M/S.Blb Institute Of Financial Markets ... vs Mr.Ramakar Jha on 22 September, 2008

Author: Reva Khetrapal

Bench: Reva Khetrapal

REPORTED

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ OMP 241/2008

DATE OF RESERVE: August 25, 2008
DATE OF DECISION: September 22, 2008

M/S. BLB INSTITUTE OF FINANCIAL
MARKETS LTD. ..... Petitioner
Through: Mr.Neeraj Kishan Kaul, Sr. Advocate
with Mr.P.Nagesh and Mr.Anand Mishra,
Advocates.

versus

MR.RAMAKAR JHA ..... Respondent
Through: Mr.Atul Bandhu, Advocate.

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

JUDGMENT

: REVA KHETRAPAL, J.

1. This petition, under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner seeking interim relief against the respondent, an employee of the petitioner.

2. The facts in a nutshell are as follows: The petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is one of the leading institutes in imparting education and knowledge in the field of financial services. The objective of the petitioner is to educate and develop professionals for the securities industry in India, to disseminate information about Indian capital markets by creating a comprehensive body of knowledge and to contribute to the healthy development of securities market by bringing expertise to bear on structural and policy issues

concerning the securities industry. The petitioner is also an authorized education provider of the Financial Planner Standards Board, India (FPSB) for the Certified Financial Planner (CFP) professional education programme in India. Details of the courses/materials developed by the petitioner and the advertisements of the courses offered by the petitioner since 2005 are annexed with the petition as Annexure P-2.

3. In the course of its business, the petitioner appointed the respondent as a faculty member. The respondent was to be responsible for the development of the petitioner's study material and teaching methodology so as to ensure that it remained most suitable, relevant and always ahead of others. The respondent accordingly executed an employment agreement dated 08.09.2006 (Annexure P-3), thereby agreeing to the following among other terms and conditions:

> "(i) He shall be responsible for imparting 'Total Quality Teaching', the objective of the company by employing sandardized methods of teaching in the financial markets.

He shall be devoting full time without any constraint and attention to all specified functions with day-to-day teaching and support keeping the students' need in mind from all perspectives and will also impart practical training at its best. He shall be required to be at his work till regular office hours or till the completion of day's work, without any time constraint and may also be required to come on Sunday for disposal of his duties as per the need of the organization.

(ii) He shall also design and upgrade the courses and teaching and other course contents and also management courses as per the main objectives of the company. The services promised to the students shall be delivered at its best. He shall also be contributing towards general administration and executive help, as required. Besides, management can assign other incidental works from time to time, as per the need, to fulfil the objectives of BIFM.

(iii) He shall exhibit his high quality of competency, commitment and initiation while performing his job and will maintain a cordial environment, without which the objective of BIFM would suffer irreparable loss. Hence the employee assures BIFM for his best of the best efforts in the said regard.

(iv) Since the mission of BIFM is a long term process where the commitment for a longer period is required, hence the employee commits to serve the BIFM for a period of 5 years, taken as employment period wherein there is no exit for a minimum period of 3 (three) years. During the course of his stay and thereafter, the employee further undertakes to maintain complete integrity, confidentiality, not to leak, divulge, share or misuse any of the business secrets, secrecy related to software & tampering or hacking strategies, plans etc. with any third party or for himself for any oblique motive.

(v) He shall maintain high standards of decorum and sense of discipline among the students befitting the image of a good financial education body. Further he shall not indulge himself in any alliance or front or politics among the staff members/students, including subordination.

(vi) That at any stage if it is observed by BIFM that the employee is not performing his duties as per the terms and conditions of his agreement, then BIFM reserves its right to take appropriate disciplinary/official action against the employee. If the company wishes to terminate his services, it can do so by serving one month notice or salary in lieu thereof.

(vii) The salary revision/increment will be done on yearly basis. It shall be done depending upon the competence, performance, achievements, behavior, discipline, etc. and upon the sole contribution towards the growth of the company. Decision relating to increment shall be taken by compensation committee, headed by the Chairman of BIFM.

(viii) He shall work with the company for 5 years with 3 years as minimum compulsory period, but in case of some extra ordinary situation, if he decides to quit his job after the completion of the compulsory period, then he can do so by serving a prior notice of at least 6 months in writing to the company.

