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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2875 OF 2018

Tapas Kanti Mandal

PETITIONER

Age - 49 years, Occ - Service

R/o Plot No. 48, Sadguru Housing Society,

Opp - Airport, Near Vimannagar,

Chikalthana, Aurangabad

VERSUS

Cosmo Films Ltd.

RESPONDENT

A Company registered under the

Companies Act, 1956 and having its

Registered Office at 13, Community Centre,

New Delhi and having its administration

And Manufacturing unit at B-14/8-9

MIDC, Waluj, Aurangabad

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Mr. R.N.Dhorde, Sr. Advocate i/b Mr. P.S.Dighe, Adv for petitioner
Mr. A. D. Kasliwal, Advocate for the respondent

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 16th AUGUST, 2018

JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. Petitioner is before this court aggrieved by order dated 17th February, 2018 passed by Joint Civil Judge, Junior Division, Gangapur whereunder application at Exhibit-5 in Regular Civil Suit No. 16 of 2018 seeking temporary injunction under Order XXXIX, Rules 1 and 2 of Civil Procedure Code, 1908 has been

granted.

3. Parties hereto would be referred to by their status in Regular Civil Suit No. 16 of 2018, *Cosmo Films Limited V/s Tapas Kanti Mandal*, petitioner as 'defendant' and respondent as 'plaintiff'.

4. Plaintiff has instituted Regular Civil Suit No. 16 of 2018 seeking perpetual injunction against the defendant restraining him from rendering service in Asia, directly or indirectly through collaborator, employee, consultant or any other manner in line with business which competes with the whole or part of the business of the plaintiff, for a period of three years from the date of resignation, which is 27th December, 2017.

5. Succinctly stated, it is the case of the plaintiff that;

It is a multinational company having global manufacturing facilities and is supplier of BOPP, thermal laminating films, lacquer coated films, CPP films and synthetic paper. Defendant had applied for a post of manager with the plaintiff and the plaintiff on the request had decided to employ him as a manager in its Research and Development Department. The defendant had been appointed in May, 2003 on the terms and conditions as referred to in appointment order and in the agreement. The

defendant had agreed to the same and had joined services with the plaintiff with effect from 5th May, 2003. Agreement contains non-compete clause, according to which, the defendant is obligated not to directly or indirectly engage himself in business or profession as consultant or advisor to any competitor or company manufacturing BOPP films etc. or subsidiaries, associated companies, holding companies for a period of three years from the date of cessation of his employment. There is a clause in the agreement that default in observance of the terms would entitle plaintiff company to initiate action in law, of civil or criminal nature.

The defendant had gone through all the terms and conditions and had solemnly signed the same after taking into account pros and cons and consequences flowing therefrom. The defendant, by virtue of his employment had acquired in-depth knowledge of current products of the company. He had also come in possession of confidential process and knowledge of manufacture of its product. He had also been in knowledge of various projects of the company, formulae, patterns, complexion, programmes, devices, methods, techniques and processes of the plaintiff company. Future plans of the plaintiff company have been known to him. He had also been aware of unique ideas, discoveries and inventions of the plaintiff company and also

about its future plans and product. Such knowledge as well as trade secrets, unique ideas, discoveries, inventions, processes, projects are intellectual property of the plaintiff and by virtue of his position in employment, the defendant had come across the same and had been in possession of the same and he is under obligation not to divulge the same to any other person, partnership, company, corporation as per the contractual obligations incurred by him.

After serving for about fifteen years, abruptly, on 27th December, 2017 the defendant purported to communicate that he intends to resign from services with the plaintiff and requested to accept his resignation and to relieve him before 26th January, 2018. The plaintiff company had not relieved the defendant from the post of Deputy Manager of Research and Development, a promoted post which he had been holding since April, 2012, as his unilateral resignation was in contravention of terms and conditions of agreement and had put the interest of the plaintiff in peril of suffering injury, which would be irreparable and irreversible. Apart from above, the abrupt truncation of employment had been prejudicial to the interest of the plaintiff.

Sudden flurry of activities at the end of the defendant entailed an action in law to safeguard and secure plaintiff's

interest. The plaintiff has expressed grave concern and apprehension that the defendant in all likelihood would engage himself in similar business as that of the plaintiff and in all probability would disclose knowledge and intellectual knowhow gained by him during his service with the plaintiff.

6. The plaintiff, along with plaint, had also filed application Exhibit-5 seeking temporary injunction referred to above. It appears that an *ex parte ad interim* relief had been granted by the trial court against the defendant on 16th January, 2018, restraining the defendant from taking up employment elsewhere. While the matter had been before the trial court on 29th January, 2018, the plaintiff had filed an application Exhibit-11 seeking continuation of *ad interim* order and according to the defendant despite his appearance, without calling upon his response, Exhibit-11 had been allowed and *ad interim* order had been continued till 5th February, 2018. Said order of continuation of interim relief had been subjected to challenge by the defendant under writ petition bearing No. 1217 of 2018, which came to be disposed of by the high court on 31st January, 2018 directing the trial court to hear the parties on 5th February, 2018 and to decide the temporary injunction application Exhibit-5 by 17th February, 2018 by a reasoned order, considering all the contentions of the parties.

