

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 24.2.2011.
Judgment Pronounced on: 28.02.2011.

+ **CS(OS) No. 661/2005**

FITZEE LTD.

.....Plaintiff

- versus -

BRILLIANT TUTORIALS (P.) LTD.

.....Defendant

Advocates who appeared in this case:

For the Plaintiff:	None.
For the Defendant:	Mr. K.K. Rohtagi, for Defendant No.1.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J

1. This is a suit for permanent injunction.
2. The plaintiff company is engaged in imparting specialized coaching to students for the purpose of enabling them to get through JEE examination conducted by various

IITs all over the country. The plaintiff claims to have attained immense goodwill and reputation on account of constant good results in the aforesaid examination. The plaintiff company has been appointing faculty members for conducting class room training and coaching of students. It is claimed that the faculty members are given training so as to maintain uniform standard of teaching, culture etc., which is imparted on regular basis. It is further claimed that the training to the faculty members includes lectures by the persons possessing high skill and expertise, who give teaching tips to the faculty members, and is imparted for a minimum period of three months. The plaintiff company claims to be incurring substantial expenditure on the aforesaid training.

3. Defendant No.1 is also a company engaged in coaching the students, who want to appear in JEE examination conducted by IITs. Defendant No.1 also imparts coaching to students for other competitive examinations such as IIT-JEE, AIEEE, MBBS, IAS etc. It has been alleged by the plaintiff that defendant No.1 has no infrastructure to train faculty and is dependent on the trained faculty members of the plaintiff company and,

therefore, it has been indulging in poaching so as to take away trained faculty members of the plaintiff company in the middle of sessions leaving the students in a lurch and causing immense loss to the plaintiff company. It is alleged that besides offering lucrative salary package and other monetary benefits, defendant No.1 also represents the faculty members of the plaintiff that their chances of growth are minimal with the plaintiff company.

It is also alleged that defendant No.2 was targeted by defendant No.1 for this purpose but he refused to accept the unethical offer given to him and he was compelled to write a letter to the plaintiff company informing him about the disturbance created by defendant No.1. It is further alleged that defendant No.3 was also approached by defendant No.1 in the similar manner with the object of getting trained faculty members without imparting training to them.

4. The plaintiff has sought permanent injunction restraining defendant No.1 from poaching the factually members of the plaintiff company including defendant Nos. 2 and 3, or from instigating them to quit the plaintiff company and join them. It has also sought injunction

restraining defendant Nos. 2 and 3, from joining defendant No.1 in the act of poaching triggered by defendant No.1.

5. Defendant No.1 has contested the suit. It has taken a preliminary objection that since the injunction claimed by the plaintiff would have the effect of curtailing the freedom given to its employees to improve their future prospects and service conditions by changing their employment, no such injunction can be granted to the plaintiff. On merits, defendant No.1 has denied that the plaintiff company is imparting any training to its faculty members. Defendant No.1 has denied the alleged poaching and having caused any loss to the plaintiff company.

6. Defendant No.2 was proceeded ex-parte vide order dated 25th February, 2009 whereas the name of defendant No.3 was deleted from the array of defendants vide order dated 9th April, 2009.

7. The following issues were framed on the pleadings of the parties:-

“1. Whether the plaintiff has any right to injunct the defendant from poaching its faculty members? OPP.

2. Whether the plaintiff has trained its faculty & incurred any costs in training, if so to what effect? OPP.

3. Relief.”

Issues No. 1 and 2

8. The plaintiff has filed the affidavit of Col. K.C. Oberoi (Retd.), Senior Manager (HRD) by way of evidence whereas defendant No.1 has filed the affidavit of his Manager (HRD), Mr. D.K. Gupta by way of evidence.

9. In his affidavit by way of evidence, Mr K.C. Oberoi has stated that all faculty members and staff of the plaintiff-company are required to undergo training to maintain uniform standard of teaching, philosophy of the company and to work cohesively as a team. The training is imparted in terms of manual Ex.P-4. He has further stated that substantial expenditure involved in training the faculty members so that success rate of students is remarkably good with more chances of success. He has also stated that the defendant-company indulges in taking away their trained faculty members, by enticing them and by offering a little more salary perks, etc. According to him, this is done in the middle of the session, thereby leaving the students in a lurch. He has further stated that defendant No.2 was

approached by defendant No. 1, but he refused to accept the offer given to him and wrote a letter Ex.P-5 in this regard. According to him, Ex.P-7 is the letter which defendant No. 3 had written to the plaintiff-company.