(ix) Both the parties shall endeavour to resolve all the disputes amicably and in good faith, through mutual dialogue. However, all disputes which fail to resolve in that manner shall be subject to arbitration by a sole arbitrator appointed by the Chairman of the company, and to be conducted as per the Arbitration and Conciliation Act, 1996 at Delhi only."

4. It is averred in the petition that the respondent was initially involved in redesigning and restructuring the course content of Stock Market and Trading Operation, a 4 month diploma programme, for which he had prepared the handouts and study materials, with the help and suggestion of the petitioner, for the students. With the growing competition in the financial sector, however, the respondent approached the petitioner with the suggestion of launching a few more specialized courses in order to counter the competition faced by the petitioner. Relying solely upon the assurances and recommendations of the respondent, the petitioner agreed to launch new course curricula after spending considerable amount on infrastructure to the tune more than 100 lakhs. The statement of expenses is attached with the petition as Annexure P-4. The specialized courses upon which the respondent began his exercise were: "Security Analysis and Portfolio Management", "Post Graduate Diploma in Wealth Management and Planning" and "Derivative Content and Investment Technique".

5. The petitioner alleges that the respondent, knowing fully well that he was holding one of the key positions in the Institute, steadily used it as a weapon to extort money from the petitioner. He approached the petitioner in the month of April, 2007 and asked for a salary hike along with other non- monetary benefits, otherwise he would resign. This, despite the agreement dated 08.09.2006, wherein it was agreed between the parties that the salary revision of the respondent would become due upon completion of one year of service. Such was the pressure put by the respondent on the petitioner that the petitioner was left with no other option than to accept his unfair demand and by letter dated 14.04.2007, the respondent's salary was increased from Rs.30,000/- per month to Rs.47,000/- per month, besides other benefits, effective from April, 2007. The respondent was also given the liberty of flexible working hours, as demanded by him. It was, however, agreed that the next salary revision would be on the annual basis during the defined employment period with an

incremental bracket of 7.5% - 15%. A copy of the letter dated 14.04.2007 is enclosed with the petition as Annexure P-5.

6. In consideration of the aforesaid, the respondent agreed vide letter of the same date, i.e., 14.04.2007, that during the period of his stay with the petitioner, he will not engage directly or indirectly in any business or associate himself in any capacity with any organization dealing in stock market/capital market/financial market education institute or serve whether as principal, agent, partner or employee or in any other capacity, either full time or part time, in any business whatsoever other than that of the company.

7. On 03.10.2007, however, the respondent in gross violation of the agreement dated 08.09.2006 , wherein he agreed to serve the company for a period of 5 years with 3 years of minimum compulsory period, tendered his resignation vide e-mail dated 3.10.2007 (Annexure P-6). In response to the aforesaid e-mail of the respondent dated 3.10.2007, the petitioner sent an e- mail dated 4.10.2007, that his resignation could not be accepted and called him to discuss the cause of his resignation with an assurance that all the concerns of the respondent would be resolved once for all (Annexure P-7).

8. On 13.10.2007, the respondent was called for a meeting to discuss the issues with regard to his resignation and to the utter shock and surprise of the petitioner, the respondent informed the petitioner that he would call back his resignation if he was given an increment of another Rs.50,000/- per month. He also demanded that he be upgraded and designated as Head-Academics. The petitioner tried its level best to explain to the respondent that the next revision of his salary as per the terms and conditions of the agreement dated 08.09.2006 was due only in April, 2008 and not before that, but the respondent stuck to his demand, and as such the petitioner had no option but to accede to the same. Accordingly, the respondent's salary was revised vide letter dated 18.10.2007 (Annexure P-8) from Rs.6,37,000/- annually (Rupees Six Lacs Thirty Seven Thousand only) to Rs.8,77,000/- annually (Rupees Eight Lacs Seventy Seven Thousand only), and the respondent was also designated as Head-Academics.

9. Still dissatisfied, the respondent on 27.11.2007 wrote to the petitioner by an e-mail (Annexure P-9), once again demanding salary revision. A few days later, the respondent vide e-mail dated 29.11.2007 (Annexure P-10) wrote to the petitioner as follows:

> "Sir, I am sorry to say that BIFM does not deserve a talent like me. It's not me who wants BIFM, but it's BIFM who wants me. What I have delivered in 1 year to BIFM, it will take 10 years for others to deliver that. The only problem has been that I have begged for even getting my rights from you and I realize that was a mistake. Whatever you have given to me I have given many more times than that to BIFM. Only time will make u realize that. Thank you for giving me the platform to show my worth to the finance fraternity. Today I get more than 10 calls a day to establish an institution like BIFM. (emphasis supplied).

