

O.A.No.769 of 2019
and A.Nos.5992 and 6667 of 2019

PUSHPA SATHYANARAYANA, J.

O.A.No.769 of 2019 is filed by Anantara Solutions Private Limited, Chennai, praying for an order of interim injunction restraining the respondents 1 to 3, their men, agents, representatives, including but not limited to Mr.Rajeev Rajadhyaksha, or any other person claiming through or under them from engaging in or continue to be engaged in business directly or indirectly with the clients of the applicant including but not limited to MTB, MAFS and any other part of division of Mahindra & Mahindra Limited as agreed to under the Services Agreement/Teaming Agreement dated 01.04.2015, the Engagement Letter dated 05.06.2015 and the Services Agreement/Delivery Partner Agreement dated 05.06.2015 till the disposal of the arbitration proceedings between the parties.

2. The applicant also filed A.No.5992 of 2019 under Order XIV Rule 8 of the Original Side Rules read with Section 9(1)(ii)(d) of the Arbitration and Conciliation Act, 1996 seeking to allow the applicant to proceed against the respondents jointly under the Services Agreement/Teaming Agreement dated 01.04.2015, the Services Agreement/Delivery Partner Agreement dated 05.06.2015 and the

Engagement Letter dated 05.06.2015 by combining the causes of action against the respondents.

3. The crux of the disputes leading to filing of these applications runs as follows :

3.1. The applicant is a Consulting and Outsourcing Company engaged in the business of software and business consulting. The first respondent is a Supply Chain Solutions Company and the second respondent is a Limited Liability Partnership engaged in the business of Management Consultancy and Business Advisory Services. The third respondent is the Head - Operations of the second respondent Partnership and a designated partner of the second respondent.

3.2. The applicant entered into a Services Agreement/Teaming Agreement dated 01.04.2015 (in short, "SA") with the first respondent. The applicant issued a letter dated 05.06.2015 engaging the services of the second and third respondents, which is called as Engagement Letter. A Delivery Partner Agreement dated 05.06.2015 (in short, "DPA") was also entered into by the applicant with the second respondent. Each of the agreements contain a non-compete/non-solicitation clause, viz., Clause 4 of the SA ; Clause 6 of the Engagement Letter ; and Clause 4 of the DPA. Clause 4 of the SA reads as follows :

"4.0. NON-COMPETE AGREEMENT

While this agreement is in force, or so long as Anantara and Aumkar engaged in business not necessarily under this agreement, each party agrees not to approach any of the other party's customers introduced by the other party, directly or indirectly for any business. Aumkar and Anantara further commit that each party would not approach any of the other party's customers introduced by the other party, directly or indirectly for any business, for a minimum period of 36 months after the cessation of business between them under this agreement or other arrangements, whichever is later, except with the express written permission of the other party. If one party introduces a Delivery or a Demand Partner to the other, all transactions and further business done with such a partner will be covered by this clause."

Clause 6 of the Engagement Letter, so also Clause 4 of the DPA impose a similar condition on the other party.

3.3. As per Clause 7 of the SA as well as DPA and Clause 3 of the Engagement Letter, the agreements were for a period of one year, after which, they automatically expire, if the parties do not extend the same in writing. However, the non-solicitation clause will continue to survive. It is stated that the sole purpose of the applicant to engage the services of the first and second respondents was to engage the services of Mr.Rajeev Rajadhyaksha, the Managing Director of the first respondent and the third respondent, who is the designated partner and Head – Operations of the second respondent respectively.

3.4. As stated above, as per Clause 4 of the SA and the DPA, it was agreed that neither party would approach any of the other party's customers introduced by either party directly or indirectly for any business, while the agreement is in force or until the applicant and the first respondent ceases to engage in any kind of business relation. The parties also agreed not to approach any customer introduced by the other party directly or indirectly for any business for a minimum period of 36 months after cessation of business between them under the SA/Engagement Letter/DPA, except with the written permission from the concerned party.

3.5. It is submitted that in spite of the aforesaid agreements binding on the respondents, the respondents are working with Mahindra and Mahindra Truck and Bus Division (in short, "MTB") in violation of the aforesaid agreements. Therefore, MTB issued a notice dated 10.05.2018 terminating the Purchase Order (PO) dated 30.07.2016 placed on the applicant by MTB with effect from 08.08.2018. On acceptance of the said notice of termination of the PO by MTB, the applicant issued a notice to each of the respondents via e-mail dated 13.05.2018 terminating the POs, i.e., DOM/PO/05/2016-17 and DOM/PO/06/2016-17 with effect from 08.08.2018.

