

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 22nd November, 2017.**

+ **CS(COMM) 437/2017 & IA Nos. 7391/2017 (under Order XXXIX Rule 1 and 2 CPC), 7392/2017 (under Order II Rule 2 CPC), 9123/2017 (under Order VII Rule 11 CPC), 10556/2017 (under Order XXXIX Rule 2A CPC) and Crl.M.A.No. 12978/2017 (under Section 340 Cr.PC)**

PARAMOUNT COACHING CENTRE PVT LTD. Plaintiff

Through: Mr. Murari Tiwari, Mr. Rahul Kumar & Mr. Devesh Gupta, Advs.

Versus

GOPAL KRISHAN @ GOPAL VERMA & ANR ...Defendants

Through: Mr. K.Sunil and Mr. Sidhant Antil,
Advs. for D-1 with D-1 in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff instituted this suit, pleading i) that the plaintiff is an Institute imparting educational knowledge, of various competitive examinations, to the aspiring candidates and is highly popular throughout India; ii) on 1st August, 2013, the defendant No.1 Gopal Krishan @ Gopal Verma entered into a Memorandum of Understanding (MOU)/Agreement with the plaintiff Institute with regard to rendering his services for the purpose of imparting educational knowledge in the particular subject of English to the students aspiring to appear in the competitive exam of SSC; iii) that the term of duration of the MOU/Agreement executed by the defendant no.1 with the plaintiff Institute is five years from the date thereof i.e. from 1st August, 2013 till 31st July, 2018; iv) that the defendant

had contracted to carry on his job with the plaintiff company with all sincerity and discipline, till the completion of courses and agreed period; v) that on the faith of the promise made by defendant no.1, the plaintiff company took admissions of the students in several batches consisting of thousands of students and also advertised the name of the defendant no.1 as part of the Faculty for English and invested a huge amount in formulating the respective batches; vi) that in compliance of the MOU/Agreement dated 1st August, 2013, the defendant no.1 commenced taking classes in the plaintiff Institute and at the time of institution of the suit the defendant no.1 had been taking classes for the last 3-1/2 years; vii) that the defendant no.1, to the surprise of the plaintiff, started the defendant no.2 “Learning English with Gopal Verma” Institute, which is a competing Institute; viii) the said action of the defendant no.1 is in contravention of the MOU/Agreement between the parties; and, ix) that the defendant no.1 has been enticing the students of the plaintiff Institute to his own Institute, causing loss and damage to the plaintiff.

2. On the basis of the aforesaid pleas, reliefs of (i) permanent injunction restraining the defendant No.1 from running/operating the defendant No.2 Institute till 31st July, 2018 and from enticing the students of the plaintiffs Institute to join the defendant no.2 in any manner; and, (ii) mandatory injunction, directing the defendant No.1 to exclusively teach at the plaintiff Institute till 31st July, 2018 in terms of the MOU/Agreement dated 1st August, 2013, have been claimed.

3. The suit was entertained and summons thereof and notice of the application under Order XXXIX Rules 1 & 2 of the Code of Civil

Procedure, 1908 (CPC) accompanying the suit were issued and vide subsequent order on the application of the plaintiff for interim relief, dated 12th July, 2017, till further hearing, the defendant no.1 was restrained from starting his own Institute or teaching in any other Institute.

4. The defendant no.1 filed FAO(OS)(COMM) No.146/2017 but which was on 24th July, 2017 withdrawn.

5. Since then, the suit is pending for completion of pleadings and the interim applications under Order II Rule 2 of the CPC, under Order VII Rule 11 of the CPC, under Order XXXIX Rule 2A of the CPC and under Section 340 Code of Criminal Procedure, 1973 (Cr.PC) have also been filed.

6. Today, the counsel for the defendants states that he has filed an application for amendment of the written statement.

7. However, there is no such application on record.

8. The counsels have been asked to argue on the application under Order VII Rule 11 of the CPC.

9. The counsel for the plaintiff states that he was expecting only the application of the defendants for amendment of the written statement, of which advance copy has been received, to be heard and thus seeks adjournment.