10. In rebuttal, Mr D.K. Gupta of defendant No.1-company has stated that defendants 2 and 3 are not the faculty members of the plaintiff-company and, in fact, they do not exist. He has further stated that defendant No.1-company never approached either defendant No. 2 or defendant No. 3 with any offer, for any purpose. He has also stated that two false and frivolous cases have been filed by the plaintiff-company against defendant No. 1 before MRTP Commission with a view to destroy the energies of defendant No. 1-company and to harass it.

11. The first question which comes up for consideration in this regard is as to whether the plaintiff has been able to prove that defendant No. 1 had made any attempt to instigate or entice its employees, to quit the service of plaintiff and join defendant No. 1-company. No employee has been produced by the plaintiff-company to prove that any officer/official of defendant No. 1-company had approached him and offered employment with

defendant No. 1-company. The case of the plaintiff in this regard is based wholly upon three documents Ex.P-5, Ex.P-6, Ex.P-7. Ex.P-5 is the letter purporting to be written by defendant No. 2 to Mr Partha Haldar, Centre In-charge (NW) of the plaintiff-company, whereas Ex.P-6 is the letter purporting to be written by Mr Partha Haldar to the Chairman of the plaintiff-company. Ex.P-7 is the letter purporting to be written by defendant No. 3 to the Managing Director of the plaintiff-company. The letter Ex.P-6 only refers to the offer alleged to have been made by defendant No. 1-company to defendant No. 2 Ateet Mittal, to join defendant No.1-company on a big salary. No offer is alleged to have been made by defendant No.1-company to Mr Partha Haldar himself, nor does he claim to be a witness to Mr Ateet Mittal, being approached by defendant No.1-company to join its service on a higher salary. Therefore, this document does not prove the alleged pouching by defendant No.1. As regards the letters Ex.P-5 and P-7, neither Mr Ateet Mittal, who purports to have been written the letter Ex.P-5, nor Dr P. K. Sharma, who purports to have been written the letter Ex.P-7, have not been produced in the witness-box. Even if it is assumed that the

documents Exs.P-5 and P-7 have been duly proved by the plaintiff-company, that by itself, does not amount to proving the contents of these documents. It is a settled proposition of law that mere proving a document does not prove its contents and a document by itself is not an evidence of the facts stated therein. The fact in issue before the Court cannot be proved merely by proving the signature and handwriting on a document since the document, by itself, does not constitute truthfulness of its contents. The truthfulness or otherwise of the contents of a document can be proved only by legally admissible evidence, i.e., the evidence of a person who is in a position to vouchsafe for the truthfulness of those contents.

12. In **Judah v. Isolyne Bose**, AIR 1945 PC174, the issue before the Court was whether the testatrix was so seriously ill as would result in impairment of her testamentary capacity. To substantiate the degree of illness, a letter and two telegrams written by a nurse were tendered in evidence. The question was whether in the absence of any independent evidence about the testamentary capacity of the testatrix the contents of the letter could be utilized to prove want of testamentary capacity. In these

circumstances, the Privy Council observed that the fact that a letter and two telegrams were sent by itself would not prove the truth of the contents of the letter and, therefore, the contents of the letter bearing on the question of lack of testamentary capacity would not be substantive evidence. It was held that the contents of the letter and telegram were not the evidence of the facts therein and mere proof of handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document therein.

In **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee** (2009) 9 SCC 221, Supreme Court observed that a document becomes admissible in evidence unless its author is examined and that the contents of a document cannot be said to have been proved unless he is examined and subjected to cross-examination in a Court of law.

In **Narbada Devi Gupta v. Birendra Kumar Jaiswal** (2003)8 SCC 745, Supreme Court, *inter alia*, observed as under:

“The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held, to be a due proof of its contents. Its execution has to be proved by

admissible evidence that is by the evidence of those persons who can vouchsafe for the truth of the facts in issue.”

In the absence of production of the author of Exs.P-5 and P-7 in the witness-box, the allegations of poaching contained in these documents, cannot be said to have been proved by the plaintiff-company. It is, therefore, difficult to dispute that no evidence has been led by the plaintiff-company to prove the alleged pouching.

13. Assuming that defendant No.1-company had approached the employees of the plaintiff-company and offered better salaries to them, no legal right of the plaintiff-company has been violated by defendant No.1-company by such an act on its part. There is no contract between the plaintiff-company and defendant No.1-company not to pouch on the employees of each other. In the absence of any such contract, nothing in law prevented defendant No.1-company from approaching the employees of the plaintiff-company and offering better service conditions to them. Therefore, it cannot be said that any legal injury was caused to the plaintiff-company by the alleged poaching or any legal right, vesting in the plaintiff-company, was violated by

defendant No.1-company.

