**(2013) 07 DEL CK 0415**

**Delhi High Court**

**Case No:** O.M.P. No. 864 of 2012 and I.A. No. 21399 of 2012

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| Omicron Energy Solutions Pvt. Ltd. | APPELLANT |
| Vs | |
| Imteyaz Anwar Siddiqui | RESPONDENT |

**Date of Decision:** July 1, 2013

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 9
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 4
- Contract Act, 1872 - Section 27

**Hon'ble Judges:** Manmohan Singh, J

**Bench:** Single Bench

**Advocate:** Amrendra Sharan, Mr. Aseem Chandra and Mr. Vivek Singh, for the Appellant; Maninder Singh Mr. M. Tarique Siddiqui and Ms. Rakhshan Ahmed, for the Respondent

**Final Decision:** Dismissed

**Judgement**

Manmohan Singh, J.

The petitioner in the instant matter is the Indian subsidiary of Omicron Electronics Asia Ltd., Hong Kong and was established in 2004. The parent company is Omicron Electronics GmbH (parent company incorporated in Vienna). The petitioner is a company which provides testing and diagnostic solutions for the electrical power industry. The respondent was initially employed by the petitioner as a Sales and Application engineer was later on promoted to the post of Area Sales Manager in 2007.

2. The employment contract, dated 23rd April 2007 between the petitioner company and the respondent contained a confidentiality clause, which prohibited the disclosure of any form of information gained while working as an Area Sales Manager.

In this contract, the respondent also undertook to not promote, distribute or sell any products which are competition with those or all marketed by Omicron, whether alone or in conjunction with and 3rd party as principle, agent, partner, shareholder, consultant, guarantor or in any other capacity whatsoever for the period of one year after his discharge from employment under the petitioner company. The respondent also undertook not to take advantage of any opportunities which are under consideration before the petitioner company, to not solicit or contact any employee or customers of the corporation and to promote, distribute or sell any products which are in competition with that of the petitioner.

Argument of the Petitioner in brief:

3. The respondent was the liaison between various Indian and foreign customers on behalf of the petitioner company, and was also entrusted for the sale of relay test equipment and primary test system products, which is a unique product. This product was sold exclusively by the respondent on behalf of the petitioner company. The petitioner states that, immediately after his resignation, the respondent joined a rival company, ISA Advance Instruments India Pvt. Ltd., as the Regional Manager for South Asia and the Middle East.

4. ISA Advance Instruments has been marketing products similar to that of the petitioner company in its South Asian and Middle Eastern markets as well. The petitioner submits that the respondent was aware of the terms and conditions of the confidentiality and non-competition agreement and by joining a rival company, he has violated the terms of his employment contract. The petitioner further alleges that the respondent has divulged confidential information, which relate to the petitioner''s business strategy, products and research.

5. The petitioner claim that he has an unfettered right to stop the respondent from promoting or selling products which are in direct competition with that of the petitioner''s. The petitioner argues that, considering the exigent situation, wherein, the respondent has specialized knowledge and specialized technical expertise, a negative stipulation in an employment contract should not be seen as unconscionable.

6. The employment contract contained an arbitration clause, the relevant portion being, "Arbitration: any dispute, controversy or claim arising out of or related to this agreement, or the interpretation, breach, termination or validity hereof or arising out of or relating to the business of the corporation may be settled finally by the arbitration rules set by the Govt. of India by one arbitrator, appointed in accordance with such rules, upon the timely request by either of the parties (i.e., within six months of the commencement of the dispute), otherwise, the parties will resort exclusively to the court found within India were venue lies".

7. The present petition is u/s. 9 of the Arbitration and Conciliation Act, 1996 wherein the petitioner seeks interim relief against the respondent in order to restrain him

from promoting any products which are in competition with or sold by the petitioner company. The petitioner submits that he has a strong prima facie case, with the balance of convenience in his favour, as, acting in accordance with the employment contract, which is in favour of the petitioner, would cause the least hardship in the instant case. The petitioner also submits that the employment of the respondent with ISA causes irreparable monetary loss to the petitioner and damage to his reputation as well.

Argument of the Respondent in brief:

8. The respondents submit that, at the outset, the petition us not maintainable, since there is no board resolution in favour of Mr. G. Papneja, authorizing him to act on behalf of the company. The counsel for the respondent further submits that, it is settled law u/s. 27 of the Indian Contract Act that, a service covenant, extended beyond the termination of the service is void.

9. The respondent''s technical expertise is gained from years of experience, and not from employment under the petitioner. Therefore, he cannot be restrained from using his expert knowledge in course of his employment - counsel submits that the petitioner''s claim regarding disclosure of confidential information gained during the respondent''s employment with the petitioner is baseless.

10. The respondent further counter-allege that the petitioner himself has been involved in the practice of employing people from their own competitors and therefore, has not approached the court with clean hands.

11. The next argument of the respondent is that, the petitioner has not disclosed material facts to this court. The respondent was involved only in work that relates to the ''Partial Discharge System'' in Sales and Technical Support and was never involved in any research and development activities, as alleged by the petitioner. Further, the respondent submits that, the company he joined subsequent to his employment with the petitioner, ISA SRL Italy, does not even manufacture products related to the Partial Discharge system, something he was trained for at the petitioner company. Therefore, the question of disclosure of sensitive information does not even arise.

12. The respondent argues that the balance of convenience does not rest in favour of the petitioner and neither is there an irreparable harm, because, while the petitioner can be fully compensated monetarily, the respondent cannot be compensated for being forced to refrain from continuing on with his profession.

13. Various decisions have been referred by both parties in support of their rival submissions.

14. The petitioner has not filed its rejoinder to the averments made in the reply nor reply to I.A. No. 21399/2012 filed under Order 39 Rule 4 CPC read with Section 9 of the Act wherein the respondent has raised various contentions on merit.