10. Such adjournments cannot be granted when vide order dated 20th September, 2017 the suit and all pending applications were posted for hearing for today and the counsels ought to come prepared for the same. Even otherwise, the application for amendment of the written statement

has not been listed and shown in the cause list. The counsel for the plaintiff had no reason to expect that only that application will be heard.

11. The counsels have been heard on the application under Order VII Rule 11 of the CPC.

12. The counsel for the defendants has argued that the MOU/Agreement dated 1st August, 2013, on the basis of which the suit has been filed, was not even signed by the defendant no.1.

13. The counsel for the plaintiff contends that the defendants, in the written statement have admitted the signatures on the MOU/Agreement and pleaded that the signatures were obtained on blank papers and thus today the defendants cannot deny execution of the document.

14. The counsel for the defendants states that the original MOU/Agreement also has not come before this Court and on objection being taken by the defendants, now after the last date, advance copy of 'NCR' filed by the plaintiff with the Police on 14th November, 2017 of original having been misplaced has been received.

15. The counsel for the plaintiff confirms that NCR has been filed, though probably has not come on record.

16. Be that as it may, during the hearing, I have perused the MOU/Agreement dated 1st August, 2013 and on the basis of which this suit has been filed. From a reading of the said MOU/Agreement, it appears that the plaint does not disclose any cause of action for the suit.

17. It is deemed appropriate to set out the said MOU/Agreement in entirety hereunder:-

**AGREEMENT BETWEEN A TEACHER/STAFF
ANDPARAMOUNT COACHING CENTRE**

This AGREEMENT is made at Delhi on this 01 day of August, 2013 between Paramount Coaching Centre Pvt. Ltd., situated at 704, Mukherjee Nagar, near Batra Cinema Hall Delhi-9 represented by its Director of the One Part AND Mr. Gopal Krishan S/o Dharam Pal Resident of H.No.-1670, Pana Mamurpur, Narela, Delhi-40, (hereinafter called the teacher/staff) of the Other Part. Whereby it is consented as follows:-

“1. In consideration of effective service as qualified teacher, offered by the teacher, the Paramount Coaching Centre hereby employs the teacher to instruct the students in those subjects as laid by Institute.

2. The institute shall pay the teacher, during the duration of this agreement, as per the negotiation at the time of joining.

3. The teacher shall not indulge in teaching in any other Institute as long as associated with this Institute, or start his own Institute.

4. This agreement is for a period of five years.

IN WITNESS WHEREOF the parties have put their respective hands and signed on this Agreement at Delhi on the day, month and year mentioned hereinabove, in the presence of following witnesses.”

18. A perusal of the aforesaid MOU/Agreement shows the only commitment of the defendant No.1, even if for any consideration, which though is not mentioned, to be, ‘not to indulge in teaching in any other

Institute or to not start his own Institute, as long as associated with the plaintiff Institute.’

19. The association of the defendant No.1 with the plaintiff Institute ceased on the defendant No.1 starting his own defendant No.2 Institute. The said ‘association’ was not agreed to extend for the period of five years stipulated in para 4 of the MOU/Agreement. If the agreement between the parties had been for the defendant No.1 to not teach in any other Institute and to not start his own Institute for the said period of five years, even if ceasing to be associated with the plaintiff Institute, the parties would have provided so. The parties having not provided so and having not agreed so, this Court in any case cannot injunct the defendant from carrying on the business/professional activity for which he is qualified according to the plaintiff also and which agreement otherwise would be in restraint of trade and void per Section 27 of the Contract Act, 1872.

20. Supreme Court in ***Superintendence Company of India (P) Ltd. Vs. Krishan Murgai*** (1981) 2 SCC 246, held that the true rule of construction is that when a covenant or agreement is impeached on the ground that it is in restraint of trade, the duty of the Court is, first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties. If there is an ambiguity it must receive a narrower construction than the wider—the employed ought to have the benefit of the doubt.