10. On 28.11.2007, the respondent suddenly stopped attending to work without any kind of intimation to the petitioner and tendered his resignation once again vide letter dated 01.12.2007,

which was returned unaccepted by the petitioner on 13.12.2007, informing the respondent that his unauthorized absence was in breach of the terms and conditions of the employment agreement dated 08.09.2006 (Annexure P-11 Colly).

11. The respondent not only did not resume work, but on 14.12.2007 addressed an e-mail to all the key employees of the petitioner, wherein he instigated and called upon the employees to act against the interest of the petitioner, advising them not to work hard for the petitioner. The respondent vide his reply dated 20.12.2007 to the letter of the petitioner dated 13.12.2007 also made various false and baseless allegations and claimed an amount of Rs.1 crore from the petitioner (Annexure P-12 Colly). The petitioner wrote back to the respondent vide letter dated 29.12.2007, denying the alleged liability of Rs.1 crore and claiming that it was the respondent who should compensate the petitioner for the losses suffered by it due to breach of agreement by the respondent (Annexure P-13).

12. Since the respondent neither resumed work nor compensated the petitioner company, and continued to be unauthorizedly absent from work in breach of the agreement dated 08.09.2006, the petitioner invoked the arbitration clause contained in the said agreement and requested its Chairman vide letter dated 17.12.2006 for the appointment of a sole arbitrator. Acting on the said letter, the Chairman of the petitioner company appointed Mr.Anil Kumar Chauhan, Advocate to act as the sole arbitrator vide letter dated 24.03.2008. The appointment of the arbitrator was intimated to the respondent vide letter dated 25.03.2008.

13. On 10.04.2008, it came to the knowledge of the petitioner; when a letter dated 30.03.2008 was received by the petitioner, that the respondent was about to join the employment of another Financial Educational Institute of a similar nature as that of the petitioner (Annexure P-14), contrary to the agreement dated 08.09.2006 wherein the respondent had agreed to serve the petitioner for a period of 5 years with a minimum compulsory period of 3 years and in breach of the undertaking given by him in his letter dated 14.04.2007 that he will not engage directly or indirectly in any business or associate himself in any capacity with any organization dealing in stock market/capital market/financial market education institute or serve whether as principal, agent, partner or employee or in any other capacity, either full time or part time, in any business whatsoever, and also contrary to the oral assurances given by the respondent to the petitioner from time to time.

14. Apprehending that the respondent, unless restrained from doing so, would divulge all the proprietary confidential information and business strategies of the petitioner to the competitors of the petitioner, as the respondent was holding a key position with the petitioner and had access to all the copyrighted study materials and handouts of different specialized courses developed by him during the course of his employment with the petitioner, and thereby cause irreparable loss and prejudice to the petitioner, the petitioner has filed the present petition.

15. The petitioner alleges in the petition that by attempting to join another institute of similar nature as that of the petitioner during the course of his employment with the petitioner and enticing/soliciting the employees of the petitioner, in gross breach of the terms of employment, the respondent has committed breach of the agreement dated 08.09.2006 and letter dated 14.04.2007

issued by the petitioner to the respondent, and prays for the passing of orders restraining the respondent from joining any other employment, and from divulging to any other business/firm or company any of the secrets processes or information relating to the courses, course material and business of the petitioner.

16. By an order dated 2nd May, 2008, notice of the filing of the petition was issued to the respondent and the respondent was restrained by an ex parte injunction from divulging to any business/firm or company any of the secrets, processes or information relating to the courses, course material and business of the petitioner as per the proprietary confidential systems developed and used by the petitioner.

17. On 08.07.2008, while seeking extension of time for filing the reply, the counsel for the respondent made a statement in Court that the respondent had not joined any other employment and that he would not be joining any other employment till the next date, that is, 5.8.2008. However, on 23.07.2008, an application, being I.A.No.8696/2008 under Section 151 of the Code of Civil Procedure, was filed by the respondent, which was ultimately listed before this Court on 28th July, 2008. Through this application the respondent prayed for vacation of the interim order dated 8th July, 2008 and that the consent given by the respondent on the said date be deemed to be withdrawn w.e.f. 5.8.2008. The respondent also prayed for vacation of the interim orders passed by this Court on 2nd May, 2008. On 5th August, 2008, however, when the counsel for the respondent again sought time for removing the objections on his reply and re-filing the reply, the respondent was directed by the Court to abide by the undertaking given by him to the Court on 8th July, 2008 till the next date fixed for hearing, i.e., 25th August, 2008. Today, I have heard the learned counsel for the parties and while reserving orders, have extended the interim orders in the meanwhile.