3.6. After termination of the respondents' services by the applicant, the applicant found an e-mail sent by Mr.Rajeev

Rajadhyaksha to the third respondent detailing a proposal to be submitted to MTB. The said e-mail shows that the respondents have colluded and breached the conditions stipulated in the SA, Engagement Letter and the DPA by entering into business with MTB indirectly through a LLP incorporated in the names of some of their spouses, who were themselves shareholders and Directors of the first and second respondents.

3.7. Hence, the applicant has moved this Court under Section 9 of the Arbitration and Conciliation Act, 1996, (in short, "the Act") seeking for the reliefs aforesaid.

4. This Court granted interim injunction, while ordering notice in these applications on 20.08.2019, which was extended subsequently.

5. Seeking to vacate the said interim order, the second and third respondents in those applications filed A.No.6667 of 2019.

6. The original applications were resisted by the respondents on various grounds including the maintainability of the applications by contending the cause of action. According to the respondents, when there is a separate contract between the parties and the cause of action, duties, responsibilities and nature of work are entirely different

from each other, a single application under Section 9 of the Act cannot be maintained. Admittedly, there is also no tripartite agreement between the three parties. Secondly, when the agreements were only for one year, which automatically came to an end by efflux of time, the question of termination does not arise. Thirdly, the respondents cannot be prevented from carrying on their trade by using their lawful skills and competence. The third respondent is an individual, who is not a party to the contract and the applications are not maintainable against him. Thus, the respondents prayed for dismissal of the applications on the ground that there was no arbitration agreement.

7. Before going into the merits of the case, the preliminary objection raised by the respondents has to be addressed.

8. The applicant has sought for an interim injunction restraining the respondents 1 to 3 from directly or indirectly serving Mahindra and Mahindra, which has got two Divisions, namely, MTB and also Mahindra and Mahindra Limited, Automative and Farm Equipment sectors (MAFS), which are claimed to be the customers of the applicant. According to the applicant, the respondents have colluded with each other and have violated the non-solicitation clause under the SA, Engagement Letter as well as DPA. Further, according to the

applicant, the nature of issues between the parties cannot be adjudicated in the absence of other respondents and thus, inextricably intertwined disputes can be argued in a single petition. The learned counsel for the applicant pressed into service the judgment of the Hon'ble Supreme Court in **P.R.Shah V. B.H.H. Securities, (2012) 1 SCC 594**, wherein, it has been held as follows :

"19. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration."

9. A learned Single Judge of the Delhi High Court in a recent order in **Global Infonet Distribution Pvt. Ltd. V. Lenovo (India) Private Limited and Others, 2019 SCC OnLine Del 9980**, has held that if there is a direct relationship to the party signatory to the arbitration agreement, commonality of the subject matter and the agreement between the parties having a composite transaction, then, a single arbitration can be maintained. It is relevant to extract the following paragraphs from the said judgment :

"17. Similarly, in *Cheran Properties Limited v. Kasturi & Sons Limited*, 2018 SCC OnLine SC 431 the Supreme Court held as follows:—

"26. The Court held that it would examine the facts of the case on the touch-stone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a 'direct commonality' of the subject matter and on whether the agreement between the parties is a part of a composite transaction:

"A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the

dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even no signatory parties would fall within the exception afore-discussed."

27. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus:

"The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

..

We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."

.....

31. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties

may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

".. The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession."

18. As held by the Supreme Court in *Cheran Properties Limited v. Kasturi & Sons Limited* (supra), the existence of a relationship between the parties, commonality of the subject matter and whether the agreement between the parties is a part of a composite transaction have to be seen. A third party or a non-signatory could be subjected to arbitration without his prior consent, though this would only be in exceptional cases. This would happen only when there is a direct relationship to the party signatory to the arbitration agreement, commonality of the subject-matter and the agreement between the parties being a composite transaction.

