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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of decision: 14th May, 2024*

+ **ARB.P. 223/2024**

VRENTIN TECH PRIVATE LIMITED

..... Petitioner

Through: Mr. Atul Agarwal, Ms. Sushalini
Sethi and Mr. Mayank Sethi,
Advocates.

versus

UDIT GOGOI

..... Respondent

Through: Mr. Febin Mathew Varghese and Mr.
Dhiraj Abraham Philip, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

1. **The present Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996** (*hereinafter referred to as the "Act, 1996"*) has been filed on behalf of the petitioner seeking appointment of the Ld. Sole Arbitrator, for adjudication of the arbitrable disputes having arisen between the parties, as a result of the failure of the Respondent to follow the procedure for appointment, as provided in the ***Arbitration Clause 16*** in the ***Consultancy Agreement dated 25.11.2021***.

2. Briefly stated, the petitioner is an Information Technology (IT) services Company that specializes in providing complete consulting solutions and staff augmentation to its clients. It is engaged in the business of providing end-to-end hiring and management solutions for building



dedicated engineering teams and deploying remote software developers and operates under the brand name of *Muoro/Muoro.io*.

3. The Petitioner Company had entered into a Master Services Agreement (*MSA*) with another company called Code Shastra Private Limited "*Code Shastra*" under which the petitioner was providing consultancy services to Code Shastra and other end clients including Kard Tech Pte. Ltd. which owns and operates the fintech platform *Arrow* and *GSPANN* Technologies Inc. Code shastra also entered into a Statement of Work "*SoW*" for a period of six months with the petitioner to provide *angular development services* to Arrow.

4. The petitioner Company thus, entered into a *Consultancy Agreement dated 25.11.2021*, with the respondent, a software Engineer who provides software and design solutions, for a period of 6 months, *expiring on 25.05.2022* and during this engagement the respondent was directed to provide these services directly to "Arrow". The Petitioner was thus, providing the services through the respondent, through Code Shastra, eventually to its end customer i.e. "Arrow".

5. The *Clause 7* of the *Consultancy Agreement for Arrow* provided the terms relating to "*Conflicts of Interest, Non-hire and Non-solicitation*" and further provided that for the duration of engagement and for two years thereafter, the respondent could not solicit any current or potential customer of the petitioner/its associates or related entities.

6. However, within one month of the respondent's engagement, the petitioner started receiving complaints about the performance of the respondent and eventually "*Arrow*" asked to drop the respondent from the Project for the time being. The petitioner also received an email dated



18.12.2021 from the respondent stating about some concern issues with the project with *Arrow* and requested the petitioner to come up with a proper solution. Thus, the respondent ceased working on Arrow project w.e.f 18.12.2021 for the time being. However, the petitioner during this time was in contact with Code Shastra and Arrow to resolve the issues. It is further submitted that the contract *had not been terminated*, but the respondent had been *directed to temporarily halt working* on the Project. The Agreement between the petitioner and respondent was thus, *in abeyance* and was not terminated.

7. Since the talks between the petitioner and respondent were not going through and the petitioner was inclined to retain the respondent in its services, it entered into a new separate ***Consultancy Agreement dated 09.02.2022***, with the respondent to provide the services to another end customer namely GSPANN , ***effective from 09.02.2022 for a period of six months ending on 09.08.2022***. However, even at this stage the earlier ***Consultancy Agreement dated 25.11.2021*** was neither terminated nor rescinded.

8. However, eventually, ***Arrow*** did not engage the services of the petitioner for angular development for which the respondent had been engaged and this led to loss of business and opportunity for the petitioner causing huge monetary loss and damages.

9. Subsequently, it was realized that the respondent's direct engagement with Arrow and the respondent's inducement of Arrow, led to the stoppage of the association of Arrow with the petitioner. Though the respondent continued to provide its services to GSPANN Technologies for the duration of the Agreement, the petitioner found out from the official page on



www.linkedin.com., that the respondent had been working *as a full time employee with Arrow since March, 2022* Thus, it became apparent that the respondent had started working directly with Arrow at the same time when the agreement of respondent with GSPANN was in place, both of which contained identical non-solicitation clause.

10. Hence, owing to the breach of contract and *violation of non-solicitation Clause 7* of the Agreements, a ***Legal Notice dated 27.03.2023*** was got served upon the respondent and was asked to pay damages of Rs.40,00,000/-. When the respondent failed to respond to the Legal Notice, the petitioner served a *Notice dated 19.10.2023 invoking arbitration proceedings* seeking appointment of a Sole Arbitrator.

11. A Reply dated 31.10.2023 was sent by the respondent, wherein he raised the contentions that *firstly*, the Consultancy Agreement dated 25.11.2022 with Arrow, *was not stamped or registered* and was unenforceable; *secondly*, *the non-solicitation Clause 7* was in violation of Section 27 of Indian Contract Act, 1872 and was thus, unenforceable; *thirdly*, the Consultancy Agreement dated 25.11.2022 with Arrow *was orally terminated by the petitioner* and in any case it automatically got terminated once the new *Consultancy Agreement dated 09.02.2022* with GSPANN was signed between the parties. For the aforesaid reasons, the respondent asserted that there is no arbitrable dispute between the parties.