18. The learned senior counsel for the petitioner Mr. Neeraj Kishan Kaul, relying upon clause-4 of the agreement dated 08.09.2006, vehemently contended that the respondent was bound by the agreement to serve the petitioner company for a period of 5 years, taken as employment period, wherein there is no exit for a minimum period of 3 years, and was further bound by his undertaking given in the said Clause to maintain complete integrity and confidentiality and not to mis-use any business secrets of the petitioner company. The said clause is, for the sake of ready reference, reproduced hereunder as follows:

> "4. Since the mission of BIFM is a long term process where the commitment for a longer period is required, hence the employee commits to serve the BIFM for a period of 5 years, taken as employment period wherein there is no exit for a minimum period of 3 (three) years. During the course of his stay and thereafter, the employee further undertakes to maintain complete integrity, confidentiality, not to leak, divulge, share or misuse any of the business secrets, secrecy related to software & tampering or hacking strategies, plans etc. with any third party or for himself for any oblique motive."

19. Reliance was also placed by the learned senior counsel for the petitioner on the provision in the agreement relating to termination of agreement to contend that the respondent had contracted to

work with the petitioner for an employment period of five years, with three years as minimum compulsory period in case of some extraordinary situation. Thus, if the respondent in the case of some extraordinary situation decided to quit his job after the completion of the compulsory period of three years, he could do so provided he served a prior notice of at least six months in writing to the company as stipulated in the contract. The relevant provision of the contract reads as follows:-

> "Termination of Agreement:
>
> As committed above, Mr. Ramakar Jha shall work with the company for 5 years with 3 years as minimum compulsory period, but in case of some extra ordinary situation, if Mr. Jha decides to quit his job after the completion of the compulsory period, then he can do so by serving a prior notice of atleast 6 months in writing to the company."

20. The learned senior counsel for the petitioner also sought to emphasize the fundamental difference between an employee voluntarily leaving the service of an employer during the period of contract on the one hand, and the termination of the services of the employee by the employer on the other hand, during the aforesaid period. It was emphasized by him that in the instant case, it was the respondent, who had left the Institute. This was not a case where his services had been terminated by the petitioner. Emphasis was also laid on the fact that from time to time, the respondent had blackmailed the petitioner into increasing his salary and on such occasions, the stipulations contained in the agreement, including the stipulation contained in Clause 4 (supra), were reiterated by the respondent. Reference in particular was made by Mr. Kaul to the document dated April 14, 2007 titled as "Employment Agreement dated 8th September, 2008", "Subject: Remuneration and Greater commitment". The said document after setting out the revised pay package and other perks of the petitioner provided as follows:-

> "1. The above remuneration package shall be effective from April 2007 till March 2008.
>
> 2. As agreed and accepted vide Employment agreement dated 08/09/2006 and same also given as a precondition for the new remuneration package, it is reiterated that you shall work with a greater commitment and shall serve the company for a period 5 years with 3 years as minimum compulsory period including the period already served by you under the said agreement.
>
> 3. During the period your stay with the Institute the code of ethics, demands that you should not engage directly or indirectly in any business or associate yourself in any capacity with any organization dealing in stock market/capital market/financial market education institute or serve whether as principal, agent, partner or employee or in any other capacity either full time or part time in any business whatsoever other than that of the company.
>
> 4. That the institute shall own, in perpetuity, the copyright of all literary works and any other form of works ideas etc. All other contents of the agreement dated

08/09/2006 shall remain unaltered.

Please sign duplicate copy of this letter as an acknowledgement of your acceptance.