19. In the present case though the parties have entered into three different agreements there is clearly a commonality of facts which as per the plaintiff bind the defendants together. It is the own case of the plaintiff in the plaint that defendants No.1, 2 and 3 are jointly and severally liable for the damages suffered by the plaintiff. The plaintiff further states that the transactions of the

plaintiff with the defendants in relation to the products of defendant No. 1 are closely inter-related, fully inter-dependent and the defendants have acted in joint collusion by hatching an ingenious plan. It is also stated by the plaintiff that the cause of action for the plaintiff qua the defendant arises out of mutual collusive acts and omissions of the said defendants.

20. Keeping in view the legal position and the fact that there is a commonality of facts which bind the defendants together as pleaded by the plaintiff, in my opinion, the present applications are liable to be allowed. The plaintiff cannot escape from the arbitration agreement as is sought to be done. I may also note that a perusal of the above arbitration clause would show that regarding defendants No. 1 and 3 the Agreement provides that the seat of arbitration would be Bangalore. The arbitration clause with defendant No. 2 states that the seat of arbitration would be Mumbai. However, learned counsel appearing for defendant No. 2 submits that they have no objection in case arbitration proceedings are held in Bangalore."

In the case on hand also, the applicant is seeking reliefs jointly and severally from the respondents and the issue is also common. Hence, the application filed as such is maintainable.

10. The next point that arises for consideration is about the novation of contract. It was submitted by the learned counsel Mr.T.K.Baskar that there cannot be novation of agreement. In paragraphs 29 to 31 of their counter-affidavit, the respondents had contended that various POs issued to them substituted or superseded the earlier agreements, namely, SA or Engagement Letter or DPA

between the applicant and respondents 1, 2 and 3 respectively. It was specifically contended that the POs do not contain non-solicitation clause and therefore, the respondents are not bound by the non-solicitation clause contained in the SA, Engagement Letter or DPA. However, it was pointed out by the learned counsel for the applicant that the non-solicitation clause contained in those documents continued to survive even after the termination of the said agreements till the parties cease to have business under the said agreements or not. It is his claim that the POs make it evident that the applicant and the respondents continued to carry on business. There is nothing in the PO to even suggest that it had superseded or substituted the existing agreements. Clause 8 of the SA specifically states that the terms of the agreements should be modified, varied or altered only by a written deed of modification. Hence, it was contended that if any modification of the terms of the agreement was contemplated, it could be done by a written deed of modification.

11. It is the further case of the applicant that the applicant had only dispensed with the requirement of executing an elaborate agreement and a detailed PO with a simple PO in order to avoid protracting negotiations by the respondents on clauses in the PO and the draft agreements. Therefore, the POs cannot be said to have

substituted the SA. Besides there was no consensus ad idem between the parties to rescind the non-solicitation clauses, which would survive independent of the termination either voluntarily or by efflux of time. As a result, the obligations enshrined in the non-solicitation clause continued and the PO issued by the applicant on 04.11.2018 thereafter was acted upon by the respondents. The alleged novation is based on two e-mails dated 17.10.2016 and 04.11.2016. After the MTB issued the termination notice of the PO dated 30.07.2016 placed on the applicant, the applicant issued notices to the respondents terminating the POs issued to the respondents with effect from 08.08.2018. The date of cessation is from 08.08.2018, as the period of thirty six months starts from 08.08.2018. From the above, there is nothing in the PO to show or suggest that it superseded or substituted the SA or the Engagement Letter or DPA. Hence, the respondents cannot contend that the non-solicitation clause in the SA or Engagement Letter or DPA is not binding on them and that there is no breach of the conditions by them set out therein.

12. The next question arises for consideration is as to whether the non-solicitation clause amounts to restraint on trade and if it is contrary to Sections 14 and 41 of the Specific Relief Act ?

13. According to the applicant, even if the respondents had an earlier contract, they cannot work for Mahindra and Mahindra as per the non-solicitation clause. On 08.08.2018, MTB terminated the contract and such termination is on account of dissatisfaction. Though the non-solicitation is a negative covenant, it is binding on the respondents. However, as argued by the applicant, there is no total prohibition on respondents in doing business and the restraint is only to solicit the customer of the applicant for a period of 36 months. The respondents, on the other hand, contended that the POs were entered into with the applicant for the years 2016-2019 and these POs do not contain non-compete/non-solicitation clause. The parties have been attempting to alter the conditions to enter into new agreements and proposed three years agreement, instead of one year. The PO dated 04.11.2016 also does not contain non-compete/non-solicitation clause and hence, according to the respondents, the said non-compete clause cannot be made applicable to them.

