

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20 / 08 / 2020

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

O.A.NOS.599 AND 600 OF 2018

M/s. LifeCell International Private Limited
Represented by its Company Secretary
D.Mahesh
Having its Registered Office
at No.26, Vandalur – Kelambakkam Main Road,
Keelakkottaiyur, Chennai – 600 127.

... Applicant
in both OAs'

Vs.

Vinay Katrela

... Respondent
in both OAs'

PRAYER: Original Application filed under Order XIV Rule 8 of Original Side Rules read with Section 9(ii)(c)(d)(e) of the Arbitration and Conciliation Act, 1996 with a prayer to grant (i) an order of interim injunction restraining the respondent, its Directors, its associates, partners or employees or relatives of such Directors or employees and professional consultants from in any manner competing with the business of the applicant by any business of similar to that of the applicant's business pending final adjudication of the disputes between the applicant and the respondent through arbitration; (ii) an order of an injunction not to divulge any information in relation to the

applicant's affairs or business, method of carrying on business and any other trade secrets for a period of two years from the effective date of termination of the said Franchise Agreement dated 01.10.2016 pending final adjudication of the disputes between the applicant and the respondent through arbitration.

For Petitioner : Mr.Ravikumar
Senior Counsel
for M/s.Paul and Paul

For Respondent : Mr..Rajadithya Sadasivan

COMMON ORDER

The applicant has approached this Court for the relief of injunction as per Section 9 (ii) (c) (d)(e) of the Arbitration and Conciliation Act, 1996.

2.The applicant is in the business of of testing, processing, preserving and storage of Umbilical Cord Stem Cells collected at the time of birth of the child. The applicant had centres / branches all over the Country and run on its own and through its own centres and also through independent franchisees. The respondent is one of the franchisees to run the centre at Bengaluru on a non-exclusive basis for a period of three years from

01.10.2016. The parties have entered into a Franchise Agreement dated 01.10.2016 at Chennai. The relevant clauses in the said Agreement pertaining to the present applications are as under:

“Restraints:

Clause 11.3: The Franchisee shall not directly or indirectly contract with the various vendors of the company during the term of this agreement and for a period of two years thereafter. Breach of this clause will be treated as a material breach and the company reserves the right to terminate the agreement and also claim such compensation as it may deem fit from the franchisee in the event of a breach thereof.

Clause 11.5: The Franchisee hereby agrees and undertakes that they will not at any time whether during the continuance of this agreement or at any time after the termination thereof, divulge any information in relation to the company's affairs or business, method of carrying on business and any other trade secrets that the Franchisee may

have come to know while dealing with the company and keep the same confidential. The Parties hereby agree that the obligations under this clause shall survive this agreement.

Non-compete:

Clause 12.1: *During the term of this agreement and for a period two (2) years following the expiration, non-renewal or other termination of this Agreement, the Franchisee, any of its associates or partners or relatives, any of its Directors or employees or relatives of such Directors or employees and professional consultants shall not compete with the Company by conducting or involving in any manner in any business of similar nature as that of the company's business. To the extent that this covenant "not to compete" is determined by any court of competent jurisdiction to be unduly broad in scope or application, it is the intention of the parties in the said event that this covenant "not to compete" be interpreted to the broadest extent legally permissible and that this covenant "not to compete" shall not be deemed unenforceable in its entirety.*

The Franchisee shall also not employ or cause to be employed any personnel of the company either during the term of the agreement or within two years after termination of this agreement, or that of any other Franchisee in the business or any of the Company's vendors or Clients, without the prior written approval of the Company. In case of any breach, with respect to this clause, the Company reserves the right to cause the Deposit to be forfeited and also claim such damages as it may deem fit from the Franchisee. “

Since the respondent failed to achieve the target even in the minimum sales, he was advised to improve his performance and the failure of which will constitute breach of terms and conditions of the Franchise Agreement.