Thanking You	
Yours truly,	
For BLB Institute of Financial Markets Limited	I Accept & Agree
Sd/-	Sd/-
(Vikash Rawal)	(Ramakar Jha)
Director	Sr. faculty"

21. Mr. Neeraj Kaul next referred to the e-mail dated October 03, 2007 sent by the respondent with the following request:-

"1. As requested earlier, I would want you to review my working with BIFM, as I have finished 1 year of working on 11th September, 2007. If according to you I have performed as per your expectation, I would further request certain favors from you, they are:

(i) I would want you to remove the non-leaving clause that was put in my joining bond, as I don't see myself continuing with BIFM in the present requirement or working. I have overworked and laterally burnt myself. If I continue working the way I have been asked or otherwise decided myself for the past year I am sure I won't survive. I am further sure that even you would not want that to happen.

(ii) In the background of the above point I would request the management to accept my resignation and to consider the 6 months notice starting 1st October, 2007.

2. .....Hence, I see myself serving my notice period of 6 months from 1 st October, 2007 to 31st March, 2008. I thank the management for the kind of support given to me. Looking forward to your acceptance."

22. This was, Mr. Kaul contends, by no means the end of the matter as is evidenced from document dated October 18, 2007 emanating from the petitioner to the respondent regarding revision of salary and profile enrichment with reference to the employment agreement dated 08.09.2006 and letter dated 14.04.2007 referred to hereinabove. A bare glance at the said document shows that the salary of the respondent was again revised from Rs.40,000/- to Rs.60,000/- with effect from 01.04.2008 and his designation upgraded as Head-Academics. The document bears the following endorsement at the foot thereof:-

"I accept and agree Sd/-

(Ramakar Jha) Head-Academics"

23. Subsequent to this, however, the learned counsel for the petitioner points out that the respondent by his letters dated November 27, 2007, November 29, 2007 and December 01, 2007 again expressed dissatisfaction with his job and its attendant responsibilities. In his last letter, that is, letter dated 1st December, 2007, he requested the management to accept his resignation and expressed an opinion that calling it a day would be good for both the parties.

24. The learned counsel for the petitioner next drew my attention to letter dated December 13, 2007 and in particular to the following extracts of the said letter sent by the petitioner to the respondent, which is captioned "Unauthorized absence w.e.f. 28.11.2007":-

> "It is placed on records that institute enhanced your salary perks & perquisites twice over a period of one year at your demands. Despite of said enhancements you have abandoned your duties and more than 15 days have passed since your above stated unauthorized absence. Please note that you are in possession of confidential & proprietary information including assets of the institute. Various messages were given to you to join your duties but that did not yield any results.
>
> You are under obligation not to engage directly or indirectly in any business or to associate yourself in any capacity with any organization dealing in Stock Market or Capital Market or Financial Market, Education Institute or to serve as principal, agent, partner or as employee either full time or part time. The said undertaking was reiterated by you while you further negotiated your salary, perks & perquisites at Rs.47,000/- per month on April 14, 2007."

25. Mr. Kaul contends that on the very next day, that is, on December 14, 2007, the respondent by e-mail addressed to all the key employees of the petitioner instigated and called upon the employees to act against the interests of the petitioner and also advised them not to work hard for the petitioner. This was followed by a letter dated 20th December, 2007 purporting to be a response to the letter of the petitioner dated 13th December, 2007, making various false and baseless allegations against the petitioner and claiming an amount of Rs.1 crore from the petitioner.

26. The learned senior counsel for the petitioner has also vehemently urge that a conjoint reading of the e-mail dated October 13, 2007 whereby the respondent withdrew his resignation terming it as a "mistake" with the document enhancing the salary of the respondent, viz., document dated October 18, 2007 captioned ""Revision of salary and profile enrichment", makes it amply clear that the respondent was adopting blackmailing tactics with the petitioner for enhancement of his salary and employment profile. The said e-mail is apposite and is accordingly reproduced hereunder:-

> "Respected Sir, Thank you for your time and guidance. Today's meeting assured lot of things and made me realize my mistake of deciding to part with the organization. I sincerely apologize for that and once again thank you for showing me my growth path. I would like to assure you my continued commitment going forward and would like to take back my resignation request. It was a mistake. I am there with BIFM as earlier or whichever capacity the management feels fit. Thanking you for all the

support and guidance."

27. A three-fold submission was raised by the learned senior counsel for the petitioner:-

(a) a negative covenant restraining the right of the employee, during the subsistence of his service contract, to engage in any business similar to, or competitive with that of the employer, cannot be said to be a covenant in restraint of trade and, therefore, hit by Section 27 of the Contract Act.

