby prices are fixed. The concept that prohibit employees from engaging in a business or non-compete clause beyond the terms of contract are invalid. The same applies to non-compete agreements between the Companies.

32. In AIR 1988 Bombay 157 - Taprogge Gesellschaft MBH v. IAEC India Ltd., a learned single Judge of the Bombay High Court observed, while explaining the reason why covenants pertaining to the duration of the contract was not in restraint of trade observed as under:-

> "The distinction between the restraints imposed by a Contract, operative during the subsistence of the contract and those operative after the lifetime of the contract is of a fundamental character .... Generally speaking, the negative covenants operative during the term of the contract are not hit by S.27 of the Contract Act because they are designed to fulfil the contract and not to restrict them.... This distinction which is of a fundamental nature has to be borne in mind; otherwise the perspective will be lost.... the restraints which operate during the term of the contract have to fulfil one kind of purpose viz. Furthering the contract. On the other hand, the restraints operative after the termination of the contract strive to secure freedom from competition from a person who no longer works within the contract...."

33. According to the appellant, the respondent has to abide by the terms of agreement for a further period of five years. The suit was filed on 16.04.2012 alleging that the respondent solicited the customers of appellant, thereby violating the provisions of non-disclosure agreement dated 22.05.2006. The agreement was valid for a period of five years, meaning thereby, it would expire by efflux of time after the prescribed period. Clause 6 of the contract agreement gives a prima facie view that it would operate for another five years only in case there is a premature termination. This view is fortified by clause 15 of the agreement. The said clause provides for termination of agreement by either parties. In case clause 6 is read in the light of clauses 14 and 15, it would give a primafacie impression that the agreement is valid only for a period of five years and the question of invoking the extended period of agreement for a period of five years would depend upon the termination of the contract.

34. In AIR 1967 SC 1098 Niranjan Shankar Golikari case, the Honourable Supreme Court categorically held that the negative covenants in agreement could be enforced only during the currency of the contract and not beyond the expiry of the agreement. In paragraph No.20, the Supreme Court held as under:

> "20. 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. (1927) W.N.233. 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 employment 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".

35. Applying the ratio of the above decision and well settled legal principles, the learned single Judge rightly held that the negative covenants of the agreement can be enforced only during the period of contract and that the same cannot be enforced beyond the agreement period.

36. Clause 6 - a non-solicitation agreement:- Mr.Vijay Narayan, the learned Senior Counsel for appellant submitted that Clause 6 consists of two different obligations (i) a non-solicitation obligation, wherein the respondent is barred from quoting directly to the customers of the appellant and the other, (ii) a non-compete obligation, wherein the respondent is barred from carrying on activities of a compete nature and that the two obligations are distinct and severable. The learned Senior Counsel submitted that the first obligation non-solicitation clause, which the appellant seeks to enforce by way of injunction is very reasonable one and obligation of non-solicitation does not in any way stop the respondent from carrying on the trade or business and the restriction of non-soliciting the appellant customers is again operative on the respondent only for a brief period of five years and the learned single judge failed to take note of the reasonableness inherent in this obligation and failed to interpret it from the stand point of two commercial entities.

37. In support of his contention that non-solicitation agreement could be enforced in post-contract period, the learned Senior Counsel placed reliance upon a decision of Delhi High Court in MANU/DE/2671/2006 - Wipro Limited Vs. Beckman Coulter International S.A. In the said case, Wipro Limited worked as a sole and exclusive canvassing representative/distributor for Beckman Coulter International, S.A., for 17 years. Agreement contained non-solicitation. Beckman Coulter decided to undertake direct operations in India and issued advertisement seeking employment from people and giving preference to candidates having experience in having handled respondent's product of similar product. Wipro Limited alleged that advertisement was in violation of non solicitation clause and approached court for prohibiting solicitation and claiming damages. The Delhi High Court held that bar or restriction was on Wipro Limited and Beckman Coulter from offering inducement to each other's employees to give up employment and join them. It is a restriction cast upon the contracting parties and not on the employees. Therefore, the non-solicitation clause by itself did not put any restriction on employees. The restriction is put on the Wipro Limited and the Beckman Coulter and, therefore, has to be viewed more liberally than a restriction in an employer-employee contract. Non-solicitation Clause did 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. Accordingly, the Delhi Court held that injunction could not be granted restraining Beckman Coulter from employing even those employees of Wipro Limited who were allured by solicitation.