14. Coming to the relief sought against defendant No.2 (defendant No.3 has already been deleted from the array of defendants), no employer can perpetually prevent its employee from quitting its service and joining another employer. If, however, the employment is for a specified period and there is an agreement between the employer and the employee, whereby the employee undertakes to serve the employer during that period and not to join the services of any other employer during that period, it would be permissible in law for the employer to seek enforcement of the negative agreement. Even if such a term is agreed by an employee, it would be wholly unconscionable and cannot be enforced. The plaintiff-company does not claim that the employment of defendant No.2 was for a specific period and it had an agreement with him not to leave the services of the plaintiff-company during that period.

15. If there is a covenant between the employer and the employee, whereby the employee is required to serve the employer in perpetuity, such a restraint on the right of the employee to engage in any trade of his choice would be wholly unreasonable and unnecessary for the protection of

the employer. To press a negative covenant not to leave the services or not to serve any other employer would be wholly unlawful if it is not restricted to a specified reasonable period and would constitute an unreasonable and unconscionable restraint on his legal right to engage himself into any trade, business or employment. The contract to serve a particular employer either in perpetuity or for a specified period cannot be enforced by a Court.

The negative agreement between the employer and the employee, whereby the employee undertakes not to serve any other employer during the period of his employment provided it is a specified and reasonable period as also not to join any other employer engaged in a competing business would be valid and enforceable so long as it is for a specified period which is not found to be unreasonable or excessively harsh.

In **Superintendence Company Of India** (supra), the Supreme Court, *inter alia*, observed as under:

“A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses. A contract of this class is prima facie void, but is becomes binding upon proof that the restriction is justifiable

in the circumstances as being reasonable from the point of view of the parties themselves and also of the community.”

16. In **Niranjan Shankar Golikari vs The Century Spinning and Mfg. Co.**, (1967) 2 SCR 378, there was a contract of employment for five years. The employee Niranjan Shankar left the services of the respondent-company four years before the expiry of the contract, whereupon the respondent-company filed a suit for enforcing the negative covenant which restrained him from engaging in or carrying on competing business or serving in any capacity with an employer engaged in competing business. The injunction sought by the plaintiff was confined to the period ending 15th March, 1968 which was the last day of the five year term of the contract. Supreme Court was of the view that restraints during the period of contract are generally not regarded as restraints on trade and, therefore, are outside the purview of Section 27 of the Contract Act. It was also of the view that the restrictions operating from the term of the contract may be void if they are excessively harsh or unconscionable.

17. In **Superintendence Company of India vs**

Krishan Murgai (1981) 2 SCC 246, Supreme Court had an occasion to deal with a post service restraint. Clause 10 of the Contract of employment placed the employee Krishna Murgai under post-service restraint that he shall not serve in any other competing firm for two years at the place of his last posting. Clause 10 was operative for a period of two years after the employee leaving the company. The services of the employee were terminated by the employer. Supreme Court held that the negative covenant against working during the term of the contract is not in restraint of trade and that the doctrine of restraint on trade never applies during the continuance of the contract. In **W.H. Milsted and Son Ltd. v. Hamp:** (1921) 2 AC 158, the contract of service was terminable only by notice of the employer. The contract was held to be bad in law on account of being wholly one sided.

18. The plaintiff, therefore, is not entitled to any injunction even against defendant No.2. In any case, this is not the case of the plaintiff that defendant No.2 was likely to join the service of defendant No.1. The case of the plaintiff is other way round and according to the plaintiff-company,

defendant No.2 firmly declined the offer made by defendant No.1 to join its services. Therefore, the plaintiff had no cause of action to file the present suit against defendant No.2. The issues are decided against the plaintiff and in favour of the defendants.

Issue No. 3

In view of my findings on issue No. 1 and 2, the plaintiff is not entitled to any relief.

ORDER

For the reasons given in the preceding paragraphs, the suit is dismissed with costs. I am satisfied that the suit was false and vexatious to the knowledge of the plaintiff and the plaintiff had no legal right to claim the relief sought in this suit and it appears that the suit was filed only with a view to harass a competitor and drag it into litigation. Defendant No.1, therefore, is entitled to compensatory costs in terms of Section 35A of the Code of Civil Procedure. In view of the provisions contained in sub-Section (2) of Section 35A of CPC, the amount of compensatory costs cannot exceed Rs 3,000/-. I, therefore, in addition to usual costs of the suit, also award compensatory costs amounting

to Rs 3,000/- to defendant No.1.

Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

FEBRUARY 28, 2011
vk/bg