3. According to the applicant, the respondent had approached City Civil Court at Bengaluru and obtained an *exparte* interim order dated 21.10.2017 in I.A.No.1 of 2017 in AA No.379 of 2017. The said order was vacated on 19.04.2018. Thereafter, on 25.04.2018, the Franchise Agreement dated 01.10.2016 was terminated by the applicant giving 30 days prior notice

to take effect from 25.05.2018. Thereafter, the respondent engaged in soliciting business from the customers and corporate clients of the applicant and therefore, vide letter dated 21.05.2018, the applicant demanded the respondent to desist from such activities. Since the respondent failed to respond within 24 hours, the Franchise Agreement was terminated with effect from 22.05.2018 itself. It came to the notice of the applicant that the respondent by mail dated 24.05.2018 from M/s.Kids Clinic India Private Limited communicated about the sample status report to a company, who is the applicant's competitor. The conduct of the respondent is in contravention of the confidentiality agreement as well as non-compete. Further, the respondent breached the terms and conditions of the contract after termination of the Franchise Agreement forcing the applicant to approach this Court for the intervening protection pending initiation of arbitral proceedings.

WEB COPY

4.This Court on 29.06.2018 has granted interim injunction and

on notice, the respondent appeared and filed counter denying the allegations.

5. According to the respondent, the business of the applicant has gone down due to change of policy itself. Originally, the samples collected from the customers were treated as confidential and the functioning was like a private bank storing Stem Cells. Later, on commercial motive, it was converted into community banking and the samples were sold outside for higher price. Therefore, the sales has gone down. The respondent is in the business as a Franchise for more than a decade. For the defective policy taken by the applicant, the sales has gone down, for which, he cannot be blamed. The allegation that he had corresponded with M/s.Kids Clinic India Private Limited through e-mail and given the accounts is false. In fact, M/s.Kids Clinic Private Limited has sent an e-mail to the applicant asking for certain statement of accounts. Since it was not supplied, they stopped doing business with the applicant as on 21.05.2018 and they have demanded the accounts from the respondent in the capacity of agent, as it was dealing with the said customer and there is no breach of confidentiality in respect of the same. In

fact, the applicant owes a sum of Rs.15,52,350/- as on 22.05.2018, whereas without paying money, the applicant is dodging and approached this Court on false allegations.

6.The learned counsel for the respondent would contend that enforcing a non-compete or non-disclosure clause will restrain the respondent from carrying on in a business, which is no longer carried on by the applicant is unreasonable and violative of Section 27 of the Indian Contract Act. Non-compete and non-disclosure clauses are void in law and therefore, the original application is liable to be dismissed. Further, trafficking human organs is an offence under Section 19 of the Transplantation of Human Organs and Tissues Act, 1994 and hence, interim injunction cannot be granted, favouring the offence committed by the applicant. Therefore, he seeks dismissal of the original applications.

7.I have considered the rival submissions.

8.The Hon'ble Supreme Court in **NIRANJAN SHANKAR**

***GOLIKARI VS. CENTURY SPINNING AND MANUFACTURING
COMPANY LIMITED [CDJ 1967 (SC) 078]*** has held as follows:

“15. The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided as in the case of W.H. Milsted and Son Ltd.(3). Both the Trial Court and the High Court have found, and in our

view, rightly, that the negative covenant in the present case restricted as it is to the period of employment and to work similar or substantially similar to the one carried on by the appellant when he was in the employ of the respondent company was reasonable and necessary for the protection of the company's interests and not such as the court would refuse to enforce. There is therefore no validity in the contention that the negative covenant contained in clause 17 amounted to a restraint of trade and was therefore against public policy.

16. The next question is whether the injunction in the terms in which it is framed should have been granted. There is no doubt that the courts have a wide discretion to enforce by injunction a negative covenant. Both the courts below have concurrently found that the apprehension of the respondent company that information regarding the special processes and the special machinery imparted to and acquired by the appellant during the period of training and thereafter might be divulged was justified; that the

information and knowledge disclosed to him during this period was different from the general knowledge and experience that he might have gained while in the service of the respondent company and that it was against his disclosing the former to the rival company which required protection. It was argued however that the terms of clause were too wide and that the court cannot sever the good from the bad and issue an injunction to the extent that was good. But the rule against severance applies to cases where the covenant is bad in law and it is in such cases that the court is precluded from severing the good from the bad. But there is nothing to prevent the court from granting a limited injunction to the extent that is necessary to protect the employer's interests where the negative stipulation is not void. There is also nothing to show that if the. the negative covenant is enforced the appellant would be driven to idleness or would be compelled to go back to the respondent company. It may be that if he is not permitted to get himself employed in another similar employment he might perhaps get a lesser remuneration than the one agreed to by