21. Though I had in Dr. ***Lal Pathlabs Pvt. Ltd. Vs. Dr. Arvinder Singh*** 2014 SCC OnLine Del 2033 taken a view that such a restraint can be provided for in the Agreement between the parties but the said order was

vacated by the Division Bench of this Court in *Arvinder Singh Vs. Lal Pathlabs Pvt. Ltd.* 2015 SCC OnLine Del 8337 holding that even where the agreement so provided, the defendants could not be so restrained. In that case, it was observed that medical practitioners/pathologists could not be so restrained from carrying on their business. In the present case as aforesaid, the plaintiff has not even bound the defendant to, after ceasing to be associated with the plaintiff for any reason, for the period of five years, refrain from carrying on the said vocation.

22. As far as the relief seeking mandatory injunction directing defendant No.1 to teach at the plaintiff Institute is concerned, Section 41(e) of the Specific Relief Act, 1963 prohibits the Court from granting injunction to prevent breach of contract the performance of which would not be specifically enforced. The relief claimed by the plaintiff in the suit of mandatory injunction directing the defendant no.1 to exclusively teach at the plaintiff Institute only till 31st July, 2018 in terms of the MOU/Agreement dated 1st August, 2013 is thus directly in the teeth of the said prohibition and once that is so, what has been prohibited by the Legislature to be done directly cannot be done indirectly.

23. The counsel for the plaintiff has drawn attention to Section 42 of the Specific Relief Act which provides that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

24. I have while making the aforesaid observation considered the said aspect also.

25. Not only is the negative covenant in the present case restricted to the period of association, an injunction, which would leave the defendant No.1 without any vocation and source of earning or livelihood, cannot be granted. It is not as if the plaintiff, after the defendant No.1 has ceased to be associated with it, has offered to pay to the defendant No.1 the emoluments which he may have been earlier paid. In *Superintendence Company of India (P) Ltd.* supra it was held that negative covenant not to serve elsewhere or enter into competitive business does not arise when the employee does not leave the services but is dismissed from service and the restraint may not be greater than necessary to protect the employer, nor duly harsh and oppressive to the employee. In the present case, negative covenant cannot apply after the defendant No.1 has ceased to be associated with plaintiff.

26. I have in the earlier part of this order expressed doubt as to the consideration for the Agreement inasmuch as it is quite evident from a reading of the Agreement that the MOU/Agreement, if at all was signed, was signed even before the defendant No.1 had negotiated his emoluments with the plaintiff. The plaintiff, along with the suit, has not filed any other document to show as to what were the negotiations and what was the consideration being paid by the plaintiff to the defendant No.1. There is no whisper of the said aspect in the plaint, either of the plaintiff having paid or agreed to pay or having bound itself to pay to the defendant No.1 the emoluments for a period of five years. The plaintiff cannot restrain the defendant from earning his livelihood.

27. The counsel for the plaintiff states that he has pleaded that the defendant No.1 was being paid through its account. The counsel is, however, unable to show the paragraphs of the plaint in which it is so pleaded.

28. Thus, no case for grant of any of the two reliefs having been made out and the reliefs claimed being barred by law and/or the plaint not disclosing any cause of action therefor, the suit is a dead wood which ought not to be kept pending and is dismissed.

29. However, since the suit has been dismissed without trial and an application under Order II Rule 2 of the CPC filed by the plaintiff is pending, it is deemed appropriate to grant liberty to the plaintiff to, notwithstanding the dismissal of this suit and without being effected by the observations in this order of rejection of the plaint, if so desires sue the defendants for damages, if any, suffered by the plaintiff.

30. Owing to the view aforesaid taken, it is not deemed appropriate to keep the application under Section 340 Cr.PC filed by the defendant pending and the same is dismissed in accordance with the above.

31. The suit is disposed of. All pending applications are also disposed of.

32. The date of 22nd January, 2018 fixed before the Joint Registrar (Judicial) stands cancelled.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 22, 2017

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(corrected & released on 27th December, 2017)