14. Mr.M.S.Krishnan, learned Senior Counsel for the respondents placed reliance on Section 14(1) of the Specific Relief Act, 1963, which provides that a contract, the performance of which involves the performance of a continuous duty which Court cannot supervise, is a contract which cannot be specifically enforced. The agreement

between the applicant and the respondents 1 and 2 is a contract of agency and is covered under Clause (b) and (d) of Section 14(1) of the Specific Relief Act and is one which cannot be specifically enforced. As the contract period of one year expired in the year 2016 itself, the Court cannot specifically enforce the contract.

15. On the other hand, the applicant contended that the reliance placed on Section 14 of the Specific Relief Act by the respondents is totally misplaced as the same has got no applicability to the present case. It was argued that if the contract contained a negative covenant between the parties, the performance can be enforced under Section 42 of the Specific Relief Act.

16. According to the respondents, the applicant does not have any contract with Mahindra and Mahindra, as the same was terminated prior to the alleged breach and therefore, the alleged breach could not cause any business loss to the applicant. Admittedly, the applicant's business with MTB was terminated prior to the contract got concluded and on the very next date, Infinity Management Consultants LLP was incorporated by Mrs.Vinita Rajeev Rajadhyaksha as the Director of Aumkar/the first respondent and Mrs.Mini Hari, was the designated partner of the second respondent partnership till 15.09.2018. Upon

coming to know of the breach by the respondents that a new company was floated and the spouses are made the partners, according to the applicant, from the conduct of the respondents, the breach of contract is proved.

17. It was also contended by the learned Senior Counsel for the respondents that they had a pre-existing professional relationship with Mahindra and Mahindra even prior to entering into the agreement with the applicant and thus, they are not bound by the non-complete clause. However, it is alleged by the applicant that the respondents did not have any prior business relationship with MTB as a separate entity and later as a division of Mahindra and Mahindra Limited or MAFS or any other part of Mahindra and Mahindra Limited. As per the non-solicitation clause, the respondents agreed not to approach any of the applicant's customers or prospects with whom the Consultant has been engaged by the applicant. Therefore, the third respondent is forbidden to even engage with the applicant's customers and thus, the pre-existing right has no relevance.

18. It is to be seen that non-solicitation clauses, which are part of business contracts, agency or commercial contracts, etc., must be viewed different from that of an employer-employee contract. In any

commercial contract, the parties have equal footing and they are balanced and not one-sided. Therefore, the respondents are *prima facie* bound by the negative covenant specified in SA and DPA.

19. Indisputably, the contract of the applicant with Mahindra and Mahindra Limited and MAES expired in March 2018 and with MTB was terminated in August, 2018. Therefore, Mahindra and Mahindra had brought the contracts to the end with the applicant. Admittedly, first respondent had relationship with Mahindra and Mahindra in the year 2015 itself, which was within the knowledge of the applicant. However, the applicant did not raise any objection then itself. But it would appear from the facts that both the parties have not come to court with clean hands. The respondents are guilty of breach of contract, no matter from which date, cannot claim to continue the misuse of the same.

20. Though it is alleged by the respondents that the applicant had approached the court belatedly, the delay itself cannot be the ground for refusing to exercise discretion of the Court. The Court has to see only from the totality of the circumstances. The applicant's business with MTB was terminated before the contract could be concluded and on the very next day, the respondents spouses have

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incorporated Infinity Solutions LLP. Thus, the conduct of the parties
also to be considered for grant of injunction.

21. As these applicants has made out a prima facie case and the
balance of convenience is also in their favour, the order of interim
injunction already granted and extended by this Court is further
extended for a period of eight weeks from the date of receipt of a copy
of this order. In the meantime, it is open to the parties to initiate the
arbitration proceedings and agitate the issue before the Arbitral
Tribunal in accordance with law.

22. In the result, O.A.No.769 of 2019 is disposed of, with the
above direction. A.No.6667 of 2019 is closed. In view of the above
order, no separate order is necessary in A.No.5992 of 2019 and the
same also stands closed.

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