7. The defendant had filed his say at Exhibit-10 and his defence was to the effect that;

The trial court does not have jurisdiction to try and entertain the suit in view of the term under the service bond and secrecy agreement, whereunder according to the defendant, jurisdiction had been restricted exclusively to the court in Aurangabad city and no other. According to the defendant the words "*exclusively*" and "*none else*" are used. Without reference to the same, the suit has been instituted at Gangapur and, as such, the same is suppressed. The plaint has been devoid of requirements for seeking restraint on the defendant and had been deficient of material for grant of injunction under section 38 of the Specific Relief Act. The defendant had objected to the maintainability, tenability and sustainability of the suit.

The suit is not maintainable as it is covered by section 41 of the Specific Relief Act. It is referred to that pursuant to section 42 of the Act, in order to have relief of injunction, the plaintiff is under obligation to perform its part. While agreement provides for liquidated damages, in no case, injunction would issue. It is stated that pursuant to the terms of agreement, employee can sever ties forthwith and with the resignation dated 27th December, 2017, the defendant ceases to be employee of the

plaintiff and had accordingly requested the plaintiff to relieve him under communications dated 29th December, 2017 and 17th January, 2018 with effect from 26th January, 2018 by adjusting privilege leave of 77 days towards period of notice. It is contended that in view of section 27 of the Contract Act, every restraint on carrying on lawful profession or trade or business of any kind is void. Conditions in the agreement with respect to space and time have been void right from the beginning and unreasonable, unfair, onerous, against public policy and offend the fundamental rights of the defendant. Employer cannot prevent a person from taking up employment elsewhere on cessation of his employment with the employer. It is submitted that all the information which has come across during his service would not be confidential or a trade secret. The plaintiff cannot claim itself to be an exclusive manufacturer or a trader. A person cannot be permanently tied down with employer. Enforcement of contract of personal service after cessation of relationship is abhorred by law. Resignation is unilateral act and does not require any further action of acceptance. It has been denied that defendant had failed to return all the information, material, documents, computer programme provided by plaintiff to him. The allegations have been termed by him to be vague and baseless. All the information of the plaintiff is in its office. The

defendant is not holding any property of the plaintiff and / or misusing the same for benefit of competitor. It is contended by the defendant that injunction, if granted, would defeat his fundamental right to earn livelihood. The service bond cannot be specifically enforced being replete with onerous conditions. The defendant, as such, requested rejection of application for temporary injunction with costs of Rs. 5,00,000/-

8. Trial court had framed usual points for determination about *prima facie* case, balance of convenience and irreparable loss to the plaintiff. Trial court, to quite some extent, has dwelt upon the question of jurisdiction, albeit points for determination did not contain any issue in respect of the same and has considered that there was no force and substance in the contention of the defendant in respect of ouster of jurisdiction of the court at Gangapur. Trial court went on to consider that the plaintiff company is situated within the jurisdiction of the court and the judgments cited on behalf of the defendant have been decisions in different contexts. Trial court, in paragraph No. 25 of the order impugned, has referred to citations relied on, on behalf of the defendant and has referred to that facts in the citations and the case before it had been different and as such, considered that the ratio thereunder may not hold the present case.

9. Trial court has further referred to citation relied upon on behalf of the plaintiff in the case of “*Niranjana Shankar Golikari V/s Century Spinning and Manufacturing Co. Ltd.*,” reported in *AIR 1967, SC 1098*, and reproducing an excerpt from the same, has considered that facts in the present case and the facts in the cited case to quite large extent were identical and considered that employee can be restrained from doing similar business or seeking similar employment. It had, thus, considered that restraint on the defendant from getting engaged in any trade or business in competitor company would be a reasonable restriction imposed.

10. Trial court has also referred to citation relied upon on behalf of the plaintiff in the case of “*M/s Kuoni Travel ((I) Pvt. Ltd. V/s Mr. Ashish Kishore*” reported in *2007 (6) ALL MR 808* and taken and quoted excerpt therefrom and considered that a trade secret agreement can be enforced even after service period. Trial court has considered clause 7 of the appointment letter referring to that it was the term wherein defendant had undertaken not to engage himself in competing employment or business for a period of three years from cessation of his employment with the plaintiff.