(b) Even de hors the law, in equity jurisdiction, it is not open for the respondent to state that the relief prayed for by the petitioner of restraining the respondent from joining any other employment or engaging directly or indirectly in any business similar to that of the petitioner for the remaining period of his employment, is unjustified.

(c) A contract of service is essentially a contract of trust and faith and the material resources, infrastructure, etc. of the employer cannot be allowed to be used by a rival, through the conduit of an employee divulging the confidential systems developed and used by the petitioner, and that too during the subsistence of the employee's service agreement with the employer.

28. Reliance was placed by the learned counsel for the petitioner on the principles laid down by the Supreme Court in the case of Niranjan Shankar Golikari vs. Century Spinning and Manufacturing Co. Ltd. (1967) 2 SCR 378 and Superintendence Company of India (P) Ltd. vs. Sh. Krishan Murgai (1981) 2 SCC 246, to urge that there was a clear distinction between cases containing a negative covenant preventing the employee from working elsewhere during the term of the agreement and cases containing a negative covenant not to serve elsewhere after the termination of the contract. The former were specifically enforceable, while the later made the agreement void on the ground that they were in restraint of trade and, therefore, hit by Section 27 of the Contract Act.

29. The learned senior counsel for the petitioner next urged that the respondent was not only under a legal but also an equitable duty to maintain confidentiality with respect to the courses, course material and business of the petitioner as stipulated in the agreement. He further contended, relying upon Zee Telefilms Ltd. & Anr. vs. Sundial Communications Pvt. Ltd. & Ors. 2003 (27) PTC 457 (Bom) (DB), that the right to restrain the publication of a work using confidential information is a broader right than the proprietary right of copyright, though the law of confidence is different from the law of copyright.

30. In the above context, reference was also made to the decision rendered by a learned Single Judge of this Court (Sanjay Kishan Kaul, J.) in the case of Daljeet Titus, Advocate (Mr.) vs. Mr. Alfred A. Adebare & Ors. 2006 VI AD (DELHI) 117 wherein the Court in a suit for injunction for infringement of copyright while holding that the legal pronouncements make it clear that copyright exists not only in what is drafted and created, but also in lists of clients and addresses specially designed by an advocate or a law firm, in paragraph-81 of the judgment observed as under:-

> "81. .....Court must step in to restrain a breach of confidence independent of any right under law. Such an obligation need not be expressed but be implied and the breach of such confidence is independent of any other right as stated above....."

31. Finally, it was contended by Mr. Kaul that the study material and teaching methodology designed and structured by the respondent as a faculty member of the Institute were the property of the Institute, the resources and infrastructure of the Institute having been utilised by the respondent for the development thereof. As set out in the petition, the Institute had invested to the tune of more than Rs.100 crores of rupees on the launching of the new curriculum alone in the last one year by setting up state of the art infrastructure. The respondent was holding one of the key posts in the Institute and was accordingly in a position to blackmail the Institute. Though the petitioner stricto senso did not have copyright in the courses, the study materials, the hand-outs and the teaching technology devolved by the respondent at the expense of the petitioner, the respondent by breaching his employment agreement and divulging to a rival business any of the secret processes or confidential systems developed and used by the petitioner would be subjecting the petitioner to irreparable injury.

32. Per contra, a three-fold contention was also raised by the learned counsel for the respondent Mr. Atul Bandhu, to negate the prayer of the petitioner for interim relief. According to Mr. Bandhu,

(a) Section 9 of the Arbitration and Conciliation Act, 1996 cannot be invoked by the petitioner to claim interim relief as the aforesaid provision does not empower the Court to grant interim measures save those which are necessary for the preservation of "property".

(b) The consequences for the breach of the negative covenant are not contained in the contract and, as such, the said covenant cannot be enforced.

(c) The negative covenant relied upon by the petitioner is in restraint of trade and, therefore, hit by Section 27 of the Contract Act.

33. First a look at Section 9 of the Arbitration and Conciliation Act, 1996, which reads as under:-

> "9. Interim measures, etc., by Court. - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

34. From the provisions of Section 9 of the Act, I am unable to accede to the contention of the learned counsel for the respondent that this Court is not empowered to pass any interim measures save those as are necessary for the preservation and custody of any property, etc. Sub-clause (e) of Clause (ii) of Section 9 clearly stipulates that the Court shall have the power to order "such other interim measure of protection as may appear to the Court to be just and convenient", and "the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it". There is no reference in the said sub-clause to any property, whether movable or immovable. To curtail the width and magnitude of the said clause so as to make it applicable only to movable and immovable property, in my view, would be wholly unjustified, apart from being in violation of all canons of interpretation. Clearly, the provisions of Section 9 of the Act must be allowed to go to the rescue of the petitioner, who has already invoked the arbitration clause.