15. In the reply, apart from raising other objections, the respondent alleged that the allegations made in the petition are vague, baseless and frivolous with extraneous considerations with sole intention to injure the respondent for his professional carrier without any substantial evidence. ISA SRL does not manufacture or deal in partial discharge system in which the respondent was trained by the petitioner company. None of products in question being manufactured exclusively by the petitioner and almost all the products have many other manufactures from all around the world. The details of such companies are given in the reply. Most of the customers mentioned are not the exclusive customers of the petitioner. As the respondent being an expert demoted on 22nd February, 2011 by reducing one-third by the division of Indian Territory into three parts therefore, he tendered resignation for acceptance on 20th March, 2012 but continue with the petitioner company sincerely till 29th June, 2012 with the same dedication. The respondent has also denied the fact that the petitioner had incurred any amount for his visit in overseas countries. According to him, most of the trips undertaken by him were for providing services to different customers of the petitioner and were fully paid by those customers.

16. It was also submitted that the respondent has joined ISA SRL - a multinational company and he is neither utilizing the SKILL acquired during his employment with the petitioner company nor performing the substantially similar activities or the respondent was responsible and trained by the petitioner company. The respondent being a professional cannot be restrained from using his knowledge and skill and experience that he has gained during the course of his employment either with the petitioner company or any other employer.

17. In regard to such approach of employers, Dalveer Bhandari, J. in Pepsi Foods Ltd. and Others Vs. Bharat Coca-cola Holdings Pvt. Ltd. and others, was pleased to held that:

149. The plaintiffs are not entitled for injunction for the following reasons also:

(a) The injunction, as prayed for by the plaintiffs, if granted would certainly have a direct impact of curtailing the freedom of employees for improving their future prospects and service conditions by changing their employment.

(b) Rights of an employee to seek and search for better employment cannot be restricted by an injunction.

(c) Injunction cannot be granted to create a situation such as "Once a Pepsi employee, always a Pepsi employee". It would almost be a situation of ''economic terrorism'' or a situation creating conditions of ''bonded labour''.

(d) Freedom of changing employment for improving service conditions is a vital and important right of an employee, which cannot be restricted or curtailed by a Court injunction.

(e) Inter-changeability of service is an accepted norm of Service Jurisprudence which cannot be curtailed by a Court injunction.

(f) ''Employees'' right to terminate their contracts also cannot be curtailed by Court injunction.

(g) An injunction can be granted only for protecting the rights of the plaintiffs, but cannot be granted to limit the legal rights of the defendants.

(h) An injunction cannot be granted where the Courts have a doubt in the credibility, veracity and truthfulness of the plaintiffs'' version.

(i) An injunction also cannot be granted in a case where the Court directly or indirectly gets the impression that the injunction has been sought for extraneous considerations or oblique motives.

(j) Rough and tumble of the business including stiff competition has to be faced in a free market economy. The problems which should be settled in the market place cannot be brought to Law Courts or settled by a Court injunction.

(k) In economic matters, while granting injunction, business realities have to be taken into consideration. The employees seek betterment and advancement of their careers, while they are in service. It is impracticable and unrealistic to artificially create a situation by a Court injunction when employees would first leave the employment and then look for better service conditions and job opportunities elsewhere.

(l) Most of the senior employees of the plaintiffs or the defendants were working with other multinationals or business organizations. They joined the plaintiffs or the defendants because attractive salaries and better service conditions were offered by them. The plaintiffs themselves have engaged a large number of employees who were working in other multinational or business organizations. They were appointed because they had work experience with other organizations. The same plaintiffs are not justified in seeking an injunction so that their employees may not join the defendants. All that is to be seen is whether the defendants had adopted unfair means in advancing their business interests or not.

(m) In a free market economy, everyone concerned, must learn that the only way to retain their employees is to provide them attractive salaries and better service conditions. The employees cannot be retained in the employment perpetually or by a Court injunction.

(n) Free, fair and uninterrupted competition is the life of trade and business. This freedom in free market economy has to be zealously protected in the larger interest of free trade and business. No injunction can be granted which is likely to restrict or curtail this freedom.

(o) It is difficult to hold at this stage that the predominant object and paramount consideration behind the actions of the defendants was designed to injure the plaintiffs.

(p) At this stage, it is also difficult to hold that the defendants resorted to business practices which are unethical, illegal and constitute tortious interference in the business of the plaintiffs.

18. In the present case, the petitioner has not rebutted the specific statement made in the reply by filing of rejoinder despite of opportunity taken by the petitioner who have also filed to pay the cost in terms of order dated 10th January, 2013. There is no cogent and clear evidence produced by the petitioner. In the absence of above, it is difficult to continue with the interim orders passed on 12th September, 2012. Even otherwise, the period of particular Clause sub-titled ''Non-Competition'' agreed by the respondent has expired by the flux of time. In failure to produce the evidence and rebut the statement of the respondent, none of the decision referred by the petitioner is applicable to the facts of the present case.

19. The petitioners have not made out a case which would grant them an interim injunction; the respondent was not even given appropriate legal notice.

20. A question of a prima facie case does not even arise, since the respondents have clearly contended that ISA SRL Italy, is not even involved in Partial Discharge Systems, nature of the work that the respondent partook under the employment of the petitioner.

21. Moreover, the specific purpose for approaching the court under the Arbitration Act, is to ensure that the parties continue with the arbitration process. Therefore, another vital element in a section 9 petition is that, the petitioner has to exhibit a manifest intention to arbitrate the matter, which has clearly not been shown in the present case. The petition is, therefore, dismissed with cost of Rs. 20,000/-.