11. Trial court has refused to buy line of the defendant about period had been agreed upon only for five years from the date of

joining service i.e. 5th May, 2003 to 4th May, 2008 and has considered that service bond and secrecy agreement cannot be read in isolation, while a part imposes a condition of five years minimum service, it does not refer to as to what should be the whole period of service. Besides, there is a retirement clause in the same and age of retirement is mentioned to be 58 years. If the service period had been for five years, then it ought not to have referred to retirement age. As such, it was considered, intention of the parties appears to be different. In addition to aforesaid, there were certain terms in respect of probation and confirmation, superannuation, provident fund and gratuity. As such, it was considered that it cannot be said that the agreement had been only for five years.

12. The court had appreciated that an exception has been created and commercial or business agreement may fall under such exception, considering explanation under section 27 of the Indian Contract Act, which refers to that in sale of goodwill of business one may agree with buyer to refrain from carrying on specific business within specified local limits if it appears to the court reasonable, regard being had to the nature of business. Trial court has considered that the defendant had been holding a key post in the plaintiff company, had come across various confidential secrets and knowhow of the company, the company

had spent huge amounts on the defendant. It has considered that the plaintiff had been seeking only three year's restraint and restriction of three years has been found to be reasonable and necessary for protection of interest of the plaintiff. The plaintiff has been a multinational company, if such a condition is not imposed on its employee, it will suffer irreparable loss.

13. The trial court, thus, allowed the application and passed an order confirming *ad interim* injunction for a period of three years with effect from 26th January, 2018 to 25th January, 2021 or till disposal of the suit, whichever is earlier. It is against this decision of the trial court, defendant is before this court.

14. At the outset, Mr. R. N. Dhorde, learned senior advocate for the petitioner – defendant vehemently submits that impugned order is wholly misconceived on facts as well as in law.

15. Mr. Dhorde further submits that decisions cited on behalf of the defendant have been made short work of, by cursorily discarding them as being different on facts and context. He submits that order does not depict as to how said authorities could be said to be distinguishable, so far as ratio thereunder is concerned. Ratio under said authorities had not only been relevant, but would be applicable to the present set of facts and circumstances. He submits that impugned order falls short of

showing application of mind to the vital aspects involved in the matter.

16. He submits that appointment letter and agreement, as annexed to the petition, would show that beyond the period of initial five years, no specific period of contract had been agreed upon. Learned judge of the trial court has adverted to the appointment letter and to a few terms appearing therein about provident fund, superannuation, gratuity as per law, but has missed out on a term appearing therein about notice period at item No. 5, which speaks of service being terminable by notice. According to him, clause 7, captioned '*secrecy agreement*', though refers to a hiatus to be had from engaging in any profession or employment in any capacity for a period of three years after cessation or termination of service, there is no corresponding provision for any remuneration / compensation to be payable to employee during such period. He submits that in present case, it cannot be gainsaid that no period after expiry of initial period agreed upon had been specifically agreed upon. The negative covenant does not provide for and does not take care of the remuneration / compensation to the employee. Post service restrictive covenant in the circumstances is all the more not only void but also is illegal. He submits that reliance on judgment in the case of "*Niranjan Shankar Golikari V/s The Century Spinning and Mfg.*

Co. Ltd.,” reported in *AIR 1967 SC 1098*, which clarifies position that a negative covenant of the agreement can be enforced during the period of contract, is wholly misplaced and the same would not hold at all after termination / cessation of employment.

17. He goes on to refer to series of decisions, “*Bhavesh J. Bhatt V/s Cyrus N. Baxter*” reported in *1991 Mh.L.J. 231*; “*American Express Bank Ltd. V/s Ms.Priya Puri*” reported in *(2006) 3 LLN 217*; “*F.L.Smith Pvt. Ltd., V/s Secan Invescast (India) Pvt. Ltd.*” reported in *2013 (1) CTC 886 = 2012 (2) MWN (Civil) 815* in support of his submission that a post employment period restraint term under the garb of protecting proprietary interest, by which employer compels the employee to serve the employer or leads the employee to remain idle or starve would not be in public interest and cannot be binding. He submits that aforesaid legal position in India has been settled and post service period restriction in negation is void under section 27 of the Indian Contract Act and the same is a unlawful restriction. He submits that catena of decisions and even a recent decision of this court delivered on 16th February, 2016 in the case of “*Satyam Patel V/s Human Factors International Pvt. Ltd.*” in Company Petition No. 733 of 2015 not only reiterate, but also reassert aforesaid position. He submits that the position is holding field from long time. Delhi High Court has even quite recently in its decision dated 17th May, 2017 has followed said

dictum. He submits that for many other reasons and rationale, such a covenant would not be specifically enforceable.

18. Mr. Dhorde submits that learned judge of the trial court has failed to appreciate and draw distinction in enforceability of restrictive negative covenant during course of employment and after cessation of employment. He submits that the court has been in oblivion of that restriction after cessation of employment in this particular case is inequitable and does not take care of the compensation to the employee for a period under restriction. He, therefore, urges to grant the writ petition.