35. The contention of the learned counsel for the respondent that since the consequences for the breach of the negative covenant are not contained in the contract and in view of the fact that no penal consequences, either of a civil nature or of a criminal nature, are spelt out for the aforesaid breach, the said negative covenant cannot be enforced, is, to my mind, equally specious and unsustainable in law.

36. Finally, as regards the submission of the learned counsel for the respondent that the covenant in the instant case is a negative covenant, which is in restraint of trade and the said covenant cannot, therefore, be enforced against the respondent, in my considered opinion, the Supreme Court in Golikari's case (supra) and in Murgai's case (supra) has unambiguously laid down the law in respect of negative covenants which are hit by Section 27 of the Contract Act and those which are valid under the said Act. In Golikari's case (supra), the injunction granted by the trial court was upheld by the High Court and finally by the Supreme Court on the premise that it was confined to the period of the agreement. The validity of Clause 17 of the agreement in the said case, which provided that in the event of the employee leaving, abandoning or resigning the service of the company before the expiry of the period of five years, he shall not directly or indirectly engage in the business at present being carried on by the company for the remainder of the said period, was upheld. It was found that

Clause 17 did not prohibit the appellant from seeking similar employment from any other manufacturer after the contractual period was over. It was also found that there was no indication at all that if the appellant was prevented from being employed in a similar capacity elsewhere, he would be forced to idleness or that such a restraint would compel the appellant to go back to the company, which would indirectly result in specific performance of the contract to personal service. The following pertinent observations were made by the Court in paragraph-15 of the judgment:

> "15. 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....."

37. In Murgai's case (supra), a three Judge Bench of the Supreme Court endorsing the view taken in Golikari's case (supra), after delving into all previous precedents held that by virtue of the servant's duty of fidelity, a negative covenant, having regard to the interest of the employer during the subsistence of the service agreement, is normally valid. In paragraph 58 of the judgment, the Supreme Court held as follows:- (SCC, page 264) "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.

38. In Robb Vs. Green reported in [1895] 2 Q.B.315, the defendant was employed as manager of the plaintiff's business. While so employed, he surreptitiously copied from the plaintiff's books a list of names and addresses of the plaintiff's customers, with the intention of using it for his own benefit after he had left the plaintiff's employment and set up a similar business on his own account. Having left the plaintiff's employment, he so used the list. The Court of appeal, applying the dictum of Bowen, L.J. in Lamb Vs. Evans, [1893] 1 Ch. at page 229 held that it was an implied term of the defendant's contract of service that he would act with good faith towards his master; his conduct was a breach of the implied term; and the plaintiff was entitled to damages and injunction. Lord Esher, M.R. in delivering the judgment made the following observations:

> "A master would not take a servant into his employ if the servant refused to agree to act honestly, and a servant must know that his master, who is going to engage him, relies on the faithful performance by him of the duties arising out of the confidential relations between them. This stipulation must have been in the minds of both the plaintiff and the defendant when they entered into the contract of service, and it is, therefore, a part of that contract. Bowen, L.J., in Helmore v. Smith (2) and in Lamb v.

> Evans (1), was clearly of the same opinion. He says in the latter case ([1893] 1 Ch. At p.229):
>
> "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile."

Now, a contract of service is a transaction of confidence and trust, and if a stipulation of faithful performance cannot be implied, the contract would be futile."

39. Dealing with the aforesaid aspect of a service contract, in Seager v. Copydex Limited (1967) RPDT 349, at page 368 and going a step further Lord Denning, MR opined:

> "The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent."

40. The basic principles of the law of confidence as set out in Copinger and Skone-James on Copyright (13th Edn) paragraph 21.1, pages 720-721 are apposite and are set out as follows:-

> "There is a broad and developing equitable doctrine that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of him who gave it, without obtaining his consent or, at any rate, without paying him for it. It has for long been clear that the courts can restrain a breach of confidence arising out of a contract or any right to property..... The ground of equitable intervention is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. Acceptance of information on the basis that it will be kept secret affects the conscience of the recipient of the information. In general it is in the public interest that confidences should be respected, even where the consider can point to specific financial detriment to himself. If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff without his consent express or implied, he will be guilty of an infringement of the plaintiff's rights."