Rajasthan Rayon. But that is no consideration against enforcing the covenant. The evidence is clear that the appellant has torn the agreement to pieces only because he was offered a higher remuneration. Obviously he cannot be heard to say that no injunction should be granted against him to enforce the negative covenant which is not opposed to public policy. The injunction issued against him is restricted as to time, the nature of employment and as to area and cannot therefore be said to be too wide or unreasonable or unnecessary for the protection of the interests of the respondent company.

9.As per the above judgment, there cannot be absolute restraint posed termination of the employment or in this case the trade agreement. When an employee or agent is given special training and imparted with special knowledge in respect of a particular trade, it is an intellectual property of the Principal and there could be reasonable restrictions. On the other hand, if an employee or agent acquired knowledge by his experience, which is individual to his intelligence portion, there cannot be any restriction and

enforcement of the condition as per the agreement after termination is absolutely void. Therefore, depending on the circumstances and reasons, the negative comments can be ignored.

10. In the judgment of the Hon'ble Supreme Court in ***SUPERINTENDENCE COMPANY OF INDIA (P) LTD., VS. SH. KRISHAN MURGAI*** [1981 (2) SCC 246] it has been held that if a person on his own volition enters into an agreement, the restriction shall be given on narrower construction and the restriction should not be given wider or broader construction. It shall not be greater than necessary to protect the employer nor unduly harsh and oppressive to the employee. The minority view of taken in the said judgment reads as follows:

“63. The restraint may not be greater than necessary to protect the employer, nor unduly harsh and oppressive to the employee. I would, therefore, for my part, even if the word 'leave' contained in clause 10 of the agreement is susceptible of another construction as being operative on termination,

*however, accomplished of the service e.g. by dismissal without notice, would, having regard to the provisions of **Section 27** of the Contract Act, 1872, try to preserve the covenant in clause 10 by giving to it a restrictive meaning, as implying volition i.e. where the employee resigns or voluntarily leaves the services. The restriction being too wide, and violative of **section 27** of the Contract Act, must be subjected to a narrower construction. “*

11. In the judgment of the Madhya Pradesh High Court in **MANISH VS. SANDEEP [2002 SCC ONLINE MP 662]** it has been held as under:

*“10. In **Gujrat Bottling Company Ltd. and Ors. v. Coca Cola Company and Ors.**, (1995) 5 SCC 545, the agreement in question was an agreement for grant of franchise and it was a commercial agreement. The negative stipulation was confined in its application to the period of subsistence of the agreement and the said stipulation could*

not be held to be in restraint of trade so as to attract the bar of Section 27 of the Contract Act. It was held that the purpose of the said agreement is to promote the trade and the negative stipulation seeks to achieve the said purpose. It is pointed out that the rule in England now is that restraints, whether general or partial, may be good if they are reasonable and any restraint on the freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. The Court has to decide, as a matter of law, (i) whether a contract is or is not in restraint of trade, and (ii) whether if in restraint of trade, it is reasonable. Instead of segregating two questions, the Courts have often fused the two by asking whether the contract is in "undue restraint of trade". It is further said that the question of reasonableness of restraint is outside the purview of Section 27 of the Contract Act and need not be gone into. The Courts in India have only to consider the question whether "the contract is or is not in restraint of trade". On this premise it was held that the restriction imposed therein being operative only during the period the agreement is

subsisting, the said stipulation cannot be held to be "in restraint of trade". The principle which was culled out is "a stipulation in a contract which is intended for advancement of trade shall not be regarded as being in restraint of trade. Similarly, except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period of contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract. The underlying principle governing contracts in restraint of trade is the same and as a matter of fact the Courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements". It is further observed that "there is a growing trend to regulate distribution of goods and services through franchise agreements providing for grant of franchise by the franchiser on certain terms and conditions to the franchisee. Such agreements often incorporate a condition that the franchisee

shall not deal with competing goods. Such a condition restricting the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchiser and it cannot be regarded as in restraint of trade".