19. Mr. A. D. Kasliwal, learned advocate for respondent - plaintiff vehemently submits that as a matter of fact order of temporary injunction is an appealable order pursuant to Order XLIII, Rule 1 (r) of the Civil Procedure Code. He submits that it cannot be gainsaid that an appeal is provided and while an appeal is available, writ petition would seldom be entertained. He emphatically submits that series of decisions by the Supreme Court would show that high court should not meddle with an order, which is amenable to challenge in appeal.

20. Learned advocate for the plaintiff purports to put up stiff resistance to maintainability of the writ petition in the face of appellate remedy as is available pursuant to Order XXXIII, Rule

1 (r) of the Civil Procedure Code. He submits, order impugned has been passed in exercise of powers under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure. According to him, while a stronger remedy has been under an appeal, a direct resort to extra ordinary powers of this court, would not be possible and such an attempt will have to be stamped down.

21. He submits, it may have other facet that in case of decision going adverse to the interest of any party, a forum locally and conveniently available would stand taken away or for that matter wiped out. He submits that it is not such an extraordinary situation wherein alternate remedy could not have been resorted to by the defendant and underlying intention appears to pre-empt remedy available locally to the original plaintiff.

22. Mr. Kasliwal goes on to submit that one has to take into account that temporary injunction application has been preferred by the plaintiff under Order XXXIX, Rules 1 and 2 of the Civil Procedure Code, while resisting the same the defendant had purportedly raised question of jurisdiction and forced the court to decide the same. He submits that even in such a case, the application filed by the plaintiff continues, without depleting its basic character to be an application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure. As such, upon decision

therein, a resort necessarily, pursuant to the legal procedural requirements, will have to be in an appeal and not otherwise. He submits that if statute has prescribed a remedy against an order, the same will have to be invoked first.

23. In order to buttress his aforesaid submissions, he refers to a decision of the Supreme Court in the case of “*Miss Maneck Custodji Surajaji V/s Sarafazali Nawabali Mirza*” reported in 1976 ALL MR On Line 174 (SC).

In aforesaid case the Supreme Court had rendered the decision in the circumstances, wherein appellant before it had been a tenant of a flat in city of Mumbai. The respondent had advertised for accommodation as a paying guest and in response thereto, the appellant who had been tenant of the premises, had entered into an agreement and respondent had been allowed to occupy part of the premises as paying guest. The respondent, trying to take advantage of amendment to Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, instituted a suit in the Court of Small Causes praying that standard rent be fixed and an *ex parte* order against appellant restraining her from taking possession without due process of law had been passed.

As such, litigation ensued before City Civil Court at the

instance of appellant and notice of motion for injunction had been taken out and *ex parte* injunction was granted for removing lock in respect of flat, save portion allowed to be occupied as paying guest to the respondent and accordingly possession was taken by the appellant of portion of premises excluding part given to respondent as paying guest.

An attempt by respondent before city civil court to have stay to the suit under section 10 had been made, contending earlier suit being pending raising same issue, however, that did not succeed before city civil court and the high court.

City civil court decreed the suit deciding that respondent had not been entitled to continue to occupy, however, had stayed operation of said decree for three months in order to enable the respondent to file appeal. Respondent, in the circumstances, instead of preferring appeal, had filed special civil application before High Court for quashing and setting aside final decree of the city civil court. The special civil application, against final decree of the court was entertained by high court directing that execution of decree be stayed until other suit had been decided.

It is in that context the Supreme Court considered that it is very difficult to appreciate reasoning behind order of the high

court. The respondent had legal remedy by way of an appeal against the decree and the same is more comprehensive than an application under Article 227 of the Constitution of India.

24. He further refers to a recent decision of the Supreme Court in the case of “*Hameed Kunju V/s Nazim*” reported in 2017 ALL SCR 2178, wherein as well the Supreme Court had been considering case of eviction. It is in the facts and circumstances of that case, the court considered that all the four orders were amenable for challenge before appellate authority and writ petition, in the circumstances, would not have been a proper remedy. The court had considered that the high court ought to have declined to entertain writ petition on the ground of availability of alternate remedy.

25. He also refers to a decision of the Supreme Court in the case of “*A. Venkatsubiah Naidu V/s S. Chellappan and Others*” reported in 2001 (1) ALL MR 247, referring to paragraphs No. 11 and 20 thereof reading, thus-

“ 11. It cannot be contended that the power to pass interim *ex parte* orders of injunction does not emanate from the said Rule. In fact, the said rule is the repository of the power to grant orders of temporary injunction with or without notice, interim or temporary, or till further orders or till the disposal of the suit. Hence, any orders passed in exercise of the aforesaid powers in Rule 1 would be appealable as indicated in Order 43 Rule 1 of the Code. The choice is for the party

affected by the order either to move the appellate Court or to approach the same Court which passed the ex parte order for any relief.