41. In Percept D'Mark (India) (P) Ltd. Vs. Zaheer Khan and Another reported in (2006) 4 SCC 227, the Supreme Court, after reviewing the entire case law from the 132 years old interpretation of Section 27 of the Contract Act laid down in Madhup Chunder Vs. Rajcoomar Doss, (1874) 14 Bengal Law Reporter 76 and after reiterating the principles laid down in Golikari and Murgi (Supra),

summed up the law as follows: [SCC page 247] "63. Under Section 27 of the Contract Act: (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable, (b) the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applies only when the contract comes to an end, (c) as held by this Court in Gujarat Bottling v.

Coca-Cola this doctrine is not confined only to contracts of employment, but is also applicable to all other contracts."

42. Per contra, reliance was placed by the learned counsel for the respondent on the judgment rendered by the Division Bench of the Delhi High Court in Murgai's case (supra) reported in AIR 1979 DELHI 232. Far from being of any assistance to the respondent, the said decision buttresses the contention of the counsel for the petitioner that Section 27 does not apply to a negative covenant during the period of service as is clear from a reading of paragraph 22 of the judgment, which reads as follows:-

> "22. With respect, it may be pointed out that the injunction upheld in the Supreme Court case related to the negative covenant operating during the period of service. The court has repeatedly emphasised that Section 27 does not apply to a negative covenant operating during the period of service. The Supreme Court has not upheld in that case any restrictive covenant which prevented the employee from carrying on a similar business or working with a rival employer after the period of service. The injunction operating after the period of service was confined to the divulgence of trade secrets only. In the present case no such trade secrets, have been shown to have been imparted to the defendant."

43. In the instant case, indubitably the respondent is in breach of the negative covenant contained in his service agreement, during the subsistence of his service agreement with the petitioner, and the doctrine of restraint of trade cannot therefore be held to apply. The respondent must, accordingly, in my opinion, be held to be bound by the terms of his service agreement, at least till such time as the arbitrator renders his award on the dispute between the parties. The petitioner has thus made out a prima facie case for the grant of interim relief under Section 9 of the Act, restraining the respondent from seeking employment with any business rival of the petitioner or with any organization dealing in Stock Market/Capital Market/Financial Market Education Institute. The balance of convenience also tilts in favour of the petitioner, as the petitioner cannot be monetarily compensated, if any of its trade secrets or information relating to its courses, course materials and business is divulged by the respondent to any other organization carrying on a business akin to that of the petitioner. Irreparable injury would also undoubtedly be caused to the petitioner's business, if such an eventuality occurs.

44. In view of the aforesaid conclusion, the respondent is restrained, during the pendency of the arbitration proceedings before the Arbitrator, from joining any employment or engaging directly or indirectly in any business or associating himself in any capacity with any organization dealing in Stock Market/Capital Market/Financial Market Education Institute or serving whether as principal, agent, partner or employee or in any other capacity, either full time or part time in any business

whatsoever similar to that of the petitioner. The respondent is further restrained from divulging to any other business/firm or company any of the secret processes or information relating to the courses, course material and business of the petitioner as per the proprietary, confidential systems developed and used by the petitioner. The respondent is also restrained from joining any competitor of the respondent and from alluring or enticing any of the existing employees of the petitioner to join any other business/firm or company.

45. The above interim orders shall enure during the pendency of the arbitration proceedings. The nominated Arbitrator shall, however, render his award as expeditiously as possibly and latest within three months from the date of entering into the reference. The arbitrator shall enter upon the reference forthwith, if already nominated and shall be nominated latest within one week, in case no arbitrator is so far nominated. The parties shall fully cooperate in the arbitration proceedings and endeavour to expedite the same.

46. It is clarified that all observations made in the present order are tentative in nature and shall be independently evaluated by the Arbitrator on their merits and on the touchstone of the evidence, which may be adduced by the parties before the learned Arbitrator. Any expression of opinion contained in the order will have no bearing on the award to be rendered by the Arbitrator.

OMP 241/2008 stands disposed of with the aforesaid orders and directions.

REVA KHETRAPAL, J SEPTEMBER 22, 2008 dc/km