

(2019) 08 DEL CK 0311

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 307, 308, 309, 310, 311, 312 Of 2019

M/S. International Design And Engineering Solutions Pvt. Ltd APPELLANT
Vs

M/S. MGI (India) Pvt. Ltd RESPONDENT

Date of Decision : 13-08-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(3)
Indian Contract Act, 1872 — Section 27

Citation : (2020) 1 R.A.J. 86

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Anne Mathew, S.Ravishankar, Ruhini Dey

Judgement

Navin Chawla, J

IA 10778/2019 in OMP(COMM) 307/2019

IA 10787/2019 in OMP(COMM) 308/2019

IA 10790/2019 in OMP(COMM) 309/2019

IA 10793/2019 in OMP(COMM) 310/2019

IA 10796/2019 in OMP(COMM) 311/2019

IA 10799/2019 in OMP(COMM) 312/2019

1. These applications have been filed by the petitioner praying for condonation of 19 days delay in re-filing the present petitions.

2. The petitions challenge the Arbitral Awards dated 22.02.2019 passed by the Sole Arbitrator. The petitions were filed on 22.05.2019, that is, within the period of limitation prescribed in Section 34 (3) of the Arbitration and Conciliation Act, 1996. The applications state that the delay in re-filing the petitions occurred as the defects were notified by the Registry first on 23.05.2019, which were

removed and the petitions were re-filed on 28.05.2019. However, the Registry again notified certain defects on 29.05.2019. Thereafter, due to summer vacation, the petitions could be re-filed only on 01.07.2019. By that time, as delay had occurred in re-filing of the petitions, the Registry insisted on a formal application seeking condonation of this delay. However, as the Director of the petitioner company was travelling to the United Kingdom, he was not available for signing the affidavits in support of the applications. This led to a total delay of 19 days in re-filing of the petitions.

3. I find the above to be a sufficient cause for condoning the delay in re-filing of the petitions. Consequently, the delay is condoned and the applications are allowed.

OMP(COMM) 307/2019

OMP(COMM) 308/2019

OMP(COMM) 309/2019

OMP(COMM) 310/2019

OMP(COMM) 311/2019

OMP(COMM) 312/2019

1. These petitions challenge the Arbitral Award(s) dated 22.02.2019 passed by the Sole Arbitrator in relation to the Contracts executed between the parties. As a common question of law and fact arises in these petitions, they are being disposed of by this common judgment.

2. These petitions have been taken up for final hearing at this stage with the consent by the counsels for the parties.

3. The parties have entered into Structural Engineering Consulting Agreement(s) for various construction projects of the respondent. In terms of these Agreements, the petitioner was to provide services for the purpose of Architectural design, drafting, engineering drawings and other consulting related services to the respondent.

4. Clause 3 of the Agreements provides for 'non-hire clause' and is reproduced hereinunder:

"3. Non-Hire Clause

MGI hereby warrants that it will not recruit, hire, engage, cause and/or encourage other persons or entitles to recruit hire and/or engage any staff, directly or indirectly, nor contact, nor conduct any business with any (current or former) staff during implementation of this agreement and for a period of two years after termination/cessation/revocation of this agreement. In the event of a breach of this clause IDES shall be entitled to a legal monetary compensation equal to Rs.9,000 per day per staff for each calendar day if MGI uses staff/

consultants without knowledge or concurrence of IDES directly or indirectly plus any and all expenses, including attorney fees, incurred to enforce this provision. MGI specifically admits such compensation payable immediately on occurrence of breach. No exception to this provision shall be recognized unless it shall be reduced to writing and signed by both parties for each and every staff for which a exception is sought. The provisions of this paragraph govern current, future and former staff."

5. The petitioner claiming that the respondent has breached Clause 3 of the Agreement, raised a claim for compensation in terms of the said Clause. In defence, the respondent contended that the four employees who had allegedly left the service of the petitioner and joined the service of the respondent had, infact, formed a separate company by the name and style of M/s MGI Infra Pvt. Ltd. and therefore, the respondent could not be said to be in breach of the Agreement.

6. The Arbitrator by the Impugned Award has found that M/s MGI Infra Pvt. Ltd., though may not be a subsidiary company of the respondent, but is an associate of the respondent. I may herein quote the relevant findings of the Arbitrator on this issue:

"19. Under the circumstances and the evidence discussed above, it is clear that Respondent has significant influence on M/s MGI Infra (Pvt.) Ltd. M/s MGI Infra (Pvt.) Ltd. may not be a subsidiary Company of the Respondent but it is an associate Company of M/s. MGI (India) Pvt. Ltd. i.e. the Respondent."