20. *Now what remains is the question whether the High Court should have entertained the petition under Article 227 of the Constitution when the party had two other alternative remedies. Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy. Learned single judge need not have entertained the revision petition at all and the party affected by the interim ex parte order should have been directed to resort to one of the other remedies. Be that as it may, now it is idle to embark on that aspect as the High Court had chosen to entertain the revision petition. ”*

26. He submits that in the face of such situation, writ petition ought not to be considered and the defendant be directed to avail of alternate remedy.

27. Learned advocate for the plaintiff Mr. A. D. Kasliwal, countering arguments of learned senior advocate on behalf of the defendant, refers to clause 7 of the agreement reading as under :

“ 7. *Secrecy Agreement:*

a) *During the employee's service with the company, he / she shall come across various business / trade Secrets, confidential data or details. Information relating to the technology and processes, Methods and Systems used by the company and it's market details, which are exclusive*

and vital and which should not be divulged out. For the employee's functional development with the company, the company would have trained him / her in it's exclusive business areas, systems, methods and technology by incurring considerable expenses and spending management's time. Accordingly, the company's image, expertise, business areas, systems trade secrets and the related goodwill shall be in the trust with the employee to that extent during the period of his / her employment / service with the company. Hence in the event of cessation of employment with the company for any reason whatsoever, he / she shall not directly and / or indirectly engage himself / herself in any business, profession and / or employment including engaging himself / herself as Consultant / Advisor to any competitor and / or any company manufacturing BOPP Films, It's subsidiaries, associated companies, holding companies for a period of THREE years from the cessation of his / her employment. In case the employee fails to abide by this covenant while in employment or otherwise, the company shall be entitled to take action against the employee under civil and criminal laws inclusive of damages as deem fit and proper.

- b) *Any process, discovery, invention or patent promoted or made by you in the course of your employment with us shall belong to the company and / or it's management. If required, company may execute a secrecy agreement with you. ”*

28. Learned advocate for plaintiff, submits that in the present case, the employee had entered into a solemn agreement

putting his signature under the same, binding himself with confidentiality term and not only had joined but has continued with employment. The term 7, captioned as "*Secrecy Agreement*", reproduced hereinabove, refers to that properties referred to therein are in trust with the employee and on cessation of employment for a specific period of three years, he is obligated not to render service to others. It had been agreed upon by the defendant that post cessation of employment, he would be bound under the term for a period of three years not to get engaged or employed in any capacity. He submits that such a term is necessary to be incorporated for protection of proprietary interest in the knowledge, technology, know-how, trade secret, business relations, etc., lest years of efforts, labour, money and hard work and time would be under peril and threat of getting ruined and the benefit may be made readily available to others / person himself without any expense. He, therefore, submits that the restriction cannot be termed as unreasonable or irrational or in the present case to be void under section 27 of the Contract Act.

29. Mr. Kasliwal submits that though the learned senior advocate had referred to various decisions contending that prevailing legal position is as submitted by him, yet, in present peculiar facts and circumstances, as also, so far as this high

court is concerned, position appears to be distinguishable. For said purpose he refers to and relies on a decision of this court in the case of “*M/s Kouni Travel (I) Pvt. Ltd V/s Mr. Ashish Kishore*” reported in 2007 (6) *ALL MR 808*. It was a case dealing with a non compete and garden leave clause giving right to employer requiring employee to remain away from employment directly or indirectly in any capacity and in any way with any competitive business for a period of three months after termination / resignation of service and non compete clause provided for that the employee shall be bound not to take similar employment.

30. Mr. Kasliwal, learned advocate supports the decision relying on the case of “*Niranjana Golikari*” (*supra*). He further refers to that aforesaid judgment and the case of “*Kouni Travel*” (*supra*) have been referred to and relied on in impugned order.

31. He submits that the defendant is an educated person and had been working on a key post with the employer and has entered into a service contract, bond and secrecy agreement. He submits that although it is argued that there is no specific period agreed upon, the trial court has adverted to that the agreed period would have to be gathered from the terms appearing in appointment letter and / or agreement. The appointment letter and the agreement have to be harmoniously read, which put

restraint on the defendant on cessation of employment. The trial court has rightly considered that clause 7 of the appointment letter obligates the defendant to refrain from directly or indirectly engaging himself in similar business of the plaintiff for a period of three years after cessation of employment with the plaintiff. Trial court has rightly appreciated that intention underlying the agreement shall receive its due.