12. The petitioner has placed relied upon the judgment of *Re-inter play between arbitration agreements under Arbitration & Conciliation Act and Indian Stamp Act, 1899, 2023/INSC/1066*, wherein it has been held that non-stamping or inadequate stamping of an arbitration agreement would not render the arbitration clause void and therefore, the initiation of arbitration



proceedings cannot be halted on this ground. It is, therefore, submitted that there are arbitrable disputes raised by the petitioner and the Arbitrator may accordingly be appointed.

13. *Learned counsel on behalf of the respondent has objected* to the present petition on three grounds; *firstly*, the Contract/Agreement being not duly stamped; *secondly* Clause 7 of the Consultancy Agreement dated 25.11.2021, restricting the right of the respondent to work, is void under Section 27 of the Indian Contract 1872; and *thirdly* that the Contract stood orally terminated by virtue of the second Consultancy Agreement having been entered between the parties.

14. **Submissions heard and judgments perused.**

15. The *first objection* of the Consultancy Agreement dated 25.11.2021, not being stamped or registered, has been answered by the Seven Judge Bench in the matter of Re-inter play between arbitration agreements (supra), wherein it has been held that non-stamping or non-registration of the Contract would not make the arbitration clause ineffective and the matter irrespective of the inadequate stamping/registration can still be referred for arbitration.

16. The *second objection* taken on behalf of the respondent, is that *Clause 7* dealing with *Conflict of Interest, Non-hire and Non-solicitation* is a void being in violation of Section 27 of the Indian Contract Act, 1872.

17. This objection warrants analysis of Clause 7 of the Agreement dated 25.11.2021, which reads as under :

“7. Conflicts of Interest, Non-hire and Non-Solicitation., The Consultant, in rendering his/her duties shall not utilize any invention, discovery, development, improvement, innovation, or trade secret in which he



does not have a proprietary interest. During the term of this Agreement, the Consultant shall devote as much of his/her productive time, energy and abilities to the performance of his/her duties hereunder as set forth in Exhibit A in a timely and productive manner. During the period of this Agreement and for a period of two year following any termination, the Consultant shall not, directly or indirectly hire, solicit, or encourage leaving Muoro's employment, any employee, consultant, or contractor of Muoro or its associates and related entities or hiring any such employee, consultant, or contractor who has left Muoro 's or any of its associates' or related entities' employment or contractual engagement within two year of such employment or engagement. During the term of this Agreement and for a period of two year immediately following the expiration or termination of the Agreement for any reason, the Consultant shall not, without first obtaining Muoro's written consent, directly or indirectly, individually or on behalf of any person, corporation, or other entity that is a competitor of Muoro solicit, interfere with, endeavour to entice away, or encourage any current or potential customer, employee, contractor or consultant of Muoro or any of its associates or related entities with whom Muoro had any dealings or contact during two year period prior to the expiration or termination of the Agreement, to discontinue or reduce their relationship with Muoro.

The Consultant agrees and acknowledges that the scope, time and geographical limitations in the above mentioned covenants, are reasonable and properly required for the adequate protection of the business interests of Muoro. The Consultant further agrees and acknowledges that damages cannot be an adequate remedy to compensate Muoro for any actual or threatened breach by the Consultant of this provision of the Agreement and the Consultant accordingly agrees that in addition to any and all other remedies available, Muoro shall be entitled to obtain injunctive relief to enforce these obligations.”



18. From its terminology, it is quite evident that the restriction on the respondent was for a period of two years immediately upon the termination of Agreement for any reason and was limited to not directly or indirectly soliciting work, with a competitor of the petitioner, without the consent of the Petitioner.

19. The Apex Court in Superintendence Company of India Pvt. Ltd v. Krishan Murgai AIR 1980 SC 1717 relying on several judgements by House of Lords observed that principally, covenants in restraint of trade, partial as well as general are *prima facie* void and cannot be enforced unless the test of “reasonableness” is satisfied. Further, it drew a distinction between contracts of service and contracts for the sale of a business holding that Agreements of Service containing a negative covenant preventing the employee from engaging in services elsewhere during the term of the agreement are not void under Section 27 of the Contract Act since doctrine of restraint of Trade is inapplicable during the continuance of a contract of employment and shall apply once the contract comes to an end. Thus, the validity of agreement in restraint of Trade after the term of Agreement must satisfy the Test of Reasonableness with reference to particular facts and circumstances of the case as laid down by Lord Macnaghten in Nordenfelt v. Hakim Nordenfelt Guns & Ammunition Co. Ltd. L.R. [1894] A.C. 535 case and accepted by the House of Lords in Mason v. Provident Clothing and Supply Co. Ltd. L.R. [1930] A.C. 724.

20. The Apex Court, in the case of Niranjan Shankar Golikari v. The Century Spinning And Mfg. Co. 1967 SCR (2) 378 highlighted the distinction in the applicability of restrictive covenants such as *non-compete*



and non-solicitation Agreements during employment and post the course of employment. It was observed that negative covenants would be legally enforceable when they are operative during employment. Such covenants would be valid if found, reasonable and not against the public policy. The court, in the above judgement, took a liberal approach in observing that not all post termination/ non-compete clauses are in restraint of trade and held that, ‘a negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any 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.’