7. Having concluded the above, the Arbitrator has rejected the claim of the petitioner holding that the Clause 3 of the Agreement is void and unenforceable against the respondent as if enforced, it would curtail the rights of the employees to go for a better employment. I may again quote from the Arbitral Award as under:

"25. The Claimant has claimed compensation for the post discharge period of two years of the contract from the Respondent for its employees, who left the Company and floated a new Company i.e. M/s MGI Infra (P) Ltd. Counsel for the Claimant has argued that he has claimed damages from the Respondent and not from the employees, who left its services. This argument, as per settled law is deprived of any merit and is not acceptable. Clause-3 of the covenant is void and enforceable against the Respondent. If enforced, it would curtail the rights of the employees to go for better employment. Hence, this question is partly decided against the Claimant."

8. The learned counsel for the petitioner places reliance on the judgment of this Court in Wipro Ltd. vs. Beckman Coulter International S.A. 2006 SCC OnLine Del 743, to contend that this finding of the Sole Arbitrator cannot be sustained and is totally contrary to the judgment of this Court.

9. I find merit in the submissions of the learned counsel for the petitioner. In

Wipro Ltd. (supra), this Court, considering clause similar to Clause 3 of the Agreements in question, held that though the employees cannot be restrained from taking employment with the respondent, at the same time, if it is proved that the respondent, in breach of the Agreement, had enticed such employees, the petitioner would be entitled to be compensated by grant of damages. I may quote the ratio of the judgment of this Court as under:

"59. In the light of these principles which have been culled out from the decisions with regard to the scope and ambit of the provisions of Section 27 of the Indian Contract Act, it remains to be considered as to whether the non-solicitation clause in question amounts to a restraint of trade, business or profession. Two things are material. First of all, the contract in which the non-solicitation clause appears is a contract between the petitioner and the respondent whereby the petitioner was appointed as the sole and exclusive Canvassing Representative/Distributor of the respondent for its products in India. Secondly, it is not a contract between an employer and an employee. If one considers the non-solicitation Clause, it becomes apparent that the parties are restrained for a period of two years from the date of termination of the agreement, from soliciting, inducing or encouraging any employees of the other party to terminate his employment with or to accept employment with any competitor, supplier or customer of the other party. It is a covenant which essentially prohibits either party from enticing and/or alluring each other's employees away from their respective employments. It is a restriction cast upon the contracting parties and not on the employees. The later part of the non-solicitation which deals with the exception with regard to general advertising of positions makes it clear that there is/no bar on the employees of the petitioner leaving its employment and joining the respondent and vice versa. The bar or restriction is on the petitioner and the respondent from offering inducements to the other's employees to give up employment and join them. Therefore, the clause by itself does not put any restriction on the employees. The restrictions put on the petitioner and the respondent and, therefore, has to be viewed more liberally than a restriction in an employer-employee contract. In my view, therefore, the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act, 1872 as being void.

60. However, the question that arises is what happens when the respondent has solicited and/or induced or encouraged employees of the petitioner to leave and/or resign from such employment and join the respondent. Can an injunction be granted restraining the respondent from giving employment to such employees? There are only two possible situations. The first is that an injunction is granted and, the second is that an injunction is not granted. If an injunction is granted, it would imply that the respondent cannot employ such employees who have responded to the advertisement which I have already held to be a solicitation. But it would also mean that employees who did not have any such restrictive covenant in their employment contracts, would be barred from taking up employment with the respondent. In other words, we would be reading into their

employment contracts a negative covenant that they would not seek employment after termination of their present employment, with the respondent. If such a term were to be introduced in their employment contracts, then, it, in view of the settled legal principles indicated above, would be void being in restraint of trade. Consequently, when such employees cannot be restrained from directly seeking the employment of the respondent, they cannot be restrained indirectly by preventing the respondent from employing them. Therefore, an injunction cannot be granted restraining the respondent from employing even those employees of the petitioner company who were allured by the solicitation held out by the respondent in the said advertisement. But, the respondent can be enjoined and restrained from making any such or other solicitation in future during the period of two years w.e.f. 31.12.2005 to any other employees of the petitioner. As regards the solicitation already made by the respondent in the advertisement, the petitioner, if it is able to substantiate this in the arbitration proceedings, would be entitled to be compensated by the grant of damages. So, it is not as if a breach of the non-solicitation clause would leave the petitioner without a remedy. The remedy lies in the claim for damages and an injunction against solicitation in future. It does not lie in the grant of an injunction preventing its employees from resigning and taking up employment with the respondent....."

(Emphasis supplied)

10. Though the learned counsel for the respondent submits that in the facts of the present case the respondent cannot be made liable to pay damages under Clause 3 of the Agreement inasmuch as the employees themselves had formed a new company after tendering their resignation to the petitioner, as this aspect has not been considered by the Arbitrator in the Impugned Award(s) and the petitioner has been non-suited on a preliminary finding of law by the Arbitrator that such Agreement/Clause would be void, the same cannot be considered by this Court. This submission would first have to be considered by the Arbitrator on a scrutiny of evidence led by the parties.

11. In view of the above, the Impugned Award(s) are liable to be set aside, leaving it open to the petitioner to agitate its claims in accordance with law. There shall be no order as to costs.