32. He submits that not all the agreements placing restraint on employment post service period are void under section 27 of the Contract Act. He submits that the agreement read with explanation under section 27 of the Contract Act has been appropriately considered and appreciated by the trial court and accordingly, having regard to facts and circumstances decision has been rendered. Trial court has specifically taken into account employer is a multinational concern and is likely to suffer irreparable loss on cessation of employment of a key person. The same would not be open for finding fault with. He, therefore, considers that the impugned order is not amenable for interception under the writ jurisdiction of this court.

33. Mr. R. N. Dhorde, learned senior advocate for the defendant, submits that while jurisdiction of the court had been questioned with reference to specific clause under the

agreement, which restricts the same to Aurangabad city court, the same has been decided disregarding underlying intention and substance of the term agreed upon by the parties solemnly and also disregarding the legal position that parties can restrict the same to anyone, in case jurisdiction is with multiple courts. He submits that the court had drifted away from this imperative legal position and entertained erroneous concept on erroneous assumptions. While agreement had been entered into, it had been agreed upon that Aurangabad city court would be resorted to and no other. The terms "*exclusive*" and "*none else*" must assume significance and ought to have been considered accordingly. Even otherwise, according to learned senior advocate, Aurangabad court would always have jurisdiction, since the defendant resides at Aurangabad and his address in title clause would evince the same. Going by provisions of law, jurisdiction would be with the court, where the defendant would reside and this aspect has not been even considered while deciding this issue.

34. Mr. Ajit D. Kasliwal, learned advocate appearing for the respondent – plaintiff, however, on the other hand, submits that question of jurisdiction has been raised by the defendant and the court had to deal with the same and had accordingly been answered.

35. He submits that so far as jurisdiction of Gangapur court is concerned, it is beyond question. Cause of action had arisen within territorial limits of jurisdiction of Gangapur court. Plaintiff's manufacturing factory, office and employment of the defendant had been within the jurisdiction of Gangapur Court. Resignation had been tendered and communicated by the defendant to the plaintiff within the jurisdiction of Gangapur court. Major part of occupation of the defendant had been within the jurisdiction of Gangapur court. In the circumstances, Gangapur court would always have jurisdiction to try and entertain the suit. While the agreement had been entered into, this particular area had been part of Aurangabad and with subsequent developments has been falling in Gangapur area. In the circumstances, situation in which terms and conditions had been entered into, will have to be looked into and appreciated in that context under which the clause had been incorporated. With aforesaid developments, the clause will have to be construed in tune with the same.

36. Over and above this, learned advocate for the plaintiff refers to an ordinance dated 27th June, 2018 issued by Law and Judiciary Department of Government of Maharashtra bearing No. XVIII of 2018. Clause 3 (2) of the ordinance declares that any proceedings questioning decision in respect of jurisdiction in

favour of court where proceedings are filed, being pending before a revisional court, shall stand abated, leaving it open to be considered in appellate proceedings.

37. In the circumstances, learned senior advocate for the defendant although has submitted that in the present matter, a writ petition had to be preferred as impugned order gives decision on the question of jurisdiction, yet, having regard to the ordinance, such a question would not be amenable now to be considered.

38. Learned senior advocate Mr. Dhorde, however, has a different perspective of the matter submitting that indeed, question of jurisdiction had been raised by the defendant having regard to the terms in appointment letter and the agreement and the court had despite the same decided that it has jurisdiction. In such a case, while the order is a composite order with regard to jurisdiction and injunction, a resort would be have to such a forum which would be able to take into account grievance of the defendant on both the counts. It cannot be gainsaid that appellate forum, pursuant to Order XXXIII of the Civil Procedure Code, in the present matter, would not have been a forum against order on issue of jurisdiction as it is not an order from which an appeal is provided. He, therefore, submits that

maintainability of writ petition is beyond question. It indeed would be maintainable in present circumstances and would even otherwise be always maintainable, while the court decides to exercise its extraordinary powers having regard to facts and circumstances and present matter is precisely one such matter. He submits that despite series of decisions on the point, the trial court has wholly misconceived the same. While the law favours the defendant, trial court has decided the application against the defendant. He submits that right to carry on avocation and profession and service is a personal fundamental right and that in the process has got intercepted under erroneous appreciation by the trial court. He, therefore, submits that there is no substance in the argument that a resort necessarily had to be in an appeal alone, in the given facts and circumstances is absolutely untenable and deserves non consideration.

39. Learned senior advocate Mr. Dhorde with respect to alternate remedy, refers to quite a few decisions of the Supreme Court, particularly the case of “*Whirlpool Corporation V/s Registrar of Trade Marks, Mumbai and Others*” reported in *AIR 1999 SC 22*, wherein the Supreme Court has considered that an alternate remedy is not an absolute embargo on invoking powers of high court. According to him, it has been considered that existence of alternate statutory remedy is not a constitutional bar to high

court's jurisdiction. Particularly, alternate remedy would not operate as a bar in at least three contingencies - (i) where writ seeks enforcement of fundamental rights; (ii) Where there is violation of principles of natural justice and (iii) Where the order or the proceedings are wholly without jurisdiction or *vires* of the act is challenged.