11.....

12. The defendant unilaterally terminated the contract before its expiry. Therefore, on the facts and in the circumstances of the present case, it cannot be held that the term of the contract that the franchisee would not conduct the same or similar courses as those covered under the agreement, for a period of six months after the termination of the agreement is 'in restraint of trade' but it was for 'advancement of trade'. For smooth flow of trade and commerce and specially for business and franchise agreements such a covenant limited in point of time and for the courses covered by the agreement should be permissible and would not be in restraint of trade. It would be in overall business interest. The order passed by the Appellate Court is unassailable. Such an order of interim injunction

can be granted under Order 39 Rule 2, CPC to prevent the breach of the contract. “

12.Following the judgment of the Hon’ble Supreme Court in ***GUJRAT POTTING COMPANY VS. COCO COLA COMPANY [1995 (5) SCC 545]*** the learned Judge has held that the restriction as per the terms and conditions of the agreement cannot be considered as “in restraint of trade”, but it shall be considered as “advancement of trade”. Therefore, there could be restriction for a limited point of time.

13.In the judgment of ***PERCEPT D’ MARK (INDIA) PRIVATE LIMITED VS. ZAHEER KHAN AND ANOTHER [2006 (4) SCC 227]*** the Hon’ble Supreme Court has taken a different view as follows:

“37. We have already perused the judgment of the learned Single Judge and of the learned Division Bench of the High Court. On the pleadings contained in the Arbitration Petition, there can be no escape from the conclusion that what the appellant sought to enforce was a

negative covenant which, according to the appellant, survived the expiry of the agreement. This, the High Court has rightly held is impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under Section 27 of the Contract Act. It was contended by learned senior counsel for the appellant that Clause 31(b) is not prima facie void as (i) it allegedly does not travel beyond the term because it is an independent contract; (ii) the term of agreement was itself extendable and never came to an end; (iii) the words "initial term" denote that Clause 31(b) itself resulted in an automatic extension of the term; and (iv) the "full term" contemplated was beyond the "initial term" of 3 years.

38. The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within express exception

engrafted in *Section 27*.

Section 27 of the Indian Contract Act, 1872 provides as follows:-

"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.

Exception 1.- Saving of agreement is 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."

39. We have perused the relevant portions of Niranjani Shankar Golikari (supra), Superintendence Company of India (supra) and Gujarat Bottling (supra)

which have been extracted by the learned Judges of the Division Bench and quoted in extenso. In the circumstances, there can be no manner of doubt that the Division Bench was right in coming to the prima facie conclusion drawn by it, and in setting aside the Single Judge's order. No case was made out by the appellant for compelling respondent No.1 to appoint the appellant as his agent in perpetuity. In view of the personal nature of the service and relationship between the contracting parties, a contract of agency/management such as the one entered into between the appellant and respondent No.1 is incapable of specific performance and to enforce the performance thereof would be inequitable. Likewise, grant of injunction restraining first respondent would have the effect of compelling the first respondent to be managed by the appellant, in substance and effect a decree of specific performance of an agreement of fiduciary or personal character or service, which is dependent on mutual trust, faith and confidence.

40.The appellant can be adequately compensated in

terms of money if injunction is refused. In our view, grant of injunction, in the present case, would result in irreparable injury and great injustice to first respondent which is incapable of being remedied in monetary terms, as he would be compelled to enter into a relationship involving mutual, faith, confidence and continued trust against his will. We have perused the contract in detail. The terms of the contract was expressly limited to 3 years from 30.10.2000 to 29.10.2003, unless extended by mutual agreement, and all obligations and services under the contract were to be performed during the term. Clause 31 (b) was also to operate only during the term, i.e. from the conclusion of the first negotiation period under clause 31(a) on 29.7.2003 till 29.10.2003. This respondent No.1 has scrupulously complied with. So long as Clause 31(b) is read as being operative during the term of the agreement, i.e. during the period from 29.7.2003 till 29.10.2003, it may be valid and enforceable. However, the moment it is sought to be enforced beyond the term and expiry of the agreement, it becomes prima facie void, as rightly held by the Division

Bench.”