38. Referring to various judgments, the single Judge of Delhi High Court held that bar was on Wipro and Beckman from offering inducement to each other's employees and is a restriction cast upon the contracting parties and not on the employees. Therefore, the non-solicitation clause by itself did not put any restriction on employees. Holding that the restriction is to be on the contracting parties has to be viewed liberally than a restriction in an employer employee contract, the learned single Judge of Delhi High Court held that non-solicitation clause did not amount to restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act as being void. Referring to the various judgments, the learned single Judge of Delhi High Court summarised the principles as under:

> "1) Negative covenants tied up with positive covenants during the subsistence of a contact be it of employment, partnership, commerce, Page 2704 agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided;
>
> 2) Negative covenants between employer and employee contracts pertaining to the period post termination and restricting an employee's right to seek employment and/or to do business in the same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;
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> 3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;
>
> 4) The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of a contract is or is not in restraint of trade, business or profession."

39. Contending that one part of obligation of Clause 6 is a non-solicitation clause and placing reliance upon the Wipro case, (MANU/DE/2671/2006), the learned Senior Counsel for appellant submitted that the obligation of non-solicitation clause is to be given effect beyond the period of

contract. In our considered view, the principles of solicitation laid down in Wipro case is not applicable to the facts of the present case. The agreement in question, being one, not to solicit the customers of the appellant, is not a simple agreement of non-solicitation of employees/customers; but it is a non-disclosure agreement coupled with non-solicitation. Both are integral part of one another. That apart, no foundation is laid in the plaint to the effect that clause 6 is an agreement of non-solicitation.

40. Assuming that Clause 6 is a non-solicitation clause, solicitation is essentially a question of fact. The appellant should prove that the respondent approached their erstwhile customers and only on account of such solicitation, customers placed orders with the respondent. Mere production of quotation would not serve the purpose. It is not as if the appellant is without any remedy. In case the Court ultimately holds that the appellant has got a case on merits, they can be compensated by awarding damages. The supplies made by the respondent to the erstwhile customers of the appellant would be borne out by records. There would be no difficulty to the appellant to prove that inspite of entering into a non-disclosure agreement, respondent have solicited customers and pursuant to such solicitation they have actually supplied castings. When there is such an alternative remedy, question of issuing a prohibitory injunction does not arise.

41. Drawing our attention to the provisions of Indian Partnership Act - Sections 36 and 54, the learned Senior Counsel for appellant Mr.Vijay Narayan submitted that upon a fair interpretation of Section 27 as the whole and other provisions of Partnership Act, it is clear that Section 27 is in conjunction with the provisions of Partnership Act and that non-solicitation clauses always stood outside the purview of Section 27. Drawing our attention to Section 36(2) of the Indian Partnership Act, the learned counsel submitted that a partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Learned Senior Counsel has also drawn our attention to Section 54 of the Partnership Act which stipulates that partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits. The learned Senior Counsel submitted that on a plain reading of the provisions of Sections 36 and 54 of the Indian Partnership Act, it is clear that non-solicitation clauses always stood outside the purview of Section 27 of the Act.

42. Indian Partnership Act, 1930 makes provision for enabling partners to impose covenants of restraint of trade in certain cases. Because of elements of mutuality involved in a contract of partnership, such reasonable restrictions are imposed. The business agreement between the appellant and the respondent cannot be said to be an act of partnership so as to interpret the terms of the agreement in conjunction with the provisions of Indian Partnership Act.

43. The materials produced by the appellant are not sufficient to arrive at a clear finding that the respondent solicited the customers of the appellant. In view of expiry of the agreement by efflux of time, prima facie case is not in favour of the appellant. Appellant has also not established that the balance of convenience is in their favour and in case injunction is refused they would be put to irreparable injury.

44. Section 41(e) of Specific Relief Act provides that no injunction can be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. The appellant must prove that the contract is such, that the court can grant a decree of specific performance. Prima facie, no such decree can be granted. Similarly, Section 41(h) also provides that in case an efficacious remedy is available, injunction would not be granted. Here, appellant can always claim damages, if ultimately it is proved by evidence that the respondent solicited their customers or obtained orders for supply of castings.

45. Referring to the decisions of ((1895) 2 Q.B. 315 Robb. Vs. Green, AIR 1967 SC 1098 Niranjan Shankar Golikari case and AIR 1995 SC 2372 - M/s.Gujarat Bottling Co.Ltd. Vs. Coca Cola Co. and others, the learned single Judge rightly held that the negative covenant of the agreement can be enforced only during the period of contract and that the same cannot be enforced after the expiry of the agreement period. We do not find any error or illegality warranting interference with the order of the learned single Judge and this appeal is liable to be dismissed.

46. In the result, the appeal is dismissed. However, there is no order as to costs. Consequently, the connected miscellaneous petition is dismissed.

(R.B.I.,J.) (K.K.S.,J.) 01.02.2013 Index:Yes Internet:Yes usk Copy to:

The Sub.Asst.Registrar High Court Madras.

R.BANUMATHI,J.

AND K.K.SASIDHARAN,J.

Usk JUDGMENT IN OSA.NO.314 OF 2012 01.02.2013