40. He submits that right to carry on profession and vocation is indeed a fundamental right and a covenant imposing post service period restriction is void under law and is illegal. In present facts and circumstances, defendant would not be unnecessarily relegated and forced to file miscellaneous civil appeal against the impugned order, which is a common order passed on question of jurisdiction of the court and injunction. He submits that since the court has determined that it has jurisdiction, without letting opportunity to lead evidence to the parties, in the circumstances, defendant had been left with no option but to invoke jurisdiction of this court under writ petition, since determination of question of jurisdiction is not amenable to appeal under the scheme of Civil Procedure Code, including Bombay Amendment of incorporation of section 9A. He, therefore, submits that while decision on such a question could not be amenable to appeal before appellate forum, resultantly, defendant had no alternative but to challenge the same before

this court. Even otherwise, alternate remedy is not an absolute embargo on the powers of this court, to invoke its extraordinary jurisdiction,. He submits that though further developments, may have been submitted to have seemingly diffused challenge on the question of jurisdiction involved in present case, in the circumstances invoking powers of this court is not unjustified at all. He submits that with the developments and having regard to passage of time while an individual is pitted against financial corporate giant, a weaker party may not be driven to appellate remedy having regard to circumstances in which writ petition had been preferred.

41. It would be worthwhile to refer to that section 27 of the Indian Contract Act, which declares an agreement in restraint of trade is void carving out an exception referred to therein. Section 27 of the Act, reads, thus-

“ 27. *Agreement in restraint of trade, void – Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.*

Explanation 1 – Saving of agreement not to carry on business of which goodwill is sold – One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business. ”

42. While it comes to restrictions on personal service and employment, decision in the case of “*Niranjan Shankar Golikar V/s The Century Spinning and Mfg. Co. Ltd.*,” reported in *AIR 1967 SC 1098*; observes that a restraint by which a person binds himself during the period of contract for not taking services with any other employer is not a restraint on trade and is not hit by section 27 of the Indian Contract Act.

43. Following decisions consistently show that a negative restrictive covenant to be operative post service period would not be enforceable at all and this particular position has not been deviated from during all this period:

“*Superintendence Company of India (P) Ltd. V/s Krishan Murgai*, reported in (1981) 2 SCC 246; “*M/s High Polymer Labs Pvt. Ltd., V/s R. K. Mutreja and Another*” reported in 1982 SCC Online Del 237; “*Taprogge Gesellschaft MBH V/s IAEC India Ltd*” reported in *AIR 1988 Bombay 157*; “*Bhavesh J. Bhatt V/s Cyrus N. Baxter*” reported in 1991 *Mh.L.J.* 231; “*Jet Airways India Limited V/s Mr. Jan Peter Ravi Karnik*” reported in 2000 SCC Online Bom 241; “*Star India Private Limited V/s Laxmiraj Seetharam Nayak and Another*” reported in 2003 SCC Online Bombay 27; “*Weiler International Electronics Private Limited V/s Punita Velu Somasundaram*” reported in 2003 SCC Online Bom 1006; “*Zaheer Khan V/s Percept D' Mark (India) Private Limited and Another*” reported on *AIR 2004 Bombay 362*; “*R. Babu and*

Another V/s TTK LIG Ltd” reported in 2004 SCC Online Mad 1789; “Ambiance India Private Limited V/s Naveen Jain” reported in 2005 SCC Online Del 367; “American Express Bank Ltd V/s Priya Puri” reported in 2006 (3) LLN 217; “VFS Global Service Pvt. Ltd., V/s Suprit Roy” reported in 2007 SCC Online Bom 1083; “F. L. Smidth Pvt. Ltd., V/s Secan Invescast (India) Pvt. Ltd.,” reported in 2012 (2) MWN (Civil) 815; “Satyan Patel V/s Human Factors International Pvt. Ltd.” in Company Petition No. 733 of 2015 (Bombay High Court); and “M/s ELI Research India Private Limited V/s Mr. Deepak Gupta and Another” reported in 2017 SCC Online Del 8403. Most of the decisions have been given with reference to section 27 of the Indian Contract Act and enforceability of restrictive covenant post service period has been held in the negative.

