FINLAY RENTOKIL (CEYLON) LTD.
v.
A. VIVEKANANTHAN

COURT OF APPEAL.
S. N. SILVA, J. (P/CA)
R. B. RANARAJA, J.
C.A. 839/94
CA/LA 265/95
D.C. COLOMBO NO. 4109/SPL.
MAY 08, 1995.

Contracts - Letter of Appointment was it accepted – Contracts in Restraint of Trade – Prima Facie void – Justifiable Restrictions.

Petitioner instituted action against the Respondent alleging that it appointed the Respondent as a Pest Control Supervisor; it was pleaded that the Respondent having left the services of the Petitioner engaged in the marketing, sale or supply of products or services for purposes contrary to clause 15(h) of the Letter of Appointment. An application for an interim injunction was refused by the District Court.

Held:

(1) The original of the document accepting the terms of employment has been misplaced. *Ex facie* the Petitioner cannot maintain the action as presently constituted. There is no *prima facie* proof that the Respondent was appointed on 1.2.94.

(2) Petitioner has not placed sufficient material before Court to satisfy that the Respondent was using trade secrets or canvassing customers of the Petitioner to its detriment.

(3) There is also no material to conclude that the restraint on the Respondent is reasonable or it is not too restrictive of the activities restrained.

(4) There is no evidence that the Respondent could earn a living through any other means except the experience that he has gained after working for the Petitioner.

"Courts have long maintained that an injunction will not be allowed against an employee if the consequences of that injunction would be to put the employee in a position that he could have to go on working for her former employer or starve".

Cases referred to:

1. *Petrofina (GB) Ltd., v. Martin* – 1966 1 All ER 126.
2. *Attwood v. Lamot* (1920) 3 KB 571.
3. *Herbert Morris v. Saxelby* – (1916) 1 AC 688 at 710.
4. *McEllistrim v. Ballymacelligot Co-operative Agricultural & Dairy Society Ltd.*, – (1919) AC at 548 at 571, 572.
5. *Foster & Sons Ltd., v. Sugget* – (1919) 35 TLR 87.
6. *Faccenda Chicken Ltd., v. Fowler* – 1987 CH 117.
7. *Littlewood's Organization Ltd., v. Harris* (1978) 1 All ER 1026.
8. *Lansing Linde Ltd., v. Kerr* (1991) 1CR 428.
9. *Hinton & Higgs (UK) Ltd., v. Murphy & Valentine* (1989) 1RLR 519.
10. *Mason v. Provident Clothing & Supply Co. Ltd.*, 1913 AC 724 at 742.
11. *Marion White Ltd., v. Francis* (1972) 3 AER 857.
12. *Esso Petroleum Co., Ltd., v. Harper's Garage (Stourport) Ltd.* (1967) 1 All ER 699.
13. *Hentley Garments Ltd. v. Fernando* (1980) 2 SLR 145 at 155.
14. *Warner Bros. Pictures Inc. v. Nelson* (1937) 1 KB 209.

APPLICATION in Revision from the Order of the District Court of Colombo.

Romesh de Silva P.C. with *P. Kumarasinghe* for Petitioner.
N. S. A. Goonetilleke, P.C. with *N. Mahendra* for Respondent.

Cur adv vult.

June 07, 1995.

RANARAJA, J.

The Petitioner instituted action against the Respondent on 27.7.94, alleging that it appointed the respondent as a Pest Control Supervisor in the Staff Officer Grade with effect from 1.2.94 by letter of appointment marked "F" dated 31.1.85. (para 13 of the plaint), and that the respondent having left the services of the Petitioner, acted in Breach of Clause 15(h) of the letter of appointment "F". Clause 15(h) reads;

> "You shall not during the period of three years next following the termination of your employment howsoever the same may be

determined either on your own account or as an employee or on behalf of any other person, Firm or Company engage or be concerned directly or indirectly, or be interested (save as a minority shareholder in or a debenture holder of a Limited Liability Company) in the marketing, sale or supply of products or services for like purposes."

The petitioner prayed for an enjoining order preventing the respondent, his servants, agents and those holding under and through him from engaging in or being concerned directly or indirectly or being interested (save as a minority shareholder in or a debenture holder of a Limited Liability Company) in dealing with and/or being involved in and/or in the marketing, sale or supply of products or services similar to that of the nature of and/or in the field of and/or related to pest control and/or in the field and/or business of pest control till the end of January 1997.

An enjoining order as prayed for was issued on the respondent. The respondent filed objections denying that that he ever signed letter of appointment "F" accepting clause 15(h). He moved that the enjoining order be dissolved. Both parties tendered their written submissions after, which the District Judge discharged the enjoining order and refused the petitioner's application for an interim injunction on the same terms as the enjoining order. This application in revision is from that order.