14.In the judgment of the Bombay High Court in ***BOMBAY DYEING AND MANUFACTURING COMPANY LIMITED VS. MEHAR KARAN SINGH*** [2010 (7) MH.L.J.48] it is observed as under:

*“ 58. However, the injunction with regard to the use of the software by keeping and understanding the manual is quite another matter. This would fall within the mischief of the common law relating to confidential information as held in the case of *BLB Institute of Financial Markets Ltd. vs. Ramakar Jha*, 2008 (4) Arb. LR 12 (Delhi). The employee of the institution who had himself developed business strategies for the Plaintiff institution threatened to use it for his own purpose or other authors. The Plaintiff acquired rights in what was developed by its employee by virtue of granting its employee a huge salary and perquisites which were from time to time increased under the agreement with the employee for not parting with information during the*

period of his employment contract. During such period itself the employee threatened and ultimately resigned and was about to join the employment of another and divulge the proprietary confidential information which was by way of study materials and handouts of different specialised course which the Plaintiff institution ran as Post Graduate Diploma Courses. The negative covenant in the employment contract was allowed to be enforced under Section 27 of the Contract Act. The service contract was held to be a contract of trust and faith and the material resources and infrastructure, it was held, cannot be allowed to be used by a rival through the conduct of the employee divulging confidential systems developed and used by the Plaintiff during the course of its employees service agreement. It was held, placing reliance upon Zee Telefilms Ltd. & anr. vs. Sundial Communications Pvt. Ltd. & ors., 2003 (27) PTC 457 (Bom.) (DB) = 2003(5) BCR 404 in which it was held at page 409 that the right to restrain the publication of a work using confidential information is a broader right than the proprietary right of copyright, though

the law of confidence is different from the law of copyright. It held that a breach of good faith in publishing an idea or information acquired by a person in confidence could be restrained by an injunction if it has not become public knowledge otherwise. Upon investment by the institute to the tune of more than Rs.100 Lakhs in launching an individual curriculum, setting up of the art infrastructure, it was held that though stricto sensu the Plaintiff did not have copyright, divulging the Plaintiff's business to its rival would cause it irreparable injury which could be prevented by an injunction upon breach of the Plaintiff's confidence.

59. Taking a holistic view of the scenario that emerges from a reading of all the aforesaid judgments spanning the last half century of the common law of confidence analogous to the contractual obligation of the Defendant, the Plaintiff's case of injunction sought in respect of the manual of the Plaintiff's software and in respect of the most of itemised intangible and incorporeal rights would have been considered differently.

60.The Plaintiff has a proprietary right in the

manual of customised software sent by the Defendant to the officers of DD, however, remains at large. Even if DD does not misuse that e-mail, the fact that the Defendant had its custody, its future misuse cannot be ruled out and rather can be anticipated given his past conduct. The competitors using or developing their real estate business plans and strategies identical to those of the Plaintiff as reflected in the manual e-mailed by the Defendant to them would cause damage to the Plaintiff using such software assisted by the manual provided by the Plaintiff. However, the case which the Plaintiff disclosed in its business plans and strategies or its product mix and its budgets cannot be on par.

61. Though the Defendant has exhibited himself as a man of No-Confidence, who has proved to be untrustworthy and disloyal, the Plaintiff's case stretched to the Plaintiff's decisions or plans with regard to the real estate business, its expenditure or the decisions of the extent of the construction are not matters which are even prima facie shown by the Plaintiff to be copyable products as the Plaintiff's

customised software except, of course, documents such as the MOU relating to the Goa Project of the Plaintiff shown above which are sought to verbatim copied. Though the Defendant who attended the Board meetings of the Company from time to time, minutes of which are shown to the Court, would have amassed the information and knowledge with regard to the Plaintiff's plans of operation, the Defendant cannot be enjoined from disclosing those plans, if any, to the competitor except for what would cause injury or damage to the Plaintiff by such disclosure alone, if he carried them in his head. The competitors in the real estate, which is a fiercely competitive market, cannot be taken to be driven by the Defendant's disclosure alone."

Wherein in the above judgment, the Court has held that the confidential information which is developed by the company is its intellectual property exclusively belonging to them and divulging the secrets to the rival would cause irreparable injury, which could be prevented by an injunction on breach of the confidence.

