

**SUIT NO. 901/21**

**RAJESH KUMAR GANDHI VS. MUKESH DUTT**

**27.01.2022**

**THROUGH CISCO WEBEX VIDEO CONFERENCING**

Present: - Sh. Trilok Chand, Ld. counsel for defendant.

Vide this order, the undersigned shall dispose off an application under Order 39 Rule 1 & 2 CPC moved by the plaintiff.

Arguments have already been heard. Record perused.

In this application, plaintiff has prayed for restraining the defendants and his legal heirs/ attorneys/ assignees/ executors/ representatives/ nominees/ servants/ employees or any other person on their behalf restraining them permanently from establishing/ approaching/making contact with the customers of the plaintiff till the pendency of the present suit. The plaintiff has based his plea on a memorandum dated 01.02.2021 executed between the plaintiff and the defendant. The defendant was an employee of the plaintiff and ceased working at the plaintiff firm on 28.01.2021.

Before granting of the temporary injunction, the following conditions are required to be satisfied:

1. **Prima Facie Case** is in the favour of the plaintiff and against the defendant.

Prima facie case does not mean that the plaintiff should have a cent percent case which will in all probability succeed in trial. Prima facie case means that the contentions which the plaintiff is raising, require consideration in merit and are not liable to be rejected summarily.

2. **Balance of convenience** is in favour of the plaintiff and against the defendant.

To see balance of convenience, it is necessary to compare case of parties, comparative mischief or inconvenience which is likely to sue from withholding the injunction will be greater than which is likely to arrive from granting it.

3. **Irreparable injury** is likely to be caused to the plaintiff, which cannot be compensated for in terms of money.

Ordinarily injury is irreparable when without fair and reasonable address of Court, it would be denial of justice. Very often an injury is irreparable where it is continuous and repeated or where it is remediable at law only by a multiplicity of suits. Sometime the term irreparable damage refers to the difficulty of measuring the amount of damages inflicted. However, a mere difficulty in proving injury does not establish irreparable injury.

Thus, the burden is on the plaintiff praying for the relief. Mere proof of one of the above conditions does not entitle a person to an order of temporary Injunction.

**Prima Facie Case-** In the present application, the restraint which the plaintiff is seeking against the defendant prima facie appears to be in connection with right to trade, business and profession of the defendant. The Court has to delve into Section 27 of the Indian Contract Act,1872 for this.

As per **Section 27 of the Indian Contract Act, 1872** every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extend void. There is one exception to this rule-that if the goodwill of a business has been sold, an agreement to refrain from carrying on similar business, if it appears to the Court to be reasonable, would be protected and would be enforced.

**Policy behind Section 27-** The public have an interest in every person's carrying on his trade freely, so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves are contrary to public policy, and therefore void. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, if the restriction is reasonable -reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public

*In Suprintendence Company of India v. Krishna Murgai, 1980 SCR (3)1278*, the Supreme Court while discussing the objective behind Section 27 of the Act analyzed the difference of negative covenant between an employer-employee and a seller-purchaser and stated that a negative covenant between the employer – employee, pertains to performance of personal service which is altogether different in substance from purchase and will have vastly different social and economic implications. The essential line of distinction is that the purchaser is entitled to protect himself against competition on the part of his vendor, while the employer is not entitled to protection against mere competition on the part of his servant. A restrictive covenant ancillary to a contract of employment is likely to affect the employee's means or procuring a livelihood for himself and his family to a greater degree than that of a seller, who usually receive ample consideration for the sale of the goodwill of his business.

**Rationale for Rule against Restraint of Trade-** An employment contract generally includes restraint of trade clause to protect the interest of the employer after an employee leaves their organization or business for the following reasons:

- Non-compete clause prevents the employees from competing with their former employer for a reasonable period of time the employees can compete by opening a similar business or working with a rival business.
- Non-solicitation clause prevents the employee to solicit his former employer's clients for a reasonable period of time.
- Non-recruitment clause prevents the employee to hire the former employer's employee for a reasonable period of time.
- Confidentiality clause prevents the employee from disclosing the former employer's confidential information.

Here, the word 'reasonable' is of significant importance. For a contract to be enforceable, the restraint of trade clause must be reasonable.

In the case of ***Polaris Software Lab. Limited Case AIR 1980 SC 1717***, the Supreme Court held that in order to validate a restrictive covenant, an employer must establish that the covenant –

- (i) operates for a restricted period and areas,
- (ii) pertains to information that is exclusive and shared with the confidence that the employee shall use such information only for the benefit of the employer and maintain fidelity, and
- (iii) the restraint will not tantamount to restraining the employee from using his own acumen or skill sets,
- (iv) Restriction falls within Exception I of the Section 27, Indian Contract Act, 1972.

Thus, reasonability can be ascertained on the basis of the following grounds:

1. Time period
2. Geographical location
3. Scope of work

The Hon'ble Supreme Court in ***M/S Gujarat Bottling Co. Ltd. V Coca Cola Co. & Ors (1995)*** have held that courts in India have only to consider the question whether the contract is or is not in restraint of trade.

Moreover, negative stipulation during the period of employment still may be held to be valid and not in restraint of trade. However, post termination non-compete clauses in employment contracts are “restraint of trade” and it is impermissible under section 27 of the Act. Such agreements of restraint are void because of being unfair and depriving an individual of his or her fundamental right to earn a living.

Also, in *Independent News Service Pvt. Ltd. Vs. Sucherita Kukreti(2019) 257 DLT 426*, in the context of Section 27 of the Contract Act, it has been held the right saved thereby to be a facet of Article 21 of the Constitution of India.

In the present application-

- 1) The plaintiff is seeking permanent restraint against the defendant from establishing/approaching/making contact with the customers of the plaintiff.
- 2) The agreement of restraint has been entered into after the defendant ceased to be the employee of the plaintiff.
- 3) There is no specific mention in the application that who are the customers of the plaintiff with respect to whom the plaintiff seeks the restraint.
- 4) There is no reasonable time and geographical area limit specified by the plaintiff in restraining the defendant from contacting his customers.
- 5) The case of the plaintiff prima facie does not fall under Exception I of the Section 27, Indian Contract Act, 1872.
- 6) The case of the plaintiff does not prima facie appear to be that of protecting his trade secrets.

In this case, the restraint cannot be allowed in such a form whereby it violates the fundamental right of the defendant to carry on his trade, business or profession. Moreover, the Court cannot restrain the defendant from using his own acumen or skills to compete with the plaintiff in the same kind of business. The restriction which the plaintiff is seeking to impose upon the defendant is of permanent and unlimited nature and is not reasonable.

Moreover, the plaintiff entered into this agreement of restraint with the defendant when the defendant was not the employee of the plaintiff.

Hence, the plaintiff could not prove to the Court the prima facie case in his favour for the purpose of interim injunction application. The application of plaintiff under Order 39 Rule 1 & 2 CPC is dismissed.

Put up for further proceedings on 13.04.2022.

**RICHIKA TYAGI**  
**C.J-02, West, THC, Delhi**  
**27.01.2022**