21. The Delhi High Court has discussed the legal validity of a non-solicitation agreement in Wipro Ltd v. Beckman International 2006 (131) DLT 681 and observed that a non-solicitation clause would not be void per se and if the clause is reasonable, it would not be violative of Section 27 of the Indian Contract Act, 1872 either. The clause in question bars contracting parties from inducing their employees to give up their current employment and join such other party. Thus, the Court has crystalized the following principles; *firstly*, negative as well as positive covenants that are applied during the course of employment cannot be inferred as restrictive of trade, if reasonable; *Secondly*, such agreements are not applicable post-termination of the employee contract; *Thirdly*, the Courts shall take a more stringent approach when dealing with employee-employer contracts than in other contracts, such as partnerships because it is believed that in employer-employee relations, one is in a dominant position. *Lastly*, the bar under section 27 of the Act would not be attracted in cases where the non-



solicitation clause operates between two individuals, businesses, or partnerships as the restriction was put solely on the contracting parties. Similarly, in Mr. Diljeet Titus, Advocate v. Mr. Alfred A. Adebare and Ors. 2006 (32) PTC 609 (Del), the Delhi High Court clarified that confidential information of the employer can be protected even in the post-employment period.

22. Subsequently, the Delhi High Court in LE Passage to India Tours & Travels Pvt. Ltd v. Deepak Bhatnagar (2014) 209 DLT 554 has observed that while there is a complete ban on any agreement that restrains trade, there is an exception when the limits applied to such Agreements are declared reasonable by the Court.

23. Thus, Notwithstanding the general rule holding that all Agreements in restraint of trade are void, the Act specifically exempts Agreements not to carry on business, of which goodwill is sold, from the purview of Section 27. This has been upheld by the Delhi High Court in Affle Holdings Pte Limited v. Saurabh Singh 2015 SCC OnLine Del 6765 where the court examined the validity of a negative covenant which restricted the respondent from engaging in a competing business for a period of 36 months. The court observed that since the respondent acquired a business which was competing with the business of the appellant with the clear intention of acquiring its goodwill, the covenant would fall within the exception envisaged in Section 27 and would not be in restraint of trade.

24. Recently, the Madras High Court in E-merge Tech Global Services P. Ltd. v. M.R. Vindhyasagar and Ors C.S.No.258/2020 held that the non-solicitation clause for a period of 3 years post termination is binding on the employee in order to prevent divulgence of confidential information of the



employer.

25. From the above judicial pronouncements, it emerges the courts take a far stricter view of covenants in employment agreements than it does of similar covenants between vendor and purchaser or in Partnership Agreements. The primary tests used by the courts to determine the validity of a '*non-solicit clause*' in an employment Agreement is whether the employer has made out any exceptional case to deviate from the general principle whereby the loss suffered by the employer due to breach of confidentiality obligations of the employee, could not be measured adequately or if measured could/would not adequately place the employer in the same position as if the breach had not occurred.,

26. Thus, though *Section 27 of the Contract Act, 1872* only restricts a person from exercising lawful profession, trade or business of any kind, in the present case it is not absolutely restricting the respondent, but had only limited his right in soliciting the competitors of petitioner for a period of two years after termination of the Agreement. The breach has allegedly occurred during the subsistence of the contract and not post termination according to the Petitioner. Thus, the Employee would be clearly bound by the *Non-Solicitation Clause*, thus, raising arbitrable issues. The respondent has assented that the Contract stood terminated as he was put on another Contract during the subsistence of the first Contract, but it is a moot point whether the contract stood terminated which cannot be determined in the present application. Therefore, *prima facie* the contention raised by the respondent is not tenable. It may also be observed that these arguments are on the merits, which more appropriately must be agitated before the learned Arbitrator.



27. To conclude, the only tenable objection for consideration in the present petition was non-stamping/ inadequate stamping of the Contract which is not relevant in view of the recent judgment of the Apex Court in *In Re, Interplay Between Arbitration Agreements Under the Arbitration and Conciliation Act of 1996*, 2023 SCC OnLine SC 1666.

28. ***The observations made herein on the Contract are prima facie for the purpose of deciding the present petition and not an expression on the merits of the case. The parties are at liberty to agitate their rival contentions, on merits, before the learned Arbitrator.***

29. In view of the above, without prejudice to the rights and contentions of the parties, the present petition is allowed and Mr. Ajay Kohli, Advocate, Mobile No.9910087765 is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

30. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule of the Act, 1996 or as consented by the parties.

31. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of the Act, 1996 and not being ineligible under Section 12(5) of the Act, 1996.

32. The arbitration shall be conducted under the aegis of Delhi International Arbitration Centre, Delhi High Court.

33. The parties are directed to contact the Arbitrator within one week of being communicated a copy of this Order to them by the Registry of this Court.

34. The parties are at liberty to agitate their respective objections before the Arbitrator.



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35. Accordingly, the present petition is disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 14, 2024

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