44. While the legal position is as aforesaid, a post service restrictive convent is not enforceable, in the present case, additionally it will have to be adverted to that in the case of *“M/s Kouni Travel (I) Pvt. Ltd V/s Mr. Ashish Kishore”* reported in 2007 (6) ALL MR 808 28, the court after taking stock of the situation, had found that in that particular case, the condition had not come free for the plaintiff. The plaintiff was required to pay full remuneration to the defendant for the relevant period when garden leave clause would be in operation and substantial amount was being paid to the employee. The term under said agreement took care of payment of compensation / remuneration to the employee during

the period in which restrictive covenant is stated to be operative. It is in that context decision had been rendered. The period of restraint in that case had been smaller and only for three months. As such, said case although being cited by learned advocate for the plaintiff, in support of his contentions, the same is distinguishable on facts and the terms of agreement. It is not the case of employer – plaintiff in the present matter that any such term has been incorporated in the agreement. There is no corresponding provision in the appointment letter or under clause 7 in the agreement, taking care of remuneration / compensation to the employee, which to a quite large extent gives indication of that the defendant in the circumstances either will be forced to continue with the plaintiff – employer or would be required to remain idle.

45. A negative covenant, which oppresses a person either to perform personal service or to remain idle or starve is considered inequitable, onerous and oppressive term and tends to obliterate the object underlying section 27 of the Indian Contract Act forbidding a compelled servitude. An employee seeking better employment would not be injuncted on the ground that he has confidential information and under the garb of confidentiality employer cannot be allowed to perpetuate forced employment. Freedom to change employment is a vital and important right of

an employee, which cannot be curtailed on the ground of confidentiality and such a restriction will be hit by section 27 of the Contract Act. As such, injunction would not issue.

46. Taking into account that Bombay High court, subsequent to decision in *"M/s Kouni Travel"* (*supra*) in similar set of facts in the case of *"VFS Global Services"* (*supra*) read with other decisions in the field has considered that even a garden leave clause would not be enforceable and would amount to restraint on trade and would be hit by section 27 of the Contract Act.

47. In the present matter, perusal of the plaint would disclose that negative restraint has been sought against the defendant for a period of three years and so is the case of temporary injunction under the application therefor. Further perusal of the impugned order, particularly its operative part shows that the defendant – petitioner has been restrained for a period of three years, as prayed for in the suit and interim relief application. In the circumstances, it may have to be adverted to that there is hardly any distinction between the final relief and the interim relief. Under interim order court has restrained the defendant for the whole of the term as claimed in the suit.

48. The Supreme Court in the case of *"Dayanand Vedic Vidyalaya Sanchalak Samiti V/s Education Inspector, Greater Bombay and Another"*

reported in (2007) 15 SCC 192 has considered that an interim relief in the nature of final one which is not in consonance with statutory rules, would be refrained from being given. The court had observed, an interim order which amounts to grant of final relief should not be granted and such a practice should be discouraged.

49. One may have to give regard to that an alternate remedy is not an absolute embargo to exercise powers of this court. Writ petition has been filed asserting breach of fundamental rights having regard to the decisions as also the question of jurisdiction of the court been raised and decided. In the present case, there are strong circumstances, which warrant invoking of such jurisdiction while trial court does not appear to have properly appreciated those. The reported decisions consistently hold and reaffirm that post service period negative restrictive covenant is not enforceable. One may have to consider that circumstantial and legal position unmistakably is in favour of the defendant – employee and his right to carry on profession and avocation is at stake, since January, 2018.

50. The question of jurisdiction may pale into insignificance under the recent ordinance issued during pendency of the writ petition and it is being argued that resort shall be had to an

appeal, as provided under Order XXXXIII of the Civil Procedure Code. Predominant legal position is that negative restrictive convent post employment period is not enforceable. Circumstances like duration consumed hitherto and that the defendant - employee is pitted against a corporate, financially able ex-employer and the circumstances in which writ petition has been preferred would not be ignored. The trial court has committed error in granting interim injunction restraining the defendant from seeking employment after termination of employment with the plaintiff. Facts, circumstances and exposition of law in the decisions referred to clearly point out the position that injunction as clamped would not be sustainable. Since appeal is provided against the impugned order, to relegate the defendant to such a remedy, in the present facts and circumstances, would tantamount to a formality to achieve compliance of procedural requirement and in the process a person like petitioner - employee would be dragged and hurtled along, though the circumstances and law are in his favour. It would not be a case to adopt stickler's approach to the matter and to pedantically send the petitioner - defendant to appellate remedy. Such an approach would have to be eschewed in the given facts and circumstances.

51. Writ petition, therefore, succeeds and is allowed. Rule is

made absolute in terms of clauses “II” and “III”. Request under prayer clause “IV” is not considered and is kept open. Regular Civil Suit No. 16 of 2018 in the circumstances may be proceeded with as expeditiously as possible.

[SUNIL P. DESHMUKH, J.]

. At this stage, learned advocate for the respondent makes a request to stay operation of this order for a period of six weeks. As such, operation of this order be put on hold for a period of six weeks.

[SUNIL P. DESHMUKH, J.]