A greater part of the submissions on behalf of the petitioner in this Court was focussed on the question whether the respondent in fact signed document "F" accepting the terms of employment contained therein. The original of this document has allegedly been misplaced or is missing. Thus the petitioner relied solely on other documentary evidence to support the averment that the respondent signed document "F" containing clause 15(h) accepting the appointment with effect from 1.2.85. Document "F" states that the respondent was appointed with effect from 1.2.85. This is contrary to the pleadings in paragraph 13 of the plaint, which gives the date of appointment as 1.2.94. The respondent has denied signing the document referred to in the plaint in his objections. *Ex facie*, the petitioner cannot maintain

the action as presently constituted on the first cause of action. Since the enjoining order/interim injunction have been sought in the plaint, and there is no *prima facie* proof that the respondent was appointed on 1.2.94, the District Court has correctly dissolved the enjoining order and refused to grant an interim injunction.

Learned President's Counsel moving on to the second cause of action submitted that on general law and on principles of equity, apart from the contractual agreement between the respondent and the petitioner, the latter is entitled to the injunction sought, and that the general law seems to have found its way into the Code of intellectual Property Act No. 52 of 1972, specifically Section 142. That Section however deals with acts of unfair competition and not with restraint of trade.

A contract in restraint of trade is one in which a party agrees with the other party to restrict his liberty in the future to carry on his trade, with other persons not parties to the contract in such manner as he chooses. Lord Diplock in *Petrofina (GB) Ltd., v. Martin* [1]. A contract of this class is *prime facie void,* but it becomes binding upon proof that the restriction is justifiable in the circumstances as being reasonable from the point of view of the parties themselves and also of the community. *Attwood v. Lamot* [2].

Generally an employer cannot prevent an ex-employee from competing with him, nor from using the knowledge, skill and experience gained during the employment. *Herbert Morris v. Saxelby* [3]. Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his labour, skill or talent by any contract that he enters into. *Lord Finlay in McEllistrim v. Ballymacelligot Co-operative Agricultural & Dairy Society Ltd.* [4]. Besides, in contracts of service the parties are not in an equally strong position and the employee will find it difficult to resist the imposition of terms favourable to the employer. Thus if an employee agree that after leaving his employment, he will not work for a competitor, the courts will rarely enforce such an agreement, *Herbert Morris* (*supra*), because the employee will be forced either to work for his former employer or to starve. However an employee

owes a duty of fidelity to his employer during his period of contract of employment. An employer in certain circumstances may have proprietary interests that need to be protected by a restrictive covenant in the employment agreement such as not to disclose confidential information on trade secrets, *Foster & Sons Ltd., v. Sugget* [5], *Faccenda Chicken Ltd. v. Fowler* [6], detailed knowledge of the working of a business, *Littlewood's Organization Ltd., v. Harris* [7], customers and business connections, *Lansing Linde Ltd. v. Kerr* [8]. But the legitimate interests of the employer will only be protected within proper limits as to the period of time and geographical area, *Hinton & Higgs (UK) Ltd. v. Murphy & Valentine* [9] and the activities covered by the restraints, *Mason v. Provident Clothing & Supply Co., Ltd.*[10]). If the covenant is too restrictive it will be totally void and the Courts will not enforce any part of it. It is to be noted that the judgment in *Marion White Ltd. v. Francis* [11], cited by learned President's Counsel does not appear to have been followed in any subsequent decisions, presumably because that decision goes against the grain of previously established principles.

The Court has first to decide whether the contract is so restrictive of the employee's liberty and therefore void. If the covenant is found to be void Court should proceed to decide whether the covenant can be justified as being reasonable in the interests of both parties and the public. If Court finds it to be reasonable, the contract is valid. *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.* [12]. The onus of proving reasonableness of the covenants is on the employer. *Hentley Garments Ltd. v. Fernando* [13].

A director of the petitioner Company, C. L. K. P. Jayasuriya has filed an affidavit affirming to the fact that the respondent is actively engaged in United Professionals (Pvt) Ltd. incorporated for the purpose of carrying on the business of pest control. He also averred that several complaints have been received that the respondent has been canvassing the customers of the petitioner for United Professionals (Pvt) Ltd. Apart from the affidavit of the Director, no other affidavit from a customer has been filed to substantiate this claim. It is also to be noted that the respondent had resigned from United Professionals (Pvt) Ltd. on the enjoining order being issued.

The petitioner submits that it trained the respondent. It is not denied that the respondent was sent to Singapore and Malaysia for a period of 12 days training. The respondent upon his return to the Island served the petitioner for over three years as agreed upon before he was sent on training. What is of importance is that the petitioner has not placed sufficient material before Court to satisfy it that the respondent was using trade secrets or canvassing customers of the petitioner to its detriment. Similarly, there is no material to conclude that the restraint on the respondent is reasonable in respect of the area within which he could work or its duration or it is not too restrictive of the activities restrained. Nor has the petitioner placed any evidence before Court that the respondent could earn a living through any other means except the experience that he has gained after working for the petitioner. Courts have long maintained that an injunction will not be allowed against an employee if the consequences of that he would have to go on working for his former employer or starve. *Warner Bros. Pictures Inc. v. Nelson* [14].

Thus the petitioner has not established a *prima facie* arguable case to obtain the injunctive relief prayed for. This application in revision is accordingly dismissed with costs.

S. N. SILVA, J. – I agree.

Application dismissed.