15. In the judgment of the Calcutta High Court in **HI-TECH**

SYSTEMS AND SERVICE LIMITED VS. SUPRABHAT RAY AND OTHERS [2015 SCC ONLINE CAL 1192] it has been held as under:

“The action is based on an apprehended breach. The plaintiff has been able to demonstrate that there is a basis of a genuine apprehension that the said respondents as ex-employees are going to part with, divulge or to utilize the confidential informations and trade secrets in course of their business. In a quia timet action of this nature, the Court is required to find out if such apprehension is genuine and the plaintiff is able to make out a strong prima facie case. The expression "quia timet" means "since he fears". The application for temporary injunction under Order 39 Rule 1 is in the nature of a quia timet action. The plaintiff in such an action would be required to prove that there is an imminent danger of a substantial kind or that an apprehension of injury, if it does come, will be irreparable and the compensation of money would be inadequate. In the instant case, if the plaintiff is allowed to wait till the actual damage is caused and in the process the respondents

gained an unfair advantage in first procuring a breach of contract and secondly to make unlawful gains and unjust enrichment by utilizing the confidential informations and trade secrets, the damage that the plaintiff would likely to suffer could not be compensated in terms of money. In such a situation, equity would step in and prevent any damage being caused to the existing business of the plaintiff. Mr. Banerjee would submit that the gains of learning would be an asset acquired by applying one's own intelligence and skill and the Court would be extremely chary to prevent a person from using such gains of learning. Had it been only restricted to gains of learning and not of utilizing confidential informations and trade secrets, I would have declined to pass any order in favour of the plaintiff. The respondents are using such confidential informations and trade secrets which they have no right to reveal to anyone else or utilize it to the detriment of the plaintiff. The formation of the partnership firm followed by resignations of the respondents in quick succession sharing informations with the third parties in between with a clear object to cause

diversion of the business from the clients of the plaintiff which includes Hora clearly shows that the respondents seek to utilize those trade secrets for their own advantage. The said respondents would not have known those entities and their requirements and other details of the trade without being in the employment of the said plaintiff.

It is by reason of their employment with the petitioner and by reason of the dealings, transactions and interactions, the said respondents became acquainted with the officials of Sky Climber and they knew precisely the requirements of the Sky Climber. The contents and tenor of the said e-mail would show that the said respondents were soliciting business from the said Sky Climber and were inducing Sky Climber to transfer all their businesses to the respondents. The respondents by reason of their employment were in possession of all the confidential informations and trade secrets such as prices, clientele, database, the exact requirements and other confidential informations attached to the trade which the said respondents are not entitled to

reveal. There cannot be any doubt that the informations the said respondents are in possession of and are being utilized are confidential in nature and such informations the plaintiff had shared with the said respondents under circumstances which established confidentiality, that is to say, the plaintiff had reposed faith and trust on the said respondents in sharing such information with the said respondents relating to the conduct of business to be solely utilized for the business of the plaintiff. The respondent No.2 has explicitly stated in the said e- mail that the said respondent No.6 wants to acquire the business which Sky Climber had with the plaintiff. That the said respondents were influencing the customers of the plaintiff which is likely to result in diversion of business as also breach of the existing contract entitles the plaintiff to have the equitable relief.

Determining whether information is confidential is dependent upon several factors. In Saltman Engineering Co. v. Campbell Engineering Co. Ltd reported at 1963 (3) All

ER 413 the Court of Appeal held that the "confidential" information: "must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process".

The existence of irreparable harm is an essential consideration for a court in determining whether to award an injunction. Plaintiff would commonly claim that when confidential information is disseminated or trade secrets are lost, so too will be its competitive advantage.

The dissemination and/or sharing of any confidential information is liable to cause harm which does not involve proof of actual harm or special damage.

In Saltman Case (supra) it was held that the

maintenance of secrecy, according to the circumstances in any given case, either rests on the principles of equity, that is to say the application by the court of the need for conscientiousness in the course of conduct, or by the common law action for breach of confidence, which is in effect a breach of contract.

A trade secret or a business secret may relate to financial arrangement, the customer list of a trader and some of the informations in this regard would be of a highly confidential nature as being potentially damaging if a competitor obtained such information and utilized the same to the detriment of the giver of the information. Business information such as cost and pricing, projected capital investments, inventory marketing strategies and customer's list may qualify as his trade secrets. The Court needs to find out if the informations that were acquired during the course of their employment are now being used as the spring board to enable the said respondents to exploit such database in the course of their business."

16.From the foregoing ratio laid down by the Hon'ble Supreme

Court and other High Courts, it could be seen that there cannot be absolute restraint of breach of trade against an employee or franchisee. The franchisee who is well versed in his trade shall be permitted to carry on his avocation otherwise he will be erased and his livelihood will be at risk. There is significant difference in enforcing the restraint against the agent or franchisee. The knowledge acquired by a person during his employment as agent, due to his efficiency and intelligence is personal to him. His ability to persuade or canvas or communicate with the parties cannot be said as a property of his Principal. Nor there would be any restraint from using his individual skills after termination of relationship. On the other hand, if for a particular purpose, a specialized training is imparted at the cost of the company, with regard to the trade secrets, it is a special knowledge given in confidence by the employer to its employee or agent. The special secrets regarding the trade shall not be divulged to rival parties as it will be detrimental to the future prospects of the Principal. Therefore, the restriction can be only in respect of the trade secrets or the business dealings which is developed suiting the prospects of the company cannot be divulged. In that

view of the matter, it has to be seen as to whether the restriction seek to be enforced by the applicant is reasonable or not.

17.The business of the applicant company is testing, processing, preserving and storage of Umbilical Cord Stem Cells collected at the time of birth of the child. This is not a common business. But it requires a special knowledge and process. Individual companies will have their own formula developed by them. The respondent, being an agent was imparted with the special knowledge on the processes created by the applicant company. It is also relevant to state that for giving specialized services, the prices are also developed and followed by the applicant company according to the needs in services rendered to the customers. That is also a personal confidential information of the company. It is natural that the Principal even after termination of Franchise Agreement, expects its Franchisee or agent not to divulge the confidential information with regard to the preserving and storage of Umbilical Cord Stem Cells and fixing the price tag for the services.

18.From the materials produced before this Court, it is seen that

the respondent has contacted one of the employees of the applicant company namely the erstwhile colleague with regard to the price tagging. There are other communications through e-mail with respect to the business by the respondent. Naturally, it evokes that for the advancement and promotion of the trade, the applicant company is entitled to protection. As held by the Hon'ble Supreme Court there cannot be blanket restraint of trade by an individual. But it shall be based on reasons.

19.The Calcutta High Court in its decision in ***HITECH SYSTEMS (cited supra)*** has held that when an agent in order to protect the utilization of confidential informations and trade secrets and to prevent the damage, it cannot be compensated in terms of money and can seek for restriction on its agent. In such a situation, equity would step in and prevent any damage being caused to the existing business of the Principal. Therefore, the trade secrets or business secrets which may relate to financial arrangement, if divulge, will potentially cause damages. Similarly, business information, such as cost and pricing, projected capital investments,

inventory marketing strategies and customer's list may also qualify as trade secrets.

20.In the instant case, the e-mail communications produced before this Court would reveal that there are communications with regard to pricing, customer's list and also other confidential information through files attached to the mail conversation. In such circumstances, this Court is of the considered opinion that there can be reasonable restriction at least for a shorter period till the arbitration gets over. It is also made clear that whether the restraint is reasonable or not and whether there is breach of agreement or not? are the subject matters to be decided in arbitration. But on *prima facie* grounds, to prevent irreparable damage, which may be caused to the applicant, this Court grants the order of interim protection as prayed for. The arbitral proceedings shall be completed within the statutory time limit.

WEB COPY

21.In fine, both the Original Applications are allowed as prayed

for.

20 / 08 / 2020

Index : Yes/No
Internet : Yes/No
Speaking / Non-speaking order
TK



WEB COPY

O.A.NOS.599 AND 600 OF 2018

M.GOVINDARAJ, J.

TK



O.A.NOS.599 AND 600 OF 2018

WEB COPY

20 / 08 / 2020